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CRIMINAL LAW — ACCUSATORY STAGE OF PROCEEDINGS — CUSTODY TEST REQUIRES MIRANDA WARNINGS AFTER DWI ARREST

A deputy sheriff was informed by radio of a car accident and that the driver had been taken to a nearby hospital.[1] The deputy investigated the accident scene.[2] He then contacted the police chief of the town to which the driver had been taken and requested him to go to the hospital and obtain a blood-alcohol test if he felt it was necessary.[3] The police chief went to the hospital, located the defendant, and asked him if he had been the driver of the car at the time of the accident.[4] Defendant answered "yes," agreed to submit to a blood-alcohol test, and was placed under arrest.[5] Defendant

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1. State v. Fields, 294 N.W.2d 404, 405 (N.D. 1980).
2. *Id.*
3. *Id.* Section 39-20-01 of the North Dakota Century Code provides as follows:

> Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent . . . to a chemical test, or tests, of his blood, breath, saliva, or urine for the purpose of determing the alcoholic content of his blood. The test or tests shall be administered at the direction of a law enforcement officer only after placing such person . . . under arrest and informing him that he is or will be charged with the offense of driving or being in actual physical control of a vehicle upon the public highways while under the influence of intoxicating liquor. The arresting officer shall determine which of the aforesaid tests shall be used.

N.D. CENT. CODE § 39-20-01 (1980).

4. 294 N.W.2d at 405.
5. *Id.* Defendant was arrested for driving while under the influence of intoxicating liquor pursuant to section 39-08-01 of the North Dakota Century Code, which provides in relevant part as follows:

> 1. No person shall drive or be in actual physical control of any vehicle upon a highway or upon the public or private areas to which the public has a right of access for vehicular use in this state if:
>
> . . . .
>
> b. He is under the influence of intoxicating liquor . . . .

N.D. CENT. CODE § 39-08-01(1)(b) (1980).

was then informed of some of his *Miranda* rights,[6] and a blood sample was taken.[7] The deputy sheriff subsequently arrived at the hospital and questioned defendant.[8] Defendant was not advised of his *Miranda* rights at this questioning.[9] The trial court suppressed defendant's response to the police officer and his statement to the deputy sheriff on the ground that defendant had not been fully advised of his *Miranda* rights prior to questioning.[10] The North Dakota Supreme Court affirmed in part and reversed in part.[11] Noting that it may not be necessary to apply *Miranda* to routine traffic offenses, the court *held* that *Miranda* warnings should be given before questioning persons who are in custody for more serious traffic offenses such as driving while intoxicated.[12] *State v. Fields,* 194 N.W.2d 404 (N.D. 1980).

In 1966 the United States Supreme Court decided *Miranda v. Arizona,*[13] the landmark fifth amendment case safeguarding the privilege against self-incrimination.[14] *Miranda* required the employment of procedural safeguards when an individual "has been taken into custody or otherwise deprived of his freedom of

6. Miranda v. Arizona, 384 U.S. 436 (1966). The following procedural safeguards were announced in *Miranda:* "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444.

7. 294 N.W.2d at 405.

8. *Id.* The deputy "indicated his purpose in visiting [defendant] was to obtain information needed to complete the accident report form and to issue a citation for driving while under the influence of intoxicating liquor." *Id.*

9. *Id.*

10. *Id.* Defendant moved to suppress the results of the blood test and his statements to the police officer and the deputy sheriff on the ground that he was deprived of his rights under the fourth, fifth, and fourteenth amendments to the United States Constitution and equivalent provisions of the North Dakota Constitution. *Id. See* N.D. CONST. art. I, §§ 8, 12.

11. 294 N.W.2d at 410.

12. *Id.* at 409. Another issue raised in *Fields* was whether the state had the right to appeal from the suppression order. *Id.* at 405. Section 29-28-07(5) of the North Dakota Century Code allows appeals from suppression orders:

> An order granting the return of property or suppressing evidence, or suppressing a confession or admission, when accompanied by a statement of the prosecuting attorney asserting that the deprivation of the use of the property ordered to be returned or suppressed or of a confession or admission ordered to be suppressed has rendered the proof available to the state with respect to the criminal charge filed with the court, (1) insufficient as a matter of law, or (2) so weak in its entirety that any possibility of prosecuting such charge to a conviction has been effectively destroyed. The statement shall be filed with the clerk of district court and a copy thereof shall accompany the notice of appeal.

N.D. CENT. CODE § 29-28-07(5)(Supp. 1979).

Defendant contended that the state had "no right to take this appeal because it failed to file the required statement along with the notice of appeal." 294 N.W.2d at 406. The court stated that although it did not condone the more than three-month delay in filing, it did not believe the delay warranted a dismissal, particularly since the defendant did not challenge the content of the statement but only the date of its filing. *Id.*

13. 384 U.S. 436 (1966).

