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THE RIGHT TO COUNSEL: THE *ARGERSINGER-KIRBY* DICHOTOMY

INTRODUCTION

The sixth amendment to the United States Constitution provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." To what extent an accused has a right to the "Assistance of Counsel" is still not completely settled. An analytical survey of the United States Supreme Court cases on this subject reveals that the right to counsel has developed in an irregular fashion. The development by the Supreme Court produced two rights, the right to retained counsel and the right to appointed counsel. To complicate matters more, the treatment of these two rights has varied between the federal and state levels. This confusing and somewhat inconsistent "two-level split analysis"[1] appeared to have been mooted in the past only to reappear as the Court further interpreted the right to counsel.

Two recent Supreme Court cases, *Argersinger v. Hamlin*[2] and *Kirby v. Illinois*,[3] brought new clarity to the status of the right to counsel as a constitutional doctrine. *Argersinger* represents a clear confirmation that *Gideon v. Wainwright*[4] was not limited to the old felony distinction and *Kirby* represents possibly the final word on the "critical stage" test in pretrial situations. Obviously both cases are of considerable import in determining to what extent an accused has a right to counsel.

These two cases are by no means the "last words on the subject." It is hoped, however, that in depth examination of these two cases will serve as a basis for understanding what future interpretation may be applied to the right to counsel.

1. This term is applied by the author to denote the existence of a four pronged approach consisting of retained and appointed counsel on the state and federal level. The significance of this four pronged approach has diminished greatly; however, knowledge of the existence of this approach and its gradual demise is helpful in understanding the proper modern analysis in this area.

2. 407 U.S. 25 (1972).

3. 406 U.S. 682 (1972).

4. 372 U.S. 335 (1963).

DEMISE OF THE "SPECIAL CIRCUMSTANCES" TEST

Gideon v. Wainwright[5] and *Douglas v. California*[6] were decided on the same day by the United States Supreme Court. They represent the pivotal point for the Supreme Court's interpretation of the right to counsel. Any consideration of this constitutional doctrine must use this point as a platform from which to look into the past and the future. On that day, the two-level split analysis mentioned earlier appeared to have ended; however, this observation did not stand the test of further interpretation.

The two-level split analysis actually began with *Powell v. Alabama*.[7] This case involved a challenge to a state court which failed to allow the defendants an opportunity to obtain their own counsel in a capital case. The Supreme Court articulated the issue as whether the denial of the assistance of counsel contravenes the due process clause of the fourteenth amendment.[8] In holding that denial of the assistance of counsel under the circumstances contravenes the concept of due process, the Court quoted the following:

> "It is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action because the denial of them would be the denial of due process of law. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law."[9]

This form of analysis resulted in the right to counsel in state cases being decided under a different standard than the federal cases. This decision took notice of the difference between the right to appointed counsel and the right to retained counsel. The Court said in a capital case the failure to appoint counsel for an indigent was a denial of due process. The case of *Johnson v.*

5. *Id.*

6. 372 U.S. 353 (1963).

7. 287 U.S. 45 (1932).

8. This case also indicates that the right to counsel means a right to effective counsel. The state court had designated "all the members of the bar" as appointed counsel for the defendants. The Supreme Court found this appointment so indefinite as to amount to a denial of effective counsel.

9. 287 U.S. at 67, *quoting from* Twining v. New Jersey, 211 U.S. 78, 99 (1908). The reasoning seemed to be that the right to be heard which is protected by due process would be of little aid to a defendant without a concurrent right to counsel.

Zerbst[10] completed the development of the two-level split analysis. This was a federal court case, thus requiring the Court's analysis to be focused on the sixth amendment. This Court formulated a test whereby the trial court was required to provide counsel for an accused[11] who was unable to obtain it, who did not intelligently waive it, and whose life and liberty was at stake. *Johnson* involved a felony but there is no language to indicate the Court intended to use that as a point of classification.

After *Johnson*[12] there were clearly four different rights to counsel. In the federal courts there was the right to retained counsel and the right to appointed counsel. There were also the same two rights in the state courts. At this point the status of the right to counsel was that at the trial itself there is an absolute right to retained counsel in both federal and state courts.[13] The right to appointed counsel in federal courts at the trial was absolute, in light of *Johnson.*[14] The right to appointed counsel in state courts at the trial was in need of further clarification.

Powell had indicated that due process required the appointment of counsel before trial in capital cases, but beyond that narrow situation the status of the right remained uncertain.

The clarification of the right to appointed counsel for non-capital state cases began with *Betts v. Brady.*[15] The Court said that the fourteenth amendment did not require the appointment of counsel in every non-capital state case. While examining the history of the right to counsel and finding that it was not a fundamental right, essential to a fair trial, the Court stated:

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10. 304 U.S. 458 (1938).

11. The Court spoke in terms of the constitutional deprivation divesting the trial court of jurisdiction:

> If the accused . . . is not represented by counsel and has not completely and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty.

304 U.S. at 468.

12. There was some doubt after *Johnson* as to the scope of the holding. There was a tendency among the courts to imply a waiver of counsel from a defendant who pleaded guilty without asking for one. Since the case of Walker v. Johnston, 312 U.S. 275 (1941), the rule has been that waiver of counsel at pleading must be explicit and intelligent.

13. If there was any doubt about the absolute right to retained counsel in state courts after *Powell*, the case of Chandler v. Fretag, 348 U.S. 3 (1954), should have dispelled that doubt. The Court in this case stamped the right of retained counsel as unqualified.

14. The felony limitation that beset the interpretation of *Gideon* never seemed to arise in the interpretation of *Johnson.*

15. 316 U.S. 455 (1942).

> [T]he Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.[16]

The application of the concept of due process and its pre-*Gideon* interpretation of fundamental fairness gave rise to a "special circumstances" test. After *Betts* and its companion case of *Bute v. Illinois*,[17] the holding in *Powell* was restricted to capital crime cases and to those instances where the defendant was incapable of making an adequate defense due to age, ignorance, or intellectual limitations. For more than twenty years after *Betts* the courts occupied themselves with case by case determination of what constituted the "special circumstances"[18] that would require the appointment of counsel in non-capital state cases. By the time the Court handed down *Gideon*, there was very little remaining of the *Betts* rule.

Gideon involved a factual situation very similar to *Betts*.[19] The Court accepted the *Betts* assumption that a provision of the Bill of Rights that is fundamental and essential to a fair trial is made obligatory upon the States by the fourteenth amendment; however, the Court disagreed with the *Betts* conclusion that the right to counsel was not one of those fundamental rights. The Court regarded *Betts* as an anomaly in the development of the right to counsel. While noting this break with precedent extending from *Powell*,[20] the Court in *Gideon* said:

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16. 316 U.S. at 473.

17. 333 U.S. 649 (1948).

