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Criminal Law - Counsel for Accused - Due Process Requires Accused Be Provided Reasonable Opportunity to Secure Second DWI Test

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CASE COMMENTS

CRIMINAL LAW — COUNSEL FOR ACCUSED — DUE PROCESS REQUIRES ACCUSED BE PROVIDED REASONABLE OPPORTUNITY TO SECURE SECOND DWI TEST

Police arrested the defendant for suspicion of driving while intoxicated (DWI).[1] After the police gave the defendant his *Miranda* warnings[2] at the police station, the defendant requested to telephone his attorney.[3] The police refused his request.[4] The defendant also requested an independent blood test after the chemical breath test, but the police took no action on this request.[5] The arresting officer did, however, call the defendant's wife.[6] The defendant was not able to call his attorney until the police released him two and one-half hours later.[7] His attorney, however,

1. McNutt v. Superior Court, 133 Ariz. 7, ____, 648 P.2d 122, 124 (1982). The Arizona Supreme Court consolidated three cases on appeal because they involved similar issues and the same parties. One case was an appeal from a superior court special action order granting defendant McNutt a dismissal of a driving while intoxicated (DWI) charge. The second case was a special action taken from the superior court's affirmance of McNutt's revoked probation based on the same DWI charge. The third case was an appeal of the superior court's denial of defendant McNutt's motion to dismiss and its affirmance of the city court's actions. *Id.* at ____, 648 P.2d at 123-24.

2. Miranda v. Arizona, 384 U.S. 436 (1966). In *Miranda* the United States Supreme Court announced the following procedural safeguards: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444.

3. 133 Ariz. at ____, 648 P.2d at 124.

4. *Id.* at ____, 648 P.2d at 124. The police refused the defendant's request without apparent reason. *Id. Cf.* Scarborough v. Kellum, 386 F. Supp. 1360, 1363-64 (N.D. Miss. 1975), *aff'd*, 525 F.2d 931 (5th Cir. 1976). In *Scarborough* the arresting officer offered to make a phone call on the defendant's behalf, but the defendant refused because he could not make his own call. The court held that a policy of making the telephone call for the DWI arrestee was substantial compliance with an arrestee's constitutional rights. 386 F. Supp. at 1363-64.

5. 133 Ariz. at ____, 648 P.2d at 124. *See* Annot., 78 A.L.R.2D 905, 905-07 (1961 & Supp. 1982) (constitutional right of DWI suspect to call physician to obtain a second test).

6. 133 Ariz. at ____, 648 P.2d at 124.

7. *Id.* The Arizona Supreme Court noted in a footnote that "it is crucial for both the state and the defendant to gather evidence relevant to intoxication close in time to when the defendant

informed him that too much time had passed since the arrest to obtain an independent blood test of any evidentiary value.[8] The defendant claimed that the State violated his right to counsel and a fair trial under rule 6.1 of the Arizona Rules of Criminal Procedure[9] and the sixth amendment to the United States Constitution.[10] The defendant argued that by preventing him from telephoning his attorney, the State denied him the right to gather exculpatory evidence by means of an independent test.[11] The Arizona Supreme Court applied constitutional standards of due process[12] and section 28-692 (F) of the Arizona Revised Statutes

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allegedly committed the crime. Otherwise, any alcohol that may have been in the blood will have decomposed before the blood can be tested." *Id.* at ____ n.2, 648 P.2d at 125 n.2.

8. 133 Ariz. at ____, 648 P.2d at 124. *Contra In re* Howard, 208 Cal. App. 2d 709, 25 Cal. Rptr. 590 (Dist. Ct. App. 1962). In *Howard* the defendant requested that her physician, who was two hours driving time away, be contacted to make a blood test. 208 Cal. App. 2d at ____, 25 Cal. Rptr. at 591. The officer refused due to the distance and time involved, but offered to take the defendant to a hospital 10 minutes away. *Id.* The defendant refused and was released from jail 20 to 30 minutes after her arrest. The defendant made no effort after release to have a blood test taken. *Id.* An expert testified that a blood test would still have probative value up to five hours after the arrest. The court held that the defendant was not denied due process. *Id.* at ____, 25 Cal. Rptr. at 595. *See also* Sharp v. Commonwealth, 414 S.W.2d 902 (Ky. Ct. App. 1967) (two hour delay before allowing DWI suspect to telephone her attorney was not unreasonable because delay was caused by her condition).

9. 133 Ariz. at ____, 648 P.2d at 124. Rule 6.1(a) of the Arizona Rules of Criminal Procedure provides:

> A defendant shall be entitled to be represented by counsel in any criminal proceeding, except in those petty offenses such as traffic violations where there is no prospect of imprisonment or confinement after a judgment of guilty. The right to be represented shall include the right to consult in private with an attorney, or his agent, as soon as feasible after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefor.

ARIZ. R. CRIM. P. 6.1(a).

10. 133 Ariz. at ____, 648 P.2d at 124. The sixth amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

11. 133 Ariz. at ____, 648 P.2d at 124. *See* McCormick v. Municipal Court, 195 Cal. App. 2d 819, ____, 16 Cal. Rptr. 211, 215 (Dist. Ct. App. 1961) (denial of due process when the one phone call allowed the defendant was used to obtain bail and the defendant was denied a reasonable opportunity to call a physician to obtain a timely sample of his blood).

12. 133 Ariz. at ____, 648 P.2d at 124. *See In re* Martin, 58 Cal. 2d 509, ____, 374 P.2d 801, 803, 24 Cal. Rptr. 833, 835 (1962) (when the defendant made a reasonable and sincere effort to obtain blood tests at two hospitals, but hospital personnel refused because police withheld authorization, refusal by the police was analogous to suppression of evidence and violated due process); State v. Munsey, 152 Me. 198, ____, 127 A.2d 79, 82 (1956) (when the physician the defendant requested was occupied, the police permitted the defendant to call his wife 15 minutes later, and the defendant did not call another doctor or request his wife to get one for him, the police did not deny the defendant a reasonable opportunity to obtain a second test); People v. Burton, 13 Mich. App. 203, 163 N.W.2d 823 (1969) (failure of the police to inform the defendant in a timely fashion that his physician was not contacted deprived him of a reasonable opportunity to gather competent evidence for his defense). *Cf.* Harlan v. State, 430 S.W.2d 213, 214 (Tex. Crim. App. 1968) (when there was nothing in record to show that the defendant requested, but was refused, the right to obtain a sobriety test at his own expense, mere failure to take the defendant before a

Annotated[13] to give a DWI suspect the right to obtain an independent blood test.[14] The court determined that by denying the defendant the chance to have his attorney arrange for the test, the State violated the defendant's right to consult with an attorney as soon as possible after arrest.[15] The Arizona Supreme Court *held* that the State's action prevented the defendant from obtaining exculpatory evidence no longer available, thus foreclosing a fair trial.[16] *McNutt v. Superior Court*, 133 Ariz. 7, 648 P.2d 122 (1982).

