

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000647-001 DT

02/24/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA

F TYLER RICH

v.

JENNIFER RENEE JACKSON (001)

RICHARD G ZIELINSKI

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 2011-9006110.

Defendant-Appellant Jennifer Renee Jackson (Defendant) was charged in Phoenix Municipal Court of driving under the influence and leaving the scene of a collision. The State contends the trial court erred in granting Defendant's Motion To Suppress/Dismiss, which alleged the conduct of the officers violated her right to counsel. For the following reasons, this Court reverses the order of the trial court in granting Defendant's motion.

I. FACTUAL BACKGROUND.

On March 15, 2011, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); driving under the extreme influence, A.R.S. § 28-1382(A)(1) & (A)(2); and leaving the scene of a collision involving damage to a vehicle only, A.R.S. § 28-662. Prior to trial, Defendant filed a Motion To Suppress/Dismiss alleging the conduct of the officers violated her right to counsel.

At the hearing on Defendant's motion, Officer Michael Smojver testified he was on patrol on October 15, 2010, when he was called to investigate a hit-and-run collision at 36th Street and Thomas Road. (R.T. of June 29, 2011, at 6-8.) When he arrived at that location, the parties there told him a vehicle hit their vehicle and left without stopping. (*Id.* at 8.) He was able to locate that other vehicle and determined Defendant was the driver. (*Id.*) He smelled a moderate odor of alcohol coming from Defendant's vehicle, and saw she had watery, bloodshot eyes. (*Id.*) He performed an HGN test on Defendant, and she showed six cues of impairment. (*Id.* at 9.)

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At 1:35 a.m., Officer Smojver advised Defendant he was arresting her for DUI and placed her in the back of his patrol vehicle. (R.T. of June 29, 2011, at 9–10, 12.) Defendant had a cell phone, which he placed in a plastic bag with her property. (*Id.* at 14.) He read Defendant the *Miranda* warnings, and she said she understood those rights. (*Id.* at 10, 12.) When he asked questions of Defendant, she just stared blankly ahead and cried occasionally, and at one point said, “I’m sorry; I just have to have my lawyer; I’m sorry.” (*Id.* at 10, 12–13.) In response to that statement, Officer Smojver asked no further questions. (*Id.* at 10, 13, 15, 16.) He understood Defendant’s actions as indicating she did not want to answer any questions. (*Id.* at 15.) At that point, Officer Smojver had not said anything to Defendant about taking a BAC test. (*Id.* at 13.) He then transported Defendant to the DUI van for processing. (*Id.* at 11, 12–13.) Officer Smojver did not remember whether he told the DUI van operator what Defendant had said, and Officer Smojver himself did not provide her with the opportunity to use the telephone in the DUI van. (*Id.* at 11.) During the time Officer Smojver was with Defendant, she never indicated she wanted to talk to an attorney or to make any telephone calls. (*Id.* at 15–16.)

Officer Harold Wearne testified he was operating the DUI van on October 15, 2010. (R.T. of June 29, 2011, at 18–19.) At 1:47 a.m., Officer Smojver brought Defendant to the DUI van, but did not tell him anything about Defendant’s statement about a lawyer. (*Id.* at 20–22.) Officer Wearne began using a laptop computer to fill out the alcohol influence report form. (*Id.* at 22.) At 1:54 a.m., he read Defendant the *Miranda* warnings, and she said she understood them. (*Id.* at 23–24, 30–31.) He then read Defendant the implied consent information, and she agreed to submit to a BAC test. (*Id.* at 24, 31–31.) At 2:02 a.m., Officer Wearne obtained a blood sample from Defendant. (*Id.* at 24–25.) Both before and after the taking of the blood sample, Defendant said nothing about wanting to talk to an attorney or wanting to make a telephone call. (*Id.* at 25–26, 27, 29.) Officer Wearne noted there was a sign in the DUI van advising suspects a telephone and telephone book were available. (*Id.* at 25.)

At 2:06 a.m. after Officer Wearne had completed taking the blood sample and packaged the samples, he attempted to interview Defendant. (R.T. of June 29, 2011, at 26.) When he asked Defendant the first question, she said she wanted to have a lawyer present. (*Id.* at 27.) As a result of that response, Officer Wearne did not ask Defendant any further questions. (*Id.*) He told Defendant they had a telephone and a telephone book available, but she said she would wait until she got home. (*Id.* at 28.) At 2:15 a.m., Defendant was released, and she called her husband. (*Id.* at 14–15, 28–29.)

After the testimony and arguments of counsel, the trial court ruled the officers violated Defendant’s right to counsel:

THE COURT: . . . And it is the finding of this Court that the Defendant’s right to counsel was violated in this matter by the officers’ failure to allow her to contact an attorney or to make available to her means to contact an attorney, as Officer Wearne said, by giving her the phone book and cell phone or allowing her access to her own cell phone.

