WALK & TURN, FINGER TO NOSE, ONE LEG STAND: OH MY!

HOW FLORIDA COURTS HAVE DEFINED FIELD SOBRIETY EXERCISES

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INTRODUCTION

If you drink alcohol and get behind the wheel of a vehicle, you dramatically increase your chance of being in a car accident.[1] You also run the risk of being stopped by law enforcement and subjected to arrest and DUI charges.[2] When law enforcement stops a vehicle based on a reasonable suspicion of DUI, probable cause must be established before

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1. *See* Robert R. Wilk, *Compelling Medical Personnel to Draw Blood Samples from DWI Suspects*, 17 SETON HALL LEGIS. J. 329, 334–335 (1993).

> The rate of intoxicated drivers involved in motor vehicle accidents has risen with the increased popularity of the automobile. In 1939, statistics indicate that at least twenty-five percent of the drivers involved in fatal motor vehicle accidents were intoxicated. In 1955, the figure climbed to fifty percent. The data from 1972 through 1982 indicates that 250,000 lives were lost in alcohol-related crashes at an annual societal cost estimated to be between $21 and $24 billion. Between 1979 and 1980, alcohol was estimated to be responsible for forty-three percent of the fatal accidents and twenty-nine percent of the serious injury accidents. Currently, year after year the figures remains relatively the same. Over 55,000 people are killed on the roadways each year. Nearly half of these fatal accidents involve alcohol. Twenty-five to forty percent of injury accidents involve the use of alcohol. The economic cost to society as a result of alcohol-related accidents is estimated to be $2 billion a year. The chilling facts indicate that there is a one in two chance that the average driver will be involved in an alcohol-related crash in his lifetime. Unfortunately one in ten drivers will be involved in an alcohol-related crash that either kills him or the drinking driver.

Id.

2. *See id.* at 335; *Florida*, CENTURY COUNCIL, http://www.centurycouncil.org/state-facts/florida (last visited Feb. 8, 2014) [hereinafter *DUI Facts*]. "In 1990 43,252 people were arrested for drinking and driving. The carnage caused by driving while intoxicated has been recognized for many years. Indeed, Justice Blackmun even wrote that 'the slaughter on the highways of this Nation exceeds the death toll of all our wars.'" Wilk, *supra* note 1, at 335. In the State of Florida, the number of arrests parallels the national average from over twenty years ago; in 2011 there were 43,784 total arrests for DUI. *DUI Facts*, *supra*.

making an arrest.[3] Field sobriety exercises ("FSEs")[4] are commonly used police procedures to establish that probable cause.[5]

Developing probable cause is of critical importance, not only because it is a prerequisite to a lawful arrest, but also because citizens who operate a motor vehicle in Florida are consenting to a blood, urine,[6] or breath test upon a lawful arrest for DUI.[7] Given that FSEs are an important tool in establishing probable cause for a DUI arrest, many Florida courts recently have faced the issue of what legal standard applies to a request for FSEs.

This article presents a compilation of Florida case law addressing the aforementioned issue. Part I discusses the background and dictates of the Fourth Amendment, as well as the definitions of "search" and "seizure."[8]

3. *See* Mathis v. Coats, 24 So. 3d 1284, 1288 (Fla. Dist. Ct. App. 2010) ("Sufficient probable cause to justify an arrest exists where the facts and circumstances allow a reasonable officer to conclude that an offense has been committed. The existence of probable cause requires an examination of the totality of the circumstances. The facts are to be analyzed from the officer's knowledge, practical experience, special training, and other trustworthy information.").

4. *See* CIPES, BERNSTEIN, & HALL, 2-51 CRIMINAL DEFENSE PRACTICE § 51.04 (2013); *Horizontal Gaze Nystagmus: A Resource Guide for Judges, Prosecutors and Law Enforcement*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., http://www.nhtsa.gov/people/injury/enforce/nystagmus/hgntxt.html (last visited Feb. 15, 2014) [hereinafter *Horizontal Gaze Nystagmus*].

> Field sobriety tests are used by law enforcement officers to detect the presence of any noticeable impairment of the motorist's balance, coordination, eye functions or mental alertness due to the use of alcohol. The tests most commonly used include the walk-the-line test, the finger-to-nose test, alphabet recitation, and the horizontal gaze nystagmus (HGN) test. The reliability of field sobriety tests, particularly HGN tests has recently been called into question.

CIPES, BERNSTEIN, & HALL, *supra*.

5. *See* FLA. STAT. § 316.193(1) (2013); *Mathis*, 24 So. 3d at 1288 ("Many factors contribute to a finding of probable cause for a DUI arrest. . . . [A]n odor of alcohol is [a] significant [factor] . . . . Other factors 'may include the defendant's reckless or dangerous operation of a vehicle, slurred speech, lack of balance or dexterity, flushed face, bloodshot eyes, admissions, and poor performance on field sobriety exercises.'"); Layman v. State, 455 So. 2d 607, 608 (Fla. Dist. Ct. App. 1984). The crime of driving under the influence may be committed by either driving under the influence of alcohol to the extent that the person's normal faculties are impaired, or alternatively, with a blood-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath. FLA. STAT. § 316.193(1). A defendant may be charged in a one-count information with both methods in the alternative. *Layman*, 455 So. 2d at 608.

6. *See* FLA. STAT. § 316.1932.

> The urine test must be incidental to a lawful arrest and administered . . . at the request of a law enforcement officer who has reasonable cause to believe [that the] person was driving or was in actual physical control of a motor vehicle within [Florida] while under the influence of . . . controlled substances.

Id. The test must be administered at a "detention facility or any other facility, mobile or otherwise, which is equipped to administer such test in a reasonable manner that will ensure the accuracy of the specimen and maintain the privacy of the individual involved." *Id.*

7. *See* FLA. STAT. § 316.1932 (explaining that any person who applies for and accepts a Florida driver's license is "deemed to have expressed his or her consent" to a lawful request for blood, urine, or breath testing).

8. *See infra* Part I.

Part II addresses the various theories that courts have established as to what standard is required for field sobriety exercises.[9] Part III concludes with a discussion of which legal standard is correct and urges the Florida Supreme Court to consider and clarify the standard.[10]

I. OVERVIEW OF THE FOURTH AMENDMENT

A. BACKGROUND OF THE FOURTH AMENDMENT.[11]

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[12]

The purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."[13] The United States Supreme Court has interpreted the text of

9. *See infra* Part II.

10. *See infra* Part III.

11. *See* U.S. CONST. amend. IV; FLA. CONST. art. I, § 12; State v. Baldwin, 686 So. 2d 682, 684 (Fla. Dist. Ct. App. 1996) (discussing the interpretation of Florida's search and seizure amendment). Under article one, section twelve of the Florida Constitution, "Florida courts are constitutionally required to interpret search and seizure issues in conformity with the [United States Constitution (Fourth Amendment)] as construed by the United States Supreme Court." *Baldwin*, 686 So. 2d at 684. The Florida search and seizure amendment nearly mirrors the United States Fourth Amendment, reading in relevant part:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained.

FLA. CONST. art. I, § 12.

12. U.S. CONST. amend. IV.

13. Camara v. Mun. Court, 387 U.S. 523, 528 (1967) (discussing the purposes of the Fourth Amendment); *see* United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990) (explaining that the history of the Fourth Amendment shows that "the purpose . . . was to protect the people of the United States against arbitrary action by their own Government"); Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 639 (1989) (citing New Jersey v. T.L.O., 469 U.S. 325, 357–58 (1985)) (explaining that the purpose of the Fourth amendment is "to protect the privacy and security of [U.S.] citizens."); New Jersey v. T.L.O., 469 U.S. 325, 358 (1985) ("[T]he purpose of the Fourth Amendment [is] to protect the privacy and security of our citizens."); United States v. Chadwick, 433 U.S. 1, 7 (1977) (explaining that the purpose of the Fourth Amendment is to safeguard individuals "from unreasonable government intrusions into their legitimate expectations of

the Constitution as a two-fold dictate requiring all searches and seizures be pursuant to a warrant (the warrant requirement) and conducted in a "reasonable" manner (the reasonableness requirement).[14] The protection of the Fourth Amendment is not triggered unless the government has engaged in a "search" or "seizure."[15]

B. WHAT CONSTITUTES A SEARCH

At a bare minimum, a search consists of a governmental intrusion into a constitutionally protected area.[16] However, in the cornerstone case *Katz v. United States*, the Court held "that the Fourth Amendment protects people—and not simply 'areas.'"[17] Justice Harlan in his concurrence articulated the now famous two-fold requirement for a Fourth Amendment search: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[18]

In the realm of DUI offenses,[19] the United States Supreme Court has

privacy"); Church v. State, 9. So. 2d 164, 166 (Fla. 1942) ("The Fourth Amendment to the Federal Constitution prohibiting unreasonable searches and seizures stems from the principle of the common law securing to every citizen in his home and office immunity from interference by the State and the protection of his person, property, and papers form legal process.").

