Montana Law Review

Volume 46
Issue 2 *Summer 1985*

Article 8

July 1985

State v. Armfield: No Right to Counsel under Montana's Implied Consent Statute

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STATE V. ARMFIELD: NO RIGHT TO COUNSEL UNDER MONTANA'S IMPLIED CONSENT STATUTE

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I. INTRODUCTION

In a concerted effort to cope with the escalating problem of alcohol-induced automobile accidents, by 1979 every state had adopted an implied consent statute as one means of removing drunk drivers from the highways.[1] The implied consent statutes all basically provide that anyone operating a motor vehicle within the state is deemed to have consented to a chemical test for intoxication at the direction of any police officer having reasonable grounds to believe the driver is intoxicated, and they provide for license revocation in the event the driver refuses to take the test.[2] Implied consent statutes have been unsuccessfully challenged as violating the right against self-incrimination,[3] the right against un-

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1. ALA. CODE § 32-5-192 (1983); ALASKA STAT. § 28.35.031 (Michie 1984); ARIZ. REV. STAT. ANN. § 28-691 (West Supp. 1984); ARK. STAT. ANN. § 75-1045 (Michie Supp. 1983); CAL. VEH. CODE § 13353 (West Supp. 1985); COLO. REV. STAT. § 42-4-1202 (1984); CONN. GEN. STAT. § 14-227b (1985); DEL. CODE ANN. tit. 21, § 2740 (Michie Supp. 1984); FLA. STAT. ANN. § 322.261 (West Supp. 1985); GA. CODE ANN. § 40-5-55 (Supp. 1984); HAWAII REV. STAT. § 286-151 (Supp. 1984); IDAHO CODE § 18-8002 (Supp. 1984); ILL. ANN. STAT. ch. 95-½, § 11-501.1 (Smith-Hurd Supp. 1984); IND. CODE ANN. § 9-11-4-1 (Burns 1984); IOWA CODE ANN. § 321 B.4 (West Supp. 1984); KAN. STAT. ANN. § 8-1001 (1982); KY. REV. STAT. ANN. § 186.565 (Baldwin 1982); LA. REV. STAT. ANN. § 32:661 (West Supp. 1985); ME. REV. STAT. ANN. tit. 29, § 1312 (West Supp. 1983); MD. TRANSP. CODE ANN. § 16-205.1 (Michie 1984); MASS. GEN. LAWS ANN. ch. 90, § 24(f) (Michie/Law. Co-op. Supp. 1985); MICH. STAT. ANN. § 9.2325(3) (Callaghan Supp. 1984); MINN. STAT. ANN. § 169.123(2) (West Supp. 1985); MISS. CODE ANN. § 63-11-5 (Supp. 1984); MO. ANN. STAT. § 577.020 (West Supp. 1985); MONT. CODE ANN. § 61-8-402 (1983); NEB. REV. STAT. § 39-669.08 (1984); NEV. REV. STAT. § 484:383 (1979); N.H. REV. STAT. ANN. § 265:84 (Equity Supp. 1983); N.J. STAT. ANN. § 39:4-50.2 (West Supp. 1984); N.M. STAT. ANN. § 66-8-107 (Supp. 1984); N.Y. VEH. & TRAF. LAW § 1194 (McKinney Supp. 1984); N.C. GEN. STAT. § 20-16.2 (1983); N.D. CENT. CODE § 39-20-01 (Supp. 1983); OHIO REV. CODE ANN. § 4511.19.1 (Page Supp. 1984); OKLA. STAT. ANN. tit. 47, § 751 (West Supp. 1984); OR. REV. STAT. § 487.805 (1983); PA. CONS. STAT. ANN. tit. 75, § 1547 (Purdon Supp. 1984); R.I. GEN. LAWS § 31-27-2.1 (1982); S.C. CODE ANN. § 56-5-2950 (Law. Co-op. 1977 & Supp. 1984); S.D. CODIFIED LAWS ANN. § 32-23-10 (1984); TENN. CODE ANN. § 55-10-406 (Supp. 1984); TEX. REV. CIV. STAT. ANN. art. 6701 L-5 (Vernon Supp. 1985); UTAH CODE ANN. § 41-6-44.10 (1981); VT. STAT. ANN. tit. 23, § 1202 (Supp. 1984); VA. CODE § 18.2-268 (Supp. 1984); WASH. REV. CODE ANN. § 46.20.308 (West Supp. 1985); W. VA. CODE § 17C-5A-1 (Supp. 1984); WIS. STAT. ANN. § 343.305 (West Supp. 1984); WYO. STAT. § 31-6-102 (1984). For a discussion of the history and adoption of implied consent laws see Note, *Driving While Intoxicated and the Right to Counsel: The Case Against Implied Consent*, 58 TEX. L. REV. 935 (1980).

2. *See, e.g.*, MONT. CODE ANN. § 61-8-402 (1983).