14. Miranda v. Arizona, 384 U.S. 436, 444 (1966). Unless the accused chooses to speak after having been informed "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed," any statement he makes in response to questioning may not be used by the prosection. *Id.*

action in any significant way."[15] The "custody test" outline in *Miranda*[16] supplanted the earlier "focus test" announced in *Escobedo v. Illinois*.[17] Nevertheless, the language of both *Miranda* and *Escobedo* has often been intertwined,[18] and "[w]hat . . . amount[s] to 'custodial interrogation' has given the state and federal courts no small amount of difficulty."[19]

In *Beckwith v. United States*[20] the United States Supreme Court apparently decided the question of custody based upon whether the defendant, at the time he was questioned, reasonably could have believed he was free to go.[21] The Court also indicated that the "focus test" applies only after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.[22] Thus, the Court decided that "custody" rather than "focus" determined the point at which *Miranda* warnings must be given.[23] In a later case, the Supreme Court found that the right to remain silent described in the *Miranda* warnings was derived from the fifth amendment privilege against self-incrimination, but did

15. *Id.* (footnote omitted). *Miranda* involved four felonies. "In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world." *Id.* at 445. Each case shared "salient features — incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." *Id.*

16. *Id.* The Court stated the following:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

Id. at 444 (footnote omitted). The Court noted in a footnote that this definition of custody "is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused." *Id.* at 444 n.4.

17. 378 U.S. 478 (1964). In *Escobedo* the United States Supreme Court held that when a police investigation is no longer a general inquiry into an unsolved crime, but has begun to "focus" on a particular suspect, the suspect must be informed of his right to remain silent and his right to consult an attorney. The Court held that failure to inform the defendant of these rights would make all statements solicited by police interrogation inadmissible in a criminal trial. Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964). Although the decision was based on the sixth amendment right to counsel, *id.*, the Court implicitly recognized a fifth amendment privilege against self-incrimination at the interrogation stage. *Id.* at 488. "Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination." *Id.*

18. *See* State v. Iverson, 187 N.W.2d 1 (N.D.), *cert. denied*, 404 U.S. 956 (1971), in which the court stated that its "reading of *Miranda* is not that every person questioned in the process of a criminal investigation must be given *Miranda* warnings, but rather that these warnings must be given to any person who is suspected of having committed a crime, or upon whom the investigation is focused." *Id.* at 14.

19. Alberti v. Estelle, 524 F.2d 1265, 1266 (5th Cir. 1975), *cert. denied*, 426 U.S. 954 (1976).

20. 425 U.S 341 (1976). *Beckwith* involved statements made by defendant taxpayer to Internal Revenue agents during the course of a noncustodial interview in a criminal tax investigation. Beckwith v. United States, 425 U.S. 341, 341-42 (1976).

21. *Id.* at 344. The Court quoted United States v. Caiello, 420 F.2d 471, 473 (2nd Cir. 1969), when it stated that " '[i]t was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the court to impose the *Miranda* requirements with regard to custodial questioning.' " 425 U.S. at 346-47 (originally stated in United States v. Squeri, 398 F.2d 785, 790 (2nd Cir. 1968)).

22. 425 U.S. at 347.

23. *Id.*

not expand that privilege.[24] The Court stated that "[a]lthough *Miranda's* requirement of specific warnings creates a limited exception to the rule that the privilege must be claimed, the exception does not apply outside the context of the inherently custodial interrogations for which it was designed."[25]

The Supreme Court of North Dakota has had several opportunities to address the issue of what constitutes a custodial interrogation for the purpose of *Miranda*.[26] In 1971 the court indicated in *State v. Iverson*[27] that North Dakota's test for determining whether a custodial interrogation has taken place entails a combination of the "reasonable man test" and the "focus test."[28] Cases subsequent to *Iverson,* however, have indicated that the court is moving away from the "focus test."[29] In *State v. Metzner*[30] the court, citing both *Iverson* and *Miranda* as authority, stated that "an accused person must be adequately apprised of his constitutional rights when the police conduct a custodial interrogation of the suspect."[31] The court found that the "total absence of coercion" in *Metzner* when "[t]he officers used no threat of force or threat of authority to induce [the defendant] to cooperate in their investigation" belied the occurrence of a "custodial interrogation."[32] Therefore, because there was no "custodial interrogation," *Miranda* rights did not attach.[33]

Thus, the North Dakota Supreme Court, in determining whether a defendant should have been informed of his *Miranda* rights, considered not only whether the defendant was in custody during the interrogation, but also whether the investigation had focused upon the defendant.[34] Nevertheless, the court apparently

24. Roberts v. United States, 445 U.S. 552 (1980). In *Roberts* the defendant was convicted of using a telephone to facilitate the distribution of heroin. *Id.* at 554.

25. *Id.* at 560.

26. *See, e.g.,* State v. Metzner, 244 N.W.2d 215 (N.D. 1976); State v. Iverson, 187 N.W.2d 1 (N.D.), *cert. denied,* 404 U.S. 956 (1971).

27. 187 N.W. 2d 1 (N.D. 1971).

28. *Id.* at 14-15. In holding that *Miranda* warnings were not required when the defendant was questioned at a State's Attorney's Inquiry, the court stated that law enforcement officials had "no information which would lead a reasonable man to believe that [the defendant] was a suspect, upon whom the investigation would have focused." *Id.*

29. State v. Leuder, 242 N.W.2d 142, 145 (N.D. 1976). In *Leuder* the court stated that defendants are entitled to a "court-appointed attorney only if the investigation has focused upon them and they have been taken into custody or otherwise deprived of their freedom in any significant way." *Id.*

30. 244 N.W.2d 215 (N.D. 1976).

