

2001

John Robert McCall v. Earl N. Dorius : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David M Bown; Attorney for Respondent.

Vernon B Romney; Attorney General; M Reid Russell; Assistant Attorney General; Bernard M Tanner; Assistant Attorney General; Attorneys for Appellant.

Recommended Citation

Brief of Appellant, *McCall v. Dorius*, No. 13450.00 (Utah Supreme Court, 2001).
https://digitalcommons.law.byu.edu/byu_sc2/724

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

ENT

UTAH SUPREME COURT

BRIEF

LAW LIBRARY

NO.

13450

DEC 6 1975

SUPREME COURT OF THE
STATE OF UTAH

BYU YOUNG UNIVERSITY
J. Reuben Clark Law School

JOHN ROBERT McCALL,
Plaintiff-Respondent,

vs.

EARL N. DORIUS, Director, Driver
License Division, State of Utah,
Defendant-Appellant.

Case No.

13450

BRIEF OF APPELLANT

Appeal for a Reversal of the Judgment of the Third
Judicial District Court, in and for Salt Lake County,
State of Utah, the Honorable Gordon R. Hall, Presiding.

VERNON B. ROMNEY
Attorney General

M. REID RUSSELL
Assistant Attorney General

BERNARD M. TANNER
Assistant Attorney General

Attorneys for Appellant

FILED
Clerk, Supreme Court, Utah

DAVID M. BOWN
321 South 6th East
Salt Lake City, Utah
Attorney for Respondent

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
BACKGROUND	4
ARGUMENT	6
POINT I. THE RESPONDENT HAD NO ABSOLUTE RIGHT TO COUNSEL BEFORE DECIDING TO TAKE THE TEST, AS THIS IS A CIVIL MATTER AND MR. McCALL GAVE HIS CONSENT ON THIS AT THE TIME HE OBTAINED A LICENSE; MR. McCALL'S FAILURE TO SO TAKE THE TEST DESIGNATED WITHIN A REASONABLE TIME WAS A PROPER REASON FOR THE FILING OF THE REFUSAL AFFIDAVIT	6
POINT II. THE RESPONDENT HAD ADEQUATE TIME TO DETERMINE WHETHER OR NOT TO TAKE THE CHEMICAL TEST UNDER UTAH CODE ANN. § 41-6-44.10, AS AMENDED	10
POINT III. RESPONDENT'S ACTION CONSTITUTED A REFUSAL UNDER UTAH CODE ANN. § 41-6-44.10 AND OFFICER FURR WAS JUSTIFIED IN CONCLUDING THAT THE REFUSAL TO SUBMIT TO THE CHEMICAL TESTS WAS COMPLETED	11

TABLE OF CONTENTS—Continued

	Page
POINT IV. THE TRIAL JUDGE ERRED IN NOT REQUIRING THE REVOCATION OF THE RESPONDENT'S DRIVER'S LICENSE TO REMAIN IN FORCE UNDER THE PRES- ENT FACTS	13
CONCLUSION	15

CASES CITED

Anderson v. Macduff, 208 Misc. 271, 143 N. Y. S. 2d 257 (1955)	10
Bean v. State, 12 Utah 2d 76, 362 P. 2d 750 (1961) ..	12
Breithaupt v. Abram, 352 U. S. 432	9
Calciano v. Hults, 13 App. Div. 2d 534, 213 N. Y. S. 2d 500 (1961)	13
Campbell v. Superior Court in and for Maricopa County, 479 P. 2d 685, 106 Ariz. 542	6
Clancy v. Kelly, 7 App. Div. 2d 820, 180 N. Y. S. 2d 923 (1958)	13
Combes v. Kelly, 2 Misc. 2d 591, 152 N. Y. S. 2d 943 (1956)	10
Ent v. Department of Motor Vehicles, 265 A. C. A. 1073, 71 Cal. Rptr. 723	8
Finley v. Orr, 262 A. C. A. 711, 69 Cal. Rptr. 137	8
Funk v. Department of Motor Vehicles, 1 Cal. App. 3rd 449, 18 Cal. Rptr. 662	9
Garcia v. Department of Motor Vehicles, 456 P. 2d 85	6