3. One of the first such challenges was to New York's statute in Schutt v. MacDuff, 205 Misc. 43, 127 N.Y.S.2d 116 (Sup. Ct. 1954). The Supreme Court resolved this question

reasonable searches,[4] and the right to due process.[5] The Supreme Court has resolved those questions, but it has not yet decided the issue of the accused driver's right to counsel before deciding whether to submit to the blood alcohol level test.[6] Many states have considered the question and have come to surprisingly diverse conclusions.[7]

On December 28, 1984, the Montana Supreme Court decided, in *State v. Armfield*,[8] that a person arrested in Montana for driving under the influence (DUI) has no constitutional right to consult with counsel before deciding whether to submit to a test of his or her blood alcohol content.[9] The court reasoned that the United States Constitution should not be read to provide such a right, and implied that the Montana Constitution provides no greater protection than the federal Constitution.[10] *Armfield* is important for its resolution of a key question about the rights of persons accused of DUI, and for its implicit rejection of an opportunity to interpret Montana's state constitutional or statutory guarantees of a right to counsel as more protective than the federal guarantee. This comment discusses the *Armfield* decision, criticizes the court's analysis of the central constitutional arguments in light of contrary decisions in other jurisdictions, and briefly addresses the court's apparent unwillingness to consider whether the Montana Constitution provides an "independent and adequate"[11] state ground for pro-

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in South Dakota v. Neville, 459 U.S. 553 (1983) (test results and the refusal to submit are within the area of unprotected physical evidence); the Montana Supreme Court followed *Neville* in State v. Jackson, ___ Mont. ___, 672 P.2d 255 (1983).

4. Following Schmerber v. California, 384 U.S. 757 (1966) (holding that compulsory chemical blood tests do not violate the fifth amendment because the evidence is nontestimonial, and do not violate the fourth amendment since such a test is a reasonable search), state courts have held that states are free to compel drivers to submit to blood alcohol level tests. *See, e.g.*, State v. Mitchell, 245 So. 2d 618, 621 (Fla. 1971); State v. MaCuk, 57 N.J. 1, 268 A.2d 1 (1970).

5. *See* Bell v. Burson, 402 U.S. 535 (1971) (holding that license revocation proceeding must satisfy the notice and hearing aspects of procedural due process).

6. The right to counsel issue reached the Supreme Court in Washington v. Fitzsimmons, 449 U.S. 977, *vacating* 93 Wash. 2d 436, 610 P.2d 893, *aff'd on other grounds*, 94 Wash. 2d 858, 620 P.2d 999 (1980). The Supreme Court remanded the case for a determination of whether there were independent and adequate state grounds for the decision, thus avoiding a decision on the scope of the sixth amendment right to counsel in the DUI arena. *Fitzsimmons*, 449 U.S. 977.

7. *See infra* notes 43-98 and accompanying text.

8. ___ Mont. ___, 693 P.2d 1226 (1984).

9. *Id.* at ___, 693 P.2d at 1228.

10. *Id.*

11. *See* Michigan v. Long, 463 U.S. 1032 (1983) (articulating the "independent and adequate" state grounds test). For a discussion of the development of the doctrine and its relevance to Montana law, see Elison & NettikSimmons, *Federalism and State Constitutions: the New Doctrine of Independent and Adequate State Grounds*, 45 MONT. L. REV.

tecting the rights of a driver arrested on a DUI charge.

II. The *Armfield* Decision

A. *Facts*

Bozeman police officers arrested Timothy Armfield on a charge of DUI, took him to the Gallatin County Detention Center, informed him of the Montana consent law[12] and of his right to refuse to submit to a blood alcohol test, and told him that he could not consult with an attorney before deciding whether to submit to the test.[13] Armfield took the test, then moved to suppress the results in Bozeman City Court.[14] The court denied his motion and Armfield pleaded guilty.[15] Armfield appealed to the district court, which granted his motion to suppress the test results on the grounds that the officers had obtained the results in violation of Armfield's limited constitutional right to counsel.[16] The district court held that the sixth and fourteenth amendments afford a reasonable opportunity to consult counsel prior to submitting to a breathalizer test and that in this case a reasonable opportunity meant the twenty to thirty minutes required to warm up the breathalizer.[17] The state and city appealed from that decision.

B. *Holding*

The Montana Supreme Court held that there is no constitutional guarantee of an opportunity to seek an attorney's advice before deciding whether to submit to a blood alcohol test "where consent is deemed given as a matter of law."[18] The court restated the propositions of various Supreme Court decisions which define the contours of the right to counsel under the sixth, fifth, and fourteenth amendments.

1. *No Sixth Amendment Right to Counsel*

The *Armfield* court reiterated that the fundamental sixth

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177 (1984).

12. Mont. Code Ann. § 61-8-402 (1983)

13. ___ Mont. at ___, 693 P.2d at 1227.

