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The Right to Counsel in Pretrial Investigation -- Inmates Held in Administrative Detention Pending Criminal Investigation: United States v. Gouveia

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The Right to Counsel in Pretrial Investigation — Inmates Held in Administrative Detention Pending Criminal Investigation: *United States v. Gouveia*[1] The sixth amendment provides numerous rights to an individual accused in a criminal prosecution, including "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[2] Commencing in 1932, the Supreme Court began to construe the parameters of this constitutional guarantee and to formulate guidelines for determining the point during a criminal prosecution when the Constitution mandates that the state provide counsel to the accused.[3] The vital role which the right to counsel assumes in the American criminal justice system[4] is evidenced by the Court's early recognition that the counsel guarantee is one of the "fundamental principles of liberty and justice which lie at the base of our civil and political institutions."[5]

Broadly stated, the primary purpose of the sixth amendment right to counsel is to ensure fairness in the adversary criminal process.[6] The counsel guarantee ensures a fair trial by providing an accused with a legal representative, who aids in the preparation of a defense, to enable an accused to meet his adversary, the state.[7] Moreover, the counsel guarantee helps to minimize the imbalance in the adversary system resulting from the broad investigatory powers and almost unlimited resources possessed by public prosecutors.[8] Thus, the sixth amendment guarantee is called a "trial right" because counsel's assistance is required at any trial type confrontation between the accused and the state.[9]

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[1] 104 S. Ct. 2292 (1984).

[2] U.S. CONST. amend. VI.

> 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.

Id.

[3] Powell v. Alabama, 287 U.S. 45 (1932). Prior to *Powell*, the right to counsel clause of the sixth amendment had not been considered by the Supreme Court. *Powell* began an era of expansion and explanation of the protections provided to an accused by the sixth amendment. Note, *The Right to Counsel: Attachment Before Criminal Judicial Proceedings?*, 47 FORDHAM L. REV. 810, 810 n.2 (1979) [hereinafter cited as Note, *The Right to Counsel*].

Sixth amendment right to counsel jurisprudence has developed separately from the fifth amendment counsel guarantee to protect an individual's privilege against self-incrimination. The fifth amendment provides, in pertinent part that, "[n]o person . . . .shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. For the most part, the fifth amendment privilege against self-incrimination is beyond the scope of this article.

[4] *See* Powell v. Alabama, 287 U.S. 45, 71–72 (1932). *See infra* notes 61–70 and accompanying text.

[5] Powell v. Alabama, 287 U.S. 45, 67 (1932) (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

[6] United States v. Morrison, 449 U.S. 361, 364 (1981).

[7] *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[8] United States v. Ash, 413 U.S. 300, 309 (1973) (an additional motivation for the American right to counsel guarantee was a desire to minimize the imbalance in the adversary system that would have resulted with the creation of a professional prosecutor). *See also* Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1034 (1964) [hereinafter cited as Note, *Counsel During Interrogation*] ("Counsel, then, has been more than technical aid, he has served to overcome the original unfairness of the balance of the state against individual.").

[9] Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

Recognizing that certain pretrial events could potentially decide an accused's fate, courts have extended the right to counsel to certain events that occur prior to trial.[10] In these pretrial situations, the Court has stated that an accused individual is entitled to the assistance of counsel during all "critical stages" of the proceedings against him.[11] This "critical stage" standard has been defined as any point in the pretrial confrontations of the accused where "potential substantial prejudice to defendant's rights inheres."[12]

Recently, this broad and flexible standard allowing pretrial attachment of the right to counsel has been restricted by the Supreme Court.[13] Although the right to counsel still attaches in certain pretrial situations, the Court has enunciated a rule that has retreated from the "critical stage" standard. The attachment of the right to counsel is now usually required only at the initiation of formal proceedings, either by way of indictment, preliminary hearing, or arraignment,[14] in effect excluding counsel from some "critical stages" of the proceedings against an accused. This restriction of the counsel guarantee appears to have occurred because of the Court's concern with certain practical problems associated with ensuring pretrial attachment of the guarantee.[15]

The most recent case interpreting the sixth amendment right to counsel protection, *United States v. Gouveia*,[16] involved an evaluation of the counsel guarantee in the context of a prolonged preindictment segregation of prison inmates in administrative detention.[17] In *Gouveia*, the Court stated that the right to counsel attaches only at or after the initiation of adversary judicial proceedings.[18] Thus, despite the prolonged segregation

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[10] *See* United States v. Ash, 413 U.S. 300, 310 (1973) (although the Court did not extend the right to counsel to the photographic identification at issue in *Ash*, the Court recognized that certain pretrial events are, in reality, a portion of the trial itself). *See also* Coleman v. Alabama, 399 U.S. 1, 9–10 (1970) (the right to counsel attached at a preliminary hearing, regardless of its being a pretrial event); Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964) (the counsel guarantee attaches to the preindictment custodial interrogation); Powell v. Alabama, 287 U.S. 45, 57 (1932) (counsel's assistance was required at the critical pretrial events, at least from arraignment to the trial itself).

[11] Powell v. Alabama, 287 U.S. 45, 57 (1932).

[12] United States v. Wade, 388 U.S. 218, 227 (1967).

[13] *See, e.g.*, Moore v. Illinois, 434 U.S. 220, 227 (1977) (Court applied mechanical standard in holding that the right to counsel attaches at preliminary hearing); United States v. Ash, 413 U.S. 300, 321 (1973) (right to counsel does not attach at postindictment photographic identification); Kirby v. Illinois, 406 U.S. 682, 689 (1971) (plurality opinion) (right to counsel attaches only at the initiation of formal criminal proceedings).

[14] Kirby v. Illinois, 406 U.S. 682, 689 (1971).

[15] There appear to be two major reasons underlying the replacement of the critical stage standard with the bright-line test. First, in retreating to the bright-line test, the Court appeared to be concerned with the practical implementation of a flexible test which permitted attachment of the right to counsel at various stages of the prosecution depending upon the circumstances presented in each case. *See* Escobedo v. Illinois, 378 U.S. 478, 496 (1963) (White, J., dissenting) (the flexible test enunciated by the *Escobedo* Court is totally unworkable). Second and more critically, the Court appeared to be very concerned with the exclusion of evidence which can result from violations of various fourth, fifth, and sixth amendment rights. *See* Brewer v. Williams, 430 U.S. 387, 441 (1977) (Blackmun, J., dissenting) (due to the operation of the exclusionary rule, vital evidence will not be admissible and the guilty party will go free). Recently, the Court has sought to limit the operation of exclusionary rules, permitting the use of evidence which would otherwise have been inadmissible. *See* United States v. Leon, 104 S. Ct. 3405 (1984) (the Court approved the good faith exception to the exclusionary rule). For a further discussion of these practical problems, *see infra* notes 219–236 and 302–310 and accompanying text.

[16] 104 S. Ct. 2292 (1984).

[17] *Id.* at 2294–96.

[18] *Id.* at 2297.

of the suspected inmates in administrative detention pending the government's investigation of the crime, the Court in *Gouveia* held that the right to counsel had not attached because adversary proceedings had not been commenced by the state.[19]

The litigation in *Gouveia* involved two groups of inmates who were treated in a similar fashion by prison officials at the Federal Correctional Institution in Lompoc, California.[20] Both groups were detained in administrative detention for prolonged periods of time pending criminal investigation by prison and government officials.[21] The first group ("Gouveia group") was composed of four individuals: Gouveia, Ramirez, Reynoso, and Segura, who were suspected of murdering a fellow inmate on November 11, 1978.[22] As soon as prison officials suspected these inmates, they were segregated from the general prison population and placed in an administrative detention unit ("ADU").[23] From the outset of their segregation, the inmates repeatedly requested the assistance of counsel.[24] These requests were denied by prison authorities.[25] Pursuant to prison regulations,[26] disciplinary hearings were held by prison officials in December of 1978.[27] Because the officials determined that all four of the inmates had participated in the murder, their continued confinement in ADU was ordered.[28]

In ADU, the inmates were separated from the general prison population.[29] Prison officials and FBI investigators were the only contacts which the inmates had with the outside world.[30] They were confined to individual cells and their participation in prison programs was curtailed.[31] All opportunities for education, recreation, and employment were eliminated.[32] Thus, ADU confinement resulted in a substantial deprivation of the

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[19] *Id.* at 2300.

[20] *Id.* at 2294–96.

[21] *Id.* at 2294–95.

[22] *Id.* at 2295.

[23] *Id.*

[24] Brief of Respondents Mills and Pierce in Opposition to the Petition at 2, U.S. v. Gouveia, 104 S. Ct. 2292 (1984). *See also* United States v. Gouveia, 704 F.2d 1116, 1118 (9th Cir. 1983).

[25] United States v. Gouveia, 704 F.2d 1116, 1118 (9th Cir. 1983).

[26] *See* Inmate Discipline and Special Housing Units, 28 C.F.R. §§ 541.10–.49 (1984). §§ 541.15–.19 detail the procedures which prison officials are to follow in conducting hearings of the Institutional Disciplinary Commission. The full array of constitutional rights protecting a non-inmate accused of a crime are not available to inmates in the disciplinary hearing. *See* Wolff v. McDonnell, 418 U.S. 539, 555 (1974).

[27] *Gouveia*, 104 S. Ct. at 2295.

[28] *Id.*

[29] *Id. See* 28 C.F.R. §§ 541.20(c)–(d), 541.22 (1984). These sections outline the restrictions which administrative detention imposes.

[30] Brief of Respondents Mills and Pierce in Opposition to the Petition at 2–4, United States v. Gouveia, 104 S. Ct. 2292 (1984). The American Correctional Association defines administrative segregation as a

> level of custody into which an inmate may be classified as a result of a determination that he presents a substantial risk to the security or order of the institution, the safety of that inmate or others, and, therefore, requires separation from the general institution population and strict supervision in a highly structured, controlled setting.

Robinson, *The Constitutional Rights of an Inmate at an Administrative Segregation Proceeding: Hewitt v. Helms and the Withdrawal of Prisoners' Rights*, 11 OHIO N.U.L. REV. 57, 58 (1984) [hereinafter cited as Robinson] (quoting CORRECTIONAL LAW PROJECT, AMERICAN CORRECTIONAL ASSOCIATION, MODEL RULES AND REGULATIONS (1979)).

[31] *Gouveia*, 104 S. Ct. at 2295.

[32] *Gouveia*, 704 F.2d at 1118.

freedoms which unconfined inmates retained, and eliminated all access to the general prison population.[33]

In March of 1979, a federal grand jury investigation into this murder began.[34] Sixteen months later, on July 17, 1980, the grand jury investigation culminated with the return of an indictment against the Gouveia group charging them with first degree murder.[35] On July 14, 1980, after nearly nineteen months in ADU without the assistance of counsel, the inmates were arraigned and counsel was appointed.[36]

The second group of inmates in *Gouveia* ("Mills group"), composed of Mills and Pierce, received similar treatment by prison authorities.[37] On August 22, 1979, they were accused of murdering a fellow inmate at Lompoc.[38] Immediately following the murder, Mills and Pierce were examined by a doctor and questioned by the FBI.[39] Because their involvement in the murder was suspected, the Mills group was placed in ADU following this questioning.[40] A disciplinary hearing was held on September 13, 1979.[41] Prison officials concluded that these inmates had committed the murder and ordered their continued confinement in ADU.[42] On March 27, 1980, a federal grand jury indicted Mills and Pierce on charges of first degree murder.[43] After eight months in ADU confinement, they were arraigned on April 21, 1980 and counsel was appointed at that time.[44]

Prior to trial, both the Gouveia group and the Mills group filed motions to dismiss their indictments arguing that the prolonged preindictment delay had violated either their fifth amendment due process rights,[45] or, in the alternative, their sixth amendment

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[33] *See id.* Inmates who are not confined in administrative detention enjoy freedoms such as participation in educational, vocational training and employment programs. *See also* 28 C.F.R. § 541.12 (1984).

[34] *Gouveia*, 704 F.2d at 1118.

[35] *Gouveia*, 104 S. Ct. at 2295. The *Gouveia* inmates were charged with violations of 18 U.S.C. § 1111 and § 1117, murder and conspiracy to commit murder. *Gouveia*, 104 S. Ct. at 2295.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 2295–96. The Mills inmates were charged with violations of 18 U.S.C. § 1111, murder, and 18 U.S.C. § 1792, conveyance of a weapon in prison. Pierce was also charged with assault in violation of 18 U.S.C. § 113(c). *Gouveia*, 104 S. Ct. at 2295–96.

[44] *Id.*

[45] *Id.* at 2295. The due process clause appears in the Constitution in the fifth and fourteenth amendments. The Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The fifth amendment applies only to actions of the federal government, whereas the fourteenth amendment applies to actions of the states. U.S. CONST. amend. V, XIV.

