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NCDD Journal

National College for DUI Defense

Editor:Paul Burglin

Summer, 2019

Dean's Message

William Kirk

Summer is here, our Summer Session is just around the corner and my term as Dean of NCDD is nearly complete. I want to thank every member of the National College for giving me the privilege to be the Dean for the past year. I am thrilled with what we have accomplished this year and excited about what the future holds for NCDD.

I am thankful for this forum and the opportunity to talk with all of you about the need to take better care of ourselves and each other. This profession was never easy, but changing political and economic landscapes has made this profession ever more demanding. It has taken a toll on ourselves and

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E.D.'S Corner

Rhea Kirk

It's hard to believe that school is out, and summer is upon us! We have lots of new things happening at the NCDD! A new ncdd.com is in development right now. In our effort to provide our members with the most comprehensive learning tools available, NCDD is committed to building a bigger and better website. Please watch for announcements about the launch of our new site later this summer. Make sure your profile bio and picture are up-to-date!

Our exciting upcoming seminars for the second half of 2019:

Summer Session: "The DUI Trial from Voir Dire to Verdict" Cambridge, MA This three-day, trials skills program, will be held July 18-20 at Harvard Law School's Austin Hall. NCDD is proud to announce that famed attorney, Rusty Hardin, will be our keynote speaker this year.

Las Vegas: "Solving the Mystery of DUI Acquittals" Las Vegas, NV The nation's largest DUI defense CLE, co-sponsored by NACDL, will take place September 18-21 at Planet Hollywood in Las Vegas, NV. NCDD and NACDL are proud to announce that Larry Pozner will be part of this years' faculty.

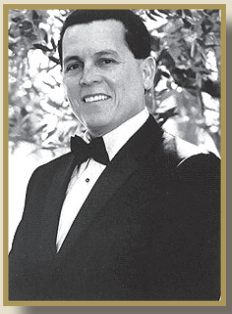
SFST II Course: "DWI Detection & Standardized Field Sobriety Testing" Chicago, IL Back by popular demand, after selling out in three weeks, NCDD is proud to announce another NHTSA SFST Student Program, featuring Anthony Palacios, taking place Oct. 10-12 in Chicago, IL. Space is limited and due to our waiting list from the first program, only a few spots remain!

Mark your calendars now and please visit the NCDD Website www.ncdd.com for more details about our upcoming seminars or call the NCDD Office 334-264-1950 for more information.

I look forward to seeing each of you at one of our upcoming NCDD seminars soon!

Rhea

LEGENDARY ATTORNEY FELIPE PLASCENCIA KILLED IN PLANE CRASH



Felipe Plascencia

December 13, 1965 - February 21, 2019

Renowned DUI-defense attorney Felipe Plascencia, 53, tragically perished in an airplane crash in the Tehachapi Mountains in southern California on February 21, 2019, along with fellow lawyer Marina Vellavicencio, 38, of Yorba Linda, California. The two had only a month earlier attended NCDD's Winter Session at the Hollywood Roosevelt Hotel in Los Angeles, where Felipe gave a passionate lecture entitled, "*Man on Fire: Cross Examination of a DRE*."

Some 400-plus mourners, including a bevy of well-known political figures in California, turned out to pay their respects for Plascencia at a memorial service on March 9, 2019, at the Immanuel Presbyterian Church in Los Angeles.

Felipe, as he was known by all in the DUI defense bar, maintained a private practice in Whittier after serving as a Los Angeles County deputy public defender and a deputy city attorney for the City of Compton. Not only was he a highly regarded trial attorney, but he was also a political activist who strove to make life better for working immigrants in his community. He and Vellavicencio were returning from a court appearance in San Luis Obispo. The crash also took the life of the pilot, Ruben Piranian, 74, of Granada Hills, California.

Plascencia was born in Tepatitlan, Jalisco, Mexico in 1965. He immigrated to Santa Ana, California at the age of seven. He was a graduate of the Gerry Spence Trial Lawyer's College and regularly lectured on trial techniques throughout the country without reimbursement of expenses. In 2009 he was recognized as the Attorney of the Year by the Mexican American Bar Association (MABA) and served as President of the Mexican American Bar Association Political Action Committee from 2005 to his untimely passing. He was a family man who took immense pride in his surviving wife and college sweetheart, Yolanda, and his daughters Magali and Alena.