14. *Id.* at ___, 693 P.2d at 1227-28.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* (citing Standish v. Department of Revenue, M.V.D., 235 Kan. 900, 904, 683 P.2d 1276, 1281 (1984) (holding, under a consent statute similar to Montana's, that when state law deems drivers have consented to chemical tests when arrested for DUI, there is no constitutional right to consult counsel before deciding whether to submit to the test).

amendment guarantee of the presence of counsel at trial extends to the presence of counsel at pretrial events considered to be "critical stage" encounters under the test of *United States v. Wade*.[19] The court held that chemical testing of blood alcohol content is not such a critical stage because "a breathalizer test is not susceptible of the suggestive manipulation characteristic of the 'critical stage' event."[20] The court reasoned that *Wade* only requires that a defendant be assured the opportunity for meaningful confrontation of the government's case at trial, and that Armfield did not need the advice of counsel to assure such confrontation.[21]

2. *No Fifth Amendment Right to Counsel*

The Montana Supreme Court observed that in the landmark decisions of *Massiah v. United States*,[22] *Escobedo v. Illinois*,[23] and *Miranda v. Arizona*,[24] the United States Supreme Court linked the sixth amendment right to counsel to the fifth amendment privilege against self-incrimination.[25] In *Escobedo*[26] and *Miranda*[27] the Court held that the presence of counsel was necessary to help protect defendants from any coercive tactics which officers might employ during custodial interrogation, and in *Massiah*[28] it extended the right of counsel to post-indictment, noncustodial interrogation. The Montana Supreme Court emphasized that this branch of right to counsel analysis is inapplicable to breath tests because, under the recent decision by the United States Supreme Court in *South Dakota v. Neville*,[29] the results of a breath test are not a self-incriminating communication. Since the Supreme Court had confined the fifth amendment privilege to communicative testimony, and had already held that the privilege did not extend to evidence of physical characteristics,[30] the *Neville* decision was predictable. The Montana Supreme Court had already adopted and applied the *Neville* rule in *State v. Jackson*,[31] in which it held that admission

19. 388 U.S. 218 (1967), *cited in Armfield*, ___ Mont. at ___, 693 P.2d at 1229.
20. ___ Mont. at ___, 693 P.2d at 1229.
21. *Id.*
22. 377 U.S. 201 (1964), *cited in Armfield*, ___ Mont. at ___, 693 P.2d at 1229.
23. 378 U.S. 478 (1964), *cited in Armfield*, ___ Mont. at ___, 693 P.2d at 1229.
24. 384 U.S. 436 (1966), *cited in Armfield*, ___ Mont. at ___, 693 P.2d at 1229.
25. ___ Mont. at ___, 693 P.2d at 1229.
26. 378 U.S. at 490-91.
27. 384 U.S. at 465.
28. 377 U.S. at 206-07.
29. 459 U.S. 553 (1983).
30. *See* Gilbert v. California, 388 U.S. 263 (1967); *Wade*, 388 U.S. at 223; *Schmerber*, 384 U.S. 757; *discussed in Armfield*, ___ Mont. at ___, 693 P.2d at 1230.
31. ___ Mont. ___, 672 P.2d 255 (1983).

of a defendant's refusal to submit to a breath test did not violate his privilege against self-incrimination. The court concluded in *Armfield* that a defendant's sixth amendment right to counsel exists only "where the assistance of counsel is required to protect other rights guaranteed him by law."[32] Without the need to protect a fifth amendment privilege against self-incrimination, there is no concomitant sixth amendment right to counsel.

3. *No Fourteenth Amendment Right to Counsel*

The district court had based its holding in *Armfield* on the fourteenth amendment as well as the sixth, thus suggesting that a denial of the right to consult with counsel was a denial of due process.[33] The Montana Supreme Court reasoned that the fourteenth amendment could support a right to counsel either through its function of making the sixth amendment right to counsel applicable to the states, or independently through its guarantees of due process.[34] Since it had already found that the sixth amendment provides no such right to consult counsel before deciding whether to take a breathalizer test,[35] the court turned to an analysis of the requirements of due process. Relying upon *Rochin v. California*,[36] the court observed that due process requires only that "convictions cannot be brought about by methods that offend 'a sense of justice.' "[37] In *Rochin*, law enforcement officers illegally entered the defendant's home, struggled with him to extract evidence he had swallowed, then had his stomach pumped to retrieve the capsules they sought.[38] The Supreme Court found these practices violative of fundamental standards of decency,[39] but the Montana Supreme Court found nothing analogous in the arrest and treatment of Armfield, who submitted to a breath test after officers advised him he had no right to seek advice of counsel.[40] Since the officers' conduct complied with statutory provisions,[41] the court held that it did not violate Armfield's rights to due process, and further that the implied consent law itself embodies the community's standards

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32. ___ Mont. at ___, 693 P.2d at 1230.
33. *Id.*
34. *Id.*
35. *See supra* notes 19-21 and accompanying text.
36. 342 U.S. 165 (1952).
37. ___ Mont. at ___, 693 P.2d at 1230 (citing *Rochin*, 342 U.S. at 173).
38. *Rochin*, 342 U.S. at 172.
39. *Id.*
40. ___ Mont. at ___, 693 P.2d at 1230-31.
41. *See* MONT. CODE ANN. § 61-8-405 (1983).

