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Minnesota Meets the Drunk Driver Head-On [Nyflot v. Commissioner of Public Safety, 369 N.W.2d 512 (Minn.) (en banc), appeal dismissed, 106 S. Ct. 586 (1985)]

Susan M. Mindrum

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COMMENTS

MINNESOTA MEETS THE DRUNK DRIVER HEAD-ON

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INTRODUCTION

Taken from his car to the police station, the driver sits alone as the officer sets up the chemical testing equipment. One officer approaches him and reads a statement regarding the chemical testing procedure. He thinks the statement presents an option of submitting or not submitting to the test. The officer, however, insists that the test is required. The driver has always understood that if ever in custody for a crime, he would have the right to call an attorney.1 The officer, however, insists that the driver no longer has this right when deciding whether to submit to chemical testing. He is, therefore, held alone in custody until he decides between taking a test, which could, in effect, prove his guilt,2 or refusing the test, which would result in his losing his license for a year and having his refusal used against him at his prosecution for driving while intoxicated. Alone, confused, and unsure of what rights he has, the driver states that he will not take the test until he talks to his attorney. Finding this response to constitute a refusal, and the decision to be final, the officer allows him to telephone his attorney.

The attorney now explains the effect of his serious and binding, albeit somewhat unknowing decision. Such information, however, is of little use to him now. The attorney can only assist him in facing the consequences of his decision.3 Such is the current system of justice in Minnesota when dealing with a driver arrested for driving while intoxicated.

Drunken drivers are a threat to everyone on the roads.4 In response to this problem, state legislatures, including Minnesota’s,

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1. “What the public usually understands, and indeed expects, is that if one is in trouble, the first thing to do is consult with a lawyer.” Nyflot v. Commissioner of Pub. Safety, 369 N.W.2d 512, 522 (Minn. 1985)(Yetka, J., dissenting).
2. See infra note 172 and accompanying text.
3. The driver has irretrievably lost his right to submit to a test which could have proven him innocent. “One can imagine a cynical prosecutor saying: ‘Let them have the most illustrious counsel, now. They can’t escape the noose. There is nothing that counsel can do for them at the trial.’” Escobedo v. Illinois, 378 U.S. 478, 488 (1964).
4. Drunken drivers were involved in an estimated 21,000 fatal accidents in the
have enacted implied consent statutes designed to curtail the threat of drunken drivers on the roads. While answering one problem, however, the implied consent statutes have created another. Implied consent statutes have been interpreted not to allow individuals the right to consult with an attorney before deciding whether to submit to chemical testing of their blood-alcohol content. Because of this, many concerned citizens are questioning the constitutionality of the implied consent statutes. Citizens are attacking the statutes on the ground that they have been interpreted in such a way as to deny individuals their constitutional right to counsel.

The Minnesota Supreme Court has recently confronted this problem. In *Nyflot v. Commissioner of Public Safety*, the court interpreted Minnesota's implied consent statute as effectively eliminating an individual's constitutional and statutory right to counsel in the implied consent situation. Recently, in a summary action, the United States Supreme Court in effect affirmed the holding in *Nyflot* by dismissing an appeal for want of a substantial federal question.


Examples of associations organized to eliminate drunk drivers include: Citizens for Safe Drivers Against Drunk Drivers/Chronic Offenders, Mothers Against Drunk Drivers (MADD), Truckers Against Drunk Drivers (TADD), React International: CB Radio Coalition Against Drunk Driving, Students Against Drunken Driving (SADD).


7. Minnesota Statutes section 481.01 provides:

   All officers or persons having in their custody a person restrained of his liberty upon any charge or cause alleged, except in cases where imminent danger of escape exists, shall admit any resident attorney retained by or in behalf of the person restrained, or whom he may desire to consult, to a private interview at the place of custody. Such custodians, upon request of the person restrained, as soon as practicable, and before other proceedings shall be had, shall notify any attorney residing in the county of the request for a consultation with him. Every officer or person who shall violate any provision of this section shall be guilty of a misdemeanor and, in addition to the punishment prescribed therefor shall forfeit $100 to the person aggrieved, to be recovered in a civil action.


9. 106 S. Ct. 586-88 (1985). Dismissal for want of a substantial federal question in a state court appeal is the same as an affirmation on the merits as far as the federal questions under 28 U.S.C. § 1257(1) and (2) are concerned, and it is not restricted to a determination of whether such a federal question exists. R. STEARN & E. GRESSMAN, SUPREME COURT PRACTICE 378 (1978). Justice White, with whom Justice Stevens
their efforts to decrease the hazard of drunken drivers on the road, the courts have created a new hazard by denying individuals their constitutional and statutory right to consult with an attorney. In Minnesota, an individual must make a binding decision which will effect the outcome of his criminal prosecution for driving while intoxicated without the right to be informed by or have the aid of counsel.

This Comment suggests that there is a constitutional and statutory right to counsel in the implied consent situation. Part I will review the history of the implied consent laws, and part II will analyze the constitutional and statutory rights to counsel. Parts III and IV will outline the development of Minnesota's implied consent statute and focus on the Nyflot decision, respectively. Part V will discuss the constitutional and statutory right to counsel as it applies to the implied consent situation. The Comment will focus on the importance of providing an individual with counsel in this situation. Part V will also discuss possible alternatives to eliminating drunken drivers from our roads in lieu of depriving them of the right to counsel, a right which allows them to be clearly informed of the law by a licensed practitioner.

I. HISTORY OF THE IMPLIED CONSENT STATUTE

Every state in the country has made it a crime for a person to operate a motor vehicle while under the influence of alcohol. The typical
cal statute provides that it is a misdemeanor for a person to drive, operate, or be in control of a motor vehicle while under the influence of alcohol, or when the person's alcohol concentration is over a certain percentage. In order to determine the level of alcohol concentration, the driver must undergo a chemical test of his blood, breath, or urine.

It is often difficult, however, to get one voluntarily to submit to such a test. For example, in *Rochin v. California*, officers forced an individual to vomit, in order to obtain two capsules he swallowed. The Court held that the officers' actions violated the due process clause of the fourteenth amendment of the United States Constitution. Although the individual in *Rochin* was not physically coerced to submit to a chemical test for blood-alcohol concentration, the

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11. Most statutes provide that it is unlawful to drive or be in physical control of a vehicle while there is .10% or more by weight of alcohol in the person's blood. See, e.g., Minn. Stat. § 169.121, subd. 1 (Supp. 1985).


14. Id. at 166. In *Rochin*, the police believed the defendant was selling narcotics. Id. They entered his home and forced their way into Rochin's room. Id. When they entered, Rochin placed two capsules in his mouth. Id. The officers tried to force the pills out of Rochin's mouth, but were unsuccessful. Id. They handcuffed him, took him to a hospital where a doctor, against Rochin's will, put a tube down his throat, and forced him to vomit. Id. The United States Supreme Court found the officers' conduct shocking to the conscience. Id. at 172. The Court stated that the officers' actions offended "those canons of decency and fairness which express the notions of justice of English-speaking peoples..." See id. at 169 (citing Malinski v. New York, 324 U.S. 401, 416-17 (1945)).

15. See id. at 172; see also Breithaupt v. Abram, 352 U.S. 432 (1957). In *Breithaupt*, the petitioner was involved in an automobile accident in which there were fatalities. Id. at 433. The police found a near-empty whiskey bottle in the glove compartment and took the petitioner, who smelled of liquor, to the hospital. A physician, while the petitioner was unconscious, withdrew a blood sample which showed the blood to contain .17% alcohol. Id. The Court held that a blood test taken by a skilled technician was not the type of conduct which "shocks the conscience" as was found in *Rochin*. Id. at 437.
chemical testing situation produces the same possibility of physical coercion. In 1953, New York enacted the prototype implied consent statute in response to *Rochin.* Under that statute, one had the power, but not the right, to refuse the chemical test. Rather than overcoming resistance to the test with physical compulsion, the statute provided a nonphysical form of coercion, the adverse consequences of license revocation. The desire of the legislature that individuals submit to the chemical test without being physically coerced was the impetus behind implied consent statutes.

To date, nearly all the states have enacted implied consent statutes, but the wording and interpretation vary among jurisdictions.
In some jurisdictions, the statutes provide that refusal to submit to chemical testing is a criminal offense. In these jurisdictions, therefore, the right to counsel under the fifth and sixth amendments must be considered when an individual asks to speak with an attorney prior to deciding whether to submit to chemical testing. Most jurisdictions, however, distinguish between the civil nature of the implied consent proceeding and the criminal nature of the driving while intoxicated (DWI) prosecution. Making this differentiation, courts have held that the two proceedings are separate and distinct. Because the fifth and sixth amendments apply only to criminal prosecutions, these courts have found them to be inapplicable to the administrative implied consent proceeding.