TABLE OF CONTENTS—Continued

	Page
Goodman v. Orr, 1971, 97 Cal. Rptr. 226, 19 C. A. 3rd 845	6
Hunter v. Dorius, 23 Utah 2d 122, 458 P. 2d 877	5, 12
Johnson v. Dept. of Mtr. Vehicles, 485 P. 2d 1258 (Oregon 1971)	6, 8, 9
Lee v. State, 187 Kansas 566, 358 P. 2d 765 (1961)	5
Mills v. Bridges, 471 P. 2d 66, 93 Idaho 679	6, 8
Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A. L. R. 3d 974 (1966)	4
People v. Brown, 485 P. 2d 500	6, 7
Prucha v. Department of Motor Vehicles, 172 Neb. 415, 110 N. W. 2d 75 (1961)	10
Ringwood v. State, 8 Utah 2d 287, 333 P. 2d 943 (Utah 1959)	5, 12
Rust v. Division of Motor Vehicles, et al., 1971, 267 C. A. 2d 545, 73 Cal. Rprs. 366	6, 8
Stratikos v. Dept. of Motor Vehicles (1968) 477 P. 2d 237	6, 8
Taylor v. Kelly, 5 App. Div. 2d 931, 171 N. Y. S. 2d 909 (1958)	13

STATUTES CITED

Utah Code Ann. § 41-6-44.10 (1953)	1, 2, 4, 7, 12, 14
U. S. C. A. Const. Amends. 4, 9	9
1967 Perm. Supp., Colorado Revised Statutes, § 13- 5-30(3) et seq.	7

TABLE OF CONTENTS—Continued

Page

OTHER AUTHORITIES CITED

Const. art. 2, §§ 3, 7	7
62A Consolidated Laws of New York, Art. 31 § 1194..	4
7 North Dakota Century Code 39-20 Chemical Test for Intoxication	4
17 Albany L. Rev. 258	4
18 Albany L. Rev. 203	4
51 Mich. L. Rev. 1195	4
44 Minn. L. Rev. 673	4
35 Tex. L. Rev. 813	6
88 A. L. R. 2d 1064	6

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

JOHN ROBERT McCALL,
Plaintiff-Respondent,

vs.

EARL N. DORIUS, Director, Driver
License Division, State of Utah,
Defendant-Appellant.

} Case No.
13450

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Is the revocation of respondent's driver's license pursuant to Section 41-6-44.10 for failure to take the chemical test a refusal when he refuses to respond because of the "Miranda" warning or where he alleges he did not understand all of the "Miranda" warning, or where he alleges he was refused a right to consult an attorney.

DISPOSITION IN THE LOWER COURT

On May 21, 1973, appellant revoked respondent's driver's license to drive for one year effective April 2,

1973, for the latter's failure to submit to a sobriety test under sec. 41-6-44.10, U. C. A., as amended. Pursuant to the act respondent filed for a trial *de novo* in the district court of Salt Lake County for a determination of whether respondent's license was subject to revocation. The case was heard before the Honorable Gordon R. Hall on July 12, 1973. Judge Hall found that respondent had a right to contact counsel prior to deciding whether to take the offered chemical test under the implied consent law. Judge Hall further found the officer failed to adequately distinguish between the criminal matter and the civil matter and therefore revocation was not warranted. Judge Hall held this was not a refusal and filed findings of fact and conclusions of law to that effect. No order or decree other than minute entry was apparently filed.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the lower court's findings of fact and conclusions of law granting return of respondent's driver's license and seeks an order in harmony with the appellant's order of revocation.

STATEMENT OF FACTS

Trooper Stephen R. Furr testified respondent was noticed on the wrong side of the Wendover road at about the Salt Plant, traveling at a rate of speed higher than warranted for the road conditions (R. 46, R. 47). The trooper had trouble stopping Mr. McCall (R. 47). He noticed the odor of alcohol (R. 48.5), administered field

sobriety tests which the trooper felt were unsatisfactory (R. 55, R. 67).

Trooper Furr placed him under arrest, and he evidenced that Mr. McCall was a little belligerent subsequently (R. 57, R. 70).

The trooper advised him of his "Miranda" rights and read him the Implied Consent rights (R. 48.5, R. 49, R. 54, R. 58, R. 72).

