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CONSTITUTIONAL LAW:
SCHMERBER V. CALIFORNIA: BLOOD AND THE CONSTITUTION

On June 13, 1966, the United States Supreme Court handed down the controversial ruling of *Miranda v. Arizona.*[1] In that decision, the Court actually reviewed four criminal cases[2] involving basically the same Constitutional issues. Three of the petitioners, Miranda, Vignera, and Westover, were appealing from convictions in state and federal courts for the crimes of rape, robbery, and kidnapping. The fourth petitioner, State of California, appealed from the California Supreme Court's reversal of respondent Stewart's conviction for rape, robbery and murder.[3] Each accused had, without benefit of counsel and after varying degrees and intensity of police interrogation, given oral or written confessions. In reversing the convictions of petitioners Miranda, Vignera, and Westover and affirming the California Court's reversal of respondent Stewart's conviction, Chief Justice Warren writing for a narrow majority of five laid down precise guidelines to be followed by State and federal police officers in future interrogations.[4]

This decision set in motion a national wave of controversy.[5] Much of the discussion praised the ruling, and much damned it as an unwarranted interference with and virtual hamstringing of

[1] Miranda v. Arizona, 86 Sup. Ct. 1602 (1966).

[2] *Id.*

[3] People v. Stewart, 43 Cal. Rptr. 201, 400 P.2d 97 (1955).

[4] *Supra,* note 1, at 1612. "The 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." The Court defined these procedural safeguards as: "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 . . . . The defendant may waive . . . these rights, provided the waiver is made voluntarily, knowingly, and intelligently."

[5] 28 U. PITT. L. REV. 77 (1966); 19 VAND. L. REV. 1379 (1966); Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test,* 65 MICH. L. REV. 59 (1966); Schaefer, *Police Interrogation and the Privi-*

police investigational procedures. While the critics bemoaned the alleged inbalance created by *Miranda* in favor of protection of the rights of an accused at the expense of the health and safety of the public, the Supreme Court, seven days after propounding *Miranda,* on June 20, 1966, announced its decision in *Schmerber v. California,*[6] which is the subject of this note. *Schmerber* appears to be, in a narrow area, contrary to the trend of *Miranda* and earlier cases[7] which enlarged the rights of a criminally accused protected by the United States Constitution.

In *Schmerber,* the Court, in another five to four decision, held that State compulsion of one suspected of driving under the influence of alcohol to submit to a blood test, and admission of the results of analysis of such test in the trial of the accused for the crime of driving while intoxicated was not a denial of due process and was not an abridgment of the accused's right to counsel, his privilege against self-incrimination, or his privilege against unreasonable searches and seizures as guaranteed by the United States Constitution.[8] The petitioner, Armando Schmerber, was involved in an automobile collision in 1964 on a California highway. He sustained minor injuries and was taken to a hospital for treatment. There a California patrolman observed petitioner and became suspicious as to his state of sobriety. Petitioner was thereupon arrested and at the patrolman's direction, over the express objection and refusal by petitioner and his attorney who was present, a sample of blood was taken from petitioner by a physician. An analysis of the blood sample, showing a percent of alcohol by weight which indicated intoxication, was introduced into evidence, over objection, at petitioner's trial in Los Angeles Municipal Court, which resulted in a conviction. The Appellate De-

lege Against Self-Incrimination, 61 NW. U. L. REV. 506 (1966); LIFE, Oct. 21, 1966, p. 35; SATURDAY EVENING POST, July 30, 1966, p. 82; TIME, June 24, 1966, p. 53; NEWSWEEK, June 27, 1966, p. 21; U. S. NEWS & WORLD REPORT, Aug. 1, 1966, p. 46, 51; U. S. NEWS & WORLD REPORT, Oct. 17, 1966, p. 82.

[6] Schmerber v. California, 86 Sup. Ct. 1826 (1966).

[7] Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Rogers v. Richmond, 365 U.S. 534 (1961); Spano v. New York, 360 U.S. 355 (1959); Palko v. Connecticut, 302 U.S. 319 (1937).