II. THE RIGHT TO COUNSEL

A. Constitutional Right to Counsel

1. Fourteenth Amendment Right to Counsel

The due process clause of the fourteenth amendment has long been recognized as a source of a right to counsel when necessary for a fair proceeding. Some courts have held that counsel is necessary


22. See, e.g., Gottschalk v. Sneppel, 258 Iowa 1173, 1180, 140 N.W.2d 866, 870 (1966) (the outcome of the criminal prosecution for driving while intoxicated has no bearing on the civil license revocation proceeding).

23. The fifth amendment states that “[n]o person . . . shall be compelled in any criminal case . . . .” U.S. CONST. amend. V (emphasis added). The sixth amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI (emphasis added).

24. See infra notes 53 & 91 and accompanying text.


before submitting to chemical testing in order to assure a fair implied consent proceeding.27

In *Troy v. Curry*,28 an Ohio court pointed out that although the implied consent proceeding is not criminal in nature, the driver needed the advice of an attorney to protect his rights.29 The *Troy* court stated that it is unconstitutional under the due process clause of the fourteenth amendment to refuse a person accused of driving while intoxicated the right to consult with an attorney prior to submitting to chemical testing.30

The due process clause was also applied by a Michigan court in *Hall v. Secretary of State*.31 In its analysis, the court weighed the individual's interest in consulting with an attorney against the government's interest in administering the chemical test.32 The court held that to avoid problems which may arise during the administration of retain an attorney for a pre-termination hearing regarding welfare benefits); *Stovall v. Denno*, 388 U.S. 293, 298 (1967) (counsel's presence will promote a fair confrontation and a full hearing at the trial regarding identification); *In re Gault*, 387 U.S. 1, 41 (1967) (in juvenile court proceedings which may result in commitment to an institution the child and his parents must be informed that the child has a right to counsel retained or appointed). The United States Supreme Court recognized the fourteenth amendment right to counsel in 1932 in *Powell v. Alabama*, 287 U.S. 45 (1932). The Court in *Powell* held that it was the court's duty to appoint counsel in a capital case for an individual who is unable to employ counsel and to make his own defense because of ignorance or illiteracy. *Id.* at 71. To deny counsel in such a situation, the Court reasoned, would be a due process violation within the meaning of the fourteenth amendment. *Id.*

27. *See* *Heles v. South Dakota*, 530 F. Supp. 646, 652 (D.S.D.), *vacated as moot*, 682 F.2d 201 (8th Cir. 1982); *Hall v. Secretary of State*, 60 Mich. App. 431, 440, 231 N.W.2d 396, 399 (1975); *Troy v. Curry*, 36 Ohio Misc. 144, 146, 303 N.E.2d 925, 927 (1973). 28. 36 Ohio Misc. 144, 303 N.E.2d 925. In *Troy*, the driver asked to speak with his attorney before deciding whether to take the breathalyzer test. He called his attorney, and the attorney said he would be at the station within ten minutes. After the call, the driver was again asked whether he would submit to the test. The driver stated that he would like to wait for his attorney before deciding. The officer stated that if the driver did not take the test right away, he would be deemed to have refused. The driver chose to wait for his attorney. When the attorney arrived, the officer refused to administer the breathalyzer test, and the driver's license was suspended for refusing to take the test. *Id.* at 144-45, 303 N.E.2d at 926. 29. *Id.* at 146, 303 N.E.2d at 927. 30. *Id.* 31. 60 Mich. App. 431, 231 N.W.2d 396 (1975). Hall was arrested for driving while under the influence of intoxicating liquor. His request for an attorney prior to deciding whether to take the breathalyzer test was denied. The court held that licenses were not to be taken away without procedural due process required by the fourteenth amendment. This required that the individual be allowed to call his attorney before deciding whether to take the breathalyzer test. *Id.* at 440, 231 N.W.2d at 399. 32. *Id.* at 440, 231 N.W.2d at 399. The due process standard requires that the court weigh the individual's interests against the state's interests. Note, Kirby, Big-
the test, the government’s interest is best served by allowing the
individual to consult with an attorney prior to deciding whether to
submit to chemical testing. This approach satisfies the due process
requirement of fundamental fairness.

In Heles v. South Dakota, a federal district court applying South
Dakota law concluded that a license may be necessary to “the pur-
suit of a livelihood,” and therefore, it is an entitlement that cannot

33. The court pointed out that the police may want to give Miranda warnings to a
driver spotted for driving while intoxicated in order to protect the admissibility of
inculpatory statements in the driver’s DWI prosecution. Hall, 60 Mich. App. at 438-
39, 231 N.W.2d at 398. However, the Miranda warnings, which include advice on the
right to counsel, may confuse the driver if he is then told that he had no right to
counsel prior to the chemical test. Id. at 439, 231 N.W.2d at 399. See infra note 74
and accompanying text.

The court in Hall also found that because the legislation provided that an arres-
tee could reasonably refuse to take the test, counsel may be necessary in order for an
individual to determine fairly whether his refusal is reasonable. See Hall, 60 Mich. App. at 440, 231 N.W.2d at 399.

34. Hall, 60 Mich. App. at 440, 231 N.W.2d at 399.
35. See id. at 438-440, 231 N.W.2d at 398-99.
36. 530 F. Supp. 646 (D.S.D.), vacated as moot, 682 F.2d 201 (8th Cir. 1982).

Although Heles was vacated as moot because the driver later died, it provides a useful
element of the due process approach to the right to counsel in the chemical testing
situation. Heles requested to consult an attorney several times prior to deciding
whether to take the breathalyzer test. Each request was denied. One hour after his
arrest, he was permitted to call his attorney, who recommended he take the test.
Heles and his attorney asked that Heles now be allowed to take the test. The officer
refused. Heles, 530 F. Supp. at 649. The court held that due process demands that
Heles have a reasonable opportunity to contact his attorney prior to his decision
regarding the test. Id. at 654. Braunsereither, who joined Heles in this action, was
given the opportunity to call his attorney. After one hour, he was still unable to
reach his attorney and the officer requested that he make his decision on his own.
The court held that Braunsereither was given a reasonable opportunity to contact his
attorney and he could not expect the officer to delay the test indefinitely while he
tried to contact his attorney. Id.

37. Id. at 652. In its analysis of the importance of a driver’s license, the court
cited Bell v. Burson, 402 U.S. 535 (1971). This case did not involve a DWI related
offense, but rather the driver’s license was revoked for violating a statute which held
that an uninsured motorist involved in an accident must post security for damages
without consideration of his fault or responsibility for the accident at a pre-suspen-
sion hearing. Id. at 537-38. The Court held that this violated the driver’s procedural
due process and that before the state may revoke the driver’s license it must provide
a forum for the determination of the likelihood of a judgment against him for the
In Dixon, a driver’s license was revoked without a preliminary hearing for his re-
peated traffic violations. The Court distinguished this case from Bell because public
safety, as opposed to security for judgments, was involved in Dixon. Id. at 114-15. The
Court held that the public interests involved were sufficient for the state to make its
initial decision valid, based on the individual’s driving record, without a preliminary
hearing. Id. at 115.
be taken without procedural due process. Due process embodies society's idea of reasonableness and fundamental fairness. The Heles court found that to force a person to make a decision which could result in license revocation, without the aid of counsel, would be fundamentally unfair and thus would constitute a due process violation.

Troy, Hall, and Heles were based on civil license revocation proceedings. The reasoning, however, used by courts for applying a fourteenth amendment right to counsel in DWI prosecutions also seems applicable to implied consent proceedings. In *State v. Newton*, the Oregon Supreme Court stated that the freedom of an arrested person to communicate beyond confinement is a substantial liberty which may be restricted only if there is a legal right to do so. The court found that allowing an individual a reasonable amount of time to call an attorney would not affect the evidence gathering process in the chemical testing situation. The court held, therefore, that police had no legal right to restrict an individual's opportunity to contact an attorney prior to deciding whether to submit to chemical testing.

In *Sites v. State*, which also involved a DWI prosecution, the Court of Appeals of Maryland stated that a driver's license is an entitlement which cannot be taken from a person without due process.