31. *Id.* at 223. The court then held that the investigation had not "focused" upon the defendant, as the term was used in *Miranda,* when police followed footprints from the scene of the crime to defendant's home. Additionally, no "custodial interrogation" took place when the defendant was questioned about the footprints. *Id.*

32. *Id.*

33. *Id.*

34. *See* State v. Metzner, 244 N.W.2d 215 (N.D. 1976); State v. Leuder, 242 N.W.2d 142 (N.D. 1976).

placed greater emphasis on whether the defendant reasonably believed himself to be a suspect than on whether the investigation had actually focused on him.[35] Therefore, the court appeared to be moving towards the "reasonable man test" and away from the "focus test."[36]

In addition to the issue of which test should apply is the issue of whether the *Miranda* warnings apply to traffic offenses.[37] Although *Miranda* involved felony prosecutions, the decision was based on the fifth amendment, which makes no distinction between felonies and misdemeanors.[38] Nevertheless, a number of courts have determined that the *Miranda* rules do not apply to misdemeanor violations of motor vehicle laws.[39] This particular issue has not been addressed by the United States Supreme Court, however. When the Court denied certiorari in *Lewin v. New Jersey,*[40] Justice White, with whom Justices Brennan and Stewart joined, dissented from the denial, stating that the conflict needs to be addressed and resolved.[41] The New Jersey Supreme Court had stated in *State v. Lewin*[42] that "[t]he law in New Jersey is plain that *Miranda* warnings need not be given to a person arrested for or charged with a violation of the motor vehicle laws such as drunken driving, before investigatory questioning of him."[43] The *Lewin* court was relying heavily on an earlier New Jersey opinion, *State v. Macuk.*[44] In that case the court held that a police officer who had probable cause to arrest the defendant for driving under the influence of alcohol was not required to give *Miranda* warnings prior to questioning.[45] The court stated that the rules of *Miranda* should not apply to traffic offenses.[46] Other jurisdictions have

35. 242 N.W.2d at 145.

36. *See* W. PROSSER, LAW OF TORTS § 32 (4th ed. 1978) (discussion of the "reasonable man" standard).

37. 294 N.W.2d at 409.

38. U.S. CONST. amend V. The fifth amendment provides in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." *Id.*

39. *See* Annot., 25 A.L.R.3d 1081-82 (1969 & Supp. 1979).

40. 100 S. Ct. 218 (1979).

41. Lewin v. New Jersey, 100 S. Ct. 218, 219 (1979) (White, J., dissenting from denial of certiorari).

42. 163 N.J. Super. 439, 395 A.2d 211 (1978).

43. State v. Lewin, 163 N.J. Super. 439, ____, 395 A.2d 211, 212 (1978). In *Lewin* statements had been offered and admitted into evidence in the prosecution of a criminal offense that arose out of an automobile accident. The court reasoned that because the statements were taken during the investigation of a motor vehicle violation, *Miranda* warnings were unnecessary. Futhermore, since the statements were therefore valid and admissible in a prosecution during which they were taken, the court found that they were likewise admissible in the subsequent prosecution. *Id.*

44. 57 N.J. 1, 268 A.2d 1 (1970).

45. State v. Macuk, 57 N.J. 1, 16, 268 A.2d 1, 9 (1970).

46. *Id.* The court's reasoning was three-pronged:

> First, the type of police questioning involved in motor vehicle violations is not ordinarily the lengthy, incommunicado inquisition seeking to "sweat out" a confession at which *Miranda* was aimed. Generally it encompasses only simple

followed the *Macuk* reasoning in reaching similar conclusions.[47]

At least five theories have been employed to justify not applying *Miranda* to traffic offenses.[48] Some courts have refused to require *Miranda* warnings for persons arrested for traffic offenses on the theory that since *Miranda* involved felonies, the thrust of the decision goes only to felonies.[49] Other courts have found that giving *Miranda* rights to persons involved in traffic offenses causes undue interference with law enforcement.[50] Another theory for holding *Miranda* inapplicable to traffic offenses is that it would be impossible to provide sufficient lawyers to consult with the number of traffic offenders who would request legal advice.[51] Some courts have tried to distinguish *Miranda* by arguing that it was concerned with preventing lengthy, incommunicado interrogations, which are unlikely to occur in investigation of traffic offenses.[52] Finally, some

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> standard inquiries for the purpose of a necessary accident or violation police report, even though some of the information obtained may go beyond the so-called investigatory phase and be inculpatory as to the violation. The fundamental reason for the *Miranda* rules is just not present. . . . Secondly, the violations involved are not serious enough in their consequences to warrant the time consuming interference which would result to effective law enforcement and the expeditious administration of justice in petty offense cases. Thirdly, as a purely practical matter, it would be utterly impossible to provide sufficient lawyers to consult with the number of motor vehicle violators who would be likely to request legal advice. . . .

Id. See State v. Zucconi, 93 N.J. Super. 380, ____, 226 A.2d 16, 22 (1967). The *Zucconi* court stated that "[t]he question is not whether the rights against self-incrimination and to counsel exist in a motor vehicle prosecution, but whether the Supreme Court intended that in such a prosecution those rights must always be implemented with the *Miranda* rules." *Id.* The court concluded that the police practices described in *Miranda* as reasons for the adoption of the *Miranda* rights have no pertinence to motor vehicle and similar minor cases. *Id.* at ____, 226 A.2d at 23. *See also* State v. Mann, 171 N.J. Super. 173, 408 A.2d 440 (1979) (stopping of vehicle did not constitute in-custody interrogation).

47. *See, e.g.*, State v. Beasley, 10 N.C. App. 663, 179 S.E.2d 820 (1971).

48. *See* 14 LAND & WATER L. REV. 521, 526-30 (1979).

