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D.W.I. Suspects Do Not Have Right to Consult with Counsel before Intoxilyzer Test under Texas Constitution because Test Is Not a Critical Stage in Proceedings.

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CASENOTE

CRIMINAL PROCEDURE—Right to Counsel—D.W.I. Suspects Do Not Have Right To Consult With Counsel Before Intoxilyzer Test Under Texas Constitution Because Test Is Not A "Critical Stage" In Proceedings.

Forte v. State,
759 S.W.2d 128 (Tex. Crim. App. 1988).

While driving down a public street on January 10, 1984, Edward Earle Forte ran a stop sign, struck another vehicle, and eventually came to rest in a ditch after losing control of his car.[1] The officer dispatched to the scene of the accident, Lt. Crawford, found Forte apparently inebriated and arrested him for suspicion of driving while intoxicated (D.W.I.).[2] Forte was taken to jail and informed of his Miranda rights.[3] Crawford asked Forte to take an intoxilyzer test and informed him of the penalties[4] for refusing to do so.[5] Forte, then, requested an attorney.[6] Crawford refused Forte's request and

1. Forte v. State, 707 S.W.2d 89, 90 (Tex. Crim. App. 1986).

2. *Id.* at 90. Forte was unable to stand, speaking with a slur, and Crawford smelled alcohol on his breath. *Id.* The zipper on Forte's pants was open and there was a dark spot in the crotch area. *Id.* In Forte's car, Crawford saw a partially empty whiskey bottle and an empty wine bottle. *Id.*

3. *Id.* *See generally* Miranda v. Arizona, 384 U.S. 436, 479 (1966)(police must inform accused of constitutional rights before beginning interrogation).

4. *See* TEX. REV. CIV. STAT. ANN. art. 6701l-5, § 2(b)(Vernon Supp. 1989). In pertinent part, the statute provides that a refusal to take the test results in the automatic suspension of the suspect's driving permit. *Id.* The statute further provides that the refusal to take the test may be admissible at trial. *Id.*

5. *See* Forte v. State, 707 S.W.2d 89, 90-91 (Tex. Crim. App. 1986)(en banc). In all, Forte was given both his Miranda and "breath test" warnings three times. *Id.* at 91. These multiple warnings resulted from the movement of Forte to another jail in order to administer the intoxilyzer test. *Id.*

6. *Forte*, 707 S.W.2d at 91. It was not until the third set of warnings were given that Forte requested an attorney. *Id.*

Forte subsequently provided a sample of his breath for analysis.[7] Forte was charged with driving while intoxicated after the intoxilyzer unit registered a blood alcohol level of 0.10 percent.[8] Forte was convicted at trial, but the Fort Worth Court of Appeals reversed his conviction.[9] The Fort Worth court held that evidence of the intoxilyzer test results should not have been admitted at trial because the police denied Forte his limited right to counsel under the sixth amendment to the United States Constitution.[10] The Court of Criminal Appeals affirmed in part,[11] reversed in part,[12] and remanded to the court of appeals for consideration of whether Forte's right to counsel had been denied under state law.[13] On remand, the court of appeals held that the Texas Constitution did not provide the appellant with the right to consult counsel prior to the administration of an intoxilyzer test.[14] The Court of Criminal Appeals granted Forte's petition for discretionary review to decide whether article I, section 10 of the Texas Constitution provided a right to consult with counsel before the administration of an intoxilyzer test.[15]

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7. *Id.*

8. *Id.* For a detailed explanation of how an intoxilyzer unit operates, see, TRICHTER & LEWIS, TEXAS DRUNK DRIVING LAW 29-55 (vol. 1 1988); *see also* State v. Tiernan, 206 N.W.2d 898, 900-01 (Iowa 1973)(description of intoxilyzer unit). TEX. REV. CIV. STAT. ANN. art. 6701l-5, § 3(4)(A),(B) states that a person is legally intoxicated when the blood alcohol concentration is or exceeds 0.10% or when physical impairment is caused by alcohol or a controlled substance.

9. Forte v. State, 686 S.W.2d 744, 756 (Tex. App.—Fort Worth 1985), *aff'd in part, rev'd in part*, 707 S.W.2d 89, 96 (Tex. Crim. App. 1986).

10. Forte v. State, 686 S.W.2d 744, 756 (Tex. App.—Fort Worth), *aff'd in part, rev'd in part*, 707 S.W.2d 89, 96 (Tex. Crim App. 1986). Forte raised eight grounds of error on appeal. *Id.* at 745. The court overruled all of them except his claim of denial of his right to counsel. *Id.* at 748, 751, 752, 756.

11. Forte v. State, 707 S.W.2d 89, 96 (Tex. Crim. App. 1986) (D.W.I. statute held constitutional under sixth amendment).

12. *Id.* The court held that the sixth amendment right to counsel does not attach until formal adversary judicial proceedings have commenced against the defendant. *Id.* at 91; *see also* Moran v. Burbine, 475 U.S. 412, 428 (1986)(right to counsel first attaches at time of formal charging); United States v. Gouveia, 467 U.S. 180, 187 (1984)(initiation of criminal proceedings marks point at which right to counsel attaches); Kirby v. Illinois, 406 U.S. 682, 688 (1972)(plurality opinion)(right to counsel attaches when adversary judicial proceedings initiated against accused).

13. Forte v. State, 707 S.W.2d 89, 96 (Tex. Crim. App. 1986). Forte claimed that article I, sections 3, 10, & 19 of the Texas Constitution and articles 1.04, 1.05, and 38.23 of the Texas Code of Criminal Procedure provided him with the right to counsel before taking the intoxilyzer test. *Id.* at 92.

14. Forte v. State, 722 S.W.2d 219, 221 (Tex. App.—Fort Worth), *aff'd*, 759 S.W.2d 128, 139 (Tex. Crim. App. 1988). The court of appeals narrowed the issue solely to Forte's right to counsel under article I, section 10 of the Texas Constitution and eliminated all other state law claims. *Id.*

15. Forte v. State, 759 S.W.2d 128, 129 (Tex. Crim. App. 1988).

Held—*Affirmed*.[16] D.W.I. suspects do not have a right to consult with counsel before an intoxilyzer test under the Texas Constitution because the test is not a "critical stage" in the proceedings.[17]

The guarantee of the right to counsel as provided by the sixth amendment to the United States Constitution ensures that the defendant will have effective assistance of counsel at his trial.[18] In order for the accused to have a fair trial, the assistance of counsel is necessary at certain critical pretrial events.[19] Once an indictment is issued, the right to counsel attaches.[20] However, the right to counsel at pre-indictment proceedings is determined by whether the proceeding is deemed to be a "critical stage."[21] A "critical stage" occurs when the state has committed itself to prosecute the defendant, and the proceeding is such that the accused would be unfairly

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16. *Id.* at 139.

17. *Id.*

18. *See* U.S. CONST. amend. VI. The sixth amendment provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.*; *see also* United States v. Wade, 388 U.S. 218, 224 (1967)(counsel required at any "critical stage" where accused's right to fair trial might be diminished). The United States Supreme Court in *Gideon v. Wainwright* established the right to counsel for indigent defendants in state criminal trials. 372 U.S. 335, 340 (1963). *Gideon* declared that the accused required the "guiding hand of counsel at every step of the proceedings against him." *Id.* at 345 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)). In *Powell*, the Court stated that counsel was necessary at "the most critical period of the proceedings . . . from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important." *Powell*, 287 U.S. at 57.

19. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1, 9-10 (1970)(preliminary hearing); White v. Maryland, 373 U.S. 59, 60 (1963)(hearing before magistrate to enter any plea); Hamilton v. Alabama, 368 U.S. 52, 54 (1961)(pretrial arraignment).

20. *See* Massiah v. United States, 377 U.S. 201, 205-06 (1964)(post-indictment interrogations without counsel violate sixth amendment). In *Massiah*, a defendant awaiting trial made incriminating statements to a police informant who was wearing a transmitting device thus allowing police to intercept the conversation. *Id.* at 203. The Supreme Court held that the actions of the informant and police constituted an interrogation which was impermissible when an indictment had issued, and counsel was not present. *Id.* at 206.

21. *See* United States v. Wade, 388 U.S. 218, 227 (1967)(post-indictment lineup deemed a "critical stage"). The Supreme Court recognized the complex and sophisticated nature of modern law enforcement and stated, "[T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial to a mere formality." *Id.* at 224. However, not all pretrial events are considered to be critical. *Compare* Buchanan v. Kentucky, __ U.S. __, __, 107 S. Ct. 2906, 2919, 97 L. Ed.2d 336, 356 (1987)(psychiatric interviews conducted pursuant to joint motion by defendant's counsel and the prosecution not critical stage) *with* Estelle v. Smith, 451 U.S. 454, 470-71 (1981)(court ordered psychiatric examination conducted without presence of counsel held to be critical stage). Other pretrial proceedings have been ruled to be non-critical. *See, e.g.*, United States v. Ash, 413 U.S. 300, 321 (1973)(photographic lineup not critical stage); Kirby v. Illinois, 406 U.S. 682, 690 (1972)(pre-indictment lineup not critical stage); Schmerber v. California, 384 U.S. 757, 765-66 (1966)(taking blood sample by police over objection of accused not violative of sixth amendment).

prejudiced at trial if denied counsel.[22] Therefore, if the two prerequisites of certain prosecution and prejudice to trial rights have been met, federal law requires that the accused receive counsel.[23]

Although the United States Constitution provides the minimum protection afforded to an individual, the states are free to further protect individual rights within their body of state law.[24] Article I, section 10 of the Texas

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22. Kirby v. Illinois, 406 U.S. 682, 689 (1972). In *United States v. Wade*, the Supreme Court left open the question of whether investigatory stages could be considered a critical stage which necessitated counsel for the accused. *See* Note, *Criminal Procedure—Right to Counsel—Miranda Warnings Sufficient to Inform Defendant of Sixth Amendment Right to Counsel for Postindictment Interrogations*, 20 ST. MARY'S L.J. 473, 476-77 (1989). In *Kirby*, the Court foreclosed the possibility that investigations are critical stages when it ruled that the right to counsel does not attach until it is clear that the accused will be prosecuted. *See Kirby*, 406 U.S. at 688. The Court reasoned that it is only when "criminal prosecutions" have been initiated that the defendant must confront the adversarial judicial system. *Id.* To meet that confrontation, the defendant must have counsel. *Id.* at 689-90. Thus, *Kirby* established a "bright line rule" to determine when the right attaches. Forte v. State, 759 S.W.2d 128, 131 (Tex. Crim. App. 1988); *see also* United States v. Wade, 388 U.S. 218, 223-27 (1967)(explaining history of sixth amendment cases).