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(R.T. of June 29, 2011, at 54.) The trial court therefore ordered the results of the State's blood test suppressed. (*Id.*) Defendant later submitted to the trial court the A.R.S. § 28-1381(A)(1) and A.R.S. § 28-662 charges, and admitted she had a prior conviction. The trial court found Defendant guilty of those charges. The State moved to dismiss the A.R.S. § 28-1381(A)(2) and A.R.S. § 28-1382(A)(1) & (A)(2) charges, which the trial court granted. On July 6, 2011, the State filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

II. ISSUE: DID THE TRIAL COURT ERR IN FINDING THE OFFICERS VIOLATED DEFENDANT'S
RIGHT TO COUNSEL.

The State contends the officers did not violate Defendant's right to counsel, and thus the trial court erred in granting Defendant's motion to suppress. In reviewing a trial court's ruling on a motion to suppress, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court's legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm*, 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010). Based on this Court's review of the record, this Court concludes the trial court erred in granting Defendant's motion to suppress.

In order to determine whether the trial court erred in finding the officers violated Defendant's right to counsel, it is necessary to determine which right to counsel applied to Defendant's situation. There are two sources of a right to counsel granted by constitution, the Sixth Amendment to the United States Constitution and Article 2, Section 24, of the Arizona Constitution. There are two other sources of a right to an attorney described by the courts, *Miranda v. Arizona*, 384 U.S. 436 (1966), and Rule 6.1(a) of the Arizona Rules of Criminal Procedure.

A. RIGHT TO COUNSEL GRANTED BY CONSTITUTION.

As noted above, there are two sources of a right to counsel granted by constitution, the Sixth Amendment to the United States Constitution and Article 2, Section 24, of the Arizona Constitution. Because this right to counsel is granted by constitution, it would be considered a substantive right.

1. *The Sixth Amendment to the United States Constitution.* The Sixth Amendment to the United States Constitution grants to a defendant the right to counsel:

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

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U.S. CONST. amend. 6. The Sixth Amendment right to counsel does not attach, however, until after the initiation of formal charges. *Montejo v. Louisiana*, 556 U.S. 778, ___ 129 S. Ct. 2079, 2085 (2009) (“[O]nce the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all ‘critical’ stages of the criminal proceedings.”); *Moran v. Burbine*, 475 U.S. 412, 431 (1986) (“[T]he Sixth Amendment right to counsel does not attach until after the initiation of formal charges.”); *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (“[T]he right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him ‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.’”), quoting *Kirby v. Illinois*, 406 U.S. at 682, 689 (1972); *Massiah v. United States*, 377 U.S. 201, 205 (1964); *State v. Martinez*, 221 Ariz. 383, 212 P.3d 75, ¶ 11 (Ct. App. 2009) (“The Sixth Amendment right to counsel is triggered ‘at or after the time that judicial proceedings have been initiated.’”), quoting *Fellers v. United States*, 540 U.S. 519, 523 (2004). In the present matter, the State did not file any charges against Defendant until after the events in question took place. Thus, at the time of the events in question, Defendant’s right to counsel under the Sixth Amendment had not yet attached, so there could be no violation of a Sixth Amendment right to counsel.

2. *Article 2, Section 24, of the Arizona Constitution.* The Arizona Constitution also grants to a defendant the right to counsel:

In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

ARIZ. CONST. art. 2, § 24. Although this Court is not aware of any case that holds this right to counsel under the Arizona Constitution does not attach until after the initiation of formal charges, in *State v. Transon*, 186 Ariz. 482, 924 P.2d 486 (Ct. App. 1996), the court stated as follows:

We have been unable to locate any authority for appellee’s assertion that Arizona’s right to counsel is broader than the federal right. Where, as here, the language of the federal and state constitutional provisions are substantially similar, we will use the same standard to analyze both provisions.²

² Compare U.S. Const. amend. VI (“the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.”) with Ariz. Const. art. 2, § 24 (“the accused shall have the right to appear and defend in person, and by counsel . . .”).

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186 Ariz. at 485 & n.2, 924 P.2d at 489 & n.2. Because (1) both the Sixth Amendment and Article 2, Section 24, use the term “the accused,” and (2) both provisions contain essentially the same rights, and (3) the provisions in Article 2, Section 24, describe events that happen after the State has charged a defendant in a criminal matter, this Court concludes a defendant’s right to counsel under Article 2, Section 24, of the Arizona Constitution does not attach until after the initiation of formal charges. Again, in the present matter, the State did not file any charges against Defendant until after the events in question took place. Thus, at the time of the events in question, Defendant’s right to counsel under Article 2, Section 24, had not yet attached, so there could be no violation of the right to counsel under the Arizona Constitution.