14. *See Camara*, 387 U.S. at 528–34; Johnson v. United States, 333 U.S. 10, 13–14 (1948); *See also* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 202–03 (1993) (acknowledging that modern day discussions of the Fourth Amendment interpret the Amendment as having a "warrant clause" and a "reasonableness clause").

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence.. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson, 333 U.S. at 14.

15. *See* Richard G. Wilkins, *Defining the "Reasonable Expectation of Privacy": An Emerging Tripartite Analysis*, 40 VAND. L. REV. 1077, 1086–87 (1987) (explaining that a "search" triggers the protection of the Fourth Amendment).

16. *See* Silverman v. United States, 365 U.S. 505, 511 (1961).

17. Katz v. United States, 389 U.S. 347, 353 (1967). In Katz, an electronic surveillance device was attached to the outside of a public telephone booth. *Id.*at 348. In concluding that one's person, papers, and effects had not been violated, the lower court determined there was no search, since the device did not penetrate the wall of the telephone booth. *Id.* at 348–49. On appeal, the Supreme Court found that the Fourth Amendment was not limited by the presence or absence of a physical intrusion. *Id.* at 358. Justice Stewart concluded:

> These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.

Id. at 359.

18. *Id.* at 361 (Harlan, J., concurring).

19. *See* FLA. STAT. § 316.193. In Florida, a person commits a DUI if they are operating a

found that an attempt to obtain nonconsensual blood or urine samples is a search requiring consent, a warrant, or exigent circumstances.[20] In Florida, statutory protections provide that blood may be requested upon a lawful arrest for DUI, or compelled by reasonable force where law enforcement has probable cause that a person caused serious bodily injury or death during the commission of a DUI.[21] However, unlike obtaining blood samples, there are no statutory provisions regulating the administration of field sobriety exercises.[22] Thus, in evaluating the constitutionality of FSEs, it is necessary to look solely to constitutional principles.

C. WHAT CONSTITUTES A SEIZURE

A person is seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances, a reasonable person would have believed that he or she was not free to leave.[23] By its plain language, the

motor vehicle, while under the influence of alcohol or controlled substance, to the extent that their normal faculties are impaired; and/or if they are operating a motor vehicle with a blood alcohol level of .08 or higher. *Id.* The Florida legislature has determined that there are increased penalties when a person has multiple DUI convictions, has an "enhanced breath" (one of .15 or higher), or has persons under eighteen (18) years old in the vehicle at the time of the DUI. *Id.*

20. *See* Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 617 (1989) ("Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment."); Schmerber v. California, 384 U.S. 757, 767 (1966) ("But if compulsory administration of a blood test does not implicate the Fifth Amendment, it plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment.").

21. *See* FLA. STAT. § 316.1932(1)(c) (stating that law enforcement may request a blood sample upon probable cause that a DUI has been committed); FLA. STAT. § 316.1933 (stating that law enforcement may force a person, within reason, to submit to a blood test if there is probable cause that the person has caused death or serious bodily injury during the commission of a DUI); State v. Taylor, 648 So. 2d 701, 704 (Fla. 1995) (explaining that a refusal to submit to blood testing is admissible in evidence).

22. State v. Slaney, 653 So. 2d 422, 425 (Fla. Dist. Ct. App. 1995) (recognizing that the Florida Statutes provide greater protection from blood extraction to citizens than the U.S. Constitution).

> Florida's implied consent statutes (1) limit the power of the police to require a person who is lawfully arrested for DUI to give samples of his/her breath, urine, or blood without the person's consent, and (2) prescribe the exact methods by which such samples may be taken and tested. These limitations and prescribed procedures represent higher standards for police conduct in obtaining samples of this nature from a DUI defendant than those required by the Fourth Amendment and are entirely permissible as a matter of state law.

Id.

23. United States v. Mendenhall, 446 U.S. 544, 554 (1980); *see also* United States v Drayton, 536 U.S. 194, 203–04 (2002) (explaining that a number of factors may be considered in determining whether a person has been "seized" including intimidating movements by the officers, their display of weapons, and their tone of voice); Florida v. Royer, 460 U.S. 491, 500

Fourth Amendment proscribes only unreasonable seizures.[24] In determining reasonableness, courts must balance "'the nature and quality of the intrusion . . .' against the countervailing governmental interests at stake."[25] The test is an objective one, made from "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[26]

(1983) ("[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."); Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) ("Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.").

24. United States v. Arvizu, 534 U.S. 266, 273 (2002); Whren v. United States, 517 U.S. 806, 809–10 (1996); *see* Samson v. California, 547 U.S. 843, 857 (2006) (suspicionless search of a parolee); Bd. of Educ. v. Earls, 536 U.S. 822, 837 (2002) (concerning random drug testing of students in competitive extracurricular activities where the only result of a positive test was to bar participation in the activity, and the policy preserved non-participation as an option for conscientious objectors); Wyoming v. Houghton, 526 U.S. 295, 300 (1999); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995) (concerning random drug testing of student athletes in light of the government responsibilities as guardian of children entrusted to its care); Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (concerning sobriety checkpoints limited to brief questioning and observation because of the state's interest in preventing drunk driving); Nat'l Treasury Emp. Union v. Von Raab, 489 U.S. 656, 679 (1989) (holding suspicionless drug testing of customs officials because of the extraordinary safety and national security hazards peculiar to their positions and their routine handling of controlled substances and practice of carrying firearms is reasonable); Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 633 (1989) (concerning suspicionless drug and alcohol testing of railroad employees because they are charged with protecting life and property and voluntary participate in a heavily regulated industry); O'Connor v. Ortega, 480 U.S. 709, 732 (1987) (Scalia, J., concurring) (concerning warrantless, work-related searches of government employee offices based on individualized suspicion of misconduct); Griffin v. Wisconsin, 484 U.S. 868, 880 (1987) (concerning warrantless search of probationer's home upon reasonable grounds); Unites States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976) (concerning suspicionless stops limited to brief questioning and observation at reasonably located permanent border checkpoints); Gnann v. State, 662 So. 2d 406, 408 (Fla. Dist. Ct. App. 1995); *see, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 347–48 (1985) (finding that a school official's warrantless search of a student's purse did not violate the Fourth Amendment because the official had a reasonable suspicion that the student had violated a school rule). Usually, a search or seizure is not reasonable unless it is accomplished pursuant to a warrant issued upon probable cause. *Gnann*, 662 So. 2d at 408. However, the Supreme Court has recognized certain exceptions. *Id.* The principal exceptions are: "(1) consent, (2) incident to lawful arrest, (3) with probable cause to search but with exigent circumstances, (4) in hot pursuit, and (5) stop and frisk." *Id.* However, additional exceptions have been recognized. *T.L.O.*, 469 U.S. at 347–48. All of the exceptions to the warrant requirement are based upon whether the search was reasonable under the circumstances. *Houghton*, 526 U.S. at 300.

25. Graham v. Connor, 490 U.S. 386, 396 (1989); *see also* Pennsylvania v. Mimms, 434 U.S. 106, 108–09 (1977).

26. *Graham*, 490 U.S. at 396 (citing *Terry*, 392 U.S. at 20–22).

During a routine traffic stop, citizens are "seized" and therefore these brief encounters implicate the Fourth Amendment.[27] The detention is lawful, however, if the police have either (1) probable cause to believe that a driver has committed a traffic violation,[28] or (2) reasonable suspicion that criminal activity is afoot.[29] Accordingly, when a person is seized during a DUI investigation, the seizure is reasonable so long as the person was stopped based on a violation of the traffic code or reasonable suspicion of impairment.[30]

II. FIELD SOBRIETY EXERCISES: WHAT IS THE STANDARD?

A. THEORY ONE: FSES REQUIRE VOLUNTARY CONSENT

Recently, a number of Florida courts have held that law enforcement must obtain voluntary consent before requesting FSEs.[31] A prime example can be found in *State v. Lynn*.[32] In *Lynn*, the arresting officer was conducting a DUI investigation and told the defendant to follow his instructions and commands in performing FSEs.[33] The court found that the defendant was merely acquiescing to the officer's apparent authority, and therefore any consent given was not voluntary.[34] Accordingly, the court suppressed the results of the FSEs. However, the opinion did not partake in even brief discussion of any factors bearing on consent, such as the number of officers present, whether they were armed, the age and intelligence of

27. *Whren*, 517 U.S. at 809–10; United States v. Sharpe, 470 U.S. 679, 682 (1985); Delaware v. Prouse, 440 U.S. 648, 653 (1979) ("'[S]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth Amendment], even though the purpose of the stop is limited and the resulting detention [is] quite brief."); Dep't of Highway Safety & Motor Vehicles v. Jones, 935 So. 2d 532, 534 (Fla. Dist. Ct. App. 2006).