49. State v. Neal, 476 S.W.2d 547 (Mo. 1972). Noting that all four of the cases encompassed in *Miranda* involved felonies, the court concluded that "[t]he fundamental reason for the *Miranda* rule simply is not present in the investigation of motor vehicle offenses." *Id.* at 553.

50. State v. Easley, 515 S.W.2d 600, 603 (Mo. 1974). "[T]he administration of a warning would have effectively slowed up and possibly destroyed the investigation of the accident." *Id. See also* State v. Tellez, 6 Ariz. App. 251, 431 P.2d 691 (1967). After being stopped and arrested for driving under the influence of narcotics, the defendant made several admissions which were admitted into evidence in a subsequent prosecution for receiving stolen property. In holding that the defendant was not entitled to *Miranda* warnings after being stopped for crossing back and forth over the street center line, the court stated that "[t]he degree of seriousness, the number of offenses, the burden put upon police and courts, all militate against extending the *Miranda-Escobedo* protections to certain types of traffic offenses." *Id.* at ____, 431 P.2d at 695. *Cf.* Campbell v. Superior Court of Maricopa County, 106 Ariz. 542, 479 P.2d 685 (1971). In *Campbell* the court held the *Miranda* decision inapplicable when the driver is detained no longer than is necessary to make out the citation and have it signed. The court did point out, however, that warnings must be given prior to any questioning regarding the state of intoxication of the driver or when an arrest is to be made. *Id.* at 695. *See generally* Elsen & Rosett, *Protections for the Suspect Under Miranda v. Arizona*, 67 COLUM. L. REV. 645 (1967) (discussing the effects of *Miranda* on law enforcement activities).

51. State v. Neal, 476 S.W.2d 547, 553 (Mo. 1972); State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970). *But cf.*, Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (Court extended the sixth amendment right to appointed counsel to all cases in which imprisonment could be imposed). *See also* Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1563 (1967) (indicating that *Miranda* warnings rarely caused suspects to request assistance of counsel).

52. *See, e.g.*, Clay v. Riddle, 541 F.2d 456 (4th Cir. 1976) (DWI is a breach of law to which *Miranda* does not apply); People v. Dorner, 66 Mich. App. 298, ____, 238 N.W.2d 845, 848 (1975)

courts have refused to apply *Miranda* to traffic offenses by simply holding that admitting statements into evidence which were taken without *Miranda* warnings constituted harmless error.[53]

Notwithstanding the authority to the contrary, there is support for the argument that *Miranda* is applicable to traffic offenses.[54] There is no language in *Miranda* that indicates the Court intended its decision to apply only to felonies.[55] The requirement of apprising an individual of his fifth amendment protections arises whenever the "privilege against self-incrimination is jeopardized."[56] Cases holding *Miranda* applicable to motor vehicle violations have included both "focus"[57] and "custody"[58] terminology. Regardless of the test chosen, though, the courts applying *Miranda* to traffic offenses recognize *Miranda's* mandates and refuse to separate offenses by degree in determining the applicability of constitutionally guaranteed rights.[59] An Ohio court,

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(questions prior to *Miranda* warnings allowed when investigation had not yet reached an accusatory stage or focused only on the defendant); McCrary v. State, 529 S.W.2d 467 (Mo. 1975). The *McCrary* court held admissible incriminating statements made after a motor vehicle stop but in absence of *Miranda* warnings. The court based its decision on the totality of the circumstances, finding they did not "present a compelling police atmosphere with which *Miranda* was concerned." 529 S.W.2d at 475. *See also* Tiffany, *Field Interrogation: Administrative, Judicial, and Legislative Approaches*, 43 DEN. L.J. 389 (1966) (discussing acceptable police practices in light of *Miranda*).

53. *See* State v. Bliss, 238 A.2d 848, 850 (Del. 1968) (defendant suffered no harm from police failure to advise him of availability of appointed counsel).

54. *See, e.g.*, People v. Weinstock, 80 Misc. 2d 510, ____, 363 N.Y.S.2d 878, 879 (App. Term. 1974). The *Weinstock* court held that "hereinafter the local criminal courts are on notice that defendants charged with traffic violations and subject to possible imprisonment, must be advised of their right to counsel and to have counsel assigned where the defendant is financially unable to obtain same." *Id. Cf.* People v. Scharle, 14 Ill. App. 3d 511, 302 N.E.2d 663 (1973) (only abstract published). In *Scharle* the court held that it was incumbent upon a police officer arresting the defendant for DWI to inform the defendant of his constitutional rights. The court found, however, that the admission of statements obtained in violation of *Miranda* was harmless error beyond a reasonable doubt. *Id.*

55. 384 U.S. 436 (1966).

56. *Id.* at 478.

57. *See, e.g.*, State v. Darnell, 8 Wash. 627, 508 P.2d 613, *cert. denied*, 414 U.S. 1112 (1973). The court stated:

> Once the trooper had stopped the vehicle for traveling at an exceedingly slow speed and crossing the center line, had sensed the strong odor of alcohol in defendant's vehicle, and observed defendant's physical condition, he desired to further confirm his suspicions by physical tests. It was at that point that the investigation focused on defendant specifically for the crime charged. Once the trooper's reasoning brought him to request these tests, *Miranda* applied, not to the tests about to be performed, but to any statements defendant might make during the giving of such tests. Once the *Miranda* warning was given, defendant would know he could refrain from making any statements while performing the tests.