The Plascencia family requests that donations be made to the "Felipe Plascencia Foundation" to continue his mission and perpetuate his legacy of serving the community and underprivileged youth." Please make checks payable to: Felipe Plascencia Foundation C/O Edwards Charles Foundation 269 S Beverly Dr #338 Beverly Hills, CA 90212 (Edward Charles Foundation, a 501(c)(3) NFP Org (Tax ID#26-424-5043), is a fiscal sponsor of the Felipe Plascencia Foundation).

(Continued from cover - "Dean's Message")

on our families. But over the past year, we have spent time and energy focusing on ourselves and our colleagues with the same energy that we dedicate to our clients. We recognize that no matter how talented we are as lawyers we cannot effectively represent our clients if we are not of sound mind. We have come to recognize the need for better time and stress management. We have spent more time this year looking out for one another than in any year prior. And most importantly, our families are grateful that we have re-dedicated some of our time and energy to them as well.

The primary purpose of NCDD is to educate lawyers and over the past year our College has demonstrated that no organization does a better job of preparing the DUI defense attorney to defend the rights of the accused. Our Las Vegas program, last October, was again the largest DUI defense CLE in the nation. Our partnership with NACDL remains strong as both our organizations continue to evolve this program to meet the needs of our members.

Our Winter Program in Hollywood was a huge success. For the first time ever, NCDD streamed the entire program live online. Your College will continue to utilize and expand this technology to further its outreach to members nationwide. The advent of streaming NCDD programs has also allowed this College to exponentially increase its Public Defender education program. Over the next few years, it is my hope that this College will continue to stream its programs to ensure that attorneys nationwide have the same opportunities at continuing education as anyone else.

The development of the singular subject Winter Session is, again, another evolution based upon the needs and desires of our members. Gone are the shotgun approach, half-day programs with no real direction. Instead, this College now offers precise and thorough training via our Winter Sessions. It is my hopes that NCDD will continue with this very focused programming to better serve the needs of our members.

This spring, *Mastering Scientific Evidence*, now in it's 26th year, once again lived up to the billing as the nation's premier DUI forensic evidence seminar. Our continued relationship with TCDLA remains vital to the success of this program and our relationship with our brothers and sisters in Texas has never been healthier.

Our *Serious Science* program, under the direction of Regent Andrew Mishlove, continues to sell out. It is the most reasonably priced, high level training, for blood analysis/lawyer advocacy anywhere in the nation for practicing attorneys. The College recognizes the demand for more programs of this nature, and continues to develop new curriculum in these areas. It is my belief that over the next few years, NCDD's programming will further evolve into more of these intense, micro-seminars.

That, of course, leads us to our first (and second) *NHTSA-SFST Student Courses*. May's program in Atlanta was a complete sell out and our Fall program in Chicago is near capacity as well. It is with these highly focused programs that NCDD will continue to explore better educational opportunities for our members, offering you the opportunity to further sharpen your skills and hone your talents.

Under the guidance of Regent Donald Ramsell, our *Amicus* contributions over the past year demonstrate the immense talent and outreach that NCDD possesses. In *McGraw v. State*, NCDD's Amicus efforts were led by Flem Whited III. In *Commonwealth v. LaRose*, Michael DelSignore and Julie Gaudreau were instrumental. And in *Mitchell v. Wisconsin*, the combined efforts of Michelle Behan, Andrew Mishlove and Flem Whited III allowed NCDD's presence to be felt by the United States Supreme Court.

I am also extremely excited about NCDD's new website set to launch this summer. Your College has made a considerable investment in the new and improved ncdd.com to ensure that our website is the single most useful tool in educating and preparing the DUI defense attorney for the challenges that await them. We have heard from many of you over the past couple of years about our current website, and your College has responded to your needs. We look forward to the website we will all be proud of.

However, what excites me the most about the future of NCDD is what has always made this organization great from day one: the camaraderie. Over the past year, I have had the opportunity to travel nearly 25,000 miles around this country meeting with some of the finest DUI defense attorneys our nation has to offer. While the talent is immeasurable, it is the friendships that are created by this College that is its greatest asset. Defending drunk drivers is a difficult task. No one ever roots for us until the day the need us. But knowing that you are supported by over a thousand colleagues fighting the same fight who will be there to assist you in a minute's notice is the true meaning of "Justice Through Knowledge."
Thank you to everyone for allowing me the privilege of being Dean of NCDD for the past year. It is a great honor and one that I shall cherish for the rest of my life.