The due process clause does not have a fixed meaning, but generally encompasses the notion of fundamental fairness. Anti-Fascist Committee v. McGrath, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring). The due process clause guarantees that notice and a fair hearing be accorded to an individual prior to the deprivation of life, liberty or property. *See* Powell v. Alabama, 287 U.S. 45, 68 (1932). *See also* Anti-Fascist Committee v. McGrath, 341 U.S. 123, 162–163 (1951) (Frankfurter, J., concurring) (due process is not a technical formula, but instead represents "a profound attitude of fairness between man and man, and more particularly between the individual and government"); Frank v. Mangum, 237 U.S. 309, 326 (1915) (as long as notice and hearing or an opportunity to be heard is provided, the due process clause is satisfied).

speedy trial and counsel rights.[46] Although the District Court for the Central District of California denied the Gouveia group's motion,[47] the district court allowed the Mills group's motion and dismissed their indictments.[48] On appeal, a panel of the Ninth Circuit Court of Appeals reversed the district court's dismissal of the Mills group's indictment and remanded the case for trial.[49] Both groups of inmates were eventually tried and found guilty of murder.[50]

The United States Court of Appeals for the Ninth Circuit, proceeding en banc, consolidated the appeals of the Gouveia and Mills groups to consider whether, under any circumstances, a federal inmate suspected of a prison crime and placed in ADU is constitutionally entitled to an attorney prior to the return of an indictment.[51] The court of appeals held that the inmates' sixth amendment counsel rights had been violated.[52] According to the court, any detention which exceeds the maximum period recommendations in the prison regulations,[53] and is persisting due to a pending criminal investigation, requires the appointment of counsel.[54] The court of appeals therefore reversed the judgments of the lower courts and dismissed the earlier indictments.[55] Subsequently, the government filed a petition for certiorari which was granted by the Supreme Court.[56] The Supreme Court reversed the decision of the court of appeals and held that the right to counsel does not attach until the initiation of formal proceedings by the state.[57]

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[46] *Gouveia*, 104 S. Ct. at 2295. The sixth amendment guarantees the right to a speedy and public trial, as well as the assistance of counsel to aid in preparing a defense. U.S. CONST. amend. VI.

[47] *Gouveia*, 104 S. Ct. at 2295. The district court pointed out the distinction between administrative procedures and indictment. The rights which attach at indictment do not attach at the time of disciplinary proceedings. Therefore, the court denied the motion to dismiss. *Id.*

[48] Joint Appendix for the Petition for Writ of Certiorari at 170–180, United States v. Gouveia, 104 S. Ct. 2292 (1984). The district court concluded that when Mills and Pierce were placed in ADU, the "finger of suspicion" had already been pointed toward them. *Id.* at 180. According to the court, the government's refusal to appoint counsel or some other neutral investigator irreparably damaged the defendant's ability to prepare for trial. *Id.* Also, the court determined that the segregation in ADU bore all the indicia of a criminal arrest and thus, must be viewed as such. *Id.*

[49] United States v. Mills, 641 F.2d 785 (9th Cir.), *cert. denied*, 454 U.S. 902 (1981). In reversing the lower court, the court of appeals reasoned that segregation in ADU does not constitute an arrest or accusation for speedy trial purposes. *Id.* at 787. Thus, if a defendant is not accused, the counsel guarantee is inapplicable. *Id.* at 788.

[50] *Gouveia*, 104 S. Ct. at 2295–96. After a four week trial of the Gouveia group which ended in a mistrial, the inmates were re-tried and found guilty. The Gouveia group defendants were sentenced to consecutive life and ninety-nine year prison terms. *Id.* at 2295. The Mills group was found guilty on all counts and sentenced to life imprisonment. *Id.* at 2296.

[51] *Gouveia*, 704 F.2d at 1117.

[52] *See id.* at 1123–25. The court of appeals analyzed the issue as one of first impression, unique to the prison setting. The court determined that the point of accusation was different for prison crimes. *Id.* at 1120. According to the court, ADU confinement can serve an accusatory function when the detention is related to subsequent prosecution. *Id.* at 1124. The court stated that confinement in ADU functioned much like an arrest outside of prison. Thus, the court concluded that "[t]o insist that an inmate is not 'accused' until formal charges are initiated is to ignore reality." *Id.* at 1122.

[53] 28 C.F.R. §§ 541.11, 541.13 (1984) set out sanctions for offenses committed in prison.

[54] *Gouveia*, 704 F.2d at 1125.

[55] *Id.* at 1127.

[56] 104 S. Ct. 272 (1983).

[57] 104 S. Ct. at 2298, 2300.

In holding that the right to counsel attaches only at or after the initiation of formal adversary proceedings, *Gouveia* represents a significant restriction of a guarantee which the Court has "deemed necessary to insure [the] fundamental human rights of life and liberty."[58] As a consequence of this decision, the Court has virtually precluded sixth amendment scrutiny of any preindictment confrontations, regardless of the violation alleged. Although earlier sixth amendment jurisprudence had indicated that counsel's assistance is guaranteed "whenever necessary to assure a meaningful 'defence,'"[59] the *Gouveia* Court continued a recent trend of narrowly defining the applicability of the counsel guarantee.[60] Moreover, as a result of the *Gouveia* decision, the sixth amendment counsel guarantee offers little protection in the prison context. Even though a prison inmate is confronted with government forces from the first moment he is suspected of committing a prison crime, these confrontations will never have sixth amendment significance if the prisoner has not been formally indicted.

This casenote submits that the attachment of the right to counsel only at or after formal judicial proceedings is an elevation of form over substance which is contrary to the spirit of the sixth amendment. In support of this assertion this casenote will begin by outlining the history of the counsel guarantee. Against this historical background, the reasoning of the *Gouveia* Court is presented. This casenote then argues that the mechanical rule applied by the Court in *Gouveia* frustrates the purpose of the right to counsel guarantee because that right is designed to protect an individual's right to a fair trial, which cannot be achieved through application of the *Gouveia* rule. Next, the underlying motivations of the *Gouveia* Court will be explored to determine some possible reasons why the Court reaffirmed the bright-line test established in earlier case law. It is contended that protection of the right to a fair trial cannot be adequately ensured by a rule which creates an arbitrary dividing line at the initiation of formal proceedings by the state. Such an arbitrary line disallows counsel's assistance at a confrontation where that assistance would be required if an individual had been formally accused. The inequity which the *Gouveia* standard imposes on the accused inmate will then be analyzed. As a substitute for the mechanical rule of *Gouveia*, this casenote will propose a three-part test which uses prior Supreme Court precedent to balance the *Gouveia* Court's practical concerns with the mandate of the sixth amendment to determine when the right to counsel should attach. Finally, this new standard will be applied to the facts presented in *Gouveia* to demonstrate when the right to counsel should have attached to protect these inmates' right to a fair trial.

I. The History of the Counsel Guarantee

A. *Interpretation and Expansion of the Guarantee: 1932–1967*

The 1932 Supreme Court decision, *Powell v. Alabama*, marked the beginning of the interpretation of the sixth amendment right to counsel guarantee.[61] In *Powell*, the Court

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[58] Johnson v. Zerbst, 304 U.S. 458, 462 (1937).

[59] United States v. Wade, 388 U.S. 218, 225 (1967).

[60] Kirby v. Illinois, 406 U.S. 682 (1972). The *Gouveia* Court continued this narrowing of the scope of the counsel guarantee despite language in a post *Kirby* decision indicating the possibility that the counsel guarantee could, in appropriate situations, attach at earlier points in time. Brewer v. Williams, 430 U.S. 387, 398 (1977). *See also* Note, *The Right to Counsel*, *supra* note 3, at 840 n.223.

[61] Powell v. Alabama, 287 U.S. 45, 59 (1932). The Court commenced its interpretation of the

was presented with the appeal of nine defendants convicted of a capital offense.[62] When the defendants were arraigned, the trial court appointed "all members of the bar" for the purpose of arraignment.[63] Because no individual attorney had been appointed, however, when the trial date arrived the defendants had not met with counsel nor prepared any sort of defense.[64] Recognizing that criminal defendants had a vital need for legal advice during the pretrial phase of a prosecution, the Court held that the defendants' sixth amendment right to counsel had been violated and thus, reversed the judgment of the lower court.[65]

Fundamental to the *Powell* Court's sixth amendment analysis was the recognition that at critical stages of the prosecution, an accused has a right to counsel.[66] Although the Court did not define when a stage is critical, it found that the need for counsel was particularly necessary in the period from arraignment to trial, "when consultation, thoroughgoing investigation and preparation were vitally important."[67] After reviewing the English common law rule and the colonial alteration of the English rule regarding the right to counsel,[68] the Court determined that it is not sufficient to give a defendant his day in court without providing both the accused and his attorney time to prepare for trial.[69] In conclusion, the Court found that protection of the fundamental right "requires the guiding hand of counsel at every step in the proceedings" against an accused.[70]

Eight years after *Powell*, the Court continued this general expansion of the counsel guarantee in *Avery v. Alabama*.[71] In *Avery*, the Court again addressed the question of

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counsel guarantee in the context of the due process clause because *Powell* was a state prosecution and the sixth amendment, at that time, applied only to actions of the federal government. *Id.* at 66. The due process clause is a broad protection generally providing fundamental fairness and specifically requiring notice and an opportunity for a fair hearing. *Id.* According to the Court, the counsel guarantee is encompassed in this notion of a fair hearing because the right to a hearing means the right to be heard through counsel. *Id.* at 68–69. *See* Note, *Counsel During Interrogation*, *supra* note 8, at 1004. See *also supra* note 45 and accompanying text for a further discussion of the due process clause.

[62] *Powell*, 287 U.S. at 49. The defendants were nine black men charged with raping two white women. The jury found the defendants guilty and they were sentenced to death. *Id.* at 50–51.

[63] *Id.* at 49. It is unclear from the decision how or why the trial judge appointed all members of the bar. The effect seems to be that no individual attorney was appointed as counsel and consequently no trial preparation was undertaken. *Id.*

[64] *Id.* at 53–56.

[65] *Id.* at 73.

[66] *Id.* at 57.

[67] *Id.*

[68] *Id.* at 60. In England, the lawyer's role was merely to advise his clients in matters of law, but take no responsibility for matters of fact. *Id.* Moreover, the right to counsel was limited to misdemeanors and the felony of treason. *Id.* For any other felony, the accused could consult with an attorney only for legal questions which the accused himself suggested. *Id.* The sixth amendment was derived from colonial statutes and constitutions which were designed to reject the English common law rule. *Id.* at 61. *See also* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955).

[69] *See Powell*, 287 U.S. at 69.

[70] *Id.*

[71] 308 U.S. 444 (1940). Prior to *Avery*, the Court in *Johnson v. Zerbst* further defined and expanded the right to counsel guarantee in recognizing that "the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." 304

when counsel must be appointed.[72] Although the Court determined that the attorneys in *Avery* had been appointed at a pretrial stage which allowed them enough time to prepare their client's case, the Court warned that appointment of counsel under circumstances which do not allow counsel a chance to prepare a defense would contravene the sixth amendment.[73] *Avery*, therefore, demonstrated the Court's determination to ensure that counsel is appointed at a meaningful time to protect the most basic right of a criminal defendant.[74] This same concern is evidenced in *Gideon v. Wainwright*,[75] where the Court incorporated the sixth amendment into the fourteenth amendment and held that defendants in state criminal prosecutions were guaranteed the assistance of counsel.[76]

Following this general expansion of the counsel guarantee, the Court began during the early 1960's to define the "critical stage" standard. Initially, the Court analyzed "critical" in terms of the stage of proceedings against an individual.[77] The Court defined "critical" on a case by case basis, never really setting out a test to determine if a stage was critical. After defining preliminary hearing,[78] arraignment,[79] and indictment[80] as critical stages, the Court moved away from defining "critical" in terms of the court proceedings and developed a more general, informal accusatory standard. In the 1964 decision of *Escobedo v. Illinois*,[81] the Court addressed the issue of whether the refusal by police to honor the defendant's request to consult with his attorney during the course

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U.S. 458, 462–63 (1938). Moreover, the Court determined that the right to *appointed* counsel was demanded by the counsel guarantee if the accused could not afford counsel. *Id.* at 463.

[72] *Avery*, 308 U.S. at 445.

[73] *Id.* at 446. The Court stated that "the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." *Id.*

Avery involved an individual convicted for murder. Avery's attorneys moved for continuance before the trial on the basis that they did not have adequate time to prepare. *Id.* at 447–48. The trial court denied the motion and the defendant was found guilty. *Id.* at 448. On appeal, the Supreme Court found that the attorneys did have sufficient time to prepare the case, present a defense and even bring an appeal to the state supreme court. *Id.* at 450. The Court found that the attorneys performed their "full duty intelligently and well." *Id.*

[74] *Id.* at 446.

[75] 372 U.S. 335 (1963).

[76] *Id.* at 339 (Court held that the right to counsel is a fundamental right applicable to the states through the fourteenth amendment in all criminal cases where the defendant is faced with the possibility of incarceration). *Gideon* overruled a prior Supreme Court decision, Betts v. Brady, 316 U.S. 455, 462 (1942), in which the Court held that the fourteenth amendment does not require the states to provide counsel to protect a defendant's due process rights. *Id.* at 342. *Gideon* was one of several cases during the 1960's in which a wide range of rights that had previously only been available to defendants in federal courts were extended to defendants in state prosecutions. *See also* Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment right to trial by jury); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to a speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (sixth amendment right to confrontation); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment exclusionary rule).

[77] Massiah v. United States, 377 U.S. 201 (1964) (indictment); White v. Maryland, 373 U.S. 59 (1963) (preliminary hearing); Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment).

[78] White v. Maryland, 373 U.S. 59, 60 (1963).

[79] Hamilton v. Alabama, 368 U.S. 52, 53 (1961).

[80] Massiah v. United States, 377 U.S. 201, 204 (1964).