[8] U.S. CONST. amends. IV, V, VI, XIV.

partment of the California Superior Court upheld the conviction and upon denial of certification by the California District Court of Appeals, the United States Supreme Court granted certiorari.[9]

The Majority opinion written by Justice Brennan on behalf of himself and Justices Clark and White (Justices Harlan and Stewart concurring by separate opinion based primarily on the White, Harlan, and Stewart dissenting opinions in *Miranda*[10]) deals with each constitutional claim separately. The right to counsel claim was dismissed with little comment,[11] the principal contentions of petitioner being based on his allegations of denial of due process, and infringement on his privileges against self-incrimination and unreasonable searches and seizures. But before the Court's reasoning can be intelligently discussed, it is essential that a background be laid in the form of a brief review of two prior decisions which are fundamental to and cited throughout *Schmerber.*

The first such case is *Breithaupt v. Abram*[12] decided in 1957 in an opinion by Justice Clark writing for a majority of six. There petitioner Breithaupt had been convicted in a New Mexico State court for the crime of involuntary manslaughter arising out of an automobile collision. As in *Schmerber,* blood had been extracted from Breithaupt by a doctor at a hospital at a police officer's direction, and the results of an analysis of the blood were admitted as evidence in Breithaupt's trial. But unlike Schmerber, petitioner Breithaupt was unconscious when the blood was extracted and was, therefore, unable to object at that time. Breithaupt did not appeal his conviction but later sought a writ of habeas corpus alleging denial of his Constitutional rights under the Fourth, Fifth, and Fourteenth Amendments. The New Mexico Supreme Court denied the writ[13] and the United States Supreme Court granted certiorari.[14]

[9] Schmerber v. California, 382 U.S. 971 (1966).

[10] *Supra,* note 1, at 740, 753; dissenting opinions not discussed here as reasoning not particularly in point.

[11] *Supra,* note 6 at 1833.

[12] Breithaupt v. Abram, 352 U.S. 432 (1957).

[13] Breithaupt v. Abram, 58 N.M. 385, 271 P.2d 827 (1954).

[14] Breithaupt v. Abram, 351 U.S. 906 (1956).

The Supreme Court did not pass on the merits of Breithaupt's constitutional allegations, holding that the United States Constitution did not require, in state prosecution of a state crime, the exclusion of evidence obtained in violation of the accused's Fourth Amendment privilege against unreasonable searches and seizures,[15] and his Fifth Amendment privilege against self-incrimination.[16] The exclusionary rule had, of course, been applicable for many years in federal court proceedings.[17] The Court dismissed petitioner Breithaupt's principal contention that the conduct of the state patrolman offended that "sense of justice" of which the Court spoke in *Rochin v. California,*[18] the second background case to be considered in connection with *Schmerber.*

In *Rochin,* three deputy sheriffs on a narcotics raid, without a search warrant, entered the home of the accused and upon observing Rochin placing some capsules into his mouth, tried to retrieve same by holding him down, forcing open his mouth, and forcibly attempting to extract the pills therefrom. This being unsuccessful, petitioner Rochin was taken to a hospital where he was forced to submit to having his stomach pumped. The capsules were recovered and analyzed. The results of the analysis, indicating the presence of narcotics, was admitted as evidence at Rochin's trial for the crime of possessing a preparation of morphine. The California District Court of Appeal upheld the conviction[19] and hearing was denied by the Supreme Court of California.[20] The Supreme Court of the United States granted certiorari[21] and in deciding the case, in 1952, reversed petitioner Rochin's conviction, again not on constitutional grounds,[22] but as Justice Frankfurter for a unanimous Court put it, because "... this course of proceeding by the agents of the government to obtain evidence is bound to offend even the hardened sensibilities... it shocks the con-

[15] Wolf v. Colorado, 338 U.S. 25 (1948).
[16] Irvine v. California, 347 U.S. 128 (1954); Palko v. Connecticut, 302 U.S. 319 (1937); Twining v. New Jersey, 211 U.S. 78 (1908).
[17] Weeks v. United States, 232 U.S. 383 (1914).
[18] Rochin v. California, 342 U.S. 165 (1952).
[19] People v. Rochin, 101 Cal. App.2d 140, 225 P.2d 1 (Ct. App. 1950).
[20] People v. Rochin, 225 P.2d 912 (Cal. 1951).
[21] Rochin v. California, 341 U.S. 939 (1951).
[22] *Supra,* note 15; Twining v. New Jersey, *supra,* note 16.