Scotus Radar

On June 27, 2019, the high Court handed down its ruling in *Mitchell v. Wisconsin*, 559 U.S. ___ (Docket No. 18-1620), on the issue of whether an implied consent statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.

Rather than directly answer that question, J. Alito, writing for a four-member plurality with C.J. Roberts, J. Breyer, J. Kavanaugh joining, held that in all but the rarest of circumstances, the "exigent circumstances" to the search warrant requirement is sufficient to permit the warrantless taking of a blood sample without offending the Fourth Amendment.

J. Thomas concurred in the judgment of the four-member plurality, but went further in opining (as he did in *McNeely*), that there should be a categorical, *per se* exception that permits the warrantless taking of a blood sample from DUI suspects.

J. Sotomayor, joined by J. Kagan and J. Ginsburg, dissented, noting that there is no significant difference between conscious suspects and unconscious ones, in terms of the time it takes to procure a warrant (their alcohol dissipates at the same rate).

Case Law Roundup

Case Highlights from Paul Burglin (California)

Waiver of Appeal in Plea Agreement Did Not Relieve Counsel Of Duty To File Notices of Appeal

Garza v. Idaho
586 U.S. ___, 139 S.Ct. 738 (2019)

Defendant signed plea agreements in state court containing a waiver of his right to appeal. Shortly after sentencing, he told his attorney he wanted to appeal. His attorney told him an appeal would be "problematic" in light of the waivers, and declined to file the notices. Defendant sought state postconviction relief after the deadline for filing the notices had passed, alleging ineffective assistance of counsel. The Idaho Supreme Court held the presumption of prejudice recognized in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000) when trial counsel fails to file an appeal as instructed does not apply when the defendant has agreed to an appeal waiver.

The high Court found that plea agreements are essentially contracts and that appeal waivers within them may be challenged on various fronts (e.g., limited in scope, unwaiveable claim, not knowingly and voluntarily agreed to, forfeited or waived by the Government, etc.). It noted that the filing a Notice of Appeal is "a purely ministerial task that imposes no great burden on counsel" [cite], and that the "ultimate authority" to decide whether to "take an appeal" belongs to the accused. [cite]. It concluded that the *Flores-Ortega* presumption of prejudice applies regardless of whether a defendant has signed an appeal waiver, and that defendant's attorney rendered ineffective assistance of counsel by failing to file the Notices of Appeal.

REASONABLE SUSPICION

Commonwealth v. Walls
2019 WL 1247092 (2019) (Supreme Court of Pennsylvania)

A trooper with eight years of experience was advised by a fellow trooper driving in front of him radio that a truck was coming towards him that appeared to be straddling the right fog line. He slowed down in anticipation of the truck, and when he saw it he immediately noticed its right tires were across the right fog line. He turned around to follow it and testified that it crossed the right fog line twice within a 300-yard distance and weaved within its lane. A video confirmed weaving within the lane but only depicted the truck touching the fog line (the trooper said a glare on the video tape from headlights compromised what one could see on the tape but not his own view of the truck crossing the fog line).

The Court determined it was proper to consider the other trooper's advisement along with the testimony of the trooper who made the stop, and concluded there was reasonable suspicion for the detention.

State v. Perez
164 Idaho 626 (2019) (Supreme Court of Idaho)

An identified citizen called police and described a white Mercedes with a driver who seemingly "didn't know how to drive it, 'cause it kept trying to go in drive, and then it couldn't, but like it's a standard or something." She said that once the driver was able to get the car moving, it pulled into a driveway and almost hit the back of a parked car. She said the driver left the area "not even five minutes ago" She added that the driver had been slamming on the car's brakes earlier in the day and "roaring around," and that the car was recently "roaring its motor, like it wanted to race."

Earlier in the day an Indian Highway Safety Officer had driven through the same neighborhood and noticed a white, two-door Mercedes parked on a street. He had never seen a white Mercedes in that neighborhood in his three years as a highway safety officer.

Approximately ten to fifteen minutes passed between the time of the call to dispatch and the time that Officer Henry stopped the Mercedes. Officer Henry stated that he did not observe any violations of the law or erratic driving while following the vehicle; however, he only followed it for less than a minute before he initiated the stop.