[81] 378 U.S. 478 (1964).

of an interrogation constitutes a denial of the right to counsel in violation of the sixth amendment.[82] At the time of Escobedo's request for counsel, he had not been formally indicted.[83] The Court stated that formal accusation or indictment was not a prerequisite to the attachment of the right to counsel.[84] Although the Court recognized that there were no formal proceedings, it noted that the defendant, through the actions of the police, had become the accused.[85] The Court added that "[i]t would exalt form over substance to make the right to counsel . . . depend on whether at the time of interrogation, the authorities had secured a formal indictment."[86] The practical effect of the government's actions, the Court explained, was to charge the defendant with a crime without formal proceedings.[87] Thus, the Court held that when the process ceases to be investigatory and the focus is directed at one individual, the adversary system has begun to operate.[88] Therefore, the accused must be permitted to consult with his attorney at that time.[89]

Two years after *Escobedo*, the Court in *Miranda v. Arizona*[90] changed its approach in confession/interrogation cases. Instead of relying on the sixth amendment counsel guarantee, the Court held that the fifth amendment privilege against self-incrimination[91] requires counsel's presence during custodial interrogations.[92] *Miranda* and *Escobedo* both addressed the issue of the right to counsel in the interrogation situation. Although both cases determined that counsel must be provided, *Miranda* relied on the fifth amendment privilege against self-incrimination, not the sixth amendment counsel clause. Therefore, *Escobedo*'s precedential value for the sixth amendment proposition that the right to counsel attaches at the point in time when the investigation focuses on one individual became uncertain after *Miranda*.[93] The Court, however, a year after the *Miranda* decision,

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[82] *Id.* at 479. In *Escobedo*, the defendant was suspected of the murder of his brother-in-law. *Id.* The police arrested him and began questioning him. In the meantime, the defendant's mother called an attorney, who went to the police station. *Id.* at 480. The attorney requested to speak with the defendant, but the police refused his requests. *Id.* at 480–81. Eventually Escobedo made statements that implicated himself in the murder. *Id.* at 483.

[83] *Id.* at 485.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 486.

[87] *Id.*

[88] *Id.* at 492.

[89] *Id.*

[90] 384 U.S. 436 (1966).

[91] *Id.* at 444. Through history the Court came to recognize that a system which depends on confessions extracted from an accused in a custodial interrogation tend to be "less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." *Escobedo*, 378 U.S. at 489. Therefore, the Court in *Miranda* announced three fundamental rules to protect the accused's right against self-incrimination. *Miranda*, 384 U.S. at 444–45. First, before an individual is interrogated, he must be warned of his constitutional rights of silence and counsel. *Id.* Second, counsel, retained or appointed, must be made available during interrogation. *Id.* Finally, the individual may waive both his right to counsel and his right to remain silent if such waiver is made voluntarily. *Id. See also* Elsen & Rosett, *Protections for the Suspect Under Miranda v. Arizona*, 67 COLUM. L. REV. 645, 646 (1967) [hereinafter cited as Elsen & Rosett].

[92] *Miranda*, 384 U.S. at 444.

[93] *See* Note, *The Pretrial Right to Counsel*, 26 STAN. L. REV. 399, 404 (1973) [hereinafter cited as Note, *The Pretrial Right*]. Some commentators have speculated that *Miranda* may have implicitly overruled *Escobedo*'s sixth amendment basis for expanding the right to counsel to cover the prein-

cited *Escobedo* as support in another sixth amendment right to counsel case.[94] This fact alone may indicate that the Court still regarded *Escobedo* as sixth amendment precedent for the proposition that the right to counsel may attach in preindictment situations.[95]

The peak of the growth of the counsel guarantee occurred in 1967 with the trilogy of line-up cases: *United States v. Wade*,[96] *Gilbert v. California*,[97] and *Stovall v. Denno*.[98] *Wade* involved an individual who was indicted for bank robbery.[99] Two weeks after counsel had been appointed by the court to represent Wade, the FBI, without providing notice to Wade's counsel, arranged to have two bank employees observe a line-up including the defendant.[100] The employees identified the defendant and subsequently made an in-court identification of the defendant.[101] The Court concluded that this line-up was a critical stage in the prosecution since it was fraught with dangers which may render a fair trial impossible.[102] Because the defendant was subjected to this uncounseled line-up, the Court determined that the in-court identification must be excluded.[103] The *Wade* Court stated that the protection afforded by the right to counsel can be accomplished only if "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."[104] The *Wade* Court concluded that scrutiny of any pretrial confrontation which takes place without the assistance of counsel is necessary to preserve a criminal defendant's most basic right to a fair trial.[105] In *Wade*, the critical stage standard was broadly defined as any stage where "potential substantial prejudice to defendant's rights inheres."[106]

Gilbert, like *Wade*, involved a line-up conducted without notice to counsel sixteen days after defendant had been indicted and counsel had been appointed.[107] The *Gilbert* Court followed the reasoning in *Wade* and held that the in-court identifications must be excluded if the witness did not have a basis, independent from the uncounseled line-up,

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dictment custodial interrogation. *Id.* Instead, a fifth amendment basis for the expansion may have been substituted through *Miranda*. *Id. See* Elsen & Rosett, *supra* note 91, at 665 (if any sixth amendment right to counsel stemming from *Escobedo* survived *Miranda*, it lacks definition). *See also* Moore v. Illinois, 434 U.S. 220, 232–33 (1977) (Rehnquist, J., concurring). Justice Rehnquist stated that the primary purpose of *Escobedo* was not to guarantee the right to counsel, but like *Miranda*, to guarantee the privilege against self-incrimination. *Id.*

[94] United States v. Wade, 388 U.S. 218, 225–26 (1967). The Court, in citing *Escobedo* for the sixth amendment proposition that the right to counsel attaches at critical stages of the prosecution, appeared to be indicating that *Escobedo* was not overruled or subsumed by *Miranda*. *See id.*

[95] *See id.*

[96] 388 U.S. 218 (1967).

[97] 388 U.S. 263 (1967).

[98] 388 U.S. 293 (1967).

[99] *Wade*, 388 U.S. at 220.

[100] *Id.*

[101] *Id.*

[102] *Id.* at 235–37.

[103] *Id.* at 239–40.

[104] *Id.* at 226.

[105] *Id.* at 227.

[106] *Id.* The Court remanded the case to give the government an opportunity to establish by clear and convincing evidence that the in-court identifications had an independent origin from the illegal line-up. *Id.* at 240. If these identifications did not have an independent source, the defendant must be granted a new trial. *Id.*

[107] *Gilbert*, 388 U.S. at 269.

to identify the defendant.[108] *Gilbert* therefore firmly established the *Wade* "per se exclusionary" rule, which requires the exclusion at trial of evidence resulting from uncounseled identifications, and applied this rule to state proceedings.[109]

In the third case of the line-up trilogy, *Stovall*, the Court addressed the question whether the *Wade-Gilbert* per se exclusionary rule should be extended retroactively.[110] *Stovall* involved the stabbing of a husband and wife in their home.[111] The husband died, and the wife was in the hospital in critical condition when the police brought the suspect to her hospital bed.[112] The suspect had not been formally arraigned nor did he have the assistance of counsel at this "show-up."[113] After the victim identified the suspect as her assailant at the hospital, she also made an in-court identification.[114] The Court considered whether the in-court identification should be excluded because the defendant was unassisted by counsel at the initial identification.[115] Instead of focusing on the lack of formal accusation, the Court detailed the aspects of the procedure containing the potential for irreparable prejudice.[116] The Court, however, held that the *Wade* rule would be applied only prospectively.[117] The Court explained that law enforcement officials had operated on the great weight of authority that counsel was not required at preindictment confrontations of this sort.[118] Law enforcement officials had no way to suspect that the Court would change this rule.[119] Therefore, because the retroactive application of the *Wade* rule would be more disruptive than helpful, the Court declined to extend the rule to cover this preindictment confrontation.[120]

In the *Wade*, *Gilbert*, and *Stovall* decisions, the Supreme Court demonstrated that the definition of the "critical stage" standard is not contingent on any formal proceeding. Instead, the Court concluded that the *Wade* rule encompasses any confrontation, formal or informal, where the potential for substantial prejudice to the defendant's rights inheres.[121] In all three of these cases the Court recognized that a functional analysis of counsel guarantee questions is required to protect an individual's right to a fair trial.

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[108] *Id.* at 272. The Court remanded the case to the California Supreme Court to determine two issues. The first issue was whether the witness had a basis, independent of the line-up, to identify the defendant. Second, if the witness did not have an independent basis, the lower court was to assess whether admission of the identification amounted to harmless error. *Id.*

[109] *Id.* at 273.

[110] *Stovall*, 388 U.S. at 294.

[111] *Id.* at 295.

[112] *Id.*

[113] *Id.* A "show-up" involves a one-on-one identification of a suspect by a victim or witness.

[114] *Id.*

[115] *Id.* at 296.

[116] *Id.* at 295–99.

[117] *Stovall*, 388 U.S. at 296. Because the accused was denied the benefit of the *Wade-Gilbert* rule, the Court continued its analysis by questioning whether the confrontation was so suggestive and conducive to "irreparable mistaken identification" as to be a violation of the due process clause. *Id.* at 301–02. Because the only witness was in the hospital, near death, a police station line-up was out of the question. *Id.* at 302. The only feasible alternative was this immediate hospital confrontation. Therefore, the Court concluded that the due process rights of the accused had not been violated. *See infra* notes 206–210 and accompanying text.

[118] *Stovall*, 388 U.S. at 299.

[119] *Id.*

[120] *Id.* at 300.

[121] *Wade*, 388 U.S. at 227. After these three cases were decided, most lower courts construed them broadly and held the right to counsel applicable to preindictment confrontations. *See* Wilson

B. *Restriction of the Counsel Guarantee*: Kirby v. Illinois

In 1972, the Court radically departed from the functional analysis used in its past right to counsel cases in the plurality opinion of *Kirby v. Illinois*.[122] *Kirby* involved a preindictment show-up at the police station where the victim identified the defendant.[123] The defendant argued that the Court should extend the *Wade-Gilbert* per se exclusionary rule to this preindictment confrontation.[124] Without any scrutiny of the confrontation, the Court simply held that their prior cases "firmly established"[125] that the right to counsel attaches only at or after adversary proceedings have been initiated.[126] The *Kirby* plurality did not deny that the preindictment line-up may be critical to the defense of a criminal case and may result in irreparable prejudice. The Court, however, simply stated that the defendant has no right to counsel until the government formally commences suit.[127] Concluding that the initiation of judicial criminal proceedings is the starting point of the adversary system of criminal justice, the Court reasoned that only then is the accused faced with the prosecutorial forces and the technicalities of the law.[128] As support for this proposition, the Court found it significant that the majority of prior cases addressing the counsel issue involved postindictment confrontations.[129] Therefore, the Court determined that only with the formal initiation of criminal proceedings will the sixth amendment guarantee attach.[130]

Although the *Kirby* plurality stated that it was not departing from the rationale of the *Wade* line of cases,[131] *Kirby* does not follow the spirit of those cases.[132] *Kirby* continued

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v. Gaffney, 454 F.2d 142 (10th Cir.), *cert. denied*, 409 U.S. 854 (1972). The Tenth Circuit Court of Appeals stated that, although the line-ups in *Wade* and *Gilbert* were conducted after indictment and the line-up in *Wilson* occurred before the accused had been formally charged, "surely the assistance of counsel . . . does not arise or attach because of the return of an indictment." *Id.* at 144. The Court noted that all the reasons supporting the *Wade* decision are equally compelling in the preindictment situation. *Id. See also* United States v. Greene, 429 F.2d 193 (D.C. Cir. 1970); United States v. Phillips, 427 F.2d 1035 (9th Cir.), *cert. denied*, 400 U.S. 867 (1970); People v. Fowler, 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969); Commonwealth v. Guillory, 356 Mass. 591, 254 N.E.2d 427 (1970).

[122] 406 U.S. 682 (1972). *See also id.* at 691–705 (Brennan, J., dissenting); Note, *The State Responses to* Kirby v. United States [sic], 1975 WASH. U. L. Q. 423, 434 [hereinafter cited as Note, *The State Responses*] (*Kirby* deviated from precedent in applying a rigid distinction between preindictment and postindictment cases).

[123] *Kirby*, 406 U.S. at 684.

[124] *See id.* at 685–86.

[125] *Id.* at 688. The Court's statement regarding what past cases have "firmly established" is particularly puzzling in that Justice Stewart, the author of the *Kirby* opinion, notes in his concurring/dissenting opinion of *Wade* that as a result of the *Wade* holding the right to counsel attaches in certain confrontations whether before or after indictment. *Wade*, 388 U.S. at 251 (Stewart, J., dissenting). Moreover, Justice Stewart noted at the outset of *Kirby* that the applicability of *Wade* and *Gilbert* to preindictment confrontations has severely divided the courts. *Kirby*, 406 U.S. at 687 n.5.

[126] *Kirby*, 406 U.S. at 688.

[127] *Id.* at 689.

[128] *Id.*

[129] *Id.* at 688. Historically, the majority of cases addressing the counsel guarantee involved postindictment confrontations. *See, e.g.*, *Wade*, 388 U.S. at 219 (postindictment line-up); *Powell*, 287 U.S. at 50 (trial). But, the types of cases in which the issue has arisen should not dictate when the right attaches. They are irrelevant to the inquiry that a court must make in each different fact pattern.

[130] *Kirby*, 406 U.S. at 690.

[131] *Id.*

[132] *Id.* at 704 (Brennan, J., dissenting). Brennan concluded that the majority had refused to

to repeat the language of *Wade* when the plurality opinion stated that all pretrial confrontations must be scrutinized,[133] yet, the Court did not scrutinize the show-up in *Kirby*. Instead, the Court dismissed the issue by stating that there is no right to counsel until the initiation of formal proceedings.[134] In most situations, where the defendant has already been indicted and is then, for the first time, subject to a confrontation with the legal system, the right to counsel will attach at that time and the outcome under *Kirby* would be no different than under *Wade*. In the preindictment confrontation, however, as presented in *Kirby*, the accused would have no right to counsel according to the *Kirby* Court since formal charges had not been filed.[135]

After the *Kirby* decision, the trend of the Court was one of restriction of the sixth amendment guarantee.[136] For example, in *United States v. Ash*,[137] the Court held that the right to counsel does not attach in a postindictment photographic identification of the defendant.[138] The defendant in *Ash* was indicted for bank robbery.[139] In preparing for trial, the prosecutor showed color photographs to the trial witnesses to determine if they could make an in-court identification.[140] This postindictment photographic identification, without the presence of either the accused or his attorney, was the basis for the defendant's claim that he had been denied the right to counsel at a critical stage in the prosecution.[141] The *Ash* Court stated that the right to counsel had been extended to pretrial situations because a "trial-like" confrontation had been involved.[142] Because the

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recognize the principles of the *Wade-Gilbert* line of cases. *Id. See also* Note, *The Pretrial Right*, *supra* note 93, at 413 (*Kirby* pays only "lip service" to the functional analysis of *Wade* and *Gilbert*); Note, *The State Responses*, *supra* note 122, at 434 (*Kirby* varies from the *Wade-Gilbert* rationale).