The case of *Coleman v. Alabama* provided the Supreme Court with the vehicle to further set boundaries of a critical stage. *See* Coleman v. Alabama, 399 U.S. 1, 9-10 (1970). In *Coleman*, a preliminary hearing was held solely to determine whether sufficient evidence existed to warrant the presentation of the evidence to the grand jury and to fix bail if the offense was one which so permitted. *Id.* Any testimony produced at the hearing was inadmissible against the accused. *Id.* The Supreme Court held that the presence of counsel was required to "protect the indigent accused against an erroneous or improper prosecution." *Id.* The Court gave four reasons in support of its holding. *Id.* at 9. First, counsel's ability to effectively examine and cross-examine witnesses could illuminate fatal defects in the prosecution's case which could lead the magistrate to release the accused. Second, an attorney may also gather testimony which could be used to impeach witnesses or be put forward at trial in the event a witness fails to appear. Third, counsel can begin discovery to prepare a proper defense. *Id.* Finally, counsel can present effective arguments at the preliminary hearing concerning the propriety of bail or a psychiatric examination for the accused. *Id.*

The Supreme Court has also held that entering a plea at a preliminary hearing requires the assistance of counsel. White v. Maryland, 373 U.S. 59, 60 (1963). In *White*, the defendant at a preliminary hearing before a magistrate entered a guilty plea without the aid of counsel. *Id.* Upon the appointment of counsel, the defendant changed his plea to "not guilty by reason of insanity." At trial the state entered into evidence the original plea of "guilty" and the defendant was convicted. The Supreme Court stated, "Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently." *Id.* (quoting Hamilton v. Alabama, 368 U.S. 52, 55 (1961)).

23. *See Kirby*, 406 U.S. at 689-90 (right to counsel attaches when prosecution is certain); United States v. Wade, 388 U.S. 218, 227 (1967)(right to counsel attaches when necessary to prevent prejudice to trial rights of accused).

24. *See* Oregon v. Hass, 420 U.S. 714, 719 (1975)(states free to provide greater protections against police actions than those required by federal constitution); Lucas v. United States, 757 S.W.2d 687, 692 (Tex. 1988)(Texas Constitution provides right of access to courts not found in federal Constitution). The Texas Supreme Court noted that the Texas Constitution contains an "open courts" guarantee which dates to the founding of the republic and to

Constitution provides, in part, "In all criminal prosecutions the accused . . . shall have the right of being heard by himself or counsel, or both."[25] Since the founding of the Texas Republic in 1836, the citizens of Texas have adhered to the concept of ordered liberty unrestrained by governmental interference.[26] Article I, section 10 contains a panoply of rights intended to protect the accused including the right to confront witnesses, the right to a jury trial, and the right to counsel.[27] The unique history of Texas has fostered the public's desire to strongly protect the rights of the criminally accused.[28] The Texas Legislature further solidified the rights of its citizens by

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the Magna Carta. *Id.* at 690. In expounding on the protections of the Texas Constitution, the Texas Supreme Court has stated:

> State constitutions can and often do provide additional rights for their citizens. The federal constitution sets the floor for individual rights; state constitutions establish the ceiling. Recently, state courts have not hesitated to look to their own constitutions to protect individual rights. This court has been in the mainstream of this movement.

LeCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986); *see also* Gillett v. State, 588 S.W.2d 361, 367 (Tex. Crim. App. 1979)(Roberts, J., dissenting)(states may grant greater protections than federal constitution); Olson v. State, 484 S.W.2d 756, 762 (Tex. Crim. App. 1969)(federal Constitution only sets minimum safeguards for individual rights and when interpreting Texas Constitution courts must follow own interpretation).

25. TEX. CONST. art. I, § 10. The right to counsel has been embodied in all Texas Constitutions. TEX. CONST. art. I, § 10 interp. commentary (Vernon 1984).

26. *See* J. HARRINGTON, THE TEXAS BILL OF RIGHTS: A COMMENTARY AND LITIGATION MANUAL 19 (1987)(framers of Texas Constitution had anti-government sentiments).

27. *See* TEX. CONST. art. I, § 10 (listing rights of accused). The framers of the first Texas Constitution incorporated into a single paragraph all of the protections granted to the accused. *See* TEX. CONST. DECLARATION OF RIGHTS para. 6 (1836). The present constitution reflects those same rights in much the same form. *Compare* TEX. CONST. art. I, § 10 (listing rights of accused) *with* TEX. CONST. DECLARATION OF RIGHTS para. 6 (1836)(rights of accused listed in paragraph form).

28. *See* TEX. CONST. PREAMBLE, interp. commentary (Vernon 1984)(Mexico deprived Texas of basic rights). Mexico had promised Texas a separate state constitution which was never granted. *Id.* Instead, Texans were governed by laws written in Spanish and were denied even the basic right to a jury trial. *Id.* After its period of independent self-rule and eventual statehood, Texas was subjected to the devastation of the Civil War and the abusive policies of the Reconstruction. *Id.* Each of these events contributed to the strong commitment to individual liberty. *See* Ponton, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 94, 104 (1988)(Texas Bill of Rights unique from others because of unique Texas experience); *see also* Long v. State, 742 S.W.2d 302, 309 (Tex. Crim. App. 1987)(right of confrontation guaranteed since founding of republic); Brown v. State, 657 S.W.2d 797, 799 (Tex. Crim. App. 1983)(Texas has more protective constitutional provisions than federal constitution); Milton v. State, 549 S.W.2d 190, 192 (Tex. Crim. App. 1977)(state statute authorizing warrantless arrest more restrictive on police officers than federal constitution); Texas Nat'l Guard Armory Bd. v. McGraw, 132 Tex. 613, 624, 126 S.W.2d 627, 634 (1939)(Texas Constitution to be liberally construed); Terrell v. Middleton, 187 S.W. 367, 372 (Tex. Civ. App.—San Antonio 1916)(Texas Constitution should be liberally construed as opposed to strict interpretation of federal Constitution), *writ ref'd per curiam*, 191 S.W. 1138, 1150 (1917); Mellinger v. City of

enacting a specific statute to prevent the denial of counsel to the accused.[29] Likewise, the Texas Court of Criminal Appeals has adamantly guarded this right.[30] However, with the advent of the automobile, the desire to protect individual rights had to be balanced against the responsibility of protecting

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Houston, 68 Tex. 37, 43, 3 S.W. 249, 252 (1887)(citizens of Texas given greater protections in state constitution than federal constitution).

Texas preceded the United States Supreme Court when it imposed greater restrictions on police seeking to obtain a search warrant. *See* Chapin v. State, 107 Tex. Crim. 477, 481-84, 296 S.W. 1095, 1097-99 (1927)(probable cause may not be based on mere conclusions). The decision in *Chapin* defining the requirements of probable cause came thirty years before the United States Supreme Court reached the same result when defining probable cause under the federal constitution. *See* Eisenhauer v. State, 754 S.W.2d 159, 172 n. 11 (Tex. Crim. App. 1988)(Clinton, J., dissenting).

29. *See* TEX. PENAL CODE 1911, art. 1046 (Complete Texas Statutes-Vernon, 1920)(White's Ann. P.C. art. 625). The statute read as follows:

> If any officer or other person having the custody of a prisoner in this state shall willfully prevent such prisoner from consulting or communicating with counsel, or from obtaining the advice or services of counsel in the protection or prosecution of his legal rights, he shall be punished by imprisonment in the county jail not less than six months, and by fine not exceeding one thousand dollars.

Id; *see also* Law of Nov. 15, 1864, ch. 19, § 1, 1864 Tex. Gen. Laws 15 (Second Extra Session), 5 H. Gammel, Laws of Texas 821 (1898). This statute, which grants extra protections to the accused, was enacted while Texas was involved in the Civil War. *Id.* The protections of the statute are now embodied in Penal Code section 39.02 which prohibits official oppression. TEX. PENAL CODE ANN. § 39.02 (Vernon 1974)(public servant commits crime if knowing conduct to be unlawful, he deprives another of a right); *see also* TEX. PENAL CODE ANN. § 39.021 (Vernon 1989)(prohibiting violation of civil rights of prisoner).

30. *See* Hamilton v. State, 68 Tex. Crim. 419, 427, 153 S.W. 331, 336 (1913)(Texas constitution guarantees that accused has right to consult with counsel). In *Hamilton*, the Court of Criminal Appeals discussed article I, section 10, by saying:

> It is not necessary that the party desiring counsel should be preparing a defense against some accusation after an indictment found or after arrest. The statute is broader and fully comprehends every possible situation in which an accused person or person under arrest or not under arrest desires to consult with counsel, or communicate with counsel, or obtain advice or services of counsel in the protection of his rights, or even supposed legal rights.

Id. at 427, 153 S.W. at 336; *see also Ex Parte* Brown, 38 Tex. Crim. 295, 304, 42 S.W. 554, 556 (1897)(statute prohibiting cold storage of liquor held violative of Texas Constitution as interference with property rights). The Court of Criminal Appeals speaking of the Texas Constitution stated:

> [The] Bill of Rights' lays down the ancient limitations which have always been considered essential in a constitutional government . . . and there are scattered through the instrument some other express provisions in restraint of legislative authority. But the affirmative prescriptions and general arrangements of the constitution are far more fruitful of restraints upon the legislative power.

Brown, 38 Tex. Crim. at 304, 42 S.W. at 556; *see also* Ellis v. State, 149 Tex. Crim. 583, 586, 197 S.W.2d 351, 353 (1946)(right to counsel guarantees right of consultation in preparation for trial); Turner v. State, 91 Tex. Crim. 627, 632, 241 S.W. 162, 164 (1922)(police refusal to grant private consultation between attorney and accused violated state constitution).

motorists from the drunken driver.[31]

As early as 1917, Texas made the act of driving while intoxicated a criminal offense,[32] and by 1923 it had been elevated to felony status.[33] In 1969, Texas incorporated into its D.W.I. statute an implied consent provision.[34] The term "implied consent" is a legal fiction which presupposes that every person who drives upon a public road consents to the administration of an intoxilyzer test when arrested for suspicion of driving while intoxicated.[35] Such statutes began to emerge in state legislation after the United States Supreme Court's 1952 ruling in *Rochin v. California*[36] appeared to prohibit nonconsensual searches by police.[37] As states wrestled with increasing num-

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31. *See* Lightner, *Victims of Crime: M.A.D.D. at the Courts, (Mothers Against Drunk Driving)*, 23 JUDGES J. 36, 39 (Spring 1984)(increased public awareness resulting in nationwide movement to prevent drunk driving). Studies indicate that the risk associated with drunk driving is relatively small. *See* H. ROSS, DETERRING THE DRUNK DRIVER 107 (rev. ed. 1984). The chances of an accident occurring while driving intoxicated are 4.5 in 10,000. *Id.* Nevertheless, the chances of a sober driver having an accident are .00016 which is nearly three times less than the drunk driver. However, this low risk to individuals is deceptive when considered with the major social harm due to the fact that some intoxicated drivers present a greater danger than others. Lanza-Kaduce & Bishop, *Legal Fictions and Criminology: The Jurisprudence of Drunk Driving*, 77 J. CRIM. L. & CRIMINOLOGY 358, 364, n. 35 (1986). It is estimated that more than half of all traffic deaths on the nation's highways are alcohol-related. *Presidential Commission on Drunk Driving*, 1 (1983). Given these statistics, at least two commentators urge the enactment of policies which attempt group control rather than those that attempt to regulate individual control which seems ineffective. *See* Lanza-Kaduce & Bishop, *Legal Fictions and Criminology: The Jurisprudence of Drunk Driving*, 77 J. CRIM. L. & CRIMINOLOGY 358, 374 (1986). Laws that cover an entire group, for example, drinking age statutes, have much greater effect than individual control statutes such as D.W.I. laws. *Id.* at 376.