science . . . . They are methods too close to the rack and the screw to permit of Constitutional differentiation . . ."[23] being conduct which offends ". . . a sense of justice . . .", running counter to the ". . . decencies of civilized conduct . . . ."[24]

In deciding *Breithaupt,* the Court refused to apply the *Rochin* rule by finding that the official action under review in *Breithaupt* was not "brutal and offensive" to due process in the sense of *Rochin.* In support of this finding, the Court pointed to the fact that every medical precaution was taken with respect to Breithaupt and took judicial notice of the fact that blood tests are extensively, safely and commonly taken for a variety of purposes. The Court further bolstered its holding by stating, " . . . the individuals right to immunity from such invasion of the body as is involved in a properly safeguarded blood test, is far outweighed by the value of the deterrant effect due to public realization that the issue of driving while under the influence of alcohol can often by this method be taken out of the confusion of conflicting contentions."[25] Moreover, Justice Clark noted that many states, either by statute or court approval, authorize the use of chemical tests for intoxication.[26]

[23] *Supra,* note 18 at 172.

[24] *Supra,* note 18 at 173.

[25] *Supra,* note 12 at 439.

[26] *Supra,* note 12 at 451; *see also* Uses of Chemical Tests for Intoxication, Committee on Tests for Intoxication of the National Safety Council (1955). At this writing the Oklahoma Legislature is considering such a statute. Senate Bill No. 28 has passed the Senate and its counterpart, House Bill No. 564, has passed the House of Representatives. Conference Committee consideration appears necessary. Both bills, in my opinion, are rather ineffectual having been substantially weakened by amendment.

The Senate version provides that drivers in Oklahoma, by virtue of their act of driving, give their consent to a blood or breath test, to be administered by a qualified physician, technician, etc. at the direction of a police officer who has "reasonable grounds" to believe that the driver is under the influence of alcohol (Sections 1 and 2). The results of such a test are admissible in criminal proceedings arising out of acts committed by the accused while allegedly under the influence (Section 6); the results not being admissible in civil actions (Section 2). The bill is completely disemboweled by Section 3 which provides that a conscious person may refuse to submit to a chemical test, and for such

It was with these cases, *Rochin* and *Breithaupt,* as discussed above, that the Court was faced in its consideration of *Schmerber.* Justice Brennan first took up petitioner's due process claim which was summarily rejected by finding nothing to distinguish *Schmerber* from *Breithaupt.*

The Court next examined petitioner's self-incrimination claim. As noted previously, in *Breithaupt* the Court had not considered this Constitutional issue. But in view of its post-*Breithaupt* decision of *Malloy v. Hogan*[27] the Court was forced to deal with it in *Schmerber.* Thus the Court had to decide whether or not the facts behind *Schmerber* constituted a violation of this Constitu-

refusal his drivers license *may* be suspended for six months (subject to limited review by the Oklahoma Commissioner of Public Safety and eventually the Court of Common Pleas as provided in Sections 4 and 5). Under the *Breithaupt* and *Schmerber* decisions discussed in this note, there is no constitutional basis for this fatal limitation. The Senate bill goes on to define intoxication in terms of per cent of alcohol per weight of blood (Section 6) and to declare an emergency so that it will be effective as soon as passed.

The House version is substantially the same as the Senate Bill. However, it is much stronger in that it provides for saliva and urine tests in addition to breath and blood tests (Section 1), and that evidence of refusal to submit to a test is admissible in criminal *and civil* proceedings arising out of acts committed while allegedly under the influence (Section 8). Also the results of such tests are admissible in civil and criminal proceedings (Section 7). The House Bill recognizes *Breithaupt* in that it specifically provides that any person incapable of refusing to submit to a test (by reason of being dead, unconscious, etc.) is *not* deemed as having withdrawn consent to testing. This is the so-called "Vampire Amendment" (Section 8). However, conscious refusal to submit to a test is authorized under the House version, with the same punishment for such refusal as provided in the Senate draft. It is to be hoped that whatever eventually emerges as law will be more in line with the House Bill. However, amendments are still being urged on the legislature which will further undermine the effectiveness of this law. *See* Tulsa Daily World, Feb. 18, 1967, pg. 16, col. 3.

