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To Submit or Not to Submit—Where Is My Attorney? The Right to Counsel before Submission to Chemical Testing in a DWI Proceeding

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Note

To Submit or Not to Submit—Where Is My Attorney?: The Right to Counsel Before Submission to Chemical Testing in a DWI Proceeding

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I. INTRODUCTION

Reacting to the tremendous damage which has been done to property and individuals by drunken drivers, concerned citizens have begun to organize for the purpose of increasing public awareness of the hazards of driving while intoxicated (DWI) and to lobby for tougher penalties and stricter enforcement of DWI and implied consent statutes.[1] As a result, twenty-seven state legisla-

1. Two of the more prominent groups in this movement are MADD (Mothers Against Drunk Drivers), which has grown to eighty-three chapters in twenty-nine states in just two years, and RID (Remove Intoxicated Drivers—U.S.A.), which has fifty-nine chapters in twenty-nine states.

tures passed more stringent DWI laws in 1982.[2] Among the states which responded to the cries for new legislation was Nebraska, which, in 1982, enacted its current DWI and implied consent statutes.[3]

As is the case with all DWI legislation, the aim of Nebraska's DWI statute is to deter individuals from operating motor vehicles while under the influence of alcohol or other drugs and, thereby, promote highway safety. The Nebraska statute accomplishes this goal by providing a minimum penalty of probation, sixty day license revocation for first time offenders and a maximum penalty of permanent license revocation for third time offenders, as well as by abolishing pretrial diversion.[4]

To ensure the effective enforcement of the DWI statutes, almost all states have enacted implied consent statutes, which provide that each driver within the state, by the exercise of the privilege of driving within the state, is deemed to have consented to chemical testing for the purpose of determining the driver's degree of intoxication.[5] Under the implied consent statutes, if a driver refuses to

2. *See The War Against Drunk Drivers*, NEWSWEEK, Sept. 13, 1982, at 34. For examples of the more stringent penalties accompanying a DWI conviction, see FLA. STAT. ANN. §§ 316.193, 316.1931 (West Supp. 1983) (providing for maximum penalties of six months imprisonment, nine months imprisonment, and one year imprisonment, respectively, for the first, second, and third offenses); ME. REV. STAT. ANN. tit. 29, § 1312-B(2) (Supp. 1982-1983) (providing for mandatory minimum fines of $350, incarceration of not less than forty-eight hours, and suspension of the operator's license for ninety days); MD. TRANSP. CODE ANN. §§ 21-902, 27-101(21) (Supp. 1982) (imposing a possible fine of $500 and imprisonment of two months).

3. *See* NEB. REV. STAT. § 39-669.07 (Cum. Supp. 1982) (DWI statute); NEB. REV. STAT. § 39-669.08 (Cum. Supp. 1982) (implied consent statute).

4. *See* NEB. REV. STAT. § 39-669.07 (Cum. Supp. 1982).

5. ALA. CODE § 32-5-192 (1975); ALASKA STAT. § 28.35.031 (Supp. 1982); ARIZ. REV. STAT. ANN. § 28-691 (Supp. 1982-1983); ARK. STAT. ANN. § 75-1045 (1979); CAL. VEH. CODE § 13353 (West Supp. 1983); COLO. REV. STAT. § 42-4-1202 (Supp. 1983); CONN. GEN. STAT. ANN. § 14-227b (West Supp. 1982); DEL. CODE ANN. tit. 21, § 2740 (Supp. 1982); D.C. CODE ENCYCL. § 40-1002 (West Supp. 1978-1979); FLA. STAT. ANN. § 322.261 (West Supp. 1983); GA. CODE ANN. § 68B-306 (Supp. 1982); HAWAII REV. STAT. § 286-151 (Supp. 1982); IDAHO CODE § 49-352 (Supp. 1983); ILL. ANN. STAT. ch. 95½, § 11-501.1 (Smith-Hurd Supp. 1983-1984); IND. CODE ANN. § 9-4-4.5-1 (Burns 1980); IOWA CODE ANN. § 321B.4 (West Supp. 1983-1984); KAN. STAT. ANN. § 8-1001 (1982); KY. REV. STAT. ANN. § 186.565 (Baldwin 1982); LA. REV. STAT. ANN. § 32:661 (West Supp. 1983); ME. REV. STAT. ANN. tit. 29, § 1312 (1978 & Supp. 1982-1983); MD. TRANSP. CODE ANN. § 16-205.1 (Supp. 1982); MASS. GEN. LAWS ANN. ch. 90, § 24(f) (West Supp. 1983-1984); MICH. COMP. LAWS ANN. § 257.625c (Supp. 1983-1984); MINN. STAT. § 169.123 (1980); MISS. CODE ANN. § 63-11-5 (Supp. 1982); MO. ANN. STAT. § 577.020 (Vernon Supp. 1983); MONT. CODE ANN. § 61-8-402 (1981); NEB. REV. STAT. § 39-669.08 (Cum. Supp. 1982); NEV. REV. STAT. § 484.383 (1981); N.H. REV. STAT. ANN. § 265:84 (1982); N.J. STAT. ANN. § 39:4-50.2 (West Supp. 1983-1984); N.M. STAT. ANN. § 66-8-107 (Supp. 1982); N.Y. VEH. & TRAF. LAW § 1194