41. 291 Or. 788, 636 P.2d 393 (1981). In *Newton*, the defendant was arrested for driving while under the influence of alcohol. He was advised of his right to counsel and to remain silent. The defendant requested to speak with his attorney prior to taking the test. The officer refused, stating that regardless of information he may have received before the request, he did not have the right to an attorney at the breathalyzer test and his request for a delay to consult with an attorney will constitute a refusal. The defendant took the test, which indicated a blood-alcohol content of .10%. The court held that there was an unauthorized restriction of the defendant's freedom to call his attorney. *Id.* at 808, 636 P.2d at 407. Such a freedom is a substantial liberty which may only be officially restricted if legal authority allows it. *Id.* at 807, 636 P.2d at 406.
42. Newton, 291 Or. at 807, 636 P.2d at 406.
43. *Id.* at 808, 636 P.2d at 406. The court pointed out that under Oregon law an individual in custody for driving while intoxicated must be observed for fifteen minutes before the chemical test is administered. *Id.* at 808, 636 P.2d at 406. During this observation period, an individual would have time to call an attorney. *Id.* In addition, most states provide that the test must be given within two hours of the time of driving. See, e.g., Minn. Stat. § 169.121, subd 1(e) (1984). Within this two-hour span, the court found that one could be provided with a reasonable amount of time to contact an attorney. See Newton, 291 Or. at 808, 636 P.2d at 406.
44. See Newton, 291 Or. at 808-09, 636 P.2d at 407.
The court found that due process requires that a person arrested for driving while intoxicated be permitted a reasonable opportunity to communicate with counsel prior to submitting to a chemical test.\textsuperscript{46} The \textit{Sites} court held that this process, however, must not substantially interfere with the administration of the test.\textsuperscript{47}

As the above-cited cases demonstrate, the fourteenth amendment right to counsel is broad. It is not limited to criminal proceedings, but rather, extends to all proceedings where it is necessary for fundamental fairness. Because of the importance of one’s right to drive and one’s right to communicate, some courts have found the right to counsel prior to testing is necessary to ensure a fair implied consent proceeding.

2. Fifth Amendment Right to Counsel

In addition to the fourteenth amendment right to counsel, the fifth amendment also requires a right to counsel based on self-incrimination grounds. The fifth amendment provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”\textsuperscript{48} The United States Supreme Court in \textit{Miranda v. Arizona}\textsuperscript{49} held that prior to custodial interrogation,\textsuperscript{50} a suspect must be warned of his right to counsel in order to protect his right against self-incrimination.\textsuperscript{51} The right against self-incrimination, however, is limited to criminal proceedings.\textsuperscript{52}

It could be argued that because the proceeding under the implied consent statute is civil in nature, the fifth amendment right to counsel is inapplicable.\textsuperscript{53} Some courts, however, have stated that the

\begin{itemize}
\item \textsuperscript{46} Id. at 717-18, 481 A.2d at 200.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} U.S. CONST. amend. V. \textit{See also MINN. CONST. art. I, § 7.}
\item \textsuperscript{49} 384 U.S. 436 (1966).
\item \textsuperscript{50} In \textit{Miranda}, custodial interrogation was defined as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” \textit{Miranda}, 384 U.S. at 444.
\item \textsuperscript{51} Id. at 471. The \textit{Miranda} Court held that the prosecution may not use statements from a custodial interrogation unless it shows that it used procedural safeguards which were effective to secure the right against self-incrimination. \textit{Id.} at 444. The procedural safeguards include informing the accused of his right to remain silent, and that any statement he does make may be used as evidence against him, and that he has the right to have an attorney present. The attorney may be either retained or appointed. \textit{Id.}
\item \textsuperscript{52} Id. at 477.
\item \textsuperscript{53} The Minnesota Court of Appeals, in \textit{Butler v. Commissioner of Public Safety}, 348 N.W.2d 827 (Minn. Ct. App. 1984), stated that because the implied consent proceeding is civil in nature, rather than criminal, the fifth amendment right to \textit{Miranda} warnings does not attach. \textit{Id.} at 828. It could be argued, therefore, that the fifth amendment right to counsel as provided through the \textit{Miranda} warnings is also inapplicable to the civil implied consent proceeding. \textit{See also Note, supra note 21, at 379 (courts have found the proceedings to be civil in nature, and therefore, no fifth or...
driver's license revocation for refusing to submit to chemical testing is so entwined with the prosecution for driving while intoxicated that such a distinction cannot be made. The nexus between the implied consent proceeding and the criminal prosecution for driving while intoxicated is the result of two factors. First, the results from the chemical test are used against the driver at his prosecution for driving while intoxicated. Second, many statutes provide that the driver's refusal to submit to chemical testing under the implied consent statute is admissible in evidence in the prosecution against the driver for driving while intoxicated.

Courts, however, have not based their decisions on the civil nature of the implied consent proceeding. Instead, they have held that it is not a violation of an individual's right against self-incrimination to deny him the right to counsel prior to deciding whether to submit to chemical testing. These courts have applied the reasoning of the United States Supreme Court in Schmerber v. California. In Schmerber, the driver was hospitalized after an automobile accident. In addition to other signs of intoxication, the officer smelled liquor on the driver's breath. The officer directed a physician, without the driver's consent, to take a blood sample, the results of which were admitted as evidence against him at trial. ld. at 758-59.
ber, the Court held that a state may compel a defendant to submit to chemical testing without violating his fifth amendment right against self-incrimination. 59 The Court found that the blood test results were an incriminating product of compulsion, but stated that the evidence was not the driver's testimony and it did not relate to a communicative act or writing. 60 The Court reasoned that the privilege against self-incrimination extends generally to communicative or testimonial evidence and not to real or physical evidence such as one's own blood. 61 As a result, the Court ruled that the test did not violate the driver's fifth amendment rights. 62 The procedures must not, however, violate the due process standards set forth in Rochin. 63

In South Dakota v. Neville, 64 the Court answered a question left open in Schmerber. 65 The Neville Court held that the driver's refusal to submit to the chemical test may be admitted into evidence without violating the individual's right against self-incrimination. 66 The Court reasoned that the fifth amendment is limited to prohibiting the use of coercion on the individual asserting the right. 67 The individual in the chemical testing situation, however, is not compelled to refuse the test. Instead, the individual is given a choice of submitting to or refusing the test. 68 In fact, the officers would rather that the

59. Id. at 765.
60. Id.
61. Id. at 764 (the Court noted exceptions to this general rule, i.e. tests, such as the lie detector test, which seem to obtain physical evidence, but which obtain responses that are basically testimonial).
62. Id. at 765.
63. See id. at 759-60.
64. 459 U.S. 553 (1983). In Neville, the police stopped the driver for failing to heed a stop sign. The driver staggered out of his car, smelling of alcohol. Id. at 554-55. The driver told the officers his license was revoked for a previous DWI conviction. After failing field sobriety tests he was placed under arrest and read his Miranda rights. Id. at 555. The driver said he understood his rights and agreed to talk. The officers asked the driver to take the blood-alcohol test, warning him that he could lose his license if he refused. Id. The driver refused to submit to the test stating, "I'm too drunk, I won't pass the test." Id. at 555. The driver refused repeated requests. A South Dakota statute provided that the refusal to submit to testing may be admissible [as evidence] at trial. Id. at 556. The driver sought to suppress the evidence, but the Supreme Court held that its admission did not violate the driver's right against self-incrimination. Id. at 556, 564.
65. Id. at 554.
66. Id. at 564.
67. Id. at 562.
68. Id. The Court analyzed an approach used by other courts that the refusal is a physical act rather than a communication and, therefore, not protected by the privilege. Id. at 560-61. The court looked at Justice Traynor's explanation of this approach in People v. Ellis, 65 Cal.2d 529, 55 Cal. Rptr. 385, 421 P.2d 393 (1966). Justice Traynor said that evidence of a refusal is like other circumstantial evidence of "consciousness of guilt, such as escape from custody and suppression of evidence." Neville, 459 U.S. at 561. While the Neville Court found such analogies forceful, it
individual submit to the test. A positive chemical test is more forceful evidence for a DWI prosecution than evidence of a refusal to submit to the test. Finding that an individual has a choice, the Neville Court held that there was no compulsion in the individual's expression of refusal and, therefore, no fifth amendment violation.

The admission of the refusal into evidence is justified because jurors are aware of chemical tests and may refuse to convict a driver if the prosecutor fails to produce such evidence. If the prosecutor is allowed to explain the reason for the lack of evidence, the jurors would be less likely to acquit, because they would understand why no scientific evidence was presented by the state.

The Neville Court also stated that the Miranda warnings need not be given to an individual prior to his decision to submit to the blood-alcohol test. Courts have found that drivers become confused if they learn via Miranda warnings that they have the right to counsel, but then are asked to decide whether to submit to chemical testing without being allowed to contact an attorney. The Neville Court

rejected this approach and rested its decision on the absence of coercion. Id. at 561-62.

69. See Neville, 459 U.S. at 564.

70. Id.

71. Crump, supra note 18, at 351.

72. Id. For a list of statutes which allow the prosecution to introduce the defendant's refusal to submit to chemical testing into evidence, see supra note 56. The argument against admitting the refusal in evidence is that the jury is likely to assume that the defendant knew that he was intoxicated and that this was the true reason for his refusal. See Crump, supra note 18, at 354. The argument posits that it is unfair to give an individual the power to refuse and then use this refusal against him at trial. Id. The following statutes prohibit the refusal to be admitted into evidence in a criminal trial for driving while intoxicated: HAWAII REV. STAT. § 17-286-159 (1976) (admissible only in preliminary hearing); MD. CTS. & JUD. PROC. CODE ANN. § 10-309(a) (1984); MASS. ANN. LAWS ch. 90, § 24(1)(c) (West Supp. 1986); R.I. GEN. LAWS § 31-27-2(c)(1) (Supp. 1985) (refusal not admissible unless defendant offers it); VA. CODE § 18.2-268(i) (Supp. 1985) (except in rebuttal).