Noting that "reasonable suspicion" need not rule out the possibility of innocent conduct, the Court held that what the reporting party described provided reasonable suspicion to stop the vehicle based on the totality of circumstances.

NO DUTY TO ADMONISH THAT FST'S ARE OPTIONAL

Otto v. Commissioner of Public Safety
924 N.W.2d 658 (2019) (Court of Appeals of Minnesota)

Defendant sought the reinstatement of his driving privilege on the basis that his constitutional rights were violated.

Defendant was requested to perform various field sobriety tests followed by a preliminary breath test (PBT), and was thereafter arrested on suspicion of DUI. He challenged the legality of his arrest, asserting the officer was obliged to advise him that participation in FST's and the PBT is optional. The district court rejected his petition, stating it "[could] not find any provisions in [s]tate statutes or case law suggesting officers are required to relay to drivers information regarding the voluntariness of their participation in field sobriety testing[,]" and noting that this argument is best left with the legislature.

The Court agreed and affirmed. It noted the FST's are not a search, and as for the PBT, since it was administered after probable cause developed from the FST performance, it was a lawful search incident to arrest.

SCIENTIFIC FOUNDATION REQUIREMENTS FOR BREATH TEST RESULTS

People v. Manzueta
62 Misc.3d 187 (2018)
Criminal Court, City of New York

The only evidentiary foundation laid by the People to show the scientific reliability of the PBT device used on defendant were service slips reflecting calibration check performances on 30 March 2017 and 18 September 2017. These records failed to show how the test was administered, whether the results were recorded, whether the device contained the proper kind and mixture of chemicals in proper portions; and the testing, maintenance and operation of the device was in proper working order on the date of the testing.

"[A] PBT device on the list of approved devices is not a dispositive indication of reliability [cite]. To admit results of a portable breath test, the People have the burden to lay the proper foundation showing the device's reliability [cites]. Specifically, the admissibility of the results of the PBT remains premised on the proper working order of the device when the test was preformed and the proper administration of the test [cite]. Additionally, the People must show that the chemicals used in conducting the test were of the proper kind

and mixed in the proper portions [cite].

"Moreover, an acceptable calibration report should contain a `lot number' and `tank number' that corresponds to a lot and tank numbers of the PBT device administered on this defendant. However, no lot or tank number was provided for this device, thus, there are no assurances that the calibration reports pertain to this case."

Accordingly, the PBT results were inadmissible.

Connor v. State
114 N.E.3d 901 (2018)
Court of Appeals of Indiana

Defendant was administered a breath test using the Intox EC/IR II machine. He blew so hard that the instrument registered a "maximum flow exceeded" message. The officer then waited approximately three minutes, replaced the mouthpiece, and administered another test using the same machine and go a .097 test result.

Defendant contended the result was inadmissible because the procedure followed by the officer when he got the "maximum flow exceeded" message had not been approved in accordance with the rules adopted by the Department of Toxicology.

Pursuant to statute, the Department of Toxicology has adopted rules concerning the proper technique an operator must follow when administering a breath test on an Intox EC/IR II breath test instrument, and those rules prescribe twelve steps an operator is required to follow in order to properly administer a breath test. In the event a test operator receives one six specified error message, the rules provide for additional procedures that must be followed in order to re-administer the breath test. The "maximum flow exceeded" message is not one of the six identified in the rules, and defendant therefore contended that that error message was an "unanticipated problem" for which there is no direction in the administrative code. He persuasively argued that the officer's procedure in this instance had not been approved by the Department of Toxicology or by statute, and the results were therefore inadmissible.

SUFFICIENCY OF IMPLIED CONSENT ADMONITION

State v. Cole
822 S.E.2d 456 (2018)
Court of Appeals of North Carolina

Where defendant was given the statutorily required implied-consent admonition and chose breath, there was no requirement that the admonition be read again before testing was done on a second machine after first machine produced contaminated mouth-alcohol result. Had he tried to go from breath to blood, a second reading would have been required.

CHEMICAL TEST REFUSALS

Factor v. Commonwealth of Pennsylvania, Dept. of Transportation, Bureau of Driver Licensing
199 A.3d 492 (2018)

Officer read DUI arrestee the chemical test admonition and wrote him up as a refusal. In the administrative hearing contesting a one year civil license suspension, the officer could not recall what specifically the licensee said but testified that he clearly refused. The licensee offered no evidence as to what he purportedly said in response to the chemical test demand.