32. *See* Act of April 9, 1917, ch. 207, § 13, 1917 Tex. Gen. Laws 474, 477 (driving while intoxicated on public road outlawed), *repealed by* Act of May 28, 1923, ch. 23, § 3, 1923 Tex. Gen. Laws 56.

33. *See* Act of May 28, 1923, ch. 23, § 2, 1923 Tex. Gen. Laws 56 (felony punishable by up to 2 years in prison for D.W.I.).

34. Act of June 24, 1969, ch. 434, § 1, 1969 Tex. Gen. Laws 1468 (enactment of implied consent statute).

35. *See* Lerblance, *Implied Consent to Intoxication Tests: A Flawed Concept*, 53 ST. JOHN'S L. REV. 39, 41-42 (1978)(consent to intoxilyzer text implied by statute).

36. 342 U.S. 165 (1952).

37. *See Rochin*, 342 U.S. at 174 (forced search by police violated due process clause thus requiring reversal of conviction). In *Rochin*, the conduct of police was such that it "shocks the conscience" and, thus, offended the requirements of due process. *Id.* at 171-72. In an attempt to retrieve suspected drugs, which the defendant had placed in his mouth, the police tried to forcibly extract them. When this failed, the defendant was taken to a hospital where he was forced to ingest an emetic causing him to regurgitate the suspected drugs. The Supreme Court reversed Rochin's conviction because of the brutal tactics used by police. *Id.* at 172.

The *Rochin* decision compelled state legislatures to enact implied consent statutes in an effort to avoid any constitutional limitations imposed by a suspect's refusal to consent to blood or breath testing. *See* Note, *Driving While Intoxicated and the Right to Counsel: The Case Against Implied Consent*, 58 TEX. L. REV. 935, 937-38 (1980). However, any concern about

bers of traffic fatalities attributed to alcohol, the concept of implied consent offered an attractive means to remove drunk drivers from the road.[38] In 1983, the Texas Legislature amended the implied consent statute to make driving with a blood alcohol content of 0.10 percent or more, a strict liability offense.[39] The amendment also imposed penalties for refusing to submit to an intoxilyzer test.[40] The D.W.I. statute does permit the suspect to refuse the test.[41] However, the suspect who refuses the test loses the right to drive for 90 days unless, at a subsequent hearing, the suspect can show that proper procedures were not followed.[42]

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the constitutionality of nonconsensual testing was relieved in the Supreme Court's decision in *Breithaupt v. Abram* which held that a D.W.I. suspect could be compelled to give a blood sample. *See* Breithaupt v. Abram, 352 U.S. 432, 435-37 (1957)(taking of unconsented blood sample not offensive to constitution).

38. *See* Cramton, *The Problem of the Drinking Driver*, 54 A.B.A. J. 995, 997 (1968). Law enforcement authorities viewed the implied consent law, coupled with the establishment of a statutory definition of intoxication based on blood alcohol concentration, as an effective means to combat the drunk driver. *Id.*

39. *See* Forte v. State, 707 S.W.2d 89, 93 (Tex. Crim. App. 1986)(discussing 1983 amendments to statute); *see also* TEX. REV. CIV. STAT. ANN. art. 6701l-5 (Vernon Supp. 1989)(intoxication defined as having blood alcohol concentration of 0.10% or above). Prior to the 1983 amendment, a blood alcohol content of 0.10% established a rebuttable presumption of intoxication. *See Forte*, 707 S.W.2d at 93 (0.10% alcohol creates presumption of intoxication). The former statute also did not allow introduction into evidence of the defendant's refusal to take the test. *See* Nevarez v. State, 671 S.W.2d 90, 92 (Tex. App.—El Paso 1984, no pet.)(refusal to take breath test inadmissible).

40. TEX. REV. CIV. STAT. ANN. art. 6701l-5, § 2(b) (Vernon Supp. 1989). The penalties for driving while intoxicated are significantly more severe than those for refusing the test. *Compare* TEX. REV. CIV. STAT. ANN. art. 6701l-1(c)-(f) (Vernon Supp. 1989)(penalties for D.W.I.) *with* TEX. REV. CIV. STAT. ANN. art. 6701l-5 § 2 (Vernon Supp. 1989)(penalties for refusing test). *Id.*

41. TEX. REV. CIV. STAT. ANN. art. 6701l-5 § 2(a) (Vernon Supp. 1989).

42. TEX. REV. CIV. STAT. ANN. art. 6701l-5 § 2(f) (Vernon Supp. 1989). When a D.W.I. suspect refuses to take the test, the Director of the Texas Department of Public Safety must notify the suspect of the driver's license suspension. *Id.* This notice must be by certified mail. *Id.* The suspension takes effect 28 days after receipt of the notice or 31 days if he refused to accept delivery of the notice. *Id.*

A D.W.I. suspect who refuses the test has the right to a hearing to challenge the license suspension. TEX. REV. CIV. STAT. ANN. art. 6701l-5 § 2(b) (Vernon Supp. 1989). This hearing is civil in nature as opposed to a D.W.I. proceeding which is a criminal prosecution. Robinson v. Texas Dept. of Pub. Safety, 586 S.W.2d 604, 605 (Tex. Civ. App.—Austin 1979, no pet.). The D.W.I. suspect has 20 days after receipt of the notice, or 23 days if he refused to accept the notice, to request a hearing. TEX. REV. CIV. STAT. ANN. art. 6701l-5 § 2(f) (Vernon 1989). Once such a request is made, the Department of Public Safety must, within 10 days, request a court to set a hearing. *Id.*

At the hearing, the court is required to make affirmative findings on three issues. *Id.* First, the court must find that the police officer had probable cause to believe that the suspect was driving on a public highway or beach while intoxicated. *Id.* Second, the court must find that the suspect was arrested and given the opportunity to provide a breath or blood sample for

To counter the apparent Hobson's choice confronting the D.W.I. suspect, constitutional challenges have been brought to defeat implied consent statutes.[43] Although the suspect may acquiesce in order to avoid the penalty, he cannot later claim that his fifth amendment rights were violated because he was compelled to incriminate himself.[44] Furthermore, breath or blood samples taken from a D.W.I. suspect do not constitute an unlawful search or seizure under the fourth amendment.[45] Fourteenth amendment due process

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analysis. TEX. REV.CIV. STAT. ANN. art. 6701l-5 § 2(f) (Vernon Supp. 1989). Third, the court must find that the suspect refused the police officer's request to provide a sample. *Id.* If the court makes affirmative findings on each of the three issues, the Department of Public Safety shall suspend the suspect's driver's license for 90 days. *Id.* However, if the court finds that one or more of the events did not occur, his license must be reinstated. TEX. REV. CIV. STAT. ANN. art. 6701l-5 § 2(j) (Vernon Supp. 1989).

The D.W.I. statute is somewhat confusing in that it is not entirely clear whether the suspension is "automatic" within the strict sense of that term. *Compare* TEX. REV. CIV. STAT. ANN. art. 6701l-5 § 2(b) (Vernon Supp. 1989)(required warnings to D.W.I. suspect) *with* TEX. REV. CIV. STAT. ANN. art. 6701l-5 § 2(f) (Vernon Supp. 1989)(procedure for obtaining hearing). In section 2(b) the statute states that the suspect who refuses the test must be informed that his driver's license will be "automatically suspended for 90 days *after the date of adjournment* of the hearing provided for in Subsection (f) of this section." TEX. REV. CIV. STAT. ANN. art. 6701l-5 2(b) (Vernon Supp. 1989)(emphasis added). This language implies that the suspension does not occur until after the hearing is held. *See id.* However, section 2(f) states that the director "*shall suspend*" the suspect's license once the arresting officer has submitted a written report stating that the suspect refused the test. TEX. REV. CIV. STAT. ANN. art. 6701l-5 § 2(f) (Vernon Supp. 1989)(emphasis added). This language indicates that the suspension technically occurs before the hearing is held. *See id.* Furthermore, section 2(g) states that if the suspect prevails at the hearing "the director shall *reinstate*" the suspect's driver's license. TEX. REV. CIV. STAT. ANN. art. 6701l-5 § 2(g) (Vernon Supp. 1989)(emphasis added). The term "reinstate" implies that the suspension occurred before the hearing. *See id. But see* Balios v. Texas Dept. of Pub. Safety, 733 S.W.2d 308, 311 (Tex. App.—Amarillo 1987, writ ref'd) (dicta)(request for hearing prevents suspension until hearing conducted). The discrepancy in the language of the statute is significant because, under the notice timetables set out in section 2(f), it is theoretically possible for the suspension to begin before the hearing has been held. *See* REV. CIV. STAT. ANN. art. 6701l-5 § 2(f) (Vernon Supp. 1989)(notice and hearing timetable).

43. *See, e.g.*, Massie v. State, 744 S.W.2d 314, 317 (Tex. App.—Dallas 1988, no pet.)(court not required to give instruction that refusal to take test not admission of guilt); Hewitt v. State, 734 S.W.2d 745, 750 (Tex. App.—Fort Worth 1987, no pet.)(failure to inform suspect of right to have blood test performed does not render test results inadmissible); DeMangin v. State, 700 S.W.2d 329, 331-32 (Tex. App.—Houston [1st Dist.] 1985, no pet.)(no right to counsel before taking breath test).

44. *See* South Dakota v. Neville, 459 U.S. 553, 564 (1983)(admission into evidence of refusal to take intoxilyzer test not violative of fifth amendment); Schmerber v. California, 384 U.S. 757, 765 (1966)(extraction of blood sample not violation of right against self-incrimination); *see also* Rodriguez v. State, 631 S.W.2d 515, 517 (Tex. Crim. App. 1982)(intoxilyzer test does not violate state or federal protections against self-incrimination).

45. *See Schmerber*, 384 U.S. at 766. Regarding Schmerber's fourth amendment claim, the Supreme Court concluded that the taking of a blood sample was a search but it was reasonable under the circumstances. *Id.*

arguments have also met with only limited success.[46] As a result, most states have found their implied consent statutes to be constitutionally sound.[47] Despite their apparent invincibility, continuing challenges to implied consent statutes have compelled some courts to find a limited right to counsel for D.W.I. suspects.[48]

Following an era where the United States Supreme Court established strong safeguards in the area of criminal procedure,[49] the Court has subsequently created exceptions to the protections afforded to the accused.[50] The

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46. *See id.* at 759-60; *see also* Mackey v. Montrym, 443 U.S. 1, 18-19 (1978)(automatic license suspension for refusing test not violative of due process). *But see* Sites v. State, 481 A.2d 192, 199-200 (Md. 1984)(upholding right to counsel before breath test under due process clause of fourteenth amendment).

47. *See* Lerblance, *Implied Consent to Intoxication Tests: A Flawed Concept*, 53 ST. JOHN'S L. REV. 39, 39-41 (1978)(implied consent accepted in American law).