18. The Court found "special circumstances" in a variety of situations, *e.g.* Chewning v. Cunningham, 368 U.S. 443 (1962). This was the last of the *Betts* rule cases to reach the Court before *Gideon* (complexity and variety of the defenses). McNeal v. Culver, 365 U.S. 109 (1962) (accused was ignorant and mentally ill); Hudson v. North Carolina, 363 U.S. 697 (1960) (accused was an 18-year-old with a sixth grade education); Townsend v. Burke, 334 U.S. 736 (1948) (misinformation that might have been prevented by counsel was placed in the court record); Tomkins v. Missouri, 323 U.S. 485 (1945); Williams v. Kaiser, 323 U.S. 471 (1945) (both cases found special circumstances in the nature of the criminal charge).

19. Mr. Gideon, like Mr. Betts, did a credible job of defending himself. Therefore, viewed in the light of *Betts*, the Court was unable to fit *Gideon* under the "special circumstances" test.

20. Mr. Justice Black, speaking for the Court, said,

> Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him.[21]

This decision incorporated the sixth amendment into the fourteenth amendment. Before *Gideon* there were two different analytical approaches involving the right to appointed counsel. After *Gideon*[22] it was assumed the tests merged until later interpretation showed that this conclusion was premature.

Douglas v. California,[23] although decided on the same day as *Gideon*, took a different analytical approach to a similar problem. This case involved an equal protection attack on the denial of the right to counsel to indigents unless a court made a prior determination of the merit of the appeal.[24] The Court looked to the "suspect classification"[25] created by this unequal treatment of indigents as unjustified by any state interest.

> The fact is that in deciding as it did—that "appointment of counsel is not a fundamental right, essential to a fair trial"—the Court in Betts v. Brady made an abrupt break with its own well-considered precedents.

372 U.S. at 343.

21. *Id.* at 344. Is our system of criminal justice really adversarial? See Blumberg, *Covert Contingencies in the Right to the Assistance of Counsel*, 21 VAND. L. REV. 581 (1967). Mr. Blumberg feels that the Supreme Court is too idealistic in its confidence in the protection provided by the assistance of counsel. He noted that the Court's opinions should take cognizance of the following realities. Firstly, the informal structure of the courts is characterized by bureaucratic goals other than the formal traditional goal of due process. Secondly, there are certain realities of the relationship between the defense lawyer and the other professionals in the court organization which bear on the lawyer-client relationship in the criminal court when appointed counsel is involved. These factors militate against the adversarial character which the Court finds so necessary in our system of justice.

22. Note that in Miranda v. Arizona, 384 U.S. 436 (1966), the Court perceived no relevant difference between the sources of the right to counsel.

> Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in *Gideon* and *Douglas*.

Id. at 472-73.

23. 372 U.S. 353 (1963).

24. This was an appeal granted as a matter of right in state court. This Court left open the question of a discretionary appeal in state courts. The Court, using a sixth amendment analysis, had already determined that there was a right to appointed counsel for appeals in federal court. See Ellis v. U.S., 356 U.S. 674 (1957); Johnson v. U.S., 352 U.S. 565 (1956).

25. In the earlier case of Griffin v. Illinois, 351 U.S. 12 (1956), the Court recognized that classifications based on economic status were suspect, thus shifting the burden of justifying the discrimination to the State.

In the light of *Douglas* why did the Court in *Gideon* avoid the obvious equal protection argument in favor of incorporating the sixth amendment to the states through the fourteenth amendment? By comparing the protection available to the average person with that available to an indigent, the Court could have relied on *Powell* to hold that where counsel would be available to the one, it must be supplied to the other. With this analysis the Court could have effectively overruled *Betts* and its progeny without attacking the wisdom of the court that decided the case. Although the factual analysis of the sixth amendment and the equal protection basis as to a right to counsel overlap, the equality approach brings a new perspective to bear on the analysis of this right. The recognition of governmental discrimination against the poor as an independent constitutional violation, unlike traditional sixth amendment analysis, puts the burden of justification on those who would continue economic discrimination against the misdemeanant. The incorporation approach of *Gideon* involved the expansion of the concept of the right to counsel while an equal protection attack would have required a justification of the right to counsel's containment short of equality.

Another perplexing question about *Gideon* is why it was construed non-expansively until recently?[26] The facts in *Gideon* involved the denial of counsel to an indigent felon as did the facts in *Johnson v. Zerbst*,[27] but the holding in *Johnson* has not been limited to felonies. The same is true of *Mapp v. Ohio*.[28] *Mapp* involved a felony but no one has suggested that the fourth amendment-exclusionary rule be limited to felony cases. Before the restrictive interpretation of *Gideon* began, it appeared that *Gideon* and *Douglas* considered together required counsel to be appointed anytime there was a right to retained counsel. This interpretation coupled with *Gideon*'s incorporation of the sixth amendment into the fourteenth amendment, which seems to destroy the federal-state distinction, appeared to be the end of the two-level split analysis referred to earlier.

26. See Argersinger v. Hamlin, 407 U.S. 25 (1972).

27. 304 U.S. 458 (1938). This case involved the right to counsel in federal courts.

28. Although there are definitely analytical differences between the fourth amendment issue involved in *Mapp* and the sixth amendment right to counsel, there appears to be no analytical reason for drawing felony-misdemeanor distinctions in one and not the other.

The state courts[29] have limited *Gideon* to felonies despite the presence of broad language in the opinion.[30] Unfortunately their guidance came from the Supreme Court in post-*Gideon* decisions. In *Patterson v. Warren*[31] the Court indicated that the length of sentence might be the proper test under *Gideon*. The Court sealed the felony interpretation of *Gideon* when it denied certiorari in *Winters v. Beck*[32] and *DeJoseph v. Connecticut*,[33] two cases in which the state courts had refused to apply *Gideon* to misdemeanor prosecutions.[34] In the later landmark cases of *Mempa v. Rhay*[35] and *In re Gault*[36] the Court used language that tended to limit *Gideon* to felonies.[37] Thus, what at first appeared to be an egalitarian move that merged the right to appointed counsel with the right to retained counsel was later interpreted as limiting the right to appointed counsel to felony cases.

THE "CRITICAL STAGE" TEST

The analysis up to this point has focused on the development of the right to counsel in the courtroom setting. There is a collat-

29. See Argersinger v. Hamlin, 236 So. 2d 442 (Fla. 1970); Burrage v. Superior Court, 105 Ariz. 53, 459 P.2d 313 (1969); People v. Dupree, 42 Ill. 2d 249, 246 N.E.2d 281 (1969); Hendrix v. City of Seattle, 76 Wash. 2d 142, 456 P.2d 696, *cert. denied*, 397 U.S. 948 (1969); Plutshack v. Dept. of Health and Social Services, 37 Wis. 2d 713, 155 N.W.2d 549 (1968).

30. "[A]ny person haled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him." 372 U.S. at 344.