73. See Neville, 459 U.S. at 564 n.15. The Miranda warnings include informing the accused of his 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." Miranda, 384 U.S. at 444. Earlier, in Heles, the United States District Court for the district of South Dakota held that the Miranda warnings were required prior to the driver's decision. Heles, 530 F. Supp. at 651. The Heles court stated that only after arrest could one be asked to submit to the chemical test. Id. Once arrested, the court reasoned, the driver is no longer free to leave and is in custody. Id. The court held, therefore, that the Miranda warnings were required at the point when the individual was in custody or significantly deprived of his freedom of action. Id.

74. Because of this confusion, courts which do not recognize a constitutional right to consult an attorney before submitting to the test, have reversed driver's license revocations when the warnings were given and the officer made no clarification to the driver of his rights. See, e.g., Rees v. Dep't of Motor Vehicles, 8 Cal App. 3d 746, 751, 87 Cal. Rptr. 456, 458 (1970)(driver's refusal was based on a mistaken
resolved this problem by stating that when an individual is arrested for DWI, police inquiry regarding whether the individual will submit to chemical testing is not an interrogation as that term is used in *Miranda*. Therefore, the warnings are not required.

3. The Sixth Amendment Right to Counsel

The sixth amendment right to counsel is much broader in scope than that of the fifth amendment. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." The importance of the assistance of counsel at the trial has long been recognized by our system of justice. The trial, however, is not the only setting in which the Court has recognized the need and importance of counsel. In 1961, the United States Supreme Court extended the sixth amendment right to counsel to pretrial confrontations which were considered critical stages of criminal proceedings. In determinations due to *Miranda* warnings; Calvert v. State Dep't of Revenue, Motor Vehicle Div., 184 Colo. 214, 218, 519 P.2d 341, 343 (1974)(following *Miranda* warnings, driver was not told he had no right to an attorney before the test); State v. Severino, 56 Hawaii 378, 380, 587 P.2d 1187, 1188 (1975)(driver was never told the *Miranda* rights did not apply to the implied consent proceeding); Swan v. Department of Pub. Safety, 311 So.2d 498, 500 (La. Ct. App. 1975)(following *Miranda* warnings, officers should have stated the right to counsel was inapplicable to the blood-alcohol test); State Dep't of Highways v. Beckey, 291 Minn. 483, 487, 192 N.W.2d 441, 445 (1971)(driver's refusal was justified because he was confused following *Miranda* warnings); Wiseman v. Sullivan, 190 Neb. 724, 729-30, 211 N.W.2d 906, 910 (1973)(request for an attorney did not constitute a refusal due to confusion resulting from *Miranda* warnings).

75. *Neville*, 459 U.S. at 564 n.15. The Court found that police inquiry in this situation was regulated by state law and fairly uniform. *Id.*


77. U.S. CONST. amend. VI; see also MINN. CONST. art. I, § 6.

78. The Court in *Powell v. Alabama*, 287 U.S. 45 (1932), stated that counsel is necessary to protect the rights of the nonprofessional who is assumed to be unfamiliar with legal proceedings. *Id.* at 69. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court held that an indigent could not be assured a fair trial unless an attorney was provided for him. *Id.* at 344. Nine years later, the Supreme Court expanded the sixth amendment right to counsel in *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). The Court in *Argersinger* held that without a knowing and intelligent waiver, no person could be imprisoned for an offense, including a misdemeanor, unless he was represented by counsel at trial. *Id.* at 37. *See Comment, Criminal Law - Counsel for Accused - Due Process Requires Accused Be Provided Reasonable Opportunity To Secure Second DWI Test*, 59 N.D.L. REV. 479, 483-84 (1983).

mining what constitutes a critical stage, the Court analyzed two factors. First, the Court must determine whether counsel is necessary to ensure the defendant's right to a fair trial as affected by his right to have a meaningful cross-examination of the witnesses against him, and to have the effective assistance of an attorney at the trial itself. Second, the court must determine whether substantial prejudice to the defendant's rights could occur from the confrontation and whether counsel could help avoid such prejudice.

The United States Supreme Court applied the critical stage analysis in *Kirby v. Illinois*. The *Kirby* Court held in a plurality decision that the sixth amendment right to counsel attaches only at or after adversary judicial proceedings have begun. At this stage, the Court found the defendant is “faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.” The Court stated that adversary judicial proceedings may begin with a formal charge, preliminary hearing, indictment, information, or arraignment. This statement, however, in *Kirby* 's plurality opinion was not joined by a majority of the Court. The concurring opinion in *United States v. Gouveia* stated that the *Kirby* holding does not foreclose the possibility that the right to counsel might, under some circumstances, attach before the formal initiation of judicial proceedings. One year after *Kirby*, however, the Court defined the critical stage to be limited to events in which the individual needed help in dealing with legal problems or aid in meeting the adversary.

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lineup); United States v. Wade, 388 U.S. 218 (1967) (post-indictment lineup); Escobedo v. Illinois, 378 U.S. 478 (1964) (prior to arraignment when the investigation has begun to focus in on a particular suspect); Massiah v. United States, 377 U.S. 201 (1964) (once adversary proceedings have begun); White v. Maryland, 373 U.S. 59 (1963) (preliminary hearing where the defendant entered a plea without counsel).

80. Note, supra note 21, at 377-78.
82. Id.
83. 406 U.S. 682 (1972). In *Kirby*, the Court declined to extend the sixth amendment right to counsel to a post-arrest, but to pre-indictment police station identification. *Id.* at 690.
84. *Id.* at 688. The *Kirby* Court referred to the right to counsel in the sixth and fourteenth amendments. *Id.* It appears, however, that the Court mentioned the fourteenth amendment only as reference to the vehicle through which the sixth amendment is made applicable to the states. See Grano, supra note 32, at 742 n.148.
86. *Id.* *Id.* at 689-90. Only at these stages, the Court reasoned, has the government committed itself to prosecute and formed an adverse position against the defendant. *Id.*
88. 104 S. Ct. at 2300 (Stevens, J., concurring).
89. *Id.*
90. United States v. Ash, 413 U.S. 300, 313 (1973) (the sixth amendment does
Jurisdictions differ on whether the sixth amendment requires a right to counsel in the implied consent situation. Courts that have denied the individual a right to counsel have done so because the proceedings are civil in nature, because the chemical tests are highly accurate and not likely to be manipulated, or because they have not found the chemical testing situation to be a critical stage. Most courts which have held that an individual does have a right to counsel at this stage in the implied consent proceeding have based their decision on statutory grounds. One court, however, has found the point at which one decides whether or not to submit to chemical testing to be a critical stage of the DWI prosecution, thereby, triggering the sixth amendment right to counsel.
**B. Statutory Right to Counsel**

In addition to the constitutional rights to counsel, some states have enacted statutes which specifically give individuals a right to counsel.\(^{96}\) Minnesota has enacted such a statute.\(^{97}\) Minnesota Statutes section 481.10 has been fundamental to Minnesota public policy for ninety-nine years.\(^{98}\) This statute provides that an individual, once in custody and restrained of his liberty, shall be given the right to contact an attorney before any further proceedings, as long as there is no imminent danger of escape.\(^{99}\) In addition, Minnesota’s implied consent statute specifically provides that the officer inform the individual that he has the right to counsel after submitting to chemical testing.\(^{100}\)

**III. MINNESOTA’S IMPLIED CONSENT STATUTE**

**A. History of Minnesota’s Implied Consent Statute**

Minnesota, following other states, enacted its first implied consent statute in 1961.\(^{101}\) The statute was designed to make evidence gathering easier.\(^{102}\) Under that statute, a person who drove or operated a motor vehicle was deemed to have consented to a chemical test to determine blood-alcohol concentration unless he expressly refused.\(^{103}\) If he refused, his license was revoked for six months.\(^{104}\)

Ten years after the enactment of the implied consent statute, the Minnesota Supreme Court, in *State v. Palmer*,\(^{105}\) addressed the issue of whether an individual has the right to counsel before deciding whether to submit to blood-alcohol testing.\(^{106}\) The *Palmer* court held that the implied consent proceeding is a civil proceeding and, there-
fore, the driver had no constitutional right to counsel.107

In *Prideaux v. State Department of Public Safety*,108 the Minnesota Supreme Court was faced with the same issue presented in *Palmer*. The court mentioned in dicta that the driver’s decision regarding chemical testing could be viewed as a critical stage in the criminal prosecution for driving while intoxicated, which would trigger the sixth amendment right to counsel.109 The court, however, declined to rest its decision on constitutional grounds.110 Instead, it held that under Minnesota Statutes section 481.10 a driver had a right to counsel prior to deciding whether or not to take the chemical test.111 Although *Palmer* did not base its decision on section 481.10, the *Prideaux* court held that to the extent its decision was inconsistent with the *Palmer* decision, *Palmer* was no longer of any force or effect.112

B. Amendments to Minnesota’s Implied Consent Statute

In 1978, the Minnesota Legislature expanded the implied consent advisory113 to include a limited right to counsel as provided in *Prideaux*.114 The right was limited to the extent that, if it unreasonably delayed administration of the test, the individual was deemed to have refused.115 In 1983, the legislature added a warning to the advisory.