B. RIGHT TO AN ATTORNEY DESCRIBED BY THE COURTS.

As noted above, there are two sources of a right to an attorney described by the courts, *Miranda v. Arizona*, 384 U.S. 436 (1966), and Rule 6.1(a), Arizona Rules of Criminal Procedure. The right to an attorney under *Miranda* is not, however, self-effectuating, and instead comes into effect only when a defendant asserts the right to an attorney. *State v. Davolt*, 207 Ariz. 191, 84 P.3d 456, ¶ 26 (2004) (“Once an accused asserts his right to counsel, the interrogation must cease until counsel is present or until the accused validly waives his request.”). Similarly, a defendant’s right to an attorney under Rule 6.1(a) comes into effect only when the defendant asserts the right to an attorney. *Transon*, 186 Ariz. at 486, 924 P.2d at 490 (“[A]ppellee’s right to counsel [under Rule 6.1(a)] cannot be infringed upon unless appellee actually asks for an attorney.”). Further, the Arizona Court of Appeals has held the request for an attorney under Rule 6.1(a) does not serve as a request for an attorney under *Miranda*. *State v. Uraine*, 157 Ariz. 21, 22, 754 P.2d 350, 351 (Ct. App. 1988). To understand why this is so requires an understanding of the nature of the right to counsel under the different situations.

1. *Miranda v. Arizona and the Fifth Amendment to the United States Constitution*. The Fifth Amendment to United States Constitution does not grant to a defendant the right to an attorney, but instead provides a defendant has the right to remain silent:

No person . . . shall be compelled in any criminal case to be a witness against himself

U.S. CONST. amend 5. In *Miranda*, the Court held that “the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.” 384 U.S. at 469. A review of the history behind *Miranda* shows how the court reached this ruling.

On March 3, 1963, an 18-year-old woman was sexually assaulted. On March 13, 1963, the police arrested Ernesto Miranda and placed him in a line-up, where the victim identified him as her attacker. The police interrogated him, and he confessed to the sexual assault on the victim. The state subsequently indicted Miranda, and at trial introduced his confession in evidence. Miranda was convicted of kidnapping and sexual assault.

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On appeal, Ernesto Miranda was represented by a Mr. Alvin Moore. One of the claims he made on appeal was admission of Miranda's confession violated his Sixth Amendment right to counsel. *State v. Miranda*, 98 Ariz. 18, 30, 401 P.2d 721, 729 (1965). At that time, the controlling authority was *Escobedo v. Illinois*, 378 U.S. 478 (1964). In that case, the following events took place: (1) Escobedo's brother-in-law was fatally shot; (2) the police arrested Escobedo; (3) Escobedo retained an attorney, who secured his release by obtaining a writ of habeas corpus; (4) another suspect told police Escobedo had fired the fatal shots; (5) police again arrested Escobedo; (6) when police questioned Escobedo, he continually told them he wanted to talk to his attorney; (7) Escobedo's attorney went to the police station to see him, and on at least four occasions police officers told him he could not see Escobedo; (7) at one point, Escobedo and his attorney saw each other from across the room, but police officers refuse to let them talk to each other; (8) Escobedo ultimately made statements that implicated him in the shooting; and (9) those statements were admitted at trial, and Escobedo was convicted of murder. The Court stated the issue as follows:

The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of "the Assistance of Counsel" in violation of the *Sixth* Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," *Gideon v. Wainwright*, and thereby renders inadmissible in a state criminal trial any incriminating statement elicited by the police during the interrogation.

378 U.S. 479 (emphasis added; citations omitted). The Court held as follows:

We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "The Assistance of Counsel" in violation of the *Sixth* Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," *Gideon v. Wainwright*, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

378 U.S. at 490-91 (emphasis added; citations omitted). Although only 5 weeks before, the Court in *Messiah* had held the Sixth Amendment right to counsel did not attach until the state had filed formal charges against a defendant, the majority opinion said the fact that the state had not yet filed formal charges against Escobedo made no difference:

The interrogation here was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference.

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378 U.S. at 485.

It would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment.

378 U.S. at 486. In their dissents, Justice Stewart and Justice White both essentially said the fact that the interrogation was conducted before Escobedo was formally indicted should make all the difference in the world because the Court had just held the Sixth Amendment right to counsel did not attach until the state had instituted formal charges against the defendant. 378 U.S. at 493–95 (Stewart, J., dissenting); 378 U.S. at 495–99 (White, J., dissenting). Thus, *Escobedo* started out on somewhat of an unsure footing.

In its *Miranda* decision, the Arizona Supreme Court stated its view of *Escobedo*:

It will be noted that the court in the *Escobedo* case set forth the circumstances under which a statement would be held inadmissible, namely: (1) The general inquiry into an unsolved crime must have begun to focus on a particular suspect. (2) The suspect must have been taken into police custody. (3) The police in its interrogation must have elicited an incriminating statement. (4) The suspect must have requested and been denied an opportunity to consult with his lawyer. (5) The police must not have effectively warned the suspect of his constitutional rights to remain silent.

