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Of Trumpeters, Pipers, and Swingmen: What Tune Is the Burger Court Playing in Right to Representation Cases?

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I. Prelude: The History of and Problems in Right to Representation Cases[1]

One hundred and forty years after its embodiment in the sixth amendment,[2] the right to counsel was proclaimed by the Supreme Court as a meaningful constitutional right;[3] since that proclamation, the right at trial has been expanded intermittently yet consistently, but attachment of the right at stages of the criminal process other than trial and collateral questions concerning the right have been the subjects of considerable controversy and confusion. Regarding the right at trial, the Supreme Court during the 1930's decided two key cases: the first was *Powell v. Alabama*,[4] the 1932 proclamation case, which established the right to appointed counsel for indigents in federal capital offense cases,[5] and the second was *Johnson v. Zerbst*,[6] which extended the right to appointed counsel for indigents in all federal criminal cases.[7] Later, in *Betts v. Brady*,[8] a 1942 decision in which due process rather than sixth amendment reasoning was applied, the Court found against the defendant and seemingly slowed expansion of the right to state criminal cases by holding that appointment of counsel for indigents was necessary only if the totality of circumstances demanded the presence of counsel. Nevertheless, application of this special circumstances approach did not restrict the right as much as might have been ex-

1. Because the Burger Court in Faretta v. California, 422 U.S. 806 (1975), has held recently that a constitutional right to proceed without counsel exists, that Court's cases concerning the presence or absence of counsel will be designated as "right to representation" rather than "right to counsel" cases.

2. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

3. Prior to Powell v. Alabama, 287 U.S. 45 (1932), an accused enjoyed a constitutional right to employ counsel. The right was made "meaningful" when a constitutional right to appointment of counsel was "proclaimed."

4. 287 U.S. 45 (1932).

5. The Court in *Powell* also spoke for the first time of effective representation. Technically, however, the holding in *Powell* was based on due process and not sixth amendment reasoning.

6. 304 U.S. 458 (1938).

7. The Court in *Johnson* employed, for the first time, sixth amendment reasoning in holding for the right to appointment of counsel. The Court in *Johnson* also said, for the first time, that a waiver of counsel must be express.

8. 316 U.S. 455 (1942).

pected.[9] In 1963, during the Warren Court era, the Court rendered *Gideon v. Wainwright*,[10] which is still the most dramatic decision in the right to counsel area. *Gideon*, which overruled *Betts*, incorporated the sixth amendment right to counsel into the due process clause of the fourteenth amendment and hence extended the right to appointed counsel to indigents in all state felony cases.[11] Recently, the Burger Court in *Argersinger v. Hamlin*[12] has expanded further the right to appointed counsel for indigents in many state misdemeanor cases. Although *Gideon* resolved the question of the sixth amendment's incorporation into the fourteenth amendment for trial purposes, the decision also provocatively opened the question whether the right to counsel attaches at other stages of the criminal process, both pretrial and post-trial. This latter issue was treated only lightly before *Gideon*[13] and remains a matter of controversy. While the key decisions of the Warren Court after *Gideon* expanded the right toward both ends of the spectrum—from the trial center back to interrogation and identification and forward to sentencing and appeal—the decisions of the Burger Court have been much more chaotic, expanding the right on some occasions and restricting it on others, in both directions. Further adding to the confusion is the Burger Court's recent decision concerning an important collateral question: in *Faretta v. California*[14] the Court held that a criminal defendant has a constitutional right to proceed without counsel.

In order to understand better the seemingly disharmonious tune of the Burger Court in the right to representation cases, a closer analysis of the Warren Court's key right to counsel cases after

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9. One commentator has stated:

> In the cases following *Betts*, . . . [f]actors [that] the Court considered in determining whether due process requirements were met in each specific case included the capacity of the criminal defendant—his age, ignorance, illiteracy, and inexperience; the complexity of the criminal proceeding—the showing of substantial error in the proceeding indicating that counsel had in fact been needed; and, finally, the severity of the penalty to he imposed on the unsuccessful defendant.

Comment, *The Continuing Expansion of the Right to Counsel*, 41 U. COLO. L. REV. 473, 476 (1969).

10. 372 U.S. 335 (1963).

11. The Court in *Gideon* also held that its ruling was retroactive; therefore, those state prisoners who without counsel and without waiver of counsel had been convicted of felonies before *Gideon* could attack their convictions.

12. 407 U.S. 25 (1972).

13. *See* Hamilton v. Alabama, 368 U.S. 52 (1961) (right to appointment of counsel attaches at arraignment in which defenses will be lost if not pleaded); Griffin v. Illinois, 351 U.S. 12 (1956) (state must provide free transcript to indigent defendant who is appealing).

14. 422 U.S. 806 (1975).

Gideon will be helpful, both because these cases are important as precedents and because they illuminate proclivities of the Warren Court in this constitutional area.[15] In the three years following *Gideon*, the Warren Court decided three cases that were significant for, among other reasons, the variety of their rationales. In *Douglas v. California*[16] the Court relied on the equal protection clause of the fourteenth amendment to hold that states must provide free counsel to indigents on appeals granted by the states as a right. One year later in *Escobedo v. Illinois*[17] the Court, applying sixth amendment reasoning, recognized a right to retained counsel during police station interrogations. Subsequently in *Miranda v. Arizona*[18] the Court employed the self-incrimination provision of the fifth amendment to grant a right to appointed counsel during custodial interrogations. Although the Court in *Miranda* reemphasized its fear, earlier expressed in *Escobedo*, of the coercive nature of police tactics, the Court's reliance in *Miranda* on the fifth amendment cast considerable doubt on the possibility of applying the sixth amendment reasoning of *Escobedo* to other pretrial situations. In 1967, the Warren Court rendered five variegated decisions. In *In re Gault*[19] the Court held that the right to counsel attaches at those juvenile proceedings in which institutional confinement could result. Determining initially in *Gault* that juvenile proceedings are not criminal prosecutions and hence not sixth amendment prosecutions, the Court then decided, on the basis of due process reasoning, that the possible sanctions of institutional confinement and negligible treatment are so severe that the presence of counsel is necessary to protect the privilege against self-incrimination and to protect the rights of confrontation and cross-examination. In *United States v. Wade*[20] and *Stovall v. Denno*[21] the Warren Court dealt with the right to counsel in the context of pretrial identifications. Speaking of the suggestion inherent in identifications, much as the Court in *Miranda* had spoken of the compulsion inherent in interrogations, the Court in *Wade* voiced regard for enhancing the fairness of the eventual trial and accorded a sixth amendment right to counsel to protect the other sixth amendment rights of confrontation and cross-examination.

15. *See generally* Stephens, *The Assistance of Counsel and the Warren Court: Post-Gideon Developments in Perspective*, 74 DICK. L. REV. 193 (1969).

16. 372 U.S. 353 (1963).

17. 378 U.S. 478 (1964).

18. 384 U.S. 436 (1966).

19. 387 U.S. 1 (1967).

20. 388 U.S. 218 (1967).

21. 388 U.S. 293 (1967).

The holding in *Wade*, however, concerned only the right to counsel at post-indictment lineups and hence left unclear both the application of the right to other identifications and the chronological point of attachment. *Stovall* was significant because the Court created criteria for determining whether to accord retroactivity to rules embodied in new right to counsel cases[22] and because the Court noted the possibility that, even if the sixth amendment would not apply to certain pretrial identification situations, due process might. In finding against the defendant, however, the Court in *Stovall* refused to give retroactivity to the *Wade* holding and determined that the lineup in *Stovall* was not so suggestive as to violate due process. Although the Warren Court in *Stovall* refused to accord retroactivity to the *Wade* holding and hence left in doubt greater expansion of the right in pretrial cases, the Court subsequently in *Burgett v. Texas*[23] granted further retroactivity to the *Gideon* holding[24] and in *Mempha v. Rhay*[25] continued expansion in post-trial cases. In *Burgett*, which concerned a counseled felony conviction obtained after *Gideon* but the evidentiary use of uncounseled felony convictions obtained before *Gideon*, the Court held that, when a defendant is tried under a recidivist statute, use of prior felony convictions, obtained without counsel and without waiver of counsel, causes the defendant to suffer anew and cannot be employed either to support guilt or to increase punishment. In *Mempha* the Court held that, when a defendant has been convicted but has been placed on probation with sentencing deferred, the right to counsel attaches at a probation revocation hearing. From these eight key cases after *Gideon*, certain conclusions can be drawn regarding the tendencies of the Warren Court in the right to counsel area.[26] First, although never confronting directly the issue of standards for indigency, the Warren Court was obviously sympathetic to the plight of the poor. Secondly, the Warren Court viewed the right to counsel not only as a sixth amendment right but also as a right that was

22. Those criteria are: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards and (c) the effect on the administration of justice of a retroactive application of the new standards." *Id.* at 297.

23. 389 U.S. 109 (1967).

24. *See* note 11 *supra*.

25. 389 U.S. 128 (1967).