The defendant in *McNutt* argued that the State, by denying him the opportunity to call his attorney to arrange for an independent test, suppressed any possible exculpatory evidence he might have obtained.[17] The basis for this argument was *Brady v. Maryland*,[18] the leading case on suppression of evidence. In *Brady* the United States Supreme Court held that suppression of evidence, favorable to the defendant, by the prosecution violated the due process clause when the evidence was material to the defendant's guilt or punishment.[19] In *Brady*, a murder case, the prosecution withheld statements made by the defendant's companion, in which the companion admitted the actual murder.[20] Because the statement of the companion would have aided in mitigating the punishment for the offense, the Court held that suppression of the confession was a violation of the due process clause of the fourteenth amendment.[21]

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magistrate for 12 hours did not show that police denied the defendant the right to obtain a sobriety test at his own expense).

13. 133 Ariz. at ____, 648 P.2d at 124. Section 28-692(F) of the Arizona Revised Statutes Annotated provided as follows:

> The person tested may have a physician or a qualified technician, chemist, registered nurse or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

ARIZ. REV. STAT. ANN. § 28-692(F) (1976) (current version at ARIZ. REV. STAT. ANN. § 28-692(I) (Supp. 1981-1982)).

14. 133 Ariz. at ____, 648 P.2d at 124. *See* State v. Snipes, 478 S.W.2d 299, 303 (Mo.) (when the defendant received the requested independent blood test, due process did not require the police to transport the defendant to a hospital so that a physician could determine by physical observation whether he was intoxicated), *cert. denied*, 409 U.S. 979 (1972).

15. 133 Ariz. at ____, 648 P.2d at 124.

16. *Id.* at ____, 648 P.2d at 125. The court also held that the State could not revoke the defendant's probation based on the DWI incident because the State's actions prevented the defendant from gathering evidence relevant to whether he was driving while intoxicated. *Id.* The State's actions denied the defendant the right to a fair hearing on the petition to revoke probation. *Id.*

17. *Id.* at ____, 648 P.2d at 124.

18. 373 U.S. 83 (1963).

19. Brady v. Maryland, 373 U.S. 83, 87 (1963). *See* Comment, *Judicial Response to Governmental Loss or Destruction of Evidence*, 39 U. CHI. L. REV. 542 (1972) (further case law on suppression of evidence).

20. 373 U.S. at 84.

21. *Id.* at 86.

In a later case, *United States v. Keogh*,[22] a jury convicted the defendant for conspiracy to influence, obstruct, or impede justice.[23] The district court denied the defendant's appeal on a writ of *coram nobis*, which alleged that the prosecution had knowingly suppressed exculpatory evidence and used perjured testimony.[24] The United States Court of Appeals for the Second Circuit determined that when the suppression of evidence was not deliberate and no request was made, the standard of materiality must be considerably higher to grant relief.[25] The court held that the trial judge should hold an evidentiary hearing to determine whether the Government's failure to turn over to the defense an unrequested FBI report on the financial records of a prosecution witness would have altered the result at trial.[26] Thus, to constitute a violation of the defendant's due process rights under the *Brady* line of cases, the prosecution must have withheld evidence that was both material and favorable to the defendant.[27]

Several jurisdictions hold that the denial of an opportunity to procure a blood test on a DWI charge denies due process because the denial may be suppressing evidence of the defendant's sobriety.[28] In *Brown v. Municipal Court*[29] the police arrested the defendant for DWI and administered a breathalyzer at the police station.[30] The police then transported the defendant to the hospital because of possible neck injuries.[31] At the hospital the defendant requested a blood test and offered to pay for it.[32] The police officer

22. 391 F.2d 138 (2d Cir.), *on remand,* 289 F. Supp. 265 (S.D.N.Y. 1968), *aff'd,* 417 F.2d 885 (2d Cir. 1969).

23. United States v. Keogh, 391 F.2d 138, 139 (2d Cir.), *on remand,* 289 F. Supp. 265 (S.D.N.Y. 1968), *aff'd,* 417 F.2d 885 (2d Cir. 1969).

24. 391 F.2d at 140.

25. *Id.* at 147. The court reasoned that "[t]o invalidate convictions in such cases because a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense, but not likely to have changed the verdict would create unbearable burdens and uncertainties." *Id.* at 148.

26. *Id.* at 148-49.

27. *See, e.g.,* Moore v. Illinois, 408 U.S. 786, 794-95 (1972). In *Moore* the Court held that the standards by which the prosecution's conduct was to be measured were: "(a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence." *Id.* In United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971), the court held that the *Brady* disclosure requirement applied to a case in which the evidence requested by the defendant has been lost or discarded. *Id.* at 653.

28. For cases holding that it is a denial of due process to prohibit a defendant from obtaining a second test, see *supra* note 12.

29. 86 Cal. App. 3d 357, 150 Cal. Rptr. 216 (Ct. App. 1978).