When all of these five factors occur, then the *Escobedo* case is a controlling precedent.

98 Ariz. at 32, 401 P.2d at 730. The court noted *Miranda* had not requested an attorney, and thus held *Escobedo* did not preclude admission of *Miranda*'s confession. 98 Ariz. at 33, 401 P.2d at 731.

John P. Frank of Lewis & Roca then took over representation of Ernesto Miranda and filed a petition for certiorari, which the Court granted. *Miranda v. Arizona*, 382 U.S. 925 (1965). In the *Miranda* brief, the issue was stated as follows:

The issue is whether the conviction of petitioner violates his constitutional rights under the *Sixth* and Fourteenth Amendments to the Federal Constitution.

1966 WL 100543 at *2 (emphasis added). That brief cited the Sixth Amendment and the Fourteenth Amendment, but did not even cite the Fifth Amendment. *Id.* at *v. Acknowledging the Court had held the Sixth Amendment right to counsel did not attach until the state had filed formal charges against a defendant, the brief essentially urged the Court to move up the start time of the Sixth Amendment to when a defendant is arrested and interrogated by the police:

We therefore urge upon the Court that line of cases interpreting *Escobedo* which holds that there is a right to counsel during the interrogation period for any person under arrest.

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1966 WL 100543 at *8.

The larger problem is whether extending the right to counsel into the interrogation period will unduly handicap the police in their work.

Id. at *8. This would have included the right to consult in private with an attorney as soon as feasible after a defendant was taken into custody.

The *Amicus Curiae* brief filed by the American Civil Liberties Union took a different approach, citing both the Fifth Amendment and the Sixth Amendment. 1966 WL 100516 at *v. That brief summarized the argument as follows:

In *Escobedo v. Illinois*, 378 U. S. 478 (1965), this Court held that the privilege against self-incrimination was violated when an accused's confession was obtained through police in-custody interrogation designed to elicit incriminating statements from him at a time when he was denied the presence of counsel, since the presence of counsel was necessary to protect the constitutional privilege. In so holding, the Court reached the natural culmination of its "involuntary" confession decisions, in light of its application of the privilege against self-incrimination to the States. The determination that *Escobedo* rests upon effective enforcement of the privilege against self-incrimination is not of mere academic interest, but vitally affects the proper application of the decision.

There can be no doubt that police custodial interrogation designed to elicit a confession is inherently violative of the privilege against self-incrimination. Therefore confessions obtained under such circumstances cannot be constitutionally admitted in State or federal criminal proceedings unless it has been shown that adequate safeguards were present to protect the privilege. For reasons spelled out at length in the brief, under the present circumstances of police custodial interrogation designed to elicit a confession, the required safeguard is the presence of counsel.

A police warning of the subject's right to remain silent is not adequate. Neither is the granting of prior access to counsel, as distinguished from the presence of counsel. For these reasons it is immaterial that a subject of police custodial interrogation asked for or was able to obtain retained counsel. Effectuation of the privilege against self-incrimination, in these circumstances, requires the providing of counsel to all.

This does not mean that the effectuation of the privilege requires the presence of counsel in other than police custodial interrogation designed to elicit a confession. Nor does it mean that if other protective devices are devised and put into effect which effectively secure the privilege even in the police custodial situation, the presence of counsel would still be required. A holding that, under the conditions of police interrogation as they normally exist today, the presence of counsel is necessary to protect the privilege against self-incrimination, should not foreclose a determination that other protective devices are acceptable when and if such devices are put into effective use.

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Finally, the Court must reject the argument that the privilege against self-incrimination should not be enforced in the face of a police “need” for its non-enforcement. Even if such “need” conflicting with the privilege were shown to exist, the Constitution requires that the conflict be resolved in favor of effective enforcement of the constitutional privilege. However, this issue need not be reached as the asserted police “need” has not been shown to exist and the burden of production of evidence clearly rests on the prosecution. Not only have prosecutors not produced any convincing evidence, the assertions which they make are not even supported by considered legislative determinations of police need. Thus in a scale which opposes unsupported assertions of necessity by police and prosecutors on the one side, and effectuation of the individual’s constitutional right not to be compelled to incriminate himself on the other, the balance must be struck on the side of the constitutional right.

1966 WL 100516 at *3–*4.

At oral argument, the *Miranda* case was not argued by John P. Frank, but was instead argued by John J. Flynn of Lewis & Roca, widely thought to be the best criminal law defense trial attorney in Arizona. Flynn began his presentation with the Sixth Amendment argument advanced in the brief. MAY IT PLEASE THE COURT 214–16 (P. Irons & S. Guitton eds. 1993). But once the Justices gave Mr. Flynn the opening he needed, Mr. Flynn argued there was a Fifth Amendment right to remain silent and the need of an attorney to assist a suspect in exercising or waiving that right, which was the argument advanced by the ACLU in its brief. *Id.* at 216–18.