of decency and fairplay.[42]

III. A Critique of *Armfield* in Light of Right to Counsel Decisions in Other Jurisdictions

A. *States in Which There Is No Right to Counsel*

Courts in many jurisdictions have reached the same conclusion as the Montana Supreme Court about the scope of the right to counsel in the DUI context. Many courts based their decisions on the assertion that a driver's license revocation proceeding is civil and not criminal, thus the decision whether to take a blood alcohol level test is not part of a criminal prosecution and does not require the advice of counsel.[43] When the implied consent law permits the introduction of evidence of the refusal to take the test in subsequent criminal prosecutions, the distinction between civil and criminal proceedings actually makes very little sense. All except one of the courts which found the civil-criminal dichotomy determinative were construing statutes which do permit introduction of evidence of refusal in a later criminal proceeding against the person accused of DUI.[44] At least one court has held that when a state statute was amended to provide for the admissibility of refusal in a criminal prosecution, it necessarily implied a reasonable right to consult with counsel, a right which had not existed under the prior law when such a refusal was inadmissible.[45] Other courts have been critical of the dichotomy between civil and criminal proceedings, and have held that labeling the proceeding civil does not justify abridgment of basic rights.[46] For example, the Minnesota Supreme Court held that since the license revocation proceeding is inextri-

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42. ___ Mont. at ___, 693 P.2d at 1231 (citing *Rochin*, 342 U.S. at 173).

43. *See, e.g.*, Department of Pub. Safety v. Maples, 149 Ga. App. 484, 254 S.E.2d 724 (1979); State v. Severino, 56 Hawaii 378, 537 P.2d 1187 (1975); Ruge v. Kovach, ___ Ind. ___, 467 N.E.2d 673 (1984); Green v. Department of Pub. Safety, 308 So. 2d 863 (La. App. 1975); Lewis v. Nebraska State Dep't of Motor Vehicles, 191 Neb. 704, 217 N.W.2d 177 (1974); Blow v. Commissioner of Motor Vehicles, 83 S.D. 628, 164 N.W.2d 351 (1969); Cavaness v. Cox, 598 P.2d 349 (Utah 1979).

44. Ga. Code Ann. § 40-6-392(c) (Supp. 1984); Ind. Code Ann. § 9-11-4-3(d) (Burns 1984); La. Rev. Stat. Ann. § 32:661 (West Supp. 1985); Neb. Rev. Stat. § 39-669.08 (1984); State v. Meints, 189 Neb. 264, 202 N.W.2d 202 (1972) (refusal to submit to a blood test may be shown in a DUI prosecution); S.D. Codified Laws Ann. § 32-23-10.1 (1984); Utah Code Ann. § 41-6-44.10(h) (1981). The only state which does not admit evidence of refusal in a criminal prosecution is Hawaii. Hawaii Rev. Stat. § 286-159 (Supp. 1984) (provides that proof of refusal to take a chemical test shall not be admissible in any criminal proceeding or civil action except a license revocation proceeding).

45. Forte v. State, 683 S.W.2d 145, 156-58 (Tex. Ct. App. 1985).

46. *See, e.g.*, Prideaux v. State Dep't of Pub. Safety, 310 Minn. 405, 409, 247 N.W.2d 385, 388 (1976).

cably intertwined with the prosecution for driving under the influence, and since a license revocation (for six months) might have as serious an impact as a criminal sanction,[47] the accused has a right to consult with an attorney, although the court grounded the right in a statutory provision rather than the constitution.[48]

More than a dozen states have rejected defendants' claims of a right to counsel on the grounds that the decision whether to take a blood alcohol test does not represent a "critical stage" of the prosecution under the *Wade* test.[49] In these cases the courts' reasoning typically has been rather cursory and identical in most respects to that employed by the Montana court in *Armfield*.[50]

B. *States in Which There Is a Right to Counsel*

Courts holding that persons accused of DUI do have a right to counsel base the right on either statutory or constitutional grounds. Those which interpret the federal constitution as protecting the accused driver's right to counsel ground their decisions in either the sixth amendment, viewing the decision whether to take a chemical test as a "critical stage" in the prosecution, or in the due process clause of the fourteenth amendment. The Montana Supreme Court did not indicate whether it considered these decisions in deciding *Armfield*, but a review of these courts' reasoning illustrates that the court could have come easily and quite justifiably to the conclusion that a person arrested for DUI is entitled to the assistance of counsel in deciding whether to take the blood alcohol test.

1. *Statutory Provisions of a Right to Counsel*

Typical of the provisions courts have interpreted to guarantee an opportunity to consult with an attorney prior to taking a blood test is an Alaska statute which says that "[i]mmediately after an arrest, a prisoner shall have the right to telephone or otherwise

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47. *Id.* at 410-11, 247 N.W.2d at 388-89.