48. *See, e.g.*, Forte v. State, 759 S.W.2d 128, 136 (Tex. Crim. App. 1988)(increasing number of states recognizing limited right to counsel under state constitution); Sites v. State, 481 A.2d 192, 200 (Md. 1984)(limited right to counsel under fourteenth amendment and state constitution due process clauses); People v. Gursey, 292 N.Y.S.2d 416, 419, 239 N.E.2d 351, 353 (N.Y. 1968)(limited right to counsel implied into D.W.I. statute); Siegwald v. Curry, 319 N.E.2d 381, 385 (Ohio Ct. App. 1974)(limited statutory right to consult with counsel before breath test); State v. Spencer, 750 P.2d 147, 156 (Or. 1988)(limited right to consult with counsel before breath test under state constitution); State v. Welch, 376 A.2d 351, 355 (Vt. 1977)(limited right to counsel under sixth amendment critical stage analysis); State v. Fitzsimmons, 610 P.2d 893, 900-01 (Wash. 1980)(en banc)(limited right to counsel under sixth amendment critical stage analysis), *vacated on other grounds*, 449 U.S. 977 (1980). The Washington Supreme Court reasoned that the issuance of a citation for D.W.I. initiates formal judicial proceedings and the right to counsel attaches at that point. *Fitzsimmons*, 610 P.2d at 898; *see also* Kirby v. Illinois, 406 U.S. 682, 688 (1972)(right to counsel attaches upon initiation of adversary proceedings).

49. *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 794-95 (1969)(double jeopardy prohibition of fifth amendment deemed fundamental right and made applicable to states by fourteenth amendment); Miranda v. Arizona, 384 U.S. 436, 464-67 (1966)(fifth amendment requires accused be informed of rights prior to police custodial interrogation); Pointer v. Texas, 380 U.S. 400, 403 (1965)(sixth amendment confrontation clause applies to states through fourteenth amendment); Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963)(accused's right to counsel under sixth amendment applicable to states by fourteenth amendment); Mapp v. Ohio, 367 U.S. 643, 654-55 (1961)(fourth amendment prohibition against unreasonable search and seizure made applicable to states).

50. *See* United States v. Gouveia, 467 U.S. 180, 187-92 (1984)(murder suspects have no right to counsel while in administrative confinement even though prosecution likely); *see also* Brown v. State, 657 S.W.2d 797, 808 (Tex. Crim. App. 1983)(en banc)(Teague, J., dissenting)(United States Supreme Court no longer champion of individual liberties); J. HARRINGTON, THE TEXAS BILL OF RIGHTS A COMMENTARY AND LITIGATION MANUAL 2 (1987)(United States Supreme Court retreating from forefront of movement to protect individual rights); Note, *Fifth and Sixth Amendments—Changing the Balance of Miranda*, 77 J. CRIM. L. & CRIMINOLOGY 666, 667 (1986)(Supreme Court failed to maintain equilibrium between police and accused). In *Gouveia*, the Supreme Court concluded that although the prisoners were interned for up to nineteen months, the presence of counsel would not aid in

Supreme Court has approved procedures used by police which have had the effect of decreasing the defendant's access to retained counsel.[51] The exclusionary rule[52] has been narrowed[53] while the defendant's Miranda rights have also had exceptions carved from them.[54] As the United States Supreme Court has retreated from its leading role as guardian of individual rights,[55] the duty of protecting those rights has shifted to the state courts which must decide whether to grant greater liberties to their citizens than the federal Constitution currently affords.[56] As a whole, state constitutions grant broader rights to the individual than does the federal Constitution.[57] While the Texas Constitution contains greater protections of individual rights than

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preserving evidence. 467 U.S. at 191. The fact that pretrial investigation may be desired is irrelevant because the right to counsel does not create a right to a private investigator. *Id.*

51. *See* Moran v. Burbine, 475 U.S. 412, 427 (1986)(police not required to inform suspect of counsel's attempts to contact him).

52. *See* Stone v. Powell, 428 U.S. 465, 482-89 (1976)(exclusionary rule commands that all evidence obtained in violation of defendant's rights is inadmissible at trial).

53. *See* Nix v. Williams, 467 U.S. 431, 440-50 (1984)(creation of inevitable discovery exception to exclusionary rule). The United States Supreme Court first suggested the inevitable discovery exception the first time *Williams* came before the Court. *See* Brewer v. Williams, 430 U.S. 387, 407 n.12 (1977).

54. *See* Oregon v. Elstad, 470 U.S. 298, 317-18 (1985)(invalid confession admissible when made second time after receiving Miranda warnings); *see also* New York v. Quarles, 467 U.S. 649, 653-60 (1984)(public safety exception grafted onto Miranda rule). According to the Miranda rule, the police must inform arrested suspects of their constitutional rights before commencing a custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 460-61 (1966). Discussion of the applicability of the Miranda rule is required when the sixth amendment right to counsel is concerned because the fifth amendment protections offered by the rule are intertwined with the sixth amendment. *See Miranda*, 384 U.S. at 442-44, 466 (presence of counsel at interrogation protects defendant from blatant or subtle police intimidation).

55. J. HARRINGTON, THE TEXAS BILL OF RIGHTS: A COMMENTARY AND LITIGATION MANUAL 2 (1987)(United States Supreme Court retreating from protections of individual liberties); Brennan, *The Bill of Rights and the States: The Revival of State Constitutions As Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 547 (1986)(Supreme Court restricting guarantees of individual rights); *cf.* Comment, *The Pendulum Swings: The Rehnquist Court and the De-Emphasis of Individual Liberty in Criminal Procedure Analysis*, 65 U. DET. L. REV. 291, 294 (1988)(United States Supreme Court limiting civil rights).

56. J. HARRINGTON, THE TEXAS BILL OF RIGHTS: A COMMENTARY AND LITIGATION MANUAL 7-9 (1987). In more than 400 cases since 1970, state courts have been more protective of individual rights than has the United States Supreme Court. *Id.* at 1. *But see* Spaeth, *Burger Court Review of State Court Civil Liberties Decisions*, 68 JUDICATURE 285, 285 (1985)(asserting Supreme Court more protective of liberties than state courts). *See generally*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495, 498-504 (1977)(state courts should extend individual rights beyond federal constitution).

57. J. HARRINGTON, THE TEXAS BILL OF RIGHTS A COMMENTARY AND LITIGATION MANUAL 7 (1987). Alaska, Arizona, Arkansas, California, Connecticut, Hawaii, Michigan, New Hampshire, New Jersey, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin, among others, have extended state protections beyond those of the federal system. *Id.*

its federal counterpart, the Texas Court of Criminal Appeals' interpretation of the Texas Constitution has generally relied on the narrower federal constitution for guidance.[58] The right to counsel contained in article I, section 10 of the Texas Constitution has not been significantly analyzed since the court held that defendants do not have the right to "hybrid representation" at trial.[59] However, recent decisions from the Texas intermediate appellate courts have directly confronted the issue of the right to counsel at an intoxilyzer test under article I, section 10.[60] A split of authority emerged which failed to resolve the issue.[61]

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58. *See* Brown v. State, 657 S.W.2d 797, 798-99 (Tex. Crim. App. 1983)(court interpreted article I, section 9 of Texas Constitution as no broader than fourth amendment of United States Constitution); *see also* Douglas, *Federalism and State Constitutions*, 13 VT. L. REV. 127, 138-39 (1988)(Texas Court of Criminal Appeals harmonizes Texas Constitution with federal constitution).

59. *See* Landers v. State, 550 S.W.2d 272, 274-75 (Tex. Crim. App. 1977)(court discussed but did not reach conclusion about whether state and federal right to counsel offers same protections). "Hybrid representation" refers to instances where a defendant is represented at trial and has also retained co-counsel to aid in the defense at trial. *Id.* at 280.

60. *See* Forte v. State, 686 S.W.2d 744, 754 (Tex. App.—Fort Worth 1985)(D.W.I. suspect has limited right to counsel), *aff'd in part, rev'd in part*, 707 S.W.2d 89, 96 (Tex. Crim. App. 1986); *see also* Martinez v. State, 712 S.W.2d 242, 245 (Tex. App.—San Antonio 1986, pet ref'd)(no right to counsel). The Oregon Supreme Court recently interpreted its constitutional right to counsel provision to determine when the right attaches. *See* State v. Spencer, 750 P.2d 147, 156 (Or. 1988)(D.W.I. suspect has right to counsel before taking breath test). The court concluded that under the state constitution the right does attach prior to the formal charging of the suspect. *Id.* The Court reasoned:

> A person taken into formal custody by the police on a potentially criminal charge is confronted with the full legal power of the state, regardless of whether a formal charge has been filed. Where such custody is complete, neither the lack of a selected charge nor the possibility that the police will think better of the entire matter changes the fact that the arrested person is, at that moment, ensnared in a 'criminal prosecution.' The evanescent nature of the evidence the police seek to obtain may justify substantially limiting the time in which the person may exercise his or her Article I, Section 11, right, but it does not justify doing away with it.

Id. at 155-56. The Oregon Supreme Court held that the right to counsel existed under the article I, section 11, of the Oregon Constitution. *Id.* at 156. In pertinent part, Article I, section 11, of the Oregon Constitution provides, "In all criminal prosecutions the accused shall have the right . . . to be heard by himself and counsel." *Id.* Article I, section 11, of the Oregon Constitution is drafted similarly to the corresponding Texas constitutional provision containing several rights in that each respective section contains a single paragraph listing the rights of the accused. *Compare* OR. CONST. art. I, § 11 (defendant has right to be heard by himself or counsel) *with* TEX. CONST. art. I, § 10 (defendant has right to be heard by himself or counsel or both). *See also* Forte v. State, 759 S.W.2d 128, 130 (Tex. Crim. App. 1988)(Texas constitutional provision drafted in manner contrary to federal Constitution).

61. *See, e.g.*, Martinez v. State, 712 S.W.2d 242, 245 (Tex. App.—San Antonio 1986, pet. ref'd)(no right to counsel); McKinnon v. State, 709 S.W.2d 805, 806 (Tex. App.—Fort Worth 1986, no pet.)(no right to counsel); *Forte*, 686 S.W.2d at 752-54 (granting right to counsel), *rev'd in part, aff'd in part*, 707 S.W.2d 89, 96 (Tex. Crim. App. 1986)(en banc).

In *Forte v. State*,[62] the Texas Court of Criminal Appeals held that a D.W.I. suspect does not have the right to counsel under the Texas Constitution "until the time the complaint [is] filed."[63] The court specifically rejected the United States Supreme Court's holding in *Kirby v. Illinois*,[64] which determined a defendant's right to counsel under the sixth amendment attaches when formal proceedings are initiated.[65] Instead, the court adopted the "critical stage" analysis of *United States v. Wade*[66] to establish the Texas test regarding when the right to counsel attaches under the Texas Constitution.[67] Under the newly adopted test, the proper inquiry into pretrial proceedings is whether counsel is required to prevent the derogation of a "known right or safeguard."[68] In the case of an intoxilyzer proceeding, the court reasoned that because consent to the test is implied by statute and the suspect has no legal right to refuse the test, counsel's presence would not serve to protect "any known right or safeguard."[69] Thus, the decision to

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62. 759 S.W.2d 128 (Tex. Crim. App. 1988).