submit to chemical testing after being placed in custody, an administrative hearing is held to provide the defendant an opportunity to show good cause for such refusal; if good cause cannot be shown, the driver's license may be revoked for a period of time.[6] Unlike other states, the Nebraska implied consent statute provides that refusal to submit to chemical testing not only results in an administrative license revocation, but is also deemed to be a criminal offense which is punishable in the same degree as if the person had actually been convicted of DWI.[7]

Since implied consent statutes essentially force the defendant to release information about himself which could be used against him in a subsequent criminal trial, and since this evidence is gathered in what seems to be a criminal prosecution against the defendant, the question is raised as to whether the defendant has a constitutionally guaranteed right under either the fifth or sixth amendment to consult with counsel before being forced to submit to chemical testing.[8] State courts which have considered this question have focused on the fact that such chemical testing is done pursuant to the implied consent statute which is considered to be civil, not criminal in nature. Based on this determination, these state courts have found that the accused has no constitutionally guaranteed right to counsel, since the fifth and sixth amendments afford such a right only in the case of criminal proceedings.[9]

(McKinney Supp. 1982-1983); N.C. GEN. STAT. § 20-16.2 (Cum. Supp. 1981); N.D. CENT. CODE § 39-20-01 (1980); OHIO REV. CODE ANN. § 4511.19.1 (Page Supp. 1982); OKLA. STAT. ANN. tit. 47, § 751 (West Supp. 1982-1983); OR. REV. STAT. § 487.805 (1981); PA. CONS. STAT. ANN. tit. 75, § 1547 (Purdon Supp. 1983-1984); R.I. GEN. LAWS § 31-27-2.1 (Supp. 1981); S.C. CODE ANN. § 56-5-2950 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 32-23-10 (Supp. 1982); TENN. CODE ANN. § 55-10-406 (Supp. 1982); TEX. REV. CIV. STAT. ANN. art. 6701L-5 (Vernon 1977); UTAH CODE ANN. § 41-6-44.10 (1981); VT. STAT. ANN. tit. 23, § 1202 (Supp. 1982); VA. CODE § 18.2-268 (1982); WASH. REV. CODE ANN. § 46.20.308 (Supp. 1983-1984); W. VA. CODE § 17C-5A-1 (Supp. 1982); WIS. STAT. § 343.305 (1979-1980).

6. Statutes vary as to the period of revocation and other penalties which may result from refusal to submit to chemical analysis under the implied consent statutes. While no driver under any state statute can be forced to take the chemical test against his will, some states provide a statutory right to refuse testing; however, even in those states which grant a right to refuse testing, the consequence of such refusal is still the revocation of the driver's license. *See* Note, *Driving While Intoxicated and the Right to Counsel: The Case Against Implied Consent*, 58 TEX. L. REV. 935 (1980).
7. NEB. REV. STAT. § 39-669.08 (Cum. Supp. 1982).
8. *See infra* section II. The fifth amendment has been interpreted to apply when the suspect is in custody and is involved in any type of custodial interrogation. *See* Miranda v. Arizona, 384 U.S. 436 (1966). The sixth amendment gives the accused a right to have counsel present at any critical stage of a criminal proceeding. *See infra* notes 18-20 and accompanying text.
9. *See, e.g.*, Winter v. Peterson, 208 Neb. 785, 305 N.W.2d 803 (1981); Seders v.