8 Wash. at 629-30, 508 P.2d at 615.

58. *See, e.g.*, People v. Ceccone, 260 Cal. App. 2d 886, 67 Cal. Rptr. 499 (1968). (failure of police officers to give *Miranda* warnings to a stopped driver was improper because officers had subjected him to "custodial interrogation"); State v. Lawson, 285 N.C. 320, 204 S.E.2d 843 (1974). In *Lawson* the court noted that "[t]he Supreme Court of the United States in *Miranda* does not limit the rights it sets forth to persons *charged* with felonies or misdemeanors . . . rather . . . those rights [are related] to any individual being subjected to custodial interrogation concerning a criminal charge." *Id.* at 328, 204 S.E.2d at 848. (emphasis in original).

59. *See, e.g.*, Commonwealth v. Bonser, 215 Pa. Super. 452, 258 A.2d 675 (1969). The court stated that there is no indication in *Miranda* "that one accused of a misdemeanor, who faces the

speaking of a defendant charged with driving while intoxicated, expressed no sympathy for the defendant, noting that traffic offenses are very serious crimes.[60] The court stated, however, that "the defendant is not a criminal in the usual sense. His occupation is that of a paper hangar, and he should be entitled, at least, to the same constitutional protection afforded daily to hardened criminals."[61]

Thus, it seems that determining when the *Miranda* rule should or should not apply continues to be a problem for both state and federal courts.[62] Courts vary in their interpretations of *Miranda,* and they differ in their attempts to determine the appropriate test and how to apply it.[63] As noted above, the exact standard applied by the North Dakota Supreme Court in determining whether a custodial interrogation has taken place has also been unclear.[64]

In the context of a prosecution for drunken driving, the North Dakota Supreme Court in *State v. Fields* faced the issue of what test governs whether *Miranda* warnings are required.[65] The trial court had made the determination that since suspicion had "focused" on the defendant during the investigation of a car accident, he should have been informed of his *Miranda* rights "prior to any questioning."[66] The supreme court disagreed. It stated that *Miranda* warnings are not required when the investigation has merely "focused" on the defendant.[67] Instead, "custody" is the factor that determines the attachment of *Miranda* rights, because it was "custodial interrogation" in *Miranda* that triggered the requirement for procedural safeguards.[68]

The *Fields* court distinguished language in *State v. Iverson*,[69] in

potential of a substantial prison sentence, must subject himself to police interrogation absent the fundamental safeguards afforded others." *Id.* at ____, 258 A.2d at 679.

60. City of Piqua v. Hinger, 13 Ohio App. 2d 108, ____, 234 N.E.2d 321, 324 (1967), *rev'd on other grounds,* 15 Ohio St. 2d 110, 238 N.E.2d 766, *cert. denied,* 393 U.S. 1001 (1968).

61. *Id.*

62. Alberti v. Estelle, 524 F.2d 1265, 1266 (5th Cir. 1975), *cert. denied,* 426 U.S. 954 (1975). The Court of Appeals for the Fifth Circuit stated that the *Miranda* definition of custodial interrogation "enunciates no hard and fast concept of 'custody.' " 524 F.2d at 1267. As a result, that court has adopted the "approach of deciding the issue on a case-by-case basis." *Id.*

63. *See, e.g.,* Alberti v. Estelle, 524 F.2d 1265, 1267 (5th Cir. 1975) (subjective analysis adopted for determining custody); State v. Mumbaugh, 107 Ariz. 589, ____, 491 P.2d 443, 448-50 (1971) (objective test adopted for determining custody). *See generally* Annot., 31 A.L.R.3d 565 (1970). *See also* Note, *Miranda v. Arizona: In-Custody Interrogation: An Examination of the New Rules Further Defining the Suspect's Rights,* 71 DICK. L. REV. 116 (1966)..

64. *See, e.g.,* State v. Metzner, 244 N.W.2d 215, 223 (N.D. 1976) (court used both "custody" and "focus" language).

65. 294 N.W.2d at 406.

66. *Id.*

67. *Id.*

68. *Id.* at 407.

69. 187 N.W.2d 1 (N.D.), *cert. denied,* 404 U.S. 956 (1971). The *Iverson* court stated that "[o]ur reading of *Miranda* is not that every person questioned in the process of a criminal investigation must be given the *Miranda* warnings, but rather that these warnings must be given to any person who is

which the court had suggested that the "focus test" governed whether *Miranda* warnings were required. The court noted that in *Miranda* the United States Supreme Court had indicated in a footnote that its earlier reference to investigatory "focus" in *Escobedo* referred to "custodial interrogation."[70] The *Fields* court found that North Dakota cases which applied the holding in *Iverson* construed it as applying the "custodial interrogation" test.[71] Therefore, the court, by distinguishing *Iverson* and noting *Miranda,* held that "custody" rather than "focus" is the proper test for determining whether *Miranda* warnings are required.[72]

The *Fields* court also concluded that the defendant's response to the officer's initial inquiry of whether he had been the driver of the car was merely investigatory and therefore should not have been suppressed.[73] The court noted that the defendant had been neither in custody nor deprived of his freedom in any significant way.[74] He was in the hospital for medical reasons and not because of any action of the authorities.[75] The court further pointed out the absence of a "police-dominated atmosphere."[76] The test the court applied to determine whether the defendant had been in custody was an objective, or "reasonable man test."[77] Thus, if a reasonable man would believe that under the circumstances he was not free to go, he would be in custody for purposes of *Miranda.* The court found support for adopting an objective test in decisions from other jurisdictions.[78]

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suspected of having committed a crime, or upon whom the investigation is focused." 187 N.W.2d at 14.