[133] *Kirby*, 406 U.S. at 690–91.

[134] *Id.* at 688.

[135] *See* Note, *The Right to Counsel*, *supra* note 3, at 822 (under *Kirby* an accused has no right to the assistance of counsel at a corporeal identification which occurs before the filing of formal charges, despite the critical nature of the confrontation). Commentators have criticized the *Kirby* decision. *See id.* at 823 (the author finds *Kirby* inadequate protection for the right to counsel); Note, *The State Responses*, *supra* note 122, at 436 (*Kirby*'s formalistic approach offers only "an illusory protection to the accused"). The California Supreme Court, along with a few other state courts, have either explicitly rejected or questioned *Kirby*. *See, e.g.*, People v. Bustamante, 30 Cal. 3d 88, 102, 634 P.2d 927, 935–36, 177 Cal. Rptr. 576, 585 (1981) (based on the California Constitution, the right to counsel encompasses preindictment line-ups); People v. Jackson, 391 Mich. 323, 338, 217 N.W.2d 22, 27 (1974) (before and after the commencement of formal proceedings, a suspect is entitled to be represented by counsel at line-up identifications or photographic identifications); State v. Gray, 503 S.W.2d 457, 461 (Mo. Ct. App. 1973) (the principles of *Wade* and *Gilbert* should apply to a preindictment, post-arrest line-up, especially when the investigation has focused on one individual as the suspect). *See also infra* note 211 and accompanying text.

[136] Despite this trend, the Court slightly expanded the scope of the sixth amendment guarantee in Argersinger v. Hamlin, 407 U.S. 25, 40 (1972), in holding that a criminal defendant, tried for a petty offense which carries a penalty of incarceration, has a right to counsel just as one who is facing more serious charges has that right. *But see* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (the Court restricted *Argersinger* to apply only to crimes in which the defendant is actually threatened with imprisonment).

[137] 413 U.S. 300 (1973).

[138] *Id.* at 321.

[139] *Id.* at 302.

[140] *Id.* at 303.

[141] *Id.*

[142] *Id.* at 317.

Court concluded that a photographic session was not particularly trial-like, it found that the right to counsel did not apply.[143]

Most of the cases between *Kirby* and *Gouveia* involved postindictment confrontations. In these cases, the Court consistently followed the *Kirby* test that if the defendant was confronted by the forces of the state without the assistance of counsel after the initiation of formal proceedings, that individual had been denied his sixth amendment right to counsel.[144] The Court did not, however, directly address the issue of whether the *Kirby* rule applied to all preindictment confrontations. In *Brewer v. Williams*,[145] the Court seemed to fluctuate on the issue of the applicability of the *Kirby* rule to preindictment confrontations.[146] The *Brewer* Court, reaffirming the reasoning of the *Powell* and *Wade* Courts, emphasized the indispensable nature of the counsel guarantee to the adversary system of criminal justice.[147] Moreover, the Court stated that:

> [t]here has occasionally been a difference of opinion within the Court as to the peripheral scope of this constitutional right . . . . Whatever else it may mean, the right to counsel . . . 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 . . . .[148]

Thus, prior to *Gouveia*, it was not clear whether *Kirby* represented a general rule from which certain preindictment exceptions could be carved, or whether it had established an inflexible rule applicable to all cases.[149]

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[143] *See id.* at 317–18. This notion of trial-like confrontations does not seem consistent with *Wade* in that a line-up is not particularly trial-like. The defendant is confronted neither with legal questions nor legal intricacies, yet the *Wade* Court found that the right to counsel attached because counsel could lessen the impact of any potential prejudice to defendant's right to a fair trial. *Wade*, 388 U.S. at 236–37.

[144] Estelle v. Smith, 451 U.S. 454, 473 (1981) (the testimony of a psychiatrist was excluded by the Court because he interviewed the defendant, at the state's order, after indictment, without the assistance of counsel); Moore v. Illinois, 434 U.S. 220, 229 (1977) (the *Moore* Court found that a defendant, identified by his victim at a preliminary hearing without the aid of counsel, had been deprived of his right to counsel).

[145] 430 U.S. 387 (1977). This case involved the kidnapping of a child on Christmas Eve. *Id.* at 390. The police immediately suspected the defendant. *Id.* Prior to arrest, the defendant contacted his attorney, who advised him to turn himself in, but not to say anything to the police. *Id.* The defendant followed his attorney's advice. *Id.* After arraignment and advice by a second attorney not to say anything to the police, the defendant got into the police car to return to the town where he was from, 160 miles away. *Id.* at 391–92. Despite the defendant's requests and his attorney's instructions to the police not to interrogate the defendant, the police engaged in a subtle form of questioning, capitalizing on the defendant's strong religious beliefs. *Id.* This subtle questioning technique was called the "Christian burial speech," which eventually prompted the defendant to incriminate himself by talking about his murder of the child and leading the police to her body. *Id.* at 392–93. The Court found that this procedure violated the defendant's sixth amendment right to counsel. *Id.* at 401.

[146] *Id.* at 398.

[147] *Id.*

[148] *Id.*

[149] *See* Note, *The Right to Counsel*, *supra* note 3, at 840 n.233. The author stated that the *Brewer* language seemed to leave open the possibility that the right to counsel could attach sooner than the initiation of formal proceedings. *Id.*

II. The Supreme Court's Reasoning in *Gouveia*

A. *The Majority's Approach*

In *United States v. Gouveia*,[150] the Supreme Court held that the right to counsel does not attach at any point during a prolonged preindictment segregation of inmates confined in administrative detention.[151] Justice Rehnquist, writing for a six member majority, reached this decision by analyzing the specific wording of the sixth amendment guarantee[152] in conjunction with the Court's prior precedent interpreting the counsel guarantee.[153] Through this analysis, the Court determined that the court of appeals had departed from the long standing interpretation of the sixth amendment when the court held that the defendants were entitled to the assistance of counsel prior to the formal intiation of adversary proceedings.[154]

The Court began its analysis by summarizing its prior cases regarding the right to counsel, stating that "our cases have long recognized that the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant."[155] Relying on *Kirby*, and the cases following it, the majority found that these past cases construing the right to counsel were consistent with the literal language of the sixth amendment because the amendment specifically requires both a "criminal prosecution" and an "accused."[156] Additionally, the Court recognized that its prior decisions protect the core purpose of the sixth amendment — providing an accused with aid at trial.[157] According to the Court, trial is the primary point in time in which the accused is confronted with the legal system and the prosecutor, therefore, trial is the point at which the accused needs aid.[158] To provide an accused this assistance at trial, the majority noted that the right to counsel has been extended to some "critical" pretrial proceedings.[159] This extension of the counsel guarantee has occurred, the Court explained, because certain pretrial proceedings involve trial-like confrontations with the adversary or the legal system, the outcome of which could determine the accused's fate well before the actual trial.[160] Therefore, in conclusion, the Court determined that attachment of the right to counsel at the initiation of formal proceedings is appropriate because only then has the government definitely determined that it will prosecute, resulting in the solidification of the adverse positions of the government and the accused.[161]

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[150] 104 S. Ct. 2292 (1984).

[151] *Id.* at 2298, 2300.

[152] *Id.* at 2297. Prior to its analysis, the majority presented the holding and the reasoning of the court of appeals. The majority's interpretation of the court of appeals' opinion will be presented after the majority's reasoning is discussed. *See infra* notes 162–172 and accompanying text.

[153] 104 S. Ct. at 2297–98.

[154] *Id.* at 2298–99.

[155] *Id.* at 2297.

[156] *Id.* at 2298. Of course, as Justice Stevens pointed out, those cases which reaffirm *Kirby*'s holding did not present preindictment right to counsel questions. Instead they were merely postindictment confrontations in which the Court held that the *Kirby* plurality's test of initiation of formal proceedings had been satisfied. *See id.* at 2302 n.3 (Stevens, J., concurring).

[157] *Id.* at 2298.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

Analyzing the appeals court's reasoning, the majority noted that the court of appeals had evaluated the case as a prison case, and therefore not controlled by *Kirby*.[162] Because the lower court analogized the right to counsel claim presented by *Gouveia* to another sixth amendment guarantee, the speedy trial right, the Court noted that the lower court had concluded that the counsel guarantee, like the speedy trial right, could be triggered by situations other than indictment.[163] The majority characterized this analogy as "inapt," remarking that the basic protections afforded by each of these guarantees is very different.[164] According to the Court, the right to counsel protects an accused during trial-like confrontations with the prosecutor, while the speedy trial right protects an individual's liberty interest.[165] The Court therefore concluded that the court of appeals' analogy was simply "not relevant to a proper determination of when the right to counsel attaches."[166]

Through its analysis of the lower court opinion, the Court discussed the court of appeals' underlying concern with the facts presented in *Gouveia*. The Ninth Circuit recognized that because an inmate suspected of a crime is already in prison, the prosecution has little motivation to initiate the adversary proceedings promptly.[167] Without some formal initiation of proceedings, the court of appeals concluded that the government could unnecessarily delay formal proceedings and prevent the attachment of the right to counsel.[168] Therefore, the court of appeals was concerned that inmates would find the preindictment delay particularly prejudicial.[169] The Court acknowledged that this concern was a legitimate one, but did not find the appropriate remedy embodied in the sixth amendment counsel guarantee.[170] Instead, the Court looked to the protections provided by relevant statutes of limitations and the fifth amendment due process clause as sufficient in the preindictment delay situation presented by the *Gouveia* case.[171] Although application of the due process clause and the statutes of limitations did not change the outcome in the *Gouveia* case, the Court concluded that these protections were sufficient in all preindictment delay situations and therefore held that the lower court was incorrect in formulating a new extension of the counsel guarantee to protect accused inmates.[172]

B. *The Concurring Opinion*

In a separate opinion joined by Justice Brennan, Justice Stevens rejected the majority's interpretation of the right to counsel, but concurred in the judgment of the

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[162] *Id.* at 2296.
[163] *Id.* at 2299.
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.* at 2300.
[170] *Id.* at 2299.
[171] *Id.* at 2300. Statutes of limitation protect against the bringing of "stale criminal charges." *Id.* Due process requires the dismissal of an indictment, regardless of the statutes of limitations, if a defendant can prove that the preindictment delay was used by the government to gain an advantage over him and that this delay caused him actual prejudice. *Id.*
[172] *Id.* The Court remanded the case to the lower court for proceedings consistent with this opinion. *Id.*

Court.[173] The concurring opinion asserted that the Court had in the past consistently found that "the right to counsel might under some circumstances attach prior to the formal initiation of judicial proceedings."[174] The concurrence therefore stated that the majority's broad holding that the right to counsel attaches only at or after the initiation of formal proceedings was both "unjustified" and "unnecessary" in this case.[175]

Justice Stevens asserted that the majority's opinion was inconsistent with the Court's prior opinions in both the *Escobedo*[176] and *Miranda*[177] cases. In *Escobedo*, according to the concurring justice, the Supreme Court held that the sixth amendment right to counsel *can* attach prior to the filing of formal charges.[178] Moreover, Justice Stevens highlighted the recognition in *Miranda* that the true beginning of the adversarial process is custodial interrogation, not the return of a formal indictment.[179]

Next, the concurring opinion assessed past sixth amendment precedent and determined that the attachment of the counsel guarantee turns on the nature of the confrontations between the individual and the government, not on the timing of these confrontations.[180] According to Justice Stevens, until *Gouveia*, the Court had adhered to the basic test of examining an event, regardless of whether a formal indictment had been returned, to determine whether an individual had become an "accused" who needed aid in dealing with his adversary or the legal system.[181] The concurring opinion found that the sixth amendment protections were available to an individual once he became an accused, whether formally or informally.[182] Justice Stevens added that the events transforming an individual into an "accused" can occur in various situations prior to the return of a formal indictment.[183] According to Justice Stevens, "when a person is deprived of liberty in order to aid the prosecution in its attempt to convict him, . . . that person is . . . 'an accused'"[184] and the counsel guarantee attaches.[185]

The concurring justices, however, joined in the Court's opinion because they did not find that the prolonged confinement in administrative detention served an accusatorial function.[186] Justice Stevens concluded that the defendants were placed in ADU because of the security risk which they posed to the general prison population.[187] Thus,

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[173] *Id.* at 2300–01 (Stevens, J., concurring).

[174] *Id.* at 2300 (Stevens, J., concurring). The concurring opinion quotes a recent Supreme Court case in which the majority concluded that "[w]hatever else it may mean, the 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 . . . ." *Id.* (quoting *Brewer*, 430 U.S. at 398).

[175] *Id.* at 2300–01 (Stevens, J., concurring).

[176] Escobedo v. Illinois, 378 U.S. 478 (1964).

[177] Miranda v. Arizona, 384 U.S. 436 (1966).

[178] 104 S. Ct. at 2301 (Stevens, J., concurring). For a discussion of the facts and issues presented in *Escobedo*, see *supra* notes 81–95 and accompanying text.

[179] 104 S. Ct. at 2301 (Stevens, J., concurring).

[180] *Id.* at 2301–02 (Stevens, J., concurring).

[181] *Id.*

[182] *Id.*

[183] *See id.*

[184] *Id.* at 2303 (Stevens, J., concurring).