26. The conclusions to be drawn concern the tendencies of the *majority* within the Warren Court. Justice White ominously voted against the right to counsel in 5 of the 8 key cases, dissenting in *Escobedo, Miranda, Wade*, and *Burgett*, and concurring in *Stovall*. Justice Stewart, even more ominously, voted against the right in 6 of the 8 cases, dissenting in *Douglas, Escobedo, Miranda, Gault*, and *Wade*, and concurring in *Stovall*.

supportive of other constitutional provisions.[27] Finally, the Warren Court, possibly for these reasons, almost always was willing to expand the right to counsel to both pretrial and post-trial stages of the criminal process.

Six years after *Gideon*, the Warren Court became the Burger Court in name because the previous Chief Justice was replaced by the new Chief Justice; shortly thereafter, the new Court became the Burger Court in fact because Justices Fortas, Harlan, and Black were replaced by Justices Blackmun, Rehnquist, and Powell. As it faced the multifaceted right to representation issue, the Burger Court was subjected to three divergent pulls. First, the Court was confronted, as the Warren Court had been, with the variable verbiage of the sixth amendment, a pliable provision narrow enough to cover almost nothing and broad enough to cover almost everything.[28] Secondly, another pull, again faced by both Courts, was the restrictive resistance to reform of the lower courts,[29] which have had a conscientious concern for the needs of society and the allocation of manpower, money, and time.[30] A final pull was the liberal legacy of the Warren Court,[31] which had been concerned with the needs of

27. "The [Warren] Court [was] willing to engage in as much 'amendment jumping' as necessary to expand the doctrine of right to counsel, because the Court [considered] counsel to be the paladin of fairness to the accused." Steele, *The Doctrine of Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession*, 23 Sw. L.J. 488, 495 (1969).

28. One commentator has stated:

> The words "criminal prosecutions" and "defence" are too narrow because it strains their plain meaning to extend their import to some of the modern stages of the criminal continuum . . . . It may reasonably be argued that it was the recognition of just such limitations [that] caused the Supreme Court to use the fiftb amendment as the rationale for *Miranda* . . . .
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> . . . The words "criminal prosecutions," "accused," and "defence" as used in the sixth amendment . . . do not set any . . . limits . . . to any particular level of criminal prosecutions. In this respect the langauge of the sixth amendment is overly broad . . . . The Court seemed to have this fact in mind when it decided *Betts* . . . .

Id. at 491.

29. *See, e.g.*, Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. Rev. 785 (1970).

30. The enormity of the allocation problem is illustrated by the following statistics: Each year, approximately 350,000 felony arrests are made; of those arrested, approximately 250,000 cannot afford a lawyer. Each year, approximately 5,000,000 misdemeanor arrests are made; of those arrested, approximately 1,250,000 cannot afford a lawyer. Each year, approximately 50,000,000 traffic cases occur. *See generally* Duke, *The Right to Appointed Counsel: Argersinger and Beyond*, 12 Am. Crim. L. Rev. 601 (1975); Rossman, *The Scope of the Sixth Amendment: Who Is A Criminal Defendant*, 12 Am. Crim. L. Rev. 663 (1975); Steele, *supra* note 27.

31. As used in the text, "liberal" means willing to side with the defendant by expanding the right to representation. As discussed in the text, the Warren Court after *Gideon* was "liberal" in 7 of its 8 key right to counsel cases.

	Votes for Expansion and/or Against Contraction of the Right to Representation																Votes for Contraction and/or Against Expansion of the Right to Representation																		
JUSTICES	McMann v. Richardson	Coleman v. Alabama	Chambers v. Maroney	U. S. v. Tucker	Adams v. Illinois	Loper v. Beto	Brooks v. Tennessee	Kirby v. Illinois	Argersinger v. Hamlin	Tollett v. Henderson	Gagnon v. Scarpelli	U. S. v. Ash	Ross v. Moffitt	Wolff v. McDonnell	Faretta v. California	Herring v New York	McMann v. Richardson	Coleman v. Alabama	Chambers v. Maroney	U. S. v. Tucker	Adams v. Illinois	Loper v. Beto	Brooks v. Tennessee	Kirby v. Illinois	Argersinger v. Hamlin	Tollett v. Henderson	Gagnon v. Scarpelli	U. S. v. Ash	Ross v. Moffitt	Wolff v. McDonnell	Faretta v. California	Herring v. New York	% of votes for rt. to rep.	% of votes with majority	total of cases for and against rt. to rep.
Douglas	d	C		m	D	m	m	d	M	d	D④	d	D		m	m			m											D⑤			88	63	
Brennan	D	M		m		m	M	D	m	d	m	D	d		m	m			m		M									d⑤			81	69	
Marshall	d	m		m	d	m	m	d	m	D	m	d	d		m	m			m											D⑤			88	63	
Burger									C		m						m	D	m	d	C	D	D	C		m		m	m	m	D	d	12	63	
Blackmun									m		m									D	C	D	d	m		m		M	m	m	D	d	15	62	
Rehnquist									c		m											D	D	m		M		m	M	m	d	D	18	64	
Stewart				M		M	C		m		m				M	M	m	D	C		m			M		m		C	m	m			44	94	
White		C		m		C	m	D	m		m				m	m	M		M		m					m		m	m	M			56	94	
Powell							m		C		M				m	m						d		C		m		m	m	m			45	91	
Total of votes for and against rt. to rep.	① 3	② 6	③ 1	5	2	5	6	4	9	3	9	3	3	0	6	6	① 5	② 2	③ 7	2	5	4	3	5	0	6	0	6	6	9	3	3			8-8

SYMBOLS: M (wrote majority opinion)
m (participated in majority)
C (wrote concurring opinion)
c (participated in concurrence)
D (wrote dissenting opinion)
d (participated in dissent)

NOTES: 1. Black wrote concurring opinion & Harlan participated in m.; 2. Black wrote concurring opinion & Harlan wrote concurring opinion; 3. Black participated in m. & Harlan wrote dissenting opinion; 4. Douglas dissented but voted for counsel; and 5. Douglas, Brennan, and Marshall dissented but did not vote for counsel.

individuals vis-á-vis the power of police, prosecution, and judiciary. Thus in the context of the Constitution, the Burger Court has had to face a constant question in the right to representation cases: How best to balance the needs of society and the needs of individuals?

At the time of this Note, the Burger Court has faced this question for six years, the same span of time in which the Warren Court after *Gideon* established its liberal legacy. As the accompanying chart reveals, the sixteen right to representation decisions of the Burger Court during this period have been split equally, eight extending and eight restricting the right. This split obviously has slowed the momentum of the Warren Court decisions. As the accompanying chart also demonstrates, the members of the Burger Court have been split equally into three voting blocs. Although *Gideon v. Wainwright* was an unanimous decision by the Warren Court for the defendant, those who almost always have blown the trumpet of Gideon (the accused) are Justices Douglas, Brennan, and Marshall. Although *Argersinger v. Hamlin* was also an unanimous decision by the Burger Court for the defendant, those who almost always have followed the piper of Hamlin (the government) are Chief Justice Burger and Justices Blackmun and Rehnquist. This conflict between the "Trumpeters" and the "Pipers" was made even more clamorous by the clashing contentions of Justice Douglas and Chief Justice Burger, but the recent retirement of Justice Douglas has ended this second six-year era. Nevertheless, because two members of his group still remain and because all three members of the third bloc, the "Swingmen," still remain, it is important to analyze the Burger Court decisions of that six-year period. Thus the purpose of this Note is to reveal and review the reasonings and voting patterns of the three blocs, to scrutinize the substance and scope of the decisions, and to attempt to predict the implications of those factors for further cases—in effect, to recognize the tune the Burger Court is playing in the right to representation cases.

II. FUGUE: THE BLOCS

As the accompanying chart demonstrates, the first of two major points to be drawn from a bloc analysis of the Burger Court's sixteen right to representation cases during its initial six years is that the "Trumpeters" voted together ninety-four percent of the time and voted for the right in more than eighty percent of the cases, while the "Pipers" voted together one hundred percent of the time and voted against the right in more than eighty percent of those cases. Why have the "Trumpeters" and the "Pipers" differed so often? One obvious answer resides in their competing philosophies.

In their right to representation opinions, Justices Douglas, Brennan, and Marshall echoed and accentuated the Warren Court's sympathy for the oppressed individual and fear of governmental power: these three Justices stressed the impotency of the impoverished defendant and the potential potency of officials who could be " 'motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.' "[32] The three Justices not only showed a strong distrust of the instrumentalities of government—police, prosecutors, courts, and other governmental forces—but also expressed a rigorous regard for procedural regularity and reform to protect the accused. Typically, Justice Marshall spoke of " 'higher values than speed and efficiency,' "[33] and Justice Brennan spoke of "grave dangers that an innocent defendant might be convicted."[34] Thus these three Justices engaged in a kind of prophylactic reasoning process,[35] the main tenet of which was that, to protect the accused and to combat the superior resources and advantages of government, the individual defendant should be accorded all possible tools " '*whenever* necessary to assure a meaningful "defense." ' "[36]

By contrast, in their right to representation opinions, Chief Justice Burger and Justices Blackmun and Rehnquist voiced the fears and faiths of the lower courts: these three Justices stressed the interests of society in the orderly administration of the criminal process[37] and showed a strong trust in the instrumentalities of that system.[38] Additionally, they unveiled an underlying belief in the

32. Wolff v. McDonnell, 418 U.S. 539, 586 (1974) (Marshall, J., dissenting).

33. *Id.* at 583 (Marshall, J., dissenting) (quoting from Fuentes v. Shevin, 407 U.S. 67, 90-91 n.22 (1972)).