He was advised of Implied Consent rights twice (R. 58). Trooper Kooring substantiated all this testimony, also in direct answer to the Court (R. 71).

Mr. McCall did not dispute that he was read "Miranda" (R. 49, R. 86) but said he did not understand the last part (R. 49, R. 86), but also, he did admit he was read a long thing at the jail, which he did not understand (R. 88, R. 93). There was some testimony about contact lenses, being in too long, calling his wife, etc., but most of this was in dispute (R. 57, R. 58, R. 64, R. 70, R. 71). Trooper Furr and Trooper Kooring said McCall never asked to call a lawyer (R. 58, R. 70, R. 71).

The officer offered a breath test. Mr. McCall refused to take any test and said he wasn't taking any tests (R. 58, R. 70, R. 71, R. 93).

Mr. McCall was given the time and opportunity to contact counsel but he did not contact an attorney; a little more than an hour elapsed from arrest to refusal (R. 59, and Exhibit 1-P in Record on Appeal).

BACKGROUND

There is ample authority that this is a "civil case."

It is the position of the appellant, that there is a differentiation between the civil and criminal aspects of the facts constituting a single incident, and as a general rule this right is recognized by most jurisdictions within the area of the eleven western states that the implied consent aspect of such an incident is civil in nature and that the criminal law nor the "Miranda" rights apply thereto. *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 694, 10 A. L. R. 3d 974 (1966).

To set the matter in perspective, it is suggested that legislatures of various states, including Utah, in order to cope with the tremendous increase in drunk driving, and to help overcome the many evidentiary difficulties in proving intoxication, have enacted Implied Consent Laws requiring persons to submit to breath, blood, urine or saliva tests or lose their license for refusing to do so. 62A Consolidated Laws of New York, Article 31, paragraph 1194; 7 North Dakota Century Code, 39-20, Chemical Tests for Intoxication: Implied Consent; Utah Code Annotated 41-6-44.10. These suggested measures which are the laws of the jurisdictions referred to have been widely discussed in various law review articles and the Court's attention is drawn to the following reports: 18 Albany Law Review, 203; 17 Albany Law Review, 268; 51 Michigan Law Review 1195; 34 Minnesota Law Review, 673; 35 Texas Law Review 813; and an annotation at 88 A. L. R. 2d 1054.

As the laws presently stand, prerequisites under Utah law are essential to the validity of the revocation of a license. They are:

1. The requirement of an appropriate invitation to take the test including (a) the prerequisite arrest, (b) sufficient probable cause to consider the invitee to be intoxicated, and (c) an appropriate opportunity to advise which of the tests is to be applied, and
2. The refusal, either expressed or implied, must be communicated to, or reasonably presumed by the inviting officer.

Authorities referred to: *Ringwood v. State*, 8 Utah 2d 287, 33 Pacific 2d 943, 1959, and *Contra, Lee v. State*, Kansas 566, 358 Pacific 2d 765, 1961. In these matters the court recognized that fewer areas in the state had the technical equipment and facilities to administer all of the tests, and therefore, the validity of the refusal was not effected by the failure of the choice of the possible kinds of tests to which he would submit.

Appellant avers this case is distinguishable from *Hunter v. Dorius*, 23 Utah 2d 122, 458 P. 2d 877.

In the case before us, the arresting officer had reasonable cause to believe Mr. McCall was intoxicated; he gave him the appropriate warning, both Miranda and the Implied Constant. Although there seems little doubt that he did so advise Mr. McCall there was an allegation by Mr. McCall that he did not get the "Miranda" warning, or did not understand the "Miranda" warning.

The lower court's decision should be reversed for the following reasons:

ARGUMENT

POINT I.

THE RESPONDENT HAD NO ABSOLUTE RIGHT TO COUNSEL BEFORE DECIDING TO TAKE THE TEST, AS THIS IS A CIVIL MATTER AND MR. McCALL GAVE HIS CONSENT ON THIS AT THE TIME HE OBTAINED A LICENSE; MR. McCALL'S FAILURE TO SO TAKE THE TEST DESIGNATED WITHIN A REASONABLE TIME WAS A PROPER REASON FOR THE FILING OF THE REFUSAL AFFIDAVIT.