31. 372 U.S. 776 (1963). This decision applied *Gideon* to misdemeanors that were punishable by felony length terms of imprisonment.

32. 377 U.S. 201 (1964).

33. 378 U.S. 478 (1963).

34. Many of the decisions found the basis for their analysis in Mr. Justice Harlan's concurring opinion in *Gideon*. In that case he said:

> The special circumstances rule has been formally abandoned in capital cases and the time has now come when it should be similarly abandoned in non-capital cases, at least as to offenses which . . . carry the possibility of a substantial prison sentence.

372 U.S. at 351.

35. 389 U.S. 128 (1967).

36. 387 U.S. 1 (1967).

37. In *Mempa* the Court said: "In Gideon v. Wainwright . . . this court held that there was an absolute right to appointment of counsel in felony cases." 389 U.S. at 134. In *Gault* the Court said: "A proceeding where the issue is whether the child will be found 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. 387 U.S. at 36. The Court then relied on *Gideon* in finding a right to counsel in this situation.

eral approach that is also a necessary prelude to understanding the Supreme Court's interpretation of the right to counsel. The stage of the criminal proceeding when a right to counsel arises is the concern of this analysis. After *Gideon* it was very clear that there was a right to counsel, retained or appointed, at the trial in federal or state court except for non-felony state cases. In that particular situation, there was an absolute right to retained counsel but no right to appointed counsel. But beyond the actual trial, the stages that were considered part of the criminal proceeding so as to invoke the already defined right to counsel were not analytically connected to the distinction between the right to retained or appointed counsel; however, an examination of the "critical stage" test seems to reveal a logical consistency with the old *Betts* test.

In *Hamilton v. Alabama*,[38] the Supreme Court devised the "critical stage-substantial rights test" that is still the standard for defining the stage of a criminal proceeding that gives rise to the right to counsel. This case involved a capital crime when the defendant was not represented by counsel at the arraignment. In holding that arraignment under Alabama law is a critical stage in a criminal proceeding, the Court said:

> What happens there may affect the whole trial. Available defenses may be irretrievably lost, if not then and there asserted . . . . Only the presence of counsel could have enabled this accused to know all the defenses available and plead intelligently.[39]

Hamilton was decided under the reign of *Betts*; therefore, the "critical stage" test was born under the "special circumstances" analysis of *Betts*. The concept of special circumstances was no more than a semantic tag for a specialized fundamental fairness test that has long been the heart of the Supreme Court's approach to due process problems. *Gideon*, in overruling *Betts*, did no more than move the consideration of the right to counsel for indigents from a fundamental fairness test to a test that looks to the sixth amendment for guidance. Thus, there was no analytical reason that *Gideon* should destroy the "critical stage" test of *Hamilton*. Any conjecture that *Gideon* had that effect was destroyed when

38. 368 U.S. 52 (1961).
39. *Id.* at 54-55.

the Court, using the *Hamilton* reasoning, rendered the post-*Gideon* decision of *White v. Maryland*.[40] The Court reversed the conviction of a defendant whose uncounseled plea of guilty given at arraignment, but later changed on advice of counsel, was introduced into his trial as evidence.[41] After this decision, the term "critical stage" became a semantic tag for the concept of determining the point at which a preliminary phase of the trial becomes part of the criminal prosecution in the sixth amendment.

The exact application of this "critical stage" analysis has been the subject of several cases. In *Massiah v. U.S.*,[42] a federal case involving a conviction for violating federal narcotic laws, the Court held that a statement surreptitiously obtained from the defendant after indictment and without presence of counsel is inadmissible as evidence. Although the Court cited *Hamilton* and *White*, the critical stage analysis was not clearly articulated in the opinion. The use of this analysis was, however, implicit in the result of the case.[43] The issue of right to counsel was intertwined with the right against self incrimination, resulting in clouding the analysis directed at the right to counsel.

Two landmark cases that involved an extension of the analysis used in *Massiah* are *Escobedo v. Illinois*[44] and *Miranda v. Arizona*.[45] In *Escobedo*, the critical question was whether the refusal by the police to allow a defendant to consult with his counsel during the course of an interrogation constituted a denial of the assistance of counsel.[46] The Court drew upon the rationale of *Hamilton* and *Massiah* in holding that the right to counsel was guaranteed when the accused prior to arraignment was subjected to "focused" interrogations.[47] In explaining the holding that this

40. 373 U.S. 59 (1963).

41. The Court noted that under the *Hamilton* rationale, the defendant did not have to show that the evidence was prejudicial.

42. 377 U.S. 201 (1964).

43. The Court said:

> We hold that the petitioner was denied the basic protections of the [sixth amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel.

Id. at 206.

44. 378 U.S. 478 (1964).

45. 384 U.S. 436 (1966).

46. The real right protected by *Escobedo* is the right against self-incrimination; however, the danger that was posed to that right by the police interrogation was the major element in determining the "criticalness" of this stage.

47. The Court said:

"focused" interrogation was a critical stage, the Court quoted the following:

> "[T]he right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pre-trial examination."[48]

Any confusion concerning the criticalness of police interrogation was vitiated by *Miranda*.[49] This case set forth a test to determine the voluntariness of a confession.[50] Part of the test required that an accused be informed of his right to retained or appointed counsel. *Miranda* extended the right to counsel that was implied by *Escobedo*. The Court in *Miranda* held that the right to counsel during the critical stage of police interrogation comprehends not only the right to consult counsel prior to investigation but also to have counsel present during any questioning.[51] Both *Escobedo* and *Miranda* involved an extension of *Massiah* beyond the pre-indictment, post-indictment analysis. This resulted in a rejection of the theory that the "critical stage" test should be a mechanistic test that relies on distinctions between pre-indictment and post-indictment restrictions on police activity.

The Court has found critical stages in other pre-trial police activity. The companion cases of *U.S. v. Wade*[52] and *Gilbert v. California*[53] extended the critical stage to pre-trial line-ups. *Wade*[54] involved a challenge to a police line-up when the defen-

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> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect . . . [and] the suspect has requested and been denied an opportunity to consult with his lawyer . . . the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment . . . .

378 U.S. at 490-91.

48. *Id.* at 487, *quoting from In re* Groban, 352 U.S. 330, 344 (1957) (dissent of Black, J.).

49. Both *Escobedo* and *Miranda* have implications much broader than the scope of this paper. This is especially true of *Miranda*. These cases are considered here only for the purpose of developing the "critical stage" test.

50. Admittedly, *Miranda* may not stand for this proposition in light of cases like Harris v. New York, 401 U.S. 222 (1971); however, that is another topic of sufficient depth to warrant more space than is available. This generalization about *Miranda* does no violence to the analysis of the right to counsel in this note.

51. This case, like other cases involving right to counsel, was concerned with waiver of counsel. The cases and analysis involved in the waiver of counsel are beyond the defined scope of this paper; therefore, no more than a mere mentioning of the problem would be appropriate.