It should be further noted here that California does not have a statute similar to the above which the Supreme Court could have considered in deciding *Breithaupt* and *Schmerber.*

[27] Malloy v. Hogan, 378 U.S. 1 (1964); held: the Fifth Amendment guarantee against self-incrimination operates through the Fourteenth Amendment as against state infringement; overruling Twining v. New Jersey, *supra,* note 16.

tional right. Justice Brennan reviewed several previous cases[28] in reinforcing the Court's holding that the Fifth Amendment privilege against self-incrimination only protects an accused from providing the state with evidence of a "testimonial" or "communicative" nature and that although petitioner Schmerber had been compelled to submit to an attempt to uncover evidence to be used in a prosecution against him, that " . . . Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated . . . . "[29] The Court pointed out that it had long been held that the Fifth Amendment does not exclude the body of an accused as evidence[30] where fingerprints, photographs, physical examinations, voice identification, etc., of the accused or pointing out the accused to witnesses are involved.[31] The Court then found that blood tests are analogous to such lawful uses of the body and are therefore not prohibited by the Fifth Amendment.

In dealing with the unreasonable search and seizure claim, the Court, as with the self-incrimination allegation, was forced to face the constitutional issue which it had been able to avoid in *Breithaupt.* This was due to another post-*Breithaupt* decision, *Mapp v.*

[28] *Supra,* note 1; Holt v. United States, 218 U.S. 245 (1910) which held that it was not a prohibition of the Fifth Amendment to introduce evidence that accused had put on some clothing which linked him with the crime and that it fit him, whether or not he did this voluntarily; Boyd v. United States, 116 U.S. 616 (1886), which held that the Fifth Amendment does forbid compulsory production of a man's private papers to be used in evidence against him; Counselman v. Hitchcock, 142 U.S. 547 (1892), which held that the Fifth Amendment protects one from being forced to disclose, on examination, the circumstances of the alleged offense or sources from which evidence of its commission may be obtained.

[29] *Supra,* note 6, at 1832.

[30] Holt v. United States, *supra,* note 28, at 252, 253.

[31] *See* 16 ALR 370 (1922), 63 ALR 1324 (1929) and 29 ALR2d 1115 (1953) as to fingerprints; 3 ALR 1706 (1919) and 28 ALR2d 1115 (1953) as to palmprints; 35 ALR2d 856 (1954) as to footprints; 16 ALR2d (1929) and 70 ALR2d 995 (1960) as to voice identification; 164 ALR 967 (1945), 25 ALR2d 1407 (1952) as to physical examinations; 72 ALR2d 1322 (1960) as to pointing out accused to witnesses.

Ohio.[32] Conceding that the compulsory blood test was a search within the constitutional meaning, the Court had to determine whether or not it was an unreasonable search. It held that as it had already decided (in the same case) that the Fifth Amendment privilege against self-incrimination did not forbid " . . . compelled intrusions into the body for blood . . . ,"[33] that the proper function of the Fourth Amendment was to confine such intrusions to those which are justified in the circumstances in each case. In applying this test, the Court found that there was sufficient cause, as shown by the record of the trial court, for the state officer to arrest petitioner and charge him with driving while intoxicated. The Court reviewed several prior cases involving the purpose of a lawful search[34] and the necessity of procurring a search warrant prior to such search.[35] The Court then held that since there was the danger of the destruction of the evidence[36] (the probability that the accused would become sober) during the delay required to obtain a warrant which would allow the blood test, that under these circumstances, the state action was " . . . an

[32] 367 U.S. 643 (1961), *overruling* Wolfe v. Colorado, *supra,* note 15, and applying the Fourth Amendment privilege to be free from unreasonable searches and seizures through the vehicle of the Fourteenth Amendment against state denial.

[33] *Supra,* note 6, at 1834.

[34] People v. Chiagles, 237 N.Y. 193, 142 N.E. 583 (Ct. App. 1923) which held that an officer may search an accused after a lawful arrest to discover evidence of the crime and that such search is not restricted to things subject to be taken on search warrant without arrest; Weeks v. United States, supra, note 17, which held that letters and private documents of an accused can be seized and used in evidence against him and this is not a violation of the Fourth Amendment.