There is serious doubt in many jurisdictions that such a right to counsel exists in the civil aspects of the Implied Consent Law where an arrested party must decide whether or not to submit to a type of sobriety test. *Mills v. Bridges*, 471 P. 2d 66, 93 Idaho 679; I. S. § 49-352; *Garcia v. Department of Motor Vehicles*, 456 P. 2d 85; *Rust v. Division of Motor Vehicles, et al.*, 1971, 267 C. A. 2d 545, 73 Cal. Rptr. 366; *Stratikos v. Department of Motor Vehicles*, (1968) 477 P. 2d 237; *People v. Brown*, 485 P. 2d 500; *Johnson v. Department of Motor Vehicles*, 485 P. 2d 1258, (Oregon 1971); *Campbell v. Superior Court in and for Maricopa County*, 479 P. 2d 685, 106 Ariz. 542; *Goodman v. Orr*, 1971, 97 Cal. Rptr. 226, 19 C. A. 3rd 845. Utah has not ruled squarely on this issue.

A recent Colorado case has held that Implied Consent statute is not unconstitutional on grounds that it violates right to travel upon state highways, or that it constitutes violation of due process by compelling citizen to choose either his right to refuse to surrender evidence that would help to convict him or his right to retain license to drive, or creates a crime of refusing to consent to blood test punishable by forfeiture of right to drive while denying fundamental rights of person charged with criminal offense or that it enforces warrantless and unreasonable searches and seizures, or that it sanctions invasion of privacy or privilege against self-incrimination. (Emphasis supplied.) Const. Art. 2 §§ 3, 7; U. S. C. A. Const. Amends. 4, 9; 1967 Perm. Supp., C. R. S., Section 13-5-30(3) et seq. *People v. Brown*, 485 P. 2d 500. Brown's appeal to the U. S. Supreme Court was dismissed for want of a substantial Federal question. 92 S. Ct. 671.

California has numerous cases on the specific question of rights to counsel deciding such a right does not exist as to Implied Consent, this before they amended their statutes in 1970, and codified that fact (see paragraph 3, Section No. 13353, Paragraph (a)), California Motor Vehicle Code and amended, Chapter 1103, statutes 1970, effective November 23, 1970.

The Implied Consent Law of California (prior to amendment), Idaho and Oregon all have provisions similar to the language of Utah Section 41-6-44.10, U. C. A. 1953, as amended, section (a). In several cases before the courts of last impression the decisions are unanimous

that the right to counsel before a decision to submit does not exist on the civil aspect.

The only variance which counsel for defendant could find to this ruling (which nonetheless pronounced the validity of such a rule), was in the Rust case (see *Rust v. Division of Motor Vehicles, et al.*, 1971, 267 C. A. 2d 545, 73 Cal. Rptr. 366) which held that while "*Miranda*" rights do not apply to the Implied Consent Law (emphasis ours), there may be a factual issue that the officer did not make clear to the arrested party as to the differentiation between criminal and civil rights and if that results in confusion to the arrested party and that is not cleared up by the officer, then there may be a question as to the arrested party's refusal to submit.

Even greater clarification of the "right to counsel" and "civil" nature of the case is provided by an Oregon case on rehearing on the question of presence of his attorney, it was there held that the driver's refusal to take a breath-analyzer test without having his attorney present was a refusal to take the test under the Implied Consent Law, and justified suspension of his driver's license. (See *Stratikos v. Department of Motor Vehicles*, (1968) 477 P. 2d 237, adhered to and Supplemental 478 P. 2d 654; also *Johnson v. Department of Motor Vehicles, et al.*, 485 P. 2d 1258. See also *Mills v. Bridges*, 471 P. 2d 66, 93 Idaho 679; *Ent v. Department of Motor Vehicles*, 265 A. C. A. 1073, 71 Cal. Rptr. 726; *Finley v. Orr*, 262 A. C. A. 711, 69 Cal. Rptr. 137.

In the *Ent* and *Finley* cases the refusals were like-

wise upheld. The language in another recent California case is supportive (see *Funk v. Department of Motor Vehicles*, 1 Cal. App. 3d 499, 18 Cal. Rptr.).