52. 388 U.S. 218 (1967).

53. 388 U.S. 263 (1967).

54. The "critical stage" analysis is not clouded by the self-incriminating issue that permeated *Escobedo* and *Miranda*. The Court in *Wade* held that a line-up was definitely not self-incrimination, citing *Schmerber v. California*, 384 U.S. 757 (1966).

dant was unaided by counsel. The Court held that the post-indictment was a critical stage of the prosecution at which the defendant was as much entitled to the aid of counsel as he was at the trial itself. In tracing the development of the right to counsel in its analysis, the Court in *Wade* noted that the framers of the Bill of Rights intended for the right to counsel to be a broad rule and that "in recognition of the realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantees to apply to critical stages of the proceedings."[55] The critical stage analysis of *Escobedo* and *Miranda* was relied on very heavily in *Wade*. The fact that these cases involved a stage much earlier in the progression of a criminal prosecution than *Wade* probably explains the Court's reliance. The interest of protecting the accused's right against self-incrimination was not present in *Wade*; however, the Court said:

> Nothing decided or said in [*Escobedo* and *Miranda*] links the right to counsel only to protection of Fifth Amendment rights. Rather those decisions no more than reflect a constitutional principle established as long ago as *Powell v. Alabama* . . . .[56]

The interest that *Wade* sought to protect is the adversary theory of criminal prosecutions. The presence of counsel at all critical stages is necessary to assure that the accused's interests that are consistent with the adversary theory are protected. The Court interpreted the principle arising from *Powell* and its progeny as a test requiring scrutinization of any pre-trial confrontation of the accused by the State to determine whether the presence of counsel was necessary to preserve the defendant's basic right to a fair trial.[57] In *Wade* the witness saw the accused in the hallway before the line-up began. The Court was obviously impressed by the prejudicial effect this could have had on the witness's judgment. Lawyerly functions that could be performed by counsel are neces-

55. 388 U.S. at 224.

56. *Id.* at 226.

57. The main threat to a fair trial in this situation is the untrustworthiness of eyewitness identifications. The problems inherent in a forced confrontation were noted by the Court. These problems included: (1) The danger of suggestiveness being created intentionally or unintentionally in many subtle ways, (2) once a witness has picked the accused at the line-up, he is not likely to change his mind, (3) the understandable outrage of a victim may excite vengeful motives, and (4) improprieties in the administration of the confrontation would go unnoticed by the defendant.

sary before a stage can be defined as critical. The Court noted that the accused's counsel could perform the function of protecting the accused from an unfair confrontation by observing the administration of the line-up.[58] The right to counsel is not a perfunctory protection; therefore, if there are no lawyerly functions to be performed by counsel, the stage is not critical. This principle is graphically illustrated by the Court's decision in *Gilbert v. California*.[59] Argued at the same time as *Wade*, this case had a few additional elements not present in *Wade*. One of these elements was a challenge to the taking of handwriting samples from the defendant without the presence of counsel. The Court distinguished the taking of handwriting samples from the line-up situations by noting that because of the exactness of the science involved in the former, there are no lawyerly functions to be performed by counsel.[60] The line-up in *Gilbert* involved a situation more unfair than the *Wade* situation.[61] There were more than 100 witnesses of crimes allegedly committed by Gilbert present at the line-up. The prejudicial effect of this group identification is obvious. The Court, using the same analysis as it did in *Wade*, concluded that any identifications based on that line-up were inadmissible. In *Stovall v. Denno*,[62] the Court held that a face to face confrontation between an accused and a mortally wounded witness is not violative of due process. The Court looked to a fundamental fairness and totality of the circumstances test rather than applying the "critical stage" analysis.[63] The real importance

58. Even if counsel is not provided at these confrontations, a *per se* exclusionary rule is not applied if as in *Wade* the admissibility of the evidence of the line-up identification itself is not involved. Usually, the witness makes a courtroom identification of the defendant. The Court set forth certain factors that must be considered before deciding if the courtroom identification is tainted by a line-up unattended by counsel. These factors are (a) prior opportunity to have observed the alleged criminal act, (b) discrepancy between any pre-lineup description and the defendant's actual description, (c) identification by picture before the line-up, (d) failure to identify the defendant on a prior occasion, and (e) the lapse of time between the alleged act and the line-up identification.

59. 388 U.S. 263 (1967).

60. Mr. Justice Black would have held the taking of a handwriting sample as a critical stage in the criminal prosecution; however, he did not enumerate the lawyerly functions that could be performed by counsel at this stage.

61. The prejudicial elements in both cases could have been prevented had counsel been present.

62. 388 U.S. 293 (1967).

63. The limitation on the analysis was probably because the Court wanted to avoid making the *Wade-Gilbert* rule retroactive for reasons related to the practical administration of the rule.

of this case was not in its analysis, but in the Court's refusal to make the *Wade-Gilbert* rule retroactive.

Although it was clear that the Court regarded most post-indictment, pre-trial stages as being as critical as the trial itself, the Court used *Coleman v. Alabama*[64] to clarify the right to counsel in one pre-indictment situation. The factual situation was similar to the case[65] in which the Court formulated the "critical stage" test. In holding that the preliminary hearing prior to indictment is a critical stage of the prosecution, the Court in *Coleman* looked to the broad language in *Wade* concerning any pre-trial confrontation. The existence of certain lawyerly functions[66] was determinative on the "critical stage" issue.[67] The Court refused to limit the "critical stage" analysis to a mechanistic post-indictment approach.[68]

The Court has been inclined to extend the "critical stage" analysis beyond the end of the formal trial also. In *Mempa v. Rhay*[69] the Court held that probation revocation or deferred sentencing proceedings are critical stages of the criminal prosecution. The Court noted that *Gideon* overruled the "special circumstances" test of *Betts* by holding that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of the accused may be affected. *Gideon's* holding coupled with the 1948 decision of *Townsend v. Burke*,[70] was enough to convince the Court that there is a right to counsel at sentencing. The State's allegation that the probation revocation proceeding was a mere formality was rejected by the Court.

64. 399 U.S. 1 (1970).

65. *See* Hamilton v. Alabama, 368 U.S. 52 (1961).

66. The lawyerly functions to be provided by counsel at the preliminary hearing are: (a) To provide the guiding hand in protecting the defendant against an erroneous or improper prosecution, (b) to fashion a vital impeachment tool for use on cross-examination, (c) to preserve favorable testimony, (d) to use the hearing as a discovery device, and (e) to make such arguments as bail, early psychiatric exam *et cetera*.

67. In a dissenting opinion, Mr. Justice White expressed his concern that the test as applied by the majority was too broad. He analogized the preliminary hearing to other stages like grand jury hearings *et cetera* in an attempt to show the expansiveness of the test. 388 U.S. at 250.