48. *Id.* at 414, 247 N.W.2d at 391.

49. *See, e.g.*, Calvert v. State Dep't of Revenue, M.V.D., 184 Colo. 214, 519 P.2d 341 (1974); Standish v. Department of Revenue, M.V.D., 235 Kan. 900, 683 P.2d 1276 (1984); State v. Jones, 457 A.2d 1116 (Me. 1983); Commonwealth v. Mandeville, 386 Mass. 393, 436 N.E.2d 912 (1982); Holmberg v. 54-A Judicial Dist. Judge, 60 Mich. App. 757, 231 N.W.2d 543 (1975); Ewing v. State, 300 So. 2d 916 (Miss. 1974); State v. Petkus, 110 N.H. 394, 269 A.2d 123, *cert. denied*, 402 U.S. 932 (1970); State v. Sandoval, 101 N.M. 399, 683 P.2d 516 (Ct. App. 1984); Flynt v. State, 507 P.2d 586 (Okla. Crim. App. 1973); King v. Commonwealth, 81 Pa. Commw. 177, 472 A.2d 1196 (1984); Dunn v. Petit, 120 R.I. 486, 388 A.2d 809 (1978); Law v. City of Danville, 212 Va. 702, 187 S.E.2d 197 (1972).

50. *See supra* notes 19-21 and accompanying text.

communicate with his attorney . . . ."[51] The Alaska Supreme Court has held that this provision of the criminal law of that state applies to persons accused of DUI, that denial of requests to speak with an attorney violates the right of access to counsel, and that the word "[i]mmediately means just that, not after tests are given."[52]

In some states the statutory right to consult with an attorney is incorporated into the implied consent law itself and there is a time limit upon its exercise, ranging from thirty minutes in North Carolina[53] to two hours in Iowa.[54] The rationale for such time limits is that the right to counsel must be balanced against the practical concern that chemical tests are of doubtful validity if not performed promptly after the arrest of the person suspected of DUI.[55] In Ohio[56] the statutory right to counsel is the same as that of anyone else accused of a crime although it is honored when the arrested driver is permitted telephone access to counsel.[57]

In one of the leading right to counsel cases, the Minnesota Supreme Court held that the statutory right to counsel is fortified by constitutional principles.[58] Although both due process concerns and "critical stage" sixth amendment analysis mandated a right to counsel, the court did not decide the case on those grounds, but rather interpreted its general statutory provision of a right to counsel as guaranteeing that right to one accused of DUI since the statute provided that any "person restrained" has a right "to a private interview at the place of custody."[59] This general statutory right has been specifically incorporated into the implied consent statute in Minnesota.[60]

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51. ALASKA STAT. § 12.25.150(b) (Michie 1984).

52. Copelin v. State, 659 P.2d 1206, 1209, 1211 (Alaska 1983). This holding was clarified in a subsequent proceeding a year later by the Alaska Court of Appeals, which held that the statutory right to counsel does not attach at the time of an investigatory stop or when field sobriety tests are administered because the right attaches only after arrest. Copelin v. State, 676 P.2d 608, 609 (Alaska App.), *cert. denied*, 105 S. Ct. 430 (1984).

53. N.C. GEN. STAT. § 20-16.21(a) (1983). *See* State v. Howren, 312 N.C. 454, 323 S.E.2d 335 (1984); 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); State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

54. IOWA CODE ANN. § 321B.3 (West Supp. 1984). *See* Fuller v. State, 275 N.W.2d 410 (Iowa 1979); State v. Vietor, 261 N.W.2d 828 (Iowa 1978).

55. *See, e.g., Howren*, 312 N.C. at ____, 323 S.E.2d at 337.

56. OHIO REV. CODE ANN. § 2935.20 (Page Supp. 1984).

57. McNulty v. Curry, 42 Ohio St. 2d 341, 347, 328 N.E.2d 798, 803 (1975).

58. *Prideaux*, 310 Minn. at 414, 247 N.W.2d at 391; *see supra* notes 46-48 and accompanying text. *Accord*, City of St. Louis Park v. Bunkers, 310 Minn. 431, 247 N.W.2d 404 (1976).

59. 310 Minn. at 415, 247 N.W.2d at 391.