30. Brown v. Municipal Court, 86 Cal. App. 3d 357, ____, 150 Cal. Rptr. 216, 219 (Ct. App. 1978).

31. *Id.*

32. *Id. See In re* Koehne, 54 Cal. 2d 757, ____, 356 P.2d 179, 181, 8 Cal. Rptr. 435, 437 (1960) (when the defendant indicated his desire to have blood tests taken only at times and places when arrangements for a doctor could not be reasonably made and he never stated that he would bear the expense of calling his doctor, the police did not violate the defendant's rights); *In re* Newbern, 175 Cal. App. 2d 862, ____, 1 Cal. Rptr. 80, 83 (Ct. App. 1959) (refusal to permit person charged with drunkenness in a public place the opportunity to call a doctor of his choice at his expense in an effort

accompanying the defendant, however, refused to allow the test.[33] The officer stated that the defendant would have to return to the hospital after his release from custody to have the test administered.[34] The police did not release the defendant from jail until four and one-half or five and one-half hours later.[35] The California Court of Appeals held that the police officer's refusal to allow the defendant a reasonable opportunity to obtain a timely blood test amounted to a suppression of the evidence and, thus, constituted a denial of due process.[36] Therefore, while it was not the duty or obligation of the police officer to administer a blood test,[37] the officer could not refuse the reasonable efforts of the defendant to obtain a timely sample of his blood without violating the defendant's due process rights.[38]

One of the defendant's arguments in *McNutt v. Superior Court*[39] was that the State violated his right to counsel under rule 6.1 of the Arizona Rules of Criminal Procedure[40] and the sixth amendment to the United States Constitution.[41] Beginning with *Powell v. Alabama*[42] the United States Supreme Court has made a number of important decisions affecting the criminal defendant's sixth amendment right to counsel.[43] The United States Supreme Court expanded the right to include the assistance of counsel in pretrial procedures that are "critical stages" of the criminal proceedings in *Hamilton v. Alabama.*[44] In *Hamilton* the arraignment was held to be a critical stage of the criminal proceedings because available defenses could be irretrievably lost if not asserted at that time.[45] Therefore,

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to obtain the only evidence that could vindicate him of the charge was unreasonable and a denial of due process).

33. 86 Cal. App. 3d at ____, 150 Cal. Rptr. at 219.

34. *Id.*

35. *Id.* at ____, 150 Cal. Rptr. at 220. The court noted that a blood test made after the defendant's release would have been too late. *Id.* For cases holding that the blood test would not have been too late, see *supra* note 8.

36. 86 Cal. App. 3d at ____, 150 Cal. Rptr. at 219.

37. *See* State v. Larson, 313 N.W.2d 750, 753 (N.D. 1981) (State not required to make a sample of the defendant's breath, taken at the time of the breathalyzer examination, available to the defendant for independent testing).

38. *See In re* Martin, 58 Cal. 2d 509, 512, 374 P.2d 801, 803, 24 Cal. Rptr. 833, 835 (1962) (when the authorities, "through affirmative action or by the imposition of their rules and regulations," frustrate a defendant's efforts to obtain a second test, it is a denial of due process).

39. 133 Ariz. 7, 648 P.2d 122 (1982).

40. McNutt v. Superior Court, 133 Ariz. at ____, 648 P.2d at 124. For the text of rule 6.1(a), see *supra* note 9.

41. 133 Ariz. at ____, 648 P.2d at 124. For the text of the sixth amendment, see *supra* note 10.

42. 287 U.S. 45, 71 (1932) (failure of trial court to give ignorant and illiterate defendants reasonable time and opportunity to obtain counsel violated due process clause of fourteenth amendment).

43. *See* Brewer v. Williams, 430 U.S. 387, 401, 404-05 (1977) (right to counsel when police indirectly interrogate the defendant after the defendant has been formally charged with an offense; no waiver when defendant consistently relied on advice of counsel); Crooker v. California, 357 U.S. 433, 439 (1958) (if a pretrial proceeding would prejudice defendant at trial because of absence of "fundamental fairness," the right to counsel attaches at that proceeding).

44. 368 U.S. 52 (1961).

45. Hamilton v. Alabama, 368 U.S. 52, 54 (1961).

the defendant was entitled to representation at arraignment.[46]

The United States Supreme Court's decision in *Gideon v. Wainwright* established the indigent's sixth amendment right to counsel at the expense of the state.[47] The Court extended the right to court appointed counsel to misdemeanor crimes resulting in imprisonment in *Argersinger v. Hamlin*.[48] Then in *Kirby v. Illinois*[49] the United States Supreme Court determined that the sixth amendment right to counsel arose at the initiation of the judicial proceedings, when the police had formally charged the defendant.[50] Throughout this expansion of the right to counsel guarantee, the critical issue in determining the defendant's sixth amendment right to counsel was whether the particular stage in the criminal proceeding was critical.[51]

The United States Supreme Court, however, has never addressed the issue of when a sixth amendment right to counsel attaches in a DWI prosecution. Courts generally have found that there is no sixth amendment or legal right to counsel at the time the accused must decide whether to comply with the request for a sobriety test.[52] A small number of courts have, however, recognized a constitutional right to counsel before submitting to a sobriety test.[53] Other courts have recognized a limited state

46. *Id.* at 55. *See also* Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing is a critical stage that entitled accused to aid of counsel); Stovall v. Denno, 388 U.S. 293 (1967) (confrontation is a critical stage that required counsel); Gilbert v. California, 388 U.S. 263 (1967) (right to counsel at a postindictment lineup); United States v. Wade, 388 U.S. 218 (1967) (postindictment lineup was critical stage that entitled defendant to counsel); Massiah v. United States, 377 U.S. 201 (1964) (once adversary proceedings had begun the accused had a right to counsel when the government interrogated him); Escobedo v. Illinois, 378 U.S. 478 (1964) (accused had a right to counsel prior to arraignment); White v. Maryland, 373 U.S. 59 (1963) (per curiam) (preliminary hearing was a critical stage because defendant entered a plea without counsel).

47. 372 U.S. 335 (1963).

48. 407 U.S. 25 (1972).

49. 406 U.S. 682 (1972).

50. Kirby v. Illinois, 406 U.S. 682, 689 (1972). *See also* United States v. Ash, 413 U.S. 300, 310, 313 (1973). In *Ash* the Court held that the sixth amendment right to counsel extended only to events during which "the accused required aid in coping with legal problems or assistance in meeting his adversary" and when "the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *Id.*

51. United States v. Ash, 413 U.S. 300 (1973) (photo display is not a critical stage); Kirby v. Illinois, 406 U.S. 682 (1972) (counsel not required at pretrial confrontation because right to counsel does not attach until the State initiates prosecution).