34. United States v. Ash, 413 U.S. 300, 338 (1973) (Brennan, J., dissenting).

35. *See*, for Justice Douglas: Wolff v. McDonnell, 418 U.S. 539, 593 (1974) (dissent); Argersinger v. Hamlin, 407 U.S. 25 (1972); Adams v. Illinois, 405 U.S. 278, 286 (1972) (dissent); Coleman v. Alabama, 399 U.S. 1, 14 (1970) (concurrence); for Justice Brennan: United States v. Ash, 413 U.S. 300, 326 (1973) (dissent); Kirby v. Illinois, 406 U.S. 682, 691 (1972) (dissent); Brooks v. Tennessee, 406 U.S. 605 (1972); Coleman v. Alabama, 399 U.S. 1 (1970); for Justice Marshall: Wolff v. McDonnell, 418 U.S. 539, 580 (1974) (dissent); Tollett v. Henderson, 411 U.S. 258, 269 (1973) (dissent).

36. United States v. Ash, 413 U.S. 300, 341 (1973) (Brennan, J., dissenting) (quoting from United States v. Wade, 388 U.S. 218, 225 (1967)).

37. *See*, for Chief Justice Burger: Faretta v. California, 422 U.S. 806, 836 (1975) (dissent); Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) (concurrence); Brooks v. Tennessee, 406 U.S. 605, 613 (1972) (dissent); Loper v. Beto, 405 U.S. 473, 485 (1972) (dissent); for Justice Blackmun: Faretta v. California, 422 U.S. 806, 846 (1975) (dissent); for Justice Rehnquist: Herring v. New York, 422 U.S. 853, 865 (1975) (dissent); Ross v. Moffitt, 417 U.S. 600 (1974).

38. *See*, for Chief Justice Burger: Faretta v. California, 422 U.S. 806, 836 (1975) (dissent); Brooks v. Tennessee, 406 U.S. 605, 613 (1972) (dissent); for Justice Blackmun: Faretta v. California, 422 U.S. 806, 846 (1975) (dissent); United States v. Ash, 413 U.S. 300 (1973); for Justice Rehnquist: Herring v. New York, 422 U.S. 853, 865 (1975) (dissent); Tollett v. Henderson, 411 U.S. 258 (1973); Brooks v. Tennessee, 406 U.S. 605, 617 (1972) (dissent).

guilt of most criminal defendants.[39] Consequently, these factors led to a literal reading of the Constitution[40] and to a refusal to follow precedent. At his first significant opportunity, Chief Justice Burger set the tone for this position when he stated:

> I do not acquiesce in prior holdings that purportedly, but nonetheless erroneously, are based on the Constitution.
>
> . . .
>
> . . . I am bound to reject categorically . . . that what the Court said lately controls over the Constitution. While our holdings are entitled to deference I will not join in employing recent cases rather than the Constitution, to bootstrap ourselves into a result . . . .[41]

The second significant, although more subtle, point to be drawn from the accompanying chart and from a bloc analysis is that, after Justice Powell joined the Burger Court, the "Swingmen" voted together in nine of those last eleven cases and, even more importantly, their votes swung to make a majority in eight of these eleven cases. Accordingly, each of the "Swingmen" not only voted in the majority in over ninety percent of the cases but also voted for the right to representation only about half of the time. As this last figure indicates, the "Swingmen," Justices White, Powell, and Stewart, favored alternately the views of the "Trumpeters" and those of the "Pipers." On some occasions they emphasized concern for individuals,[42] regard for procedural regularity and reform,[43] and the need for tools to combat the advantages of government,[44] while on other occasions they emphasized concern for society,[45] faith in the instrumentalities of the criminal system,[46] and the need for the orderly admin-

39. *See*, for Chief Justice Burger: Faretta v. California, 422 U.S. 806, 836 (1975) (dissent); Loper v. Beto, 405 U.S. 473, 485 (1972) (dissent); for Justice Blackmun: Faretta v. California, 422 U.S. 806, 846 (1975) (dissent); Loper v. Beto, 405 U.S. 473, 494 (1972) (dissent); United States v. Tucker, 404 U.S. 443, 449 (1972) (dissent); for Justice Rehnquist: Herring v. New York, 422 U.S. 853, 865 (1975) (dissent); Tollett v. Henderson, 411 U.S. 258 (1973).

40. *See*, for Chief Justice Burger: Faretta v. California, 422 U.S. 806, 836 (1975) (dissent); Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) (concurrence); Brooks v. Tennessee, 406 U.S. 605, 613 (1972) (dissent); Loper v. Beto, 405 U.S. 473, 485 (1972) (dissent); Adams v. Illinois, 405 U.S. 278, 285 (1972) (concurrence); for Justice Blackmun: Faretta v. California, 422 U.S. 806, 846 (1975) (dissent); United States v. Ash, 413 U.S. 300 (1973); Adams v. Illinois, 405 U.S. 278, 286 (1972) (concurrence); for Justice Rehnquist: Herring v. New York, 422 U.S. 853, 865 (1975) (dissent); Brooks v. Tennessee, 406 U.S. 605, 617 (1972) (dissent).

41. Coleman v. Alabama, 399 U.S. 1, 22 (1970) (Burger, C.J., dissenting).

42. *See* Faretta v. California, 422 U.S. 806 (1975).

43. *See* Herring v. New York, 422 U.S. 853 (1975); Faretta v. California, 422 U.S. 806 (1975); Wolff v. McDonnell, 418 U.S. 539 (1974).

44. *See* Kirby v. Illinois, 406 U.S. 682 (1972).

45. *See* Wolff v. McDonnell, 418 U.S. 539 (1974); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Argersinger v. Hamlin, 407 U.S. 25, 44 (1972) (Powell, J., concurring).

46. *See* Herring v. New York, 422 U.S. 853 (1975); Wolff v. McDonnell, 418 U.S. 539

istration of that process.[47] Individually, Justices Powell and Stewart seemed more philosophically coherent and hence more persuasive than Justice White. Justice Powell, along with Justice White, stressed the importance of flexibility.[48] Specifically Justice Powell, both with respect to the fourteenth amendment and with respect to the sixth amendment, urged the concept of fundamental fairness: "I would adhere to the principle of due process that requires fundamental fairness in criminal trials . . . ."[49] Justice Stewart, along with Justice White, both former members of the Warren Court, stressed the importance of precedent.[50] Specifically Justice Stewart urged an approach that emphasized fairness at trial: "I [think] that the right to counsel is essentially a protection for the defendant at trial . . . ."[51] Thus these three Justices felt that the right to representation in situations other than at trial should be expanded only "as rapidly as practicable"[52] but that the right at trial should be expanded with "no restrictions."[53]

In summary, a bloc analysis of the voting patterns indicates two propositions. First, when the question of right to representation at trial is raised, the Burger Court would seem inclined to play in at least two-part and possibly even three-part harmony: the "Trumpeters" would support expansion because that group almost always supports expansion; the "Swingmen" would support expansion because they view fairness at trial as a paramount priority; and the "Pipers" would seem disposed to support expansion because the Constitution specifically speaks of "criminal prosecutions." Secondly, when the question of right to representation at other stages in the criminal process is raised, the "Swingmen" determine the majority melody. Just what tune the entire Burger Court actually plays at each stage is the subject of the following discussion.

(1974); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Argersinger v. Hamlin, 407 U.S. 25, 44 (1972) (Powell, J., concurring); Loper v. Beto, 405 U.S. 473 (1972); Chambers v. Maroney, 399 U.S. 42 (1970); McMann v. Richardson, 397 U.S. 759 (1970).

47. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973); Argersinger v. Hamlin, 407 U.S. 25, 44 (1972) (Powell, J., concurring); Kirby v. Illinois, 406 U.S. 682 (1972).

48. *See* Wolff v. McDonnell, 418 U.S. 539 (1974); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Argersinger v. Hamlin, 407 U.S. 25, 44 (1972) (Powell, J., concurring).

49. Argersinger v. Hamlin, 407 U.S. 25, 47 (1972) (Powell, J., concurring).

50. *See* Herring v. New York, 422 U.S. 853 (1975); Faretta v. California, 422 U.S. 806 (1975); Kirby v. Illinois, 406 U.S. 682, 705 (1972) (White, J., dissenting); Loper v. Beto, 405 U.S. 473, 485 (1972) (White, J., concurring); Coleman v. Alabama, 399 U.S. 1, 17 (1970) (White, J., concurring).