60. MINN. STAT. ANN. § 169.123(2)(b)(3) (West Supp. 1985).

In at least two states the person accused of DUI has a protected right to counsel because of a court rule. Missouri courts have held that since Rule 37.89, adopted by the Missouri Supreme Court, provides that "every person arrested and held in custody shall be permitted to consult with counsel," then it makes no difference "whether the pending charge against him was to be theoretically denominated civil, quasi-criminal or criminal in character. Such distinctions become meaningless under Rule 37.89."[61] The Washington Supreme Court initially based the right to counsel on constitutional grounds in *Washington v. Fitzsimmons*.[62] When the United States Supreme Court vacated the decision and remanded the case for the court to explain whether the decision was based on federal or state grounds,[63] the court held that its court rule J. Cr. R. 211(c) provided "an independent and adequate state ground" for the decision.[64] The rule requires that anyone taken into custody be provided telephone access to an attorney at the "earliest opportunity."[65]

Montana's statutory guarantee of a right to counsel says that "[e]very defendant brought before the court must be informed by the court that it is his right to have counsel before proceeding and must be asked if he desires the aid of counsel."[66] This statute is certainly broad enough to include the right to counsel in an implied consent case if the court had chosen to follow the reasoning of other jurisdictions eager to protect the rights of all persons subject to serious sanctions regardless of the nature of their offense.

2. *Sixth Amendment Right to Counsel*

Some courts grounding the right to counsel in a state statute find that right fortified by constitutional concerns,[67] but a few have relied independently on a sixth amendment "critical stage" analysis. For example, the Vermont Supreme Court held that because the implied consent law protects the right to refuse to take a chemical test, the request to take the test rises to the level of a "critical stage" in the proceedings in that the choice whether to take the test would "affect the evidence . . . available at trial, and

61. Gooch v. Spradling, 523 S.W.2d 861, 865, 866 (Mo. Ct. App. 1975).
62. 93 Wash. 2d 436, 610 P.2d 893; *see supra* note 6.
63. 449 U.S. 977.
64. 94 Wash. 2d 858, 859, 620 P.2d 999, 1000.
65. 93 Wash. 2d at 441, 610 P.2d at 896.
66. MONT. CODE ANN. § 46-8-101 (1983).
67. *See, e.g., Prideaux*, 310 Minn. 405, 247 N.W.2d 385; *Fitzsimmons*, 94 Wash. 2d 858, 620 P.2d 999. In *Fitzsimmons* the court said the constitutional analysis was persuasive even though it rested its decision on the court rule. 94 Wash. 2d at 859, 620 P.2d at 1000.

the presumptions to be drawn from that evidence."[68]

A Texas Court of Appeals has similarly held that the time of requesting that an accused person submit to a blood test is a "critical stage" of the proceeding for sixth amendment purposes.[69] The court reasoned that since the accused person was in custody, and had been told the consequences of refusing to take the test, he was "on the horns of a dilemma" because refusal meant license suspension and use of the evidence against him at trial, while consent could lead to an automatic conviction of DUI.[70] The court concluded "[i]t stretches reason to say this is not a critical stage of a pretrial proceeding."[71] The court found the Texas statute's permitting admission of evidence of refusal of the test in subsequent criminal proceedings to be determinative in its analysis because it was the admissibility of the refusal which really created the dilemma for the accused person.[72]

One of the most thorough explications of the sixth amendment right to counsel in a DUI case was offered by a Kansas appellate court in *State v. Bristor*,[73] subsequently overruled *sub silento* by the Kansas Supreme Court in *Standish v. Department of Revenue, M.V.D.*[74] The Montana Supreme Court would have done well to have considered the thoughtful analysis of the *Bristor* court rather than relying exclusively on *Standish* as its only authority from another jurisdiction in deciding *Armfield*.[75]

First the *Bristor* court reviewed the landmark Supreme Court decisions establishing a right to counsel in *Powell v. Alabama*,[76] defining the "critical stage" in *Coleman v. Alabama*,[77] and summarizing the scope and breadth of the right in *Kirby v. Illinois*.[78] The Supreme Court stated in *Kirby* that when a defendant is "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law," he has

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68. State v. Welch, 135 Vt. 316, 321, 376 A.2d 351, 355 (1977). *But see* State of Vermont v. Welch, 136 Vt. 442, 394 A.2d 1115 (1978) (in which, one year after a clear statement that the request to submit to the test is a critical stage, the court inexplicably stated that the former decision "cannot be read as holding that a request to submit to a breath test is a critical stage in the federal constitutional sense." *Id.* at 445, 394 A.2d at 1116).

69. Forte v. State, 683 S.W.2d 145 (Tex. Ct. App. 1985).

70. *Id.* at 157-58.

71. *Id.* at 158.

72. *Id.* at 157. *See supra* note 45 and accompanying text.

73. 9 Kan. App. 2d 404, 682 P.2d 122 (1984).

74. 235 Kan. 900, 683 P.2d 1276 (1984).

75. ___ Mont. at ___, 693 P.2d at 1228.

76. 287 U.S. 45 (1932).

77. 399 U.S. 1 (1970).