The Nebraska Supreme Court has similarly held that a driver who is arrested for DWI has no constitutional right to consult an attorney before being required to submit to chemical testing.[10] The Nebraska court has also held that the request to consult an attorney constitutes a qualified refusal to submit to chemical testing,[11] and that the qualified or conditional refusal invokes the sanctions specified in the state's implied consent statute.[12] Since Nebraska's implied consent statute provides not only for administrative sanctions but also criminal sanctions, the determination that the accused has no right to counsel at the time he is requested to submit to chemical analysis is especially disturbing.

This Article analyzes the scope of the right to counsel afforded under the fifth and sixth amendments and the policy reasons for granting such a right in particular cases. Next, these tests and policies will be applied to the accused's decision to submit to chemical analysis to determine whether such a right exists, or should exist. Finally, some of the administrative problems with affording such a right to counsel will be addressed.

II. THE CONSTITUTIONAL BASIS FOR THE RIGHT TO COUNSEL

A. The Fifth Amendment Right to Counsel

The fifth amendment to the Constitution provides: "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ."[13] In *Miranda v. Arizona*,[14] the leading interpretive decision on the fifth amendment right to counsel, the Supreme Court was primarily concerned with the various physical and mental compulsion techniques which were occasionally used in police interrogations to force the suspect to incriminate himself.[15] In an effort to provide safeguards against such forced incriminations, the Court established a list of warnings which must be read to suspects who are in custody and about to be interrogated.[16] One

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Powell, 298 N.C. 453, 259 S.E.2d 544 (1979); State v. Braunesreither, 276 N.W.2d 139 (S.D. 1979); Brewer v. State Dep't of Motor Veh., 23 Wash. App. 412, 595 P.2d 949 (1979). *But see* Heles v. State, 530 F. Supp. 646 (D.S.D.), *vacated as moot in* 682 F.2d 201 (8th Cir. 1982) (the issue was mooted by the defendant's death prior to decision).

10. *See, e.g.*, Winter v. Peterson, 208 Neb. 785, 305 N.W.2d 803 (1981); Wiseman v. Sullivan, 190 Neb. 724, 211 N.W.2d 906 (1973); Stevenson v. Sullivan, 190 Neb. 295, 207 N.W.2d 680 (1973); State v. Oleson, 180 Neb. 546, 143 N.W.2d 917 (1966).
11. Sedlacek v. Peterson, 204 Neb. 625, 284 N.W.2d 556 (1979).
12. Winter v. Peterson, 208 Neb. 785, 305 N.W.2d 803 (1981).
13. U.S. CONST. amend. V.
14. 384 U.S. 436 (1966).
15. *Id.* at 469.
16. The *Miranda* warnings state: that the suspect has the right to remain silent;

of the primary safeguards alluded to by the Court was the right of the accused to consult with an attorney and to have that attorney present during his interrogation to provide reassurance to the accused that he need not provide incriminating information. By comparison, the scope of the protection, in terms of the right to an attorney, is much more limited under the fifth amendment than it is under the sixth.

B. The Sixth Amendment Right to Counsel

The sixth amendment provides: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."[17] As explained in *Powell v. Alabama*,[18] the purpose of the sixth amendment right to counsel is to protect the rights of laymen, who are assumed to be unfamiliar with the intricacies of legal proceedings, by providing them the assistance of counsel.[19] In determining the stage of the criminal prosecution where effective assistance of counsel is constitutionally mandated, the court looks to the detriment which the defendant would sustain if forced to undergo a particular stage of the proceeding without counsel; this process of determination has been labeled the critical stage analysis.[20]

Use of the critical stage analysis has enabled the Supreme Court to extend the applicability of the sixth amendment right to counsel beyond the confines of the trial itself, to various pretrial confrontations.[21] The Court has identified two factors which must

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that anything he says can and will be used against him in court; that he has a right to consult with an attorney; and, that if he cannot afford an attorney, one will be provided for him. *Id.* at 479.

17. U.S. CONST. amend VI.
18. 287 U.S. 45 (1932).
19. Specifically, the *Powell* Court stated:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id.