[35] Johnson v. United States, 333 U.S. 10 (1948) which reversed a federal district court conviction (162 F.2d 562 [1947]) based on evidence obtained without a warrant, holding that the question of when the right to privacy must yield to the right of search must be decided by a judicial, not a police officer; Aquilar v. Texas, 378 U.S. 108 (1964) which set out requisites for affidavits given by police officers in seeking a search warrant.

[36] Preston v. United States, 336 U.S. 364 (1964) which held that "...The rule allowing contemporaneous searches is justified, for example, . . . by the need to prevent the destruction of evidence of the crime . . ." at page 367.

appropriate incident to petitioner's arrest."[37] The Court bolstered its holding that the search in question was not unreasonable by reiterating the *Breithaupt* findings, that the taking of a blood sample is virtually painless, involves no risk, and does not injure one's health when performed by a physician in a hospital environment.

Justices Douglas and Fortas and Chief Justice Warren dissented in three short opinions based on the Warren and Douglas dissents in *Breithaupt*.[38] Those *Breithaupt* dissents urged the following of *Rochin* and attacked the majority's reliance on the overriding need to enforce state traffic laws by the use of scientific methods at the expense of Fourth and Fifth Amendment freedoms, by pointing out that this rule was not applied in *Rochin* which involved an offense much more heinous (narcotics) than the enforcement of traffic laws. The *Breithaupt* dissents noted further that the sanctity of the person is equally violated where the accused is incapable of resisting (as in *Breithaupt*) as it would be if force were used to overcome his resistance (as in *Rochin*). "We should, in my opinion, hold that due process means at least that the law enforcement officers . . . must stop short of bruising the body, breaking the skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth."[39] In his *Schmerber* dissent Justice Douglas also brought in the idea of invasion of the right of privacy as discussed in *Griswold v. Connecticut*.[40]

Justice Black, joined by Justice Douglas, also dissented by separate opinion attacking the Court's narrow construction of the Fifth Amendment. Black severely criticized the use of the restrictive words "testimonial" and "communicative" and then argued that the actions of the state required petitioner to provide evidence which was both testimonial and communicative in character and therefore forbidden by the Fifth Amendment guarantee that an accused not be compelled to be a witness against himself. " . . . it seems to me that the compulsory extraction . . . of blood for analysis so that the person who analyzed it could give evidence to

[37] *Supra,* note 6, at 1836.
[38] *Supra,* note 12, at 440, 442.
[39] *Supra,* note 12, at 443.
[40] Griswold v. Connecticut, 381 U.S. 479 (1965).

convict him had both a 'testimonial' and a 'communicative' nature."[41] "In such a situation, blood, of course, is not oral testimony given by an accused, but it can certainly 'communicate' to a court and jury the fact of guilt."[42] Justice Black also relies on his concurring opinion in *Rochin* and on the *Breithaupt* dissents.

In summary, it can only be said that the Court, when confronted with *Schmerber,* was faced with the alternative choices of following *Rochin* or *Breithaupt.* Conceivably, the Court could have found the fact situation more analagous to *Rochin,* without overruling *Breithaupt. Schmerber* and *Rochin* differed only in that physical force was employed by the State in the latter where only oral resistance and objection was met by the State in the former. *Schmerber* and *Breithaupt* differed only in the state of consciousness of the accused and the resulting lack of refusal to submit to the test in the latter case. If Schmerber had physically resisted to the point that he had to be forcibly restrained and the sample taken, it is likely that at least one of the majority of justices would have joined the *Schmerber* and *Breithaupt* dissenters in applying the *Rochin* "sense of justice" rule thus producing an opposite result.

Our Oklahoma Court of Criminal Appeals has also become involved in this area of constitutional law. In the 1956 case of *Alexander v. State,*[43] the defendant was convicted in a Tulsa Municipal Court for the crime of driving while intoxicated. Immediately after her arrest, defendant was told to perform some manual acts such as the standard "walking the straight line" and to blow into a balloon from which a sample of her breath was obtained. The results of an analysis of this sample (the Harger Drunkometer Test) showing intoxication was admitted over objection at the trial. Defendant testified that she had not been advised as to her right to remain silent and her right to counsel and thought at the time she performed these acts that she was required to do so. The State did not refute this testimony.