68. Denial of the right to counsel at a preliminary hearing is remedied by the Court in granting a new trial. In light of the valuable lawyerly functions involved at a preliminary hearing, the proper remedy would seem to require a new preliminary hearing in addition to a new trial.

69. 389 U.S. 128 (1967).

70. 334 U.S. 736 (1948). This case illustrates the critical nature of the sentencing process in a criminal proceeding.

Although this expansion of the right to counsel was at the opposite end of the criminal prosecution, the Court's holding in *Mempa* was a logical extension of the analysis of *White, Escobedo,* and *Miranda.*

A COMPARISON

The "critical stage" analysis was born out of an attempt to apply the right to counsel in situations where there was some doubt about when the criminal prosecution began. It is a functional approach to the problem. Under this analysis the right to counsel is extended to any stage of the criminal prosecution that actually affects a defendant's rights. As the cases discussed earlier clearly show, the Court has required the presence of two elements before a stage has been considered critical. First, the Court looks to the inherent nature of the stage itself. If the Court determines that the proceedings will have a lasting effect on the outcome of the case, the first element of the formula is satisfied. Second, the Court determines if the presence of a lawyer would serve to mitigate or avoid potential prejudice. This determination entails examining the lawyerly functions that can be performed by counsel at this stage.

Although the past use of the "critical stage" test has been for purposes different from the "special circumstances" test, the analysis involved is not entirely divorced from the old *Betts* "special circumstances" analysis.[71] The "special circumstances" test involved examining the particular individual and the nature of the proceeding in determining whether there was a right to counsel. The "critical stage" test is concerned with the nature of the proceeding. Thus we might say that *Gideon* only destroyed the consideration of the individual part of the "special circumstances" test. These two tests are not commonly thought of as analytically connected. One reason is that functionally the two tests have been used for different purposes. The "critical stage" test has been used to determine the existence of a right to counsel in general. The "special circumstances" test, before its demise, was used to determine the existence of a right to appointed counsel where there was already a right to retained counsel. The most obvious reason for the lack of comparison is that the "special

71. Note 14 *supra.*

circumstances" test was a due process test formulated before the incorporation of the sixth amendment into the fourteenth amendment. *Gideon* seemed to destroy the need for such a test; but at the same time *Gideon* laid the groundwork for the "critical stage" test when the Court talked in terms of a right to counsel at every stage of the criminal proceeding where substantial rights of the accused may be involved. This reasoning gives the implication of a "critical stage" test in its early form. Thus despite its due process origins, the part of the "special circumstances" test that factually survived *Gideon* does have an interrelationship with the "critical stage" test. Another reason for the failure to notice an interrelationship may be that the factual settings that were adjudicated under the *Betts* test involved trial proceedings that long have been considered critical stages by the courts. The "critical stage" test has been used to expand the horizons of the right to counsel into disputed areas beyond the confines of the actual trial proceeding. Only when one observes the purposes of both tests does the interrelationship become apparent. Although this comparison of tests seemed academic a few years ago, recent developments by the Supreme Court have given these observations a potential future practicality. The expansive quality of the "critical stage" test caused this form of analysis to be regarded as a vehicle that would continue to expand the right to counsel to peripheral areas of criminal prosecutions. The Court in *Kirby v. Illinois*[72] seems to have frozen the "critical stage" test in its tracks.

A NEW CRITICAL STAGE TEST?

Kirby, a five to four decision,[73] involved a police station show-up that took place after the petitioner's arrest but before he had been indicted or formally charged with any criminal offense. The Court held that this was not a stage of the criminal prosecution at which the petitioner had a right to counsel.[74] The *Wade-*

72. 406 U.S. 682, 92 S. Ct. 1877 (1972).

73. The majority consisted of Mr. Justices Stewart, Blackmun, Powell, Rhenquist, and Mr. Chief Justice Burger. The dissenters were Mr. Justices Douglas, Brennan, White, and Marshall. A close reading of the individual opinions indicates that *Kirby* cannot actually be characterized as plurality decision.

74. Mr. Justice Brennan, in his dissenting opinion, refined the question to whether it was constitutional error to admit the victim's testimony that he had identified the petitioner at the pre-trial stationhouse show-up. 92 S. Ct. at 1883.

Gilbert rule was held inapplicable in this situation.[75] The petitioner was identified by the witness while the petitioner was seated at a table in the police station. The factual situation in *Kirby* is different from *Wade* or *Gilbert* in two respects.[76] Firstly, *Wade* and *Gilbert* involved post-indictment line-ups and *Kirby* involved a pre-indictment situation. Secondly, *Wade* and *Gilbert* involved formal line-ups while *Kirby* involved an informal show-up. The Court seemed very impressed with the first factor but hardly took note of the second factor. This different priority is understandable since the pre-indictment distinction was the basis for the Court's decision while the nature of the informal show-up militated against the Court's final decision. In a step-by-step analysis, the Court looked to *Wade* only on a selective basis. Concerning the argument that the show-up was self-incrimination, the Court looked to *Wade's* holding that a line-up in no way involved self-incrimination. However, this logic does not seem to justify distinguishing *Miranda* as being analytically different from *Wade*, thus negating the complimentary effect of the pre-indictment analysis in *Miranda*.[77] The Court, however, did distinguish *Miranda* from *Wade-Gilbert* because to do otherwise would have mandated a contra decision in *Kirby*. By excluding *Miranda* and *Escobedo* the Court was able to point to strong precedent for post-indictment right to counsel, but none as to the pre-indictment right. This analysis enabled the Court to opt for a mechanistic test[78] that is very predictable in its application, but

75. Mr. Justice Stewart, writing for the majority, felt that to apply the *Wade-Gilbert* rule in this situation would be an unwarranted extension of the right to counsel.

76. In his dissenting opinion Mr. Justice Brennan said he felt that *Wade* and *Gilbert* were controlling because the Court in *Wade* said: "[T]he assistance of counsel at the line-up was indispensable to protect Wade's most basic criminal right as a defendant—his right to a fair trial at which the witness might be more meaningfully cross-examined." U.S. v. Wade, 388 U.S. at 223-24. This same reasoning would seem to be applicable in the *Kirby* situation.

77. Mr. Justice Brennan felt very strongly that *Miranda* and *Escobedo* were applicable in this case. These decisions, according to Brennan's opinion in *Wade*, reflect the constitutional principle that:

> [I]n addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.

Id. at 226.

78. The formalism of this approach was also assailed by Justice Brennan. In criticizing the Court's decision to draw a distinct line at the point where the proceeding starts, he said:

very limiting in its scope.[79] The holding in *Kirby* has turned the "critical stage" test inward, thus negating its future effect on the expansion of the right to counsel. The Court cautioned that this test did not leave the accused unprotected prior to indictment. Any activity violative of due process would still be unconstitutional in the pre-indictment setting.[80] This test is not likely to give rise to a right to counsel in pre-indictment situations. Only the basics of fairness will be required under this new standard.