Whether one refused a chemical test "turns on a consideration of whether the licensee's overall conduct demonstrates an unwillingness to assent to an officer's request for chemical testing." Anything less than an "unqualified, unequivocal assent to submit to chemical testing" constitutes a refusal.

The Court affirmed the finding that the licensee's argument was "largely speculative and unsupported by the testimony presented[,]" and it rejected the contention that officers must record or testify verbatim as to the response a licensee gives in refusing a test.

The Court also rejected the contention that a one-year license suspension is so punitive as to constitute a criminal penalty and thus is unconstitutional under *Birchfield*.

Howe v. Director of Revenue
Missouri Court of Appeals, Eastern District, Div. Four
2019 WL 578958 (2019)

Trooper read DUI suspect a chemical test admonition for breath testing only. The suspect consented but radio frequency interference (RFI) prevented the obtainment of a test result. The trooper then demanded a blood sample but neglected to give defendant another chemical test admonition. Defendant refused a blood draw.

The trooper could have satisfied the statutory requirement for a second chemical test demand by either (1) rereading the implied consent warning before the second test; (2) reminding the arrestee of the consequences for refusal before the second test; or (3) requesting both tests when reading the implied consent warning. Having failed to do one of these three things a refusal finding could not be sustained.

State v. Dowdy
923 N.W.2d 109 (2019) (Supreme Court of North Dakota)

North Dakota's "implied consent" statute requires officers to give the following chemical test admonition to DUI arrestees:

"North Dakota law requires you to submit to a chemical test to determine whether you are under the influence of alcohol or drugs. Refusal to take the post-arrest breath test as directed by a law enforcement officer is a crime punishable in the same manner as DUI. I must also inform you that refusal to take the test directed by a law enforcement officer may result in a revocation of your driver's license for a minimum of 180 days and potentially up to three years."

The officer gave this admonition but added the following underscored language to it:

"<u>As a condition of operating a motor vehicle on a highway, or public or private area to which the public has a right of access to, you have consented to taking a test to determine whether you are under the influence of alcohol or drugs</u>. North Dakota law requires you to submit to a chemical test to determine whether you are under the influence of alcohol or drugs. Refusal to take the post-arrest breath test as directed by a law enforcement officer is a crime punishable in the same manner as DUI, <u>and includes being arrested</u>. I must also inform you that refusal to take the test directed by a law enforcement officer may result in a revocation of your driver's license for a minimum of 180 days and potentially up to three years."

Dowdy argues the emphasized language added by the officer was inaccurate and coercive, and that it impaired her ability to make an informed decision on whether to consent to testing.

Because the additional language did not materially mislead or coerce the driver and was accurate, the Court held its presence did not

compromise the requisite admonition and a refusal was properly found.

City of Grand Forks v. Barendt
920 N.W.2d 735 (2018)

Defendant was the subject of a welfare check and suspected of driving under the influence. He was administered field sobriety tests and refused a preliminary alcohol screening test. The officer then informed him of North Dakota's implied consent advisory and then arrested defendant. Defendant then submitted to a breath test.

The trial court granted defendant's motion to suppress the breath-alcohol test results on the basis the implied consent admonition was given before the arrest and not after it as required by statute. The Supreme Court affirmed.

NOTE: Be mindful of other jurisdictions holding that defendants are under *de facto* arrest in these situations. Moreover, exclusion of breath-alcohol test results would not be mandated under federal law given the search-incident-to-arrest exception set forth in *Birchfield*.

State v. Vigen
2019 WL 2135850 (2019) (Supreme Court of North Dakota)

Results of a chemical test are to be suppressed by statute where the officer fails to read the mandated "implied consent" admonition to suspects. Here, the officer omitted information pertaining to the consequences of refusing to give a urine sample. The defendant proceeded to provide a breath-alcohol sample and subsequently brought a motion to suppress the result which the trial court denied.

The State argued that the omission of the reference to urine was appropriate because the North Dakota Supreme Court had previously held the warrantless collection of urine for testing is unconstitutional absent a recognized exception to the requirement for a warrant, and that the admonition given was thus legally sufficient.

The Supreme Court reversed, concluding that the statute required suppression despite its own prior holding on urine testing.

State v. Wood
922 N.W. 209 (2019) (Court of Appeals of Minnesota)

Police requested a blood sample from Defendant in connection with his DUI arrest. He refused and they procured a warrant for it.