51. United States v. Ash, 413 U.S. 300, 324 n. (1973) (Stewart, J., concurring).

52. Argersinger v. Hamlin, 407 U.S. 25, 66 (1972) (Powell, J., concurring).

53. Herring v. New York, 422 U.S. 853, 857 (1975).

III. SYMPHONY: THE CASES

> At the time the sixth amendment was written the most conspicuous stage of the criminal justice process was the trial stage where the question of guilt and punishment were adjudicated. Accordingly, the right to counsel as written in the sixth amendment was probably intended to encompass counsel at trial only. As new stages were recognized and developed through the years, the criminal justice process grew into a series of interdependent stages in the form of a continuum.[54]

Accordingly, the Burger Court's right to representation cases will be analyzed in the context of this criminal continuum and not in the order in which the cases were decided, because the continuum concept best explains the developments of the decisions and best clarifies the positions of the blocs. In conjunction with these developments and positions, the concept also best aids in attempting to predict the future course of the Burger Court in the right to representation cases.

A. Pretrial

In the pretrial area the Burger Court decided three significant cases, whose respective opinions, appropriately enough, were written by a representative from each of the three different blocs. The Court also decided a fourth case that determined whether retroactivity would be accorded to the holding of one of the former three cases.

In *United States v. Ash*[55] and *Kirby v. Illinois*[56] the Court dealt with the right to counsel in the context of pretrial identifications. As compared to the issue in *Wade* of right to counsel at lineups, the Court in *Ash* faced the question of right to counsel at photographic displays. In his opinion for the *Ash* Court, Justice Blackmun focused strictly on the sixth amendment and investigated its historical background. From this investigation he decided that the traditional test calls for an examination of the event to determine whether it is so similar to trial as to become part of the trial. He concluded, "[The event must be] a trial-like confrontation, requiring the 'Assistance of Counsel' to preserve the adversary process by compensating for advantages of the prosecuting authorities."[57] Accordingly, because photographic displays are not trial-like confrontations, the Court in *Ash* held that "the Sixth Amendment does not

54. Steele, *supra* note 27, at 522.
55. 413 U.S. 300 (1973).
56. 406 U.S. 682 (1972).
57. 413 U.S. 300, 314 (1973).

grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender."[58] As compared to the issue in *Wade* of right to counsel at lineups after formal charges have been filed, the Court in *Kirby* faced the question of right to counsel at showups before formal charges have been filed. In his opinion for the *Kirby* Court, Justice Stewart distinguished *Miranda* and also *Escobedo* as merely fifth amendment cases and focused strictly on the sixth amendment as applied through the fourteenth amendment. In attempting to determine at what critical stage criminal prosecutions begin, he decided,

> The initiation of judicial criminal proceedings . . . is the starting point of our whole system of adversary criminal justice . . . . It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and judicial criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.[59]

He concluded, "[A] person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him."[60] Accordingly, the Court gave constitutional sanction explicitly to uncounseled showups and implicitly to uncounseled lineups that are conducted before the initiation of adversary judicial proceedings.

In *Coleman v. Alabama*[61] and *Adams v. Illinois*[62] the Court dealt with whether a right to appointed counsel attaches at a preliminary hearing prior to indictment. In his opinion for the Court in *Coleman*, Justice Brennan used the familiar critical stage language but employed prophylactic reasoning[63] to find that, on the

58. *Id.* at 321.
59. 406 U.S. 682, 689-90 (1972).
60. *Id.* at 688.
61. 399 U.S. 1 (1970).
62. 405 U.S. 278 (1972).
63. Justice Brennan stated:

> Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making

basis of the sixth amendment as applied through the fourteenth amendment, the right does attach at those preliminary hearings. In *Adams* the Court dealt with the application of one aspect of *Stovall* in determining whether the *Coleman* holding was to be given retroactivity. In his opinion for the Court in *Adams*, Justice Brennan ruled,

> We hold that . . . the role of counsel at the preliminary hearing differs sufficiently from the role of counsel at trial in its impact upon the integrity of the factfinding process as to require the weighing of the probabilities of such infection against the elements of prior justified reliance and the impact of retroactivity upon the administration of criminal justice.[64]

Because the latter two factors outweighed the former factor, the Court refused to accord retroactivity to the *Coleman* holding.

Although severe criticism has accompanied the rationales,[65] holdings,[66] and results[67] of *Ash* and *Kirby*, the voting patterns in those two cases and in *Coleman* and *Adams* closely followed form: the "Pipers" voted against the right to counsel in every instance; the "Trumpeters" voted for the right in every instance (except for Justice Brennan's inexplicable stance in *Adams*); and the "Swingmen" oscillated between the two positions. Justice Powell voted with the Burger group in the two decisions in which he participated, and Justice Stewart, with his antipathy for the holdings in *Escobedo*, *Miranda*, and *Wade*,[68] also voted with the Burger group in each of the four cases. Justice White, however, who had a similar antipathy for the holdings in those Warren Court cases,[69] still felt compelled to follow their precedent and hence voted for the right to counsel in *Coleman* and *Kirby*. He also followed the *Stovall* precedent in vot-

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effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

399 U.S. 1, 9 (1970).

64. 405 U.S. 278, 281 (1972).

65. "[A]rrest can be made with or without a judicially authorized warrant. Arguably therefore, a suspect arrested under a warrant would have immediate protection . . . while one arrested without a warrant would have to wait for judicial involvement before the right to counsel would attach." Note, *The Pretrial Right to Counsel*, 26 STAN. L. REV. 399, 413 n.81 (1974).

66. *See, e.g.*, Grano, *Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent*, 72 MICH. L. REV. 717 (1974); *Pretrial Right, supra* note 65.

67. Scientific studies have amply demonstrated the dangers of mistake in human perception and identification . . . . Many cases of wrongful conviction have been reported . . . . [I]n one of the most dramatic, seventeen witnesses mistakenly identified the accused. Often the actual offender and the defendant did not resemble each other." *Danger of Convicting the Innocent, supra* note 66, at 796.

68. *See* note 26 *supra*.

69. *Id.*

ing against the right in *Adams*, but he apparently felt free, in also voting against the right in *Ash*, to disregard the *Wade* precedent because of the arguable distinguishability of photographic displays and lineups.

From these observations and from the four cases, a number of conclusions can be drawn regarding the present status of and the future possibilities for the right to representation in the pretrial area under the Burger Court. First, unlike the Warren Court, the Burger Court in this area is unwilling to look outside the sixth amendment to either the self-incrimination provision of the fifth amendment or due process for a rationale for the right to counsel. Thus the application of the holdings in *Escobedo* and *Miranda* will be limited to interrogations, and although due process was mentioned in each of the four cases as a possible rationale for the right to counsel, the chances for successful application of due process are slim.[70] Secondly, for the pragmatic present, the presence of counsel is not a constitutional necessity at photographic displays at any time and is not required at lineups or showups until after formal charges have been filed. Finally, for the philosophical future, the Burger Court seems disposed to grant the right to counsel at trial-like confrontations at or after the initiation of adversary judicial proceedings. Although this rationale was used to restrict the right to counsel in *Ash* and *Kirby*, it also could be employed to extend the right to a pretrial situation other than that in *Coleman*. Indeed, Justice Stewart in *Kirby* said as much when he listed a litany of these situations: "formal charge, preliminary hearing, indictment, information, or arraignment."[71] This extension may not occur, however, if the real reason for the decisions in *Ash* and *Kirby* was a feeling that the chances of prejudice in a pretrial situation are too low and the costs of administration too high.[72] In any event, as the discussion of the next subject will show, the clear trend of the Burger Court cases is to emphasize and scrutinize trial situations. Thus in lieu of granting

70. One commentator has stated:

> Since *Stovall*, the Court has certainly displayed no particular readiness to find due process violations. Furthermore, it has been willing to balance suggestive practices against the need for the practice employed . . . .
>
> . . . .
>
> All factors considered, it should he the rare defendant who is able to take advantage of the due process objection under *Stovall* and succeeding cases . . . . [T]he remaining protection for the accused at pretrial identifications is slim indeed.

Pretrial Right, supra Perspective, 74 DICK. L. REV. n.108.

71. 406 U.S. 682, 689 (1972).

72. *See* Gerstein v. Pugh, 420 U.S. 103 (1975) (The Court strongly implied that appointment of counsel was not necessary at informal judicial probable cause determination).

the right to counsel in other pretrial situations, the Burger Court could be receptive to requiring methods that might increase fairness at trial—methods such as a lineup in court or the defendant's relocation among spectators or the judge's giving cautionary jury instructions concerning the dangers of misidentification.

B. Trial

In the trial area the Burger Court decided five cases, four of which were of seemingly narrow significance except that, in all four, the rights of defendants at trial were extended through right to counsel rationales. In all four also, "Swingman" Justice Stewart either wrote the Court opinion or, in one instance, filed an important concurring opinion. The fifth case was of major significance both because of its present expansive effects and because of its broad implications for the future. That Court opinion, appropriately, was written by Justice Douglas.