28. *Whren*, 517 U.S. at 810; *Sharpe*, 470 U.S. at 682; *see* Ndow v. State, 864 So. 2d 1248, 1250 (Fla. Dist. Ct. App. 2004); State v. DeShong, 603 So. 2d 1349, 1352 (Fla. Dist. Ct. App. 1992).

29. Florida v. Royer, 460 U.S. 491, 498 (1983).

30. *See* Nicholas v. State, 857 So. 2d 980, 981 (Fla. Dist. Ct. App. 2003) (quoting *Roberts*, 732 So. 2d at 1128) ("'[A] police officer can stop a driver based on a founded suspicion that the driver is under the influence, even where the driver is not committing a separate traffic offense.' In [another Fourth Circuit opinion], this court determined that an officer had the reasonable suspicion necessary to pull the defendant over where the officer observed the defendant weaving significantly from side to side within the lane but not crossing over the lines."). When an officer observes "erratic" driving there is reasonable suspicion of DUI to support an investigatory stop. *Id.* at 981–82.

31. *E.g.*, State v. Burke, 16 Fla. L. Weekly Supp. 378a, ¶ 3 (Fla. Cir. Ct. Oct. 14, 2008).

32. State v. Lynn, 11 Fla. L. Weekly Supp. 798b, (Fla. Cir. Ct. June 15, 2004).

33. *Id.* at ¶ 2.

34. *Id.* at ¶ 5 (citing Smith v. State, 753 So. 2d 713, 715 (Fla. Dist. Ct. App. 2000)).

the defendant, or any other potential considerations.[35] The *Lynn* court also failed to explain why consent was necessary, i.e., whether there was a "search" actually triggering the Fourth Amendment in the case of FSEs.[36]

In *State v. Earnshaw*,[37] a different court addressed the issue with a similar result. In *Earnshaw*, after a lawful traffic stop, the responding officer noticed possible indicators of impairment and accordingly told the defendant, "I want to do a couple of exercises real quick to test your ability to drive . . . what I want you to do is . . ."[38] The court found that the manner in which the officer phrased his directive gave the defendant no occasion to refuse and the defendant did not voluntarily consent to the performance of the exercises.[39] The court stated, without explanation, that in order to conduct FSEs and a search, the officer must obtain valid consent.[40] Again, the court declined to engage in a dialogue about whether performance of simple movements on the side of a public highway could constitute a "search" under *Katz*.[41]

In *State v. McKenzie*,[42] yet another county court found that in order to conduct FSEs, law enforcement must obtain voluntary consent.[43] The court stated that the defendant's performance of FSEs was not voluntary because the language used by the arresting officer in instructing, rather than asking, the defendant to perform the exercises was consistent with the defendant's acquiescing to the officer's apparent authority.[44] Once again, the court

35. *Id.*; *see* Ruiz v. State, 50 So. 3d 1229, 1231 (Fla. Dist. Ct. App. 2011) (finding that there are a number of factors to consider in determining whether consent is voluntary such as "the time and place of the encounter, the number of police officers present, the officers' words and actions, and the age, education, or mental condition of the person detained."); Wilson v. State, 952 So. 2d 564, 569–70 (Fla. Dist. Ct. App. 2007) (explaining that courts have relied on a variety of factors in determining whether consent is voluntary including the age of the accused, his prior criminal history, his mental deficiencies or impairments, and whether he is impaired at the time).

36. *Lynn*, 11 Fla. Supp. 789b; *c.f.* Katz v. United States, 389 U.S. 347, 350, 353 (1967); *Burke*, 16 Fla. L. Weekly Supp. at ¶ 10–11. There is no "search" when a person performs field sobriety exercises because there can be no reasonable expectation of privacy in ones movements on the side of a public highway or roadway. *Katz*, 389 U.S. at 350, 353. There is no unreasonable seizure, because the stop was based upon probable cause of a traffic violation and/or reasonable suspicion of DUI. *Burke*, 16 Fla. L. Weekly Supp. at ¶ 10–11.

37. State v. Earnshaw, 14 Fla. L. Weekly Supp. 77b (Fla. Leon County. Ct. Oct. 12, 2006).

38. *Id.* at ¶ 4.

39. *Id.* at ¶ 7, 12.

40. *Id.* at ¶ 11.

41. *See id.*; *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (explaining that a search requires a subjective and objective expectation of privacy in the item, place, or thing searched).

42. State v. McKenzie, 14 Fla. L. Weekly Supp. 472b (Fla. Nassau County. Ct. Mar. 5, 2007).

43. *Id.* at ¶ 3.

44. *Id.*

neglected to discuss the consent factors or why the performance of FSEs constituted a "search" in the first place.[45]

In *State v. Hauserman*,[46] the court granted a defendant's motion to suppress finding that the State failed to meet its burden in establishing that the defendant had voluntarily consented to the performance of FSEs.[47] In reaching that conclusion, the court relied on *Taylor v. State*.[48] The court reasoned that the FSEs in *Taylor* were constitutionally valid because the exercises were explained in "some" detail and defendant was "asked" rather than instructed to perform the exercises.[49] Because the officer directed, instead of requested, the defendant to perform FSEs, the court found the defendant's performance to be nonconsensual.[50] Accordingly, the *Hauserman* court concluded that consent is a requirement of requesting FSEs.[51]

Countless courts have followed the reasoning above and suppressed the results of FSEs based upon a finding that the exercises were not consensual.[52] However, none of the cases found by these authors addresses

45. *See id.*; *cf. Katz*, 389 U.S. at 350, 353 (majority opinion); State v. Burke, 16 Fla. Supp. 378a, ¶ 8, 10; *Earnshaw*, 14 Fla. L. Weekly Supp. at ¶ 11; *Lynn*, 11 Fla. L. Weekly at ¶ 2;.

46. State v. Hauserman, 18 Fla. L. Weekly Supp. 309c (Fla. Monroe County Ct Dec. 30, 2010).

47. *Id.* at ¶ 12. The Court explained:

> The law is settled that an officer does not have to inform a defendant that he has a right to refuse the [roadside exercises]. Additionally, an officer is not required to inform a defendant the roadside exercises are voluntary. However, these exercises are still subject to Fourth Amendment protections. In order to conduct a lawful search and have the Defendant perform field sobriety exercise[s], obtaining valid consent is required. A valid consent must be voluntary. In order to be voluntary it requires a knowing and intelligent waiver of one's rights and must not be a submission to acclaim [sic] of lawful authority.

Id. (citing Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973)).

48. *See* Taylor v. State, 855 So. 2d 1 (Fla. 2003). *But see* State v. Taylor, 648 So. 2d 701, 703–04 (Fla. 1995):

> When Taylor exited his car, he staggered and exhibited slurred speech, watery, bloodshot eyes, and a strong odor of alcohol. This, combined with a high rate of speed on the highway, was more than enough to provide [the officer] with reasonable suspicion that a crime was being committed, i.e., DUI. The officer was entitled under section 901.151 [Florida's stop and frisk law] to conduct a reasonable inquiry to confirm or deny that probable cause existed to make an arrest. [The officer's] request that [defendant] perform field sobriety tests was reasonable under the circumstances and did not violate any Fourth Amendment rights.

State v. Taylor, 648 So. 2d at 703–04.

49. *See Hauserman*, 18 Fla. L. Weekly Supp. 309c at ¶ 11.

50. *Id.* at ¶ 13.

51. *Id.* at ¶ 12.

52. *See e.g.*, State v. Orme, 18 Fla. L. Weekly Supp. 896b, ¶ 5, 7 (Fla. Pasco County Ct. July 1, 2011) (finding that defendant did not voluntarily consent to take field sobriety exercises where she vehemently refused to take them and the officer merely said, "[let me see your eyes]" to which she finally replied "okay"); State v. Flores, 19 Fla. L. Weekly Supp. 485a, ¶ 1, 4 (Fla.

the most critical question in the "consent" analysis: whether the performance of FSEs is a "search" which requires a warrant or some exception to the warrant requirement—here, consent.[53]

B. THEORY TWO: FSES JUSTIFIED BY EXIGENT CIRCUMSTANCES

Few Florida courts have relied on the decision of *Schmerber v. California*,[54] in holding that, although FSEs trigger Fourth Amendment