52. *See, e.g.*, Price v. North Carolina Dep't of Motor Vehicles, 36 N.C. App. 698, ____, 245 S.E.2d 518, 522 (Ct. App.) (although there is no right to the presence of counsel at the administration of a sobriety test, the defendant has a statutory right to a reasonable time in which to call an attorney prior to taking a test), *appeal dismissed,* 295 N.C. 551, 248 S.E.2d 728 (1978); Agnew v. Hjelle, 216 N.W.2d 291, 298 (N.D. 1974) (no constitutional right to counsel before submitting to a chemical test).

53. *See, e.g.*, Heles v. South Dakota, 530 F. Supp. 646, 654 (D.S.D.) (DWI suspect had a constitutional right to request to speak with an attorney prior to making the decision whether to submit to testing), *vacated as moot,* 682 F.2d 201 (8th Cir. 1982); State v. Hill, 277 N.C. 547, ____, 178 S.E.2d 462, 466-67 (1971) (defendant denied constitutional and statutory right to communicate with counsel and friends at critical time when denial deprived him of any opportunity to confront State's witnesses with other testimony); Troy v. Curry, 36 Ohio Misc. 144, ____, 303 N.E.2d 925, 927 (1973) (refusal to allow DWI defendant to consult with counsel violates the sixth and fourteenth

statutory right to counsel before submitting to a breathalyzer test.[54] These courts based their holdings on general right to counsel statutes[55] or court rules.[56] This limited right to counsel only existed when the telephone call or access to counsel did not unreasonably delay the administration of the sobriety test.[57] Other jurisdictions recognize a limited sixth amendment right to counsel immediately after the defendant has taken a sobriety test and is charged with an offense.[58] A number of courts hold that the right to counsel does not apply because driver's license revocation hearings are a civil not a criminal matter.[59]

In *City of Tacoma v. Heater*[60] the Washington Supreme Court held that the critical stage in DWI cases arose immediately after the police officers had conducted their sobriety tests, interrogated the defendant, and charged him with the offense.[61] In a later case, *State*

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amendments).

In *State v. Welch* the court concluded that when a serious criminal case was involved, the request to submit to a chemical test could rise to the level of a critical stage in the proceedings. State v. Welch, 135 Vt. 316, ____, 376 A.2d 351, 355 (1977). The court held that the police may not, without reason, deny access between an accused and his attorney when the accused requests such access and it is readily available and will not interfere with the investigation. *Id. But cf.* State v. Petkus, 110 N.H. 394, ____, 269 A.2d 123, 125 (1970) (blood test not a critical stage requiring assistance of counsel).

54. *See, e.g.,* Prideaux v. State Dep't of Pub. Safety, 310 Minn. 405, 247 N.W.2d 385 (1976) (statutory right to consult with lawyer before making decision to submit to chemical test provided call does not unreasonably delay administration of test); Seders v. Powell, 39 N.C. App. 491, 250 S.E.2d 690, *aff'd,* 298 N.C. 453, 259 S.E.2d 544 (1979) (defendant had right to call attorney within the 30 minute statutory period before deciding whether to take breathalyzer test); McNulty v. Curry, 42 Ohio St. 2d 341, 328 N.E.2d 798 (1975) (decision whether to take blood alcohol test not a critical stage of criminal prosecution; state statute permitted defendant to contact attorney before submitting to test).

55. For an example of a general right to counsel statute, see MINN. STAT. ANN. § 481.10 (West 1971).

56. *See* Gooch v. Spradling, 523 S.W.2d 861 (Mo. App. 1975) (under court rule DWI defendant has right to representation and advice of counsel at all times after his arrest).

57. *See* People v. Gursey, 22 N.Y.2d 224, ____, 239 N.E.2d 351, 353 (Ct. App. 1968) (denial of defendant's request for opportunity to phone attorney before submitting to test violated his privilege of access to counsel when there was no danger of delay).

58. *See* State v. Krozel, 24 Conn. Supp. 266, ____, 190 A.2d 61, 62, 66 (Super. Ct. 1963) (when defendant arrested on suspicion of DWI, given sobriety tests, and charged with offense and police denied defendant's requests to call his attorney or wife, court held the police denied the defendant the constitutional right to assistance of counsel); State v. Fitzsimmons, 93 Wash. 2d 436, ____, 610 P.2d 893, 899 (time immediately after DWI arrest and charging when defendant must immediately make decision whether to submit to chemical test and arrange for further testing is critical stage to which constitutional right to counsel attaches), *vacated sub nom.* Washington v. Fitzsimmons, 449 U.S. 977, *aff'd on remand,* 94 Wash. 2d 858, 620 P.2d 999 (1980); City of Tacoma v. Heater, 67 Wash. 2d 733, 409 P.2d 867 (1966) (constitutional right to counsel; police may not prevent arrested drunk driver from contacting retained counsel for period of four hours after arrest; critical stage occurs immediately after police conducted sobriety tests, interrogated defendant, and charged him with the offense).

59. *See* Gottschalk v. Sueppel, 258 Iowa 1173, 140 N.W.2d 866 (1966) (driver's license revocation proceeding not a criminal prosecution, therefore, no right to counsel); Finocchairo v. Kelly, 11 N.Y.2d 58, 181 N.E.2d 427, 226 N.Y.S.2d 403 (revocation of driver's license by Commissioner of Motor Vehicles is civil matter; right to counsel applies to criminal proceedings), *cert. denied,* 370 U.S. 912 (1962); Brewer v. State, 23 Wash. App. 412, 595 P.2d 949 (Ct. App. 1979) (no right to counsel exists because driver's license revocation proceedings are not a criminal matter).

60. 67 Wash. 2d 733, 409 P.2d 867 (1966).