20. For a discussion of the critical stage analysis, see United States v. Wade, 388 U.S. 218 (1967). *See also* United States v. Ash, 413 U.S. 37 (1973).
21. Originally, the sixth amendment right to counsel was interpreted to apply only to the trial of the accused. *See* Powell v. Alabama, 287 U.S. 45, 71 (1932). However, as pretrial confrontations between the accused and officials of the

be considered when determining whether a particular type of confrontation between the suspect and the police constitutes a "critical stage": (1) whether consultation with an attorney is "necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witness against him and to have effective assistance of counsel at the trial itself,"[22] and (2) whether the pretrial confrontation could result in "potential substantial prejudice" to the defendant's rights and whether the presence of counsel would help avoid such prejudice.[23] If the court finds that a particular type of proceeding or confrontation constitutes a critical stage, the accused must be afforded the right to have an attorney present at the event.

III. THE RIGHT TO COUNSEL IN A DWI PROCEEDING

Having analyzed the scope of the right to counsel under both the fifth and sixth amendments, it should be obvious that each amendment: (1) seeks to protect different and distinct rights of the accused, (2) is supported by a different set of rationale, and (3) employs different sets of tests to define its parameters.[24] Yet the right to counsel under both amendments is strictly limited to criminal proceedings.[25] Therefore, before conducting an independent analysis of the right to counsel in DWI proceedings under each of the amendments, it is useful to determine whether the common threshold requirement—that the proceeding must be criminal in nature—can be met with regard to a driver's submission to chemical testing.

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state became more common, the Supreme Court recognized that "'[a]ssistance' would be less than meaningful if it were limited to the formal trial itself." United States v. Ash, 413 U.S. 300, 310 (1973). Indeed, the Supreme Court has found that the accused has a right to have counsel present at during various nontrial proceedings. *See, e.g.*, Moore v. Illinois, 434 U.S. 220 (1977) (identification of the defendant at a preliminary hearing—a critical stage); Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing—a critical stage); Mempa v. Rhay, 389 U.S. 128 (1967) (sentencing—a critical stage); United States v. Wade, 388 U.S. 218 (1967) (pretrial line-up—a critical stage); Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment—a critical stage). *But see* United States v. Ash, 413 U.S. 300 (1973) (presentation of a photographic display—not a critical stage); Kirby v. Illinois, 406 U.S. 682 (1972) (suspect's right to counsel attaches only after the state commits itself to prosecute the accused); Gilbert v. California, 388 U.S. 263 (1967) (the taking of defendant's handwriting exemplar—not a critical stage).

22. United States v. Wade, 388 U.S. 218, 227 (1967).

23. *Id.*

24. *See supra* notes 13-20 and accompanying text.

25. *See* Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Ash, 413 U.S. 37 (1963).

A. Criminal Proceedings Threshold

A majority of the courts draw a distinction between the criminal nature of the DWI proceeding and the apparently civil nature of the implied consent proceeding.[26] Pointing to the administrative proceeding and penalty of license revocation for failure to submit to chemical testing under the implied consent statute, the courts have found that the proceedings under this statute are civil, not criminal, in nature, and, thus, no fifth or sixth amendment right to counsel is afforded at the time of the request to submit to chemical analysis.[27]

In addition to being circular, the above reasoning can be attacked on the ground that the fine line which has been drawn between the criminal DWI proceeding and the "civil" implied consent statute has no basis in reality.[28] The arrest, which is made prior to the request for submission to chemical analysis, places the suspect in custody for a criminal offense, and the testing is conducted for the sole purpose of gathering evidence to convict him of a crime. Since it is the refusal to submit which invokes the implied consent statute and its administrative penalties, it would be unreasonable to conclude that the proceeding is anything but a criminal proceeding until such refusal is made. Thus, if the proceeding is criminal prior to the accused's response, then (provided the other requirements of the fifth and sixth amendments can be met) the accused should be afforded the right to consult counsel before that response is required to be made. In any event, it is pure fiction to assume that the DWI proceeding loses its criminal nature simply because administrative penalties are imposed upon the accused's failure to comply with the procedures for gathering evidence to convict him of a crime. In Nebraska, this fiction between criminal and civil proceedings is even more difficult to sustain, since the Nebraska implied consent statute imposes criminal sanctions upon the refusal to submit to testing.[29]

It must be concluded that the artificial and unrealistic classification of the implied consent proceedings as being civil in nature should no longer be maintained as an impediment to the exercise

26. *See supra* note 21.