On appeal the Court of Criminal Appeals found that the evidence of the manual and breath tests were, in effect, obtained

[41] *Supra,* note 6, at 1837.
[42] *Supra,* note 6, at 1838.
[43] Alexander v. State, 305 P.2d 572 (Okla. Crim. App. 1956).

by compulsion. The court was, therefore, faced for the first time with deciding whether or not this was a violation of defendant's privilege against self-incrimination under both the federal and Oklahoma constitutions.[44] In a rather extensive survey of prior Oklahoma case law involving this fundamental freedom together with a review of decisions from sister states, particularly Texas cases, the court in affirming the conviction found " . . . there is no substantial difference between obtaining a specimen of blood or breath of an accused, under ordinary circumstances, and obtaining fingerprints or physical property, the process of which is a pertinent issue in the charge against him . . ."[45] and that, therefore, the privilege against self-incrimination was not involved by admission of testimony as to the results of the drunkometer test taken without defendant's permission. This was virtually the same reasoning the United States Supreme Court applied in deciding *Schmerber.* Our court also quoted from and discussed *Rochin* at length, being able to easily distinguish the two cases. The court also made a very broad policy pronouncement in stating " . . . We do not believe that a fettish should be made of Art. II, Sec. 21 of the Oklahoma Constitution, the self-incrimination provision, to protect enemies of society, and the drunken driver seems to be exactly that . . . ."[46] It will be noted that this argument was also brought out by the United States Supreme Court in the *Breithaupt* decision.

In the later case of *Cox v. State*[47] defendant was involved in an automobile accident and was injured. At a Norman, Oklahoma hospital, he consented to both breath and blood tests, the results of which indicated intoxication. Defendant was charged with first degree manslaughter, and at his trial moved to suppress the evidence of results of these tests on the grounds that he had been suffering from a concussion at the time and was, therefore, unable to give his consent. The trial court received evidence on the Motion to Suppress and denied same. The Court of Criminal Appeals on review began by stating that the results of such tests taken

[44] U. S. CONST. amend. V; OKLA. CONST. art II, sec. 21.
[45] *Supra,* note 43, at 584.
[46] *Supra,* note 43, at 585.
[47] Cox v. State, 395 P.2d 954 (Okla. Crim. App. 1964).

involuntarily are inadmissible as a violation of defendant's privilege against self-incrimination. The court then went on to affirm the conviction holding that the burden was on defendant to show on the Motion to Suppress that he was unable, because of his injury, to give his consent, and that he had not met this burden.

The court did not so much as mention the *Alexander* case, but it appears that if defendant had been able to show in *Cox* that he had not consented to the tests, that *Alexander* would have been overruled. Had the court in *Cox* begun by finding that defendant had not shown on the Motion to Suppress that there was any lack of consent it would have been unnecessary to decide whether or not it would have been unconstitutional to admit into evidence the results of the tests if there had been no consent. By first stating that such evidence would be inadmissible and then finding that one of the elements of such inadmissibility ("involuntariness") was lacking, the court's declaration as to inadmissibility would appear to be dicta.

However, the *Cox* case was cited later with approval in *Lorenz v. State*,[48] the fact situation of which was almost identical as that in *Breithaupt* as discussed previously. However, the result in *Lorenz* was opposite the result in *Breithaupt*. Our Court in *Lorenz* held that to admit testimony as to the results of a blood test in the trial of an accused for the crime of driving while intoxicated, when the blood sample was taken when the accused was unconscious, was involuntary and a violation of the privilege against self-incrimination. Our court in reversing the conviction of Mr. Lorenz took the *Cox* holding as to inadmissibility of evidence of blood and breath tests involuntarily taken out of the realm of dicta and made it for all practical purposes the law of Oklahoma.

It will be noted that both *Cox* and *Lorenz* were decided after *Breithaupt* came down from the United States Supreme Court and are contra thereto. Whether Oklahoma courts will in the future follow the *Breithaupt-Schmerber* rule or if they will continue to adhere to the Oklahoma *Cox-Lorenz* rule is a matter of conjecture. However, it is almost certain that if any such cases are reviewed by the United States Supreme Court, a reversal of *Cox* and *Lorenz* will result.

W. Jay Jones

[48] Lorenz v. State, 406 P.2d 278 (Okla. Crim. App. 1965.)