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CRIMINAL PROCEDURE: ARREST, SEARCH, AND CONFESSIONS

by

Mike McColloch*

THIS Article examines the most significant developments in the law of arrest, search, and confessions during the Survey period. It reviews federal and state cases implicating the critical procedural and substantive applications of the fourth, fifth, and sixth amendments to the United States Constitution and the corresponding provisions of Texas constitutional and statutory law. This Article also discusses several crucial opinions of the United States Supreme Court, along with the most noteworthy opinions of the Texas Court of Criminal Appeals and the various courts of appeals.

I. SEARCH INCIDENT TO ARREST

Courts have long recognized that a lawful custodial arrest authorizes a contemporaneous, warrantless search of the person arrested and of the immediately surrounding area.¹ The scope of the area searched is limited, however, to the area within the immediate control of the arrestee.² Several years ago in *New York v. Belton*³ the United States Supreme Court extended this principle to searches of the interior of an automobile, ruling that police may search the passenger compartment of an automobile as incident to a lawful arrest of the occupant of that automobile.⁴ During the Survey period, however, the Texas Court of Criminal Appeals made clear that the *Belton* rationale will not apply absent a firm evidentiary showing by the prosecution that the arrestee was, indeed, a recent occupant of the vehicle. In *Gauldin v. State*⁵ the appellant robbed a convenience store and drove away in a red pick-up truck. Police soon spotted the truck in a parking lot of a nearby bar. The police found the appellant inside the bar and took him to the parking lot where he acknowledged that he had been driving the truck. The officers placed the appellant under arrest and subsequently searched the vehicle. The search resulted in the discovery of some of the stolen money in the glove compartment. The Fort Worth Court of Appeals erroneously held that the

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1. The Supreme Court firmly established the search incident to arrest exception to the warrant requirement in *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

2. *Id.*

3. 453 U.S. 454 (1981).

4. *Id.* at 460.

5. 683 S.W.2d 411 (Tex. Crim. App. 1984).

Belton rationale justified the search as incident to the appellant's arrest.⁶ But the court of criminal appeals made clear that, at least in Texas, the *Belton* exception to the warrant requirement will be strictly construed, and held the search of the vehicle impermissible.⁷ Through Judge McCormick the *en banc* court held that the record did not demonstrate that the appellant was either an occupant of the truck or a recent occupant within the *Belton* context.⁸ Furthermore, the record failed to reflect the appellant's proximity to the vehicle at the time of his arrest; thus, the State had failed to prove the items inside the automobile were within the area where the arrestee could grab a weapon or evidentiary item.⁹ Because no proof existed of any exigent circumstances which would justify the warrantless search under the traditional automobile search exception,¹⁰ the mere existence of probable cause was insufficient to render the fruits of the search admissible.¹¹ Finally, the court of criminal appeals struck down the court of appeals' holding that justified the search of the vehicle as a constitutionally permissible inventory search.¹² Although the record revealed facts sufficient to justify an inventory search of the truck,¹³ the record was devoid of any evidence that the police actually engaged in this caretaking function.¹⁴ The officers only testified that they had searched the vehicle, but not that they had actually conducted an inventory search.¹⁵ The absence of any testimony regarding actual adherence to standard police inventory procedure compelled the court of criminal appeals to the conclusion that the State had not sustained its burden of proof to show a lawful inventory search.¹⁶

6. *Gauldin v. State*, 632 S.W.2d 652, 654 (Tex. App.—Fort Worth 1982), *aff'd on other grounds*, 683 S.W.2d 411, 415 (Tex. Crim. App. 1984).

7. 683 S.W.2d at 414.

8. *Id.*

9. *Id.* (citing *New York v. Belton*, 453 U.S. 454, 460 (1981)).

10. The Fort Worth Court of Appeals had also erroneously upheld the search under *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970), in which the Supreme Court upheld warrantless searches of automobiles under the normal exigencies involved in a stop of a vehicle on the open highway. *Gauldin v. State*, 632 S.W.2d 652, 654 (Tex. App.—Fort Worth 1982), *aff'd on other grounds*, 683 S.W.2d 411, 415 (Tex. Crim. App. 1984). The court of appeals misapplied *Chambers* in failing to address the presence of exigent circumstances, which did not exist here. *See* 683 S.W.2d at 414-15.

11. 683 S.W.2d at 414-15. The court of criminal appeals noted that no accomplices to the robbery existed, that the appellant was alone at the time of his arrest, and that no one arrived to attempt to move the vehicle or remove items from it after the arrest of the appellant. *Id.* Furthermore, at least six officers were present at the scene. *Id.*

12. 683 S.W.2d at 415. Generally, police conducting a caretaking search may inventory the contents of an impounded vehicle. *See South Dakota v. Opperman*, 428 U.S. 364, 369-72 (1976).

13. The police had the authority to impound the vehicle, since they had arrested the appellant, the appellant had no identification, and no one else was present to take possession of his vehicle. The truck was parked on a bar parking lot, and it matched the description of the vehicle used in the robbery. 683 S.W.2d at 415.

14. *Id.* The state carries the burden of proof to show a lawful inventory search. *Ward v. State*, 659 S.W.2d 643, 646 (Tex. Crim. App. 1983). *See Benavides v. State*, 600 S.W.2d 809, 812 (Tex. Crim. App. 1980).

15. 683 S.W.2d at 415.

16. *Id.* The court of criminal appeals in *Gauldin* failed to consider the applicability of the inevitable discovery doctrine embraced by the court just six months earlier in *Miller v. State*, 667 S.W.2d 773, 778 (Tex. Crim. App. 1984). The court in *Miller* held for the first time that

II. INVESTIGATORY DETENTIONS

The United States Supreme Court delivered four decisions during the Survey period which refined the parameters allowing investigatory detentions upon less than probable cause. In *United States v. Sharpe*¹⁷ the Court held that not only the quantum of time a suspect is delayed may make a *Terry* stop unreasonable, but also whether the police diligently pursue a means of investigation which would confirm or dispel their suspicions quickly.¹⁸ In *United States v. Montoya de Hernandez*¹⁹ the Court held that, in the border search context, a detention of sixteen hours was not unreasonable when customs officials believed the suspect was smuggling contraband in her alimentary canal.²⁰ In *United States v. Hensley*²¹ the Court held that investigatory detentions are applicable to investigations of past crimes, and that police can make investigative stops based on another law enforcement agency's bulletin if the agency that issued the bulletin had reasonable suspicion to justify an investigatory stop.²² Finally, in *Hayes v. Florida*,²³ while the Court held that removing a suspect to the station for fingerprinting without probable cause fell outside the scope of investigatory detentions, the Court strongly indicated that an on-the-spot fingerprinting of a suspect is permissible on reasonable suspicion alone.²⁴

The Supreme Court had already approved the investigative detention in *Terry v. Ohio*,²⁵ when it found that a stop-and-frisk for weapons without probable cause was permissible merely upon reasonable suspicion that "criminal activity may be afoot."²⁶ The Court reasoned that the public interest in police self-protection justifies the frisk as the least intrusive means to assure the officer that the suspect is unarmed.²⁷ The Court has consistently held that the brevity of the search is a key factor in justifying a *Terry*

when police seize evidence pursuant to an illegal search, the evidence will nevertheless be admissible if a court later determines that the police would have ultimately discovered the evidence. *Id.* See McCulloch, *Criminal Procedure: Arrest, Search, and Confessions, Annual Survey of Texas Law*, 39 Sw. L.J. 463, 466-67 (1985). One court of appeals has already relied on *Miller* to uphold the admissibility of evidence obtained from an automobile search on the grounds that the police lawfully impounded the vehicle and would have inevitably discovered the evidence. *Arnold v. State*, 686 S.W.2d 291, 294 (Tex. App.—Houston [14th Dist.] 1985, pet. granted). Because the application of *Miller* to the facts presented in *Gauldin* could have easily yielded the opposite result, and in light of the recurring nature of automobile searches and impoundments, the court should have attempted some resolution and accommodation of the competing considerations of the inevitable discovery doctrine and the state's burden of proof. Perhaps the court felt no need to address this troublesome question in light of its ultimate conclusion in *Gauldin* that the admission of the fruits of the search was harmless error, 683 S.W.2d at 415, or because the prosecution had never raised the issue.

17. 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985).

18. *Id.* at 1575-76, 84 L. Ed. 2d at 615-16.

19. 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985).

20. *Id.* at 3312, 87 L. Ed. 2d at 393.

21. 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985).

22. *Id.* at 681, 683, 83 L. Ed. 2d at 612, 615.

23. 105 S. Ct. 1643, 84 L. Ed. 2d 705 (1985).

24. *Id.* at 1646-47, 84 L. Ed. 2d at 710-11.

25. 392 U.S. 1 (1968).

26. *Id.* at 30.

27. *Id.* at 20-27.

stop because an indefinite detention would constitute a de facto arrest.²⁸ In *United States v. Sharpe*,²⁹ however, the Court rejected the application of any per se rule limiting the time of an investigative stop.³⁰ Instead, the Court adopted a test which examined whether police during a detention pursued an investigatory means likely to confirm or dispel their suspicions quickly.³¹ The Court also concluded that any evasive action taken by the suspect to elude the police could extend the time of the stop without affecting its reasonableness.³² The Court noted that even if the suspect innocently caused the delay, the suspect's actions would still permissibly extend the length of time in which the detention would be considered reasonable.³³ In light of *Sharpe* the length of time of an investigatory detention will not be a significant factor in determining its reasonableness, so long as the delay in the stop is traceable to the evasive actions of the suspect.

*United States v. Montoya de Hernandez*³⁴ reflects a poignant application of this same rationale. In *Montoya* the Supreme Court held that a sixteen-hour detention of a suspect, based on the customs officials' reasonable suspicion that she carried contraband in her alimentary canal, did not violate the reasonableness requirement of the fourth amendment.³⁵ The Customs officials gave the defendant the choice of either having an x-ray or producing a stool sample as a means of dispelling their suspicions. The defendant refused both³⁶ and the customs officials, therefore, detained her for sixteen hours before obtaining a warrant from a magistrate to perform a rectal exam of the defendant.³⁷ The exam produced eighty-eight balloons containing 528 grams of cocaine.

While the *Montoya* decision is distinguishable from *Sharpe* in that *Montoya* involved a border search, the *Montoya* Court did rely on *Sharpe* to sup-

28. See *United States v. Sharpe*, 105 S. Ct. 1568, 1574-75, 84 L. Ed. 2d 605, 614-15 (1985); *United States v. Place*, 462 U.S. 696, 709 (1983); *Florida v. Royer*, 460 U.S. 491, 499-500 (1983).

29. 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985).

30. *Id.* at 1575, 84 L. Ed. 2d at 615. The Court rejected the Fourth Circuit's conclusion that a 20-minute stop was per se unreasonable. *Id.*

31. *Id.* at 1575, 84 L. Ed. 2d at 615-16. The Court cautioned reviewing magistrates not to second-guess less intrusive means the police could have used in carrying out the search. *Id.* at 1576, 84 L. Ed. 2d at 616.

32. *Id.* at 1576, 84 L. Ed. 2d at 616-17. In *Sharpe*, a Drug Enforcement Administration (DEA) officer, with the assistance of a local police unit, pulled over two vehicles that he suspected of involvement in transportation of narcotics. The two cars stopped one-half mile apart causing the DEA officer considerable delay shuttling between the vehicles. The Court held that the time the DEA officer spent shuttling between the vehicles resulted from the suspects' evasive actions, and therefore, could not lead to the conclusion that the detention was unreasonably long. *Id.*

33. *Id.* at 1576 n.6, 84 L. Ed. 2d at 616 n.6.

34. 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985).

35. *Id.* at 3312-13, 87 L. Ed. 2d at 393.

36. The dissent by Justice Brennan strongly criticized this finding because the defendant originally agreed to the x-ray, but subsequently refused when officials insisted that she be handcuffed en route. *Id.* at 3313, 3315-16, 87 L. Ed. 2d at 394, 397 (Brennan, J., dissenting).