107. *Id.* at 307, 191 N.W.2d at 191.
108. 310 Minn. 405, 247 N.W.2d 385 (1976). *Prideaux*, like *Palmer*, requested to speak with his attorney before deciding whether to submit to chemical testing. *Prideaux*, 310 Minn. at 406, 247 N.W.2d at 387. His request was also denied and his license was revoked for six months. *Id.* at 406-07, 247 N.W.2d at 387.
109. *Id.* at 411, 247 N.W.2d at 389.
110. *Id.* at 414, 247 N.W.2d at 391.
111. *Id.* at 419, 247 N.W.2d at 393. The *Prideaux* court held that the importance of a driver’s license and the binding decision made by a driver in the chemical testing situation made this situation a “proceeding” under section 481.10. *Id.* The court found that although the statute did not refer to telephone calls and was written before cars were commonly used, it must be “interpreted in accordance with the fundamental nature of the right it affords and the technological advance of our society.” *Id.* The court held, therefore, that a person had the right to talk with an attorney of his choice prior to deciding whether to submit to chemical testing as long as it did not unreasonably delay the procedure. *Id.* at 421, 247 N.W.2d at 394. This right, the court held, would be satisfied if the person is given a reasonable amount of time to contact and talk with his attorney. *Id.*
112. *Id.* at 422, 247 N.W.2d at 395. The court, however, did not formally overrule *Palmer*, since *Palmer* did not directly address the right to counsel under § 481.10. *Id.*
114. *See Nyflot*, 369 N.W.2d at 515.
The warning stated that if a driver refused to take the test, the refusal would be admissible in evidence against him at trial.\textsuperscript{116}

In 1984, the most recent change occurred. The legislature reworded the advisory to inform the individual that "Minnesota law requires the person to take a test to determine if the person is under the influence of alcohol or a controlled substance."\textsuperscript{117} In addition, the legislature removed that portion of the advisory which provided that the driver had a limited right to an attorney prior to testing.\textsuperscript{118} Instead, the officer now informs the driver that "after submitting to testing, the person has the right to consult with an attorney and to have additional tests made by a person of his own choosing."\textsuperscript{119} The

\textsuperscript{116} MINN. STAT. § 169.123, subd. 2(b)(5). In Alaska and Nebraska refusal to submit to chemical testing is a criminal offense. ALASKA STAT. § 28.35.032(f) (Supp. 1984); NEB. REV. STAT. § 39-669.08(3) (1985).

\textsuperscript{117} Act of May 2, 1984, ch. 622, § 10, 1984 Minn. Laws 1541, 1546-47 (codified at MINN. STAT. § 169.123, subd. 2(b)(1)(1984)) (emphasis added).

\textsuperscript{118} In 1982, the advisory read:

\begin{enumerate}
\item that testing is refused, the person's right to drive will be revoked for a period of six months; and
\item that a test is taken and the results indicate that the person is under the influence of alcohol or a controlled substance, the person will be subject to criminal penalties and the person's right to drive may be revoked for a period of 90 days; and
\item that the person has a right to consult with an attorney but that this right is limited to the extent that it cannot unreasonably delay administration of the test or the person will be deemed to have refused the test; and
\item that after submitting to testing, the person has the right to have additional tests made by a person of his own choosing.
\end{enumerate}

\textsuperscript{119} MINN. STAT. § 169.123, subd. 2(b)(1)-(4) (1982). The current version of the advisory reads:

\begin{enumerate}
\item that Minnesota law requires the person to take a test to determine if the person is under the influence of alcohol or a controlled substance;
\item that testing is refused, the person's right to drive will be revoked for a minimum period of one year or, if the person is under the age of 18 years, for a period of one year or until he or she reaches the age of 18 years, whichever is greater;
\item that if a test is taken and the results indicate that the person is under the influence of alcohol or a controlled substance, the person will be subject to criminal penalties and the person's right to drive may be revoked for a minimum period of 90 days or, if the person is under the age of 18 years, for a period of six months or until he or she reaches the age of 18 years, whichever is greater;
\item that after submitting to testing, the person has the right to consult with an attorney and to have additional tests made by a person of his own choosing; and
\item that if he refuses to take a test, the refusal will be offered into evidence against him at trial.
\end{enumerate}
legislature also extended the revocation period for refusal from six months to one year.120

IV. THE NYFLOT DECISION

A. Factual Background

In Nyfлот, the driver was arrested for driving while intoxicated on September 23, 1984 and was taken to a nearby law enforcement center.121 The deputies read her the advisory found in Minnesota's implied consent statute.122 The driver insisted that she be allowed to contact her attorney before deciding whether to submit to chemical testing.123 The deputies told her that the law had been changed and she no longer had that right. At first, the driver agreed to take the test, but when the Breathalyzer machine was ready, she declined. One of the deputies told her that her action constituted a refusal.124 At this point, she was allowed to call her attorney. After consulting with her attorney, the driver again stated that she would take the test. The machine had already been disassembled, however, and one of deputies told her that she had already refused and could not change her mind.125

As a result of the refusal, her driver's license was revoked.126 The trial court sustained the license revocation and the driver appealed.127 On appeal, the driver argued that the 1984 amendments to the implied consent statute did not effectively limit the applicability of Minnesota Statutes section 481.10 or change Prideaux. She also argued that if the amendments actually changed her rights, they violated the sixth amendment, the due process clause, and the equal protection clause of the United States Constitution.128 The Minnesota Court of Appeals held that although it seemed that the legislature intended to take away an individual's limited right to counsel prior to testing, the amendments to the implied consent advisory

120. Id., subd. 2(b)(2).
121. Nyfлот, 369 N.W.2d at 513.
122. Id. at 513-14; see also Minn. Stat. § 169.123.
123. Nyfлот, 369 N.W.2d at 514.
124. Id. In the meantime, the other deputy disassembled the breathalyzer machine. Id.
125. Id.
126. See id.
127. Id. The trial court rejected the driver's arguments that (1) under Minnesota Statutes section 481.10, as it was interpreted in Prideaux, she had a limited right to consult her attorney prior to deciding whether to take the test and that the 1984 amendment to the implied consent advisory did not change that right, and (2) the sixth amendment right to counsel as provided in the United States Constitution applied to this situation. Nyfлот, 369 N.W.2d at 514.
128. Id.
were not an effective way to achieve that end. In addition, the court stated that if the legislature had intended "a blanket denial" of the right to counsel prior to testing, this denial may violate an individual's sixth amendment right to counsel. The commissioner appealed this holding to the Minnesota Supreme Court.

B. Holding and Analysis

The Minnesota Supreme Court held that an individual arrested for driving while under the influence of alcohol has neither a statutory nor a constitutional right to counsel before deciding whether to submit to chemical testing. In so deciding, the court recalled a statement it made in Prideaux. The Prideaux court stated that if the implied consent statute were worded in such a way as to forbid a limited right to counsel before chemical testing, the implied consent statute, which is later and more specific in its scope than Minnesota Statutes section 481.10, would control. The legislature had demonstrated its approval of Prideaux by amending the implied consent advisory to include a limited right to counsel, as set out in Prideaux. The Nyflot court reasoned, therefore, that the 1984 amendments, which removed the statement regarding the limited right to counsel, must reflect the legislature's intent to eliminate the limited right to counsel.

The court in Nyflot also found that there was no sixth amendment right to counsel before deciding whether to submit to chemical testing. The court based its holding upon Kirby which held that the right does not attach until judicial proceedings are formally commenced by indictment, complaint, or substitute for complaint. In addition, the court held that the fifth amendment right to counsel, based

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129. Id. The court of appeals stated that the legislature changed the implied consent advisory, but did not change the substantive law the implied consent advisory was based on. Nyflot v. Commissioner of Pub. Safety, 365 N.W.2d 266, 268 (Minn. Ct. App. 1985). Therefore, drivers arrested for driving while intoxicated still have a limited right to counsel under Minnesota Statutes section 481.10 before deciding whether to submit to chemical testing. Id. The court said it "cannot supply that which the legislature purposely omits or inadvertently overlooks." Id. (quoting Northland Country Club v. Commissioner of Taxation, 308 Minn. 265, 271, 241 N.W.2d 806, 809 (1976)).