27. For cases which have followed this reasoning, see, e.g., Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979); Brewer v. State Dep't of Motor Veh., 23 Wash. App. 412, 595 P.2d 949 (1979). Some state courts, however, have found that the accused has a right to consult with an attorney before submitting to chemical testing based on state statute. *See, e.g.*, Gooch v. Spardling, 523 S.W.2d 861 (Mo. Ct. App. 1975). For examples of statutes which confer such a right of refusal, see CONN. GEN. STAT. ANN. § 14-227b (West Supp. 1982); S.D. CODIFIED LAWS ANN. § 32-23-10 (Supp. 1982).

28. *See* Heles v. State, 530 F. Supp. 646, 651 (D.S.D. 1982).

29. *See* NEB. REV. STAT. § 39-669.08 (Cum. Supp. 1982).

of an individual's constitutionally guaranteed right to counsel. Assuming that the courts adopt the above reasoning and that the threshold requirement—i.e., the proceeding must be criminal in nature—is met, the question now is whether the fifth and sixth amendments afford a right to counsel prior to the accused's submission to chemical testing.

B. The Fifth Amendment Right

The fifth amendment privilege against self-incrimination was interpreted in *Miranda*[30] as requiring a right to counsel for criminal suspects only when the suspect is in custody and about to be subjected to interrogation.[31] Since DWI is a criminal offense (making the individual being held for the violation a criminal suspect), and since almost all DWI statutes require the accused to be in custody before he is required to submit to the chemical testing,[32] the question left unresolved is whether the required submission to chemical testing can be considered to be an interrogation within the meaning of the fifth amendment. The Supreme Court, in *Schmerber v. California*,[33] disposed of this issue, holding that admission of the results of a blood test sample, forcibly extracted from a driver without his consent, did not violate his privilege against self-incrimination.[34] The Court emphasized that "the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature."[35] Finding that there was no testimonial compulsion in being required to submit to blood tests, the *Schmerber* Court explained the distinction as being that "the privilege is a bar against compelling 'communications' or 'testi-

30. Miranda v. Arizona, 384 U.S. 436 (1966).

31. The *Heles* court noted that the *Miranda* warnings were read to Heles, but the court expressed concern that such a reading could mislead the accused into believing that he had a right to consult an attorney before submitting to the chemical analysis. Other courts have expressed similar concerns and have gone so far as to reverse the administrative license revocation where a reading of the *Miranda* warnings (prior to conducting the chemical analysis) was shown to have misled the accused and was a factor in the accused's decision to refuse submission. *See, e.g.*, Rees v. Dep't of Motor Veh., 8 Cal. App. 3d 746, 87 Cal. Rptr. 456 (1970); Calvert v. State Dep't of Rev., Motor Veh. Div., 184 Colo. 214, 519 P.2d 341 (1974); State v. Severino, 56 Hawaii 378, 537 P.2d 1187 (1975); Swan v. Dep't of Pub. Safety, 311 So. 2d 498 (La. App. 1975); Wiseman v. Sullivan, 190 Neb. 724, 211 N.W.2d 906 (1973).

32. *See, e.g.*, State v. Brunner, 211 Kan. 596, 507 P.2d 233 (1973); Prigge v. Johns, 184 Neb. 103, 165 N.W.2d 556 (1969), *affirmed on appeal from remand* 186 Neb. 761, 186 N.W.2d 497 (1971); State v. Weatherell, 82 Wash. 2d 865, 514 P.2d 1069 (1973).

33. 384 U.S. 757 (1966).

34. *See id.* at 761.

35. *Id.*

mony' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."[36]

Applied in the DWI setting under the implied consent statutes, many courts have used the reasoning of *Schmerber* to hold that the denial of an opportunity to consult an attorney before submitting to chemical testing does not violate the accused's privilege against self-incrimination.[37] It would seem, therefore, that the fifth amendment right to counsel would not apply to such DWI proceedings under the implied consent statutes. Thus, if such a right is to exist, it must be found within the scope of the sixth amendment.

C. The Sixth Amendment Right

As discussed previously, the sixth amendment right to counsel comes into existence only after a criminal prosecution has been initiated, and will attach only to those criminal proceedings which constitute "critical stages" of the criminal action against the accused.[38] Whether a criminal prosecution is deemed to begin at the time the defendent is required to submit to chemical testing will depend, to a great extent, on whether the court labels the submission to such testing as a "critical stage" of a prosecution. Thus, the latter issue will be discussed first.

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36. *Id.* at 764. Recently, in South Dakota v. Neville, 103 S.Ct. 916 (1983), the Supreme Court held that the admission of the driver's refusal to submit to testing does not violate his fifth amendment privilege against self-incrimination.