The former four cases will be discussed again not in the order in which they were decided but in the order in which their situations would appear at trial: testimony, impeachment, closing, and sentencing. In *Brooks v. Tennessee*[73] in invalidating a state statute that had required defendants to testify first or not at all, Justice Brennan in his opinion for the Court initially relied on the prophylactic self-incrimination provision of the fifth amendment. He then alternatively relied on the sixth amendment as applied through the fourteenth amendment by stating, "[R]equiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence . . . restricts the defense—particularly counsel—in the planning of its case."[74] Justice Stewart concurred with the latter view and relied on somewhat similar sixth amendment reasoning in the other three cases. In *Loper v. Beto*[75] the prosecution, with the aid of impeachment evidence of uncounseled felony convictions prior to *Gideon*, had obtained a felony conviction against the defendant also prior to *Gideon*. Thus because of these facts, Justice Stewart and the Court were faced with whether to grant the *Gideon* holding complete retroactivity as to guilt, an issue distinguishable from the question in *Burgett* because no recidivist statute was present in *Loper* and, more importantly, because the counseled felony conviction in *Loper*

73. 406 U.S. 605 (1972).
74. *Id.* at 612.
75. 405 U.S. 473 (1972).

had been obtained prior to *Gideon*. Although refusing to consider whether prior uncounseled felony convictions could be used to impeach specific statements made by defendants, the Court otherwise gave the question in *Loper* its broadest possible answer as to guilt.[76] In *Herring v. New York*[77] in invalidating a state statute that had allowed judges in nonjury cases to deny any opportunity for summation, Justice Stewart in his opinion for the Court relied on the sixth amendment as applied through the fourteenth amendment and again employed his fair trial reasoning by stating, "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."[78] In *United States v. Tucker*[79] the facts were similar to those in *Loper*. In *Tucker* the trial judge took into consideration evidence of uncounseled felony convictions prior to *Gideon* and sentenced the defendant after a counseled felony conviction also obtained prior to *Gideon*. Thus because of these facts, Justice Stewart and the Court were faced with whether to grant the *Gideon* holding complete retroactivity, this time as to punishment, an issue distinguishable from the question in *Burgett* again because no recidivist statute was present in *Tucker* and again because the sentencing in *Tucker* had occurred prior to *Gideon*. The Court, this time as to punishment, gave the question in *Tucker* the same broadest possible answer.

Just as the holdings in *Ash* and *Kirby* were the most dramatic restrictions on the right to counsel by the Burger Court, the holding in *Argersinger v. Hamlin*[80] was the most dramatic extension of that right by the Court. Whereas the issue in *Gideon* had concerned the right to appointed counsel at felony prosecutions, the Court in *Argersinger* encountered the question of the right at prosecutions in

76. One commentator has stated:

> The Supreme Court had four alternatives open to it in deciding the retroactivity issue in *Loper*. First, it could have decided that the *Loper* decision would be applied only prospectively. Secondly, the Court could have applied *Loper* retroactively to all convictions similar to *Loper* obtained subsequent to *Burgett*, since that was the first case to apply *Gideon* to evidentiary matters. Thirdly, the Court could have declared all *Loper*-type convictions obtained after *Gideon* to be subject to attack, an alternative apparently accepted by the *Burgett* [C]ourt. Finally, the Court could apply the *Loper* decision to all similar cases, regardless of the date when the conviction was obtained. It was this last alternative [that] the *Loper* Court accepted.

Note, *Defendant's Right to Protection from Prior Uncounseled Convictions*, 1973 WASH. U.L.Q. 197, 210-11.

77. 422 U.S. 853 (1975).

78. *Id.* at 862.

79. 404 U.S. 443 (1972).

80. 407 U.S. 25 (1972).

which, if conviction resulted, imprisonment was to be imposed. Writing for the *Argersinger* Court, Justice Douglas initially examined the history of the sixth amendment and then stated, "The assistance of counsel is often a requisite to the very existence of a fair trial."[81] Stressing the significance of counsel at any and all criminal trials "where an accused is deprived of his liberty,"[82] Justice Douglas concluded, "We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[83] In an important concurring opinion, Justice Powell added, "It is clear that whenever the right-to-counsel line is to be drawn, it must be drawn so that an indigent has a right to appointed counsel in all cases in which there is a due process right to a jury trial."[84]

Except for the votes in *Argersinger*, the voting patterns of the "Trumpeters" and the "Pipers" in the five trial cases exactly followed form: the "Trumpeters" voted for the right to counsel in every instance; and the "Pipers," viewing the issues in the first four cases as merely evidentiary, voted against the right in those cases, but they made the voting unanimous in *Argersinger*. The "Swingmen," however, with the significant exception of Justice Powell in *Loper*, did not oscillate between the two positions. Justices White and Stewart voted for the right to counsel in all five cases, and Justice Powell joined the majority in *Argersinger, Brooks*, and *Herring*. Concerning retroactivity, however, although Justice Powell did not participate in *Tucker*, he did join the dissenting opinions of both Chief Justice Burger and Justice Rehnquist in *Loper*. Thus with the departure of Justice Douglas the future voting pattern in retroactivity decisions has been left in doubt.

From these observations and from the five cases, a number of conclusions can be drawn regarding the right to representation in the trial area under the Burger Court. First, as the concurring opinion of Justice Powell indicated, the wording in *Argersinger*, read with historical background, established an extremely broad right to appointed counsel.[85] Secondly, as the wording in *Argersinger* also

81. *Id.* at 31.
82. *Id.* at 32.
83. *Id.* at 37.
84. *Id.* at 45-46 (Powell, J., concurring).
85. One commentator has stated:

Argersinger, Baldwin [v. New York, 399 U.S. 66 (1970)], and Duncan [v. Louisiana, 392 U.S. 145 (1968)] together establish that [when a defendant is entitled to a jury trial, *or* when he is charged with an offense punishable by statute with more than six months],

indicated, albeit ambiguously, the holding in that case was meant to be only a temporary, transitional position.[86] Thirdly, as the two previous points suggest, the Burger Court probably will be willing to go beyond the holding in *Argersinger* in at least one dramatic direction—to vitiation, for evidentiary purposes, of uncounseled and nonimprisonment convictions in probation or parole revocation proceedings or possibly even to vitiation of these convictions for other purposes in other situations.[87] Additional support for this conclusion is found in the Burger Court's siding with the defendant in the other four trial cases. Thus in the future, "an indigent who is denied counsel [could] be convicted of an insignificant offense, but the conviction [would] have only presumptive or provisional validity; it [could not] be the predicate at any time for a significant deprivation by the legal process."[88] Fourthly, in the direction of retroactivity, however, the departure of Justice Douglas and the dissent of Justice Powell in *Loper* suggest that the Burger Court probably will not be willing to go beyond the holding in *Argersinger* and hence will not be willing to grant *Gideon*-type retroactivity to the *Argersinger* holding.[89] Finally, although the Court in all five cases showed a concern for the defendant and the indigent and hence revealed a clear trend for future trial cases, the Burger Court, like the Warren Court, never confronted directly the issue of the level of indigency that would require appointed counsel. Justice Powell, in his concurring opinion in *Argersinger*, alluded to this problem when he stated, "The line between indigency and assumed capacity to pay for counsel is . . . somewhat arbitrary, drawn differently from State to State and often resulting in serious inequities to accused persons."[90] Thus

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or [when] he is to be imprisoned in fact for any length of time, however short, he has a constitutional right to appointed counsel. Those who have read *Argersinger* as approving denial of appointed counsel merely because a jail sentence is not imposed are plainly wrong.

Duke, *supra* note 30, at 607.

86. One commentator has stated:

[T]he burden would [have been] considerable [if] the Court explicitly [had held] the right applicable in all criminal cases . . . . [S]uch an abrupt decision would [have wreaked] temporary chaos. Hence, the Court . . . deliberately obscured its rationale. The obscurity gives the States a chance to gear up for the next advance and leaves the Court free in the future to hold the right of counsel applicable "in all criminal prosecutions."

Id. at 608-09.

87. Those other situations might encompass loss of a valuable privilege, disability to enter a certain profession, difficulty in obtaining employment, and the presence generally of a conviction record. *See generally* Rossman, *supra* note 30.

88. Duke, *supra* note 30, at 618.

89. *See generally, Defendant's Right to Protection, supra* note 76.

90. 407 U.S. 25, 50 (1972) (Powell, J., concurring).

this problem[91] demands resolution in the form of a definition of indigency or an evaluation of procedures for determining its existence and may mark the occasion for a future decision by the Burger Court.

C. *Collateral Issues: Effective Representation and Self-Representation*

In view of the Burger Court's siding with the defendant in all five trial cases, the Court's avoidance of the collateral question of effective representation is almost inexplicable. Yet, the Court's very avoidance of this issue in turn has contributed to consideration by the Burger Court of still another collateral question, the issue of self-representation.

(1) Effective Representation

In the three cases in this area the Burger Court relegated the effectiveness issues to secondary status, then in effect held against the defendants, and hence, on both counts, restricted the right to counsel. In *McMann v. Richardson*[92] in response to allegations of defense counsel's inadequate consultation, mistaken grasp of law, and inadequate preparation, Justice White, writing for the Court, set a seemingly equitable standard for determining effectiveness when he spoke of "the good faith evaluations of a reasonably competent attorney."[93] Nevertheless, he diluted the standard by stating, "[We] think the matter, for the most part, should be left to the good sense and discretion of the trial courts . . . ."[94] In closing, he diluted the standard still further by saying that a defendant "must demonstrate gross error on the part of counsel"[95] and "prove serious derelictions on the part of counsel."[96] In *Chambers v. Maroney*[97] Justice White again wrote for the Court, but again his opinion failed to face squarely the question of ineffective representation. In ruling against a petition that had alleged extremely tardy appointment, he stated, "Unquestionably, the courts should make every effort to

91. "In one case, . . . [a] defendant was asked how much money he had in his pocket. He replied, 'forty cents.' The judge, presumably in jest, told the defendant he 'should hire a forty-cent lawyer.' Missing the joke, the Spanish-speaking accused was tried and convicted without a lawyer." Duke, *supra* note 30, at 621.