Monroe County Ct. June 6, 2011) (finding that defendant's performance of FSEs was not voluntary because the officer could not remember the "exact language" he used to get the defendant to perform the exercises and the defendant was "not free to leave" during the stop); State v. Jackson, 16 Fla. L. Weekly Supp. 431b, ¶ 6 (Fla. Leon County Ct. Sept. 24, 2008) (finding that defendant did not consent to field sobriety exercises where he was ordered to the ground, handcuffed, not allowed to use the restroom, and threatened with a taser before the request for FSEs was made); State v. Harper, 15 Fla. L. Weekly Supp. 232b, ¶ 6–7 (Fla. Broward County Ct. Jan. 7, 2008) (finding field sobriety exercises must be suppressed where defendant was "directed" rather than "asked" to perform field sobriety exercises); State v. Mattox, 14 Fla. L. Weekly Supp. 567a, ¶ 2, 11 (Fla. Leon County Ct. Feb. 26, 2007) (holding the officers directive "you need to do these exercises, they can only help you" was enough to render a subsequent performance of field sobriety exercises involuntary and nonconsensual warranting suppression); State v. Rushing, 14 Fla. L. Weekly Supp. 73a, ¶ 14 (Fla. Leon County Ct. Nov. 17, 2006) (finding that the defendant did not give voluntary consent to the performance of field sobriety exercises, warranting suppression of the performance of the exercises); State v. Hart, 14 Fla. L. Weekly Supp. 797a, ¶ 5–6 (Fla. Monroe County Ct. Nov. 7, 2006) (finding that defendant who was 72 years old, repeatedly told officers that he did not want to perform the exercises, was mocked throughout his performance, and was placed in handcuffs, did not voluntarily consent to the performance of field sobriety exercises); State v. Benvenuto, 13 Fla. L. Weekly Supp. 885b, ¶ 2, 7 (Fla. Leon County. Ct. June 12, 2006) (finding that the deputy's statement "there are a bunch of exercises we are going to do" caused defendant to believe the exercises were required and therefore rendered his performance involuntary); State v. Barker, 13 Fla. L. Weekly Supp. 166b, ¶ 7 (Fla. Miami-Dade County. Ct. Nov. 17, 2005) (finding that field sobriety exercises must be suppressed where defendant was directed to perform FSEs); State v. Gilbert, 12 Fla. L. Weekly Supp. 1081a, ¶ 17–18 (Fla. Miami-Dade County Ct. Aug. 15, 2005) *rev'd* 14 Fla. L. Weekly Supp. 14a (Fla. Miami-Dade County Ct. Nov. 17, 2006) (finding that defendant did not consent to performing field sobriety exercises and therefore suppression of the exercises was warranted); State v. Peruyera, 12 Fla. L. Weekly Supp. 968b, ¶ 8 (Fla. Miami-Dade County. Ct. July 11, 2005) (finding that field sobriety exercises must be suppressed where the exercises were performed without defendant's consent); State v. Gonzalez,12 Fla. L. Weekly Supp. 482a, ¶ 4, 12 (Fla. Miami-Dade County. Ct. Feb. 16, 2005) (finding that the officer's statement "I need you to do these exercises" rendered any subsequent performance involuntary because defendant had no choice but to submit to the exercises); State v. Higgins, 12 Fla. L. Weekly Supp. 242a, ¶ 4, 10, 13 (Fla. Miami-Dade County. Ct. Dec. 6, 2004), *rev'd*,13 Fla. L. Weekly Supp. 548a (Fla. Miami-Dade County Ct. Apr. 11, 2006) (finding defendants performance of field sobriety exercises was nonconsensual where defendant was ordered by a large group of officers that he better do the exercises to avoid arrest).

53. *See generally* Hulse v. State, Dep't. of Justice, Motor Vehicle Div., 961 P.2d 75 (Mont. 1998); State v. Nagel, 880 P.2d 451 (Or. 1994); Blasi v. State, 893 A.2d 1152 (Md. Ct. Spec. App. 2004), *cert. denied*, 900 A.2d 751 (Md. 2006) (failing to address whether the performance of FSEs is a "search" which requires a warrant or some exception to the warrant requirement).

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

protection, exigent circumstances render the exercises constitutionally permissible.[55] In *Schmerber*, the issue was whether law enforcement could obtain a nonconsensual blood sample from a DUI suspect.[56] The Court concluded that law enforcement properly required a nonconsensual blood sample from the defendant because there was probable cause for a DUI

55. *See* State v. Taylor, 648 So. 2d 701, 705 (Fla. 1995) (Kogan, J., dissenting) ("I further would hold that a roadside sobriety test may only be conducted on the basis of probable cause."); Jones v. State, 459 So. 2d 1068, 1080 (Fla. Dist. Ct. App. 1984) ("Only if an officer, based upon his observations following a proper stop of a vehicle, has probable cause to believe that the driver is DUI could the officer conduct a more extensive investigation, such as asking the motorist to exit the car for a roadside sobriety test."); *see also* Rogala v. Dist. of Columbia, 161 F.3d 44, 54 (D.C. Cir. 1998); Galimba v. Mun. of Anchorage, 19 P.3d 609, 612 (Alaska Ct. App. 2001) (holding that, "in Alaska, police do not need probable cause sufficient for an arrest before requesting typical field sobriety tests"); State v. Superior Court of Conchise Cnty., 718 P.2d 171, 176 (Ariz. 1986) (holding that roadside sobriety tests are justified by an officer's reasonable suspicion that the driver is intoxicated); People v. Carlson, 677 P.2d 310, 317 (Colo. 1984); State v. Lamme, 563 A.2d 1372, 1375–76 (Conn. App. Ct. 1989), *aff'd*, 579 A.2d 484 (Conn. 1990); State v. Golden, 318 S.E.2d 693, 696 (Ga. Ct. App. 1984) (holding that the brief additional intrusion occasioned by field sobriety tests is a permissible investigatory detention under *Terry*); State v. Wyatt, 687 P.2d 544, 553 (Haw. 1984); State v. Ferreira, 988 P.2d 700, 706 (Idaho Ct. App. 1999); State v. Stevens, 394 N.W. 2d 388, 392 (Iowa 1986), *cert. denied*, 479 U.S. 1057 (1987); State v. Eastman, 691 A.2d 179, 181–82 (Me. 1997); Commonwealth v. Blais, 701 N.E.2d 314, 317 (Mass. 1998) (holding that "it is appropriate for an officer with reasonable suspicion . . . to take the brief, scarcely burdensome steps involved in administering [field sobriety] tests in order to assure himself that he is not turning loose a drunk driver on the traveling public."); State v. Sanders, 721 N.E. 2d 433, 437 (Ohio Ct. App. 1998); State v. Gray, 552 A.2d 1190, 1195 (Vt. 1988) (finding field sobriety tests permissible under *Terry* because "the minimal level of intrusion occasioned by the requirement that defendant perform the dexterity tests was clearly outweighed by the strong law enforcement interest in attempting to keep a suspected drunk driver off the roads"). Although there are few cases directly on point, finding that probable cause is the standard for field sobriety exercises, there has been substantial authority applying the principles in *Schmerber* to field sobriety exercises. *Carlson*, 677 P.2d at 317; *Jones*, 459 So. 2d at 1080. Florida Supreme Court Justice Kogan specifically concluded that roadside sobriety exercises should only be conducted based upon probable cause. *Taylor*, 648 So. 2d at 705. As such, some courts have followed Justice Kogan's dissent, which cited People v. Carlson, 677 P.2d 310 (Colo. 1984) and Jones v. State, 459 So. 2d 1068 (Fla. Dist. Ct. App. 1984). *Id. Carlson* adopts the position that field sobriety tests amount to a search requiring probable cause. *Carlson*, 677 P.2d at 317. In *Carlson*, the court states that

> "[a] roadside sobriety test involves an examination and evaluation of a person's ability to perform a series of coordinated physical maneuvers, not normally performed in public or knowingly exposed to public viewing, for the public viewing, for the purpose of determining whether the person under observation is intoxicated. Since these maneuvers are those which the ordinary person seeks to preserve as private, there is a constitutionality protected privacy interest in the coordinative characteristics sought by the testing process.

Id. at 316–7. However, at least twelve other states have rejected *Carlson* or its reasoning. *Galimba*, 19 P.3d at 612; *Superior Court of Conchise Cnty*., 718 P.2d at 176; *Wyatt*, 687 P.2d at 553; *Ferreira*, 988 P.2d at 706; *Stevens*, 394 N.W. 2d at 392; *Eastman*, 691 A.2d at 181–82; *Blais*, 701 N.E.2d 314, 317; *Sanders*, 721 N.E. at 437; *Gray*, 552 A.2d 1190, 1195.

56. *Schmerber*, 384 U.S. at 758–59.

arrest, and the officers reasonably believed that the evidence would be lost if the sample was not quickly withdrawn.[57]

The Court said:

> We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.[58]

It seems that the principles set forth in *Schmerber*, allowing law enforcement to require a blood sample (drastically more intrusive than the performance of FSEs) upon probable cause of a DUI, would also allow law enforcement to require performance of field sobriety exercises.[59]

In *State v. Liefert*,[60] the Second District Court of Appeal—in fewer words—applied the rationale of *Schmerber* to FSEs.[61] The court found that when an officer has "sufficient cause" to believe that the defendant committed a DUI, the officer can require the defendant to submit to FSEs.[62] Although the *Liefert* court did not articulate its reason for the conclusion above, nor what standard "sufficient cause" meets, it relied on *State v. Mitchell*.[63] The court in *Mitchell*—discussing a nonconsensual blood draw—relied heavily on *Schmerber*.[64] Although not specifically expressed

57. *See id.* at 770–72; *see also* Reed v. State, 944 So. 2d 1054, 1058 (Fla. Dist. Ct. App. 2006) ("Exigent circumstances are those characterized by 'grave emergency,' imperativeness for safety, and compelling need for action, as judged by the totality of the circumstances."). *But see* Missouri v. McNeely, 133 S. Ct. 1552, 1556 (2013) (explaining that although exigency may justify a nonconsensual blood draw it is not a per se rule).