37. *See, e.g.*, Clay v. Riddle, 541 F.2d 456 (4th Cir. 1976); Warren v. State, 385 A.2d 1376 (Del. 1978); State v. Oleson, 180 Neb. 546, 143 N.W.2d 917 (1966); State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970). *But see* Prideaux v. State Dep't of Pub. Safety, 247 N.W.2d 385 (Minn. 1976).

The Nebraska Supreme Court has strictly adhered to the *Schmerber* rational in denying a fifth amendment right to counsel in DWI cases. In State v. Oleson, 180 Neb. 546, 143 N.W.2d 917 (1966), the court held that a driver's fifth amendment privilege against self-incrimination did not apply to the chemical testing required by the implied consent statute:

> A blood or urine test is not a comparable class with confessions or incriminating statements . . . . The giving of the sample pursuant to the statute does not involve a question of . . . self-incrimination . . . . The privilege against self-incrimination is limited to the giving of oral testimony and does not extend to defendant's body, nor to secretions therefrom, nor to the introduction of the chemical analysis in evidence.

Id. at 550, 143 N.W.2d at 919-20. In a later decision, the Nebraska court held that the *Miranda* warnings, providing a right to counsel, applied only to custodial interrogations and had no application to a proper request for submission to testing under the implied consent statute. Wiseman v. Sullivan, 190 Neb. 725, 211 N.W.2d 906 (1973).

38. *See supra* section II(B) of text.

1. Submission to Chemical Analysis as a Critical Stage

Although most courts have dismissed the sixth amendment right to counsel argument (i.e., that the sixth amendment provides the accused a right to counsel before he is required to submit to chemical testing in a DWI proceeding), on the grounds that chemical tests involve little likelihood of inaccuracy or susceptibility to manipulation, and that the presence of an attorney is not essential to ensure that the defendant's right to a fair trial is protected,[39] such reasoning employs an extremely narrow view of what constitutes a critical stage of the prosecution. The Supreme Court has defined "critical stage" broadly to include "those pretrial procedures that would impair defense on the merits if the accused is required to proceed without counsel."[40] If, as the Supreme Court suggests, the results of the proceedings and the impact of those results on the accused are taken into consideration in determining whether the decision to submit to chemical testing should be deemed to be "critical," it would be difficult to imagine how such proceedings could not qualify as a critical stage.

First, the results of the tests are admissible as evidence in court and may be used to establish a prima facie case against the accused.[41] The fact that the accused refused to take the test may be used as evidence against him, as well.[42] Clearly, the decision of whether or not to submit to chemical testing will have a great bearing on the type of evidence which will be presented against the accused at trial.

In addition, the decision of whether to submit to testing will have a large impact on the type and the amount of liability to which the defendant will be subjected. A simple refusal to submit to testing will probably mean the potential revocation of the accused's license (triggering the attendant hardships which might result from the loss of such driving privileges).[43] However, if the accused submits to the test and fails, he not only incurs an increased possibility of being convicted of the DWI crime, but he may also, depending on the circumstances and facts surrounding his arrest, leave himself open to other civil and criminal penal-

39. *See, e.g.*, United States v. Wade, 388 U.S. 218, 228 (1967) (dictum); Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971).

40. Gerstein v. Pugh, 420 U.S. 103, 122 (1975).

41. *See* State v. Dush, 214 Neb. 51, 332 N.W.2d 678 (1983); State v. Gerber, 206 Neb. 75, 291 N.W.2d 403 (1980).

42. *See* South Dakota v. Neville, 103 S.Ct. 916 (1983).

43. *See* Bell v. Burson, 402 U.S. 535 (1971) (Because an operator's license has become essential to the pursuit of livelihood in today's society, the Court indicated that the possession of the license is a property right which may not be taken away without due process of law.).

ties.[44] Thus, even though the driver's refusal to submit to the chemical analysis may result in license revocation and other sanctions under the implied consent statute, one can certainly imagine situations where refusal might be to the driver's advantage.[45]