61. City of Tacoma v. Heater, 67 Wash. 2d 733, ____, 409 P.2d 867, 871 (1966). The *Heater* court's rationale was that the denial of counsel immediately after the police arrested the defendant and conducted sobriety tests made it impossible for the defendant to have disinterested witnesses

v. Fitzsimmons,[62] the Washington Supreme Court held that the arresting officer must provide any indigent DWI defendant with access to a telephone.[63] The arresting officer also had to provide the defendant with the number of a public defender organization or the numbers of attorneys who had expressed a willingness to serve as appointed counsel for indigents.[64] The court concluded that telephone consultation immediately after police charged the defendant was sufficient to provide the defendant with adequate legal assistance and a fair trial.[65]

The Washington Supreme Court recognized a limited sixth amendment right to counsel immediately after the police administered a sobriety test and charged the defendant with an offense. In contrast, a federal district court recognized a constitutional right to counsel before submitting to a sobriety test.[66] The *Heles v. South Dakota*[67] court held that when the defendant requests to speak with an attorney prior to testing, he must be allowed a reasonable opportunity to contact an attorney.[68] The court stated that if the defendant could not reach an attorney by telephone within a reasonable period of time, the defendant would have to decide whether to submit to a chemical test without consulting counsel to prevent delay in administration of the test.[69] Thus, the courts vary in their interpretations of when the right to counsel attaches in a DWI proceeding and in the bases for their holdings.

As noted above, several courts held that the denial of an opportunity to procure a second test on a DWI charge denied due process.[70] Faced with this same issue, the Arizona Supreme Court in *McNutt v. Superior Court*[71] determined that the right of a defendant to obtain an independent test rested on the constitutional standards of due process[72] and the state statutory right to have an additional

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observe his condition and to obtain a blood test by a doctor. *Id.* These were the only means by which the defendant might have proved his innocence. *Id.*

62. 93 Wash. 2d 436, 610 P.2d 893, *vacated sub nom.* Washington v. Fitzsimmons, 449 U.S. 977, *aff'd on remand,* 94 Wash. 2d 858, 620 P.2d 999 (1980).

63. State v. Fitzsimmons, 93 Wash. 2d 436, ____, 610 P.2d 893, 899, *vacated sub nom.* Washington v. Fitzsimmons, 449 U.S. 977, *aff'd on remand,* 94 Wash. 2d 858, 620 P.2d 999 (1980).

64. 93 Wash. 2d at ____, 610 P.2d at 899.

65. *Id.* at ____, 610 P.2d at 900.

66. Heles v. South Dakota, 530 F. Supp. 646 (D.S.D.), *vacated as moot,* 682 F.2d 201 (8th Cir. 1982).

67. 530 F. Supp. 646 (D.S.D.), *vacated as moot,* 682 F.2d 201 (8th Cir. 1982).

68. 530 F. Supp. at 654.

69. *Id.* at 653. *See* People v. Gursey, 22 N.Y.2d 224, 239 N.E.2d 351, 292 N.Y.S.2d 416 (1968) (no right to refuse chemical test until lawyer is present if lawyer cannot be reached promptly).

70. For cases holding that preventing a defendant from obtaining a second test violates due process, see *supra* notes 11, 12 & 32.

71. 133 Ariz. 7, 648 P.2d 122 (1982).

72. McNutt v. Superior Court, 133 Ariz. 7, ____, 648 P.2d 122, 124 (1982).

test administered.[73] The *McNutt* court cited *Smith v. Cada*[74] in which the Arizona Court of Appeals addressed whether a defendant had the right to obtain an independent blood test. In *Cada* the police refused to grant the defendant's request to call his attorney or release him from jail on bail to obtain an independent blood test.[75] The Arizona Court of Appeals held that the police had unreasonably interfered with Cada's right to obtain evidence for his defense and, thus, had denied him his due process right to a fair trial.[76]

In *McNutt* the Arizona Supreme Court pointed out that the State's refusal of the defendant's request to telephone his attorney denied the defendant the right to have his attorney arrange for an independent test.[77] The court reasoned that this denial violated the defendant's right guaranteed by rule 6.1(a) of the Arizona Rules of Criminal Procedure[78] to confer with counsel as soon as feasible after custody.[79] In considering the denial of counsel issue the *McNutt* court applied the rationale of the New York Court of Appeals in *People v. Gursey*[80] and the Arizona Court of Appeals in *State ex rel. Webb v. City Court.*[81]

In *People v. Gursey*[82] the New York Court of Appeals held that police officers could not, without justification, prevent access between the defendant and his lawyer before the defendant submitted to a chemical test if such access would not interfere unduly with the test results.[83] The court determined that granting the defendant's request would not have interfered substantially with the investigative procedure because the defendant would have concluded a call to an attorney in a matter of minutes.[84] The court further stated, however, that there could be no recognition of an absolute right to refuse a chemical test until a lawyer was present

73. *Id.* For the text of the Arizona statute, see *supra* note 13.

74. 114 Ariz. 510, 562 P.2d 390 (Ct. App. 1977).

75. Smith v. Cada, 114 Ariz. 510, ____, 562 P.2d 390, 391 (Ct. App. 1977). In *Cada* the defendant requested an attorney while being transported to the police station and upon arrival at the station. Although he had sufficient cash to post bail, police ignored his request. *Id.*

76. *Id.* at ____, 562 P.2d at 394. *See also* Smith v. Ganske, 114 Ariz. 515, 562 P.2d 395 (Ct. App. 1977). In *Ganske* the police failed to provide the defendant "with a 'reasonable opportunity' to determine the reason for the delay in making bail or to allow bail to be posted" by a friend. *Id.* at ____, 562 P.2d at 397. The court held that this deprived the defendant of an opportunity to obtain independent evidence of his sobriety and, accordingly, deprived the defendant of due process. *Id.*

77. McNutt v. Superior Court, 133 Ariz. 7, ____, 648 P.2d 122, 124 (1982).

78. For the text of rule 6.1, see *supra* note 9.

79. 133 Ariz. at ____, 648 P.2d at 124.

80. 22 N.Y.2d 224, 239 N.E.2d 351, 292 N.Y.S.2d 416 (1968).

81. 25 Ariz. App. 214, 542 P.2d 407 (Ct. App. 1975).

82. 22 N.Y.2d 224, 239 N.E.2d 351, 292 N.Y.S.2d 416 (1968).