[185] *See id.*

[186] *Id.*

[187] *Id.* The concurring justice could find no indication in the record that the purpose of defendant's segregation was to aid the prosecutorial investigation. *Id.*

the concurring justices determined that the detention in ADU was not violative of the sixth amendment because it was "simply serving legitimate institutional policies."[188]

C. *The Dissenting Opinion*

Justice Marshall, in his dissenting opinion, agreed with the concurrence in its conclusion that the majority misinterpreted the development of the sixth amendment jurisprudence.[189] Echoing the concurrence, the dissent pointed out that prior precedent has recognized that an individual's right to counsel can be triggered before formal proceedings.[190] According to Justice Marshall, the government "can transform an individual into an 'accused' without officially designating him as such through the ritual of arraignment."[191]

Justice Marshall, however, disagreed with the concurring opinion in that he found that the prolonged detention in ADU did serve an accusatorial function.[192] He noted that the district court found that the prolonged detention was neither a form of prison discipline nor a result of security concerns.[193] Instead, Justice Marshall observed that the detention was related to the pending criminal investigation.[194] Asserting that the Court should not review these findings of fact because no showing of obvious error had been made, Justice Marshall argued that the inmates in ADU had the right to meet with counsel prior to the initiation of formal proceedings.[195]

Unlike the majority and concurring opinions, the dissent then moved on to the second issue presented in *Gouveia*, whether dismissal of the indictment was the proper remedy.[196] In analyzing this question, the dissent discussed the requirement in *United States v. Morrison*[197] that persons seeking dismissal of an indictment must show "demonstrable prejudice or substantial threat thereof."[198] Justice Marshall concluded that this requirement was fulfilled because the record revealed a great deal of evidence that substantial prejudice may have occurred.[199] Therefore, the dissent would have affirmed the court of appeals in their dismissal of the indictments.[200]

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[188] *Id.*

[189] *Id.* at 2303–04 (Marshall, J., dissenting).

[190] *Id.*

[191] *Id.* at 2304 (Marshall, J., dissenting).

[192] *Id.*

[193] *Id.*

[194] *Id.* Justice Marshall noted that the record from the district court with respect to two of the defendants stated that, at the time these inmates were placed in ADU, the finger of suspicion "had already been pointed at them." *Id.* As the dissenting justice noted, the district court concluded that ADU was really part of the prosecutorial acts employed against the inmates. *Id.* Because these were the findings and conclusions of the district court, Justice Marshall stated that the Supreme Court should not review them without an obvious showing of error. *Id.* In this case, according to the dissenting justice, no error had been shown. *Id.*

[195] *Id.*

[196] *Id.* at 2304–05 (Marshall, J., dissenting). Because the court of appeals concluded that the defendant's sixth amendment right to counsel had been violated, the issue of the appropriate remedy arose. *Id.* Since the Supreme Court found no sixth amendment violation, the majority did not address this question.

[197] 449 U.S. 361 (1981).

[198] 104 S. Ct. at 2305 (Marshall, J., dissenting) (quoting *Morrison*, 449 U.S. at 365).

[199] *Id.* Justice Marshall relied on the district court's finding that passage of time "resulted in

III. Critique of the Mechanical Approach Applied by the *Gouveia* Court

A. *The* Gouveia *Decision: A Retreat From Sixth Amendment Precedent*

The wooden and mechanical analysis employed by the majority in *Gouveia* in reaching the holding that the right to counsel does not attach at any point during a prolonged preindictment administrative detention of inmates is contrary to both the spirit of the sixth amendment guarantee and the Court's prior cases interpreting that right. The sixth amendment, as interpreted and applied by the Court through its jurisprudence, has been declared fundamental to the protection of a criminal defendant's right to a fair trial. Although the sixth amendment does not dictate when the right attaches, the Court has recognized in the past that investigation and thorough preparation are necessary ingredients of adequate representation.[201] Thus, the Court, in cases from *Powell* through *Wade*, enunciated a flexible approach to right to counsel questions which did not hinge on any particular occurrence in the proceedings against an accused.[202] The Court has recognized that balancing the interests in the sound administration of justice against the defendant's right to a fair trial "will necessarily involve a delicate judgment based on the circumstances of each case."[203]

The critical stage standard set out in *Wade* was a manifestation of the Court's willingness to examine any confrontation of the accused with the government or legal system to determine whether counsel was necessary to preserve the individual's right to a fair trial.[204] The relevant inquiry was not into when the confrontation occurred, as the majority in *Gouveia* held, but rather, whether the potential for substantial prejudice to the defendant's rights inhered in the confrontation.[205] The irrelevance of the timing of the confrontation is evidenced by the Court's decision in *Wade*'s companion case, *Stovall*

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the irrevocable loss of exculpatory testimony and evidence," thereby fulfilling the *Morrison* requirement of substantial threat of prejudice and requiring dismissal of the indictment. *Id.*

[200] *Id.* Justice Marshall did not agree with all of the court of appeals' reasoning on the issue of prejudice. According to the dissenting justice, the court of appeals departed from *Morrison* in stating that in cases of this sort a presumption of prejudice is appropriate because proving prejudice would be nearly impossible. *Id.* The dissent did not agree with this "departure" from *Morrison*. *Id.* Instead, Justice Marshall found substantial threat of prejudice, which he found sufficient to satisfy the *Morrison* standard. *Id.*

[201] *Powell*, 287 U.S. at 57. *Powell* squarely held that the appointment of counsel must occur at a point before the trial so as to assure an attorney a meaningful opportunity to investigate the case. *Id.*

[202] *Wade*, 388 U.S. at 227 (Court analyzed "whether potential substantial prejudice to defendant's right inhere[d] in the particular confrontation and the ability of counsel to help avoid that prejudice"); *Escobedo*, 378 U.S. at 492 ("when the process shifts from investigatory to accusatory," the right to counsel attaches); *Powell*, 287 U.S. at 57 (accused needs the assistance of counsel at all critical stages). The *Powell* Court recognized that "it is vain to give an accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case." *Id.* at 59 (quoting Commonwealth v. O'Keefe, 298 Pa. 169, 173, 148 A. 73, 74 (1929)). *See supra* notes 61–121 and accompanying text.

[203] United States v. Marion, 404 U.S. 307, 325 (1971). *Marion* focused on another sixth amendment protection, the speedy trial right. Although the right to counsel and the speedy trial right protect different interests, much of the interpretation of the two guarantees is similar because they both involve interpretation of the common phrase "[i]n all criminal proceedings, the accused shall enjoy . . . ." U.S. Const. amend. VI.

[204] *Wade*, 388 U.S. at 227.

[205] *Id.*

v. Denno.[206] *Stovall* involved a murder suspect identified by his victim in a preindictment "show-up."[207] Instead of simply holding that the right to counsel does not attach in preindictment confrontations, the Court emphasized that a significant possibility of prejudice existed in this type of uncounseled identification.[208] The accused, however, was denied the benefit of the *Wade* test because the Court stated that the holding could not be applied retroactively.[209]

This trend of expansive interpretation of the counsel guarantee was abruptly terminated in *Kirby v. Illinois*.[210] *Kirby* began a new era in the counsel guarantee which has been characterized by the elevation of form over substance. The *Kirby* rule provides that the right to counsel does not attach until the formal initiation of criminal proceedings.[211] The *Gouveia* decision flows directly from *Kirby* in simply repeating the *Kirby* holding and applying it to the facts presented without an independent evaluation of the differences

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[206] 388 U.S. 293 (1967).

[207] *Id.* at 295. See *supra* notes 96–121 and accompanying text for a discussion of the facts presented in the *Wade-Gilbert-Stovall* line of cases.

[208] *See Stovall*, 388 U.S. at 294–95.

[209] *Id.* at 296.

[210] 406 U.S. 682 (1972).

[211] *Id.* at 688. Justice Brennan, in his dissent in *Kirby*, commented on the majority's opinion by stating that "[i]f these propositions do not amount to 'mere formalism,' it is difficult to know how to characterize them." *Id.* at 698–99 (Brennan, J., dissenting).

Despite this holding, the *Kirby* plurality continued to recognize *Wade* by stating that any pretrial confrontation must be scrutinized. *Id.* at 690–91. The *Kirby* plurality did not attempt to reconcile the differences in outcome between *Kirby* and the *Wade* trilogy of cases. The *Kirby* Court merely repeated the *Wade* dicta approvingly while following a different course. *Id.* Through *Kirby*, the Supreme Court agreed with the position held by a minority of lower courts in interpreting *Wade* and *Gilbert* to apply only after the commencement of formal adversary proceedings. *Id.* at 688. *See also* Note, *The Pretrial Right*, *supra* note 93, at 409. Most state and lower federal courts ruling on the issue prior to *Kirby* held that the right to counsel attached to all line-up type confrontations, regardless of the time at which they occurred. *See* Wilson v. Gaffney, 454 F.2d 142, 144 (10th Cir.), *cert. denied*, 409 U.S. 854 (1972) (line-up confrontations, "riddled with innumerable dangers" cannot have a constitutional distinction based on the formal initiation of judicial proceedings); United States v. Greene, 429 F.2d 193, 196 (D.C. Cir. 1970) (counsel guarantee is equally applicable to the informal, pre-arrest confrontation); People v. Fowler, 1 Cal. 3d 335, 343–44, 461 P.2d 643, 650, 82 Cal. Rptr. 363, 370 (1969) (*Stovall* reveals that the Court does not intend to limit the operation of *Wade-Gilbert* rules to postindictment line-ups).

Moreover, the highest courts in two states, California and Michigan, have rejected *Kirby* as an elevation of form over substance. People v. Bustamante, 30 Cal. 3d 88, 100, 634 P.2d 927, 935, 177 Cal. Rptr. 576, 584 (1981) (*Kirby's* limitation of the right to counsel is a "wholly unrealistic view" which the court refused to adhere to); People v. Jackson, 391 Mich. 323, 338–39, 217 N.W.2d 22, 27–28 (1974) (pursuant to the court's power to establish rules of evidence applicable to judicial proceedings in Michigan, the *Wade* per se exclusionary rule shall apply to all corporeal identifications, regardless of the formal initiation of adversary proceedings). Because these courts found that the *Kirby* opinion was inconsistent with the spirit of the *Wade* holding, they interpreted their state constitutions to protect the accused's rights in a manner similar to *Wade*. Additionally, the Supreme Court of Pennsylvania, stating that it followed *Kirby*, held that counsel should be appointed at arrest since that is the point of commencement of adversary proceedings. Commonwealth v. Richman, 458 Pa. 167, 171–72, 320 A.2d 351, 353 (1974). At least one commentator has noted that in holding that arrest signals the commencement of formal adversary proceedings, the Pennsylvania court allowed the counsel guarantee to attach much sooner than the *Kirby* majority permitted. This flexible interpretation of *Kirby* provides much more protection for the accused. Note, *The Right to Counsel*, *supra* note 3, at 822 n.73. *See also supra* note 121 and accompanying text.

presented in the inmate versus non-inmate situation.[212] The *Gouveia* decision is somewhat surprising in light of the fact that the Court, four years after *Kirby*, appeared to be reconsidering its approach regarding attachment of the counsel guarantee.[213] In *Brewer v. Williams*,[214] Justice Stewart, the author of the *Kirby* plurality opinion, and also the author of the *Brewer* majority, seemed to recognize that a rule permitting only postindictment attachment of the right to counsel could, in certain situations, be insufficient to protect a defendant's right to a fair trial.[215] *Brewer* implicitly recognized that although an individual may not be formally accused, there are many methods by which the government can render an individual informally accused.[216] The lack of formal accusation does not prevent prejudicial events from occurring.[217] The appointment of an attorney after irreparable prejudice has occurred is of little value. Thus, an attorney's presence is necessary at any stage, regardless of formal accusation, to prevent the occurrence of abuse and prejudice.[218]

This door which *Brewer* appeared to be opening was slammed closed by the *Gouveia* majority.[219] The reaffirmation by the *Gouveia* majority of the mechanical rule of *Kirby* appears to have resulted from the Court's concern with two underlying factors. First, the Court appears to have been chiefly concerned with ensuring that the application of the counsel guarantee would not operate to overturn criminal convictions.[220] Second, the rationale underlying both the *Kirby* and *Gouveia* decisions appears to have been the Court's concern with the practical implementation of a rule which would have allowed preindictment attachment of the right to counsel. The Court ultimately decided to develop and follow a bright-line test[221] in part because the formulation of a mechanical

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[212] *Gouveia*, 104 S. Ct. at 2297–99.

[213] *Brewer*, 430 U.S. at 398.

[214] 430 U.S. 387 (1977). *See supra* notes 145–49 and accompanying text.

[215] 430 U.S. at 398.

[216] *Id.* at 399 (police deliberately sought to elicit incriminating information during defendant's isolation from his lawyer just as if police had been formally interrogating defendant). *See also Escobedo*, 378 U.S. at 485 (although petitioner had not been indicted, the petitioner had become the accused and the purpose of the police questioning was to "get him to confess"); Joint Appendix for the Petition for Writ of Certiorari at 180, United States v. Gouveia, 104 S. Ct. 2292 (1984) (district court found that by the time the inmates were committed to administrative detention, "the finger of suspicion" had been pointed at them).

[217] *See Kirby*, 406 U.S. at 697 (Brennan, J., dissenting) ("[T]he initiation of adversary . . . proceedings is completely irrelevant to whether counsel is necessary at a pretrial confrontation for identification in order to safeguard the accused's . . . rights to confrontation and effective assistance of counsel . . . .").

[218] *See Wade*, 388 U.S. at 235.