37. The customs officials were awaiting her bowel movement. The defendant refused to succumb in what the court of appeals described as "heroic efforts to resist the usual calls of nature." *United States v. Montoya de Hernandez*, 731 F.2d 1369, 1371 (9th Cir. 1984), *rev'd*, 105 S. Ct. 3304, 3313, 87 L. Ed. 2d 381, 393 (1985).

port the proposition that the search was justifiable because of the suspect's evasive actions.³⁸ The Court noted that the balance between the government interest in protecting its borders and the privacy interest of the individual weighs in favor of the government at the border.³⁹ The Court also expressed great concern over the difficulty of detecting alimentary canal smuggling.⁴⁰ When read together, the *Sharpe* and *Montoya* decisions arguably expand the temporal limits of investigatory detentions when compared with the unintrusive momentary stop originally approved in *Terry v. Ohio*.⁴¹

In *United States v. Hensley*⁴² the Court held that the police of one department could make an investigative detention of a suspect on another police department's flyer to check the suspect's identification, ask the suspect questions, or briefly detain the suspect while determining whether an actual warrant had been issued.⁴³ Police could make the stop if the police department issuing the flyer had a reasonable suspicion to believe the suspect was involved in an offense.⁴⁴ The decision appears to expand investigative detentions in two ways. First, the decision allows the use of investigative detentions to investigate felony offenses that have already occurred.⁴⁵ Justice O'Connor, writing for the majority, noted that the original rationale for investigative detentions sought to promote society's strong interest in the detection and prevention of crime.⁴⁶ The Court concluded that equally strong societal interests justified *Terry* stops to investigate past crimes.⁴⁷ Second, the Court's decision expands investigative detentions by allowing the police department receiving the flyer to rely on the reasonable suspicion of an officer of the department issuing the flyer. The Court's reliance on *Whiteley v. Warden*⁴⁸ indicates that one department could rely on another department's warrant to arrest a suspect.⁴⁹ The Court did not find significant the distinction that in the warrant situation the receiving police department relies on a warrant issued by a magistrate instead of relying only on an officer's reasonable suspicions.⁵⁰ *Hensley*, therefore, enlarges the scope of the investigative stop by permitting departments that receive a flyer to stop a

38. 105 S. Ct. at 3312, 87 L. Ed. 2d at 393. The suspect's actions were evasive in that she refused to consent to the x-ray or give a stool sample. See *id.*, 87 L. Ed. 2d at 392-93.

39. *Id.* at 3310, 87 L. Ed. 2d at 390.

40. *Id.* at 3309, 87 L. Ed. 2d at 389-90.

41. 392 U.S. 1, 30 (1968).

42. 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985).

43. *Id.* at 683, 83 L. Ed. 2d at 615.

44. *Id.* The Court ruled that the flyer need not articulate the specific facts supporting the issuing officials' suspicion because of the need to minimize the volume of information about suspects. *Id.* at 682, 83 L. Ed. 2d at 613-14.

45. The Court limited its decision to the investigation of felony crimes reserving judgment on the investigation of other crimes. *Id.* at 681, 83 L. Ed. 2d at 612.

46. *Id.* at 680-81, 83 L. Ed. 2d at 612 (citing *Adams v. Williams*, 407 U.S. 143 (1972); *Terry v. Ohio*, 392 U.S. 1 (1968)).

47. *Id.* at 681, 83 L. Ed. 2d at 612. Justice O'Connor noted the strong government interest in solving crimes and the public's interest in the prompt arrest of suspects. *Id.* She also noted that restraining police until they obtained probable cause would disrupt investigations and allow suspects an opportunity to flee. *Id.*

48. 401 U.S. 560 (1971).

49. 105 S. Ct. at 682, 83 L. Ed. 2d at 613-14.

50. *Id.*, 83 L. Ed. 2d at 614.

suspect of a past crime as long as the agency that issues the flyer had reasonable suspicion to justify a stop.

In *Hayes v. Florida*⁵¹ the Supreme Court provided authority limiting some aspects and expanding other aspects of the investigative detention. The police officer's *Terry* stop in *Hayes* included taking the defendant to the station in order to fingerprint him, because police suspected the defendant was involved in a series of burglary-rapes. Justice White, writing for the majority, held that such a seizure without probable cause violated *Davis v. Mississippi*.⁵² In *Davis*, the Court had held that a similar seizure surpassed the limits of the temporary seizure authorized by *Terry*.⁵³ The *Hayes* Court, however, forged on to say that its holding did not imply that a brief detention in the field for fingerprinting is necessarily impermissible under the fourth amendment, when the police base such a detention on reasonable suspicion not amounting to probable cause.⁵⁴ The majority indicated it would likewise permit a magistrate to authorize the seizure of a person in order to obtain fingerprints on a showing of less than probable cause.⁵⁵

III. INVENTORY SEARCHES

One time-honored exception to the fourth amendment warrant requirement for a search of an automobile is the administrative inventory exception. In *South Dakota v. Opperman*⁵⁶ the United States Supreme Court held that standard police procedures calling for an inventory of the contents of impounded automobiles are acceptable under the fourth amendment due to the caretaking responsibilities imposed on the police and the lesser expectation of privacy in automobiles.⁵⁷ The inventory search exception allows admission of evidence discovered by police in the course of a routine inventory procedure.⁵⁸ The purpose of the inventory is to protect police from claims of lost or damaged goods while the goods are in police possession.⁵⁹ Probable cause is not an issue because, theoretically, the police are not conducting the search to find evidence.⁶⁰

In *Gill v. State*⁶¹ the Texas Court of Criminal Appeals held that an inventory search could not properly extend to the contents of a locked trunk when police officials, who were previously denied permission to open the trunk, forced their way into the trunk by removing the back seat of the car.⁶² The court of criminal appeals has, however, distinguished *Gill* in several decisions during the Survey period to hold that a locked compartment may be

51. 105 S. Ct. 1643, 84 L. Ed. 2d 705 (1985).

52. *Id.* at 1648, 84 L. Ed. 2d at 711 (upholding *Davis v. Mississippi*, 394 U.S. 721 (1969)).

53. *Davis*, 394 U.S. at 726-28.

54. 105 S. Ct. at 1647, 84 L. Ed. 2d at 710-11.

55. *See id.*, 84 L. Ed. 2d at 710.

56. 428 U.S. 364 (1976).

57. *Id.* at 367-70, 376.

58. *Id.* at 366, 376.

59. *Id.* at 369.

60. *See id.* at 370 n.5.

61. 625 S.W.2d 307 (Tex. Crim. App. 1981).

62. *Id.* at 312.

opened if the police use the owner's keys to open the compartment.⁶³ In each of these cases, all handed down on the same day, the officers were conducting an inventory search pursuant to department policy. The officers took the driver's keys to open locked compartments apparently without being granted or denied the driver's permission.⁶⁴ The cases each concluded that the inventory search was necessary to protect police from possible future claims by the owner of the vehicle.⁶⁵

In *Stephen v. State*⁶⁶ the police seized a car and entered the trunk after arresting the driver and determining that the passenger did not have a driver's license. Pursuant to their department's standard procedure, the officers impounded the car and, as they awaited the wrecker, conducted an on-the-spot inventory of the vehicle. One of the officers removed the keys from the ignition of the car and unlocked the trunk. In the trunk, the officer discovered a paper bag, which he opened. The bag contained tapes taken in an earlier robbery. Even though the officer testified he could see into the bag,⁶⁷ the court went on to hold that police could search containers discovered in locked compartments despite the existence of less intrusive alternatives.⁶⁸

In *Guillett v. State*⁶⁹ police arrested a driver for driving while intoxicated. In a subsequent on-the-spot inventory of the contents of the defendant's car one of the officers took the appellant's car keys and opened the locked glove compartment where he found narcotics.

In *Kelley v. State*⁷⁰ officers arrested a driver for DWI and the driver's passenger for possession of a prohibited weapon. In a subsequent inventory search of the car one of the officers obtained the keys to the locked trunk in which he discovered a sawed-off shotgun.

IV. STANDING TO CONTEST SEARCHES AND SEIZURES

The Survey period saw further refinements in the procedural requisites involved in litigation of standing to contest an illegal search or seizure. The refinements particularly concerned whether the government can challenge a defendant's standing for the first time on appeal. This troublesome question⁷¹ has now led to the adoption of entirely different rules for state and

63. *Kelley v. State*, 677 S.W.2d 34, 37 (Tex. Crim. App. 1984); *Stephen v. State*, 677 S.W.2d 42, 44 (Tex. Crim. App. 1984); *Guillett v. State*, 677 S.W.2d 46, 49 (Tex. Crim. App. 1984).

64. *Kelley*, 677 S.W.2d at 37; *Stephen*, 677 S.W.2d at 43; *Guillett*, 677 S.W.2d at 48.

65. *Kelley*, 677 S.W.2d at 37; *Stephen*, 677 S.W.2d at 44; *Guillett*, 677 S.W.2d at 49.

66. 677 S.W.2d 42 (Tex. Crim. App. 1984).

67. Once the court permitted the police to open the trunk, the contents of the bag could have been admitted under the "plain view" doctrine, which allows police to seize evidence in plain view during a legal search. *Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971).

68. 677 S.W.2d at 44-45 (citing *Illinois v. Lafayette*, 462 U.S. 640 (1983)).

69. 677 S.W.2d 46 (Tex. Crim. App. 1984).

70. 677 S.W.2d 34 (Tex. Crim. App. 1984).

71. The Texas Court of Criminal Appeals has switched positions three times on this issue in the last ten years. In *Maldonado v. State*, 528 S.W.2d 234 (Tex. Crim. App. 1975), the court held that the state may not raise the issue of standing for the first time on appeal. *Id.* at 238. Three years later the court held in *Sullivan v. State*, 564 S.W.2d 698 (Tex. Crim. App.

federal practice.

In *Wilson v. State*⁷² a bare majority of the court of criminal appeals held that the state may attack the defendant's standing for the first time on appeal.⁷³ In reaching this decision the court distinguished the rule most recently formulated by the United States Supreme Court that the government forfeits the right to contest a defendant's standing through assertions, concessions, or even acquiescence in the trial court.⁷⁴ Because the Supreme Court has also emphasized in recent years that a privacy interest in the thing or premises searched is a substantive element of a defendant's fourth amendment claim and must be proven by the defendant,⁷⁵ the court of criminal appeals determined that the prosecution's mere silence on the issue of standing in the trial court should not prevent the state from arguing a lack of standing in the appellate courts.⁷⁶

In the wake of the *Wilson* decision the disposition of standing disputes can take several alternative courses on appeal. If the evidence uncontrovertedly demonstrates that the defendant lacks standing, the state can raise the issue for the first time on appeal, and an appellate court will sustain the trial

1978), that the state may indeed contest a defendant's standing to challenge a search for the first time on appeal. *Id.* at 704. In *Wilson v. State*, 692 S.W.2d 661 (Tex. Crim. App. 1984) (opinion on original submission), the court returned to the rule that the state cannot challenge a defendant's standing for the first time on appeal, adding the modification that the state can raise the issue on appeal only when the record conclusively demonstrates that the defendant lacked standing to challenge the search. *Id.* at 663-64. In its opinion on rehearing in *Wilson*, *id.* at 666-71, the court has now held that the state may, after all, challenge standing for the first time on appeal. *Id.* at 669.

72. 692 S.W.2d 66 (Tex. Crim. App. 1984).

73. *Id.* at 669.

74. *Id.* at 668. The Supreme Court established the rule in *Steagald v. United States*, 451 U.S. 204, 211 (1981). The Supreme Court in *Steagald* also held, however, that the government may lose its right to challenge standing "when it has failed to raise such questions in a timely fashion during litigation." *Id.* at 209. The court of criminal appeals ignored this aspect of the *Steagald* holding in its analysis in *Wilson*.

75. In 1972 the Court noted that such fourth amendment analysis "focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." *Rakas v. Illinois*, 439 U.S. 128, 139 (1978). The *Rakas* Court made clear that the question of a defendant's reasonable expectation of privacy is an issue going to the merits of his fourth amendment claim and that the burden of proving a legitimate expectation of privacy in the thing or premises searched is on the defendant in all cases. *See id.* at 138-40, 148-50. *See also Rawlings v. Kentucky*, 448 U.S. 98, 104-05 (1980) (defendant bears burden of proving he has privacy interest in object searched); *Simmons v. United States*, 390 U.S. 377, 389-90 (1968) (fourth amendment rights enforced only at instance of one who legitimately occupies premises searched).