78. 406 U.S. 682 (1972).

reached the "critical stage."[79] The *Bristor* court applied this standard and found that a defendant arrested and charged with DUI was at a "critical stage" because it found it "impossible to say" he was not faced with the prosecutorial forces of society.[80]

Secondly, the *Bristor* court reasoned that since a person accused of DUI has certain rights guaranteed by statute, which he might irretrievably lose without the guidance of counsel, it is critical that he have counsel.[81] Specifically, since the choice to refuse or submit to the test carries different sanctions, and since the accused has a right to an independent blood test, the court thought he could not make an intelligent decision and protect his rights without the advice of counsel.[82] As the court stated:

> The decision which is made will be crucial to the future direction of the defense to the charge. It is at that point that rights may be gained or lost. Once lost, rights cannot be reclaimed or salvaged; and even those rights gained, such as the right to an independent BAT [Blood Alcohol Test], can also be lost by the failure to timely assert them. Thus, if counsel is not available to the accused at that point, possible defenses may become irretrievable, even to the ablest of counsel, for no representation at trial, however stellar, could undo the harm done at that earlier point in time.[83]

The *Bristor* court distinguished the request for a blood test under the implied consent law from the situation in *Schmerber v. California*,[84] in which the accused had no right to refuse the test, thereby highlighting that the right to counsel arises not from a privilege against self-incrimination, rendered irrelevant by the *Schmerber* decision, but from a situation in which the defendant has a choice and needs advice to make the better choice.[85]

3. *Due Process and the Right to Counsel*

In *Armfield*, the Montana Supreme Court unnecessarily restricted its analysis of fairness and justice in the DUI case to a consideration of whether taking a blood alcohol test with the consent of the accused offends a sense of dignity in the way the *Rochin* stomach pumping for evidence offended the Supreme

79. *Id.* at 690.
80. 9 Kan. App. 2d at ___, 682 P.2d at 127.
81. *Id.*
82. *Id.* at ___, 682 P.2d at 127.
83. *Id.* at ___, 682 P.2d at 128.
84. 384 U.S. 757 (1966); *see supra* note 4.
85. 9 Kan. App. 2d at ___, 682 P.2d at 128.

Court.[86] Other courts have adopted broader views of the due process guarantees to make the DUI procedures, as the Oregon Supreme Court expressed it, "less draconian and more accommodative of liberty."[87]

The courts of New York have long held that "[a]s a matter of fairness, government ought not compel individuals to make binding decisions concerning their legal rights in the enforced absence of counsel."[88] In *People v. Gursey* the court held that a telephone call does not unduly interfere with the investigative procedure and that the defendant needs advice of counsel because he has several statutory options which could only be asserted at the station house.[89] The New York courts provide only a reasonable and limited right to counsel,[90] and while they do not develop their analysis specifically in terms of the fourteenth amendment due process guarantees, their "fairness doctrine"[91] seems relevant to any consideration of the mandates of due process.

The Arizona Supreme Court followed the rule of *Gursey* and held that arresting officers cannot prevent access between an accused and his lawyer if such access would not interfere unduly with the matter at hand because to prevent such access would offend constitutional due process.[92] The specific concern of the court was that denial of the defendant's right to consult with his attorney prevented him from collecting potentially exculpatory evidence (by means of an independent blood test) which was no longer available at a later time.[93]

In Maryland, the state's highest court has forthrightly stated that to "unreasonably deny a requested right of access to counsel to a drunk driving suspect offends a sense of justice which impairs the fundamental fairness of the proceeding."[94] The court found that since the Maryland implied consent statute (in common with all others) deliberately gives a driver a choice between sanctions

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86. ___ Mont. at ___, 693 P.2d at 1230-31.

87. Moore v. State, M.V.D., 293 Or. 715, 723, 652 P.2d 794, 799 (1982).

88. People v. Gursey, 22 N.Y.2d 224, 227-28, 292 N.Y.S.2d 416, 418, 239 N.E.2d 351, 352 (1968) (quoting People v. Ianniello, 21 N.Y.2d 418, 424, 288 N.Y.S.2d 462, 468, 235 N.E.2d 439, 443 (1968)).

89. 22 N.Y.2d at 228, 292 N.Y.S.2d at 419, 239 N.E.2d at 352-53. *Accord* People v. Sweeney, 55 Misc. 2d 793, 286 N.Y.S.2d 506 (1968) (counsel could assist in decision about consent to the test and about right to have one's own physician).

90. *Gursey*, 22 N.Y.2d at 228, 292 N.Y.S.2d at 419, 239 N.E.2d at 352-53.

91. *See* Roby, *The Drinking Driver and South Dakota's Implied Consent—The Need for Counsel*, 23 S.D.L. REV. 403, 417 (1978).

92. McNutt v. Superior Court, 133 Ariz. 7, 9, 648 P.2d 122, 124 (1982).

93. *Id.* at 10, 648 P.2d at 125.