70. 294 N.W.2d at 407. The position that mere focus constitutes custodial interrogation has been almost universally rejected. In Oregon v. Mathiason, 429 U.S. 492 (1977), the Supreme Court of the United States determined that a defendant who was questioned at a police station after being requested to come in was not subjected to custodial interrogation. The Court found that warnings were not necessary merely because the defendant was a suspect or was questioned at a police station. *Id.* at 494-95.

71. 294 N.W.2d at 408. *See, e.g.,* State v. Carmody, 253 N.W.2d 415 (N.D. 1977) (*Miranda* warnings required before questioning a person in custody).

72. 294 N.W.2d at 408.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* The officer "contacted [the defendant] at the hospital as part of the accident investigation. He went to check the condition of the driver and, if necessary, to have a blood alcohol test conducted. Defendant was not taken to the hospital by the officer but by a friend." *Id.* Furthermore, the officer's "question was asked at the hospital in the presence of this friend and a nurse on duty." *Id.*

77. *Id.* The United States Court of Appeals for the Eighth Circuit has relied on an objective analysis for determining whether an individual was in custody and, therefore, should have been informed of his constitutional rights pursuant to *Miranda.* State v. Long, 465 F.2d 65 (8th Cir. 1972), *cert. denied,* 409 U.S. 1130 (1973). In *Long* the court held that the defendant, who was continuously accompanied by or in the presence of a police officer from the time he was stopped for questioning concerning a burglary until he made certain admissions, was in custody and should have been informed of his constitutional rights pursuant to *Miranda.* The court reasoned that under these facts the defendant "could have reasonably believed that he was in custody." 465 F.2d at 70.

78. *E.g.,* State v. Brunner, 211 Kan. 596, 507 P.2d 233 (1973) (defendant found not to be "in custody" when questioned in a hospital); People v. Phinney, 22 N.Y.2d 288, 239 N.E.2d 515, 292

The admissibility of the blood-alcohol test results was another issue the *Fields* court addressed. The court found that the investigating officer had probable cause to arrest the defendant for driving while intoxicated and, consequently, probable cause to request that the defendant submit to a test for intoxication.[79] The trial court had excluded the test results because it believed that without defendant's admission that he had been driving the car (which the court considered was the result of improper questioning), there would have been no probable cause to arrest or to request that the defendant submit to a test.[80] The North Dakota Supreme Court found, however, not only that the questioning had been proper, but also that probable cause had been established by the appearance of the defendant's eyes, the nature of his speech, and the circumstances surrounding the accident.[81] The court relied on its opinion that the defendant's admission was admissible because it was not the result of custodial interrogation.[82] As a result, it found that the admission was properly used in conjunction with the other facts and circumstances within the officer's knowledge to support probable cause to arrest him for driving while intoxicated and request that he submit to a blood-alcohol test.[83]

To support its conclusion that the defendant was in custody when he was questioned by the deputy sheriff, the court again applied an objective test and noted that because the officer had placed the defendant under arrest and stayed near him until the deputy arrived, the defendant would clearly understand that he was no longer free to go.[84] Therefore, the court held that the statements made by the defendant to the deputy were obtained in violation of his *Miranda* rights because he had been subjected to custodial interrogation.[85] The state argued, however, that *Miranda* should not apply to arrests for traffic violations.[86] The court considered this argument in light of a line of cases that relied in part upon the *Macuk* arguments.[87] The court did not find the reasoning of those cases totally persuasive, however.[88] The court suggested that *Miranda* warnings may not apply to arrests for "routine traffic

N.Y.S.2d 632 (1968) (admission of hospitalized defendant held admissible notwithstanding absence of *Miranda* warnings).

79. 294 N.W.2d at 409.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* The court cited the following cases: State v. Bliss, 238 A.2d 848 (Del. 1968); State v. Neal, 476 S.W.2d 547 (Mo. 1972); and State v. Macuk, 47 N.J. 1, 268 A.2d 1 (1970).
88. 294 N.W.2d at 409.

offenses where a driver is detained no longer than is necessary for the issuance of a citation.''[89] Nevertheless, the court stated that warnings should be given before questioning a person who is in custody for a more serious offense such as driving while intoxicated.[90] Thus, the *Fields* court affirmed the trial court's decision to suppress the defendant's statements to the deputy.[91]

The *Fields* court expressly recognized that a conflict results when a DWI suspect is given *Miranda* warnings and is subsequently asked to respond to a request to take a blood-alcohol test.[92] The court concluded, however, that ''an arrested person does not have the constitutional right to remain silent when asked whether or not he will submit to [such a] test. . . .''[93] The court indicated that the apparent conflict would be resolved if the officer gave the *Miranda* warnings prior to asking the person to take the test, while at the same time informing the person that if he refused to take the test, whether by silence or negative answer, his license would be subject to suspension.[94] Therefore, the DWI suspect is entitled to be advised of his rights under the *Miranda* rule, with the qualification that if he exercises his right to remain silent when requested to take a blood-alcohol test, his silence may properly be used to revoke his driver's license.[95]

Although the *Fields* court indicated that an objective standard should be used to determine whether *Miranda* warnings are required,[96] the question of what exactly will satisfy that standard apparently remains unclear. The ''custody test'' triggering the requirement for *Miranda* warnings was satisfied in *Fields* when the defendant was arrested and an officer stayed with him.[97] It is

89. *Id.*

90. *Id.* (citing Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971); People v. Bartlett, 82 Misc.2d 152, 368 N.Y.S.2d 799 (1975); State v. Lawson, 285 N.C. 320, 204 S.E.2d 843 (1974)).