83. People v. Gursey, 22 N.Y.2d 224, ____, 239 N.E.2d 351, 352, 292 N.Y.S.2d 416, 418 (1968).

84. *Id.* at ____, 239 N.E.2d at 353, 292 N.Y.S.2d at 419.

because the test results were admissible in evidence only if the test had been taken within two hours of the arrest.[85]

In *State ex rel. Webb v. City Court*[86] the police arrested the defendant for DWI. The defendant made several requests to telephone his attorney.[87] A police officer informed the defendant that he had a right to an additional test,[88] but the defendant did not request a second test.[89] The police honored the defendant's request to telephone his attorney when the defendant was booked at the jail.[90] The court noted that the defendant was not entitled to assistance of counsel in deciding whether to submit to the breathalyzer test.[91] The court held that because the police honored the defendant's request to telephone his attorney and informed him of his right to obtain a second test, there was no denial of his right to counsel.[92]

Applying the reasoning of *Gursey* and *Webb* to the *McNutt* case, the Arizona Supreme Court determined that allowing the defendant an opportunity to call his attorney would not have caused undue delay in the DWI investigation and arrest process.[93] The court recognized that because alcohol in the blood stream decomposes over time, the defendant had "no right to delay by demanding to consult with counsel before being required to choose between a blood alcohol test or possible driver's license suspension."[94] Referring to *State v. Gursey*,[95] the Arizona Supreme Court noted that the police should promptly give a defendant the opportunity to contact counsel if he demands it after he takes or refuses to take the test.[96]

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85. *Id. See* Heles v. South Dakota, 530 F. Supp. 646 (D.S.D.) (if defendant could not reach an attorney, defendant would have to decide whether to submit to test without assistance of counsel), *vacated as moot*, 682 F.2d 201 (8th Cir. 1982).

86. 25 Ariz. App. 214, 542 P.2d 407 (Ct. App. 1975).

87. State *ex rel.* Webb v. City Court, 25 Ariz. App. 214, ____, 542 P.2d 407, 408 (Ct. App. 1975).

88. *Id.* at ____, 542 P.2d at 409. *Compare* Connolly v. State, 79 Wash. 2d 500, ____, 487 P.2d 1050, 1052 (1971) (failure to inform defendant of statutory right to have additional tests administered invalidated revocation of defendant's driver's license for failure to submit to chemical test) *with* City of Farmington v. Joseph, 91 N.M. 414, ____, 575 P.2d 104, 107 (Ct. App. 1978) (failure of police to advise defendant of right to additional test is not error) *and* Kesler v. Department of Motor Vehicles, 1 Cal. 3d 74, 78-79, 459 P.2d 900, 903-04, 81 Cal. Rptr. 348, 351-52 (1969) (failure of officer to advise defendant that he could obtain additional test at his own expense did not excuse refusal to submit to test or deprive defendant of due process of law).

89. 25 Ariz. App. at ____, 542 P.2d at 409. *Cf.* People v. Kingston, 216 Cal. App. 2d 879, ____, 31 Cal. Rptr. 450, 451 (App. Dep't Super. Ct. 1963) (when defendant never requested that police call physician to administer blood alcohol test, defendant not denied reasonable opportunity to obtain evidence for defense).

90. 25 Ariz. App. at ____, 542 P.2d at 409.

91. *Id. See* Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971) (DWI defendant not entitled to assistance of counsel in deciding whether to take chemical test).

92. 25 Ariz. App. at ____, 542 P.2d at 409.

93. McNutt v. Superior Court, 133 Ariz. 7, ____, 648 P.2d 122, 124-25 (1982).

94. *Id.* at ____ n.2, 648 P.2d at 125 n.2.

95. 22 N.Y.2d 224, 239 N.E.2d 351, 292 N.Y.S.2d 416 (1968).

96. *McNutt*, 133 Ariz. at ____ n.2, 648 P.2d at 125 n.2.

The Arizona Supreme Court in *McNutt* further noted that if the defendant was indigent and could not afford counsel, the State did not have to wait until the court appointed counsel to continue detention procedures.[97] In the indigent defendant situation the court determined that the police should allow the defendant an opportunity to contact a friend or relative to arrange for an independent test.[98] The Arizona Supreme Court concluded that the State's action in denying the defendant an opportunity to telephone his attorney resulted in preventing the defendant from gathering exculpatory evidence.[99] Therefore, constitutional standards of due process and Arizona statutory law and court rules entitled the DWI suspect to obtain an independent test and to call his attorney to arrange for that test.[100]

The *McNutt* court indicated that the determining factor was whether the defendant's call would unduly delay the DWI investigation and arrest.[101] Whether a defendant in Arizona may call his attorney before taking a breathalyzer test, however, remains unclear after *McNutt.*

The *McNutt* court cited *People v. Gursey*,[102] which held that the denial of the defendant's request for an opportunity to call his lawyer before taking a chemical test violated his privilege of access to counsel when granting the defendant's request would not have interfered substantially with the investigative procedure.[103] By citing *Gursey* the Arizona Supreme Court may have implied that a defendant may call his attorney before taking a chemical test if it would not unduly delay the DWI investigation. This argument was further evidenced by the court's statement in a footnote that "a defendant has no right to *delay* by demanding to consult with counsel before being required to choose between a blood alcohol test or possible driver's license suspension."[104]

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97. *Id. But see* State v. Fitzsimmons, 93 Wash. 2d 436, ____, 610 P.2d 893, 899 (officer should provide indigent defendant with access to phone and number of public defender organization or numbers of attorneys willing to represent indigent clients), *vacated sub nom.* Washington v. Fitzsimmons, 449 U.S. 977, *aff'd on remand,* 94 Wash. 2d 858, 620 P.2d 999 (1980).

98. *McNutt,* 133 Ariz. at ____ n.2, 648 P.2d at 125 n.2.

99. *Id.* at ____, 648 P.2d at 125.

100. *Id.* at ____, 648 P.2d at 124-25.

101. *Id.* at ____, 648 P.2d at 124.

102. *Id.* (citing People v. Gursey, 22 N.Y.2d 224, 239 N.E.2d 351, 292 N.Y.S.2d 416 (1968)).

103. People v. Gursey, 22 N.Y.2d 224, ____, 239 N.E.2d 351, 352, 292 N.Y.S.2d 416, 418 (1968).

104. *McNutt,* 133 Ariz. at ____ n.2, 648 P.2d at 125 n.2 (emphasis added). Section 28-691 (B) of the Arizona Revised Statutes Annotated provides as follows:

> Following an arrest a period of fifteen minutes shall elapse from the time the violator is stopped before administering any test prescribed by subsection A of this section. During this period of time the violators shall be informed that their license or permit to drive will be suspended or denied if they refuse to submit to the test.