130. Nyflot, 365 N.W.2d at 268-69.

131. Nyflot, 369 N.W.2d at 513.

132. Id. Justices Scott and Kelley concurred specially and filed opinions. Id. at 517, 518. Justice Yetka dissented and filed an opinion in which Justice Wahl joined. Id. at 519.

133. Id. at 515.

134. Id.

135. Id.

136. Nyflot, 369 N.W.2d at 515.

137. Id. at 516.
on *Miranda*, did not apply. The court stated that *Miranda* only applies to interrogation, which has been defined as express questioning, or words or actions by officers, which are reasonably likely to evoke an incriminating response.\textsuperscript{138} The court also quoted the following language from *Neville*: "in the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda*."\textsuperscript{139}

The court also rejected the driver's due process argument. The court held that, as with the sixth amendment right to counsel, due process does not demand that a driver, arrested for DWI, be given the right to counsel before deciding whether to take a test required by law.\textsuperscript{140} The court found this to be especially true when the individual is told that he is required to take the test.\textsuperscript{141} The court held that a driver does not have the right to refuse the chemical test, but rather the legislature gave him the power to refuse with its attendant consequences.\textsuperscript{142}

\textbf{C. Concurrence and Dissent}

Justice Scott concurred specially in the *Nyflot* opinion. He stated that the 1984 amendments to the implied consent statute clearly show the legislature's intent to deny an individual the right to counsel before chemical testing.\textsuperscript{143} Justice Scott found that although such a result seems unfair, the statute could not be overruled unless it was found to be unconstitutional. He reasoned that testing for blood-alcohol content is a search and seizure.\textsuperscript{144} Because there is no constitutional right to contact an attorney before a search is conducted, he argued the statute is constitutional.\textsuperscript{145}

Justice Kelley also filed a concurring opinion. He too agreed with the majority that the 1984 amendments to the implied consent statute effectively eliminated the right to counsel prior to chemical testing.\textsuperscript{146} Justice Kelley, however, did not find the majority's analysis of

\textsuperscript{138.} *Id.*
\textsuperscript{139.} *Id.*
\textsuperscript{140.} *Id.* at 516-17.
\textsuperscript{141.} *Id.* at 517. The court also rejected *Nyflot*'s equal protection argument, stating that all arrested drivers are treated equally. The court also held that there was a rational basis for denying drivers the right to the assistance of counsel before deciding whether to submit to chemical testing. *Id.*
\textsuperscript{142.} *Id.*
\textsuperscript{143.} *Id.*
\textsuperscript{144.} *Id.* at 518.
\textsuperscript{145.} *Id.*
\textsuperscript{146.} *Id.* Justice Kelley stated that because the 1984 amendments were later in time and more specific in scope, they modified the meaning of proceeding in Minnesota Statutes section 481.10. *Id.*
the amendments' constitutionality necessary. Instead, he stated that the civil action to revoke a driver's license is totally distinct from a criminal DWI prosecution, and is, therefore, valid without resorting to a constitutional analysis of the criminal aspects of the DWI charge.

Justice Yetka filed a dissenting opinion in which Justice Wahl joined. The dissent stated that the *Prideaux* decision was still good law and should be followed. The 1984 amendments, the dissent stated, did not limit the effect of Minnesota Statutes section 481.10. The dissent also found an infringement of the individual's right to privacy when he is forced to take a blood-alcohol test and is simultaneously denied the right to counsel. Justice Yetka balanced "the extent of intrusion upon the individual's dignitary interests" against the state's interests. He found that the dignity of an individual to determine his own rights by consulting with a trusted lawyer rather than his accuser, is "gravely intruded upon" when he is denied counsel before chemical testing. The dissent found this intrusion outweighed the state's interest in decreasing the number of refusals because the state did not show the intrusion was reasonable.

147. *Id.*

148. *Id.* at 519. Justice Yetka noted that in *Prideaux*, the court found a right to counsel under Minnesota Statutes section 481.10 despite the fact that under the implied consent statute at that time, officers were not required to advise a driver of any right to counsel. *Id.* at 520. Later the legislature amended the advisory to conform to the holding in *Prideaux* by requiring an officer to tell a driver that he had a limited right to counsel. *Id.* Justice Yetka found, however, that this amendment did not give the driver any greater rights than he had prior to its enactment.

149. *Id.* at 520. Justice Yetka stated that the legislature's intent was unclear because it amended the advisory section of the implied consent statute, but not Minnesota Statutes section 481.10, which is the source of the right to counsel in the implied consent situation. *Id.* at 523. Therefore, Justice Yetka stated, "[w]hen two statutes can be read in harmony with each other, especially when we are dealing with such a fundamental right as right to counsel, we can and should interpret the 1984 amendments as still permitting the right to counsel." *Id.*

150. *Id.* at 520.

151. *Id.* at 520-21.

152. *Id.* at 521 (making an individual go to the police station is in and of itself an intrusion on his dignity, but holding him "incommunicado" makes the intrusion even more severe).

153. *Id.* The state's interest is to decrease the number of refusals to take the test and to increase the number of DWI convictions. *Id.* Justice Yetka found that the state did not show that the right to counsel affected the individual's decision of whether or not to submit to testing. *Id.* He stated that the fact that the number of refusals has decreased since the 1984 amendments was probably because the penalty for refusal had increased from a six month revocation to a one year license revocation. *Id.* Justice Yetka also pointed out that it was after the driver was permitted to call her attorney that she was willing to take the test. *Id.* at 523. The state was also concerned that if an attorney could be consulted in this situation, the officers would have to provide
In addition to finding that the majority’s holding would violate an individual’s right to privacy, the dissent found that it would also violate an individual’s sixth amendment right to counsel. Justice Yetka stated that the implied consent proceeding is a “critical stage” of the criminal process. He believed that while it seems that a majority of the justices on the United States Supreme Court support the Kirby rationale, it remains short-sighted and arbitrary. He argued that the Minnesota Supreme Court has recognized this short-sightedness in other cases. Even under Kirby, Yetka announced, the implied consent process should be considered a critical stage in the criminal proceeding. The dissent maintained that the proceeding’s civil label should not be dispositive, because the chemical test is the best evidence for a criminal DWI conviction and a reading of over .10% is prima facie evidence of a criminal violation. Justice Yetka found that the ticket the officer gives the driver is the functional equivalent of a complaint. The dissent stated, therefore, that formal proceedings commence when the ticket is issued and, under Kirby, the right to counsel attaches at this point.

The dissent pointed out that most people believe that if they are in trouble, the first thing they should do is contact an attorney. The majority opinion conveys the message that “[y]es, you have the right to counsel, but not until we have all the evidence to convict you.”

V. Discussion

The Minnesota Supreme Court faced a difficult issue in Nyflot. While confronting this issue, the court was aware of the exigent need to rid our streets of drunken drivers. Minnesota’s implied consent statute has greatly enhanced the process of obtaining evidence which is used in the criminal prosecution of drunk drivers. By interpreting individuals with the opportunity to consult with an attorney in other search and seizure situations. The dissent disagreed and pointed out that the implied consent situation was different because it requires a bodily intrusion.

154. Id. at 521.
155. Id. at 522.
156. Id. The Minnesota Supreme Court has extended the right to counsel to civil proceedings. Id. Justice Yetka also noted that a state may provide its citizens greater protection in its constitution than is provided by federal law. Id. at 523.
157. Id. at 521.
158. Id. at 522.
159. Id.
160. Id.
161. Id. Justice Yetka stated that the ticket could be given on the highway or at the station. Id. He reasoned, therefore, that the fact that formal charging is done after the chemical test, is a manipulation of the system and should not deprive one of the right to counsel. Id.
162. Id.
163. Id.
the implied consent statute to forbid a driver the right to consult an attorney prior to chemical testing, the implied consent procedure runs more smoothly for the state and difficult evidence gathering problems are avoided. If a driver was allowed to consult with an attorney, he may be advised by the attorney to exercise his power not to submit to the test, thereby possibly depriving the state of direct and incriminating evidence. Under these circumstances, there may be fewer convictions and, therefore, a reduction in the deterrent effect of prosecution. Furthermore, if a driver was allowed to consult an attorney, a second problem would arise. The legal system would have to address the question of whether to provide an attorney for those who cannot afford one. Providing counsel for the indigent not only would be expensive, but also may prolong the time before testing, thereby reducing the evidentiary value of the test results.