[219] This return to the mechanical rule of *Kirby* was foreshadowed in Justice Rehnquist's concurring opinion in Moore v. Illinois, 434 U.S. 220, 233 (1977) (Rehnquist, J., concurring). Justice Rehnquist stated that perhaps the time had arrived to reconsider the *Wade-Gilbert* exclusionary rules and replace them with a test which would not necessarily result in the exclusion of evidence. *Id.*

[220] *See Brewer*, 430 U.S. at 424 (Burger, C.J., dissenting) (we "must consider society's interest in the effective prosecution of criminals"); *id.* at 441 (Blackmun, J., dissenting) (because the Court excluded the confession and the subsequent discovery of the body, the guilty party will go free). *See generally* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting); Mertens & Wasserstrom, *Foreward: The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981); Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983) [hereinafter cited as Stewart].

[221] *Gouveia*, 104 S. Ct. at 2297; *Kirby*, 406 U.S. at 688.

test which allowed the right to counsel to attach at various points in the investigation would have been much more difficult.

The concurring and dissenting opinions in *Brewer* clearly articulated the dissatisfaction of many members of the Court with the practical effect of the counsel guarantee, excluding vital evidence, which results in the overturning of criminal convictions.[222] That dissatisfaction, however, seems to disregard the requirement that the police, as law enforcement officials, must "scrupulously" follow the commands of the law.[223] The Bill of Rights requires that facts of a crime be found in a certain way.[224] As Justice Marshall stated in his concurring opinion in *Brewer*, "in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."[225] Moreover, the Constitution strikes a balance in favor of an accused[226] and while this may not be the most efficient system, it is a system which allows individuals the most freedom and privacy without compromising the safety and security of all members of society.[227] Although application of the counsel guarantee may work a hardship in an individual case, this hardship is the required trade-off to live in a society which insures justice in a greater sense for all individuals through preservation of and respect for the commands of the sixth amendment.[228]

In addition to the Court's underlying focus on law and order in society, the practical implementation of a rule allowing preindictment attachment of the right to counsel seems to have influenced the *Gouveia* Court to reaffirm the simple, mechanical rule of *Kirby*. The first clearly enunciated, yet flexible, test dictating when the right to counsel attached occurred in *Escobedo*.[229] The dissent in *Escobedo* appears to have foreshadowed the current view of the Court that a flexible test is "amorphous and wholly unworkable."[230] Preindictment attachment of the counsel guarantee does present certain problems, including, who will make the determination that a stage is critical and how will the police know that an individual has become an accused so as to provide counsel when necessary. Since a court is not usually involved in cases prior to indictment, it seems inappropriate that a judge should make the determination. In addition, courts are

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[222] *See Brewer*, 430 U.S. at 406–09 (Marshall, J., concurring); *id.* at 415–29 (Burger, C.J., dissenting); *id.* at 429–38 (White, J., dissenting); *id.* at 438–41 (Blackmun, J., dissenting). Chief Justice Burger, in his dissent, cited the famous lines of Justice Cardozo regarding the price that society pays for the operation of the exclusionary rules: "The criminal is to go free because the constable has blundered . . . . A room is searched against the law, and the body of a murdered man is found . . . . The privacy of the home has been infringed, and the murderer goes free." People v. Defore, 242 N.Y. 13, 21, 23–24, 150 N.E. 585, 587, 588 (1926).

[223] *Brewer*, 430 U.S. at 407 (Marshall, J., concurring).

[224] Note, *Counsel During Interrogation*, *supra* note 8, at 1047.

[225] *Brewer*, 430 U.S. at 407 (Marshall, J., concurring) (quoting Spano v. New York, 360 U.S. 315, 320–21 (1959)). Thus, counsel's presence protects the integrity of the adversary system by preventing suggestive and overreaching conduct on the part of the police, as well as effectuating a defendant's other sixth amendment rights, such as confrontation and cross-examination. Note, *The Right to Counsel*, *supra* note 3, at 838.

[226] *Escobedo*, 378 U.S. at 488.

[227] *See* United States v Leon, 104 S. Ct. 3405, 3431 (1984) (Brennan, J., dissenting) (framers of the Bill of Rights insisted that law enforcement efforts be restricted in such a manner as to preserve individual freedom and privacy). *See also* Stewart, *supra* note 220, at 1393; Note, *Counsel During Interrogation*, *supra* note 8, at 1047.

[228] *See* Stewart, *supra* note 220, at 1393.

[229] *See Escobedo*, 378 U.S. at 492.

[230] *Id.* at 496 (White, J., dissenting).

already extremely crowded. If investigative efforts had to cease until a counsel hearing could be held, effective criminal investigations would be greatly hampered. Nevertheless, these practical problems are not insurmountable.[231] In the most frequently occurring situation, an individual is not confronted with the forces of government until indictment, therefore, the right to counsel would not attach until that point. But, in the situation where the individual undergoes a preindictment confrontation, law enforcement officials would learn to recognize that an accused must be provided with counsel.[232]

The sixth amendment demands a flexible inquiry because many events occur prior to indictment that could potentially cause irreparable prejudice to a defendant's right to a fair trial.[233] Although allowing the counsel guarantee to attach in some preindictment situations may mean some additional costs for the state,[234] the state's investigation and ultimate criminal conviction would not necessarily be compromised. In fact, as the *Wade* Court noted, fear that counsel could "obstruct the course of justice is contrary to basic assumptions" upon which the adversary system rests.[235] If anything, counsel's presence at preindictment confrontations would result in better law enforcement because the use of tainted evidence could be prevented, thereby protecting both the liberty interest of the individual and our system of justice by insuring that the innocent avoid conviction and the guilty are convicted on the basis of accurate and reliable evidence.[236]

The *Gouveia* decision, in addition to reaffirming the bright-line test of *Kirby*, further narrowed the scope of the counsel guarantee. The *Gouveia* Court did not repeat the oft-quoted lines from *Wade* regarding scrutiny of *any* pretrial confrontation. Moreover, the *Gouveia* majority stated that "the 'core purpose' of the counsel guarantee is to assure aid at trial, 'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'"[237] No mention is made in *Gouveia* of the historically broad purpose of counsel to protect a defendant's right to a fair trial.[238] Instead, the *Gouveia* majority merely stated that the right to counsel exists to protect an accused only in "trial-type" confrontations with his adversary.[239]

Undoubtedly, one facet of the counsel guarantee is to protect an accused in trial-type confrontations. But, in protecting an accused's most basic right to a fair trial, counsel

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[231] For a discussion of methods to hurdle these practical problems, *see infra* notes 289–310 and accompanying text.

[232] *See generally Miranda*, 384 U.S. at 444. Law enforcement officials recognize when they must give an individual a *Miranda* warning. In the same way, law enforcement officials would be responsible to determine when an accused required counsel at critical confrontations.

[233] *See Wade*, 388 U.S. at 227. *See also* Note, *The Pretrial Right*, *supra* note 93, at 400–03; Note, *Counsel During Interrogation*, *supra* note 8, at 1048–49. The author asserts that when the sixth amendment was put into effect, the state and the accused did not meet until trial because the investigative process was in the hands of private individuals. *Id.* at 1048. Because the investigative process is now in the hands of the state, the author asserts, the state and the accused meet at much earlier points in time. *Id.* Therefore, counsel must be present at these early points to serve their "traditional role as [a] buffer against the state." *Id. See infra* notes 293–310 and accompanying text.

[234] Note, *Counsel During Interrogation*, *supra* note 8, at 1046–47.

[235] *Wade*, 388 U.S. at 237–38.

[236] *See* Note, *The Right to Counsel*, *supra* note 3, at 840.

[237] *Gouveia*, 104 S. Ct. at 2298 (quoting *Ash*, 413 U.S. at 309). The *Gouveia* Court, instead of quoting the broad language of such decisions as *Powell* and *Wade* regarding the many functions of counsel, cited the language of a recent, fairly restrictive case which disallowed counsel's assistance at a postindictment photographic identification. *See Ash*, 403 U.S. at 309–10.

[238] *Wade*, 388 U.S. at 223–24; *Powell*, 287 U.S. at 69.

[239] *Gouveia*, 104 S. Ct. at 2299.

performs many functions other than mere protection of an accused during "trial-type" confrontations.[240] If counsel's function was only to protect an accused from the advocacy of the prosecutor, counsel would not be needed at line-up identifications. As line-ups are not trial-type confrontations nor are they filled with procedural technicalities,[241] under *Gouveia* principles, an accused would have no need for assistance. Yet, prior to *Gouveia*, the Court consistently recognized that the accused does have a right to counsel at these line-ups because the prosecutor may take advantage of the accused without his awareness, thus prejudicing the accused's right to a fair trial.[242] The Court has historically viewed counsel "as being more sensitive to, and aware of, suggestive influences than the accused himself."[243] Therefore, an accused's counsel is better equipped to reconstruct the earlier line-up events at trial.[244] By narrowly defining the function of counsel to protection of the accused during adversarial confrontations, the majority appears to be disregarding the many other functions which are vital to the presentation of a meaningful defense.

Because the *Gouveia* majority determined that the counsel guarantee was primarily to assure aid at trial, the defendant's requests for pretrial investigation were characterized as an attempt to obtain a "pre-indictment private investigator."[245] Although designating attorneys as "private investigators" may be an unusual assessment of their function, the Supreme Court since *Powell* has recognized that pretrial consultation and investigation are essential ingredients in the preparation of an accused's defense.[246] The *Gouveia* majority has departed from past precedent by labeling pretrial investigation as something other than a vital ingredient to the thorough preparation of an accused's defense. The *Gouveia* defendants were not demanding a pretrial private investigator. Instead, they were merely attempting to preserve their right to a fair trial through pretrial investigation of the alleged offenses promptly after the incident so that crucial witness testimony and other evidence would be preserved.[247] By delaying the pretrial investigation nearly two years, much of this evidence was lost.[248]

Finally, the *Gouveia* majority concluded that the defendants, though not protected by the sixth amendment right to counsel, were sufficiently protected by the statutes of limitation and the fifth amendment due process clause.[249] The Court stated that "appli-

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[240] *Powell*, 287 U.S. at 57 (counsel is vitally important for consultation, investigation and preparation of the defense).

[241] *See Ash*, 413 U.S. at 312 (line-ups do not confront an accused with legal questions, yet counsel should still be present since counsel is better equipped to re-create the line-up at trial).

[242] *Id.*

[243] *Id.*

[244] *Id. Ash* involved a postindictment photographic identification of an accused. *Id.* at 300–01. The Court found that because the accused was not present at the identification, he was not prejudiced in any way by his lack of familiarity with the law. *Id.* at 317. Thus, the counsel guarantee did not attach. *Id.* at 321. The Court found this photographic display to be merely a part of the prosecutor's pretrial witness preparation in which defense counsel has never had a right to intervene. *Id.* at 317. According to the Court, "[t]he traditional counterbalance in the American adversary system for these interviews arises from the equal ability of defense counsel to seek and interview witnesses himself." *Id.* at 318.

[245] 104 S. Ct. at 2300. The Court found it impossible to accept this "novel interpretation of the right to counsel." *Id.*

[246] *Powell*, 287 U.S. at 57.

[247] *See Gouveia*, 704 F.2d at 1122.

[248] *Id.* at 1125.

[249] 104 S. Ct. at 2300.

cable statutes of limitations protect against the prosecution bringing stale criminal charges against any defendant."[250] Yet, because the first degree murder charge involved in *Gouveia* is a capital offense, *no* statute of limitations applies.[251] Thus, the *Gouveia* defendants were not provided any protection by that provision.

The Court also cryptically referred to the fifth amendment due process clause as protection for the *Gouveia* defendants.[252] Yet, the Court never set out how this clause operates to protect the defendants. Instead, the Court merely laid out the standard for proving due process violations. This standard, according to the *Gouveia* Court, requires a showing of actual prejudice and intentional delay on the part of the government.[253] This standard, however, is extremely difficult to meet. For example, if an accused is claiming actual prejudice because witnesses' memories have dimmed or witnesses have died or disappeared resulting from the delay on the part of the government, whether intentional or not, discerning whether the individual has been actually prejudiced is nearly impossible. The testimony is not what it would have been had the defense counsel been permitted to investigate promptly. Moreover, knowledge of what the witnesses would have said or the effect of this testimony on the jury is impossible to determine.

The due process clause is a broad protection which is generally meant to ensure fairness in the adversary process.[254] The basic requirements of procedural due process are met if an individual is provided notice and an opportunity for a fair hearing.[255] Although the Court initially began analyzing the right to counsel as a component of the due process requirement of a fair hearing,[256] due process is not an adequate substitute for the numerous protections provided by the sixth amendment counsel guarantee. While due process generally protects the reliability and fairness of a proceeding, the right to counsel protects reliability and fairness, as well as many other rights of an accused.[257] Counsel ensures that an accused's right to confront and cross-examine adverse witnesses is protected.[258] In addition, counsel preserves many defenses available to an accused through witness interviews and discovery of favorable evidence. Therefore, an attorney at the pretrial stage can *prevent* the occurrence of abuse. The protection provided by due process, on the other hand, is an "after the fact" remedy because the event complained of has already occurred and the accused, on appeal, is arguing that his due process rights were violated.[259] As the *Wade* Court noted, counsel's presence is necessary to effectuate the defendant's first line of defense — "the prevention of unfairness and the lessening of the hazards"[260] which the defendant might encounter in the pretrial stages. Due process has only a "retrospective application."[261] Thus, neither the protec-

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[250] *Id.*

[251] *See* 18 U.S.C. § 3281 (1982) ("An indictment for any offense punishable by death may be found at any time without limitation . . . .").

[252] *Gouveia*, 104 S. Ct. at 2300.

[253] *Id. See also* U.S. v. Marion, 404 U.S. 307, 324 (1971).

[254] Anti-Fascist Committee v. McGrath, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring). *See supra* note 45 and accompanying text.

[255] Frank v. Mangum, 237 U.S. 309, 326 (1915).

[256] *Powell*, 287 U.S. at 67–69.

[257] Note, *The Right to Counsel*, *supra* note 3, at 827 (right to counsel protects the accused's right to confrontation, cross-examination and preparation of a defense).

[258] *Wade*, 388 U.S. at 227, 235.