> We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test. That, however, is a reason to decide each case on its facts, as we did in *Schmerber*, not to accept the "considerable overgeneralization" that a *per se* rule would reflect.

McNeely, 133 S. Ct. at 1561.

58. *Schmerber*, 384 U.S. at 770–71.

59. DAVID A. DEMERS, FLA. PRAC., DUI HANDBOOK § 7:2 (2013).

60. State v. Liefert, 247 So. 2d 18 (Fla. Dist. Ct. App. 1971).

61. *See id.* at 19.

62. *Id.*

63. *Id.*; *see* State v. Mitchell, 245 So. 2d 618 (Fla. 1971).

64. *Mitchell*, 245 So. 2d at 620.

> In [Schmerber v. California, 384 U.S. 757 (1966)], [the] precise question was raised and it was held that the imposition of a compulsory taking of a blood sample from an accused for tests and the use of results of such tests in evidence at his trial do not violate his constitutional rights to due process of law, his privilege against self-incrimination, his right to counsel, or his right against unreasonable searches and

in *Liefert*, based on the *Mitchell* court's lengthy discussion of *Schmerber*, it can be assumed that the *Liefert* court also followed *Schmerber* in concluding that FSEs can be required with "sufficient cause."[65] These decisions are based on the premise that FSEs generate physical evidence of impairment necessary to prove DUI, and any delay to secure a warrant would result in the loss of this valuable evidence.[66]

A more recent decision finding that probable cause is the standard for "compelling" FSEs is *Morris v. State*.[67] Although the main issue on appeal was whether the prosecutor had improperly argued in closing remarks that an innocent person would have demanded to take a breath test, the court briefly discussed the appropriate standard for compelling both FSEs and breath testing.[68] The court explained, "when a law enforcement officer has probable cause to believe that an accused has committed a DUI offense, the officer can lawfully *compel* the person to perform field sobriety exercises and [take] a breath test."[69] The decision in *Morris* appears to be harmonious to the holding in *State v. Liefert*, but just how harmonious remains unclear because there was probable cause in *Morris* and as such, the court did not need to address whether reasonable suspicion *would* have been enough.[70]

C. THEORY THREE: REASONABLE SUSPICION OF IMPAIRMENT

Under *Terry v. Ohio*[71] and Florida's Stop and Frisk Law,[72] it is reasonable for law enforcement officers to stop and briefly detain persons

seizures.

Id. The Court also addressed the blood draw statute in Florida. *Id.* at 622.

65. *Liefert*, 247 So. 2d at 19.

66. *See Mitchell*, 245 So. 2d at 622–23 (explaining why evidence of a defendant's blood-alcohol level can be drawn without consent upon probable cause); Schmerber v. California, 384 U.S. 757, 770 (1966) (discussing the uniqueness of the situation where a person has alcohol in their system and the fact that the alcohol level of a person's blood declines rapidly); *see also* Kentucky v. King, 131 S. Ct. 1849, 1856–57 (2011) (explaining that law enforcement can execute a warrantless search under the exigent circumstances exception where there is a likelihood of imminent destruction of evidence, so long as the police have not "created" or "manufactured" the exigency).

67. Morris v. State, 988 So. 2d 120 (Fla. Dist. Ct. App. 2008).

68. *Id.* at 122–123.

69. *Id.* at 122 (emphasis added). The Court in Morris ultimately found that the prosecutor's argument violated the defendant's Fifth Amendment rights and constituted burden shifting. *Id.* at 123.

70. *See id.* at 121–2 ; *Liefert*, 247 So. 2d at 19.

71. Terry v. Ohio, 392 U.S. 1 (1968).

72. FLA. STAT. § 901.151 (2013) (stating that Law enforcement may stop and frisk based on a reasonable suspicion that a crime has been or is about to be committed). *Id.*

suspected of criminal activity on less than probable cause.[73] Based on the authority above, a slight majority of lower courts in Florida have held that when law enforcement has a reasonable suspicion of DUI, they may "require," "request," or "compel" performance of FSEs.[74] In reaching their

73. *Terry*, 392 U.S. at 27. A law enforcement officer may even frisk the person to determine whether the person is carrying a weapon, if the officer has reasonable suspicion that the person is armed and poses a threat to the officer or others. *Id.* at 24. The investigatory stop is justified under the Fourth Amendment if there is reasonable and articulable suspicion that the person has committed or is about to commit a crime. *Id.* at 30. The scope of the detention and search must be carefully tailored to its underlying justification. *Id.* at 19. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. *Id.* at 21. The scope of the detention must be temporary and last no longer than necessary to effectuate the purposes of the stop. *See id.* at 17–18. Further, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicions within a short time period. *See id.* at 28–29. Law enforcement's conduct during an investigative stop must be reasonable and directed toward dispelling their well-founded and reasonable suspicion. *See id.* at 27.

74. *See, e.g.*, Origi v. State, 912 So. 2d 69, 71–72 (Fla. Dist. Ct. App. 2005) (discussing whether odor of alcohol plus speeding would constitute reasonable suspicion to conduct a DUI investigation); State v. Nguyen, 20 Fla. L. Weekly Supp. 685 ¶ 4 (Fla. Brevard County Ct. Apr. 10, 2013) (finding that reasonable suspicion is the appropriate standard for compelling field sobriety exercises); State v. Walsh, 19 Fla. L. Weekly Supp. 986a, ¶ 7–9 (Fla. Broward County Ct. Aug. 7, 2012) (finding that odor of alcohol and bloodshot eyes furnished reasonable suspicion to conduct a DUI investigation and request field sobriety exercises); State v. Garcia, 19 Fla. L. Weekly Supp. 414c, ¶ 5 (Fla. Brevard County Ct. Jan. 13, 2012) ("Based on the totality of the circumstances, there was reasonable suspicion that the Defendant was under the influence and could be compelled to perform field sobriety exercises. The defendant's consent is irrelevant."); State v. Bogdanoff, 19 Fla. L. Weekly Supp. 201a, ¶ 5 (Fla. Leon County Ct. Oct. 20, 2011) ("This Court consistently maintains that when an officer has reasonable suspicion that a driver is DUI, the driver's consent is not a necessary element regarding the voluntariness of submitting to FSEs, unless there are circumstances which demonstrate inappropriate and/or excess show of authority by law enforcement . . . ."); State v. D'Augustino, 19 Fla. L. Weekly Supp. 197a, ¶ 4 (Fla. Leon County Ct. Oct. 20, 2011) ("[T]he standard for compelling field sobriety [exercises] is when there is a reasonable suspicion that a crime is being committed, an officer is entitled to conduct a reasonable inquiry to confirm or deny that probable cause exists to make an arrest. Since Fourth Amendment rights are not automatically invoked, a defendant's performance on the [field sobriety exercises] is voluntary and consensual. Consequently, consent is not considered an important element for [field sobriety exercises] where the officer has reasonable suspicion of an impaired driver."); State v. Campbell, 18 Fla. L. Weekly Supp. 1007a, ¶ 46 (Fla. Manatee County Ct. Oct. 26, 2010) ("It is well settled in this Circuit that an officer does not need a Defendant's consent in order to administer field sobriety [exercises], so long as there was reasonable cause to detain or to continue the detention of the Defendant."); State v. Blanchette, 20 Fla. L. Weekly Supp. 1042a, ¶ 15 (Fla. Manatee County Ct. Oct. 13, 2008) (citing *Leifert*, 247 So. 2d at 19) ("[T]he question of consent concerning [field sobriety [exercises]] has been held to be immaterial by the Florida Supreme Court in *State v. Mitchell*."); State v. Edwards, 15 Fla. L. Weekly Supp. 636b, ¶ 18 (Fla. Brevard County Ct. Mar. 17, 2008) ("This Court finds that there is a reasonable suspicion of impairment and therefore consent to the field sobriety exercises is irrelevant; consent is not required to satisfy the Fourth Amendment."); State v. Baines, 10 Fla. L. Weekly Supp. 371a, ¶ 5 (Fla. Brevard County Ct. Mar. 24, 2003) (finding that field sobriety exercises may be compelled, therefore consent is not required).

conclusions, most of these courts rely on, or cite to, the Florida Supreme Court's decision in *State v. Taylor*.[75] In *Taylor*, the main issue was whether "a DUI suspect's refusal to submit to pre-arrest field sobriety [exercises was] admissible in evidence[.]"[76] However, before addressing the *admissibility* of the refusal to perform the exercises, the court evaluated the legal sufficiency of an officer's request that the defendant perform them in the first place.[77] The court explained:

> When [the defendant] exited his car, he staggered and exhibited slurred speech, watery, bloodshot eyes, and a strong odor of alcohol. This, combined with a high rate of speed on the highway, was more than enough to provide [the officer] with reasonable suspicion that a crime was being committed, i.e., DUI.[78]

The court continued:

> The officer was entitled under section 901.151 [Florida Stop and Frisk Law] to conduct a reasonable inquiry to confirm or deny that probable cause existed to make an arrest. [The arresting Officer's] request that [defendant] perform field sobriety [exercises] was reasonable under the circumstances and did not violate any Fourth Amendment rights.[79]

Accordingly, the court found that, as part of a routine DUI investigation, it is reasonable for an officer to request FSEs.[80] Based on this minimal discussion in *Taylor*, many lower courts have ruled that the standard for requesting, or even requiring, FSEs is reasonable suspicion.[81]

For example, in *State v. Blanchette*,[82] the appellee (defendant below) moved to suppress evidence of her performance on FSEs arguing that her consent to take the exercises was not freely and voluntarily given. The court held that the officer did not need consent to administer the field sobriety exercises and stated, "[n]ot only has the issue of consent been held

75. State v. Taylor, 648 So. 2d 701 (Fla. 1995).

76. *Id.* at 702.

77. *Id.* at 703.

78. *id.* at 703.

79. *Id.* at 703–04; *see* FLA. STAT. § 901.151(2) (2013). The statute States,

> Whenever any law enforcement officer of this state encounters any person under circumstances which reasonably indicate that such person has committed, is committing, or is about to commit a violation of the criminal laws of this state . . . the officer may temporarily detain such person for the purpose of ascertaining the identity of the person temporarily detained and the circumstances surrounding the person's presence abroad which led the officer to believe that the person had committed, was committing, or was about to commit a criminal offense.

FLA. STAT. § 901.151(2).

80. *Taylor*. 648 So. 2d at 703–04.

81. *E.g.*, State v. Blanchette, 20 Fla. L. Weekly Supp. 1042a (Fla. Manatee County Ct. Oct. 13, 2008).

82. *Id.*

immaterial [in the context of FSEs], but at the risk of redundancy, it has been held that 'during the course of an investigatory stop, the police are *entitled* to take such action as is reasonable under the circumstances.'"[83] The court next engaged in a balancing test, weighing the individual's privacy interest against the State's legitimate interest in protecting citizens from life-threatening danger caused by drunk drivers and found that the State's interest outweighed the minimal intrusion into the driver's privacy.[84] The court reasoned that the "brief, scarcely burdensome [roadside exercises] are a reasonable and permissible component of an investigation where the officer has detained an individual on reasonable suspicion of DUI."[85]

In *State v. Ameqrane*,[86] the court reached a comparable conclusion. In that case, law enforcement properly stopped a vehicle for speeding, and the officer noticed signs of impairment (odor of alcohol, bloodshot and glassy eyes).[87] Based on observations of impairment, the officer asked the defendant to step out of the vehicle and perform a field sobriety exercise.[88] The court stated, "[t]o request that a driver submit to field sobriety [exercises], a police officer must have reasonable suspicion that the individual is driving under the influence."[89] The court reasoned that "[t]he purpose of a DUI investigation is to either confirm or deny whether there is probable cause for a DUI arrest[,]" and requesting FSEs is a reasonable method of doing so.[90]

In *State v. Edwards*,[91] the court used even stronger language, concluding that "the standard for *compelling* . . . field sobriety [exercises] is reasonable suspicion that a crime [is] being committed (in this case, the crime of DUI)."[92] The court determined that FSEs are reasonable in a DUI investigation because the exercises are calculated toward dispelling the

83. *Id.* ¶ 12 (alterations omitted).

84. *Id.* (citing South Dakota v. Neville, 459 U.S. 553, 558 (1983). "After balancing the individual's privacy interest against the State's interest in conducting the tests, the Court finds that the State's legitimate interest in protecting its citizens from life-threatening danger caused by drunk drivers outweighs the minimal intrusion into the driver's privacy." *Id.*

85. *Id.*; *see also Taylor*, 648 So. 2d at 702–03 (noting that field sobriety exercises are "simple physical tasks designed to test coordination, e.g., finger-to-nose, walk-the-line, stand-on-one-foot, etc.").

86. State v. Ameqrane, 39 So. 3d 339 (Fla. Dist. Ct. App. 2010).

87. *Id.* at 340.

88. *Id.*

89. *Id.* at 341.

90. *Id.*

91. State v. Edwards, 15 Fla. L. Weekly Supp. 636b (Fla. Brevard County Ct. Mar. 17, 2008).

92. *Id.* at ¶ 17 (emphasis added).

officer's suspicion that a DUI has been committed; therefore, performance of the exercises does not violate the Fourth Amendment.[93] The court went to an extreme in *State v. Baines*,[94] finding that although the defendant was *compelled* to perform FSEs and even though his submission to the exercises was involuntary, the results were properly admitted because the officer had a reasonable suspicion of impairment and could therefore *require* the defendant to submit to roadside exercises.[95]

Requesting—or in some cases compelling—field sobriety exercises upon a reasonable suspicion of impairment is analogous to a warrantless pat-down search of an individual for weapons during an investigative detention.[96] The pat-down is reasonable because it is minimally intrusive and directed towards dispelling the suspicion that the individual is armed.[97] Likewise, FSEs may be conducted without consent upon reasonable suspicion of DUI because the exercises are minimally intrusive and directed toward dispelling the officer's suspicion of that crime.[98]

93. *Id.*

94. State v. Baines, 10 Fla. L. Weekly Supp. 371a (Fla. Brevard County Ct. Mar. 24, 2003).

95. *Id.* at ¶ 5–6.

96. *Compare* Carder v. State of Fla., Dep't of Highway Safety & Motor Vehicles, 15 Fla. L. Weekly Supp. 547a, ¶ 7 n. 2 (Fla. Orange County Ct. Sept. 4, 2007) (stating that combination of defendant's bloodshot, glassy eyes, and odor of alcohol provided reasonable suspicion to request that defendant submit to field sobriety exercises, even if speech was not slurred), Brush v. State of Fla., Dep't of Highway Safety & Motor Vehicles, 14 Fla. L. Weekly Supp. 2b, ¶ 8 (Fla. Duval County Ct. Sept. 7, 2006) (concluding that police officer's knowledge that defendant had run a stop sign, coupled with his observation that defendant had a strong odor of alcohol about him, a flushed face, and watery, bloodshot eyes, provided reasonable suspicion to conduct field sobriety exercises), State v. Tamer, 10 Fla. L. Weekly Supp. 931a, ¶ 6–8, 16 (Fla. Palm Beach County Ct. Aug. 14, 2003) (concluding that defendant's speeding, admission that he had consumed two or three beers, and police officer's observation that the defendant smelled of alcohol, had bloodshot eyes and a flushed face provided reasonable suspicion to ask defendant to perform field sobriety exercises), *and* State v. Petroski, 6 Fla. L. Weekly Supp. 621b, ¶ 13 (Fla. Palm Beach County Ct. July 27, 1999) (concluding that state trooper had reasonable suspicion to conduct roadside sobriety exercises based on smell of alcohol on the defendant's breath, his glassy eyes, flushed face, and admission of alcohol consumption), *with* Richardson v. State, 971 So. 2d 295, 297 (Fla. Dist. Ct. App. 2008) ("A police officer may stop an individual temporarily if the officer has a reasonable suspicion that a person has committed, is committing or is about to commit a crime."), *and* Smith v. State, 925 So. 2d 465, 467 (Fla. Dist. Ct. App. 2006) (finding that a pat-down is justified if an officer develops reasonable suspicion that a suspect is armed and dangerous).

97. *See* Dunaway v. New York, 442 U.S. 200, 209 (1979) (discussing the stop and frisk and explaining that the frisk is reasonable under the Fourth Amendment because it is a brief and minimal intrusion).

98. *See* State v. Blanchette, 20 Fla. L. Weekly Supp. 1042a, ¶ 12–13 (Fla. Manatee County Ct. Oct. 13, 2008) (explaining that FSEs are minimally intrusive, and are directed toward dispelling the officers well founded suspicion that a person is under the influence to the extent that his or her normal faculties are impaired).