The difficulty of facing such problems, however, should not stand in the way of justice or the enforcement of constitutional rights. Our system of justice should not fear that if an accused is permitted to consult with an attorney, he will become aware of, and exercise powers and rights he has under the law. Under the implied consent statute, it is an affirmative defense for the individual to prove that his refusal to submit to the chemical test was based on reasonable grounds. In other words, an individual may refuse to consent to chemical testing if such refusal is based on reasonable grounds. Whether the grounds for refusal are reasonable or not, however, the implied consent statute clearly provides an individual with the power to refuse chemical testing. The issue thus becomes whether such testing is a critical stage in the state's potential criminal prosecution of the driver.

164. However, as Justice Yetka pointed out in his dissent, once consulted, the attorney in Nyflot advised her to take the test. *Id.* at 523.

165. *See Escobedo,* 378 U.S. at 490. In *Escobedo,* the Court stated:

We have . . . learned the . . . lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

*Id.*

The Court in *Wade* stated that to refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the basic assumptions upon which this Court has operated in Sixth Amendment cases. *Wade,* 388 U.S. at 237-38.


167. *See Nyflot,* 369 N.W.2d at 517; *Minn. Stat.* § 169.123, subd. 4.
A. The Chemical Testing Situation is a Critical Stage

The driver has a sixth amendment right to counsel prior to deciding whether to submit to the chemical test. The Prideaux court held that it is only after the driver decides whether to submit to chemical testing that the proceeding divides into its civil and criminal aspects. While the implied consent proceeding has been labeled civil in nature, it is too closely tied to the criminal DWI prosecution to make a clear distinction. Therefore, the right to counsel as provided under the fifth and sixth amendments must be considered.

The following facts reflect the nexus between the implied consent proceeding and the DWI prosecution and illustrate the critical nature of the decision of whether to submit to chemical testing. If in the implied consent situation, the individual refuses to take the test, the refusal will be offered into evidence against him at the DWI prosecution trial. If the individual takes the chemical test, the test result could be used against him in the DWI prosecution. Furthermore, the chemical test shows that a person has an alcohol concentration of over .10%, this is not merely evidence, rather it is proof that the person is guilty of a misdemeanor. These factors demonstrate the possibility of substantial prejudice to the driver's rights should he make an uninformed decision. An attorney would help avoid this prejudice.

An attorney is an objective third party who would inform the individual of what constitutes a reasonable refusal. Without an attorney, the driver will not know when his refusal is unreasonable. An attorney could also clarify the police officer's statements and make sure that the driver is properly informed and understands the ramifications of his decision. Even the court in Nyflot recognized that the

168. It becomes a civil proceeding if the individual refuses testing, but a criminal proceeding if the individual consents to testing. Prideaux, 310 Minn. at 410, 247 N.W.2d at 389.
169. "The fact that implied consent is labeled a 'civil' proceeding is not dispositive." Nyflot, 369 N.W.2d at 522 (Yetka, J., dissenting). Even if the proceeding is considered to be civil and separate and distinct from the criminal DWI prosecution, the Minnesota Supreme Court has found a right to counsel in certain civil actions. Id. at 521. Both Justice Yetka in his dissent and the court of appeals cited two civil cases in which the right to counsel was found: Cox v. Slama, 355 N.W.2d 401, 403 (Minn. 1984)(right to counsel in civil contempt hearings where incarceration is a real possibility) and Hepfel v. Bashaw, 279 N.W.2d 342, 348 (Minn. 1979)(right to counsel in paternity adjudications). Id. at 521; Nyflot, 365 N.W.2d at 270.
170. MINN. STAT. § 169.121, subd. 2.
171. Id. As pointed out in Nyflot, "... chemical testing is the best evidence for a criminal DWI conviction." Nyflot, 369 N.W.2d at 522 (Yetka, J., dissenting).
172. See Nyflot, 369 N.W.2d at 522 (Yetka, J., dissenting). It is a misdemeanor for a person to operate a motor vehicle when the person's alcohol concentration is .10% or more. MINN. STAT. § 169.121, subd. 1(d).
173. As the court of appeals pointed out "It is... confusing to tell a person on
advice of counsel could be useful: "[a]n attorney may advise the driver of the consequences of refusal and of the consequences of taking the test and failing it. He also may advise the driver to take the test." Some drivers are more likely to believe the advisory if it comes from their attorney. It has been argued that the chemical testing process is scientific and routine, and consequently, there is no need for an attorney’s supervision. As has been shown, however, an attorney is more than a supervisor, he is an objective third party who is available to inform, provide security, and clarify so that the individual makes a sound decision.

The driver’s decision is not easy. In some circumstances, a driver may rather face a twelve month license revocation, than take a chemical test which would increase his chance of being convicted for driving while intoxicated. The penalty in either situation is grave. The driver’s decision may affect him in subsequent proceedings. A driver, prior to deciding whether to submit to chemical testing, is in custody, often at the police station, being asked by an officer of the law to submit to a test which may give proof of his violation of the law. If the driver refuses, his refusal will be used against him at the DWI prosecution. As the court of appeals noted, this driver is faced with “the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.” The individual faced with the decision of whether to submit to chemical testing needs “aid in coping with legal problems” and “assistance in meeting his adversary.” In addition, as Justice Yetka argued in his dissent to the Nyflot opinion, the ticket issued to a driver arrested for driving while intoxicated serves as a summons to appear in court and is “the functional equivalent of a complaint.” The police could

one hand testing is required, but on the other hand the driver does not have to submit to testing.” Nyflot, 365 N.W.2d at 268.

174. Nyflot, 369 N.W.2d at 517 n.3.
175. Id. at 517 n.3.
176. See Prideaux. 310 Minn. at 412, 247 N.W.2d at 390.
177. Id. The United States Supreme Court in Wade stated that “in addition to counsel’s presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.” Wade, 388 U.S. at 226.

178. See Nyflot, 365 N.W.2d at 270 (quoting Kirby, 406 U.S. at 689). The concurring opinion in United States v. Gouveia stated that the Kirby holding does not foreclose the possibility that the right to counsel might, under certain circumstances, attach before the formal initiation of judicial proceedings. Gouveia, 104 S. Ct. at 2900 (Stevens, J., concurring).

179. See Ash, 413 U.S. at 313.
180. Nyflot, 369 N.W.2d at 522 (Yetka, J., dissenting); see also Nyflot, 365 N.W.2d at 270 (the officer usually gives the driver a charging document in the form of a uniform traffic ticket or tab charge).
issue the ticket prior to chemical testing, therefore, as Justice Yetka pointed out, the fact that the ticket is issued after the test is just a manipulation of the system.\textsuperscript{181} Prior to chemical testing, it appears that "the adverse positions of government and defendant have solidified."\textsuperscript{182} Consequently, adversarial proceedings have begun,\textsuperscript{183} and the point at which one must decide whether to submit to chemical testing is a critical stage. This set of circumstances strongly indicates that the sixth amendment right to counsel should attach.

B. The Driver's Fourteenth Amendment Right to Counsel

The right to counsel before deciding whether to submit to chemical testing is necessary for a fair trial. As a result, there is not only a sixth amendment right to counsel at this stage, but also a fourteenth amendment right to counsel.\textsuperscript{184} The due process clause of the fourteenth amendment requires reasonableness and fundamental fairness.\textsuperscript{185} It is not reasonable to hold a person, arrested for the crime of DWI, incommunicado while waiting for him to make a serious and binding decision. The driver is being forced to make a decision that will affect later proceedings,\textsuperscript{186} could result in a one-year license revocation, and which may affect his "pursuit of a livelihood."\textsuperscript{187} Without the aid of counsel, such actions unreasonably violate the basic notion of an arrested person's liberty in communicating beyond confinement,\textsuperscript{188} and deprive the driver of the fundamental fairness embodied in the fourteenth amendment.\textsuperscript{189} Providing a driver with a reasonable opportunity to contact counsel at this stage of the proceeding satisfies the due process demands of the fourteenth amendment; it would also resolve the problems of confusion resulting from \textit{Miranda} warnings when the warnings are given prior to chemical testing.\textsuperscript{190}

The fifth amendment right to counsel, as provided through the \textit{Miranda} warnings, has been held to be inapplicable to the chemical testing situation because the blood sample is physical, not testimonial evidence,\textsuperscript{191} and the refusal is not coerced.\textsuperscript{192} The \textit{Miranda} warnings should be given, however, because this situation is, in effect, a custo-