[259] *See* Note, *The Right to Counsel*, *supra* note 3, at 830.

[260] *Wade*, 388 U.S. at 235.

[261] Note, *The Right to Counsel*, *supra* note 3, at 831.

tions of the statutes of limitations or the due process clause adequately guard against the problems envisioned by the sixth amendment.

B. Gouveia *Renders the Protection of the Sixth Amendment Worthless in the Prison Context*

In addition to retreating significantly from sixth amendment precedent, *Gouveia* effectively nullifies the right to counsel protection in the prison setting. Sixth amendment protections attach only if there is both an accused and a prosecution.[262] The *Gouveia* Court held that in the prison context, administrative detention of an inmate was not sufficient to fulfill the accused requirement of the sixth amendment until a formal indictment had been returned.[263] Therefore, despite the many protections provided a criminal defendant by the sixth amendment, none of them will be of any value to an accused inmate until the government decides to formally initiate proceedings.

In assessing the role that the sixth amendment assumes in and out of court, an evaluation of the extreme differences between the inmate and the non-inmate situations is essential.[264] The underlying assumption in *Kirby* and other right to counsel cases is that the indictment is the point at which the suspect is brought for the first time face to face with the prosecutorial forces of the government.[265] In the prison context, this assumption is incorrect. Through the prison disciplinary process, the inmates have already undergone a proceeding in which prison administrators have determined their innocence or guilt. At that point, administrative detention is one of several options available to prison administrators in order to maintain discipline and security within the prison environment.[266] ADU may be used for a variety of reasons: to protect the safety of prisoners; to break up potentially disruptive groups of inmates; or to hold inmates awaiting transfer to another institution.[267] While the prison environment, in and of itself, is an extremely restrictive environment, the prisoner in the general population retains certain constitutional rights which protect his or her liberty following incarceration.[268] Administrative segregation is one of the most severe disciplinary measures available to prison administrators because, in addition to separation from the general prison population and loss of nearly all privileges, ADU confinement can be for an indeterminate length.[269] Despite the recommendation in the regulations that confinement in ADU

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[262] *Gouveia*, 104 S. Ct. at 2298.

[263] *See id.* at 2299.

[264] *See Gouveia*, 704 F.2d at 1122. The court of appeals considered this case as one of first impression, one that is "unique to prison crime." *Id.* at 1119.

[265] *Id.* at 1120. *See Kirby*, 406 U.S. at 689 (the starting point of the criminal justice system is the formal initiation of proceedings).

[266] *See* 28 C.F.R. § 541.13 (1984). Other sanctions for inmate misconduct include parole date rescission or retardation, disciplinary transfer, disciplinary segregation, monetary restitution and loss of such privileges as commissary, movies and recreation. Generally, prison officials must have broad discretion over the institutions they manage. *See id.* at §§ 541.10–.49. Thus, courts take a fairly hands-off position in dealing with matters of prison administration. Hewitt v. Helms, 459 U.S. 460, 467 (1983) (prison officials must have broad administrative and discretionary authority over the prisons they manage); United States v. Duke, 527 F.2d 386, 390 (5th Cir.), *cert. denied*, 426 U.S. 952 (1976) (administrative segregation is subject to interference from courts only in cases of "wide abuse" of discretion). *See also* Robinson, *supra* note 30, at 60.

[267] Hewitt v. Helms, 459 U.S. 460, 468 (1983).

[268] Wolff V. McDonnell, 418 U.S. 539, 555 (1974).

[269] *See* 28 C.F.R. § 541.22 (1984).

should not persist longer than ninety days,[270] prison officials are given the discretion to continue confinement beyond that time if they believe it is necessary.[271] While the indefinite nature of ADU confinement may seem minor to those not in custody, to an inmate this uncertainty represents a significant loss of freedom.[272]

Although the considerations which lead to placement in ADU are similar to the considerations which lead to an arrest, the *Gouveia* Court refused to afford the same constitutional protections to confinement in ADU.[273] ADU confinement, like arrest, separates the individual from the public or the general prison population to prevent any further acts of violence. Both segregation in ADU and arrest result in the separation of the individual from witnesses to prevent communication and possible collaboration.[274] Finally, ADU confinement and arrest result in the disruption of the individual's activities, whether that involves employment or interruption of participation in prison programs. Therefore, confinement in ADU, like arrest, furthers the governmental interest in conducting an unhurried and thorough investigation and in protecting favorable witnesses and evidence.

Yet, upon arrest, the Federal Rules of Criminal Procedure are triggered and an individual must be promptly arraigned, thereby triggering the right to counsel.[275] Moreover, arrest in combination with holding an accused to answer to charges, triggers another sixth amendment protection, the speedy trial right.[276] While prolonged confinement in ADU has many qualities similar to arrest and holding to answer, it was held not to constitute an arrest,[277] therefore prompt arraignment never occurred and the speedy

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[270] 28 U.S.C. §§ 541.13, 541.22 (1982). *See also* 4 STANDARDS FOR CRIMINAL JUSTICE, Standard 23–3.3(b) (American Bar Ass'n 1981) (Legal Status of Prisoners). The ABA recommends that prisoners alleged to have engaged in conduct that would be a criminal offense under state and federal law may be confined in their quarters or something more secure for no more than ninety days, unless during that time an indictment or information is brought against the prisoner. This limitation would serve as a practical inducement for prison administration and prosecutors to decide promptly whether charges will be brought.

[271] 28 C.F.R. § 541.22 (1984).

[272] Robinson, *supra* note 30, at 59.

[273] *Gouveia*, 104 S. Ct. at 2300.

[274] *Gouveia*, 704 F.2d at 1122.

[275] Fed. R. Crim. P. 5(a) ("An officer making an arrest . . . shall take the arrested person without unnecessary delay before the nearest available federal magistrate."); Fed. R. Crim. P. 44(a) ("Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings . . . .").

[276] United States v. Marion, 404 U.S. 307, 320 (1971). The speedy trial right will attach if an individual is arrested and held in custody or on bail pending a certain date to answer for that crime, despite the lack of formal indictment. *Id.*

The speedy trial clause of the sixth amendment guarantees the fundamental right to an accused of a "prompt inquiry into criminal charges" while the case is fresh. Dickey v. Florida, 398 U.S. 30, 37–38 (1970). The speedy trial right protects against undue delay between arrest, indictment and trial which may impair a defendant's ability to present a meaningful defense. In addition, the speedy trial right protects an individual's liberty interest by attempting to minimize the disruption in an individual's life. United States v. Marion, 404 U.S. 307, 320 (1971). Moreover, Rule 48(b) of the Federal Rules of Criminal Procedure authorizes the dismissal of an indictment if there is unnecessary delay in presenting the case to the grand jury. Fed. R. Crim. P. 48(b). Finally, through the Speedy Trial Act of 1974, 18 U.S.C.A. §§ 3161–3174 (West Supp. 1979), Congress has imposed rigid time constraints under which defendants accused of federal crimes must be brought to trial. The crucial element to trigger the speedy trial right is an accusation. The individual must be an accused before this protection attaches. United States v. Marion, 404 U.S. 307, 313 (1971).

[277] *See Gouveia*, 704 F.2d at 1122.

trial and counsel rights never attached.[278] Although as a general rule detention in ADU is immune from both speedy trial[279] and right to counsel scrutiny,[280] some courts have stated that it should only be immune to the extent that the confinement is in no way related to or dependent upon the prosecution by the federal or state government of the inmate for the prison crime which resulted in placement in ADU.[281] In addition, the Court has emphasized that placement in ADU may not be used as a pretext for indefinite confinement of an inmate.[282] Finally, the government, at oral argument before the district court, conceded that if these inmates had been at large after the murder, instead of in prison, they would have been promptly arrested and taken before a magistrate, where counsel would have been appointed.[283] This disparity indicates that in circumstances like those present in *Gouveia*, ADU confinement should be given the constitutional significance of an arrest which it so closely resembles.[284]

The prison context reveals the most egregious example of the ability of prosecutors to take advantage of the distinction between indicted and unindicted defendants to postpone the formal initiation of judicial proceedings.[285] Although the administrative detention used in *Gouveia* appeared to be a pretext for indefinite confinement and was dependent upon federal prosecution for a prison crime, the *Gouveia* Court did not even consider giving segregation in ADU any independent significance. Moreover, despite the duty placed on courts to be "'alert to repress' any abuses of the investigatory power

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[278] *See id.*

[279] *See, e.g.*, United States v. Daniels, 698 F.2d 221, 223 (4th Cir. 1983); United States v. Clardy, 540 F.2d 439, 441 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976); *but see* United States v. McLemore, 447 F. Supp. 1229, 1236 (E.D. Mich. 1978).

[280] *See* Hewitt v. Helms, 459 U.S. 460, 467 (1983). ADU confinement is generally not treated as an arrest because prison officials need broad administrative and disciplinary authority over the institutions they manage.

[281] United States v. Duke, 527 F.2d 386, 390 (5th Cir.), *cert. denied*, 426 U.S. 952 (1976) (although the court found no speedy trial right attached due to ADU confinement for thirty-five days, it was clear that this conclusion was based on the fact that the confinement in ADU was "in no way related to or dependent on prosecution by the federal government of an inmate for that same offense as a violation of federal criminal law"). *See also Gouveia*, 704 F.2d at 1124.

[282] Hewitt v. Helms, 459 U.S. 460, 477 n.9 (1983).

[283] Brief of Respondents Mills and Pierce in Opposition to the Petition at 4, United States v. Gouveia, 104 S. Ct. 2292, (1984).

[284] *See Gouveia*, 704 F.2d at 1124–25. Allowing ADU confinement to be an accusation in certain circumstances would not necessarily result in an infringement of prison administrators' discretion or authority since several criteria must be fulfilled before ADU becomes analogous to an arrest. *See supra* notes 264–75 and accompanying text.

[285] *See* United States v. Mandujano, 425 U.S. 564, 595–96 (1976) (Brennan, J., concurring) (a de facto defendant, one that has not been formally indicted, is in much greater jeopardy of making disclosures which may hinder his defense than the de jure defendant who has, through indictment, been informed of the charges against him and probably consulted with an attorney).

The Court's refusal to extend to inmates sixth amendment protection coincides with the current trend of withdrawal of other prisoner's rights. In Wolff v. McDonnell, 418 U.S. 539 (1974), the Court held that every prisoner retains a significant portion of their constitutionally protected liberty following incarceration. *Id.* at 555–56. The Court in *Wolff* stated "[t]here is no iron curtain drawn between the Constitution and the prisons of this country . . . ." *Id.* Nine years later in Hewitt v. Helms, 459 U.S. 460 (1983), the Court stated that an inmate's interest in liberty is "not one of great consequence." *Id.* at 473. According to the *Hewitt* Court, an inmate transfer from the general population to ADU is insignificant because the inmate is merely going from one restrictive environment to an even more restrictive environment. *Id.*

invoked,"[286] the *Gouveia* Court was unwilling to examine the government's actions to determine if abuses of investigatory power had been present. In *Gouveia*, the actions of the government in delaying indictment and arraignment resulted in the suspension of the inmates' right to counsel, and therefore, their opportunity to build an effective defense, while the government, on the other hand, "neatly tied its case together."[287] Confined in ADU, the inmates were completely unable to use their own efforts to help alleviate the damaging effects of the passage of time.[288] The irreparable delay and prejudice to the inmates in *Gouveia* were the consequence of the Court's holding that the right to counsel had not attached at any point during segregation in ADU.

C. *Revision of the Determination of When the Right to Counsel Should Attach*

Instead of the arbitrary timeline set out by the Court in *Kirby* and *Gouveia* to determine when the right to counsel attaches, a more flexible and functional approach, derived from the Court's prior precedent, should be adopted to protect the rights of the accused as well as the rights of the government. Historically, the right to counsel has been found to be fundamental to our system of justice[289] because it ensures fairness in the adversary system and protects an accused's right to a fair trial.[290] These broad protections of the sixth amendment have been cited most frequently in defining what the counsel guarantee means for a criminal defendant.[291] The narrow approach taken by the *Gouveia* majority in finding that the counsel guarantee exists primarily to provide the accused only with assistance at trial[292] fundamentally misconstrues the broader ramifications of the right to counsel protection.

Given the broad definition of the function of the counsel guarantee, the plain language of the sixth amendment, and the Court's prior precedent, this casenote proposes the adoption of a flexible test to determine when the right to counsel attaches, instead of the mechanical "stage of the proceedings" test of *Kirby* and *Gouveia*. The proposed test involves a three-part inquiry based on the facts presented in each case to determine when the counsel guarantee attaches. The first step of the proposal involves a determination of whether an individual has become an accused.[293] Second, the probability of prosecution at some point in the future must be assessed. Finally, the possibility of prejudice to the defendant's right to a fair trial must be evaluated in each subsequent confrontation.[294]

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[286] United States v. Mandujano, 425 U.S. 564, 598 (1976) (Brennan, J., concurring).

[287] United States ex rel. Burton v. Cuyler, 439 F. Supp. 1173, 1181 (E.D. Pa. 1977), *aff'd*, 582 F.2d 1278 (3d Cir. 1978).

[288] *Gouveia*, 704 F.2d at 1122.

[289] United States v. Morrison, 449 U.S. 361, 364 (1981).

[290] *Wade*, 388 U.S. at 227.

[291] *See, e.g.*, *Ash*, 413 U.S. at 312 (counsel acts as a "spokesman for, or advisor to," an accused to enable him to plead intelligently and meet his adversary); *Wade*, 388 U.S. at 227 (counsel must be present at any stage in which his absence would impair an accused's right to a fair trial); *Escobedo*, 378 U.S. at 486 (at critical stages in the prosecution, rights may be irretrievably lost if an accused does not have the aid of counsel); Johnson v. Zerbst, 304 U.S. 458, 462 (1938) (the right to counsel is one of the safeguards deemed necessary to insure the fundamental rights of life and liberty); *Powell*, 287 U.S. at 68–69 (it serves no purpose to give an accused a day in court without giving him counsel to help him prepare his defense).