63. *Id.* at 139. The court derived this language from its earlier decision when it considered the issue under the sixth amendment. *See* Forte v. State, 707 S.W.2d 89, 92 (Tex. Crim. App. 1986)(sixth amendment right to counsel does not attach until after the intoxilyzer test is taken).

64. *See* Kirby v. Illinois, 406 U.S. 682, 689 (1972)(no right to counsel until commencement of adversary proceedings).

65. *See Forte*, 759 S.W.2d at 134 (court rejected *Kirby* decision). The Court of Criminal Appeals called the initiation of formal charges an arbitrary and capricious point at which to grant the right to counsel. *Id.* After reviewing precedent from the United States Supreme Court concerning the sixth amendment, the Court of Criminal Appeals concluded that the reasoning behind those decisions failed to realistically address the situation. *Id.* The court noted the distinct conflict between the Supreme Court's "critical stage" analysis in *United States v. Wade* and its later holding in *Kirby v. Illinois* which decreed that the initiation of adversarial judicial proceedings demarcates the point at which the right to counsel attaches. *Id.* The Texas Court of Criminal Appeals found the Supreme Court's analysis faulty when the *Wade* and *Kirby* decisions were closely scrutinized. *See Forte*, 759 S.W.2d at 134, 138 (*Wade* and *Kirby* decisions may be impossible to reconcile). In *Wade*, the Supreme Court found that the inherent dangers in a post-indictment interrogation lineup were a critical stage requiring the presence of counsel. 388 U.S. 218, 228, 236-37 (1967). Yet, in *Kirby*, a pre-indictment lineup did not warrant counsel even though the same dangers existed as in a post-indictment lineup. 406 U.S. 682, 697-98 (1972)(Brennan, J., dissenting).

66. 388 U.S. 218, 227 (1967)(right to counsel attaches at any pretrial critical stage).

67. *See* Forte v. State, 759 S.W.2d 128, 137-38 (Tex. Crim. App. 1988)(court must look at stage of pretrial confrontation rather than rely on set rule to establish point at which right to counsel attaches). The key to the "critical stage" analysis is that the right to counsel activates when counsel's presence becomes essential to the preservation of the right to a fair trial. *See Wade*, 388 U.S. at 226 (counsel necessary to prevent prejudice to trial rights).

68. *Forte*, 759 S.W.2d at 138.

69. *Id.* at 139. The court acknowledged that although an attorney could advise his client to physically refuse to take the test, this would merely be "strategic maneuvering" which is not encompassed by the protections of article I, section 10. *See id.* at 139 n.20. However, the

take an intoxilyzer test cannot be considered a "critical stage."[70]

Judge Clinton, joined by Judge Teague, dissented on the ground that the Texas implied consent statute clearly recognizes the accused's right to refuse the test.[71] The dissent viewed the suspect's decision to exercise his right to refuse the intoxilyzer test as a "critical stage" due to the consequences which emanate from the choice to refuse or acquiesce.[72] Judge Clinton concluded that because the advice of an attorney could aid the suspect in making this decision, the breathalyzer test must be characterized as a pre-indictment critical stage because the suspect's choice will affect him in future judicial proceedings.[73] Judge Clinton supported his conclusion by reasoning that because the legislature has granted the right to refuse the test, article I, section 10 extends the right to counsel when making that choice.[74]

The *Forte* majority incorrectly held that the decision to take an intoxilyzer test is not a critical stage requiring the limited right to consult with counsel.[75] The court employed a mode of analysis which relegates the Texas Constitution to a subservient position to the federal Constitution, thus failing to recognize its independent vitality.[76] Furthermore, the decision to consent to an intoxilyzer test should be deemed a "critical stage" because the

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court specifically rejected the notion that an attorney who advises a client to refuse the test is acting unethically. *Id.*

70. *Forte*, 759 S.W.2d at 139.

71. Forte v. State, 759 S.W.2d 128, 139-41. (Clinton, J., dissenting). Judge Clinton reasoned that the concept of implied consent has become obsolete since the United States Supreme Court's decision in *Schmerber v. California*. *Id.* at 140; *see also* Schmerber v. California, 384 U.S. 757, 770-71 (1966)(extraction of blood sample over suspect's objection is permissible). The Texas Legislature has acknowledged this fact by requiring the extraction of breath or blood samples, regardless of whether the suspect has consented, when there has been an accident in which death has occurred or is likely to occur. *Forte*, 759 S.W.2d at 140.

72. *Id.* at 140.

73. *Id.* (citing *Copelin v. State*, 659 P.2d 1206, 1213 (Alaska 1983)). In *Copelin*, the Supreme Court of Alaska held that the statutorily granted right to counsel, when applied in conjunction with Alaska's D.W.I. statute, required that the accused be permitted to consult with counsel before taking a breath test. 659 P.2d at 1210.

74. *Forte*, 759 S.W.2d at 140-41.

75. *See, e.g.*, Sites v. State, 481 A.2d 192, 200 (Md. 1984)(limited right to counsel under fourteenth amendment and state constitution); People v. Gursey, 239 N.E.2d 351, 353 (N.Y. 1968)(limited statutory right to consult with counsel); Siegwald v. Curry, 319 N.E.2d 381, 385 (Ohio Ct. App. 1974)(limited statutory right to consult with counsel); State v. Spencer, 750 P.2d 147, 156 (Or. 1988)(en banc)(D.W.I. suspect has limited right to counsel under state constitution); State v. Welch, 376 A.2d 351, 355 (Vt. 1977)(limited right to counsel granted using sixth amendment critical stage analysis); State v. Fitzsimmons, 610 P.2d 893, 900-01 (Wash.)(limited right to counsel under sixth amendment critical stage analysis), *vacated on other grounds*, 449 U.S. 977 (1980).

76. *See* Brown v. State, 657 S.W.2d 797, 800 (Tex. Crim. App. 1983)(Clinton, J., concurring)(court abdicates judicial duties when it interprets state constitution as no broader than federal Constitution); Douglas, *Federalism and State Constitutions*, 13 VT. L. REV. 127, 138

potential for substantial prejudice to the trial rights of the accused is great.[77] Consultation with counsel would help ensure that the state's important interest in removing drunk drivers from the road is properly balanced against the accused's right to make intelligent decisions in the preparation of his defense.[78]

The Court of Criminal Appeals correctly adopted its own test to determine when the right to counsel attaches under the state constitution, but erred in allowing the federal Constitution to dominate the analysis.[79] After the court completed its thorough analysis using the Texas test, the result was the same as if it had been decided under the sixth amendment to the United States Constitution.[80]

Apparently, the majority chose to use a dual reliance method of state constitutional analysis wherein federal and state constitutional provisions are paralleled.[81] The effect of this method is to subordinate the state constitution to the federal Constitution.[82] While this has been an acceptable method of analysis, it has been suggested that the dual reliance method is outmoded

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(1988)(Texas Court of Criminal Appeals unwilling to remain independent and has become judicial colony of United States Supreme Court).

77. *See* United States v. Wade, 388 U.S. 218, 227 (1967)(right to counsel attaches when there exists potential for substantial prejudice to rights of accused); *see also* State v. Spencer, 750 P.2d 147, 155 (Or. 1988)(en banc)(right to counsel during investigatory stage as important as presence of attorney at trial itself).

78. *See* Mackey v. Montrym, 443 U.S. 1, 19 (1979)(highway safety is compelling state interest); *see also* Comment, *Minnesota Meets Drunk Drivers Head-On*, 12 WM. MITCHELL L. REV. 673, 703-04 (1986)(interest in removing drunk drivers does not warrant deprivation of right to counsel).

79. *See* Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 383-84 (1980)(states should look to state constitution before looking to federal constitution); *see also* Mahady, *Toward a Theory of State Constitutional Jurisprudence: A Judge's Thoughts*, 13 VT. L. REV. 145, 146-52 (1988)(states should not deny independence of their state constitutions).

80. *See* Forte v. State, 759 S.W.2d 128, 139 (Tex. Crim. App. 1988)(right to counsel attaches under Texas Constitution at same time as under sixth amendment to United States Constitution).

81. *See Forte*, 759 S.W.2d at 131-39 (analysis of right to counsel under federal and state constitutions). *See generally* J. HARRINGTON, THE TEXAS BILL OF RIGHTS: A COMMENTARY AND LITIGATION MANUAL, 36 (1987)(under dual reliance state and federal Constitutions evaluated separately but concurrently).

82. *Id.* The potential problem with the dual reliance method is that the federal constitution overshadows its state counterpart and so the independent nature of the state constitution is ignored. *Id.* The state constitution is reviewed almost as an afterthought. *Id.*; *see also* Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1029 (1985)(under dual reliance method state courts merely apply federal analysis to state constitutional provisions).

in light of the commands of the new federalism.[83] The main premise of new federalism is that state government must once again assume the dominant role as the principal guardian of individual rights.[84] The United States Supreme Court's decision in *Michigan v. Long* encourages states to create "independent and adequate state grounds" on which to base their decisions.[85] By basing decisions upon accepted and well reasoned state authority, states maintain their judicial legitimacy and are independent of the

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83. *See* Abrahamson & Gutmann, *The New Federalism: State Constitutions and State Courts*, 71 JUDICATURE 88, 90 (1987)(*Michigan v. Long*, 463 U.S. 1032 (1983), creates new debate on role of federalism). One definition of new federalism is:

> New federalism refers to the renewed willingness of state courts to rely on their own law, in order to decide questions involving individual rights. In new federalism, the federal constitution establishes the minimum rather than the maximum guarantees of individual rights, and the state courts determine, according to their own law (generally their own state constitutions), the nature of the protection against state government. New federalism also includes the potential for greater deference by federal courts to state court proceedings and decisions.

Id. at 90. The above-quoted definition of new federalism represents the "expansionist" view in which the primary goal of new federalism is to expand fundamental rights and liberties. *See* Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 13, 34 (1988)(discussing revolution in state constitutional law). A second view of the new federalism movement sees it as a vehicle to create an independent body of state constitutional law. *Id.* at 35. This view is known as the "independent state jurisprudence" view, which has as its main goal the creation of state law which reflects the unique history and constitutional heritage of the state. *Id.* This view does not regard as of any consequence the fact that the state courts' decisions may be more or less conservative than those of the United States Supreme Court. *Id.*

84. *See* Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 379-380 (1980)(discussing responsibility of state courts concerning individual rights); Oakes, *State Courts in a Time of Federal Constitutional Change*, 13 VT. L. REV. 323, 335 (1988) (Supreme Court placed task of protecting individual liberties on state courts); *see also* Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 13, 16 (1988)(revolution in state constitutional law encourages states to view federal Constitution as only providing basic floor of constitutional rights).