76. *See* 692 S.W.2d at 669. The *Wilson* court also seized upon the 1972 per curiam opinion of *Combs v. United States*, 408 U.S. 224 (1972) as direct authority for its conclusion. The trial court in *Combs* denied the defendant's motion to suppress, and the government argued for the first time on appeal that the defendant lacked standing to challenge the validity of the search. *Id.* at 226-27. The Supreme Court's review of the record did not reveal sufficient evidence upon which to decide the standing issue. *Id.* at 227. The Court observed that the defendant's failure to prove his privacy interest, either at trial or at the pre-trial suppression hearing, was possibly caused by the failure of the government to challenge the defendant's standing in the trial court. *Id.* The Court resolved the problem by remanding the case to the trial court for an evidentiary hearing on the standing issue. *Id.* at 227-28. Since the Supreme Court decided *Combs* before *Rakas*, that the Court would follow the remand approach today is highly doubtful.

court's rejection of the fourth amendment claim.⁷⁷ Conversely, if the evidence conclusively demonstrates that the defendant does have standing to contest the search, the state's challenge to the defendant's standing must ultimately fail, regardless of the state's right to raise the issue for the first time on appeal.⁷⁸ In cases involving a genuine factual dispute as to the defendant's expectation of privacy, the state will not have waived its right to challenge the defendant's standing, despite its silence on the issue, unless it has made contrary factual assertions or has otherwise effectively stipulated standing in the trial court.⁷⁹ When the evidence on this point is sufficiently controverted, the appellate court is obliged to affirm the trial court's rejection of the defendant's factual showing and find a lack of standing.⁸⁰ Finally, when the record contains insufficient evidence or no evidence on which to determine the defendant's standing, the defendant will simply have failed to sustain his burden of proof to show he possessed the requisite expectation of privacy in the thing or premises searched.⁸¹

The *Wilson* standards do not apply, however, in Texas federal prosecutions. The Fifth Circuit stated in *United States v. Amuny*⁸² that it has no intention of abandoning the traditional requirement that the government raise standing in the trial court.⁸³ The Fifth Circuit continues to presume that the defendant has standing to challenge a fourth amendment violation unless the government specifically raises the issue in the district court.⁸⁴ The

77. See *Sullivan v. State*, 564 S.W.2d 698, 704 (Tex. Crim. App. 1978). This scenario would include situations wherein the fact are uncontroverted or the trial court has made specific findings in favor of the state on any disputed factual issues involving the defendant's reasonable expectation of privacy.

78. Indeed, this was the result in *Wilson*, where the court of criminal appeals concluded that the prosecution had satisfied the defendant's burden of production on the issue in cross-examination of the defendant at the suppression hearing. 692 S.W.2d at 671. The court made clear that, in such circumstances, the defendant need not do more to meet his burden of persuasion on the issue unless the record shows that the trial court rejected the credibility of the defendant's testimony on that issue. *Id.*

79. See *id.* at 668-69.

80. The trial court is the sole judge of the credibility of the witnesses and other evidence adduced at a suppression hearing. See *Taylor v. State*, 604 S.W.2d 175, 177 (Tex. Crim. App. 1980).

81. This result is likely even though the court of criminal appeals in *Wilson* quoted approvingly from the Supreme Court's opinion in *Combs*, wherein the Court observed that a defendant's failure to assert and prove standing in the trial court is normally attributable to the government's failure to challenge his standing in the first place. 692 S.W.2d at 669 (citing *Combs v. United States*, 408 U.S. 224, 227 (1972) (per curiam)).

82. 767 F.2d 1113 (5th Cir. 1985).

83. *Id.* at 1121-22. The Fifth Circuit has repeatedly rejected the government's standing challenges when the government did not raise the issue in the district court. See *United States v. Settegast*, 755 F.2d 1117, 1119 n.2 (5th Cir. 1985); *United States v. Mendoza*, 722 F.2d 96, 97 n.1 (5th Cir. 1983); *United States v. Hultgren*, 713 F.2d 79, 83 n.6 (5th Cir. 1983); *United States v. Sanchez*, 689 F.2d 508, 509 n.1 (5th Cir. 1982).

84. 767 F.2d at 1121-22. Normally an appellate court will not hear a claim raised for the first time on appeal. See *Self v. Blackburn*, 751 F.2d 789, 793 (5th Cir. 1985); *United States v. Parker*, 722 F.2d 179, 183 n.2 (5th Cir. 1983). The Fifth Circuit continues to cling to this traditional waiver rule, apparently viewing this issue as a matter of ordinary appellate review procedure, *Rakas v. Illinois*, 439 U.S. 128 (1978), notwithstanding. See *supra* note 75 (*Rakas* disregards standing and places burden on defendant to show fourth amendment privacy interest at trial).

government in *Amuny* fell into the very trap of which the Supreme Court had warned in *Steagald v. United States*,⁸⁵ that the government may lose its right to raise on appeal the issue of the defendant's standing when the prosecution has made a contrary assertion in the trial court.⁸⁶ In *Amuny* the government prevented the defendant from establishing standing in the district court by expressly conceding that the defendant possessed standing.⁸⁷ The government's conduct thus constituted more than mere waiver, causing the Fifth Circuit to hold that the government forfeited its right to challenge the defendant's standing on appeal.⁸⁸

V. VEHICLE SEARCHES

The Supreme Court in *California v. Carney*⁸⁹ ended speculation and confusion as to whether courts should consider a motor home an automobile or a home for fourth amendment purposes. The Court held that a motor home could constitute a vehicle under the automobile exception to the warrant requirement if it was readily mobile and in a setting that indicated the vehicle's use for transportation.⁹⁰ The Court's decision reflects the Court's continued retrenchment of fourth amendment protections.

The fourth amendment guarantees individuals freedom from unreasonable searches or seizures.⁹¹ Generally, a reasonable search calls for a warrant supported by probable cause and obtained from a neutral and detached magistrate. If law enforcement officials fail to obtain a warrant, or probable cause does not support the warrant, then any evidence obtained by the search is inadmissible as evidence.⁹² In *Carroll v. United States*⁹³ the Supreme Court established the automobile exception to the warrant requirement of the fourth amendment.⁹⁴ The automobile exception permits the warrantless search of a vehicle based on probable cause.⁹⁵ In *Carroll* the Court reasoned that an automobile was entitled to a lesser degree of protection than a home because a suspect could use an automobile's mobility to circumvent a search by law enforcement officials by removing the vehicle from the jurisdiction before officials could obtain a search warrant.⁹⁶ In *South Dakota v. Opperman*⁹⁷ the Court recognized another justification for the automobile exception.⁹⁸ The *Opperman* Court noted that a lesser excep-

85. 451 U.S. 204 (1981).

86. *See id.* at 209.

87. 767 F.2d at 1121.

88. *Id.* at 1122.

89. 105 S. Ct. 2066, 85 L. Ed. 2d 406 (1985).

90. *Id.* at 2070-71, 85 L. Ed. 2d at 415.

91. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

92. *See Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961).

93. 267 U.S. 132 (1925).

94. *See id.* at 149.

95. *Id.*

96. *See id.* at 153.

97. 428 U.S. 364 (1976).

98. In *Opperman* police impounded an abandoned vehicle on the highway. In the im-

tation of privacy exists in an automobile than in a home because of the pervasive regulation of vehicles traveling on the public highways.⁹⁹ Officials, therefore, may search an automobile without a warrant because of the reduced expectation of privacy in an automobile.¹⁰⁰

Previous decisions left a question unanswered: when does an automobile take on enough characteristics of a home so that it really does not fit under the automobile exception, but belongs under the general rule requiring a warrant for the search? The Court answered part of this question in *Carney*. The case involved a warrantless search of a mini-motor home. The motor home sat on a downtown San Diego parking lot and had all of its windows curtained, including the windshield. Police officers made a warrantless search of the motor home on the suspicion that inside the motor home the occupant was exchanging marijuana for sex with youths. The officers discovered marijuana in the vehicle, and the defendant was subsequently convicted for possession.¹⁰¹ The California Supreme Court found the warrantless search violative of the fourth amendment on the grounds that the automobile exception should not include mobile homes because they entail a higher expectation of privacy than an ordinary automobile.¹⁰² The general rule established by the fourth amendment against warrantless searches therefore prevailed, and the court suppressed the evidence obtained from the warrantless search.¹⁰³

The United States Supreme Court examined the underlying justifications for the automobile exception and concluded that this motor home came within the justifications.¹⁰⁴ The motor home was readily mobile and, as a licensed motor vehicle, was subject to extensive governmental regulation.¹⁰⁵ The Court acknowledged the motor home possessed many attributes of a home but nevertheless concluded that as a readily mobile, licensed motor vehicle it fell within the scope of the automobile exception.¹⁰⁶ The Court expressly rejected the exclusion of a vehicle from the exception merely because the vehicle might also have the capability of functioning as a home.¹⁰⁷ Specifically, the Court held that if a vehicle is mobile and in a setting that objectively indicates the vehicle's use for transportation, the vehicle exception to the warrant requirement will apply.¹⁰⁸ The Court left unexplained

pound lot, officers conducted a warrantless inventory search of the contents of the car in order to protect the contents and to shield the police from any claims of liability for their loss. The search resulted in the discovery of a bag of marijuana.

99. 428 U.S. at 367-68. The Court could not rely on the mobility justification because police effectively immobilized the vehicle under consideration by impounding it.

100. *Id.*

101. *California v. Carney*, 105 S. Ct. 2066, 2067-68, 85 L. Ed. 2d 406, 411 (1985).

102. 34 Cal. 3d 597, 606-10, 668 P.2d 807, 811-14, 194 Cal. Rptr. 500, 504-07 (1983), *rev'd*, 105 S. Ct. 2066, 2071, 85 L. Ed. 2d 406, 415 (1985).

103. *Id.* at 613-14, 668 P.2d at 817, 194 Cal. Rptr. at 510.

104. *Carney*, 105 S. Ct. at 2071, 85 L. Ed. 2d at 415.

105. *Id.* at 2070, 85 L. Ed. 2d at 414.

106. *Id.*

107. *Id.*, 85 L. Ed. 2d at 414-15. The Court believed any such distinction would turn merely on the size and quality of appointments of the vehicle and would not reflect whether the vehicle was actually used as a residence. *Id.*

108. *Id.* at 2070-71, 85 L. Ed. 2d at 415.

exactly what constitutes an objective indication of use for transportation. The Court expressly refused to pass on the situation wherein a vehicle is used in a way that objectively indicates its use as a residence.¹⁰⁹ The Court hinted that relevant factors would include the vehicle's location, its mobility (noting specifically whether it sat on blocks), if it was licensed, if it was connected to utilities, and whether it had convenient access to a public road.¹¹⁰ Presumably, the presence of most of these elements would militate against a finding of mobility and objectively indicate a primary use for residential purposes rather than transportation.

VI. ROADBLOCKS

The use of roadblocks by law enforcement agencies, primarily for the purpose of detecting and apprehending DWI offenders, has become increasingly popular since the United States Supreme Court's dicta in *Delaware v. Prouse*,¹¹¹ suggesting that non-random stops for the purpose of checking driver's licenses might pass constitutional muster.¹¹² The Court in *Prouse* specifically held that detaining an automobile and driver in order to check the driver's license and the automobile's registration is unreasonable under the fourth amendment except when police possess articulable and reasonable suspicion that the driver is unlicensed or that an automobile is unregistered or otherwise in violation of the law.¹¹³ The Court noted, however, that its holding did not prevent officials from developing methods for spot checks that do not involve the unconstrained exercise of discretion of police officers, specifically stating that questioning all traffic at roadblock-type stops is a possible alternative.¹¹⁴

Both the Texas Court of Criminal Appeals and one intermediate appellate court addressed the constitutionality of roadblocks during the Survey period. In *Meeks v. State*¹¹⁵ the court of criminal appeals considered a challenge to a multi-purpose roadblock. The defendant based the challenge on both the fourth amendment to the United States Constitution and Article I, section 9, of the Texas Constitution.¹¹⁶ Numerous state and local law enforcement agencies conducted the roadblock, working together to enforce all the laws and not only to check for driver's licenses.¹¹⁷ To justify the roadblock the state relied upon Article 6687b, section 13,¹¹⁸ which purports to allow any peace officer to detain a motor vehicle operator for a driver's license

109. *Id.* at 2071 n.3, 85 L. Ed. 2d at 415 n.3.

110. *Id.*

111. 440 U.S. 648 (1979).

112. *Id.* at 663.

113. *Id.*

114. *Id.*

115. 692 S.W.2d 504 (Tex. Crim. App. 1985).