91. 294 N.W.2d at 410.

92. *Id.*

93. *Id. See, e.g.,* Schmerber v. California, 384 U.S. 757 (1966) (forcing a suspect to submit to a blood test does not constitute compulsory self-incrimination).

94. 294 N.W.2d at 410.

95. *Id.* Section 39-20-04 of the North Dakota Century Code provides in relevant part as follows:

> If a person under arrest refuses to submit to chemical testing, none shall be given, but the commissioner, upon receipt of a sworn report of the law enforcement officer, forwarded by the arresting officer within five days after the refusal, showing that he had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle upon the public highways while under the influence of intoxicating liquor, and that the person had refused to submit to the test or tests, shall revoke his license or permit to drive and any nonresident operating privilege for a period of six months. . . .

N.D. CENT. CODE §39-20-04 (1979).

96. 294 N.W.2d at 408.

97. *Id.*

difficult to say with any certainty, however, what different fact situations might also satisfy an objective standard "custody test."[98] It is not clear from *Fields,* for example, whether "custody" requires arrest or whether "police domination" is enough to constitute custody.[99] If "police domination" is sufficient, the question then is what action by the police would constitute "police domination." Other jurisdictions that have adopted an objective standard for determining the point at which a suspect is in custody for purposes of *Miranda* may provide some indication of how the North Dakota court might decide in the future.[100] The North Dakota court may follow the lead of those jurisdictions that have decided the custody issue based on such factors as the location of the questioning, the physical circumstances surrounding the event, the degree of restraint involved, and the objective manifestations of the law enforcement officers. Thus, arrest might not be necessary to constitute custody, and "police domination" might be determined in each case by looking at the various facts of the case.

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98. *See* State v. Mumbaugh, 107 Ariz. 589, 491 P.2d 443 (1971). In *Mumbaugh* the Supreme Court of Arizona set forth an objective test for determining custody:

> The test is really one of two levels. The first inquiry must be into the existence of probable cause. Where it exists, it is presumed that the police will do their job and arrest. . . . But a finding that no probable cause exists does not necessarily mean that there was no "custody" or that defendant was not "otherwise deprived of his freedom of action in any significant way." There exists, then, the second situation where the police detain someone on mere suspicion where no probable cause exists. In such cases detention constitutes custody where a reasonable innocent man under the relevant circumstances would believe he is not free to go.

Id. at ____, 491 P.2d at 448-49. *See also* State v. Ferrell, 41 Or. App. 51, 596 P.2d 1011 (1979). The police officer's testimony that he would not have permitted defendant to leave the scene of a traffic stop did not establish that defendant was in custody, for purpose of *Miranda* warnings, absent indication that such intention was communicated to defendant. *Id.* at ____, 596 P.2d at 1012.

99. *See* 294 N.W.2d at 408. The court considered a variety of facts in concluding that the defendant's statement was not "the result of a custodial interrogation in a police-dominated atmosphere." *Id.*

100. *See, e.g.*, People v. Arnold, 66 Cal. 2d 438, 426 P.2d 515, 58 Cal. Rptr. 115 (1967). The Supreme Court of California held "that custody occurs if the suspect is physically deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived." *Id.* at 448, 426 P.2d at 521, 58 Cal. Rptr. at 121. The California court does not appear to be requiring an actual arrest to constitute custody. *Id.* The New York Court of Appeals also appears not to require an arrest to constitute custody. People v. P., 21 N.Y.2d 1, ____, 233 N.E.2d 255, 261, 286 N.Y.S.2d 225, 233-34 (1967). The New York court in applying an objective standard emphasized, however, that simply because a person is restrained does not necessarily mean that *Miranda* warnings must be given. *Id.* The court interpreted the *Miranda* decision in terms of "significant restraint," which it defined as occurring "when the questioning takes place under circumstances which are likely to affect substantially the individual's 'will to resist and compel him to speak where he would not otherwise do so freely.' " *Id.* (citations omitted).

Federal courts using the objective standard have inquired into the issue of whether there has been an objective manifestation by law enforcement officers indicating that they intend to deprive the defendant of his freedom in a significant way. *See* United States v. Hall, 421 F.2d 540 (2nd Cir. 1969), *cert. denied,* 397 U.S. 990 (1970). The Court of Appeals for the Ninth Circuit considered " 'the extent to which the authorities confronted defendant with evidence of her guilt, the pressures exerted to detain defendant, and any other circumstances which might have led defendant reasonably to believe that she could not leave freely.' " Lowe v. United States, 407 F.2d 1391, 1396-97 (9th Cir. 1969) (emphasis and citations omitted) (quoting People v. Arnold, 66 Cal. 2d 438, 449, 426 P.2d 515, 522, 58 Cal. Rptr. 115, 122 (1967)). The *Lowe* court held that *Mirarda* warnings did not have to