92. 397 U.S. 759 (1970).

93. *Id.* at 770.

94. *Id.* at 771.

95. *Id.* at 772.

96. *Id.* at 774.

97. 399 U.S. 42 (1970).

effect early appointments of counsel in all cases. But we are not disposed to fashion a per se rule requiring reversal of every conviction following tardy appointment of counsel . . . ."[98] Lastly, in *Tollett v. Henderson*[99] Justice Rehnquist in his opinion for the Court gave short shrift to allegations of defense counsel's mistaken grasp of fact and inadequate preparation.

The blocs voted similarly in both the effectiveness cases and the trial cases: the "Pipers" voted against the right to counsel; the "Trumpeters" voted for the right (except for their inexplicable and unexplained stance in *Chambers*); and the "Swingmen" did not oscillate. The decisive difference, of course, between the two sets of cases was that the "Swingmen" generally voted for the right to counsel in the trial cases but in every instance voted against the right in the effectiveness cases. Thus lower courts have been left to their own devices in the effectiveness area, and their devices in most instances have not been sympathetic toward the defendant.[100] The most common standard has been the "mockery of justice" test, a standard under which, for ineffectiveness to be found, representation must have been so poor as to be considered a "farce" or a "sham that shocks the conscience" of a court.[101] The reasons for this standard could be many—such as, a reluctance to reprimand attorneys or ruin their reputations, a feeling that the problem of ineffectiveness is too widespread or that it is insoluble, a fear that the caseload, which is already in crisis, would cause a consequent collapse of the criminal system, and an attitude that the convicted defendant is guilty anyway.[102] In any event, the problem of ineffectiveness[103] remains real,[104] and "[t]he 'mockery' test requires such a minimal

98. *Id.* at 54.

99. 411 U.S. 258 (1973).

100. *See, e.g.*, Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970).

101. *See, e.g.*, Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973).

102. *See, e.g.*, Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973).

103. "[A] great many—if not most—indigent defendants do not receive the effective assistance of counsel . . . ." *Id.* at 2.

104. Judge Bazelon, of the District of Columbia Court of Appeals, has stated: "[S]ome of the counsel coming before the courts [are] 'walking violations of the sixth amendment.' " *Id.* As examples, he has cited the following: (1) "Defense counsel advised the [trial] judge that he could take only a few minutes for summation because he had to move his car by five o'clock;" (2) "[d]efense counsel told the jury he had done the best he could 'with what I have had to work with;' " and (3) "[d]efense counsel based his case on an 1895 decision; when the [trial] judge asked for a later precedent, the attorney said that he couldn't find a Shepard's citator." *Id.* at 3. And as an example of the courts' response, he has cited the following:

level of performance from counsel that it is itself a mockery of the sixth amendment."[105] Despite this stark reality, the Burger Court never confronted directly the issue of effective representation. One commentator has stated, "This may be because the Court is still developing the law on the threshold question—when and where the *right* to counsel exists."[106] Perhaps this is true, but the more convincing conclusion, as the three effectiveness cases indicate, is simply that the Court did not and will not want to face directly the question of ineffectiveness, possibly for the same reasons that the lower courts have not wanted to face this issue. The Burger Court, however, as the discussion of the next subject will show, was willing to confront the problem in an indirect fashion.

(2) Self-Representation

In an apparent attempt to atone for the failure to face squarely the question of ineffectiveness and to provide at least a partial remedy by replacing poor counsel without destroying the fabric of the criminal process, the Burger Court in *Faretta v. California*[107] gave constitutional stature to the right to self-representation. Just as he had in most of the trial cases, Justice Stewart wrote the Court opinion. Almost immediately, he raised the issue: "The question before us now is whether a defendant in a state criminal trial has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so."[108] In the very next sentence, he all but answered his question: "Stated another way, the question is whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense."[109] Then, almost as an apology, near the end of the opinion, Justice Stewart stated, "There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions

> [In one recent case,] defense counsel was observed to be sound asleep during the examination of prosecution witnesses . . . . If the lawyer had not been present, there would have been a reversal without a showing of prejudice; but because the lawyer was merely asleep, an entirely different standard was applied. The [c]ourt found that the presence of a warm, albeit sleeping body at the defense table satisfied the defendant's sixth amendment right.

Id. at 30.

105. *Id.* at 28.
106. *Id.* at 21.
107. 422 U.S. 806 (1975).
108. *Id.* at 807.
109. *Id.*

holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel."[110] Additionally, he conceded that in most instances defendants would be better served by counsel representation than by self-representation; but for historical,[111] practical,[112] and philosophical reasons, Justice Stewart still ruled that defendants indeed have a constitutional right to self-representation. " 'What were contrived as protections for the accused should not be turned into fetters.' "[113]

The behavior of the blocs in *Faretta* again paralleled the voting patterns in the effectiveness cases and the trial cases: the "Pipers" voted against a right to self-representation; the "Trumpeters" voted for it; and the "Swingmen" voted together to form a third bloc. This time, however, unlike their votes in the effectiveness cases but generally like their votes in the trial cases, the "Swingmen" voted with the "Trumpeters." Thus the theme in this self-representation case repeats the theme in the trial cases and again reveals the prevailing view within the Burger Court that fairness to the defendant at trial is the paramount priority in right to representation cases and that this fairness will be protected rigorously by affording the defendant the most unrestricted defense.

Because *Faretta* is a recent case that has received little comment, a closer analysis of its intimations and implications is warranted. In his *Faretta* dissent Justice Blackmun noted the apparent contradictions between the position of the majority in *Faretta* and the positions of majorities in earlier right to counsel cases,[114] be-

110. *Id.* at 832.

111. Noting past recognition of the right of self-representation by the Supreme Court, federal courts, and state constitutions, Justice Stewart said that the right was implicit in the sixth amendment as applied through the fourteenth amendment and implicit also in the due process provisions of the fifth amendment and the fourteenth amendment.

112. Among the pragmatic reasons cited by Justice Stewart were the traditional distrusts of the criminal system, the possible persuasiveness of personal pleadings, and the crisis in criminal caseloads. Also noted by Justice Stewart and by Chief Justice Burger in dissent was the lack of a standard for effective representation.

113. 422 U.S. at 815 (quoting from Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279-80 (1942)).

114. Justice Blackmun's point argnably is valid, for on an earlier occasion, Justice Stewart himself had stated, " '[L]awyers in criminal courts are necessities, not luxuries.' " United States v. Tucker, 404 U.S. 443, 447-48 n.5 (1972). Justice Stewart, however was not alone in assuming an apparently contradictory stance, for on an earlier occasion, Justice Blackmun himself had stated, "The accused's right to the 'Assistance of Counsel' has meant just that, namely, the right of the accused to have counsel acting as his assistant." United States v. Ash, 413 U.S. 300, 312 (1973). And, on an earlier occasion, Justice Rehnquist, another *Faretta* dissenter, had stated, "[T]he assignment of counsel to every criminal defen-

tween the right to self-representation and the right to counsel. He then asked,

> Must every defendant be advised of his right to proceed *pro se*? If so, when must that notice be given? Since the right to assistance of counsel and the right to self-representation are mutually exclusive, how is the waiver of each right to be measured? If a defendant has elected to exercise his right to proceed *pro se*, does he still have a constitutional right to assistance of standby counsel? How soon in the criminal proceeding must a defendant decide between proceeding by counsel or *pro se*? Must he be allowed to switch in midtrial? May a violation of the right to self-representation ever be harmless error? Must the trial court treat the *pro se* defendant differently than it would professional counsel?[115]

These are relevant, problematic questions, but they are not insurmountable obstacles; in any event, "[s]ome amount of disruption inevitably attends any new constitutional ruling."[116] Fortunately, some of these and other tangential questions were answered, either explicitly or implicitly, by the Court—to wit: (1) the right to self-representation and the right to counsel are of equal stature; (2) " 'the Constitution requires that counsel [still must] be tendered;' "[117] (3) the defendant "should be made aware of the dangers and disadvantages of self-representation;"[118] (4) technical legal knowledge is not relevant in determining whether to deny self-representation; (5) "in order to represent himself, the accused [still] must [act] 'knowingly and intelligently;' "[119] (6) the defendant can reject counsel even after acceptance; (7) "when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions on trial strategy in many areas;"[120] (8) "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist conduct;"[121] (9) standby counsel may be appointed;[122] and (10) a *pro se* defendant later cannot claim ineffective representation.[123]

Still, Justice Blackmun's dissent is haunting—firstly because

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dant is not mandatory; the defendant may, upon being advised of his right, determine that he does not wish to avail himself of it." Loper v. Beto, 405 U.S. 473, 501 (1972) (Rehnquist, J., dissenting).