A case on point is the *Johnson* case, *supra*, decided June 17, 1971, where the attorney advised taking a breathalyzer *when he got there*. (Emphasis ours.): The attorney did not come. The Court said that *any erroneous impression* (emphasis supplied) upon which petitioner relied in failing to take the test (he thought he could remain silent), was created by his counsel, not the police, and the Court reversed the trial court, holding it was a refusal. *Johnson v. Department of Motor Vehicles of the State of Oregon, Appellant*, 485 P. 2d 1285.

Mr. McCall has no *right* (emphasis supplied) to counsel before deciding whether he would or would not take the test. His right to remain silent does not cover implied consent, where he has given said consent by virtue of the license he holds to drive on the highways of the state. Such a right exists under the *Miranda* case, where the actions are criminal in nature.

Even in criminal cases, the United States Supreme Court has held that the absence of conscious consent by driver of automobile to the taking of blood from his body by a physician while the driver was unconscious, for purpose of making a test to determine whether driver was under the influence of intoxicating liquor, without more, did not necessarily render the taking a violation of a constitutional right. U. S. C. A. Const. Amend. 14. *Breithaupt v. Abram*, 352 U. S. 432.

In *Prucha v. Department of Motor Vehicles*, 172 Neb. 415, 110 N. W. 2d 75 (1971) the Court held that the revocation was not arbitrary and capricious because of the fact that an acquittal of a criminal charge had no bearing on the provisions of the law separate and distinct from criminal statutes. *Prucha v. Dept. of Motor Vehicles*, *supra*; also *Combes v. Kelly*, 2 Misc. 2d 591, 152 N. Y. S. 2d 943 (1965); *Anderson v. Macduff*, 208 Misc. 271, 143 N. Y. S. 2d 257 (1955).

POINT II.

THE RESPONDENT HAD ADEQUATE TIME TO DETERMINE WHETHER OR NOT TO TAKE THE CHEMICAL TEST UNDER UTAH CODE ANN. § 41-6-44.10, AS AMENDED.

The *Hunter* case says that the petitioner had a reasonable time in which to determine whether to take or not to take the test.

What that reasonable time is may vary from case to case, conditioned on fact such as: time of arrest or accident, time of consumption of last alcoholic beverage, time of last meal, whether blood test is proposed, breath test is proposed or a urine test, as the case may be.

The state has a valid interest, as well as the individual arrested, in an objective test of level of alcohol in a driver's bloodstream. This is true for protecting the rights of the arrested driver, as well as for the betterment

of law enforcement. The state makes these tests available to exonerate as well as to implicate, and it is in the interest of both sides to make the test available so long as the results will have probative value. However, the time comes when sufficient periods have elapsed from arrest to potential testing that the obtainable results are really of no measureable quantity, and therefore, of no value.

Whether of blood or breath that time, unless controverted, is best established by the peace officer, technician, or doctor that is qualified and is going to administer the test.

Here, the respondent had an hour and ten minutes from the time of arrest to the time Trooper Furr filled out the refusal form of affidavit in the jail. The respondent alleges he was refused a phone and refused the opportunity to call an attorney, however this allegation was countered by the testimony of both Trooper Furr and Trooper Kooring, who said quite to the contrary that the respondent never asked these two things (R. 58, R. 70, R. 71). If respondent later said he wanted to take the test after the jailer talked to him, there was no evidence at trial that Trooper Furr was subsequently contacted, or requested to return to the jail, in response to such a request. There was good evidence that respondent was in such condition that he may not have cared too much at that point at the jail (R. 94, R. 86).

POINT III.

RESPONDENT'S ACTION CONSTITUTED

A REFUSAL UNDER UTAH CODE ANN. § 41-6-44.10 AND OFFICER FURR WAS JUSTIFIED IN CONCLUDING THAT THE REFUSAL TO SUBMIT TO THE CHEMICAL TESTS WAS COMPLETED.

The Utah cases relating directly to revocation of a driver's license for failure to submit to a test under the statute are only these: *Bean v. State*, 12 Ut. 2d 76, 362 P. 2d (1961); *Ringwood v. State*, 8 Ut. 2d 287, 333 P. 2d (1959); *Hunter v. Dorius*, 23 Ut. 2d 122, 458 P. 2d 877. The first two of these cases invalidate the revocation because the officer failed to give the accused his choice of which test of those offered under the statute he would take. The 1967 Amendment added a second sentence to paragraph a, leaving that decision within reasonable grounds with the peace officer. See 41-6-44.10 (a).