In its *Miranda* opinion, the Court declined Mr. Frank’s invitation to move up the start date of the Sixth Amendment, and never even cited the Sixth Amendment in the body of the opinion. It instead followed the argument advanced in the ACLU brief and argued by Mr. Flynn, and decided the case under the Fifth Amendment, which it cited 21 times in the body of the opinion. Although in its original *Escobedo* opinion the Court said the issue was whether there was a “violation of the *Sixth* Amendment” (emphasis added), the Court recast *Escobedo* as a Fifth Amendment case:

We start here, as we did in *Escobedo*, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the *Escobedo* decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that “No person . . . shall be compelled in any criminal case to be a witness against himself,” and that “the accused shall . . . have the Assistance of Counsel”—rights which were put in jeopardy in that case through official overbearing.

384 U.S. at 442. It then set out its holding as follows, which essentially adopted the argument advanced in the ACLU brief:

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Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

384 U.S. at 444 (footnote omitted). The opinion then spelled out its holding with specificity, and summarized its preliminary statement in essentially the same language. 384 U.S. at 467–75, 478–79. Thus, the *Miranda* opinion did not change the existing law that the Sixth Amendment right to counsel did not attach until after the initiation of formal charges. It held instead a suspect being subjected to custodial interrogation is entitled to the assistance of an attorney to protect the suspect’s exercise of the Fifth Amendment right to remain silent.

It did not hold, however, that the police must immediately provide a suspect with access to an attorney if the suspect indicates he or she wants an attorney:

If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

This does not mean, as some have suggested, that each police station must have a “station house lawyer” present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude they will not provide counsel during a

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reasonable period of time in which investigation in the field is carried out, they may refrain from [providing counsel] without violating the person's Fifth Amendment privilege so long as they do not question him during that time.

384 U.S. at 474. Thus, if a suspect asks for an attorney, the police have two choices: (1) they may either stop questioning the suspect; or (2) if they wish to continue questioning the suspect, they must wait until he has conferred with an attorney before they resume questioning.

A review of the record in this matter shows Officer Smojver did not violate Defendant's right to an attorney under *Miranda*. When Officer Smojver read Defendant the *Miranda* warnings, she said she understood those rights. (R.T. of June 29, 2011, at 10, 12.) When Officer Smojver asked questions of Defendant, she just stared blankly ahead and cried occasionally, and at one point said, "I'm sorry; I just have to have my lawyer; I'm sorry." (*Id.* at 10, 12–13.) In response to that statement, Officer Smojver stopped questioning Defendant. (*Id.* at 10, 13, 15, 16.) At no point during the time when Defendant was with Officer Smojver did she ask to talk to her lawyer or to make any telephone calls. (*Id.* at 15–16.) Officer Smojver complied with the requirements of *Miranda*, and thus did not violate Defendant's right to counsel under *Miranda*.

The record also shows Officer Wearne did not violate Defendant's right to an attorney under *Miranda*. When Officer Wearne read Defendant the *Miranda* warnings, and she said she understood those rights. (R.T. of June 29, 2011, at 23–24, 30–31.) After Officer Wearne took Defendant's blood sample, when he questioned her further and she said she wanted to have her lawyer present, he stopped questioning her. (*Id.* at 27.) He told her they had a telephone and a telephone book available, but she said she did not want to use the telephone and would wait until she got home. (*Id.* at 28.) Officer Wearne complied with the requirements of *Miranda*, and thus did not violate Defendant's right to counsel under *Miranda*.

2. *Rule 6.1(a) of the Arizona Rules of Criminal Procedure.* The Arizona Supreme Court has promulgated rules of criminal procedure, which provide in part as follows:

A defendant shall be entitled to be represented by counsel in any criminal proceeding The right to be represented shall include the right to consult in private with an attorney, or the attorney's agent, as soon as feasible after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefor.

Rule 6.1(a), ARIZ. R. CRIM. P. Because the first sentence of that rule provides a "defendant shall be entitled to be represented by counsel in any criminal proceeding," it appears to be referring to the period after the State has initiated formal charges because a suspect does not become a "defendant" until the State has initiated formal charges, and the criminal proceedings do not begin until the State has initiated formal charges. As such, the first sentence of that rule is nothing more than a recognition of the Sixth Amendment right to counsel.

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The problem with this rule is the second sentence, which provides it “include[s] the right to consult in private with an attorney . . . as soon as feasible after a defendant is taken into custody.” If this is referring to the period before State has initiated formal charges, it is not a restatement of the Sixth Amendment because, as discussed above, the Sixth Amendment right to counsel does not attach until State has initiated formal charges. And if it is not the Sixth Amendment right to counsel, the question then is, from where is this right to counsel derived?