As indicated, the consequences resulting from the accused's decision to submit, or not submit, to chemical analysis are both complex and far-reaching.[46] The assistance of a knowledgeable attorney is crucial at this point, not only because of the variety and magnitude of the consequences resulting from the decision to submit, but also because the decision itself is irreversible and, therefore, has the effect of foreclosing various options which might otherwise be available to the accused in subsequent proceedings.[47] The Supreme Court has ruled that two of the primary factors to be considered when determining whether a particular confrontation constitutes a critical stage of the proceeding against the accused are whether the confrontation would result in "potential substantial prejudice" to the defendant's rights, and whether the presence of counsel would be advantageous in preventing such prejudice.[48] Since the driver who is arrested for DWI may be disoriented, bewildered, and frightened by the confrontation (and is probably un-

44. Numerous courts have held that evidence of intoxication obtained from chemical testing may be used to support the requisite disregard for human life in a prosecution for motor vehicle homicide. *See, e.g.*, Clayton v. State, 359 So. 2d 419 (Ala. Crim. App. 1978); Lupro v. State, 603 P.2d 468 (Alaska 1979); Gooch v. State, 155 Ga. App. 708, 272 S.E.2d 572 (1980); State v. Sommers, 201 Neb. 809, 272 N.W.2d 367 (1978). Evidence of intoxication may also be used in subsequent criminal prosecutions, *see, e.g.*, State v. Coates, 17 Wash. App. 415, 563 P.2d 208 (1977) (for criminal negligence); Royle v. State, 151 Ga. App. 85, 258 S.E.2d 921 (1979) (for reckless driving); Kirkendall v. State, 265 Ark. 853, 581 S.W.2d 341 (1979) (for failure to stop and render aid); State v. Corpuz, 49 Or. App. 811, 621 P.2d 604 (1980) (for assault). Moreover, the conviction for DWI has been held to be admissible as evidence in subsequent civil action arising out of the same facts. *See, e.g.*, Scott v. Robertson, 583 P.2d 188 (Alaska 1978).

45. For example, if the driver had been involved in an alcohol related accident which resulted in a death, the driver might well consider refusing to submit to testing. The Nebraska Supreme Court held in *State v. Sommer*, 201 Neb. 809, 272 N.W.2d 637 (1978), that the results of chemical testing under the implied consent statute are admissible against the driver in a later trial for automobile manslaughter. Thus, the driver would be faced with a choice between risking criminal DWI penalties for refusal to submit to chemical testing, or an increased possibility of conviction for automobile manslaughter.

46. *See supra* notes 6-12 and accompanying text.

47. As the court stated in Heles v. South Dakota, 530 F. Supp. 646 (D.S.D. 1982): "The arrested person must make a critical and binding decision, which will affect him or her in subsequent legal proceedings . . . . A decision under these circumstances is just as critical and equally as binding as the decision to make a statement following an arrest." *Id.* at 652.

48. United States v. Wade, 388 U.S. 218, 227 (1967). *See also supra* note 20 and accompanying text.

aware of all the possible ramifications of the decision to submit to chemical analysis), the courts should conclude that counsel's assistance in weighing the various factors and alternatives, and in preserving the defendant's options in the later proceeding, would indeed help the accused make an informed, rational decision and thus prevent "substantial potential prejudice" to his rights. Therefore, a request for submission to chemical analysis should be deemed a critical stage of the criminal DWI proceeding, and the accused should be entitled, under the sixth amendment, to consult with an attorney before making the decision to submit.

2. Submission to Chemical Analysis as a Stage of Criminal Prosecution

In *Kirby v. Illinois*[49] the Supreme Court held that the sixth amendment right to counsel may attach to pretrial confrontations or proceedings, but only after the state commits itself to the prosecution of the accused. Thus, the only remaining stumbling block to the recognition of a sixth amendment right to counsel before submission to testing is whether the state, at the time of the request for submission, has committed itself to the prosecution of the accused.

The Court in *Kirby* found that the state commits itself to a criminal prosecution "at the initiation of [the] judicial proceeding," at which point the suspect is "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[50] The Court emphasized that this point "marks the commencement of a 'criminal prosecution' to which alone the explicit guarantees of the Sixth Amendment are applicable."[51]

Although most state courts considering the issue have held that criminal prosecution begins after the accused's decision to take the test, reasoning that a judicial criminal proceeding is not initiated until the government commits itself to the prosecution of the accused, and that this commitment is not made until after the chemical tests are taken, a contrary result is indicated by the Supreme Court.[52] The Supreme Court has consistently employed the critical stage analysis to determine at what point a sixth amendment right to counsel attaches.[53] As analyzed above, the decision of whether or not to submit to chemical analysis should, in fact, be found to be a critical stage of the proceedings against the

49. 406 U.S. 682 (1972).
50. *Id.* at 689.
51. *Id.* at 689-90.
52. Powell v. Alabama, 287 U.S. 45 (1982). *See supra* note 19.
53. *See* cases cited *supra* note 21.

accused. Furthermore, it would seem apparent that the driver, at that point, is certainly "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[54] Therefore, considering the nature of the sixth amendment right to counsel and the protections it guarantees, the better interpretation is that the criminal prosecution against the accused in a DWI proceeding begins at the time he is asked to submit to the chemical analysis, and that the accused must be afforded the opportunity to consult with an attorney before responding to that request.