Defendant moved for suppression of the blood test result on the basis that he was no offered breath testing under the implied consent law.

The Court held law enforcement was not compelled to invoke the implied consent law and offer defendant a choice of chemical test sample options. Instead, it could properly seek a warrant for a blood sample and did.

Mullin v. Director of Revenue
556 S.W.3d 626 (2018) (Missouri Court of Appeals, Western District)

The officer gave the licensee the statutorily required chemical test admonition but incorrectly advised her that she would only face an infraction for DUI if she consented to a chemical test, but a misdemeanor if she refused. She then submitted to breath testing.

Her license was administratively suspended for having a .142 test result. Finding that the licensee was given an opportunity to consult with an attorney and was correctly admonished that a refusal would result in a license suspension, the Court found the misinformation about the infraction vs. misdemeanor did not mislead her on the consequence of the license suspension and was therefore not a basis to set aside the suspension action.

Schoon v. North Dakota Department of Transportation
917 N.W.2d 199 (2018)

The licensee's offense date fell between the *Birchfield* opinion and a subsequent amendment to the state's implied consent law in light of Birchfield. *Birchfield* held that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense."

North Dakota's "implied consent" admonition previously specified that a refusal to submit to a chemical test directed by a law enforcement officer is a crime punishable in the same manner as driving under the influence. It did not differentiate between breath and blood testing. Because of *Birchfield*, the officer did not advise the licensee that refusing a blood test is a crime even though a state statute mandated suppression of the chemical test result if there is failure to read the entire admonition.

Schoon submitted to a blood test and suffered a two year license suspension based on the result. The Supreme Court reversed because of the failure to read the entire admonition required by the statute. It concluded that Birchfield did not abrogate the state's implied consent statute and suggested the Legislature should have acted more quickly to amend the law.

State v. Lemeunier-Fitzgerald
188 A.3d 183 (2018) (Supreme Court of Maine)

Even post-*Birchfield*, the chemical test admonishment mandated by various "implied consent" laws continue to advise DUI/OUI arrestees that their failure to submit to a blood draw will result in increased jail time if they are convicted of the underlying offense.

Lemeunier-Fitzgerald was arrested and advised under Maine's statute as follows:

"*If you are convicted of operating while under the influence of intoxicating liquor or drugs, your failure to submit to a chemical test will be considered an aggravating factor at sentencing which in addition to other penalties, will subject you to a mandatory minimum period of incarceration.*"

She agreed to submit to the blood test and a sample was taken from her without a warrant.

The Supreme Court affirmed the trial court's denial of her motion to suppress evidence.
"Because the mandatory minimum sentence applies only upon an OUI conviction and the statute does not criminalize the mere act of refusing to submit to a blood test test, and because it does not increase a driver's maximum exposure to a fine or sentence of imprisonment, the statute's setting of a mandatory minimum sentence if a driver is convicted of OUI after refusing to submit to a blood test despite probable cause is not a "criminal penalt[y] on the refusal to submit to such a test" within the meaning of *Birchfield*.

REMEMBERING REESE JOYE

Reese Joye, one of the original ten founders of the NCDD, died in his sleep at The Charles Hotel in 2008 while attending the annual NCDD Summer Session. Those who were there will remember him hustling around with his camera to get photographs of everyone.

Reese Joye

Joye was a tenacious trial attorney with a legendary work ethic. While being honored in the South Carolina Senate on his 70th birthday, a colleague noted that Joye could argue with a stop sign and win.

Joye attended the University of South Carolina where he earned an undergraduate degree in mechanical engineering and later his law degree. He worked as in-house counsel for Boeing Corporation in Seattle before returning to South Carolina to start his own firm.

Among the many good deeds he did in his life, Joye founded the *Public Defender Corporation* of Charleston and the *I Care* organization for prisoners of war. He took great pride in the fact that he was an Eagle Scout, and throughout his life he took to heart the Scout Law and Scout Oath. In his eulogy at the service for his father, Dr. Todd Joye put it simply, "In his world, everyone deserved a chance." He was renowned for protecting the rights of individuals and giving them a helping hand.