115. 422 U.S. 806, 852 (1972) (Blackmun, J., dissenting).
116. Gagnon v. Scarpelli, 411 U.S. 778, 782 n.5 (1973).
117. 422 U.S. 806, 815 n.12 (quoting from Carter v. Illinois, 329 U.S. 173 (1946)).
118. *Id.* at 835.
119. *Id.*
120. *Id.* at 820.
121. *Id.* at 834 n.46.
122. *Id.* at 835 n.46 & 846 n.7 (majority opinion & Burger, C.J., dissenting).
123. *Id.* at 834-35 n.46 & 841 (majority opinion & Burger, C.J., dissenting).

it casts doubt on the rationale of the Court opinion, secondly because it raises some questions for the future that went unanswered by the Court, and thirdly because it provokes other, unasked questions for the future. First, with respect to one of the Court's underlying assumptions, Justice Blackmun stated, "[T]he historical evidence seems to me to be inconclusive in revealing the original understanding of the language of the Sixth Amendment."[124] Support for his conclusion abounds.[125] Thus the Court's real rationale must have been premised only on the philosophical theme of fairness at trial and on pragmatic considerations. Support also abounded for employing these pragmatic considerations as justifications for a right to self-representation. Among these practical reasons were again the absence of an equitable effectiveness standard and the presence of a legitimate desire in defendants to represent themselves, this desire being founded on distrust of the criminal system,[126] political or moral beliefs,[127] and the tactical advantages of personal pleadings.[128] Secondly, with respect to Justice Blackmun's unanswered issues for the future, various commentators have suggested resolutions to those four key unanswered questions regarding notice of the right to self-representation,[129] waiver of the right to counsel representation,[130] termination of the right to self-representation before and

124. *Id.* at 850.

125. *See, e.g.*, Steele, *supra* note 27, at 489-90; Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CALIF. L. REV. 1479, 1487 (1971). *But see* 64 J. CRIM. L. & CRIMINOLOGY 240, 244-45 (1973) ("[A]lthough the right [of self-representation] was rarely articulated as such, it was widely acknowledged and cherished as a fundamental right. The Puritans who settled in Massachusetts Bay brought with them a hatred of lawyers that was exceeded only by their love and fear of God.").

126. *See generally The Dilemma of the Pro Se Defendant, supra* note 125; 64 J. CRIM. L. & CRIMINOLOGY 240 (1973).

127. "To say that [a political or a moral] purpose is an improper use of the judicial system is overly simplistic. If an allegedly criminal act is motivated by moral or political beliefs, those beliefs may be relevant both in determining the defendant's intent and, perhaps, as evidence of mitigating circumstances." *The Dilemma of the Pro Se Defendant, supra* note 125, at 1481 n.16.

128. "[O]bjections to these kinds of tactical advantages derive not from their use by a pro se defendant, but from their apparent deviance from the truth-finding norm. As such, they are neither more nor less justified than the analogous devices employed by attorneys." *Id.* at 1505 n.145.

129. "[I]f the right to proceed *pro se* is "correlative' to the right to proceed with counsel, and if it is 'inherent' and 'unqualified,' then it would certainly seem that the defendant should have express notice." *Collateral Issues, supra* note 100, at 1186.

130. One commentator has stated:

> A record silent as to a defendant's age, education, employment history, and prior exposure to courtroom procedures, as well as to his willingness to accept counsel for consultation purposes notwithstanding that he wishes to conduct his own defense, and his awareness of the nature of the charges, including possible defenses, is devoid of virtually

during trial,[131] and the responsibility of standby counsel.[132] Lastly, the more interesting, unasked questions for the future that will be provoked by the Court's opinion are those concerning retroactivity, the choice by the indigent defendant of his own counsel, and the mixing of self-representation and counsel representation—the latter two being issues that were rejected by the trial court but not discussed by the Supreme Court in *Faretta*. In regard to retroactivity, again the departure of Justice Douglas and the dissent of Justice Powell in *Loper* suggest that the Burger Court may be willing to grant only prospective application to the holding in *Faretta*.[133] An even dimmer future seems likely for the proposition that an indigent defendant will be allowed to choose his own appointed counsel. With both these predictions, however, and especially with the next prediction, one constitutional tendency should be recognized—"the tendency of all rights 'to declare themselves absolute to their logical extreme.' "[134] Cognizance of this tendency should be maintained particularly in this, a trial area in which the Burger Court has so many times sided with the defendant. Finally, although many practical reasons have been advanced for allowing the hybrid situation of both self-representation and counsel representation,[135] the most convincing argument, a philosophical one, was conceived by Angela Davis: "[A]n either/or situation flies in the face of justice, because if one right can be exercised only when the other is renounced, it would appear to me that these are not rights at all."[136] Thus logic would seem to demand and consistent application of two constitutional rights would seem to command the allowance of simultaneous self-representation and counsel representation.[137]

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all the information necessary for the trial court to determine whether the defendant's waiver of counsel was knowing and intelligent.

Note, *The Pro Se Defendant's Right to Counsel*, 41 U. CIN. L. REV. 927, 935-36 (1972).

131. "Differentiating between requests made before and during trial cannot . . . be justified . . . . The right [of self-representation] should be either absolute or never absolute." *Collateral Issues, supra* note 100, at 1184.

132. "The attorney's civil and professional liability [should] be made commensurate [only] with the role he fulfills." *The Dilemma of the Pro Se Defendant, supra* note 125, at 1511.

133. *Contra*, People v. Holcomb, 395 Mich. 326, 235 N.W.2d 343 (1975) (granting retroactivity to *Faretta* holding).

134. Ross v. Moffitt, 417 U.S. 600, 611-12 (1974) (quoting from Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908)).

135. *See, e.g., The Dilemma of the Pro Se Defendant, supra* note 125, at 1507-09.

136. *Id.* at 1507.

137. "[I]f both the pro se defendant and the integrity of the system benefit from allowing him access to counsel, a stronger interest than some vague notion that he is getting away with too much should be demonstrated before denying joint representation." *Id.* at 1512.

D. Post-trial and Trial Type

In these related areas the Burger Court decided three cases, all of which were important as either limitations on or extensions of the right to counsel; only one, however, was a typical decision, because the other two were in effect unanimous decisions.

In *Ross v. Moffitt*,[138] a 6-3 decision in which the "Trumpeters" dissented, the Court dealt with post-trial settings, and in *Gagnon v. Scarpelli*[139] and *Wolff v. McDonnell*,[140] the Court again dealt with post-trial but also trial type settings. Whereas the issue in *Douglas* had concerned the right to appointed counsel on appeals as of right, the Court in *Ross* faced the question of right to appointed counsel for discretionary appeal and for review by the United States Supreme Court. In his opinion for the *Ross* Court, Justice Rehnquist rejected the petitioner's equal protection argument on both counts by stating, "The defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt."[141] In *Gagnon*, the Court addressed the issue of right to appointed counsel at probation or parole revocation hearings.[142] Justice Powell spoke in effect for an unanimous Burger Court and initially determined, as had the Warren Court in *Gault* with respect to juvenile proceedings, that probation or parole revocation proceedings are not criminal prosecutions and hence not sixth amendment prosecutions: "[T]here are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee have stakes in preserving these differences."[143] Nevertheless, in balancing the interests of society and individuals, which due process reasoning demands, Justice Powell also found that the loss of liberty that revocation would entail was an important individual interest. Thus in a Court opinion that echoed his earlier concurring opinion in *Argersinger*, Justice Powell concluded that the right to appointed

Contra, United States v. Hill, 526 F.2d 1019 (10th Cir. 1975) (rejecting concept of hybrid situation).

138. 417 U.S. 600 (1974).

139. 411 U.S. 778 (1973).

140. 418 U.S. 539 (1974).

141. 417 U.S. 600, 610-11 (1974).

142. In Morrissey v. Brewer, 408 U.S. 471 (1972), the Court had held that parolees are entitled to due process hearings in parole revocation proceedings; and earlier in *Gagnon*, the Court had held that probationers are entitled to due process hearings in probation revocation proceedings.

143. 411 U.S. 778, 788-89 (1973).

counsel at probation or parole revocation hearings should be determined on a case by case basis, with regard to be given to the peculiarities of the particular case.[144] In *Wolff* prison disciplinary proceedings were challenged in a class action. In his opinion for the Court, Justice White also initially determined, "Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply."[145] Also applying due process reasoning, he too spoke of balancing interests, important circumstances, and reasonable accommodations. He found, however, that deprivation of good time is not a grievous loss for a prison inmate. Thus although he specified some procedural reform, Justice White concluded, "At this stage of the development of these procedures we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings."[146] Although three dissenters, the "Trumpeters," favored more procedural reform, they agreed with the counsel holding. As a final measure, Justice White closed the past but opened the future, for he refused to accord retroactivity to the specified procedural reform[147] but also said the reform was "not graven in stone"[148] and was subject to possible future expansion.