116. TEX. CONST. art. I, § 9 generally corresponds to the fourth amendment to the United States Constitution.

117. 692 S.W.2d at 507. The officers admitted that the purpose of the roadblock included checking for DWI's, fugitives, stolen vehicles, and felony violations. *Id.*

118. TEX. REV. CIV. STAT. ANN. art. 6687b, § 13 (Vernon 1977).

check.¹¹⁹

Without resorting to an analysis of the validity of Article 6687b under *Prouse*¹²⁰ the court of criminal appeals unanimously held that the statute did not authorize the roadblock stops since a license check was not the sole reason for the detention.¹²¹ The court stressed that "a driver's license check may not be used as a subterfuge to cover up an unlawful stop based on mere suspicion unsupported by articulable facts necessary for an investigative detention."¹²² Although the continued viability of Article 6687b, section 13 is highly doubtful in light of *Prouse*, this multi-purpose roadblock could not pass muster even under the statute's broad terms.¹²³

On the same day as the *Meeks* decision the Dallas Court of Appeals handed down the first Texas case to address the constitutionality of a DWI roadblock since *Prouse*. In *Webb v. State*¹²⁴ the officer who coordinated the roadblock admitted that the real purpose of the roadblock was to ferret out DWI offenders.¹²⁵ The court of appeals was able again to avoid the question of the constitutionality of the driver's license check statute after *Prouse*, since the roadblock was not a mere license check. The court correctly noted that the constitutionality of DWI roadblocks, as with all warrantless searches and seizures, is generally determined by balancing the legitimate governmental interests against the degree of intrusion on the individual's fourth amendment rights.¹²⁶ The court then proceeded to apply this balancing test to the roadblock at issue under the three-pronged analysis set forth by the United States Supreme Court several years earlier in *Brown v. Texas*.¹²⁷ Under *Brown* a court must consider the public concern that the seizure serves, the degree to which the seizure promotes the public interest,

119. "Any peace officer may stop and detain any motor vehicle operator for the purpose of determining whether such person has a driver's license as required by this Section." *Id.*

120. Because the trial in *Meeks* occurred prior to the Supreme Court's 1979 decision in *Prouse*, the court of criminal appeals deemed it unnecessary to determine the constitutionality of the statute or the roadblock itself pursuant to the *Prouse* analysis. 692 S.W.2d at 508. The court of criminal appeals had already held that *Prouse* would not have retroactive application or effect. *McMillan v. State*, 609 S.W.2d 784, 786 (Tex. Crim. App. 1980); *Luckett v. State*, 586 S.W.2d 524, 528 (Tex. Crim. App. 1979).

121. 692 S.W.2d at 508.

122. *Id.*; see *McMillan v. State*, 609 S.W.2d 784, 787 (Tex. Crim. App. 1980); *Hall v. State*, 488 S.W.2d 788, 789-90 (Tex. Crim. App. 1973).

123. In a number of pre-*Prouse* opinions, the court of criminal appeals upheld the validity of stops under art. 6687b, § 13, when police made the stops solely to determine whether the driver had a valid driver's license or to determine the fitness of the driver and vehicle. See, e.g., *Luckett v. State*, 586 S.W.2d 524, 528 (Tex. Crim. App. 1979) (officer suspected driver did not have license); *Rezo v. State*, 577 S.W.2d 709, 711 (Tex. Crim. App. 1979) (license check roadblock); *Tardiff v. State*, 548 S.W.2d 380, 382 (Tex. Crim. App. 1977) (license check roadblock); *Leonard v. State*, 496 S.W.2d 576, 577 (Tex. Crim. App. 1973) (police stopped vehicle solely for license check); *Oliver v. State*, 455 S.W.2d 291, 293 (Tex. Crim. App. 1970) (routine license check).

124. 695 S.W.2d 676, (Tex. App.—Dallas 1985, pet. filed).

125. The court thus summarily concluded that the resultant detentions were not authorized under TEX. REV. CIV. STAT. ANN. art. 6687b, § 13 (Vernon Supp. 1985). 695 S.W.2d at 678.

126. 695 S.W.2d at 678; see *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

127. 443 U.S. 47 (1979).

and the degree of interference with individual liberty caused by the seizure.¹²⁸

Application of this balancing test led the *Webb* court to conclude that the DWI roadblock ran afoul of the fourth amendment.¹²⁹ Indeed, the court found that the state failed to satisfy its burden of proof as to each element of the *Brown* test.¹³⁰ The public interest in the type of DWI roadblock conducted in *Webb* did not outweigh the individual's right to be free from intrusion, since the record failed to reflect any facts concerning the extent of the problem of intoxicated drivers in the area of the roadblock.¹³¹ Likewise, the state made no showing as to the degree to which the seizure advanced the public interest. The state introduced no evidence to establish the superiority of the roadblock over less intrusive alternative means of deterrence¹³² such as random patrol stops based on probable cause.¹³³

Assessment of whether the public interest served sufficiently justified the particular intrusion led the court to fashion its own three-part test involving inquiry into (1) the type of checkpoint involved, (2) the checkpoint's purpose, and (3) the degree of intrusion and fright imposed upon persons going through the checkpoint.¹³⁴ The court determined that the roadblock was temporary,¹³⁵ the primary purpose for the roadblock was to check for DWI offenders,¹³⁶ and the roadblock subjected the detainees to a moderately high degree of intrusion and fear.¹³⁷ The *Webb* court thus concluded that, without evidence that police used an objective, non-discretionary procedure to conduct the roadblock, the detention of vehicles at the roadblock violated

128. 695 S.W.2d at 678 (citing *Brown*, 443 U.S. at 450-51). This three-pronged mode of analysis assures that officers in the field cannot arbitrarily invade an individual's reasonable expectation of privacy. 695 S.W.2d at 678 (citing *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 882-83 (1975); *Camera v. Municipal Court*, 387 U.S. 523, 532-33 (1967)).

129. 695 S.W.2d at 683. Although the appellant relied upon both the fourth amendment of the United States Constitution and article I, § 9, of the Texas Constitution in his attack on the validity of his detention, the court's analysis indicates that the court based the holding only on the interpretation of the strictures of the fourth amendment. See 695 S.W.2d at 683.

130. 695 S.W.2d at 681-83. The prosecution has the burden of proof to show facts authorizing a warrantless seizure. See *Coolidge v. New Hampshire*, 403 U.S. 443, 453-54 (1971); *DeLao v. State*, 550 S.W.2d 289, 291 (Tex. Crim. App. 1977); *Koonce v. State*, 651 S.W.2d 46, 47 (Tex. App.—Dallas 1983, no pet.).

131. 695 S.W.2d at 681. The court implied that the introduction of statistical evidence concerning the nature and extent of the DWI problem in the area of the roadblock could cure this record deficiency. *Id.*

132. *Id.* at 682. The court noted that "[n]othing in the record indicates that the only practical or effective means of apprehending drunk drivers is by arbitrarily subjecting all citizens to police scrutiny without suspicion of wrongdoing simply because they happen to be traveling on a particular road at a certain time." *Id.*

133. *Id.*

134. *Id.*

135. The roadblock was not the type of permanent checkpoint approved in *United States v. Martinez-Fuerte*, 428 U.S. 543, 566-67 (1976) (permanent checkpoint at border).

136. Although the record reflected that the Dallas Police Department characterized the roadblock as a routine driver's license check, the state's only witness at the suppression hearing admitted that the true purpose of the roadblock was, in fact, to check for DWI's. 695 S.W.2d at 682.

137. *Id.* at 682-83. The court noted that the only factor supporting the constitutionality of the roadblock was that the police stopped every car. *Id.* at 683.

the fourth amendment.¹³⁸ The court noted that such activities by law enforcement authorities, while commendable in their ultimate goal of removing DWI offenders from the public roads, come dangerously close to conditions in a police state.¹³⁹

Another panel of the same court of appeals, however, reached the opposite conclusion several months later and upheld the constitutional validity of a roadblock. In *Carter v. State*¹⁴⁰ a selective enforcement unit devoted to the apprehension of DWI offenders conducted the roadblock. The unit included a certified intoxilyzer operator. A police van was at the location of the roadblock for the purpose of transporting arrestees, and the police conducted the roadblock operation on a thoroughfare containing numerous bars and liquor stores. One of the officers testified that he had informed the mass media that the purpose of such checkpoint operations was "to get the drunks off the road."¹⁴¹ Despite these circumstances the officers testified at a suppression hearing that their sole purpose in conducting the roadblock was to check driver's licenses.¹⁴² They testified that traffic in both directions was stopped, even though only the traffic from one direction came from an area containing bars and liquor stores. They also testified that they conducted the roadblock in issue during the late afternoon on a Saturday, whereas the best time to catch intoxicated drivers was just after midnight.¹⁴³ The court of appeals considered these claims by the officers in their testimony as providing a sufficient basis upon which to uphold the validity of the roadblock.¹⁴⁴ Ordinarily, a trial court may believe the testimony supporting its ruling and disbelieve conflicting testimony, absent an abuse of discretion.¹⁴⁵ Because an appellate court will generally sustain a judge's ruling on the admissibility of evidence if any basis in the record supports it,¹⁴⁶ the officers' testimony that the sole purpose of the roadblock was to check drivers' licenses carried the day over the dissent's complaint that the evidence, taken as a whole, clearly showed that the roadblock was "a thinly veiled operation to enforce the DWI laws."¹⁴⁷ The opinions in *Webb* and *Carter*, along with decisions from other jurisdictions confronting this question,¹⁴⁸ demonstrate that the validity

138. *Id.* at 683. The court's hostility to roadblocks of this sort was made manifest by a dictum in which the majority observed that "[i]f roadblocks can be maintained to stop all persons, regardless of how innocent their conduct for the purpose of investigating or arresting drunk drivers, then presumably similar stops of all citizens could be undertaken for questioning and surveillance with regard to other crimes, such as possession of narcotics, possession of stolen property, or burglary." *Id.* (citing *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 663 P.2d 992, 997 (1983) (Feldman, J., specially concurring)).

139. 695 S.W.2d at 683.

140. 700 S.W.2d 289 (Tex. App.—Dallas 1985, no pet.).

141. *Id.* at 294 (Howell, J., dissenting).

142. *Id.* at 291.

143. *Id.*

144. *Id.* at 291-92.

145. *Id.* at 291 (citing *Taylor v. State*, 604 S.W.2d 175, 177 (Tex. Crim. App. 1980); *Zepeda v. State*, 638 S.W.2d 542, 545 (Tex. App.—Houston [1st Dist.] 1982, no pet.)).

146. 700 S.W.2d at 291 (citing *Nickerson v. State*, 645 S.W.2d 888, 890 (Tex. App.—Dallas 1983), *aff'd*, 660 S.W.2d 825 (Tex. Crim. App. 1983)).

147. 700 S.W.2d at 293 (Howell, J., dissenting).

148. A survey of decisions on this issue from other jurisdictions indicates a roughly even

of such roadblocks must be assessed on a case-by-case basis. The nature of the proof introduced by the prosecution concerning the manner in which police conduct the roadblock and the subjective intent of the officers in charge will constitute the pivotal factors, pending further pronouncements from the court of criminal appeals or the United States Supreme Court.

VII. BODY SEARCHES

In *Winston v. Lee*¹⁴⁹ the United States Supreme Court held that compelled surgery to remove a bullet from a defendant's shoulder constituted an unreasonable search under the fourth amendment.¹⁵⁰ The controversy arose when a shop owner exchanged shots with an assailant. The shop owner sustained a wound but he also wounded the assailant in his left side. The defendant was found eight blocks from the incident with a bullet wound in the left shoulder. He claimed that robbers shot him. The defendant arrived at the hospital emergency room where the shop owner was receiving treatment. When the defendant entered the room, the shop owner identified the defendant as the assailant. Police arrested the defendant for attempted robbery. The state subsequently attempted, through a series of hearings, to compel the defendant to undergo surgery for the removal of the bullet for identification purposes.

The Court noted the fourth amendment neither allows nor forbids such an intrusion, but merely governs the reasonableness of the intrusion.¹⁵¹ The Court found that, when the search is a surgical intrusion under the skin, the analysis in *Schmerber v. California*¹⁵² is determinative.¹⁵³ In *Schmerber* the Court had permitted the extraction of blood from an unconsenting defendant in order to test his blood alcohol level.¹⁵⁴ The *Schmerber* Court had

split. A number of recent opinions from other state courts have upheld DWI roadblocks. See *State v. Bartley*, 109 Ill. 2d 273, 486 N.E.2d 880, 889 (1985); *State v. Deskins*, 234 Kan. 529, 673 P.2d 1174, 1186 (1983); *Kinslow v. Commonwealth*, 660 S.W.2d 677, 678 (Ky. Ct. App. 1983), cert. denied, 465 U.S. 1105 (1984); *Commonwealth v. Trumble*, 396 Mass. 81, 483 N.E.2d 1102, 1108 (1985); *State v. Cocomo*, 177 N.J. Super. 575, 427 A.2d 131, 135 (1980); *People v. Scott*, 122 Misc. 2d 731, 471 N.Y.S.2d 964, 967 (N.Y. Co. Ct. 1983), aff'd, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984); *People v. Peil*, 122 Misc. 2d 617, 471 N.Y.S.2d 632, 535 (N.Y. Just. Ct. 1984). Other state courts, however, have found the conduct of the DWI roadblock in question violative of the fourth amendment. See *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 663 P.2d 992, 996 (1983); *State v. McLaughlin*, 471 N.E.2d 1125, 1141-42 (Ind. App. 1984); *Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349, 353 (1983); *State v. Koppel*, 499 A.2d 977, 979-80, 983 (N.H. 1985) (court noted that its state constitution provides more protection than the fourth amendment against state intrusion); *State v. Smith*, 674 P.2d 562, 665 (Okla. Crim. App. 1984); *State v. Olgaard*, 248 N.W.2d 392, 395 (S.D. 1976); *State v. Marchand*, 104 Wash. 2d 434, 706 P.2d 225, 227-28 (1985). As also reflected by the *Webb* and *Carter* opinions, much of the variance in the courts' rulings on DWI roadblocks is attributable to the particular manner in which police conducted the roadblocks, as reflected in the evidence adduced in each case. The decisions thus do not necessarily reveal per se acceptance or rejection of such roadblocks.