III. CONCLUSION

As discussed in detail above, lower courts in Florida have struggled to find uniformity when confronted with field sobriety exercises.[99] Some have found that consent is a necessary prerequisite of requesting the exercises; while other courts have found that consent is irrelevant where an officer has a reasonable suspicion of DUI; and still a few courts find that the exercises may be requested or compelled, but that the correct standard is probable cause.[100] The confusion among the courts may arise from the fact that the performance of field sobriety exercises often times produces highly incriminating evidence. As such, courts have felt the need to impute a higher standard than the Constitution requires; yet, the mere fact that police action produces evidence to be used at trial does not mean that the action in question is a search requiring voluntary consent.[101]

A. WHY NOT CONSENT?

Courts finding that consent is a prerequisite for the performance of FSEs have failed to address how and why the "search" element of the Fourth Amendment is implicated. Although a person is certainly seized during a routine traffic stop, the seizure is constitutionally valid if the officer has probable cause that a traffic infraction has occurred or a reasonable suspicion that a DUI has been or is being committed.[102]

99. *See supra* Part II.

100. *See supra* Part II.

101. *Compare* State v. Gilbert, 12 Fla. L. Weekly Supp. 1081a ¶ 6 (Fla. Miami-Dade County Ct. Aug. 15, 2005) ("All searches and seizures by government agents are controlled by the Fourth Amendment of the United States Constitution, which protects against unreasonable seizures of persons and property. A necessary corollary is that the exercise of unbridled discretion by police in situations involving searches and seizures is *per se* unreasonable. In fact, the Fourth Amendment would be tortured if it was not applied to circumstances such as these."), *with* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (suggesting that a "search" requires both an objective and subjective expectation of privacy and absent both, there is no Fourth Amendment protection). *But see* Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013) (explaining that officers "gathering information" by entering the curtilage of the defendant's home was a Fourth Amendment search because the officers entered a constitutionally protected area, i.e., the home). In *Jardines*, the Court discussed the definition of a search explaining that the Katz test did not change the long-standing conception that a "physical intrusion" into a constitutionally protected area is a search. *Jardines*, 133 S. Ct. at 1414. However, the reason the Fourth Amendment was implicated was not because the government was gathering evidence, but rather because law enforcement tactics were intruding into a constitutionally protected area. *Id.* Clearly, courts remain uncomfortable with governmental action directed towards collecting evidence.

102. *See* State v. Burke, 16 Fla. L. Weekly Supp. 378a, ¶ 9–10 (Fla. Orange County Ct. Oct. 14, 2008). If there is legal justification to support a traffic stop, then the seizure is reasonable under the Fourth Amendment and there is no constitutional violation. *Id.*

Therefore, because the seizure is constitutionally valid, if a consent problem is to arise in the context of FSEs, there must be a finding that the performance of the FSEs constitutes a search.

It seems illogical to say that society would possess an objective expectation of privacy in the performance of simple movements of one's arms, legs, and body on the side of a public thoroughfare.[103] Similarly, it remains questionable whether the suspect performing the exercises has a subjective expectation of privacy in the physical acts of walking a straight line, touching a finger to a nose, or standing on one leg.[104] Yet, this is what courts finding that consent is a requirement of FSEs are implicitly holding.

Although numerous courts have required consent by implicitly considering the performance of FSEs to be "searches," none have explained exactly how these exercises meet the definition of a search under *Katz*.[105] Perhaps the most interesting application of the *Katz* standard is crystalized in *State v. Gilbert*.[106] In *Gilbert*, the court cited to *Katz* when it found that the performance of FSEs is a search but failed to conduct any analysis as to *how* there is both an objective and subjective expectation of privacy as required by *Katz*.[107] Instead, the court found that the performance of FSEs is a 'search' because "the Fourth Amendment would be tortured if it was not applied to circumstances such as [performance of field sobriety exercises]."[108] The court continued:

> Clearly, in this case, the defendant was *directed and ordered* by an armed and uniformed police officer to perform several physical exercises—*a* "*search*" *for evidence*—which was tantamount to a police

103. *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (finding that a search occurs where the defendant subjectively has an expectation of privacy and society is willing to recognize that expectation as reasonable).

104. *Compare Gilbert*, 12 Fla. L. Weekly Supp. at ¶ 7 ("All searches and seizures by government agents are controlled by the Fourth Amendment of the United States Constitution, which protects against unreasonable seizures of persons and property. A necessary corollary is that the exercise of unbridled discretion by police in situations involving searches and seizures is *per se* unreasonable. . . . In fact, the Fourth Amendment would be tortured if it was not applied to circumstances such as these."), *with Katz*, 389 U.S. at 361 (suggesting that a "search" requires both an objective and subjective expectation of privacy and absent both, there is no Fourth Amendment protection).

105. *See Katz*, 389 U.S. at 361.

106. *Gilbert*, 12 Fla. L. Weekly Supp. at ¶ 7, 13, 17; *see also* State v. Barnett, 15 Fla. L. Weekly Supp. 995a, ¶ 4 (Fla. Duval County Ct. July 8, 2008) ("Florida law does not require that a driver under investigation for the offense of Driving Under the Influence perform field sobriety exercises. In order for a subject to have voluntarily consented to a field sobriety exercise proof must establish that consent to perform was voluntary and 'not mere acquiescence to police authority.'").

107. *Gilbert*, 12 Fla. L. Weekly Supp. at ¶ 7.

108. *Id.*

> directive that he better do so in order to avoid arrest for failing to comply with the officer's orders.[109]

Based on the court's language, it appears that the performance of FSEs was considered a "search" because the exercises were conducted for the purpose of gathering evidence; however, this is not the standard set forth by the United States Supreme Court.[110] Although *Gilbert* was subsequently reversed on appeal, the appellate court declined to address whether the performance of FSEs is indeed a search.[111] If the requirements of a search enumerated in *Katz* are not met, then the "search" aspect of the Fourth Amendment has not been triggered. Hence, consent is not required in the context of FSEs, and an officer must only act reasonably during the course of the traffic stop (seizure) and DUI investigation.[112]

B. WHY REASONABLE SUSPICION?

The touchstone of a seizure under the Fourth Amendment is reasonableness, and "reasonableness" is to be measured in objective terms by examining the totality of the circumstances.[113] In determining what conduct is reasonable, the United States Supreme Court has eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.[114] Further, the reasonableness of a particular law enforcement encounter often turns on the degree of the intrusion into the citizen's privacy when compared to the governmental interest at stake.[115]

In the dominion of DUI related offenses, there is indeed a significant governmental (and societal) interest at stake, namely safety.[116] A drunk

109. *Id.* at ¶ 13 (emphasis added).

110. *See Katz*, 389 U.S. at 361.

111. *Gilbert*, 14 Fla. L. Weekly Supp. 14a, ¶ 12 (Fla. Cir. Ct. Nov. 17, 2006). The appellate court relied on *State v. Leifert*, explaining,

> *State v. Leifert* held that a police officer who observed the [defendant] drive in a weaving fashion and then noticed the smell of alcohol on his breath had sufficient cause to believe that the [defendant] had committed a crime in the operation of a motor vehicle and ''could *require* him to take part in . . . physical sobriety tests."

Id. at ¶ 10 (citation omitted).

112. *See* Caldwell v. State, 41 So. 3d 188, 195 (Fla. 2010) ("The United States Supreme Court has determined that any warrantless seizure of an individual by law enforcement officers must be based on reasonable suspicion that the individual is engaged in wrongdoing. Whether the suspicion is 'reasonable' will depend on the existence of 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' This requirement 'governs all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.'") (citations omitted).

113. *See* Florida v. Jimeno, 500 U.S. 248, 250 (1991) (citing *Katz*, 389 U.S. at 360).

114. *Id.*

115. *See* Commonwealth v. Williams, 661 N.E.2d 617, 621 (Mass. 1996).

116. *See* Terry v. Ohio, 392 U.S. 1, 24 (1968) (extolling "the need for law enforcement

driver let loose on the highways is a deadly menace, not only to the officer, but also to anyone sharing the road with him or her.[117] The peril to the public created by intoxicated drivers, although supported by statistical data, is so horrifyingly real that no statistical demonstration is required.[118] Thus, the government's interest in apprehending impaired drivers outweighs the minimal intrusion required when a suspect performs field sobriety exercises.[119]

Consequently, consent is not and should not be considered an important element of FSEs, so long as the officer has detained a driver based upon a reasonable suspicion of impairment.[120] Although FSEs are constitutionally permissible to dispel a reasonable suspicion of impairment, courts finding that law enforcement may compel or require the exercises may have allowed law enforcement too much unfettered discretion.[121] Law enforcement may not coerce, force, or compel a suspect to perform FSEs; such action would be a violation of the suspect's due process.[122]

C. DUE PROCESS ALSO NECESSARY?

The Due Process Clause of the Fourteenth Amendment provides that "[no state shall] deprive any person of life, liberty, or property, without due

officers to protect themselves and other prospective victims of violence . . . where they may lack probable cause for an arrest" but where the individual being investigated is "presently dangerous to the officer or to others").

117. *See supra* notes 1–2 and accompanying text.

118. *See* Jones v. State, 459 So. 2d 1068, 1075 (Fla. Dist. Ct. App. 1984) (citing State v. Olgaard, 248 N.W.2d 392, 394 (S.D. 1976)) (discussing whether a random and unannounced roadblock violates the Fourth Amendment and identifying the "hazard to the public created by drunk drivers" as an important government interest).