One possibility is the Arizona Supreme Court promulgated this rule, and because the Arizona Supreme Court is the Arizona Supreme Court, it has the power to create this right to counsel. The problem with this explanation is the right to an attorney is a substantive right, and the Arizona Supreme Court does not have the power to create substantive rights:

A. The supreme court, by rules promulgated from time to time, shall regulate pleading, practice and procedure in judicial proceedings in all courts of the state for the purpose of simplifying such pleading, practice and procedure and promoting speedy determination of litigation upon its merits. ***The rules shall not abridge, enlarge or modify substantive rights of a litigant.***

A.R.S. § 12–109(A) (emphasis added). Providing that a defendant may “consult in private with an attorney . . . as soon as feasible after [arrest]” would be a permissible procedural rule if a defendant’s right to counsel attached at the point of arrest, but the Sixth Amendment right to counsel does not attach until State has initiated formal charges:

Counsel for appellant urges that adversary proceedings were initiated against appellant at the point of arrest and therefore the denial of his right to counsel at the show-up identification is in violation of his sixth amendment constitutional guarantees. An arrest is not the equivalent of the initiation of criminal prosecutions; therefore, a right to counsel argument is inapposite. In appellant’s case there had not yet been a complaint filed, nor a preliminary hearing, nor an indictment. Appellant relies heavily on *Moore v. Illinois*, but there a complaint had been filed and, under state law, the initiation of adversary judicial proceedings was commenced upon the filing of such a complaint. We apply the long-standing rule in Arizona to this case: “The law is quite clear in this area that pre-indictment lineups and showups are not a critical stage of the proceedings requiring the presence of counsel (citations omitted).”

State v. Tresize, 127 Ariz. 571, 575, 623 P.2d 1, 5 (1980) (citations omitted).

Another possibility is the Arizona Supreme Court *sub rosa* interpreted Article 2, Section 24, of the Arizona Constitution to mean a defendant’s right to counsel attaches at the time of arrest. There are four problems with this explanation. First, the Arizona Supreme Court has never explicitly stated it was so interpreting the Arizona Constitution. Second, this would make a defendant’s rights under the Arizona Constitution broader than under the United States Constitution, and as stated by the Arizona Court of Appeals, “We have been unable to locate any authority for

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appellee's assertion that Arizona's right to counsel is broader than the federal right." *Transon*, 186 Ariz. at 485, 924 P.2d at 489. Third, it would be contrary to those cases holding that, when "the language of the federal and state constitutional provisions are substantially similar, we will use the same standard to analyze both provisions." *Id.* And fourth, if under the Arizona Constitution a defendant's right to counsel attached at the point of arrest, the police would have violated Ernesto Miranda's right to counsel and the Arizona Supreme Court would have reversed his conviction as a matter of State law. If that had happened, Ernesto Miranda would not have been included with Michael Vignera, Carl Westover, and Roy Stewart, the other three individuals whose cases were resolved by the United States Supreme Court along with Miranda's case, and thus the police would be required instead to read to a suspect *Vignera* rights rather than *Miranda* rights. See *Vignera v. New York* (No. 760), 384 U.S. 436, 493-94 (1966).

The Arizona Supreme Court did give an explanation of the rights under Rule 6.1(a) in *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119 (2004). Moody was arrested in California and extradited to Arizona. *Id.* at ¶ 11. Shortly after he arrived in Arizona, detectives served a search warrant on him seeking "physical characteristics" and handwriting samples. *Id.* at ¶ 61. Moody asked for an attorney but the detectives denied his request, and Moody then gave hair, blood, and handwriting samples, and the detectives fingerprinted and photographed him. *Id.* Moody was then indicted. *Id.* at ¶ 12. On appeal, Moody claimed the detectives violated his rights under the Sixth Amendment and Rule 6.1(a). The Arizona Supreme Court held there was no Sixth Amendment violation because that only extends to "all critical stages of the criminal process," and the taking of non-testimonial physical evidence is not a critical stage of the proceedings. *Id.* at ¶ 65.

The court then explained why there was no violation of Rule 6.1(a):

Second, Moody argues that by refusing his custodial request to speak with counsel before the taking of the physical evidence, the State interfered with his rule-based "right of access to counsel" and that the evidence should therefore have been suppressed. Rule 6.1(a) of the Arizona Rules of Criminal Procedure provides a criminal defendant with the right to "consult in private with an attorney . . . as soon as feasible after [being] taken into custody." This court has stated that, regarding a suspect in custody, the state may deny the right to consult with an attorney "only when the exercise of that right will hinder an ongoing investigation." *Kunzler v. Pima County Superior Court*. Although the State has not shown that counsel would have hindered the investigation in this case, Moody had not been assigned an attorney when the warrant was served. This court has also stated that "[i]f the defendant is indigent and cannot afford an attorney, the state need not wait until one is appointed before continuing its detention procedures." *McNutt v. Superior Court*. The taking of the fingerprint evidence would clearly qualify under this exception for detention procedures.