149. 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985).

150. *Id.* at 1620, 84 L. Ed. 2d at 673.

151. *Id.* at 1616, 84 L. Ed. 2d at 669.

152. 384 U.S. 757 (1966).

153. 105 S. Ct. at 1616, 84 L. Ed. 2d at 668-69.

154. 384 U.S. at 772.

noted that the threshold requirement of such a search is a warrant supported by probable cause, absent exigent circumstances.¹⁵⁵ The *Winston* court therefore balanced the extent of the threat to the defendant's safety and the intrusion on his dignity and privacy against the effectiveness of the procedure to determine guilt or innocence.¹⁵⁶ When the Court applied that test to the facts, it found that the risk of the surgery outweighed the evidentiary value of the bullet.¹⁵⁷ The Court's decision in *Winston* is instructive because it recognizes that a search beneath the skin may be constitutionally reasonable and establishes some guidelines for lower courts to follow in dealing with this type of search.

VIII. INTERROGATION AND INVOCATION OF RIGHT TO COUNSEL

The Supreme Court held in *Edwards v. Arizona*¹⁵⁸ in 1981 that once an accused has invoked his right to have counsel present during custodial interrogation the accused does not waive that right by responding to interrogation, even if the police have advised him of his rights.¹⁵⁹ After an accused has expressed his desire to communicate with the police only through counsel, police may not subject him to further interrogation until counsel is available to him, unless the defendant himself initiates the communication with the police.¹⁶⁰ The question of waiver thus turns on whether the state has met its heavy burden of establishing a conscious waiver of a known right or privilege, a matter that a court must decide upon the facts and circumstances of each case.¹⁶¹ Since *Edwards* the Texas Court of Criminal Appeals has consistently held that the state has not met this burden unless the evidence clearly shows that the accused himself initiated the conversation or exchange that resulted in any incriminating statement at issue.¹⁶² When the record is silent or unclear as to which party initiated the exchange, the court will find no waiver.¹⁶³

The court of criminal appeals again confronted this issue during the Survey period in *Bush v. State*.¹⁶⁴ In *Bush* the court held that the defendant did not initiate a communication within the waiver context by responding to an

155. *Id.* at 770-71. In *Pesina v. State*, 676 S.W.2d 122 (Tex. Crim. App. 1984), the court of criminal appeals followed *Aliff v. State*, 627 S.W.2d 166 (Tex. Crim. App. 1982), in holding that the exigency created by natural body processes permits a warrantless blood test to determine the blood alcohol level of an unconscious suspect not under arrest if probable cause exists that the suspect is intoxicated. *Pesina*, 676 S.W.2d at 124-26 (citing *Cupp v. Murphy*, 412 U.S. 291, 296 (1973)).

156. 105 S. Ct. at 1617-18, 84 L. Ed. 2d at 669-70.

157. *Id.* at 1618-20, 84 L. Ed. 2d at 670-73.

158. 451 U.S. 477 (1981).

159. *Id.* at 484.

160. *Id.* at 484-85.

161. *Id.* at 482 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Some of the relevant circumstances include the background, experience, and conduct of the accused. *Edwards*, 451 U.S. at 482 (citing *Johnson*, 304 U.S. at 464).

162. See *Phifer v. State*, 651 S.W.2d 774, 780-81 (Tex. Crim. App. 1983); *Coleman v. State*, 646 S.W.2d 937, 940-41 (Tex. Crim. App. 1983).

163. See *Phifer v. State*, 651 S.W.2d 774, 780-81 (Tex. Crim. App. 1983); *Coleman v. State*, 646 S.W.2d 937, 940-41 (Tex. Crim. App. 1983).

164. 697 S.W.2d 397 (Tex. Crim. App. 1985).

officer's hard luck story that was designed to invoke the incriminating statement.¹⁶⁵ In *Bush* the defendant was arraigned, but refused to waive any of his rights until he had seen an attorney. The police transported the defendant to a neighboring county for another arraignment. Throughout the trip one of the officers unsuccessfully tried to persuade the defendant to divulge the location of the murder weapon. The officer told the defendant that to reveal the location would save everyone much trouble. The officer then changed the discussion to an article in a magazine about an arrest that the officer had made, but that gave the credit for the arrest to another officer. After hearing the story the defendant told the officer he would make him a hero and told him the location of the gun. The trial court admitted the defendant's statement and the gun and convicted the defendant of murder.¹⁶⁶

On appeal the state argued that the defendant initiated the conversation which led to the admission because fifteen minutes lapsed between the interrogation by the officer concerning the weapon and the admission by the defendant.¹⁶⁷ The court rejected this argument based on a finding that during the fifteen-minute lapse in questioning the officer was relating the magazine story.¹⁶⁸ The court found the conversation as a whole during the entire trip was designed to obtain this information from the defendant.¹⁶⁹ The court therefore concluded that the state had not met its burden of proving the defendant initiated the conversation or otherwise knowingly and intelligently waived his right to the presence of counsel at the interrogation.¹⁷⁰

In a surprising display of judicial bravado the Beaumont Court of Appeals openly castigated the court of criminal appeals' opinion in *Bush* and flouted the Supreme Court's rationale in *Edwards* and its progeny. In *Morris v. State*¹⁷¹ the evidence adduced at the suppression hearing revealed that after his arrest for burglary of a habitation the defendant asked officials to allow him to contact his lawyer, but officials refused the request. He was then transferred to the San Jacinto County Sheriff's Department where his request for counsel was again refused. Inexplicably, the defendant was subsequently transferred to the custody of the Polk County Sheriff's Department where his request was also denied. Finally, officials moved the defendant to the Tyler County Sheriff's Department where his request was once more denied and where he signed a written confession as a result of custodial in-

165. *Id.* at 403. The facts in *Bush* are similar to those in *Brewer v. Williams*, 430 U.S. 387 (1977), in which the Supreme Court held an admission by a defendant inadmissible when elicited by the "Christian burial" speech of a police officer. *Brewer*, 430 U.S. at 405-06. The *Brewer* Court based its holding, however, on the defendant's sixth amendment right to assistance of counsel once judicial proceedings are initiated, not the fifth amendment privilege against self-incrimination and right to counsel principles involved in *Bush*. See *Brewer*, 430 U.S. at 397-99.

166. *Bush*, 697 S.W.2d at 399-401. The trial judge ruled that the police officers did not interrogate the defendant during the trip. *Id.* at 401.

167. *Id.* at 401-02.

168. *Id.* at 403.

169. *Id.*

170. *Id.*

171. 697 S.W.2d 687 (Tex. App.—Beaumont 1985, pet. filed) (opinion on remand).

terrogation. The state failed to elicit any testimony to the contrary. The court of appeals rebuked the court of criminal appeals for its decision in *Bush*, finding that Bush's statement during his conversation with the officer that Bush would make a hero out of the officer made Bush the initiator of the conversation.¹⁷² Furthermore, the court dispensed with *Edwards v. Arizona's* focus on whether the state has proven that the defendant initiated the conversation that resulted in a confession, apparently believing that more recent Supreme Court case authority has greatly diluted the *Edwards* strictures.¹⁷³ The court bemoaned the *Edwards* doctrine as placing another onerous burden on Texas law enforcement, since the doctrine defeats the admissibility of custodial confessions when the evidence shows that the accused requested but was refused the right to confer with counsel.¹⁷⁴ Rather than reverse the conviction for the state's failure to meet its burden of proving that the defendant initiated the conversation that led to the confession after his repeated requests for counsel, the Beaumont court remanded the case to the trial court with the suggestion that the trial court enter a finding of fact rejecting the defendant's uncontradicted testimony that he had requested counsel.¹⁷⁵ The court made the suggestion despite the failure of the prosecution to call any witnesses to rebut the defendant's testimony.¹⁷⁶ The court has thereby attempted to evade completely the constitutional requirements of *Edwards*, eliminating the prosecution's burden of proof by urging the trial court to reject the uncontroverted evidence that the defendant was denied counsel.¹⁷⁷

Two of the most significant self-incrimination issues addressed by the

172. *Id.* at 692.

173. *Id.* The *Morris* court opined that *Wyrick v. Fields*, 459 U.S. 42 (1982), and *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), limited *Edwards*, but for reasons that are not clear. See 697 S.W.2d at 692.

174. See 697 S.W.2d at 693.

175. *Id.* at 694 (on state's motion for rehearing). The court of appeals at first reluctantly reversed and remanded the case with a zealous recommendation that the court of criminal appeals, on discretionary review, remand the case to the trial court so that the trial court could enter findings rejecting the uncontroverted evidence of the defendant's requests for counsel. *Id.* at 692-93 (opinion on remand). A month later, on the state's motion for rehearing, the court of appeals decided to remand the case to give the trial court the right to disbelieve the appellant. *Id.* at 694 (on state's motion for rehearing).

176. See 697 S.W.2d at 690-91. The court's misunderstanding of *Edwards* and *Bush* is manifested by its statement that whenever a defendant asserts at a suppression hearing that he requested counsel prior to giving a custodial confession, "the net effect [under *Edwards*] would be that the prosecutors, law enforcement officers, and peace officers of the State of Texas will, as a practical matter, absolutely have to cease to investigate even serious atrocious crimes insofar as, but only insofar as, questioning the defendant." *Id.* at 692-93. The court obviously failed to recognize that *Edwards* and its progeny provide the state with the opportunity to controvert the defendant's evidence regarding his request for counsel and the initiation of the exchange during which the confession occurred. In *Morris*, after the defendant met his burden of production on these issues, the state failed to adduce any evidence to meet its burden of proof and, indeed, failed to elicit the testimony of any of the police officers who could have effectively controverted the defendant's testimony. See *id.* at 690-91.

177. The court of criminal appeals generally accepts that whenever the accused's testimony reflects that he was unlawfully caused to make a written confession, and his testimony is uncontradicted, then the accused's written confession is inadmissible evidence as a matter of law. If, however, the facts are controverted as to whether the written confession was taken

court of criminal appeals during the Survey period involved whether a third party can effectively invoke a defendant's fifth amendment right to counsel and whether the failure of law enforcement officials to notify an accused of the availability of counsel during custodial interrogation affects the voluntary and knowing nature of a waiver of right to counsel. Both questions arose in *Dunn v. State*,¹⁷⁸ in which the court held that a third party could not invoke a defendant's fifth amendment right to counsel¹⁷⁹ and that the failure of police to inform a defendant that an attorney had been retained for him did not affect the voluntariness of the waiver of the right against self-incrimination.¹⁸⁰ The circumstances surrounding the presence of counsel and the failure of police to inform the defendant of his presence may, however, have a bearing on whether the defendant made a knowing and intelligent waiver of his right against self-incrimination.¹⁸¹ In *Dunn* a majority of the court held that the circumstances vitiated the waiver, rendering the confession inadmissible.¹⁸²

The defendant in *Dunn* went to the police station at 6:00 p.m. at the request of the police. The police informed the defendant of his *Miranda* rights¹⁸³ and placed him in a line-up. The defendant then underwent approximately three hours of questioning and several more *Miranda* warnings. At 10:35 an officer began typing the defendant's confession, and the defendant signed it at 12:17 a.m. The defendant waived his right to counsel but police never informed him that they had prevented two attorneys from seeing him.

At 10:00 that evening the defendant's wife discovered her husband was in

in accordance with the law, then the issue is one of fact to be first determined by the trial judge.