D. Administrative Concerns

Affording the accused a right to counsel before forcing him to respond to a request for his submission to chemical testing does indeed raise some concern as to the practicality of the administration of such a right. These concerns are now addressed to determine their validity.

One of the primary, and most obvious, concerns with granting a right to counsel in DWI cases is that the level of alcohol in the bloodstream diminishes markedly between the time of the arrest and the time it takes for the attorney to be contacted and come to the accused's assistance. This time difference reduces the reliability of the tests as indicators of the amount of alcohol content in the accused's body during the operation of the vehicle. While it is true that some dissipation of the alcohol in the bloodstream will occur during the delay, by statutorily limiting the amount of time which the accused has to secure the presence of his attorney, the danger of significant alterations in the alcohol content of the accused during the lapse of time can be avoided. Alternatively, the courts could interpret the sixth amendment right to counsel as being a limited right of the accused to secure the presence of an attorney within a "reasonable time," thus preserving the ability of the courts to take into consideration the individual facts and circumstances of the case. In any event, some time limitation on the right to counsel would seem to be warranted.

A second concern deals with the administrative problems which would arise when the accused does not know an attorney who would be willing to represent him in the DWI matter, or when an attorney who agrees to represent the accused cannot personally be available for the accused within the time limits imposed. The Washington court in *State v. Fitzsimmon*[55] addressed the problem alluded to in the first situation, suggesting that if the accused does

54. Kirby v. Illinois, 406 U.S. 682, 689 (1972).
55. 93 Wash. 2d 436, 610 P.2d 893 (1980).

not know an attorney who would represent him, the police officer could very easily supply the defendant with a list of criminal defense attorneys (including the public defender) and their phone numbers. As for the second situation, where the accused's attorney cannot immediately come to his assistance, the court in *Fitzsimmon* suggested that, due to the nature of the offense and the need for prompt assistance, the right to consult with an attorney could be satisfied through a phone conversation, rather than having the attorney appear in person. As stated by the *Fitzsimmon* court: "The unique nature of the offense of driving while under the influence and the circumstances under which the defendant is likely to be arrested and charged both create the constitutional right and limit the type of effort the state must make to avoid violating that right."[56] Thus, it would seem that neither of these situations would cause the administrative havoc predicted.

A final concern is the issue of whether counsel must be provided by the state to indigent suspects. In *Argersinger v. Hamlin*,[57] the Supreme Court held that "no person could be imprisoned, regardless of the degree of seriousness of a crime, unless counsel has been either been appointed or properly waived."[58] However, in a later decision, *Scott v. Illinois*,[59] the Court held that the sixth amendment does not require a state to provide counsel for an indigent defendant charged with a crime for which imprisonment upon conviction is authorized but not imposed; rather, the Constitution requires only that no indigent should be sentenced to a term of imprisonment unless the state has afforded him the right to the assistance of appointed counsel. Thus, if the applicable statute provides for imprisonment, and it is likely that the defendant will receive that penalty, counsel should be appointed; yet, this is not the case in a majority of situations.[60]

After addressing the major concerns dealing with the recognition of a right to counsel in DWI cases, it must be concluded that the problems which such a right would foster have been overemphasized. Certainly such problems are not insurmountable and should not be found to outweigh the importance of providing the

56. *Id.* at 447, 610 P.2d at 600.
57. 407 U.S. 25 (1972).
58. *Id.* at 40-41.
59. 440 U.S. 367, 373-74 (1979).
60. *See generally Constitutional Law—Sixth Amendment—Indigent Criminal Defendant's Right to Assigned Counsel—Misdemeanor—Scott v. Illinois*, 18 DUQ. L. REV. 307 (1980).

driver with an opportunity to consult with an attorney before making the decision to submit to chemical testing.

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