Based on *Gursey* a DWI suspect has no right to delay, as opposed to no right to assistance of counsel, before submitting to a chemical test. The court countermanded the argument that an Arizona DWI defendant has a right to assistance of counsel before submitting to a sobriety test by citing *Campbell v. Superior Court.*[105] In *Campbell* the court held that the defendant "was not entitled to assistance of counsel in deciding whether . . . to submit to a breathalyzer test."[106] Whether the court in *McNutt* intended to expand *Campbell* by allowing the defendant to call an attorney before submitting to a breathalyzer when it caused no undue delay or interference remains unclear.

A second issue raised by the *McNutt* opinion is whether the court created a double standard regarding the right to counsel for indigents and for those who could afford counsel. The court held that the State's action in denying the defendant an opportunity to call his attorney and arrange for an independent test violated rule 6.1(a) of the Arizona Rules of Criminal Procedure, which provides a defendant with the "right to consult in private with an attorney as soon as feasible after a defendant is taken into custody."[107] The court's holding, however, limited this right to counsel to those who can afford counsel. The indigent defendant had a right to counsel after submitting to a breathalyzer test if he could afford it, otherwise the state allowed him to call a friend or relative.[108] Therefore, under *McNutt* a person charged with DWI had a right to call and have his attorney arrange for an independent test if the defendant could afford an attorney.

As noted above, several jurisdictions held that the denial of an opportunity to obtain an independent blood test violated due process. Section 39-20-02 of the North Dakota Century Code[109]

ARIZ. REV. STAT. ANN. § 28-691 (B) (Supp. 1981-1982).

105. *McNutt,* 133 Ariz. at ____ n.2, 648 P.2d at 125 n.2 (citing Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971)).

106. Campbell v. Superior Court, 106 Ariz. 542, ____, 479 P.2d 685, 693 (1971).

107. *McNutt,* 133 Ariz. at ____, 648 P.2d at 124. For the text of rule 6.1(a), see *supra* note 9.

108. 133 Ariz. at ____ n.2, 648 P.2d at 125 n.2. *But see* State v. Fitzsimmons, 93 Wash. 2d 436, ____, 610 P.2d 893, 899 (police officer should provide indigent defendant with access to phone and number of public defender organization or numbers of attorneys willing to represent indigent clients), *vacated sub nom.* Washington v. Fitzsimmons, 449 U.S. 977, *aff'd on remand,* 94 Wash. 2d 858, 620 P.2d 999 (1980).

109. N.D. CENT. CODE § 39-20-02 (1980). Section 39-20-02 of the North Dakota Century Code provides as follows:

> Only a physician, or a qualified technician, chemist, or registered nurse acting at the request of a law enforcement officer may withdraw blood for purpose of determining the alcoholic content therein. This limitation shall not apply to the taking of breath, saliva, or urine specimen. The person tested may have a physician, or a qualified technician, chemist, registered nurse, or other qualified person of his own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer. The failure or inability to obtain an additional

provides that a defendant charged with DWI has the right to have a second test administered by a qualified person of his own choosing. The North Dakota Supreme Court addressed the issue of suppression of exculpatory evidence in *State v. Larson.*[110] In *Larson* the court held that the State is not required to provide a sample of the defendant's breath, taken at the time of the breathalyzer test, to the defendant for an independent test.[111] The court determined, however, that a person could have a qualified person of his own choosing administer a second test.[112] The court concluded that section 39-20-02 of the North Dakota Century Code, which permitted a defendant to obtain an independent test, provided a DWI defendant a fair and reasonable opportunity to impeach the breathalyzer results and met the constitutional due process standards.[113] Therefore, by statute North Dakota only allows the defendant the right to obtain an independent test at his own expense if he requests one, but does not require the state to provide the defendant with a sample of the defendant's breath taken at the time of the initial breathalyzer test.[114]

Under *McNutt* the defendant had a right to contact an attorney to arrange an independent test during the crucial time period following the arrest and testing.[115] The *McNutt* court based this holding on the state right to counsel.[116] North Dakota does not have a state rule similar to the Arizona rule that concerns the right to counsel.[117] In *State v. Iverson,*[118] however, the North Dakota

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test by a person shall not preclude the admission of the test or tests taken at the direction of law enforcement officer. Upon the request of the person who is tested, full information concerning the test or tests taken at the direction of the law enforcement officer shall be made available to him.

Id.

110. 313 N.W.2d 750 (N.D. 1981).

111. State v. Larson, 313 N.W.2d 750, 752 (N.D. 1981). *Contra* State v. Peyatt, 130 Ariz. 541, 637 P.2d 751 (Ct. App. 1981) (police must advise a suspect that they will take a second sample of his breath and preserve it for his use and that failure to do so will result in suppression of results of breath test).

112. 313 N.W.2d at 752-53.

113. 313 N.W.2d at 753. In *Larson* the court reasoned that the defendant had failed to demonstrate that the test ampoule could provide material evidence concerning his guilt or punishment. *Id.* at 756. *But see* Scales v. City Court, 122 Ariz. 231, 594 P.2d 97 (1979) (destruction of breathalyzer test ampoules violated defendants' right to due process).

114. 313 N.W.2d at 752-53.

115. *McNutt,* 133 Ariz. at ____, 648 P.2d at 124.

116. *Id.* (construing ARIZ. R. CRIM. P. 6.1(a)). For the text of rule 6.1(a) of the Arizona Rules of Criminal Procedure, see *supra* note 9.