The shift in analysis involved in *Kirby* represented a change in position by the Court on the issue of at what stage the right to counsel arises. Another recent case in the right to counsel area, *Argersinger v. Hamlin*,[81] represented a long awaited extension of *Gideon*. The early promise of *Gideon* followed by its disheartening limitations was discussed earlier. *Argersinger* restored most of the early expectations that had been placed in *Gideon* by holding that no person can be imprisoned for any offense unless he was represented at his trial by counsel. The right to counsel can, of course, be knowingly and intelligently waived.

REVITALIZATION OF GIDEON

Argersinger came to the Supreme Court on a writ of certiorari from the Florida Supreme Court,[82] which had limited the right to counsel by analogizing to the limitation placed on the right to jury trial by *Duncan v. Louisiana*.[83] *Duncan* limited the sixth amendment right to jury trial to felonies (cases involving impris-

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A post-arrest confrontation for identification is not "a mere preparatory step in the gathering of the prosecution's evidence." A primary, and frequently sole, purpose of the confrontation for identification at that stage is to accumulate proof to buttress the conclusion of the police that they have the offender in hand.

92 S. Ct. at 1887 (citations omitted).

79. Note that the triggering event in the sixth amendment right to a speedy trial is the arrest, not the indictment. *See* U.S. v. Marion, 406 U.S. 307 (1972).

80. The pre-indictment protection is procedural due process and the test applied in this situation is a fundamental fairness standard. Remember that the old *Betts* standard of special circumstances was a species of the "fundamental fairness" test. Query, could it be that the pre-indictment protections have now evolved from what was assumed to be a "critical stage" test prior to *Kirby* into a test closely related to the supposedly defunct "special circumstances" rule?

81. 407 U.S. 25 (1972). *Argersinger* was foreshadowed by the Circuit Court case of *James v. Headley*, 410 F.2d 325 (5th Cir. 1969).

82. Argersinger v. Hamlin, 236 So. 2d 442 (Fla. 1970).

83. 391 U.S. 145 (1968).

onment for more than six months). Since the Court had given credence to the felony limitation on *Gideon*,[84] the Florida Supreme Court's handling of the analysis was certainly not anomalous.[85] The Court speaking through Mr. Justice Douglas said that to analogize the right to counsel to the right to jury trial was erroneous. The comparison of the genealogy of the two rights[86] shows differences distinct enough to prevent analogy. The historical argument, although appealing, is not the strongest justification for construing the right to counsel as a more basic right than the right to jury trial. The Court said there was no reason in the language or logic of *Gideon* and *Powell* to limit the right to counsel to their factual situations. The function of the right to jury trial as an element of due process is only to guarantee that a decision is based on the facts and decided by an impartial decision maker. There are other ways of safeguarding this result; however, other elements of due process are not so easily substituted. The assistance of counsel secures fairness and makes the other elements more than mere perfunctory rights.

The Court in *Argersinger* felt that if one sought to analogize the right to counsel with decisions concerning other basic rights, it is more accurate to analogize with other basic elements of due process.[87] The length of the sentence has not affected the court's

84. *See* notes 31-35 *supra*.

85. *Cf.* James v. Headley, 410 F.2d 325 (5th Cir. 1969). Using analysis remarkably similar to the Supreme Court's analysis in *Argersinger*, the Fifth Circuit interpreted *Gideon* as broad enough to apply to all criminal offenses.

86. The Court compared the historical discussions of the right to jury trial in *Duncan* and the right to counsel in *Powell* in concluding that to analogize these rights is erroneous. As the Court stated in *Duncan*:

> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge . . . . The deep commitment of the Nation to the right to jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the states.

391 U.S. at 156. The history of the right to counsel was much different as noted by the Court in *Powell*:

> Originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest. At the same time parties in civil suits and persons accused of misdemeanors were entitled to the full assistance of counsel.

287 U.S. at 60.

87. In considering the sixth amendment guarantees other than jury trial and counsel, the Court has drawn no felony-misdemeanor distinction. *E.g.*, Washington v. Texas, 388

interpretation of other sixth amendment rights except jury trial. Therefore, should it be determinative in adjudication of the most basic sixth amendment right? The Court felt that the amount of sentence involved in no way made the legal and constitutional issues any less complex;[88] therefore, it should not be dispositive of the right to counsel issue.

The Court in *Argersinger* took notice of the volume of misdemeanor cases. This volume, rather than militate against the right to counsel, would seem to be a factor in favor of recognizing this right. The volume of cases places unbelievable pressures on the system just to dispose of the cases.[89] The Court felt that the only bulwark against the tremendous pressure to plead guilty was the attorney for the defendant.

There is a curious absence of equal protection analysis in *Argersinger* despite the fact that the opinion was written by Mr. Justice Douglas, author of *Douglas v. California*.[90] Although *Gideon* was void of equal protection analysis, there were probably doctrinal reasons which explain its absence. The Court was anxious to incorporate the sixth amendment into the fourteenth amendment. Equal protection analysis would not have accomplished that goal; therefore, it was ignored. The explanation concerning the absence of this analysis in *Argersinger* is not so easy. One theory is that the nature of equal protection analysis is different from the analysis involved in finding the existence of a substantive right.[91] Thus the court is reluctant to use this egalitarian approach unless it is the only choice available.[92]

The concern for the availability of legal manpower permeated the concurring opinions. Mr. Justice Brennan was very optimistic about the available legal resources while Mr. Justice

U.S. 14 (1967) (right to obtain witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to a speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (right of confrontation); and *In re* Oliver, 333 U.S. 257 (1948) (right of public trial).

88. *See, e.g.*, Papachriston v. Jacksonville, 405 U.S. 156 (1972).

89. Query: Does the assistance of counsel help a defendant to resist these pressures or does counsel merely serve to expedite the system? *See* Blumberg, *supra* note 21.

90. 372 U.S. 353 (1963). This case used equal protection analysis to extend the right of appointed counsel to indigent defendants on appeal.

91. See discussion of failure to use equal protection analysis in *Gideon supra*.

92. A less philosophical theory is that Mr. Justice Douglas could not have obtained a majority vote for an opinion based on equal protection. This theory is buttressed by looking to the entire Court's reaction to *Douglas*.