“Any person operating a motor vehicle in this state shall be deemed to have given his consent to a chemical test of his breath or blood for the purpose of determining the alcoholic content of his blood, provided that such test is administered at the direction of a peace officer having reasonable grounds to believe such person to have been driving in an intoxicated condition. *The arresting officer shall determine within reason which of the aforesaid tests shall be administered.*” (Emphasis supplied.)

The *Hunter* case is distinguishable because although Dr. Hunter was clearly given his choice, he was given a chance to contact an attorney which opportunity he took, and

the court said he should have a reasonable time to do so. Here, Mr. McCall never asked for an attorney, though he had time to call one.

Courts have considered that an implied refusal is sufficient. *Calciano v. Hults*, 13 App. Div. 2d 534, 213 N. Y. S. 2d 500 (1961); *Clancy v. Kelly*, 7 App. Div. 2d 820, 180 N. Y. S. 2d 923 (1958). The instant case is not rested on solely the implication.

In *Taylor v. Kelly*, 5 App. Div. 2d 931, 171 N. Y. S. 2d 909 (1958) the court stated that there was clear and direct proof of the licensee's refusal to take the blood test. The arresting officer and arraigning justice had both testified of the petitioner's refusal to submit to one of the sobriety tests offered. The instant case offers similar evidence from the arresting officer and also from Trooper Koorring (R. 71).

POINT IV.

THE TRIAL JUDGE ERRED IN NOT RE-
QUIRING THE REVOCATION OF THE RE-
SPONDENT'S DRIVER'S LICENSE TO RE-
MAIN IN FORCE UNDER THE PRESENT
FACTS.

The record reveals that, though the respondent alleges he did not refuse the test or tests, to the court's own question as to the question of refusal, Trooper Koorring responded that Mr. McCall told him "Well, I know I understand, I am not going to take any of your tests"

(R. 72). This was un rebutted by Mr. McCall in his testimony. With such un rebutted testimony in the record, substantiating the earlier testimony of Trooper Furr, the court erred in requiring the license privileges to be returned.

The statute, Section 41-6-44.10, U. C. A., does not require the officer to invite the respondent to take the test more than once. In this case the officer invited him to take the test on two occasions and in each case the respondent refused.

Further, the court found that the officer had failed to differentiate between the "Miranda Warning" and the "Implied Consent" advice, and yet the record (R. 72, R. 93) does not sustain this finding by the court; the record sets forth with clarity, that the officer advised the respondent of both the criminal and civil rights, arising out of this single incident and that the respondent of his own volition did not request an attorney, and affirmatively refused to submit to a test after he understood the consequences (R. 72). At that point, under the statute, it was the officer's obligation that "the test shall not be given and the arresting officer shall advise the person of his rights under this section." Section 41-6-44.10, U. C. A. This the officer did.

We submit that the Judge in the trial court erred in not requiring the revocation to remain valid under the circumstances.

CONCLUSION

Fundamental to the issues of this case and review thereof is the question of the right to remain silent, including Implied Consent subsequent to the "Miranda Warning," further, the question of what, under these facts, was a reasonable time for decision making and testing by respondent, and right to counsel, civil right, under the Implied Consent Law.

The Appellant respectfully submits that Miranda rights of saying nothing without counsel present, *do not* "relate over" or "umbrella" the civil aspect of the case; that response is required by virtue of the Implied Consent Law and silence can be an implied refusal, and this is no violation of the Fifth or Fourteenth Amendment rights of the United States Constitution. That further, petitioner had his chance to talk to an attorney at the jail, and he refused to take advantage of the opportunity and that his remark finally that he would not take any tests made his refusal thereby perfected, it being properly concluded and reported by the trooper as a refusal.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

M. REID RUSSELL
Assistant Attorney General

BERNARD M. TANNER
Assistant Attorney General

Attorneys for Appellant

**RECEIVED
LAW LIBRARY**

DEC 6 1975

**BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School**