Even if this court were to conclude that Moody's right to consult counsel under Rule 6.1(a) was violated as to the other evidence, however, Moody fails to demonstrate suppression would be required. Federal jurisprudence is clear that if evidence could

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have been obtained despite the violation of right to counsel, there is no reason to keep that evidence from the jury. *Nix v. Williams*. For suppression to be appropriate, there must be a nexus between the violation and the evidence seized. *Id.* (stating that the exclusionary rule requires the suppression of evidence gained as a result of a government violation of a defendant's rights). In Moody's case, the physical evidence was seized pursuant to a valid warrant, and the samples would have been collected whether or not Moody had an opportunity to speak with an attorney. Consequently, the nexus between the alleged violation and the evidence seized is absent; therefore, the policies underlying the exclusionary rule would not require suppression of this evidence.

Moody relies on a line of cases based on Rule 6.1 of the Arizona Rules of Criminal Procedure for the proposition that a defendant has the right to confer with counsel before taking a test for physical evidence. Those cases, however, all involve and are limited to the seizure of evidence of intoxication. *See, e.g., Kunzler; Holland; McNutt; Rosengren*. Only in these cases has the reviewing court either dismissed the charges against the defendant or affirmed suppression of non-testimonial, physical evidence as a sanction for the state's violation of a defendant's rights under Rule 6.1(a).

These cases addressed violations of Rule 6.1 in the context of impaired drivers. *See Kunzler; Holland; McNutt; Rosengren* (manslaughter). Such investigations raise unique concerns that justify exemption from the general rule:

In a D[U]I investigation, it is crucial for both the state and the defendant to gather evidence relevant to intoxication close in time to when the defendant allegedly committed the crime. Otherwise, any alcohol that may have been in the blood will have decomposed before the blood can be tested.

McNutt, 133 Ariz. at 10 n. 2, 648 P.2d at 125 n. 2. As the court suggested in *McNutt*, DUI investigations are unique because of the evanescent nature of blood- and breath-alcohol evidence. Thus, these DUI cases establish the required nexus between the violation and remedy: Denial of counsel may deprive a defendant of an opportunity to obtain exculpatory evidence and therefore justifies suppression of evidence.

Moody's case differs in that the physical evidence taken from him was not subject to disappearing or dissipating as is breath- or blood-alcohol evidence. The officers made it clear that the warrant sought only non-testimonial evidence and that they would not be asking Moody any questions regarding the murders while taking the evidence. Additionally, because the evidence was seized pursuant to a valid warrant, it is unlikely that an attorney would advise Moody to defy the warrant and refuse to submit to the search. For those reasons, we agree with those courts that have held that the necessity for counsel was minimized. *E.g., Nix*. Consequently, even if Rule 6.1(a) requires that a defendant be afforded the opportunity to contact counsel before administration of a search warrant for physical characteristics, Moody has failed to demonstrate why suppression would be appropriate in this case. He therefore has not shown that the trial court abused its discretion in denying his motion to suppress the physical evidence.

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Moody at ¶¶ 66–70 (citations omitted). Thus, it appears the right to “consult in private with an attorney . . . as soon as feasible after [being] taken into custody” is not a component of any specific grant of a right to counsel, but instead is a procedure provided to ensure a defendant is able to exercise a due process right to gather evidence before it disappears. As stated by the Arizona Court of Appeals:

Appellee also correctly asserts that a right to counsel component is contained within Arizona’s constitutional Due Process Clause. The right to counsel is an extension of the doctrine that defendants have the right to gather independent exculpatory evidence. Arizona’s Due Process Clause guarantees DUI suspects “a fair chance to obtain independent evidence of sobriety essential to his defense at the only time it [is] available.” *Montano v. Superior Court*. Numerous Arizona cases have found due process violations where police conduct interfered with a defendant’s right to gather evidence of sobriety before the evidence naturally dissipates. The right to a fair chance to gather exculpatory evidence includes reasonable access to counsel.

Transon, 186 Ariz. at 485, 924 P.2d at 489 (citations omitted). Again, this right to an attorney under Rule 6.1(a) is not self-effectuating, and instead comes into effect only when a defendant asserts the right to an attorney:

[A]ppellee’s right to counsel [under Rule 6.1(a)] cannot be infringed upon unless appellee actually asks for an attorney.

Transon, 186 Ariz. at 486, 924 P.2d at 490.