Moore v. State, 700 S.W.2d 193, 202 (Tex. Crim. App. 1985). In the traditional voluntariness inquiry under *Jackson v. Denno*, 378 U.S. 368, 376-77 (1964), the test is whether the state met its burden of proof to controvert the defendant's claim that the state obtained his confession unlawfully. See *Bonham v. State*, 680 S.W.2d 815, 822 (Tex. Crim. App. 1984), cert. denied, 106 S. Ct. 184, 88 L. Ed. 2d 153 (1985); *Dykes v. State*, 657 S.W.2d 796, 796-97 (Tex. Crim. App. 1983); *Darden v. State*, 629 S.W.2d 46, 51 (Tex. Crim. App. 1982); *Barton v. State*, 605 S.W.2d 605, 607 (Tex. Crim. App. 1980); *Harville v. State*, 591 S.W.2d 864, 866-67 (Tex. Crim. App. 1979). The court of criminal appeals has thus always reversed convictions for improper admission of a confession when the state has failed to controvert the defendant's testimony that his confession was obtained unlawfully. See *Smith v. State*, 547 S.W. 2d 6, 8-9 (Tex. Crim. App. 1977); *Sherman v. State*, 532 S.W.2d 634, 636 (Tex. Crim. App. 1976); *Farr v. State*, 519 S.W.2d 876, 880-81 (Tex. Crim. App. 1975). Only when the state controverts the testimony of the defendant on this point may the trial judge resolve the disputed facts one way or the other. See *Moore v. State*, 700 S.W.2d 193, 202-03 (Tex. Crim. App. 1985). Because the Beaumont Court of Appeals took the opposite approach in *Morris* the precedential value of the case is, at best, unclear.

178. 696 S.W.2d 561 (Tex. Crim. App. 1985).

179. *Id.* at 567.

180. *Id.* at 568.

181. *Id.* at 568-70.

182. *Id.* The *Dunn* court split 3-1-1-1-3, but the three concurring members all apparently agreed with the plurality that the defendant made an invalid, unknowing waiver of counsel by virtue of the police officers' refusal to inform him that attorneys retained for him were present and attempting to make contact. See *id.* at 570 (Clinton, J., concurring); *id.* at 574 (Teague, J., concurring); *id.* at 575 (Miller, J., concurring).

183. *Miranda v. Arizona*, 384 U.S. 436 (1966). See *infra* notes 214-15 and accompanying text for a discussion of *Miranda* requirements.

custody and contacted a lawyer, who had previously represented the defendant in a commercial matter, to represent her husband. He called another attorney, a criminal law specialist, and that attorney immediately contacted the police officers who were with the defendant. The attorney told the officers that he represented the defendant and that they were not to question the defendant until he arrived. The two attorneys arrived shortly before 11:00 p.m. and police told them that the defendant was in the jail area. The attorneys proceeded to the jail area but officers informed them that the defendant was not in the jail. The attorneys then learned the defendant was in an adjacent room being questioned and they demanded to see him, but the officers refused. The attorneys then tried in a myriad of ways to inform the defendant of their presence, including sending the defendant telegrams. Officials thwarted all of the attorneys' attempts.¹⁸⁴

The court first considered whether the defendant's wife could invoke the defendant's right to counsel. The issue was one of first impression in Texas,¹⁸⁵ although many other jurisdictions had addressed the issue.¹⁸⁶ The court decided that a defendant's right against self-incrimination is a personal right that cannot be asserted or waived by anyone except the accused.¹⁸⁷ The defendant's confession was therefore voluntary because he waived his right to counsel and made the confession of his own volition.¹⁸⁸ The fact that the defendant had two attorneys who wanted to speak with him but were prevented from doing so by the police had no effect on the voluntariness of the defendant's confession.¹⁸⁹

The court then questioned whether the defendant could make a knowing waiver of his right against self-incrimination without being informed that two attorneys who were representing him wished to speak with him.¹⁹⁰ The court had to determine the quantity of information required for an accused to make an informed waiver.¹⁹¹ The plurality delineated a facts and circumstances test to determine if the defendant had made a knowing waiver of his right against self-incrimination.¹⁹² The test includes, but is not limited to,

184. The court noted the attorneys "did everything short of kicking in the interrogation room door to gain access to [the defendant] . . ." 696 S.W.2d at 569.

185. *Id.* at 566.

186. Those jurisdictions that have found a third party may invoke a defendant's right to counsel include *Weber v. State*, 457 A.2d 674, 685-86 (Del. 1983); *State v. Matthews*, 408 So. 2d 1274, 1278 (La. 1982); *Commonwealth v. McKenna*, 355 Mass. 313, 244 N.E.2d 560, 566-67 (1969); *People v. Rogers*, 48 N.Y.2d 167, 397 N.E.2d 709, 710-13, 422 N.Y.S.2d 18, 19-22 (1979); *People v. Arthur*, 22 N.Y.2d 325, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968); *People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 629-30, 243 N.Y.S.2d 841, 842-45 (1963); *State v. Haynes*, 288 Or. 59, 602 P.2d 272, 277-78 (1979), *cert. denied*, 446 U.S. 945 (1980); *Commonwealth v. Hilliard*, 471 Pa. 318, 370 A.2d 322, 324 (1977). Those jurisdictions that have found a third person cannot invoke a defendant's right to counsel include *Fuentes v. Moran*, 572 F. Supp. 1461, 1468-71 (D.R.I. 1983), *aff'd*, 733 F.2d 176 (1st Cir. 1984); *State v. Smith*, 294 N.C. 365, 241 S.E.2d 674, 679-81 (1978); *Ohio v. Chase*, 55 Ohio St. 2d 237, 378 N.E.2d 1064, 1069-70 (1978); *State v. Burbine*, 451 A.2d 22, 27-31 (R.I. 1982).

187. *Dunn*, 696 S.W.2d at 567.

188. *Id.* at 568.

189. *See id.*

190. *Id.*

191. *Id.* at 568 (citing *State v. Burbine*, 451 A.2d 22, 29 (R.I. 1982)).

192. 696 S.W.2d at 568.

the relationship of the defendant to the attorney, the knowledge of the police of the attorneys' presence, the conduct of the police, the nature of the lawyers' request, and the background, experience, and conduct of the accused.¹⁹³ The court applied the test to the facts and concluded that the persistent attempts by the attorneys to communicate with the defendant negated the defendant's waiver of his right against self-incrimination.¹⁹⁴ The waiver was not a knowing waiver, regardless of its voluntariness.¹⁹⁵ The court, in applying the test, primarily considered the nature of the lawyer's request, which the circumstances of this case presented so strongly.¹⁹⁶

Currently under submission in the United States Supreme Court is a case that involves facts similar to *Dunn* and presents precisely the same fifth amendment questions raised and decided in *Dunn*. In *Moran v. Burbine*¹⁹⁷ the Court is confronting the validity of a confession obtained under custodial interrogation after an attorney, summoned by the defendant's sister, contacted the police. The police deceived the attorney by stating that no interrogation of the defendant would occur until the following day. Police never told the defendant of the attorney's call, but interrogated the defendant anyway. The interrogation resulted in a confession. The First Circuit held that the actions of the police negated the defendant's waiver of fifth amendment rights and thus rendered the defendant's statements inadmissible.¹⁹⁸ Whether the upcoming decision of the Supreme Court in *Burbine* will supersede the *Dunn* analysis is unclear. Because the factors leading to vitiation of the waiver were more aggravating in *Dunn* than in *Burbine*, the Supreme Court's resolution of *Burbine* may have little effect upon the *Dunn* analysis, particularly since the *Dunn* court based its decision upon the construction of Texas state constitutional law in addition to federal constitutional standards.¹⁹⁹

193. *Id.* (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). The court rejected a per se test adopted in Delaware that requires police to notify a defendant whenever any attorney wishes to consult with him in order for courts to consider the defendant's waiver effective. 696 S.W.2d at 568.

194. 696 S.W.2d at 569-70.

195. *Id.*

196. *See id.* at 569.

197. 753 F.2d 178 (1st Cir.), *cert. granted*, 105 S. Ct. 2319, 85 L. Ed. 2d 838 (1985).

198. *Burbine v. Moran*, 753 F.2d at 187. The Rhode Island Supreme Court had held that the trial court properly admitted the defendant's statements. *State v. Burbine*, 451 A.2d 22, 31 (R.I. 1982).

199. 696 S.W.2d at 570. The *Dunn* court grounded its holding on the right against self-incrimination embodied in article I, § 10 of the Texas Constitution, as well as the fifth amendment to the United States Constitution. *Id.*

If, however, the Supreme Court affirms the validity of the confession in *Burbine* by applying a different analysis from that adopted by the court of criminal appeals in *Dunn*, the Texas court may feel constrained to adhere to the Supreme Court's view, even as a matter of Texas constitutional law. The Texas court recently announced that the state constitutional privilege against self-incrimination should be construed as synonymous in meaning and application to the federal fifth amendment privilege as interpreted by the Supreme Court. *Ex parte Shorthouse*, 640 S.W.2d 924, 928 (Tex. Crim. App. 1982). Should the Supreme Court admit the *Burbine* confession, the court of criminal appeals may feel forced to either reverse itself on the approach adopted in *Dunn* or overrule its holding in *Shorthouse*.

IX. CONFESSIONS AS RESULTS OF COMPULSION AND FRUIT OF THE POISONOUS TREE

In *Oregon v. Elstad*²⁰⁰ the Supreme Court held that an oral confession obtained in violation of *Miranda*²⁰¹ will not render a subsequent written confession inadmissible either as the fruit of the illegal confession or as compelled by the earlier confession.²⁰² *Elstad* arose from the burglary of a home. A witness to the burglary contacted the police and implicated the defendant, an eighteen-year-old neighbor and friend of the owners of the burgled house. Two policemen went to the defendant's home with a warrant for his arrest. The defendant's mother met the officers at the door and led them to her son. One of the officers took the mother aside to inform her that they had a warrant for her son's arrest. The other officer remained with the defendant. The officer asked the defendant some general questions about whether he knew of the burglary and told the defendant that the officers felt he was involved. In response to the questions the defendant stated that he was at the burglary. The defendant was not advised of his rights at the time of the admission nor was he advised of his rights until his arrival at the station. After police informed the defendant of his rights, he signed a written confession.

At trial, the judge suppressed the oral statement because police obtained it before advising the defendant of his rights.²⁰³ The court admitted the subsequent written confession because the defendant voluntarily made it after being advised of his rights.²⁰⁴ An Oregon court of appeals reversed the decision on the ground that the unwarned admission had a coercive impact on the subsequent written confession and, therefore, the trial court should have suppressed the written confession.²⁰⁵

In an opinion by Justice O'Connor, the Supreme Court reversed the Oregon court.²⁰⁶ The Supreme Court had to overcome two metaphorical hurdles in order to reach its decision. First, the Court had to find that the written confession should not have been suppressed as the "fruit of a poisonous tree."²⁰⁷ Second, the Court had to find that the written confession was voluntary and not the result of a coercive impact from the defendant's earlier admission which let the "cat out of the bag" as to his guilt.²⁰⁸

The "fruit of the poisonous tree" doctrine arose from *Wong Sun v. United States*²⁰⁹ in which the Court used the metaphor in the fourth amendment context to describe a remedy for evidence or witnesses discovered as a result

200. 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985).

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

202. 105 S. Ct. at 1296, 84 L. Ed. 2d at 235.

203. *Id.* at 1289-90, 84 L. Ed. 2d at 227.

204. *Id.* at 1290, 84 L. Ed. 2d at 227-28.

205. *State v. Elstad*, 61 Or. App. 673, 658 P.2d 552, 555 (1983), *rev'd*, 105 S. Ct. 1285, 1298, 84 L. Ed. 2d 222, 238 (1985).

206. 105 S. Ct. at 1298, 84 L. Ed. 2d at 238.

207. *See id.* at 1290, 84 L. Ed. 2d at 228-29.

208. *See id.*

209. 371 U.S. 471 (1963).

of an illegal arrest.²¹⁰ The Court reasoned that the underlying policies of the fourth amendment exclusionary rule are indistinguishable as to direct or indirect fruits of an illegal search or seizure.²¹¹ The policy justifications for the exclusionary rule were, at that time, twofold: deterring police from using illegal methods to obtain evidence and preserving judicial integrity.²¹²

In *Miranda v. Arizona*²¹³ the Supreme Court held that the prosecution could not use a statement of a defendant resulting from custodial interrogation unless police had, prior to the statement, effectively advised the defendant of his right against self-incrimination.²¹⁴ In *Harris v. New York*,²¹⁵ however, the Supreme Court held that statements taken in violation of the *Miranda* rule are admissible for purposes of impeaching the defendant.²¹⁶ The Court explained that *Miranda* only meant the prosecution could not use the statements to make its case-in-chief and was not a bar for all purposes.²¹⁷

In *Michigan v. Tucker*²¹⁸ the Supreme Court confronted the issue of whether the fruit of the poisonous tree doctrine applied to a witness's testimony obtained from custodial interrogation in violation of the *Miranda* rule.²¹⁹ The Supreme Court noted that a violation of *Miranda* did not necessarily constitute a violation of the fifth amendment.²²⁰ The Court labeled the *Miranda* requirement as merely a prophylactic device broader than the fifth amendment itself.²²¹ Accordingly, a violation of *Miranda* need not trigger the exclusionary rule and its corollary fruit of the poisonous tree doctrine, which is the remedy for a constitutional violation.²²² The Court then fashioned a new balancing test which weighed the need to make available all relevant and trustworthy evidence and society's interest in effective prosecution of criminals against the need for deterring violations of the defendant's rights.²²³ The Court examined the deterrence rationale of the exclusionary

210. *Id.* at 487-88. As used in the fourth amendment context the exclusionary rule provides that courts should exclude from trial any evidence or witnesses obtained during an illegal search or seizure. *See id.* at 484-86. The fruit of the poisonous tree doctrine is a corollary to the exclusionary rule providing that any evidence or witnesses discovered as a result of the illegal search or seizure must also be excluded as the fruit of the illegal search. *See id.* at 484-88. The fruit of the poisonous tree doctrine applies to confessions obtained as a result of an illegal search or seizure as well as to evidence and witnesses. *See Taylor v. Alabama*, 457 U.S. 687, 694 (1982); *Brown v. Illinois*, 422 U.S. 590, 601-02, 604-05 (1975).