Burger was skeptical. Justice Burger used a balancing test to come to the same conclusion as the Court's holding. He noted the strong state interest in limiting the right to counsel to serious offenses; however, he concluded that the stronger countervailing interest of the defendant outweighed the state's interest.[93]

The most interesting opinion in *Argersinger* was written by Mr. Justice Powell. The analysis used by Justice Powell is worth more than mere academic perusal because the future of the right to counsel seems to be foreshadowed in this opinion. Justice Powell cited the narrow interpretation of *Gideon* expressed by Mr. Justice Harlan in his concurring opinion in that case as justifying the felony distinction in the right to counsel. Although agreeing with the analysis used by the Court in *Argersinger*, Justice Powell felt that the holding was too rigid and that the true analysis was that the right to counsel is necessary to assure a fair trial. The mechanistic approach offended him. His analysis is grounded in fundamental fairness rather than immutable line-drawing. This approach sounds like pre-incorporation language. He was also concerned with the fact that the Court's holding "will extend the right of appointed counsel to indigent defendants in cases where the right to counsel would rarely be exercised by nonindigent defendants."[94] This reasoning might be applicable in an equal protection argument, but it seems specious when analyzing the meaning of the sixth amendment. The mere failure of nonindigents to exercise their right is not a justification for denying that right to indigents.

Just as the majority felt that the length of sentence should not be the determinative factor in deciding the right to counsel, Justice Powell questioned the logic of using the presence of a "jail sentence" as the determinative factor.[95] The detrimental effect on

93. Mr. Justice Burger, in defining the overriding interest of the defendant, said: "There is little ground . . . to assume that a defendant unaided by counsel will be any more able adequately to defend himself against lesser charges that may involve confinement than more serious charges." 92 S. Ct. at 2014.

94. *Id.* at 2019.

95. Justice Powell felt that the simple test set forth by the Court would prove difficult to implement. He also pointed to potential constitutional problems inherent in implementation of the rule. For example, could a new trial be held if after starting without counsel it became apparent that a jail sentence would be imposed? Justice Powell felt a second trial held for the purpose of affording the judge an opportunity to impose a harsher

a defendant may be just as great or greater in a non-jail petty offense.

Justice Powell proposed a rule more flexible than the Court's rule to govern appointment of counsel. He felt that the determination of the right to appointed counsel should be made before the indigent formally pleads. The Court would have to consider the complexity of the issues and the severity of the sentence if the defendant was convicted. This case-to-case consideration of the individual factors peculiar to each case is like the special circumstances case in *Betts*. Justice Powell felt that the rule should be implemented in this limited situation because the failure of the rule was not a result of any inherent defect in its logic but rather the failure of many state courts to live up to their responsibilities. This "special circumstances" test could have particular viability when the Court finally considers the right to appointed counsel in non-jail petty offenses.

THE FUTURE: A RESURRECTION OF *Betts*?

After *Kirby* and *Argersinger* the right to counsel has taken on new dimensions. As to the stages where the Supreme Court has determined that there is a right to counsel, it is clear that with the possible exception of non-jail petty offenses the distinction between the right to retained counsel and the right to appointed counsel is mooted. In situations where the Court has yet to extend the right to retained or appointed counsel, the "critical stage" test will be used to determine if it is part of the criminal prosecution. If the stage is determined to be critical, then there will be no distinction made between retained and appointed counsel because of the *Gideon, Douglas*, and *Argersinger* analysis. The future of the "critical stage" test, however, seems limited in light of *Kirby*. In situations where the mechanistic *Kirby* test is not applicable, the analysis will probably be a fundamental fairness test. The application of this due process analysis will be on a case-by-case basis much like the approach under the old *Betts* rule.

To best analyze the status of the right to counsel after these changes, we should focus our attention on areas where the right to counsel has yet to be extended. The two stages or situations

sentence would run afoul of the guarantee against being twice placed in jeopardy for the same offense. *See* North Carolina v. Pearce, 395 U.S. 711 (1969).

chosen for examination in this paper are the grand jury proceeding and the parol revocation proceeding. These two stages are on the opposite ends of the continuum of our criminal justice system and therefore should serve as good examples for demonstrating the present status of the right to counsel analysis.

There is at present no recognized constitutional right to counsel at a grand jury proceeding. If there is ever to be such a right, the Supreme Court will have to find this right through one of two ways. The Court will either determine that the grand jury is a critical stage of the criminal prosecution or that the absence of counsel at this proceeding is fundamentally unfair and violative of due process.

In applying the critical stage analysis the Court must first look to the nature of the proceedings and its effect on the outcome of the case. The grand jury is a unique institution of Anglo-American historical origins.[96] Over the years the use of the grand jury has diminished probably because of statutory enactments or constitutional provisions in many states making the grand jury an optional stage. A changing role has come with this diminished use. The grand jury has shifted away from an independent investigative body towards becoming a ritualistic part of the accusatory process. In the case of most modern grand juries the prosecutor commonly helps organize the daily work and serves as its legal counsellor. Thus the grand juries usually review the evidence as gathered and presented by the prosecutor's office. As originally conceived, the grand jury can be one of the most critical stages of the criminal prosecution because it represents the defendant's last opportunity to be screened out of the system before trial. In addition to the nature of the grand jury, the manner in which the proceeding is conducted can be prejudicial to the defendant. All of the testimony given at this proceeding is under oath and can be stenographically recorded. The prosecutor is free to interrogate, cross-examine, discredit, or magnify testimony completely unfettered by the rules of evidence. Although an accused's right against self-incrimination follows him into the grand jury room, the Supreme Court recognized in *Escobedo* and *Miranda* how empty this right can be without the presence of counsel. A person without counsel at his side could unwittingly offer decisive testi-

96. For a concise history of the grand jury system, see Kaufman, *The Grand Jury—Its Role and Its Power*, 17 F.R.D. 331 (1955).

mony to the grand jury even though he might have avoided the disclosure if he had understood his privilege. The adverse effect can go beyond the indictment. Recorded grand jury testimony is always available to the prosecution, and it would seem to be particularly useful in impeaching a witness whose testimony at the trial is inconsistent with his prior testimony before the grand jury. There would seem to be no end to the various uses which can be made of the grand jury proceeding by a reasonably imaginative prosecutor. The grand jury must be characterized as an anomaly in the system of criminal prosecution, for it is a stage with all of the inherently prejudicial features that make other stages critical yet the right to counsel has not been extended to it. Obviously the first part of the analysis is satisfied. The proceedings most definitely can have a lasting influence on the result of the criminal case.

The second step is to determine if the presence of a lawyer would serve to mitigate or avoid potential prejudice. The principal question to be asked is what unique functions could an attorney perform if he were present. The attorney, as mentioned earlier, would make the right against self-incrimination the viable protection the framers of the Constitution intended it to be. He could observe and attempt to prevent or at least record unfair practices such as using the proceeding to circumvent the spirit of *Miranda* or *Wade*. The attorney could use the proceeding as a discovery tool for the defense. This could be very important since the preliminary hearing functions as a de facto discovery device for alert defense attorneys and the rendering of an indictment by a grand jury vitiates the accused's right to a preliminary hearing. The attorney could serve these and many other valuable functions in the grand jury proceeding. The state asserts that the presence of an attorney would disrupt the traditional order and format of the proceedings. If this is true, should the accused be denied a right to counsel for that reason? Logic would seem to require the answer to be no. Rules of procedure could prevent the proceeding from becoming adversarial by limiting the role of the attorney.