Unfortunately, the only conclusive statements that can be made concerning the voting patterns in this area are that the three blocs voted as three blocs and that all of the "Swingmen" voted with all of the "Pipers" in each case. The "Pipers" did vote against the right to counsel in two of the three cases, and the "Trumpeters" did vote for the right in two of the three cases; but it is the votes of the "Pipers" in *Gagnon* and the votes of the "Trumpeters" in *Wolff* that are somewhat disturbing. Even more disturbing are the votes of the "Swingmen," especially Justices White and Stewart. For example,

144. Justice Powell stated:

> [C]ounsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself.

Id. at 790-91.

145. 418 U.S. 539, 556 (1974).

146. *Id.* at 570.

147. Justice White also strongly implied that retroactivity should not he given to the holding in *Gagnon*.

148. 418 U.S. 539, 572 (1974).

Justice White had shown no dislike for the holding in *Douglas*[149] yet voted against the right to counsel in *Ross*, and Justice Stewart had shown antipathy for the holding in *Gault*[150] yet voted for the right in *Gagnon*. Perhaps all this merely indicates that the votes of the "Pipers" and the "Trumpeters" can be predicted *almost* all of the time and that the votes of the "Swingmen" can be predicted *most* of the time.

Once again, however, from these observations and from the three cases, a number of conclusions can be drawn regarding the right to representation in this area under the Burger Court. First, unlike the Warren Court, the Burger Court in this area is unwilling to look outside due process to either the sixth amendment or the equal protection clause of the fourteenth amendment[151] for a rationale for the right to counsel. Thus any notion that equal protection can be employed to expand radically the right to counsel[152] should be dismissed precisely because this notion is radical.[153] Secondly, for the pragmatic present, as the rationales and holdings of *Gagnon* and *Wolff* reveal, the Burger Court does not seem disposed even under due process to expand rapidly the right to counsel in this area.[154] Finally, however, for the philosophical future, as those two cases also reveal, the Burger Court is willing to engage in due procees balancing and to recognize the evolving nature of due process[155]—and it is willing particularly to grant the right to counsel

149. *See* note 26 *supra.*

150. *Id.*

151. *Cf.* Fuller v. Oregon, 417 U.S. 40 (1974) (Court held state statute that narrowly sought repayment by indigents of fees paid by state to appointed counsel was not violative of equal protection). *But cf.* James v. Strange, 407 U.S. 128 (1972) (Court held state statute that broadly sought repayment by indigents of fees paid by state to appointed counsel was violative of equal protection).

152. The extremes to which equal protection reasoning can be carried are exemplified by the following propositions: "It seems doubtful . . . that an accused should be expected to sell a . . . television set before he can be considered financially unable to employ counsel. Families on welfare often have [television sets] and consider them necessaries." Duke, *supra* note 30, at 629. "The mere fact that [a civil] plaintiff initiates [an] action should not be significant." *The Continuing Expansion, supra* note 9, at 489.

153. "The reluctance of the Court to rely more heavily on equal protection . . . perhaps refiects its uneasiness with an approach so lacking in standards or inherent limits." Clark, *Gideon Revisited*, 15 ARIZ. L. REV. 343, 352 (1973).

154. One commentator has stated:

> [I]t seems clear that some line must be drawn—extension of the right to every criminal . . . case seems not only unlikely but also unnecessary and undesirable. The right, in its extreme, should not extend beyond that point at which the consequences are so minimal or the proceeding so simplified that a non-indigent person would not hire an attorney.

The Continuing Expansion, supra note 9, at 487-88.

155. One commentator has stated:

when a loss of liberty might ensue because, while it restricted the right to counsel in *Wolff*, the Burger Court extended the right in *Gagnon*. Thus because the consequences—loss of liberty—of probation or parole revocations and of civil commitments might be the same, the Burger Court might extend the right to counsel to proceedings concerning commitment for mental illness, drug dependence, alcoholism, and communicable disease.[156] And this may be true even though civil commitment proceedings are not criminal prosecutions.[157]

IV. FINALE: THE CONCLUSION

Justice Clark, a former member of the Warren Court, recently stated:

> [C]ivilizations will be judged by the protections their criminal justice systems afford those charged with crime. Some say that our system is too protective, but I submit that it is one of our society's greatest strengths; and its strongest tenet is that the feared, the despised and the powerless must be protected equally with the mighty, the rich and the beloved. The availability of counsel for all kinds of people . . . has a direct effect upon freedom and the rights of every individual . . . .[158]

This statement typifies the attitude of the Warren Court during the six years after *Gideon*. Accordingly, the Warren Court was willing to look not only to the sixth amendment and to due process but also to the self-incrimination provision of the fifth amendment and to the equal protection clause, in order to recognize a right to counsel both before and after trial, at interrogations and identifications, and on sentencing and appeal.

> Normally, the Supreme Court attempts to maintain a balance between what it foresees as constitutionally desirable, and what it senses to be presently practical. For this purpose, the due process clause of the fourteenth amendment provides a convenient tool. The due process clause allows the Court to posit a principle [that] is realistic for the time, and yet remains sufficiently flexible to accommodate some future extension of the principle . . . .

Steele, *supra* note 27, at 492.

156. *See generally* Note, *Civil Commitments: Should There Be a Constitutional Right to Counsel*, 2 CAPITAL U.L. REV. 126 (1973).

157. One commentator has stated:

> The fact that the philosophical rationale behind the criminal sanctions are not the moving force behind civil commitment does not necessarily compel a conclusion that there is no right to counsel for civil commitments. Quite the contrary, application of due process analysis—apart from any sixth amendment consideration—demands that counsel be appointed. In the context of a proceeding with a consequence of such magnitude no other conclusion would be consonant with the balancing of interests involved in a due process analysis.

Rossman, *supra* note 30, at 650.

158. Clark, *supra* note 153, at 343.

Six years and sixteen cases into the era of the Burger Court, two new patterns emerged. The first pattern was a voting pattern, in which one solid bloc of three Justices carried forward the liberal legacy of the Warren Court and its interest in the individual, another solid bloc of three Justices bore the banner of society and government, and a third solid bloc of three Justices oscillated between the two positions to make majorities. This voting pattern produced a seemingly chaotic eight to eight split in the sixteen right to representation cases. On analysis, however, this pattern proved to be not so chaotic, for the common thread that emerged from the cases was the attitude of the "Swingmen," an attitude that recognized fairness at trial as a paramount priority. This attitude also in turn produced a second, situational pattern, in which the Burger Court was willing to look only to the sixth amendment in the pretrial area and only to due process in the post-trial area, and in which the Court was unwilling to recognize a right to counsel in some instances in either area.

From these two patterns, the tune of the Burger Court finally can be recognized: when a defendant is faced with the prospect of a trial-like confrontation and with a possible loss of liberty, the right to representation—the right to retained counsel or to appointed counsel or to neither if the defendant so desires—is inviolable. Thus in the trial area, much will be afforded to the defendant in order to assure fairness, but in the pretrial and post-trial/trial type areas, only certain limited contingencies will cause the Court to side with the defendant. For example, to assure fairness, the Court may mandate cautionary jury instructions at trial to protect against mistaken pretrial identifications or may grant a right to counsel at civil commitment proceedings. This was the tune of the Burger Court before the departure of Justice Douglas, but even now, after his departure, because two members of his group still remain and because all three "Swingmen" still remain, this tune will continue to be played by the Burger Court in the right to representation cases.[159]

DAVID M. THOMPSON

159. Although the above analysis indicates that most future votes by the Burger Court in this constitutional area, without a ninth Justice, would be either 5-3 for or 6-2 against a right to representation, a brief look at the previous voting record and tendencies of the new ninth Justice is warranted. While serving on the Seventh Circuit Court of Appeals for 5 years, new Justice Stevens participated in 11 important decisions in this constitutional area. In 9 of those cases, he voted against a right to representation. Four of those cases, however, concerned the frequently avoided question of effective representation, and 3 others concerned tangential *Wolff*-like issues. Only 4 cases then truly reveal his attitude, and in those cases,

he voted twice for and twice against a right to representation. In Springer v. United States, 460 F.2d 1344 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972) (Stevens, J., dissenting), a pretrial decision, and in Macon v. Lash, 458 F.2d 942 (7th Cir. 1972), a post-trial decision, Justice Stevens sided with the defendant; and in Holmes v. United States, 452 F.2d 249 (7th Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972), and in Sturges v. United States *ex rel.* Kirby, 510 F.2d 397 (7th Cir. 1975), both pretrial decisions, Justice Stevens sided against the defendant. *See Special Project, The One Hundred and First Justice: An Analysis of the Opinions of Justice John Paul Stevens, Sitting as Judge on the Seventh Circuit Court of Appeals*, 29 VAND. L. REV. 125, 157-62, 202-04 (1976). Thus the voting position of Justice Stevens appears to reside somewhere between the positions of the "Swingmen" and the "Pipers:"

> How does Justice Stevens define a constitutional right? For him, individual rights exist within the context of competing state interests and policies. He looks closely at the interest the individual asserts and then balances it against the state's interest. . . . One consequence of this approach is a narrow definition of those interests of constitutional dimension. In all, Justice Stevens acts with restraint in considering questions of constitutional scope and gives the states latitude to try varying solutions to such questions. This restraint appears to stem primarily from a conservative view of the judiciary's proper role in our government . . . .

Id. at 195-96.