In the present case, the record shows the officers did not interfere with Defendant’s right to an attorney under Rule 6.1(a). Officer Smojver never said anything to Defendant about taking a BAC test. (R.T. of June 29, 2011, at 13.) Thus, nothing Officer Smojver did could have interfered with Defendant’s right to contact an attorney before deciding whether to take a BAC test. Officer Wearne read Defendant the *Miranda* warnings, and she said she understood them. (*Id.* at 23–24, 30–31.) He then read Defendant the implied consent information, and she agreed to submit to a BAC test. (*Id.* at 24, 31–31.) Both before and after the blood draw, Defendant never said she wanted to talk to an attorney, and never said anything about wanting to make a telephone call. (*Id.* at 25–26, 27, 29.) Further, there was a sign in the DUI van advising suspects a telephone and telephone book were available. (*Id.* at 25.) After Officer Wearne had completed packaging the samples, he asked Defendant questions, but she said she wanted to have her lawyer present. (*Id.* at 26–27.) As a result of that response, Officer Wearne stopped questioning her. (*Id.*) He told Defendant they had a telephone and a telephone book available, but she said she would wait until she got home. (*Id.* at 28.) Thus, the record shows Defendant never asked to speak to an attorney before deciding whether to take the BAC test. Because Defendant never asked for an attorney before taking the BAC test, Officer Wearne did not interfere with Defendant’s right to contact an attorney before deciding whether to take a BAC test. The trial court thus erred when it concluded Defendant’s right to counsel was violated by the officers’ failure to allow her to contact an attorney or to make available to her means to contact an attorney.

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C. THE DIFFERENCE BETWEEN RIGHT TO AN ATTORNEY UNDER *MIRANDA* AND THE RIGHT TO AN ATTORNEY UNDER RULE 6.1(A).

The trial court apparently found Defendant's statement, "I'm sorry; I just have to have my lawyer; I'm sorry," after Officer Smojver read Defendant *Miranda* warnings served as a request to talk to an attorney before deciding whether to take the BAC test. As noted above, the Arizona Court of Appeals has held the request for an attorney under Rule 6.1(a) does not serve as a request for an attorney under *Miranda*. *Uraine*, 157 Ariz. at 22, 754 P.2d at 351. A defendant has a Fifth Amendment right to refuse to speak, and the Court in *Miranda* held a defendant has the right to assistance of counsel to advise whether or not to waive that right. A defendant does not, however, have a constitutional right to refuse a blood test, and thus has no right to assistance of counsel to advise whether or not to take a blood test:

This conclusion [that drawing and testing a suspect's blood does not violate the privilege against self-incrimination] also answers petitioner's claim that, in compelling him to submit to the [blood] test in face of the fact that his objection was made on the advice of counsel, he was denied his Sixth Amendment right to the assistance of counsel. Since petitioner was not entitled to assert the privilege [against self-incrimination], he has no greater right because counsel erroneously advised him that he could assert it. His claim is strictly limited to the failure of the police to respect his wish, reinforced by counsel's advice, to be left inviolate. No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented. The limited claim thus made must be rejected.

Schmerber v. California, 384 U.S. 757, 765–66 (1966); see *South Dakota v. Neville*, 459 U.S. 553, 559 (1983) ("*Schmerber*, then, clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test."). The right under Rule 6.1(a) is the right to the assistance of counsel in gathering exculpatory evidence. It thus does not follow logically that, when a suspect receives the *Miranda* warnings and requests the assistance of counsel to decide whether to waive the privilege against self-incrimination, that action also serves as a request for counsel to assist in the gathering exculpatory evidence. This is further supported in the present case by the fact that, when Officer Smojver read Defendant the *Miranda* warnings and she said she had to have her lawyer, Officer Smojver had said nothing about having Defendant submit to a blood test. This Court therefore concludes the trial court erred when it found Defendant's statement to Officer Smojver about her lawyer served as an anticipatory request, some 20 minutes later, to talk to her lawyer before deciding whether to submit to the blood test.

To the extent it may seem inconsistent that Defendant would want the presence of her attorney before answering any questions but not want to speak to her attorney before taking the blood test, the United States Supreme Court addressed a similar inconsistency in *Connecticut v. Barrett*, 479 U.S. 523 (1987), which the court cited in *Uraine*, 157 Ariz. at 22, 754 P.2d at 351. After Barrett received the *Miranda* warnings, he "stated that 'he would not give the police any written

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statements but he had no problem in talking about the incident,” and “told the officers that he would not give a written statement unless his attorney was present but had ‘no problem’ talking about the incident.” 479 U.S. at 525. The Court held Barrett’s invocation of his right to an attorney before making any written statements did not serve as an invocation of his right to an attorney before making any oral statements. In addressing this apparent inconsistency, the Court said, “The fact that some might find Barrett’s decision illogical is irrelevant, for we have never ‘embraced the theory that a defendant’s ignorance of the full consequences of his decisions vitiates their voluntariness.’” 479 U.S. at 530 (footnote omitted).

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial erred in granting Defendant’s motion to suppress.

IT IS THEREFORE ORDERED vacating the order of the trial court in granting Defendant’s motion to suppress.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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