[292] *Gouveia*, 104 S. Ct. at 2298.

[293] *See Escobedo*, 378 U.S. at 490–91. *See also supra* notes 81–89 and accompanying text.

[294] *See Wade*, 388 U.S. at 227. *See also supra* notes 96–121 and accompanying text.

Since the plain language of the sixth amendment requires an "accused" before the right to counsel attaches, the first inquiry of the proposed test is directed at determining if an individual has become an accused. Whether a person stands accused can only be determined from the totality of the circumstances.[295] In *Escobedo*, the Court enunciated a test to determine when an individual has become an accused.[296] The *Escobedo* Court stated that once an investigation changes from a general inquiry of a criminal offense into a focused investigation on one suspect, that individual has become an accused.[297] The *Escobedo* test would provide a simple and accurate method to answer the first inquiry of the proposed test.

Once an individual has become an accused, the new proposal next requires an inquiry into the nature and frequency of the confrontations which the accused has with the government. If it appears that the government is planning to initiate prosecution at some point in the future,[298] the second requirement of the sixth amendment and the new proposal is satisfied. If an investigation has focused on one individual in regard to a specific act or series of acts, the answer to the second inquiry of the proposed test will probably be in the affirmative.

Finally, if an individual is an accused and prosecution is likely, the third prong of the proposal requires that counsel be provided at all critical stages of the proceedings.[299] As the *Wade* Court determined, if the possibility of prejudice to the defendant's right to a fair trial inheres, then the stage is a critical one in which the accused must have counsel.[300] Therefore, in determining when the right to counsel attaches each of the three requirements must be fulfilled. First, has the individual become the accused, in that the investigation has ceased to be a general inquiry and has become a focused investigation? Second, is it reasonably foreseeable that the government will prosecute the individual? Third, does the possibility of prejudice inhere to an accused's right to a fair trial? If affirmative answers to all three inquiries are ascertained, the right to counsel should attach, regardless of the initiation of formal proceedings.

Instead of applying the mechanical test formulated in *Kirby* to determine when the right to counsel attaches, the Court could rely on its prior precedent and utilize this general accusatory-critical stage proposal to determine when the counsel guarantee attaches. By drawing on the Court's precedent, this proposal provides an appropriate balance of interests between the defendant and the government, because it requires scrutiny of any pretrial confrontation, formal or informal.[301] Yet, the right to counsel only attaches when the three required elements are fulfilled.

The practical application of the proposed inquiry would not provide a bright-line test like that used in *Kirby* and *Gouveia*. Undoubtedly, use of the new proposal would be more difficult than the simple rule that counsel attaches at or after the initiation of

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[295] *See Marion*, 404 U.S. at 325 (courts must look to the circumstances of each individual case to accommodate the sound administration of justice.); Massiah v. United States, 377 U.S. 201, 204 (1964) (the totality of the circumstances must be considered to determine if an individual is entitled to a lawyer's aid).

[296] *Escobedo*, 378 U.S. at 490–91.

[297] *Id.*

[298] Independent government investigation, prosecutive files and grand jury investigation are all external evidence of a prosecution. *See Gouveia*, 704 F.2d at 1118.

[299] *Wade*, 388 U.S. at 224.

[300] *Id.* at 227.

[301] *Id.* at 226.

formal proceedings.[302] Despite the practical difficulties, however, the proposal would provide the necessary protection for the fundamental right of an accused to a fair trial by allowing attachment when counsel is necessary instead of when the government dictates. The *Gouveia* Court's underlying concern with the practical implementation of a functional rule like the proposed accusatory-critical stage test is unfounded because the proposed test could easily operate like other law enforcement procedures mandated by the Bill of Rights.[303] Regardless of the initiation of formal proceedings, government officials would be responsible for the determination of when the right to counsel attaches by utilizing the three-part test.[304] Just as government officials are able to determine if probable cause for a search warrant exists,[305] they would be able to determine if an accused required counsel at any stage if prejudice to the defendant's right to a fair trial was likely.

The second motivation underlying the *Kirby* and *Gouveia* decisions — the concern that the counsel guarantee could operate to overturn criminal convictions[306] — would not necessarily result from the implementation of the new proposal. Under the proposed test, a government official may determine that an individual does not have the right to counsel; yet a reviewing court might disagree with the government official's decision. The consequences of this court reversal of the government official's decision would not necessarily result in the overturning of criminal convictions. Instead, as the Court in *United States v. Morrison* stated, "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered . . . and should not unnecessarily infringe on competing interests."[307] Therefore, if the government failed to provide counsel when the three-prong test required counsel's

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[302] At the outset, undoubtedly the proposed test could produce many re-trials resulting from evidence suppression and perhaps the overturning of some criminal convictions. But this new rule could operate like other constitutional protections. The government, due to the operation of the exclusionary rule, delays searches until probable cause is established. Illinois v. Gates, 462 U.S. 213, 226–27 (1983) (government investigators observed the activities of the two suspects for five days before submitting an affidavit with the anonymous letter in support of the search warrant). In the same way, the government, as a result of the proposed test, would provide an attorney to an accused individual in a critical confrontation, rather than run the risk that the evidence would later be excluded.

[303] *See generally Miranda*, 384 U.S. at 444. Officials must warn an accused of his constitutional rights of silence and counsel. If a court determines that an accused was not given the proper warning and the confession was extracted involuntarily, the evidence must be suppressed. *Id. See supra* note 91 and accompanying text. *See also* Illinois v. Gates, 462 U.S. 213, 230–31 (1983). From a totality of the circumstances, it must be ascertained that the police affidavit established probable cause for the search warrant to issue. If, upon review, it is found that the affidavit did not provide the basis for a determination of probable cause, the evidence must be suppressed. *Id.*

[304] Because the government officials are conducting the investigation, they would be the best qualified to determine if an individual had become an accused, if prosecution was likely and if the possibility of prejudice to the defendant's right to fair trial inhered.

[305] Illinois v. Gates, 462 U.S. 213, 226 (1983) (the anonymous letter, corroborated by the activities of the suspects, established probable cause which the police set forth in their affidavit); Draper v. United States, 358 U.S. 307, 308–09 (1959) (an informant's detailed description of the future events, corroborated by the activities of the suspect was sufficient to establish probable cause for a warrantless arrest).

[306] *See Brewer*, 430 U.S. at 437 (White, J., dissenting) ("a mentally disturbed killer whose guilt is not in question may be released" because the majority believes that law enforcement officers violated the defendant's right to counsel). *See supra* notes 222–28 and accompanying text.

[307] United States v. Morrison, 449 U.S. 361, 364 (1981).

presence, the evidence obtained without counsel's assistance might be suppressed, but that would not necessarily result in the reversal of a criminal conviction.[308] Instead, the government would be free to proceed with a new trial without the use of the evidence wrongfully obtained.[309]

In applying this accusatory-critical stage test to the typical lengthy government investigation into the criminal activities of one individual, the balancing of both parties' interests becomes apparent. Frequently, an individual will become the center of inquiry of an ongoing criminal investigation. Once an investigation ceases to be a general inquiry into an unsolved crime, and has become focused on one individual, that individual has become an accused under the new standard. But, under this proposed standard, the mere transformation of an individual into the accused does not trigger the sixth amendment guarantee. The ongoing criminal investigation indicates that future prosecution will, in all liklihood, be initiated. If, during this investigation, the accused is not personally confronted with the forces of government, the right to counsel will not attach. But, if an individual is confronted in such a manner as to prejudice his right to a fair trial, the guarantee will attach at that point. In this way, the accused's sixth amendment rights are protected, while at the same time, the government's ability to conduct a lengthy and thorough investigation is preserved.

While the proposed test would be more difficult to apply than the *Gouveia* test, through the Court's adoption of a less complicated rule, it becomes apparent that inadequate protection is provided for the fundamental right to counsel. The bright-line test adopted by the *Gouveia* majority has resulted in "disrespect for . . . important precedents of [the Supreme] Court."[310] The counsel guarantee demands the sensitive inquiry set out in the proposed test which provides respect for the interests of an accused in a fair trial and the interest of the government in a thorough and efficient investigation of criminal activity.

D. *Application of the Proposed Standard to the Facts in* Gouveia

The application of the proposed standard to the facts of *Gouveia* reveals the advantages of a flexible system as compared to the rigid one adopted by the Supreme Court. Utilizing the proposal to analyze the *Gouveia* defendants' situation involves an examination of the rights of the individual, the interests of the government, and the interests of a specific division of the state, the prison administrators. In looking to these conflicting interests, under the proposed standard, the right to counsel would not have attached immediately upon placement of the *Gouveia* defendants in administrative detention. Prison administrators must have the discretion to take this sort of action to protect the safety of the institution.[311] But, once the prison administrators had held their internal prison hearings and determined that the inmates held in ADU had committed the murder, the inquiry shifted from a general investigation into a specific and focused

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[308] *See Wade*, 388 U.S. at 239–40 (a new trial was granted at which evidence obtained without the assistance of counsel must be excluded); *Morrison*, 449 U.S. at 366–67 (defendant was not prejudiced in any way by the postindictment confrontation, therefore the remedy of indictment dismissal was inappropriate).

[309] *Morrison*, 449 U.S. at 365 (remedies for counsel violations should not result in dismissals of indictments; rather, the convictions should be reversed and new trials ordered).

[310] United States v. McDonald, 456 U.S. 1, 15 (1982) (Marshall, J., dissenting).

[311] Hewitt v. Helms, 459 U.S. 460, 467 (1983).

inquiry.[312] In addition, prison records indicated that the inmates' segregation was pursuant to the ongoing FBI investigation, rather than for internal prison security.[313] Therefore, at this point, the inmates became the accused. Second, it was apparent that criminal prosecution of the inmates was forthcoming. Prison officials had informed the inmates almost immediately after placement in ADU that they would eventually be indicted and tried on the murder charge.[314] The FBI investigation and the prosecutorial files are extrinsic evidence of the future indictments.[315] Finally, because the inmates had previously undergone prison disciplinary proceedings at which they did not have the full array of constitutional rights,[316] any confrontations beyond this point were critical ones because there was great potential for irreparable prejudice resulting from the inmates' lack of understanding of their constitutional rights and protections. In addition, the potential for prejudice at subsequent confrontations was greatly increased because "[c]onfined in a prison . . . [an inmate's] ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired."[317]

Although application of the proposed standard would operate to provide the inmates with counsel during their confinement in ADU, this would not infringe on prison administrators' broad discretion. Prison officials determined that the inmates had committed a prohibited act of the greatest severity, therefore the maximum punishment was certainly warranted.[318] Yet, confinement in ADU which is linked to an ongoing criminal investigation results in an accusation for purposes of the government's investigation and the defendants should have been provided with counsel to protect their right to a fair trial. By utilizing the proposed standard, the defendant's right to a fair trial would have been preserved, the government's interest in a thorough investigation would not have been sacrificed, and the prison authorities' need for broad discretion would not have been infringed upon.

CONCLUSION

In *Gouveia*, the Supreme Court continued restriction of the scope of the sixth amendment right to counsel by holding that the guarantee attaches only at the initiation of formal adversary proceedings. This approach seems to disregard the Court's prior precedent which held that the right to counsel attaches at any point in the proceedings, formal or informal, in which the potential for substantial prejudice to the defendant's right to a fair trial inhered.[319] The mechanical rule adopted by the *Gouveia* Court restricts

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[312] Joint Appendix for the Petition for Writ of Certiorari at 49–50, United States v. Gouveia, 104 S. Ct. 2292 (1984). The results of the prison investigation and hearings were provided to the government to aid them in their investigation. The investigation became focused on the defendants, if not at the outset, at the conclusion of the prison investigation. *Id.*

[313] Brief of Respondents Mills and Pierce in Opposition to the Petition at 2–3, United States v. Gouveia, 104 S. Ct. 2292 (1984).

[314] *Id.* at 3.

[315] *Gouveia*, 704 F. 2d at 1118.

[316] Wolff v. McDonnell, 418 U.S. 539, 563–72 (1974). Prisoners must receive advance written notice of violations and a written statement as to evidence relied upon to support the disciplinary action. *Id.* at 564. Inmates have a limited right to call witnesses and present documentary evidence at disciplinary proceedings. *Id.* at 566. Prisoners do not have the right to counsel at administrative and disciplinary hearings. *Id.* at 569.

[317] Smith v. Hooey, 393 U.S. 374, 379–80 (1969).

[318] *See* 28 C.F.R. § 541.13 (1984).

[319] *See Wade*, 388 U.S. at 226, 227.

the scope of the right to counsel guarantee in that the fundamental fairness meant to be inherent in the adversary process is substantially diluted. Under the *Gouveia* standard, regardless of the number or nature of the confrontations between the government and the accused, the right to counsel will not attach until the government decides to initiate formal proceedings. Instead of the flexible inquiry into the particular circumstances of each case which the sixth amendment demands, courts can now simply determine if formal proceedings have been started. The inquiry is very simple, but at the expense of the protections meant to be provided by the sixth amendment.

Instead of the rigid rule enunciated by the Court in *Gouveia*, this casenote proposes the adoption of a flexible, three-prong test. Under the proposed standard, three questions must be answered: whether an individual has become an accused; whether prosecution is likely; and whether the confrontations between the accused and the government are occurring at a critical stage of the investigation. Unlike the formalistic approach of *Gouveia*, the proposed test would allow preindictment attachment of the right to counsel in appropriate circumstances, providing an accused with sixth amendment protection when necessary, not when the government dictates. This flexible approach to right to counsel claims would guarantee that the accused does not stand alone against the state at any time.

NANCY J. MAMMEL