85. *See* Michigan v. Long, 463 U.S. 1032, 1041 (1983)(Supreme Court will review state court decisions unless based on independent and adequate state grounds). After years of reviewing state court decisions, which were based upon both federal and state law, the Supreme Court clarified the boundry lines between federal and state jurisdiction and directed state courts to base their decisions on independent and adequate state grounds in order to avoid federal review. *Id.* at 1041. Expressing respect for the independence of state courts, the Supreme Court stated, "We believe that such an approach will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of the federal law." *Id.* Thus, the United States Supreme Court has sounded the call to state judges to actively develop state law. *See* Douglas, *Federalism and State Constitutions*, 13 VT. L. REV. 127, 136 (1988)(*Long* decision requires state judges to take stand on issues). State courts are now required to participate in the federal system and grapple with the complicated issues of the day without merely relying on federal analysis. *Id.* at 136-37.

federal system.[86]

The modern approach to state constitutional analysis is the primacy method which has been adopted by several states.[87] This mode of analysis first looks to the state constitution for individual rights protection and, then, proceeds to examine federal law if state law is found to be inadequate.[88] The primacy method provides the theoretical underpinnings to achieve the Supreme Court's dictate in *Long* because state constitutions are viewed as the primary source of law on which to base decisions.[89] Aside from the creation of an independent body of state law free from dependence on the federal system, the benefits of the primacy method are two-fold.[90] First, it encourages states to develop a body of law which reflects their individual history, culture, and values.[91] Second, the development of state constitu-

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86. *See* Brown v. State, 657 S.W.2d 797, 810 (Tex. Crim. App. 1983)(Teague, J., dissenting)(independent judiciary sacrificed when state courts merely mimic United States Supreme Court); Mahady, *Toward a Theory of State Constitutional Jurisprudence: A Judge's Thoughts*, 13 VT. L. REV. 145, 149, 153 (1988)(to maintain legitimacy state courts must use accepted independent state authority when analyzing state constitution); Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 13, 19 (1988)(one role of state courts is to free state law from federal control).

87. *See* Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 382-84 (1980)(discussing primacy of state constitutions in federal system); *see also* Mahady, *Toward a Theory of State Constitutional Jurisprudence: A Judge's Thoughts*, 13 VT. L. REV. 145, 146 (state's own constitution should be reviewed before looking at other constitutions). Maine, New Hampshire, Oregon, and Vermont are among the states who have followed the primacy method. *See, e.g.*, State v. Cadman, 476 A.2d 1148, 1150 (Me. 1984)(looking to federal issue only after examining issue under state law); State v. Ball, 471 A.2d 347, 354 (N.H. 1983)(federal issue not reached because state constitution violated); Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981)(when state law provides remedy court should not reach federal issue); State v. Jewett, 500 A.2d 233, 236-37 (Vt. 1985)(issue decided on state grounds after thorough discussion of methods of state constitutional law analysis). The Texas Supreme Court has employed the primacy method on occasion. *See* Sax v. Votteler, 648 S.W.2d 661, 664 (Tex. 1983)(court refused to review issue under federal Constitution); Haynes v. City of Abilene, 659 S.W.2d 638, 641 (Tex. 1983)(court's decision based primarily on state constitution with only cursory mention of federal constitution).

88. *See* Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 983 (1985)(under primacy method court looks to federal law only if state law permits alleged infringement).

89. *See* Mahady, *Toward a Theory of State Constitutional Jurisprudence: A Judge's Thoughts*, 13 VT. L. REV. 145, 146-52 (1988)(theory of primacy of state constitution requires that decisions be based on state authority).

90. *See* Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 13, 19 (1988)(state courts have responsibility to create independent body of state law, free from federal control, which will aid development of American constitutional jurisprudence).

91. *See* LeCroy v. Hanlon, 713 S.W.2d 335, 339 (Tex. 1986)(limitations on government and individual rights guaranteed in Texas Constitution reflect the values, customs, and traditions of Texas); *see also* Mahady, *Toward a Theory of State Constitutional Jurisprudence: A*

tional law strengthens American jurisprudence because state court comment adds to the national debate concerning constitutional law and principals of federalism.[92]

The development of a body of law fashioned from state authority, the first benefit of the primacy method, recognizes the unique character of each state.[93] A court employing the primacy method is free to look to the history and traditional values of the state when deciding whether to expand the state constitution beyond the scope of its federal counterpart.[94] State courts that

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Judge's Thoughts, 13 VT. L. REV. 145, 149 (1988)(independent body of state law necessary because each state has different economic, ethical, and social concerns); Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 49, 55 (1988)(states have values which are distinctively their own). State courts function to tailor laws suited to the citizens of the particular state to meet local needs and situations while the federal courts serve the different function of establishing minimum protections which are applicable to all people living within a diverse nation such as the United States. *Id.*

92. *See* LeCroy v. Hanlon, 713 S.W.2d 335, 339 (Tex. 1986)(enforcing state constitution strengthens federalism); *see also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977)(believers in concept of federalism salute development of state constitutional law).

93. *See* Feldman & Abney, *The Double Security of Federalism: Protecting Individual Liberties Under the Arizona Constitution*, 20 ARIZ. ST. L.J. 115, 117 (1988)(each state has own unique qualities); Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 49, 54-55 (1988)(history shapes each state's cultural values); Sager, *State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 975-76 (1985)(state judiciary aware of history and social experience of state citizens).

94. *See, e.g.*, J. HARRINGTON, THE TEXAS BILL OF RIGHTS: A COMMENTARY AND LITIGATION MANUAL 45 (1987)(use of historical approach to determine intent of framers of Texas Constitution); Mahady, *Toward a Theory of State Constitutional Jurisprudence: A Judge's Thoughts*, 13 VT. L. REV. 145, 149 (1988)(state court should look to citizen's sociological, ethical, and economic concerns when resolving state constitutional issue); Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 13, 39-43 (1988)(state constitutional law must be faithful to its unique traditions).

History suggests that the Texas Constitution should be interpreted to be broader and more protective than the federal Constitution. *See* TEX. CONST. PREAMBLE, interp. commentary (Vernon 1984)(synopsis of Texas history); *see also* Ponton, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93, 100 (1988)(Texans' unique character creates philosophical difference between state and federal Constitutions); Thomas & Thomas, *The Texas Constitution of 1876*, 35 TEX. L. REV. 907, 913 (1957)(framers of Texas Constitution intended to provide greatest possible protections to prevent reoccurrence of flagrant abuses of power). The Texas Constitution is to be interpreted as a whole so that each section and clause is construed in harmony with the entire document. *See, e.g.*, Jones v. Williams, 121 Tex. 94, 111, 45 S.W.2d 130, 137 (1931)(constitution to be interpreted as a whole); Pierson v. State, 147 Tex. Crim. 15, 19, 177 S.W.2d 975, 977 (1944)(constitution construed as whole to ascertain intent of framers); *Ex parte* Woods, 52 Tex Crim. 575, 585, 108 S.W. 1171, 1176 (1908)(sections of statute may be interpreted with aid from other sections within same statute).

The Texas Constitution contains many substantive protections not found in the federal Con-

merely mimic federal law do so at the risk of harming state sovereignty.[95] Furthermore, a state court's adherence to a particular federal position may result in a holding contrary and repugnant to the traditional values of the state citizenry.[96]

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stitution. *See* Thomas & Thomas, *The Texas Constitution of 1876*, 35 TEX. L. REV. 907, 914 (1957). In Texas, for example, the suspension of the writ of habeas corpus is absolutely prohibited. *Id.* The Bill of Rights is inviolate and military authority will always be subordinate to civil government. *Id.* Texas even has an equal rights amendment. *See* TEX. CONST. art. I, § 3a (adopted 1972). Regarding the judiciary, the "open courts" provision guarantees access to the court system which is an additional due process guarantee not found at the federal level. *See* TEX. CONST. art. I, § 13 (courts shall be open to all individuals). Thus, under historical analysis, or established rules of construction, the Texas Constitution extends beyond the safeguards of the United States Constitution. *See* J. HARRINGTON, THE TEXAS BILL OF RIGHTS: A COMMENTARY AND LITIGATION MANUAL 38-48 (1987)(examination of Texas Constitution under various methods of analysis).

95. *See* Brown v. State, 657 S.W.2d 797, 810 (Tex. Crim. App. 1983)(Teague, J., dissenting)(state constitutional decisions which mimic decisions of United States Supreme Court sacrifice independent state judiciary); *see also* Duncan, *Terminating the Guardianship: A New Role for State Courts*, 19 ST. MARY'S L.J. 809, 855 (1988)(construing state constitution invokes state sovereignty principles).

96. *Cf. Ex parte* Woods, 52 Tex. Crim. 575, 588-89, 108 S.W. 1171, 1178 (1908)(occupation tax held unconstitutional under Texas Constitution). In discussing the construction of the state constitution the Texas Court of Criminal Appeals stated:

> A Constitution is not to be made to mean one thing at one time, and another at some subsequent time, when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion . . . . Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular, and pervading in their protections; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or Legislature which should allow a change in public sentiment to influence it in the intention of its founders would be justly chargeable with reckless disregard of official oath and public duty, and, if its course could become a precedent, these instruments would be of little avail. The violence of public passion is quite as likely to be in the direction of oppression as in any other; and the necessity for Bills of Rights in our fundamental laws lies mainly in the danger that the Legislature will be influenced, by temporary excitements, and passions among the people, to adopt oppressive enactments. What a court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require.

Id. at 588-89, 108 S.W. at 1175-76 (quoting COOLEY, COOLEY'S CONSTITUTIONAL LIMITATIONS 68-69 (6th ed.)). The importance of constitutional protections stressed in *Woods* is pertinent to the current public sentiment concerning drunk driving. *See* Lightner, *Victims of Crime: M.A.D.D. at the Court, (Mothers Against Drunk Driving)*, 23 JUDGE'S J. 36, 39 (Spring 1984)(nationwide movement to spark public awareness of D.W.I.); Texas Lawyer, Jan. 16, 1989, at 6, col. 1 (Texas D.P.S. troopers under tremendous pressure to make D.W.I. arrests). With public attention focused upon current issues, dangers arise that constitutional protections

The second, and perhaps the single most important benefit of the primacy method is its contribution to American constitutional law.[97] State experimentation in the area of constitutional liberties provides the trial and error experience on a limited scale which, if fruitful, may be incorporated into federal constitutional law.[98] Once tested at the state level, the United States Supreme Court, with a tolerable degree of certainty, can establish laws that reflect the values of the citizens of our diverse nation.[99] By interpreting the Texas Constitution as it has, the Court of Criminal Appeals has missed the opportunity to originate, rather than duplicate, state constitutional jurisprudence.[100]

Besides failing to utilize the benefits of the primacy method, the *Forte*

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may be shoved to the side. *See* Hart, *The Bill of Rights: Safeguard of Individual Liberty*, 35 TEX. L. REV. 919, 919-20 (1957)(as conditions which gave rise to Bill of Rights fade into past, danger arises that individual liberties will not be appreciated and may be weakened or abandoned).

97. *See* Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 13, 18 (1988)(state constitutional jurisprudence influences the course of American constitutional law); Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1041-47 (1985)(state courts construing federal Constitution essential to federal debate).

98. *See* Mapp v. Ohio, 367 U.S. 643, 651-54 (1961)(Supreme Court reviewing state experimentation of exclusionary rule before implementing it on national level); *see also* Feldman & Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 ARIZ. ST. L.J. 115, 117-18 (1988)(states serve as laboratories for economic and social experimentation); Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 49, 56-57 (1988)(illustrating Supreme Court's examination of state experience and its influence on federal law).

99. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1931)(Brandeis, J., dissenting)(states experimentation necessary in federal system). Justice Brandeis extolled the virtues of state experimentation by saying:

> There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs . . . . Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Id.

100. *See* Duncan, *Terminating the Guardianship: A New Role for State Courts*, 19 ST. MARY'S L.J. 809, 855 (1988)(advocating development of state constitutional law under principles of new federalism). In the conclusion of his article, Judge Duncan challenges the Court of Criminal Appeals to "accept its responsibility and independently judge the protections afforded its citizens under article I, section 9, of the Texas Constitution." *Id.* By analogy, Judge Duncan's article provides an effective criticism of the *Forte* majority's interpretation of article I, section 10, of the Texas Constitution because, aside from urging the court to accept responsibility for interpreting state constitution, Judge Duncan encouraged the court not to "march lock-step with the United States Supreme Court." *Id. But see* Texas Lawyer, Jan. 30, 1989, at 1, col. 1. (opponents of new federalism propose constitutional amendment to prohibit Court of

decision places the D.W.I. suspect in a precarious position because the suspect must make an important decision, without the aid of counsel, which will affect important rights in future judicial proceedings.[101] The critical stage analysis adopted by the Court of Criminal Appeals holds that the right to counsel will not attach until the D.W.I. suspect requires counsel's presence to protect a "known right or safeguard."[102] The administration of the intoxilyzer test marks the time when the D.W.I. suspect must make the crucial decision whether to confront the coercive power of the state in a civil proceeding or in a criminal prosecution.[103] Should the suspect consent to an intoxilyzer test and fail, the damning testimony of the test results virtually ensure that the person will be marked with a criminal conviction.[104] The classification of the offense as a strict liability crime means that the D.W.I. suspect who tests 0.10 percent or above in blood alcohol concentration is, assuming all other procedures are properly followed, convicted at the time he takes the test.[105] On the other hand, the suspect who refuses the test

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Criminal Appeals from interpreting state constitution as affording greater rights than federal constitution).

101. *See* Forte v. State, 759 S.W.2d 128, 140 (Tex. Crim. App. 1988)(en banc)(Clinton, J., dissenting)(D.W.I. suspect must make critical choice which will affect future proceedings, quoting Copelin v. State, 659 P.2d 1206, 1213 (Alaska 1983)).

102. *See id.* at 138 (counsel required only when necessary to preserve rights and safeguards of accused).

103. *See* Comment, *Public Outcry v. Individual Rights: Right to Counsel and the Drunk Driver's Dilemma*, 69 MARQ. L. REV. 278, 293-98 (1986)(D.W.I. suspect faces civil proceeding for refusal of test or criminal proceeding if test results indicate suspect intoxicated); *see also* TEX. REV. CIV. STAT. ANN. art. 6701l-5, § 2 (Vernon Supp. 1989)(providing for suspension of license for refusing test); TEX. REV. CIV. STAT. ANN. art. 6701l-1 §§ (c)-(f)(Vernon Supp. 1989)(listing criminal penalties for D.W.I.).

104. *See* State v. Sutherburg, 402 A.2d 1294, 1297 (Me. 1979)(trial court comments on intoxilyzer results). After a jury trial, the trial judge rendered an excessive sentence for the D.W.I. offense. *Id.* at 1296-97. The court was angered by the defendant's demand for a jury trial in light of the evidence against him. The trial judge commented:

> A .29 blood test is ordinarily a sufficiently high test that warrants a non-trial . . . [O]rdinarily I don't care about what it costs to give a man a trial because he is entitled to it, but I do expect that he has some justification for trying the case. In other words there must be some reason to believe that a jury will find him innocent, and I find it difficult in this case with a .29 test to justify the expenditure of [an extra $1,000. for a jury trial].

Id. at 1296.

105. *See* Sorg v. State, 688 S.W.2d 133, 135 (Tex. App.—Beaumont 1985, no pet.)(no mental state requirement for D.W.I.); Clayton v. State, 652 S.W.2d 810, 811 (Tex. App.—Amarillo 1983, no pet.)(no culpable mental state required in D.W.I. prosecution). A strict liability offense is one which imposes liability without fault, i.e., no requirement of intent, knowledge, or recklessness. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 3.8 (2d ed. 1986). *See also* TEX. REV. CIV. STAT. ANN. art. 6701l-1 (Vernon Supp. 1989)(blood-alcohol content of 0.10% or above is proof of intoxication); Comment, *Minnesota Meets the Drunk Driver Head-On*, 12 WM. MITCHELL L. REV. 673, 699 (1986)(submitting to test may give proof of violation of D.W.I. statute).

automatically loses his right to drive.[106] The United States Supreme Court has recognized that the property interest contained within a driver's license is substantial.[107] Because either the test results or the test refusal can be admitted in a subsequent judicial proceeding,[108] the choice made by the D.W.I. suspect has a substantial effect upon the type of evidence the state will present at trial.[109] Furthermore, a conviction for driving while intoxicated imposes a social stigma[110] which affects the person's driving record and ability to obtain employment and insurance coverage.[111] Even potentially more damaging, the intoxilyzer test results can be used against the suspect in non-D.W.I. judicial proceedings such as a civil suit brought by the parties involved in an automobile accident.[112] It must also be remembered that in a traditional custodial arrest, the accused is free to go without any further consequence should the state decide not to prosecute.[113] In the D.W.I. context, should the state decide not to prosecute, the accused still loses his license if he refuses the test.[114] A penalty is exacted even though no

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106. *See* Mackey v. Montrym, 443 U.S. 1, 18-19 (1979)(upholding validity of automatic license revocation); *see also* TEX. REV. CIV. STAT. ANN. art. 6701l-5, § 2 (b),(f)(Vernon Supp. 1989)(refusing test invokes automatic suspension of driver's license for 90 days). For a detailed explanation of the procedures used to suspend a driver's license, see *supra* note 43.

107. *See* Bell v. Burson, 402 U.S. 535, 539 (1971)(license may not be suspended without meeting requirements of procedural due process). The Supreme Court stated that the continued possession of a driver's license may be essential to fulfilling occupational duties. *Id.*; *see also* Mackey v. Montrym, 443 U.S. 1, 10 (1979)(driver's license is protectible property interest).

108. *See* TEX. REV. CIV. STAT. ANN. art. 6701l-5, § 3 (Vernon Supp. 1989)(test refusal or test results admissible at trial).

109. *See* Note, *To Submit or Not to Submit—Where Is My Attorney?: The Right to Counsel Before Submission to Chemical Testing in a DWI Proceeding*, 63 NEB. L. REV. 373, 382 (1984)(decision to take test affects evidence presented at trial).

110. *See* Argersinger v. Hamlin, 407 U.S. 25, 48 (1972)(social stigma may attach to D.W.I. conviction); Barenblatt v. United States, 360 U.S. 109, 153-54 (1959)(Black, J., dissenting)(conviction imposes public shame and humiliation).

111. State v. Scharf, 605 P.2d 690, 694 (Or. 1980).

112. *See* Crider v. Appelt, 696 S.W.2d 55, 57 (Tex. App.—Austin 1985, no writ)(evidence of D.W.I. admissible at civil trial); Soriano v. Medina, 648 S.W.2d 426, 428 (Tex. App.—San Antonio 1983, no writ)(D.W.I. evidence admissible at civil trial); *see also* TEX. REV. CIV. STAT. ANN. art. 6701l-5, § 3(a) (Vernon Supp. 1989)(evidence of blood alcohol level admissible in civil or criminal proceeding); Note, *To Submit or Not to Submit—Where Is My Attorney?: The Right to Counsel Before Submission to Chemical Testing in a DWI Proceeding*, 63 NEB. L. REV. 373, 382-83 (1984)(conviction of D.W.I. exposes suspect to other criminal and civil actions). However, the Texas D.W.I. statute does not permit a suspect to refuse the breath test when, as a result of an automobile accident, someone has died or is likely to die. *See* TEX. REV. CIV. STAT. ANN. art. 6701l-5, § 3(i)(3) (Vernon Supp. 1989)(officer shall take blood or breath sample when death occurs or is likely to result from accident).

113. *Cf.* Oregon v. Mathiason, 429 U.S. 492, 495 (1977)(interrogated suspect free to leave after completion of questioning).

114. *See* Mackey v. Montrym, 443 U.S. 1, 18 (1979)(automatic license suspension); *see*

charge or conviction has been made.[115] Therefore, the need to preserve the accused's known rights and safeguards compels the conclusion that D.W.I. suspects should have the limited right to consult with counsel.[116]

If a limited right to counsel is granted, what can an attorney do when called to aid a D.W.I. suspect?[117] Counsel can clarify the confusing situation which arises when the suspect is given Miranda warnings, and he requests counsel, but then is told that he has no right to an attorney at the test.[118] An attorney can objectively provide the full range of options open to

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also TEX. REV. CIV. STAT. ANN. art. 6701l-5, § 2(b) (Vernon Supp. 1989)(automatic suspension of license for refusing test). In *Mackey*, the Supreme Court upheld the summary suspension of driver's licenses on three grounds. 443 U.S. at 18. The Supreme Court reasoned that the statute serves as a deterrent to those who drink and drive. Also, the statute provides a strong inducement to D.W.I. suspects to submit to the breath test so that the state will have substantial evidence to present at trial. Finally, the statute allows for the swift removal of drunk drivers from the road, thus, contributing to highway safety. *Id.* However, Justice Stewart, in his dissent, stated that the sole function of the license suspension is to penalize D.W.I suspects for refusing the breath test. *Id.* at 20.

115. *See* TEX. REV. CIV. STAT. ANN. art. 6701l-5, § 2(b) (Vernon Supp. 1989)(automatic license suspension for refusing test).

116. *See* State v. Spencer, 750 P.2d 147, 156 (Or. 1988)(granting limited right to consult with counsel prior to breath test); State v. Fitzsimmons, 610 P.2d 893, 898 (Wash. 1980) (en banc) (counsel required at breath test because unique evidence obtained and trial strategy decisions which must be made), *vacated on other grounds*, 449 U.S. 977 (1980). However, granting the limited right to counsel cannot unreasonably hamper the efforts of police to remove drunk drivers from the road. *See* Heles v. South Dakota, 530 F. Supp. 646, 653 (D.S.D. 1982), *vacated as moot*, 682 F.2d 201 (8th Cir. 1982)(if attorney cannot be reached within reasonable time person must make independent decision); State v. Welch, 394 A.2d 1115, 1117 (Vt. 1978)(decision must be made within thirty minutes from first attempt to contact counsel).

117. *Cf.* United States v. Wade, 388 U.S. 218, 227 (1967)("critical stage" arises when counsel required to prevent prejudice and protect rights of accused); *see also* Note, *Implied Consent Laws: Some Unsettled Constitutional Questions*, 12 RUTGERS L.J. 99, 103-10 (1980)(discussing right to counsel using "critical stage" analysis).