211. 371 U.S. at 484-85.

212. *See Mapp v. Ohio*, 367 U.S. 643, 657-59 (1961).

213. 384 U.S. 436 (1966).

214. 384 U.S. at 444. The *Miranda* decision gave the prosecution a choice of either following the procedures set out in *Miranda* or employing other equally effective means. *Id.* The *Miranda* rule requires police to advise a defendant of his right to remain silent, of the fact that any statement made by him may be used as evidence against him, and of his right to appointed counsel in the event he cannot afford to retain an attorney. *Id.*

215. 401 U.S. 222 (1971).

216. *Id.* at 225-26.

217. *Id.* at 224. The Court stated that the shield established by *Miranda* could not be perverted into a license to use perjury by way of defense. *Id.*

218. 417 U.S. 433 (1974).

219. *See id.* at 438-39.

220. *Id.* at 444-45.

221. *Id.* 445-46.

222. *See id.*

223. *Id.* at 450-51.

rule and found that the rationale was not necessarily applicable to a *Miranda* violation.²²⁴ The Court disposed of the judicial integrity rationale as unnecessary because of its assimilation in the more specific rationales weighed.²²⁵ The Court concluded that the remedy for a violation of *Miranda* need only lead to the exclusion of the statement itself and not to the exclusion of subsequent evidence discovered as a result of the violation.²²⁶

After *Tucker's* characterization of *Miranda* as merely procedural protection the Court in *Elstad*, without difficulty, took the next logical step and concluded that a statement made in violation of the *Miranda* rule need not lead to the exclusion of a later confession made after the appropriate *Miranda* warnings.²²⁷ The majority focused on the voluntariness of a confession as the primary criterion of its constitutional acceptability under the fifth amendment.²²⁸ Therefore, unlike a fourth amendment violation that taints the confession, a finding of voluntariness satisfies fifth amendment requirements in determining whether the confession is admissible into evidence.²²⁹ The Court stated that a failure to administer the warnings created a presumption that the statement was involuntary.²³⁰ This presumption is irrebuttable for the use of the statement in the prosecution's case-in-chief, but for impeachment use or for the use of the fruits of the unwarned confession the presumption could be overcome if the unwarned statement was obtained in a non-coercive manner.²³¹ The gravamen of the Court's reasoning is that a *Miranda* violation only rises to a constitutional violation when the unwarned statement is coerced.²³² If a statement was obtained in a non-coercive manner but in violation of the *Miranda* rule, the statement will not lead to the suppression of a subsequent informed and voluntary confession.²³³

In addition to determining that the written confession was not excludable as the fruit of the illegal confession, the Court also addressed the question of whether the written confession could indeed be voluntary after the defendant had already confessed his guilt in the oral admission. First, the Court divided statements taken in violation of the *Miranda* rule into two categories: those statements made involuntarily in response to official coercion, and those statements that are clearly voluntary but made before the police advise a defendant of his privilege against compulsory self-incrimination.²³⁴ If a

224. See *id.* at 446-48. The Court found that the deterrence rationale lost much of its force when the official action was taken in good faith. *Id.* at 447.

225. *Id.* at 450 n.25.

226. *Id.* at 451-52.

227. *Elstad*, 105 S. Ct. at 1293-94, 84 L. Ed. 2d at 232.

228. *Id.*

229. *Id.* at 1292, 84 L. Ed. 2d at 230.

230. *Id.*, 84 L. Ed. 2d at 231.

231. *Id.* at 1292-93, 84 L. Ed. 2d at 231-32.

232. See *id.*

233. *Id.* at 1293-94, 84 L. Ed. 2d at 232. The Court noted that *Miranda* warnings are required only when officials take a suspect into custody. *Id.* at 1293, 84 L. Ed. 2d at 232. Difficulty in defining "custody" would result in errors by law enforcement officers in determining when to administer the warnings. *Id.* Such *Miranda* errors should not result in the same irreparable consequences as a fifth amendment violation. *Id.*

234. See 105 S. Ct. at 1294, 84 L. Ed. 2d at 232-33. The dissents in *Elstad* strongly disagreed with the majority that any such distinction between unwarned confessions should exist.

statement is actually coerced, the Court will look at the passage of time, change in the identity of the interrogators, and change in the place of the interrogation to determine whether a subsequent confession is voluntary.²³⁵ If no coercion was involved in obtaining the initial unwarned admission, then the Court concluded that it would not presume compulsion for any subsequent confession made after proper *Miranda* warnings.²³⁶

To reach its holding the Court rejected the Oregon court's position that the unwarned confession would have a coercive impact on the defendant's later confession because the defendant had let the cat out of the bag and sealed his own fate.²³⁷ The Supreme Court noted that it had never recognized that "the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver."²³⁸ The Court then weighed the high cost to law enforcement of losing the voluntary confession against the small amount of protection added to the individual's interest in not being compelled to incriminate himself and found little justification for the exclusion of the written confession.²³⁹ Finally, the Court stated that any connection between the psychological disadvantage caused by a defendant's admission and his later decision to cooperate with police is speculative and attenuated.²⁴⁰

The Court also rejected the argument that the defendant needed an additional warning to inform him that the prosecution could not use the earlier statement against him before the defendant could make a fully informed waiver of his rights.²⁴¹ The Court reasoned that a breach in the *Miranda* procedures may not come to light until well after police have given subsequent *Miranda* warnings and the defendant has given another statement.²⁴² Police could not be expected to identify when these breaches occur in order to administer additional warnings because of the intricacy of the *Miranda* rules themselves.²⁴³ In addition, the Court stated that voluntariness does not require a defendant to have a full appreciation of all of the consequences flowing from his decision to give a statement.²⁴⁴ Accordingly, the Court held that no need existed for any additional warnings to the defendant in order

Id. at 1300-01, 84 L. Ed. 2d at 240-42 (Brennan, J., dissenting); *id.* at 1324, 84 L. Ed. 2d at 270 (Stevens, J., dissenting).

235. *Id.* at 1294, 84 L. Ed. 2d at 232-33 (citing *Clewis v. Texas*, 386 U.S. 707, 710-12 (1967); *Westover v. United States*, 384 U.S. 436, 494-97 (1966) (decided together with *Miranda*)).

236. *Id.* at 1296, 84 L. Ed. 2d at 235.

237. *Id.* at 1294-96, 84 L. Ed. 2d at 232-35.

238. *Id.* at 1295, 84 L. Ed. 2d at 234.

239. *Id.* at 1295, 84 L. Ed. 2d at 234.

240. *Id.* at 1295-96, 84 L. Ed. 2d at 234-35.

241. *Id.* at 1297, 84 L. Ed. 2d at 236-37.

242. *Id.*, 84 L. Ed. 2d at 236.

243. *Id.*, 84 L. Ed. 2d at 236-37. The Court noted "[p]olice officers are ill equipped to pinch-hit for counsel, construing the murky and difficult questions of when 'custody' begins or whether a given unwarned statement will ultimately be held admissible." *Id.*, 84 L. Ed. 2d at 237.

244. *Id.* at 1297-98, 84 L. Ed. 2d at 237; see also *McMann v. Richardson*, 397 U.S. 759, 769 (1970) (defendant's ignorance that prior coerced confession was inadmissible as evidence did not compromise voluntariness of his guilty plea).

that his subsequent confession be presumed voluntary.²⁴⁵

In summary, the Supreme Court has maintained a diluted *Miranda* exclusionary rule that excludes any fruits obtained from an unwarned admission, when that admission is obtained through actual coercion.²⁴⁶ When the defendant makes an unwarned admission voluntarily, however, the *Miranda* rule only leads to the exclusion of the unwarned statement itself.²⁴⁷ Any evidence, witnesses, or subsequent admissions are not excluded because of the unwarned statement.

X. POST-ARREST SILENCE

In *Samuel v. State*²⁴⁸ the court of criminal appeals gave a strong indication that it would not follow the holding of the United States Supreme Court in *Fletcher v. Weir*.²⁴⁹ The decision in *Fletcher* permits a prosecutor, as a matter of federal constitutional law, to impeach a defendant with the defendant's silence after his arrest but before receiving warnings pursuant to *Miranda v. Arizona*.²⁵⁰ Although the portion of the opinion in *Samuel* is technically dicta, it significantly provides an adequate basis for asserting that Texas law is more protective of a defendant's right to remain silent than is federal law under *Fletcher v. Weir*.

In *Samuel* the appellant attempted to cash a check at a liquor store. The store owner called the issuer of the check who informed him the check was stolen. The defendant then attempted to retrieve the check and, failing to do so, fled from the store. The store owner, armed with a shotgun, pursued the defendant. The store owner cornered the defendant and held him until police arrived twenty minutes later.²⁵¹ At trial the prosecution argued to the jury that the defendant's twenty-minute silence during his arrest by the store owner proved his guilt and his intent to commit the crime because an innocent person would have professed his innocence at the time.²⁵²

245. 105 S. Ct. at 1297-98, 84 L. Ed. 2d at 237-38.

246. Note, however, the public safety exception created in *New York v. Quarles*, 104 S. Ct. 2626, 2632-33, 81 L. Ed. 2d 550, 557-58 (1984) (in situations posing threat to public safety, *Miranda* warnings not required before questioning), and the impeachment use exception created in *Harris v. New York*, 401 U.S. 222, 224-26 (1971) (statements admissible for impeachment purposes though obtained in violation of *Miranda*), which make no distinction between coerced and uncoerced admissions. These exceptions may apply even when actual coercion has occurred.

247. The statement is admissible under the public safety exception and for purposes of impeachment.

248. 688 S.W.2d 492 (Tex. Crim. App. 1985).

249. 455 U.S. 603 (1982) (per curiam).

250. *Id.* at 607.

251. 688 S.W.2d at 494. The court of criminal appeals did not consider the validity of the court of appeals' holding that the detention of Samuel by a private citizen constituted an arrest under TEX. CODE CRIM. PROC. ANN. art. 15.22 (Vernon 1977) (person is arrested when placed in restraint or custody by officer or person with or without a warrant). *Id.* at 495 n.2. See generally *Hardinge v. State*, 500 S.W.2d 870, 873 (Tex. Crim. App. 1973) (arrest occurs when person's liberty of movement restrained); *Hill v. State*, 643 S.W.2d 417, 419 (Tex. App.—Houston [14th Dist.]) (discussing citizen's arrest), *aff'd*, 641 S.W.2d 543 (Tex. Crim. App. 1982).

252. 688 S.W.2d at 494.

The issue on appeal concerned the sufficiency of the appellant's objection to preserve the error of admitting evidence of appellant's post-arrest silence.²⁵³ In holding that the objection was sufficient the Texas Court of Criminal Appeals elaborated at length on the bar to the use of a defendant's post-arrest silence, silence occurring even before the defendant receives any warning of his right to remain silent.²⁵⁴ This state law rule conflicts with the reasoning set out by the Supreme Court in *Fletcher v. Weir*, that use of a defendant's post-arrest, pre-warnings silence for impeachment is not unfair because, in the absence of warnings, the defendant was not induced by the state to remain silent only to confront later the state's use of this silence against him.²⁵⁵

The court in *Samuel* found that the Supreme Court's holding in *Fletcher v. Weir* made no sense.²⁵⁶ The court indicated that it would continue to adhere to its prior precedents prohibiting the use of all post-arrest silence against a defendant for any purpose.²⁵⁷ While not a direct holding on the use of post-arrest, pre-warnings silence, *Samuel* provides support for the belief that the rule in *Fletcher v. Weir* is not likely to become the law of Texas.