119. South Dakota v. Neville, 459 U.S. 553, 558 (1983) (noting strong State interest in eliminating "the carnage caused by drunk drivers").

120. *See* State v. D'Augustino, 19 Fla. L. Weekly Supp. 197a, ¶ 4 (Fla. Leon County Ct. Oct. 20, 2011).

> [T]he standard for compelling field sobriety [exercises] is when there is a reasonable suspicion that a crime is being committed, an officer is entitled to conduct a reasonable inquiry to confirm or deny that probable cause exists to make an arrest. Since Fourth Amendment rights are not automatically invoked, a defendant's performance on the [field sobriety exercises] is voluntary and consensual. Consequently, consent is not considered an important element for [field sobriety exercises] where the officer has reasonable suspicion of an impaired driver.

Id.

121. *See, e.g.*, State v. Edwards, 15 Fla. L. Weekly Supp. 636b, ¶ 17 (Fla. Brevard County Ct. Mar. 17, 2008) (explaining that an officer can compel the performance of FSEs); State v. Baines, 10 Fla. L. Weekly Supp. 371a, ¶ 4, 8 (Fla. Brevard County Ct. Mar. 24, 2003) (explaining that even if the performance of FSEs is involuntary, the results of the exercises is admissible because an officer has the authority to require performance of FSEs during a DUI investigation).

122. *See infra* Part III.C.

process of law . . . ."[123] "Defining the limits of due process is difficult," as due process is "a general principle of law that prohibits the government from obtaining convictions 'brought about by methods that offend a sense of justice.'"[124] However difficult to define, police conduct violates due process where it is so coercive as to "[wring] a confession out of an accused against his will."[125] Traditionally, due process violations in the criminal realm have been raised and examined in the context of illegally obtained confessions.[126] However, the same principles can be applied to outrageous police misconduct during investigatory detentions, i.e., the police must not use overreaching and coercive tactics to dispel their reasonable suspicion of DUI during the investigation.[127]

The "consent analysis" articulated by many Florida courts mimics due process concerns.[128] However, courts appear to have mislabeled their

123. U.S. CONST. amend. XIV, § 1; *see* Colorado v. Connelly, 479 U.S. 157, 163 (1986).

124. State v. Williams, 623 So. 2d 462, 465 (Fla. 1993) (discussing the Federal "due process defense" application in Florida courts).

125. *Connelly*, 479 U.S. at 164. The Court explained that coercive police conduct must be casually connected to a confession (or some act by the defendant) in order for due process violation to occur. *Id.*

126. *See id.* at 169–70 (discussing Fourth Amendment jurisprudence in the context of confessions and the Fifth Amendment).

127. *See, e.g.*, State v. Hart, 14 Fla. L. Weekly Supp. 797a, ¶ 4–5 (Fla. Monroe County Ct. Nov. 7, 2006). In *Hart*, defendant was seventy-two years old and was stopped on suspicion of DUI. *Id.* The defendant repeatedly told the officers that he did not want to perform the FSEs, requested to use the restroom several times. *Id.* at ¶ 4–5. The officers forced his participation by handcuffing him. *Id.* at ¶ 5. Although the court used a consent analysis in finding that the exercises must be suppressed, these facts present an obvious violation of due process because defendant's will was overborne by coercive and overreaching police tactics. *Id.* at ¶ 4.

128. *See e.g.*, State v. Bogdanoff, 19 Fla. L. Weekly Supp. 201a, ¶ 5 (Fla. Leon County Oct. 20, 2011) ("This Court consistently maintains that when an officer has reasonable suspicion that a driver is DUI, the driver's consent is not a necessary element regarding the voluntariness of submitting to FSEs, unless there are circumstances which demonstrate inappropriate and/or excess show of authority by law enforcement . . . ."); State v. Jackson, 16 Fla. L. Weekly Supp. 431b, ¶ 6 (Fla. Leon County Ct. Sept. 24, 2008) (finding that defendant did not consent to field sobriety exercises where he was ordered to the ground, handcuffed, not allowed to use the restroom, and threatened with a taser before the request for FSEs was made); State v. Benvenuto, 13 Fla. L. Weekly Supp. 885b, ¶ 1, 7 (Fla. Leon County Ct. June 12, 2006) (finding that the deputy's statement "there are a bunch of exercises we are going to do" caused defendant to believe the exercises were required and therefore rendered his performance involuntary); State v. Barker, 13 Fla. L. Weekly Supp. 166b, ¶ 1(Fla. Miami-Dade County Ct. Nov. 17, 2005) (finding that field sobriety exercises must be suppressed where defendant was instructed, instead of requested, to perform FSEs); State v. Gonzalez, 12 Fla. L. Weekly Supp. 482a, ¶ 3, 11 (Fla. Miami-Dade County Ct. Feb. 16, 2005) (finding that the officer's statement "I need you to do these exercises" rendered any subsequent performance involuntary because defendant had "no choice" but to submit to the exercises). *Jackson* is a prime example of conduct that would violate due process—the threat of being tasered, being ordered to the ground and handcuffed and being refused a request to use the facilities clearly rendered the defendant's decision to perform the exercises coerced and not a product of his free will. *Jackson*, 16 Fla. L. Weekly Supp. at ¶ 6.

concerns over coercion and involuntariness as relating to "consent" under the Fourth Amendment, rather than a violation of due process under the Fourteenth Amendment. Pursuant to a due process analysis, law enforcement need not obtain "consent" before requesting FSEs, but instead must not employ tactics that are overreaching and coercive.

It may seem like a matter of semantics, "consent" or "due process," but at the very least, the term used has a significant impact on the burden of proof during a motion to suppress. Where the standard is "consent" under the Fourth Amendment and there is no illegal detention or police misconduct, the *State* bears the burden of proving that defendant's consent is voluntary by a preponderance of the evidence.[129] The burden is heavy because "mere submission to a claim of lawful authority," which arguably occurs during all traffic stops, does not satisfy that burden.[130] However, where the court engages in a due process analysis, the defendant has the burden of proving that coercive police tactics overbore his or her will.[131] In the context of FSEs, the due process standard is more appropriate because performance of the exercises does not constitute a 'search,' but law enforcement cannot coerce a defendant's physical performance of the exercises. Coercion and the involuntary submission to FSEs is at the heart of what all courts facing the issue are trying to remedy.

D. WHAT IS THE STANDARD?

Ultimately, the Florida Supreme Court has already established the appropriate standard for requesting field sobriety exercises—a reasonable suspicion of DUI.[132] Despite this binding dictate, lower courts have failed to follow the standard.[133] Under the doctrine of *stare decisis*, an appellate court's decision on issues properly before it and decided in disposing the

129. *See* Florida v. Royer, 460 U.S. 491, 497 (1983) ("[T]he State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority."); Reynolds v. State, 592 So. 2d 1082, 1086 (Fla. 1992) ("Where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority. Where there is an illegal detention or other illegal conduct on the part of the police, a consent will be found voluntary only if there is clear and convincing evidence that the consent was a product of the illegal police action. Otherwise, the voluntariness of the consent must be established by a preponderance of the evidence.").

130. *Reynolds*, 592 So. 2d at 1086.

131. *See* Dovico v. State, 199 So. 2d 308, 309 (Fla. Dist. Ct. App. 1967). In *Dovico*, the Court explained that it was the defendant who bore the burden of proving that he was coerced to the extent that his will was overborne. *Id.*

132. *See* State v. Taylor, 648 So. 2d 701, 703 (Fla. 1995).

133. *See supra* Part II.A–B.

case are, until overruled by a subsequent case, binding precedent on courts of lesser jurisdiction.[134]

Accordingly, lower courts must follow the Florida Supreme Court's decision in *Taylor* and are bound to find that an officer with reasonable suspicion of DUI may take reasonable steps to dispel that suspicion, including requesting that the defendant perform FSEs.[135] To clarify the confusion that FSEs have created, the Florida Supreme Court should again address the issue of FSEs and refine its holding in *Taylor* adding a due process restriction to limit an officer's authority to "request," rather than "require" or "compel" the performance of FSEs.

134. *See* Pardo v. State, 596 So. 2d 665, 666–67 (Fla. 1992) ("The District Courts of Appeal are required to follow Supreme Court decisions. As an adjunct to this rule it is logical and necessary in order to preserve stability and predictability in the law that, likewise, trial courts be required to follow the holdings of higher courts—District Courts of Appeal. . . . [I]f the district court . . . in which the trial court is located has decided the issue, the trial court is bound to follow it.").

135. *See Taylor*, 648 So. 2d at 703–05. Although the Florida Supreme Court clearly held that reasonable suspicion is the appropriate standard for requesting field sobriety exercises, the issue was buried in an opinion, which primarily dealt with the question of admissibility of a refusal.