Joye was not only an expert in DUI law (he testified before legislators and wrote several books on DUI defense), but also personal injury. In 1997, Joye obtained a $262.5 million verdict against DaimlerChrysler Corporation on behalf of a family that lost a child because of a defective door latch on a minivan. The record-setting verdict was later reversed on appeal, with the judgment vacated and a new trial ordered, *Jiminez v. Daimler-Chrysler Corp.*, 269 F.3d 439 (4th Cir. 2001), but according to NCDD Fellow Barry Simons you would have never known it had you been a guest at Joye's riverfront home in Charleston, SC, just after the judicial ruling came down.

"We were in Charleston for the NCDD Winter Session," recalled Simons, "and when the seminar finished he invited attendees to a local restaurant for a dinner he hosted like the true southern gentleman we knew him to be. The night before he had as guests at his home for a fabulous reception, complete with a BBQ, oysters, and an open bar. It was the next day that we learned about the appellate reversal and we were stunned that he had been such an engaging and gracious host the previous two days without even mentioning the loss."

At Bennettsville High School where he graduated in 1956, Joye was voted "Most Likely to Succeed," and that he did.

Trial Tip Treasure

Michael J. Kennedy

Counsel should object to the admission into trial of any and all evidence related to a DUI suspects' admissions made after they were seized but prior to being advised of their *Miranda* rights.

"[The] prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of [a] 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**." *Miranda v. Arizona* (1966) 384 U.S. 436, 444 (emphasis added). That holding is now a constitutional decision, *Dickerson v. United States* (2000) 530 U.S. 428, 432, 438, which is a change we must emphasize. Prior to *Dickerson, Miranda* was thought to have presented merely a prophylactic rule that was not decreed by the Constitution. *Davis v. United States* (1994) 512 U.S. 452, 458.

So, in a traffic stop leading to a DUI arrest, a defendant is seized on the street for a custodial traffic offense. He is not free to leave, and the police never tell the defendant he is free to leave nor that he would not be arrested. After the stop, the defendant is grilled about his drinking, what he had been doing, where he had been, where he was going, etc., and then is tested. Prior to FST's and formal arrest, questions are generally asked off a pre-printed form presenting many detailed (not general) inquiries amounting to upwards of a dozen or more questions relating to drinking, eating, sleeping, etc. This is an "interrogation" as defined in *Rhode Island v. Innis* (1980) 446 U.S. 291, 301. An interrogation is either express questioning or its functional equivalent that is reasonably likely to elicit an incriminating response. *Id.*

A person is in custody when, as a suspect, he is "deprived of his freedom of action in any significant way, or is led to believe, as a reasonable person, that he is so deprived." *People v. Arnold* (1967) 66 Cal.2d 438, 448. That is, "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California* (1994) 511 U.S. 318, 323.

When the police physically stop a person for the observed commission of a **custodial crime**, that person is thereby "arrested." *Henry v. United States* (1959) 361 U.S. 98, 103 ["The prosecution conceded below, and adheres to the concession here, … that the **arrest took place when** the federal **agents stopped the car** [for a federal custodial offense, whisky theft]. That is our view on the facts of this particular case. When the officers **interrupted** the two men and **restricted their liberty** of movement [for a custodial offense!], the **arrest**, for purposes of this case, **was complete**."] [emphasis added], *Peters v. New York* (1968) 392 U.S. 40, 67 (the often overlooked companion case to *Sibron v. New York* (1968) (same cite), both of which were handed down the same day as *Terry v. Ohio* (1968) 392 U.S. 1).

"The ultimate 'in custody' determination for *Miranda* purposes [involves] [t]wo discrete inquires [including] would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane* (1995) 516 U.S.

99, 112. I have a suspension (of belief!) bridge for sale in Joshua Tree for anyone who believes that any DUI "detainee" reasonably feels that he is free to cut off questioning and leave the officer from the point at which he is stopped and then is being grilled about drunk driving.

The government relies on *Berkemer v. McCarty* (1984) 468 U.S. 420 [pre-*Dickerson*/pre-*Lago Vista*!] for the proposition that disputed questioning of DUI suspects at the scene of the stop is allowable. However, that case does not support the view that the type of detailed questions asked of these defendants are admissible. In *Berkemer,* **only one question was asked** after an officer had stopped a vehicle for weaving---have you taken any intoxicants? Respondent admitted to consuming two beers and smoking pot and was then arrested. The court held the police may ask a "moderate" number of questions to obtain identity information and to try to obtain information confirming or dispelling the officer's suspicions. That "moderate number of questions" point is *dictum*; the facts giving rise to the opinion involved **only one question**!