117. *But see* N.D.R. CRIM. P. 44. Rule 44 of the North Dakota Rules of Criminal Procedure provides as follows:

> Absent a knowing and intelligent waiver, every indigent defendant shall be entitled to have counsel appointed at public expense to represent him at every stage of the proceedings from his initial appearance before a magistrate through appeal in all felony cases. Absent a knowing and intelligent waiver, every indigent defendant shall be entitled to have counsel appointed at public expense to represent him at every stage of the proceedings from his initial appearance before a magistrate through appeal in

Supreme Court recognized a constitutional right to counsel at a critical stage of the proceedings against a defendant and that a preliminary hearing was a critical stage in the proceedings.[119]

The United States Supreme Court in *Miranda v. Arizona*[120] recognized that a defendant has a right to an attorney when there has been a "custodial interrogation" and the defendant requests counsel.[121] In *State v. Field*[122] the North Dakota Supreme Court indicated that *Miranda* warnings were necessary before questioning a person taken into custody and arrested for DWI.[123] When the police warn a DWI suspect of his right to counsel under *Miranda*, he may be tempted to refuse the sobriety test[124] until his attorney arrives[125] or until he can consult with an attorney by telephone.[126] In *Agnew v. Hjelle*,[127] however, the North Dakota Supreme Court stated that there was no constitutional right to consult with an attorney before deciding to take a chemical test, notwithstanding *Miranda* warnings.[128] The court considered proceedings under the

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all nonfelony cases unless the magistrate has determined that sentence upon conviction will not include imprisonment. The court shall appoint counsel to represent a defendant at his expense if he is unable to secure the assistance of counsel and is not indigent.

Id. See also N.D. CONST. art. I. § 12 (the party accused has the right to appear and defend in person and with counsel); N.D.R. CRIM. P. 5 (an arrested person shall be brought before the nearest available magistrate without unnecessary delay; the magistrate shall inform the defendant of his right to appear and defend in person or by counsel).

118. 187 N.W.2d 1 (N.D. 1971).

119. State v. Iverson, 187 N.W.2d 1, 35 (N.D. 1971). In Kirby v. Illinois, 406 U.S. 682 (1972), Justice Stewart in a plurality opinion indicated that there is no right to counsel before "the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment, information or arraignment." *Id.* at 689. *See* City of Tacoma v. Heater, 67 Wash. 2d 733, ____, 409 P.2d 867, 871 (1966) (critical stage in the case of DWI arose immediately after the police officers had conducted their sobriety tests, interrogated the defendant, and charged him with the offense).

120. 384 U.S. 436 (1966).

121. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

122. 294 N.W.2d 404 (N.D. 1980).

123. State v. Fields, 294 N.W.2d 404, 409 (N.D. 1980). *See* Hammeren v. North Dakota State Highway Comm'r, 315 N.W.2d 679 (N.D. 1982) (failure of arresting officer to inform defendant of consequences of refusal to take breathalyzer test may preclude suspension of driver's license if there is sufficient evidence of confusion).

124. *See* South Dakota v. Neville, 103 S. Ct. 916, 923 (1983) (defendant's refusal to take blood alcohol test admissible into evidence at trial).

125. In Minnesota if an attorney arrives at the jail within a reasonable time that does not affect the validity of the implied consent testing, the State must allow a private consultation between the attorney and his client. The State must then afford the arrested person an opportunity to submit to the test. State Dep't of Pub. Safety v. Kneisl, 312 Minn. 281, 286, 251 N.W.2d 645, 649 (1977).

126. *See* Heles v. South Dakota, 530 F. Supp. 646 (D.S.D.) (phoning attorney before submitting to chemical test sufficient to provide defendant with adequate legal assistance and a fair trial), *vacated as moot*, 682 F.2d 201 (8th Cir. 1982); People v. Gursey, 22 N.Y.2d 224, ____, 239 N.E.2d 351, 353, 292 N.Y.S.2d 416, 419 (1968) (defendant's request would not have substantially interfered with investigative procedure because call to attorney would have been concluded in a matter of minutes); *cf.* State v. Held, 311 Minn. 74, 76, 246 N.W.2d 863, 864 (1976) (because of potential security problems suspect does not have right to phone attorney from private room or booth).

127. 216 N.W.2d 291 (N.D. 1974).

128. Agnew v. Hjelle, 216 N.W.2d 291, 297 (N.D. 1974). North Dakota follows a number of other jurisdictions that hold that because proceedings under implied consent laws are civil in nature, there is no right to counsel. *See* Gottschalk v. Sueppel, 258 Iowa 1173, 140 N.W.2d 866 (1966);

North Dakota implied consent laws to be civil in nature.[129] Because a defendant had no right to counsel in a civil proceeding, the defendant had no right to counsel before deciding to take a breathalyzer test.[130] The North Dakota Supreme Court has never addressed whether a defendant has a constitutional right to counsel immediately following a DWI arrest and the administration of a breathalyzer test.[131]

The *McNutt* court applied constitutional standards of due process and state statutory law to provide the defendant with the right to obtain an independent test.[132] Although the *McNutt* decision was unclear about whether there was a right to consult with an attorney before submitting to a chemical test, the Arizona Supreme Court recognized a right to counsel immediately following administration of the test. The North Dakota Supreme Court has taken the position that there is no constitutional right to consult with an attorney before deciding to take a chemical test.[133] Based on *State v. Larson*, however, the defendant has a right to call his attorney after submitting to a breathalyzer test to arrange for an independent test.[134]

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Finocchairo v. Kelly, 11 N.Y.2d 58, 181 N.E.2d 427, 226 N.Y.S.2d 403, *cert. denied*, 370 U.S. 912 (1962); Seders v. Powell, 298 N.C. 453, ____, 259 S.E.2d 544, 550 (1979); Blow v. Commissioner of Motor Vehicles, 83 S.D. 628, 164 N.W.2d 351 (1969).

129. 216 N.W.2d at 298.

130. *Id.*

131. *See generally* Comment, *Implied Consent Laws: Some Unsettled Constitutional Questions*, 12 RUTGERS L. J. 99 (1980) (further case law on the constitutional right to counsel in DWI proceedings).

132. McNutt v. Superior Court, 133 Ariz. 7, ____, 648 P.2d 122, 124 (1982).

133. Agnew v. Hjelle, 216 N.W.2d 291, 297 (N.D. 1974).

134. 313 N.W.2d 750, 752-53 (N.D. 1981). In *Larson* the North Dakota Supreme Court stated:

> Pursuant to [section 39-20-02 of the North Dakota Century Code] a person upon whom a law enforcement officer has administered a chemical test can have any qualified person of his own choosing administer a test or tests for his own use. If that person desires samples of his breath for independent testing he has the right to acquire those samples himself with the assistance of *any qualified person he chooses.*

State v. Larson, 313 N.W. 2d 750, 752-53 (N.D. 1981) (emphasis added).