118. *See* Heles v. South Dakota, 530 F. Supp. 646, 651 (D.S.D.) (confusing contradiction between Miranda warnings and implied consent statute), *vacated as moot*, 682 F.2d 201 (8th Cir. 1982). The court noted that several states have reversed license suspensions of defendants who were confused by being given Miranda warnings and then told that the implied consent statute does not permit consultation with an attorney. The problem arises when the suspect is arrested and given Miranda warnings which inform him that he has a right to counsel. But when he is requested to take an intoxilyzer test and asks for an attorney, he is told that he does not have the right to counsel at that time. *Id.*; *see also* State v. Beckey, 192 N.W.2d 441, 445 (Minn. 1971)(Miranda warnings given in conjunction with warnings required by implied-consent statute may confuse D.W.I. suspect); Latzer, *The High Court vs. High Drivers: A Short Course in Logic*, 21 CRIM. L. BULL. 37, 38-39 (1985)(satirical dialogue between suspect and police illustrating D.W.I. suspect's confusion); Comment, *Public Outcry v. Individual Rights: Right To Counsel and the Drunk Driver's Dilemma*, 69 MARQ. L. REV. 278, 282, n. 30 (1986)(D.W.I. suspects unable to reconcile contradiction between Miranda warnings and implied consent statute).

the suspect and the consequences associated with each option.[119] This is a valuable safeguard because the police officer only informs the suspect of the consequences resulting from refusing the test.[120] The advice of counsel before taking the intoxilyzer test is essential because, due to the evanescent nature of the evidence, the suspect's available options are permanently foreclosed within a matter of hours.[121] The attorney can also advise the client on whether the refusal to take the test is reasonable.[122] Quite naturally, the D.W.I. suspect is wary and suspicious of the arresting officer at a time when

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119. *See* Comment, *Minnesota Meets The Drunk Driver Head-On*, 12 WM. MITCHELL L. REV. 673, 698 (1986)(attorney can inform and advise suspect of ramifications of decision). The D.W.I. suspect has the right to request an independent analysis. TEX. REV. CIV. STAT. ANN. art. 6701l-5, § 3(d) (Vernon Supp. 1989). The attorney can inform the suspect of the need to get an independent test. *Id.* Counsel can aid the suspect in making a rational decision by also explaining that restricted use licenses are available which will allow the suspect to drive to and from his place of employment. *See* TEX. REV. CIV. STAT. ANN. art. 6687b, § 23A(b)(1) (Vernon Supp. 1989)(person convicted of D.W.I. may obtain occupational license in order to continue employment). By providing important information and alleviating the suspect's unnecessary fear, the suspect can make a calm and intelligent decision. *See* Comment, *Minnesota Meets Drunk Drivers Head-On*, 12 WM. MITCHELL L. REV. 673, 699 (1986)(attorney informs suspect and enables rational decisions).

120. *See* TEX. REV. CIV. STAT. ANN. art. 6701l-5, § 2(b) (Vernon Supp. 1989)(officer must inform suspect of consequences of refusing breath test). The arresting officer is required to notify the suspect both in writing and orally that the refusal to take the test can be used in a future prosecution, that driving privileges will be suspended, and that a hearing will be granted if the person makes a written demand for one. *Id.* Thus, the arresting officer has no duty to fully explain all of the available options open to the D.W.I. suspect. *See* Siegwald v. Curry, 319 N.E.2d 381, 385 (Ohio Ct. App. 1974)(police not required to inform suspect of effect on criminal proceedings of either taking or refusing test).

121. *See* TEX. REV. CIV. STAT. ANN. art. 6701l-5, § 3(d) (Vernon Supp. 1989)(independent blood or breath test must be taken within two hours after arrest). The failure to obtain the independent test does not render the results of the intoxilyzer test inadmissible. *Id.* The attorney, if present, can request that the police preserve any pertinent evidence such as the ampoules used in the intoxilyzer unit to capture breath samples. *See* Turpin v. State, 606 S.W.2d 907, 917 (Tex. Crim. App. 1980)(en banc)(police not required to preserve ampoules). The Texas Court of Criminal Appeals acknowledged that the ampoules could be used to impeach the credibility of the test results. *Id.* at 917-18. However, the court's acknowledgement only pertains to the credibility of the results; it does not warrant that police be required to preserve the breath samples. *Id.* This holding does not take into account that different models of intoxilyzer units reach different results while analyzing the same sample. *See* Frankvoort, Mulder & Neuteboom, *The Laboratory Testing Of Evidential Breath-Testing (EBT) Machines*, 35 FORENSIC SCI. INT'L 27, 42 (1987)(various intoxilyzer units achieve different results while testing same sample).

122. *See* Comment, *Minnesota Meets The Drunk Driver Head-On*, 12 WM. MITCHELL L. REV. 673, 698 (1986)(attorney is objective party who can advise when refusal unreasonable); *see also* Comment, *Public Outcry V. Individual Rights: Right to Counsel and the Drunk Driver's Dilemma*, 69 MARQ. L. REV. 278, 294 (1986)(counsel can advise that refusal reasonable when police unreasonably request breath test).

he is called to produce evidence which will be used against him.[123] The presence of counsel can reduce this suspicion and provide the suspect with a trusted friend who can aid him in making a knowing and intelligent decision.[124] The granting of the right to consult with counsel means that the suspect will at least have the opportunity to talk by telephone with an attorney.[125] While it will not always be the case, an attorney can attend the actual administration of the test.[126] The value of attending the test is that the presence of an attorney serves to impose upon the proceeding that degree of care and respect for the suspect's rights which is essential to the proper administration of the test.[127] Therefore, the granting of a limited right to

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123. *See* Hollander, *Defending a Drunk Driver*, 10 LITIGATION 25, 26 (Spring 1984)(even brief jail experience of D.W.I. suspect is upsetting); Comment, *Public Outcry v. Individual Rights: Right to Counsel and the Drunk Driver's Dilemma*, 69 MARQ. L. REV. 279, 295 (1986)(suspect may be suspicious of arresting officer); *Cf.* Miranda v. Arizona, 384 U.S. 436, 448-57 (1966)(discussing coercive atmosphere of police station).

124. *See* Forte v. State, 759 S.W.2d 128, 140 (Tex. Crim. App. 1988)(en banc)(Clinton, J., dissenting) (attorney's advice helpful to D.W.I. suspect, quoting Copelin v. State, 659 P.2d 1206, 1312 (Alaska 1983)). State v. Fitzsimmons, 610 P.2d 893, 901 (Wash.)(en banc)(implied consent statute does not waive suspect's right to consult attorney), *vacated on other grounds*, 449 U.S. 977 (1980); *cf.* Edwards v. Arizona, 451 U.S. 477, 482 (1981)(decision to waive rights must be knowingly and intelligently made); North Carolina v. Butler, 441 U.S. 369, 373 (1979)(waiver of Miranda rights must be knowing and voluntary). The analogy to the above cited waiver cases illustrates the D.W.I. suspect's predicament of involuntarily waiving rights which may not be fully understood without the aid of counsel. *See* Fare v. Michael C., 442 U.S. 707, 719 (1979)(society looks to lawyer as protector of accused's rights when dealing with police). When the accused is compelled by the government to make an irreversible decision concerning his legal rights, the denial of a reasonable opportunity to consult with counsel is unfair. Heles v. South Dakota, 530 F. Supp. 646, 653 (D.S.D. 1982), *vacated as moot*, 682 F.2d 201 (8th Cir. 1982).

125. *See Fitzsimmons*, 610 P.2d at 900 (in some cases counsel will have to advise clients by telephone because of time limitations). Consultation by telephone will often be sufficient to properly protect the rights of the suspect. *Id.*

126. *See id.* (adequate preparation of defense may require counsel's presence at test). A thirty minute time period will often accommodate both the needs of the state and the D.W.I. suspect. *See Heles*, 530 F. Supp. at 653 (20-30 minute period to warm-up intoxilyzer unit provides time for suspect to consult with counsel).

127. *See* United States v. Wade, 388 U.S. 218, 236-37 (1967)(counsel required at post-indictment lineup to prevent prejudice to defendant's trial rights). Counsel is necessary at a lineup to prevent improper suggestion which occurs in the secrecy of the police station. *Id.* at 229-33. In *Wade*, the Supreme Court reasoned that the suspect could not prevent these improprieties because "lineup participants are [not] likely to be schooled in the detection of suggestive influences. Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers." *Id.* at 230-31. The reasoning in *Wade* is applicable to the intoxilyzer proceeding because D.W.I. suspects operating under the emotional tension caused by the situation may not be able to detect improper police conduct or procedural errors. *See* Texas Lawyer, Jan. 16, 1989, at 6, col. 2 (D.P.S. trooper mixed up test results of suspects and mass produced arrest reports). An attorney familar with the intoxilyzer proceeding could ensure that the test

counsel can play a significant role in the preservation of the D.W.I. suspect's known rights and safeguards.[128]

In *Forte*,* the Texas Court of Criminal Appeals missed the opportunity to join the revolution in state constitutional law and, thereby, contribute to the American concept of federalism. The test adopted by the court to determine when the right to counsel attaches under the Texas Constitution holds that the right to counsel does not attach until necessary to protect the safeguards and basic trial rights of the accused. In light of the difficult choice to be made, the consequences flowing from that choice, and the nature of the evidence obtained, substantial prejudice to the rights of the accused can occur at the intoxilyzer proceeding. Under such circumstances, consultation with counsel can inform the D.W.I. suspect of available options and ensure that decisions are intelligently made. In interpreting article I, section 10 of the Texas Constitution, the Texas Court of Criminal Appeals has narrowed the right to counsel to offer only minimal protection to the accused and denied Texans the maximum protection which history and tradition has commanded they receive.

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is properly administered. *See* Texas Lawyer, Jan. 16, 1989, at 5, col. 2 (D.P.S. trooper ignored policy of observing suspects for minimum of 15 minutes before administering intoxilyzer test). The potential for mistake and abuse suggests that the administration of the test is a critical stage requiring the presence of counsel. *See Wade*, 388 U.S. at 236-37.

128. *See, e.g.*, People v. Gursey, 239 N.E.2d 351, 353 (N.Y. 1968)(limited right to consult with counsel prior to test in order to discuss available options); State v. Spencer, 750 P.2d 147, 155-56 (Or. 1988)(en banc)(intoxilyzer test falls within meaning of "criminal prosecutions" provision of state constitution which require presence of counsel); State v. Welch, 376 A.2d 351, 355 (Vt. 1977)(limited right to consultation with counsel necessary to evaluate long-term legal ramifications of test); State v. Fitzsimmons, 610 P.2d 893, 898 (Wash. 1980)(en banc)(unique character of evidence produced by intoxilyzer test makes administration of test critical stage), *vacated on other grounds*, 449 U.S. 977 (1980).

* Editor's Note

While this issue was in the final stage of publication, the Texas Court of Criminal Appeals decided *McCambridge v. State*, No. 297-87 (Tex. Crim. App. Sept. 13, 1989) (Westlaw, Texas Cases library). Though still subject to withdrawal, the *McCambridge* case rejected the "flexible standard" adopted in *Forte v. State* and instead adopted a "bright line rule" which states "a critical stage does not occur until formal charges are brought against a suspect." As a result, the reader is advised to analyze both cases.