\footnotesize{\begin{itemize}
\item \textsuperscript{181} \textit{Nyflot}, 369 N.W.2d at 522 (Yetka, J., dissenting).
\item \textsuperscript{182} \textit{See Kirby}, 406 U.S. at 689.
\item \textsuperscript{183} \textit{See Nyflot}, 369 N.W.2d at 522 (Yetka, J., dissenting).
\item \textsuperscript{184} \textit{See Sites}, 300 Md. at 716-18, 481 A.2d at 199-200.
\item \textsuperscript{185} \textit{See Murphy}, supra note 39, at 219-20.
\item \textsuperscript{186} \textit{See Prideaux}, 310 Minn. at 412, 247 N.W.2d at 390.
\item \textsuperscript{187} \textit{Heles}, 530 F. Supp. at 652; \textit{Sites}, 300 Md. at 717. 481 A.2d at 199-200.
\item \textsuperscript{188} \textit{Newton}, 291 Or. at 807-09, 656 P.2d at 406-07.
\item \textsuperscript{189} \textit{Heles}, 530 F. Supp. at 652; \textit{Sites}, 300 Md. at 717-18, 481 A.2d at 199-200.
\item \textsuperscript{190} \textit{See supra} note 74 and accompanying text.
\item \textsuperscript{191} \textit{See supra} notes 59-63 and accompanying text.
\item \textsuperscript{192} \textit{See supra} notes 66-70 and accompanying text.
\end{itemize}}
dial interrogation and may result in incriminating statements by the accused. The *Miranda* court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."\textsuperscript{193}

The *Miranda* criterion applies in an implied consent situation. The chemical testing situation is more than just a routine traffic stop. The driver is often brought to the police station where he is asked to make a binding and far-reaching decision. The officer asks him whether he will submit to the chemical test, which may lead to an incriminating response.\textsuperscript{194} The police officers have initiated questioning and the accused is in custody. This situation fits the definition of "custodial interrogation." By providing that the individual has a right to counsel prior to chemical testing, the *Miranda* warnings may be given without the danger of confusing the arrested driver regarding when his right to counsel attaches.

**C. There is a Statutory Right to Counsel Prior to Chemical Testing**

In addition to violating the constitutional right to counsel, the result in *Nyflot* violates a statutory right to counsel. Minnesota Statutes section 481.10 states that an individual, once in custody and restrained of his liberty, shall be provided with the right to contact an attorney before further proceedings, as long as no imminent danger of escape exists.\textsuperscript{195} This law existed, unchanged, for ninety-nine years. The implied consent statute does not directly repeal section 481.10. It does not even provide for an exception to this section. The legislature merely changed the advisory so that the officer is no longer required to tell the driver that he has a limited right to counsel prior to testing. It is unlikely that the legislature intended to abolish a right to counsel which has been unaltered for nearly a century merely by omitting a statement in an advisory. Clearly, there are more explicit ways for the legislature to eliminate such an important right if that were its intent.

Although the implied consent statute is later in time and more specific in scope than Minnesota Statutes section 481.10, it is not necessarily controlling. Minnesota Statutes section 645.26 requires that if a general provision is in conflict with a special provision, the two shall be construed, if possible to give effect to one another.\textsuperscript{196} In addition, the implied repeal of a former statute will occur only when

\textsuperscript{193} *Miranda*, 384 U.S. at 444.

\textsuperscript{194} In *South Dakota v. Neville*, when the respondent was asked to submit to a blood-alcohol test, he refused and replied "I'm too drunk, I won't pass the test." *Neville*, 459 U.S. at 555.

\textsuperscript{195} MINN. STAT. § 481.10.

\textsuperscript{196} MINN. STAT. § 645.26 (1984).
the two enactments are irreconcilable.\footnote{197} It is particularly important not to erode the strength of section 481.10 in view of a recent United States Supreme Court decision regarding the right to counsel under the United States Constitution.\footnote{198} Until the legislature clearly shows its intention to remove this important and long-standing right to counsel from the implied consent proceeding, the statutes must be reconciled.\footnote{199} The implied consent statute does not forbid one the right to counsel prior to deciding whether to submit to chemical testing. The statute merely eliminates this right from the advisory. In short, the implied consent advisory requires that the officer inform the driver that he has the right to an attorney after submitting to testing. The statute does not, however, explicitly preclude the driver from exercising his right before the test. The two statutes are, indeed, reconcilable. Minnesota Statutes section 481.10 provides the driver with the right to contact an attorney in this custodial situation.


\footnote{198} On March 10, 1986, the United States Supreme Court held that police failure to tell a defendant that an attorney had been obtained for him and that the attorney had called, did not deprive him of the information necessary to knowingly waive his fifth amendment right to counsel. Moran v. Burbine, 106 S. Ct. 1135, 1141 (1986). In Moran, the defendant was arrested in Rhode Island for burglary. While under arrest, the police obtained evidence suggesting that he may have been involved in a murder. \textit{Id.} at 1138. Unknown to the defendant, his sister obtained counsel for him. An assistant public defender called the police station and said that she would act as the defendant’s counsel if he was going to be questioned. She was assured that the defendant would not be questioned that night. \textit{Id.} at 1139. Less than one hour after the call, the police gave the defendant the \textit{Miranda} warnings and began questioning the defendant. They obtained waivers from him regarding his right against self-incrimination and his right to counsel, and obtained statements admitting to the murder. \textit{Id.} The defendant did not ask for an attorney, however, he was never told his sister retained one for him or that the attorney called and asked to be present for questioning. \textit{Id.}

In Minnesota, the attorney would have been admitted to see the defendant. \textit{See} MINN. STAT. § 481.10. Under Minnesota Statutes section 481.10 an officer, who has a person in custody, “shall admit any resident attorney retained by or in behalf of the person restrained, or whom he may desire to consult, to a private interview at the place of custody.” \textit{Id.} (emphasis added). Minnesota now provides greater protection for those in custody than that provided under the United States Constitution. If the implied consent statute is construed to limit the applicability of Minnesota Statutes section 481.10, the erosion of the statute will begin. If this erosion continues, it could threaten the right, now only available through the statute, of an attorney to see his client.

\footnote{199} In Nyflot, Justice Yetka espoused “\[w\]hen two statutes can be read in harmony with each other, especially when we are dealing with such a fundamental right as right to counsel, we can and should interpret the 1984 amendments as still permitting the right to counsel.” \textit{Nyflot}, 369 N.W.2d at 523 (Yetka, J., dissenting). A statute should be analyzed as it reads and effect should be given to the clear meaning of its language. \textit{See} State \textit{ex. rel.} Livingston v. Minneapolis Fire Dep’t Relief Ass’n, 205 Minn. 204, 206, 285 N.W. 479, 480 (1939); \textit{see also} MINN. STAT. § 645.16 (1984).
prior to testing as long as it does not unreasonably delay the testing procedures.

As the *Prideaux* court held, however, the right to counsel in the implied consent situation must be limited because as the driver tries to contact his attorney, the blood-alcohol content in his system will dissipate. Minnesota requires that the chemical test be performed within two hours from the time the person was driving. Thus, in accordance with section 481.10, during this period, or a more limited period, the driver should be allowed to contact an attorney.

D. Possible Alternatives to Resolve the Drunken Driving Problem

While drunken drivers are a threat to everyone and legislation is needed to address this national problem, the answer is not to deprive individuals of their basic right to counsel. The legislature should attempt to deter people from drinking and driving by increasing the severity of the penalties for the offense. Penalties should be especially stiff for repeat offenders and those who illegally drive during the revocation period. In addition, programs should be developed to make the public aware of the legal consequences of drinking and driving. This information alone will have a deterrent effect. While protecting citizens from drunken drivers, community agencies should provide help for individuals with a drinking problem. By continuing to inform the public of programs for the problem drinker, perhaps we can reach the drinker before he reaches the road.

CONCLUSION

By holding that an individual does not have the right to counsel before deciding whether to submit to chemical testing, the court in *Nyflot* violates an individual's constitutional and statutory rights to counsel. The issue presented in *Nyflot* is a difficult one. Citizens have the right to be on the road without fear of meeting a drunken

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200. See *Prideaux*, 310 Minn. at 421, 247 N.W.2d at 394.
201. See MINN. STAT. § 169.121, subd. 1(e).
202. For example, in Alabama, upon the first conviction for driving while intoxicated a person is punished by imprisonment for not more than one year or by fine of not less than $250.00 nor more than $1,000.00 or both. ALA. CODE § 32-5A-191 (Supp. 1985). In addition, the driver's license is suspended for ninety days. *Id.* The driver must also complete a DWI court referral program. *Id.* In Minnesota, the penalty for the first offense of driving while intoxicated is license revocation for not less than thirty days. MINN. STAT. § 169.121, subd. 4(a). Minnesota's penalty is substantially less severe than the twelve month license revocation for refusing to submit to the chemical test.

One effective penalty would be to increase the punishment according to the percentage of alcohol in the person's system. In this way, those who have a high blood-alcohol content would be more severely punished than those who were just at or over .10%.
driver. Citizens also, however, have a constitutional and statutory right to consult an attorney and be informed by a third party whom they trust, before making the binding decision of whether to submit to chemical testing. By providing more effective deterrent regulations, educating the public of the legal consequences of driving while intoxicated, and reducing the number of problem drinkers, drunk drivers will present less of a hazard on the road. At the same time, the courts and legislature will not be creating a new hazard of depriving citizens of their basic right to counsel.

Susan M. Mindrum