The *Fields* court stated that "*Miranda* warnings should be given before questioning a person who is in custody or deprived of his freedom by the authorities for a more serious offense such as driving while intoxicated."[101] The court did not, however, specify what offenses, other than driving while intoxicated, would trigger the requirement of *Miranda* warnings.[102] The court seems to be leaving itself open for ad hoc determinations. For purposes of traffic violations, however, the court may decide to apply the rules of *Miranda* to only those violations that have not been decriminalized.[103] The reasoning of *Fields* would thus affect reckless driving, negligent homicide, manslaughter, leaving the scene of an accident, and driving while a license or driving privilege is suspended or revoked, as well as driving while intoxicated.[104] The court could consider these violations as those "more serious than routine traffic offenses" spoken of in *Fields*.[105]

The *Fields* court stated in a footnote that its decision did not reach the issue of whether a refusal to submit to a blood-alcohol test could be considered testimonial evidence and subject to fifth amendment safeguards.[106] Several courts have contended that a refusal to take a chemical intoxication test constitutes evidence of a testimonial or communicative nature within the present scope of the fifth amendment.[107] Although North Dakota by statute allows admission of evidence of such a refusal,[108] the statute may be unconstitutional pursuant to the fifth amendment.[109] The argument can be made that since a person has a statutory right to refuse an intoxication test, admitting evidence of that refusal is a

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be given to defendant since questioning concerning the ownership of the automobile defendant was driving did not exceed the "on the scene" exception of *Miranda*. 407 F.2d at 1396.

101. 294 N.W.2d at 409.

102. *Id.*

103. N.D. CENT. CODE §39-06.1-02 (1980). Except for a few specific violations, North Dakota has decriminalized traffic violations. *Id.*

104. N.D. CENT. CODE §39-06.1-05 (1980).

105. 294 N.W.2d at 409.

106. *Id.* at 410 n.5

107. *See, e.g.*, State v. Andrews, 297 Minn. 260, 212 N.W.2d 863 (1973), *cert. denied*, 419 U.S. 881 (1974). Even though the Minnesota Legislature had deleted a prior statutory provision that prohibited the admission of refusal evidence, the *Andrews* court held that because a defendant's refusal "communicates," it is testimonial in nature and therefore constitutes evidence of a testimonial or communicative nature that must be excluded by operation of the fifth amendment. 297 Minn. at 262, 212 N.W.2d at 864. *See also* Dudley v. State, 548 S.W.2d 706 (Tex. Crim. App. 1977) (admissibility of intoxication test results does not mean that an accused person's expression of his desire not to submit to the test must also be admissible). *But cf.*, People v. Thomas, ____ N.Y.2d ____, 412 N.Y.S.2d 845 (1979). The *Thomas* court pointed out that "in no way . . . is there any compulsion on the defendant to refuse to take the test . . . on the contrary, the compulsion is to take the test." *Id.* at ____, 412 N.Y.S.2d at 849. As a result, the court held that the evidence of refusal was admissible without violating the defendant's constitutional rights. *Id.*

108. N.D. CENT. CODE §39-20-08 (1980).

109. U.S. CONST. amend. V. *See* Note, *The Admissibility of Refusals in Drunk Driving Prosecutions: A Violation of the Fifth Amendment*, 10 PAC. L.J. 141 (1979). *But see* Cohen, *The Case for Admitting Evidence of Refusal to Take a Breath Test*, 6 TEX. TECH. L. REV. 927 (1975).

form of compulsory self-incrimination.[110] In a footnote, the United States Supreme Court stated in *Miranda* that compulsion is present whenever a defendant is asked a question by a police officer that requires an answer.[111] Refusal to take an intoxication test would seem to fall within this category. Therefore, evidence of a refusal would be compulsory and inadmissible.[112] Legislation intended to reduce drunk driving violations arguably should not be enforced at the expense of individual constitutional rights.[113]

By adopting the custody test for determining whether *Miranda* warnings are required,[114] the North Dakota Supreme Court in *State v. Fields* was apparently using an objective standard for determining when "custody" occurs.[115] The court indicated that a person is in custody for purposes of *Miranda* when he is under arrest or in a "police-dominated atmosphere."[116] The court further implied that custody occurs when a reasonable person would reasonably believe he was not free to go.[117]

The *Fields* court also held that *Miranda* applies to the offense of driving while intoxicated,[118] and indicated that other serious traffic offenses would also require *Miranda* warnings.[119] Although the court attempted to prevent a conflict between the right to remain silent pursuant to the *Miranda* warnings and a refusal to submit to a blood-alcohol test, by silence or negative answer,[120] the contradiction inherent in the situation may prove impossible to resolve in practical application.

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110. The fifth amendment states that no person "shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

111. 384 U.S. at 468 n.37.

112. *See* People v. Rodriguez, 80 Misc. 2d 1060, 364 N.Y.S.2d 786 (Sup. Ct. 1975). The court stated that a statute which endeavors to compel such communication under penalty of having the refusal admitted into evidence, presumptively as evidence of guilt, compels a defendant to bear witness against himself, in violation of his rights under the fifth amendment. *Id.* at ____, 364 N.Y.S.2d at 790. *See also* Johnson v. State, 125 Ga. App. 607, 188 S.E.2d 416 (1972). In *Johnson* the court maintained that the defendant did not knowingly waive his constitutional protection against self-incrimination, but on the contrary, asserted it, both by not taking the test and by objecting at trial to the introduction of evidence that he refused to take the test. *Id.* at ____, 188 S.E.2d at 418.

113. *See* Bell v. Burson, 402 U.S. 535, 539 (1971) (if a statute as applied infringes upon a constitutionally protected right, that application will be invalid).

114. 294 N.W.2d at 408.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 409.

119. *Id.*

120. *Id.* at 410.