94. Sites v. State, 300 Md. 702, 717, 481 A.2d 192, 200 (1984).

affecting "vitally important interests" and that since license revocation could be as much of a burden as a criminal sanction, the driver must have reasonable access to an attorney before deciding whether to submit to the test.[95]

The Supreme Court of Oregon has adopted a unique approach to a DUI suspect's constitutional rights by holding that an arrested person's "long established and well-known right" to call an attorney is a fundamental liberty embodied in the fourteenth amendment.[96] Using the broadest definition of liberty as "a freedom from all substantial arbitrary impositions and purposeless restraints,"[97] the Oregon court concluded that a defendant's freedom to call a lawyer could not be foreclosed or deferred because the time required to make the call would not have reduced the efficacy of the breathalizer test.[98]

Any of these conceptual approaches to due process fairness or personal liberty could have been applied by the Montana Supreme Court in *Armfield* had a "less draconian"[99] result been desired. Instead, the court relied on a distinction between Armfield's situation and that in *Rochin* to say that apparently the only practice it would perceive as unfair in the DUI context would be abusive or overly intrusive means of collecting the physical evidence.

C. *The Right to Counsel in Federal Courts*

The variation in state courts' interpretation of the constitutional right to counsel, coupled with the Supreme Court's silence[100] on the issue, lends added interest to the only federal court decision on a DUI suspect's right to counsel. In *Heles v. State of South Dakota*,[101] the United States District Court for South Dakota held that a person arrested for DUI has a right to consult an attorney because:

> To demand that a licensed driver be subjected to a choice involving important interests, and possibly an intrusion into his or her body, to establish evidence of guilt, without first allowing the person to contact an attorney, would be inconsistent with the due process demands of both the Sixth and Fourteenth

95. *Id.* at 717, 481 A.2d at 199-200.
96. State v. Newton, 291 Or. 788, 805, 636 P.2d 393, 405 (1981).
97. *Id.* at 806, 636 P.2d at 405 (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal of appeal)).
98. 291 Or. at 808, 636 P.2d at 406.
99. *Moore*, 293 Or. at 723, 652 P.2d at 799.
100. *But see supra* note 6.
101. 530 F. Supp. 646 (D.S.D.), *vacated as moot*, 682 F.2d 201 (8th Cir. 1982).

Amendments.[102]

The federal court reached this decision despite clear and unwavering rejection of any such right by South Dakota's state courts,[103] thus signalling that federal courts may take a more liberal view of constitutional guarantees than do state courts.

The *Heles* decision was the primary basis for the trial court's ruling in *Armfield*,[104] but the Montana Supreme Court did not indicate why it disregarded this authority. It is quite possible that the Montana Supreme Court did not find *Heles* persuasive, as it was vacated as moot by the Eighth Circuit Court of Appeals because the defendant had died by the time the case reached that court.[105]

IV. State Law of No Avail to Armfield

The *Armfield* court did not offer any separate analysis of the defendant's rights under the Montana Constitution, thus implying that his rights are no more strongly protected by state than by federal law.[106] The doctrine of "independent and adequate" state grounds is viewed by commentators as an opportunity to tap our state's own legal heritage to provide greater protection of individual liberties than the federal constitutional minimum.[107] The court's failure to consider whether Montana's constitutional provision for a right to counsel[108] might be broader or attach earlier than the federal right is somewhat disappointing, but even if it had performed the analysis the result presumably would have been the same since the court chose the narrower interpretation from among competing views of the federal constitutional right. Only if it had wished to offer greater than traditional respect to the rights of the accused would it have needed to ground its decision in an interpretation of state law.[109]

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102. *Id.* at 652.

103. *See, e.g.*, Blow v. Commissioner of Motor Vehicles, 83 S.D. 628, 164 N.W.2d 351 (1969); Peterson v. State, 261 N.W.2d 405 (S.D. 1977).

104. Respondent's Brief at 4.

105. 682 F.2d 201.

106. ___ Mont. at ___, 693 P.2d at 1228, 1229.

107. Elison & NettikSimmons, *supra* note 11, at 213-14.

108. Mont. Const. art. II, § 24 provides in part that "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel . . . ."

109. As the Washington Supreme Court did in *Fitzsimmons*, 94 Wash. 2d 858, 620 P.2d 999, after the remand by the Supreme Court, 449 U.S. 977.

V. CONCLUSION

Removing drunk drivers from the highways is a matter of compelling concern, but it must not be accomplished through the sacrifice of fundamental constitutional rights. Those courts which have maintained a steady and objective grasp of fairness in the treatment of drunk drivers recognize that the drunk driver's rights are no less important than those of a suspected murderer or rapist. Preserving a right of reasonable access to counsel would not impair the prosecution of DUI cases since a telephone call can be made in the time it takes to ready the breathalizer machine for the test.[110] Even if there were some loss of efficiency in DUI prosecutions, we should be willing to accept that possibility if justice demands it. As one judge has said:

> Enforcement of all criminal laws would be made easier by use of totalitarian-type of inquiry such as compulsory injection of truth serum, lie-detectors and the similar devices of that nature. The conception of justice in this nation has never included such practices as being acceptable even though some practical benefits might accrue.[111]

110. *See, e.g.*, Forte v. State, 683 S.W.2d 145, 158 (Tex. Ct. App. 1985).
111. Narten v. Curry, 33 Ohio Misc. 94, 96, 291 N.E.2d 799, 800 (1972).