All traffic offenses are now custodial offenses: *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, holds that custody and formal arrest are not unreasonable for a non-custodial traffic offense [*Id.,* at page 354]. Thus, the presumptively limited nature of the traffic stop which animates the *Berkemer* exception to *Miranda* [*Berkemer at* 439-440], has evaporated.

Thanks to *Dickerson* and *Lago Vista*, things are drastically different from when *Berkemer* was handed down. *Miranda* clearly applies here. Make the objection.

Opinion

JUSTICE THOMAS'S SHAMEFUL DISSENT IN FLOWERS V. MISSISSIPPI

by Paul Burglin

The first three trials of Curtis Flowers in Mississippi resulted in convictions and the death sentence, but on each occasion that State's high court reversed based on the prosecutor's racial discrimination in excluding African-American jurors with peremptory challenges. The fourth and fifth trials resulted in hung juries. In the sixth trial, Flowers was convicted again, but the Mississippi Supreme Court had grown more conservative in the intervening years and affirmed it.

Last month, the U.S. Supreme Court reversed Flowers's conviction again in *Flowers v. Mississippi*, 588 U.S. __ (2019). With J. Kavanaugh writing for the majority, the Court observed in a 7-2 ruling that over the course of the six trials, the prosecutor used peremptory challenges to exclude 41 out of 42 African-American prospective jurors. In the last trial, he struck five out of six African-Americans, and questioned all of them at far greater length than other prospective jurors. There was also a pattern of factually inaccurate statements having been made by the prosecutor to try and rationalize his challenges as being race neutral. This systematic exclusion of jurors of the same race as Flowers was, in the words of Kavanaugh, simply too much to overlook.

In *Baston v. Kentucky*, 476 U.S. 79 (1986), the high Court reversed a conviction in a similar situation based on the denial of equal protection for the accused. It determined that while a criminal defendant is not entitled to a jury that includes one or more jurors of his same race, the Equal Protection Clause does guarantee him that the State will not exclude members of his race simply on account of race.

J. Thomas, the only African-American on the high Court, and the Justice who replaced Thurgood Marshall, the only other African-American to ever sit on the high Court, wrote a fiery dissent. He chastised the majority for purportedly distorting the record below, claiming that the prosecutor's factually inaccurate statements were accidental and trivial, and mocking its holding in *Baston* as being constitutionally flawed. Although the *Baston* holding was primarily based on the denial of equal protection to the accused, Thomas twisted it to proclaim it was based solely on the violation of a juror's right to serve and that the accused therefore had no standing. J. Gorsuch, who joined in Parts I, II, and III of Thomas's dissent, could not bring himself to join Part IV in which Thomas attacked and distorted *Baston*.

It didn't end there for Thomas. He falsely proclaimed that *Baston* "requires that a duly convicted criminal go free because a juror was arguably deprived of his right to serve on the jury." As in the case of Flowers, *Baston* did not require that that defendant go free, but only that he be given a fair trial. Thomas obviously knows this, since he could not later restrain himself in his lengthy dissent from smugly stating, "If the Court's opinion today has a redeeming quality, it is this: The State is perfectly free to convict Curtis Flowers again."

Curtis Flowers may be guilty. He may be a cold-blooded, mass killer deserving of the death penalty. However, he has yet to be convicted in a fair trial that has survived constitutional scrutiny. Yet, with a final salvo Thomas assumes his guilt and suggests that comforting the victims' families is more important that assuring a fair trial to a fellow African-American: "[A]lthough the Court's opinion might boost its self-esteem, it also needlessly prolongs the suffering of four victims' families." Boost its self-esteem? It is difficult to interpret this comment as anything other than a rebuke of his fellow Jurists for defending an African-American getting a beating in our judicial system.

The concurring opinion of J. Alito is almost as disturbing as Thomas's dissent, save for the fact that Alito at least recognized the systematic racism in the Flowers case. What is troubling is that he apparently thinks this kind of racism in our judicial system is an extreme rarity. In his brief concurrence, Alito states, "As the Court takes pains to note, this is a highly unusual case. Indeed, it is likely one of a kind."

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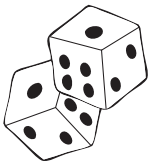

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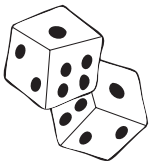

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