XI. DWI BREATH TESTS AND THE SIXTH AMENDMENT RIGHT TO COUNSEL

In 1983 the Texas legislature amended the DWI statute to provide that a defendant's refusal to submit to an intoxilyzer test is admissible into evidence at a subsequent trial.²⁵⁸ The legislature also redefined intoxication by providing that a .10% level of intoxication in the blood does not merely give rise to a presumption of intoxication, but in itself constitutes intoxication.²⁵⁹ The legislature left intact the statutory provisions requiring the suspension of the defendant's driver's license upon a refusal to submit to such testing.²⁶⁰

In *Forte v. State*²⁶¹ the Fort Worth Court of Appeals addressed the issue

253. *Id.* at 495.

254. *Id.* at 496 n.7. As the court states, this bar to use of post-arrest silence arose from the interpretation of TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 1979) (outlining requirements for admissibility of statements by an accused) and its predecessors.

255. *Fletcher*, 455 U.S. at 607. By using this reasoning the Supreme Court was able to distinguish *Doyle v. Ohio*, 426 U.S. 610, 618 (1976) wherein the Court had held that the use of post-arrest, post-warnings silence of defendant for impeachment purposes violated the defendant's due process rights. 455 U.S. at 607.

256. 688 S.W.2d at 496 n.7.

257. *Id.* Although *Fletcher v. Weir* involved the use of silence to impeach a testifying defendant, whereas in *Samuel* the defendant did not testify, the court of criminal appeals cited *Taylor v. State*, 118 Tex. Crim. 340, 342, 42 S.W.2d 426, 427 (1931) and *Harrison v. State*, 491 S.W.2d 920, 922 (Tex. Crim. App. 1973) with approval. 688 S.W.2d at 496 n.7. In both *Taylor* and *Harrison*, the prosecutor impeached the defendant's testimony with the defendant's post-arrest silence. The prosecutor's actions resulted in reversal of the convictions. *Taylor*, 118 Tex. Crim. at 342, 42 S.W.2d at 427; *Harrison*, 491 S.W.2d at 922.

258. TEX. REV. CIV. STAT. ANN. art. 6701I-5, § 3(g) (Vernon Supp. 1986).

259. TEX. REV. CIV. STAT. ANN. art. 6701I-1(a)(2) (Vernon Supp. 1986). These amendments became effective on January 1, 1984. Act of June 16, 1983, ch. 303, § 29, 1983 Tex. Gen. Laws 1568, 1607.

260. TEX. REV. CIV. STAT. ANN. art. 6701I-5, § 2(d)-(f) (Vernon Supp. 1986).

261. 686 S.W.2d 744 (Tex. App.—Fort Worth 1985, pet. granted).

of whether a DWI arrestee has the right to counsel before complying with a demand to take an intoxilyzer test despite the implied consent provisions of the statute.²⁶² One prior court of appeals decision found no right to counsel in this context under the statute as it existed prior to the 1983 amendments.²⁶³ The Fort Worth court held, however, that persons arrested for driving while intoxicated do have a limited sixth amendment right to counsel prior to deciding whether or not to submit a breath specimen.²⁶⁴

The *Forte* court recognized that the resolution of the question turned on whether the test constituted a critical stage of the adversarial process.²⁶⁵ Generally, under the sixth amendment an accused is guaranteed counsel at any stage of the prosecution, formal or informal, in court or out of court, when the absence of counsel might prejudice the accused's right to a fair trial.²⁶⁶ The court noted that a DWI arrestee faces a dilemma.²⁶⁷ The arrestee is told that he may remain silent and contact a lawyer, but at the same time he must answer a question that has significant results.²⁶⁸ In the event the arrestee refuses the test, he knows that his license will be suspended and his refusal to take the test can be used as evidence against him at trial.²⁶⁹ On the other hand, if the arrestee consents and the test reveals an alcohol content in his blood of 0.10% or more, he has just provided the prosecution with conclusive evidence of his guilt.²⁷⁰ The court concluded that to say that this decision is not a critical stage of the prosecution stretches reason²⁷¹

262. TEX. REV. CIV. STAT. ANN. art. 6701/-5, § 1 (Vernon Supp. 1986) (person who operates vehicle on public roads deemed to have given consent to breath or blood test).

263. *Grove v. State*, 675 S.W.2d 564, 566 (Tex. App.—Houston [14th Dist.] 1984, no pet.). The court in *Grove* noted, however, that under the version of the statute in effect at the time of the trial, refusal to take an intoxilyzer test was not admissible into evidence, and expressly stated that the court was not ruling in regard to the effect of the new law. *Id.* at 567-68.

264. *Forte*, 686 S.W.2d at 754. The Supreme Court has effectively extinguished the notion that a fifth amendment right to counsel might attach for an arrestee confronted with this problem. In *Schmerber v. California*, 384 U.S. 757 (1966), the Court admitted into evidence the results of blood alcohol-content tests derived from blood samples drawn from a defendant without consent because the Court did not deem such samples "testimonial" communications within the protection of the fifth amendment. *Id.* at 364-65. The Court went even further in *South Dakota v. Neville*, 459 U.S. 553 (1983), in which it held that admission of evidence of a defendant's refusal to provide a breath sample did not violate the fifth amendment privilege against self-incrimination. *Id.* at 564.

The Texas Court of Criminal Appeals has expressly adopted the *Schmerber* position, see *Rodriguez v. State*, 631 S.W.2d 515, 517 (Tex. Crim. App. 1982), but has not yet addressed the refusal issue decided by the Supreme Court in *Neville*. That the court of criminal appeals would disagree with the *Neville* rationale is, however, highly unlikely since the court has clearly evidenced its intention to define the scope of the Texas constitutional privilege against self-incrimination as identical to that of the fifth amendment to the federal constitution. See *Ex parte Shorthouse*, 640 S.W.2d 924, 928 (Tex. Crim. App. 1982); *Olson v. State*, 484 S.W.2d 756, 762, 772 (Tex. Crim. App. 1969) (opinion on motion for rehearing).

265. *Forte*, 686 S.W.2d at 753.

266. See *United States v. Wade*, 388 U.S. 218, 226 (1967).

267. 686 S.W.2d at 753-54.

268. *Id.*

269. *Id.* at 754.

270. *Id.*

271. *Id.* To say that forcing an arrestee to make a decision concerning whether to take an intoxilyzer test is not a critical pretrial proceeding may indeed "stretch" reason, but recent United States Supreme Court opinions concerning the attachment of sixth amendment right to counsel strongly indicate just that. See *Kirby v. Illinois*, 406 U.S. 682, 690-91 (1972). The

and, therefore, determined that a person has a right to counsel prior to making his decision.²⁷²

Nevertheless, because of the exigency created by the bodily processes that eliminate alcohol from the blood the court felt constrained to impose a time limitation upon a defendant's exercise of the right to counsel.²⁷³ Obviously, if the courts permitted an accused to unduly delay his answer to the request, the breath test would become meaningless.²⁷⁴ The court thus fashioned a qualification to the right to counsel in this context. An arrestee has the right to consult with an attorney before making a decision whether to take a blood-alcohol test, as long as the consultation does not unreasonably delay the administration of the test.²⁷⁵ The police must inform the arrestee of this right, and the officers must assist in vindicating the right.²⁷⁶ In this regard the court opined that police could comply with this standard by giving the arrestee access to a telephone before testing and allowing the arrestee reasonable time to contact his lawyer.²⁷⁷ Finally, if an arrestee cannot contact his attorney within a reasonable time, police may require the arrestee to make a decision regarding testing in the absence of counsel.²⁷⁸

Two months after *Forté* the Houston Court of Appeals decided the same

Court has made clear that the right to counsel does not attach prior to the filing of a formal accusation or a preliminary hearing. *Id.* See *Moore v. Illinois*, 434 U.S. 220, 231 (1977) (right to counsel attaches when witness identification of accused takes place at preliminary hearing).

272. 686 S.W.2d at 754.

273. *Id.*

274. *Id.*

275. *Id.* The court in *Forté* adopted its holding from *Prideaux v. State*, 310 Minn. 405, 247 N.W.2d 385, 394 (1976).

276. 686 S.W.2d at 754.

277. *Id.* at 754.

278. *Id.* Other state jurisdictions are split on this issue. The following courts have found, on various bases, a right to consult with an attorney: *City of St. Louis Park v. Bunkers*, 310 Minn. 431, 432, 247 N.W.2d 404, 404 (1976) (after arrest police must accommodate timely request to telephone lawyer; based on statutory right to counsel); *People v. Gursey*, 22 N.Y.2d 224, 227-29, 239 N.E.2d 351, 353, 292 N.Y.S.2d 416, 418-19 (1968) (no arrest but denial of defendant's request to telephone particular attorney improper); *People v. Rinaldi*, 107 Misc. 2d 916, 917-18, 436 N.Y.S.2d 156, 157 (Town Ct. 1981) (constitutional right to consult with attorney if no significant or obstructive delay); *People v. Sweeney*, 55 Misc. 2d 793, 795-96, 286 N.Y.S.2d 506, 508-09 (Dist. Ct. 1968) (right to consult counsel before intoxication test; distinguishing *Schmerber* on basis that New York law, unlike California law, permits right not to consent to test); *State v. Hill*, 277 N.C. 547, 551, 178 S.E.2d 462, 465 (1971) (state statute provides for communication with counsel and friends immediately upon arrest, detention, or deprivation of liberty); *City of Dayton v. Nugent*, 25 Ohio Misc. 31, 36, 265 N.E.2d 826, 830 (1970) (after arrest and *Miranda* warnings, defendant improperly denied opportunity to call attorney until after test though pursuant to police department policy; statute guarantees arrestee speedy access to facilities to contact attorney); *State v. Welch*, 135 Vt. 316, 321-22, 376 A.2d 351, 355 (1977) (because of driver's right to refuse test, chemical test rises to critical stage in proceedings; limited right of counsel attaches); *State v. Fitzsimmons*, 93 Wash. 2d 436, 448, 610 P.2d 893, 900-01, *vacated on other grounds*, 449 U.S. 977 (1980) (right to counsel attaches because driver must make decision to take or refuse test).

Courts finding no right to consult with counsel include *Holmberg v. 54-A Judicial Dist. Judge*, 60 Mich. App. 757, 760, 231 N.W.2d 543, 544 (1975) (arrested driver's test is not critical stage; no right to counsel); *Flynt v. State*, 507 P.2d 586, 588 (Okla. Cr. App. 1973) (after arrest and *Miranda* warnings no right to counsel in choosing whether to take test); *State v. Newton*, 291 Or. 788, 636 P.2d 393, 404 (1981) (not every evidence-gathering procedure is critical stage of proceeding; defendant not formally charged at time of test; therefore, no right to counsel attached); *Law v. City of Danville*, 212 Va. 702, 703, 187 S.E.2d 197, 198 (1972)

issue, but arrived at the opposite conclusion. In *McCambridge v. State*²⁷⁹ the court observed that the United States Supreme Court has held that the right to counsel under the sixth amendment attaches only when the government initiates judicial proceedings against an accused and the government has committed itself to prosecute.²⁸⁰ The Supreme Court has, indeed, held that preparatory steps in the gathering of evidence by the state, such as fingerprinting or taking a blood sample, are not critical stages in the prosecution of the accused.²⁸¹ Because the Houston court thereby found that the DWI arrestee's dilemma did not occur in a critical stage of the prosecution, the court expressly rejected the reasoning of the Fort Worth court in *Forte* and concluded that an accused is not entitled to consult with an attorney before deciding whether to refuse to take the breath test.²⁸² The same court of appeals adhered to its *McCambridge* holding in the subsequent case of *DeMangin v. State*,²⁸³ reiterating that the breath test is not a testimonial communication but instead is a preparatory step in the state's gathering of evidence and is not constitutionally protected.²⁸⁴

(minimal risk that breath test procedure would derogate from right to fair trial; no right to counsel).

279. 698 S.W.2d 390 (Tex. App.—Houston [1st Dist.] 1985, pet. granted).

280. *Id.* at 394 (citing *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

281. *Id.* (citing *United States v. Wade*, 388 U.S. 218, 227-28 (1967)).

282. *Id.*; see also *Yates v. State*, 679 S.W.2d 534, 536 (Tex. App.—Tyler 1984, pet. ref'd) (no right to counsel on decision whether to take breath test).

283. 700 S.W.2d 329 (Tex. App.—Houston [1st Dist.] 1985, no pet.).

284. *Id.* at 331-32. The court emphasized that a person arrested for driving while intoxicated is deemed to have consented to the taking of breath or blood specimen to determine blood-alcohol level by virtue of the implied consent provisions in TEX. REV. CIV. STAT. ANN. art. 67011-5, § 1 (Vernon Supp. 1986). *Id.* at 332.