Although the grand jury proceeding would seem to satisfy both elements of the "critical stage" test, the recent limitations placed on that test by *Kirby* make the likelihood of its application to grand juries very unlikely. This observation is by no means axiomatic. The holding in *Kirby*, although it refused to extend

the factual holding in *Wade*, is still broad enough to encompass grand jury proceedings. This inclusion could be accomplished by limiting *Kirby* to its facts. However, this limitation does not seem to be a likely prospect given the Supreme Court's past treatment of the grand jury situation. In *In re Groban*[97] the Court, in making liberal allusions to grand jury proceedings, said:

> Obviously in these situations [grand jury proceedings] evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of his counsel for his defense. Until then his protection is the privilege against self-incrimination.[98]

The Court's reasoning seemed to be based on the assumption that the opportunity to invoke the privilege against self-incrimination obviated any need for the presence of counsel.[99] This reasoning would seem unfounded because the pressures involved in a grand jury interrogation are similar to the pressures involved in custodial interrogation.[100] This attitude makes the prospect of the Court attempting to slip grand jury proceedings into the opening between *Kirby* and *Wade* seem unlikely.

The other form of analysis which might result in the extension of the right to counsel to the grand jury proceeding is the "fundamental fairness" test for determining due process. This type of analysis may once again come into vogue. Mr. Justice Powell's concurring opinion in *Argersinger* mentions the resurrection of a test similar to the *Betts* "special circumstances" test which was a species of the "fundamental fairness" test. However likely the prospects for this test seem to be in other areas, the Supreme Court's attitude toward what process is due in a grand jury proceeding would seem to doom the application of this test

97. 352 U.S. 330 (1957). This case actually involved a fire marshal's inquest, not a grand jury proceeding.

98. *Id.* at 333.

99. Additionally, is it not possible for a person to unknowingly incriminate himself at this stage by answering a series of seemingly innocuous questions?

100. In *Miranda*, the Court said:

> Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present at any questioning if the defendant so desires.

384 U.S. at 470.

in this area. In *Jenkins v. McKeithen*,[101] a case deciding the constitutionality of a Louisiana statute that created the Labor-Management Commission of Inquiry, the Court made its position on grand jury proceedings clear. While holding that all the requirements of due process were applicable to the hearing by the Commission, the Court said:

> We do not mean to say that this same analysis applies to everybody who has an accusatory function. The grand jury, for example, need not provide all the procedural guarantees alleged by appellant to be applicable to the Commission. As this Court noted [in past cases] "the grand jury merely investigates and reports. It does not try." Moreover, "[t]he functions of that institution and its constitutional prerogatives are rooted in long centuries of Anglo-American history."[102]

The Court regards the grand jury as a unique institution and seems certain to continue to defy objective application of their own analysis in refusing to extend the right to counsel in this situation.

The right to counsel at probation revocation as recognized by the Supreme Court in *Mempa* has not been extended to parole revocation. The analysis involved in this situation is somewhat different from the approach to grand jury proceedings. Some states allow retained counsel to appear for the parolee; however, they refuse to appoint counsel for indigents. In this situation the most obvious approach is an equal protection analysis. This approach can have its pitfalls if there is no recognized constitutional right to retained counsel in this situation as evidenced by the experience in the Tenth Circuit. In *Earnest v. Willingham*[103] the circuit court held that if a parolee is permitted retained counsel at revocation hearings, the equal protection clause required that counsel also be provided for indigent parolees. The danger in using equal protection analysis where the right denied does not have a basis as a constitutional right was graphically illustrated in *Fiskins v. Colorado*.[104] In this case the Tenth Circuit refused to hold that the barring of counsel from the revocation hearings altogether was violative of due process. The Supreme Court of

101. 395 U.S. 411 (1969).
102. *Id.* at 430 (citations omitted).
103. 406 F.2d 681 (10th Cir. 1969).
104. 434 F.2d 1232 (10th Cir. 1970).

Idaho[105] refused to extend *Mempa* or *Douglas* to require the appointment of counsel for indigent parolees facing a revocation of their parole. The Idaho court looked to Mr. Justice Harlan's dissenting opinion in *Douglas* for justification where he said:

> [T]he state may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford.[106]

The most viable approach to the right to counsel in parolee revocation would seem to be the "fundamental fairness" test for due process. The Fourth Circuit,[107] although refusing to extend *Mempa* to parole revocations, adopted the empirical "special circumstances" rule of *Betts*. The test is whether the fairness of the proceeding would be impaired by the absence of counsel:

> We presently adopt the empirical rule . . . fully aware that in adopting a case-by-case approach articulation of where the line should be drawn between those who should have been supplied with counsel and those lawfully refused such assistance is a most difficult undertaking. That *Betts* proved unworkable after 21 years of experimentation . . . does not mean, we think, that its rationale cannot be reasonably satisfactory in the administrative as opposed to the judicial context.[108]

This sounds like Mr. Justice Powell's concurring opinion in *Argersinger*. One Second Circuit case[109] has held that the fourteenth amendment's due process clause does require that parolees facing revocation have the right to appointed counsel. The court based its decision on *Mempa* and *Goldberg v. Kelly*.[110] While noting that most of the circuit cases to the contra were based on the right-privilege distinction that was destroyed by *Goldberg*, the circuit court felt that it was incontestible that substantial rights affected in this situation gave rise to a right to counsel.

105. Heath v. State, 94 Idaho 101, 482 P.2d 76 (1971).

106. 372 U.S. at 362.

107. Bearden v. South Carolina, 443 F.2d 1090 (4th Cir. 1971).

108. *Id.* at 1095.

109. Bey v. Board of Parole, 443 F.2d 1079 (2d Cir. 1971).

110. 397 U.S. 245 (1970). This case held that a constitutional challenge to procedures preceding a state's withdrawal of welfare benefits cannot be answered by an argument that public assistance benefits are a privilege and not a right.

The Supreme Court has applied the concept of due process to a parole revocation hearing in *Morrissey v. Brewer*.[111] The Court explicitly reserved the question of whether the parolee is entitled to the assistance of retained counsel or appointed counsel if he is indigent.[112] Mr. Justice Brennan disagreed with the Court's assessment of the counsel issue. He believes that *Goldberg* plainly dictates that the parolee must be allowed to retain counsel if he so desires. "The only question open under our precedent is whether counsel must be furnished the parolee if he is indigent."[113] This is where the revival of the "special circumstances" analysis could come into use. By interpreting *Goldberg* as requiring the right to appointed counsel in parole revocation hearings, the Court would be faced with determining the right to appointed counsel in this situation. In light of the spirit of *Gideon* and *Mempa*, the Court could not completely turn its back on indigent parolees; however, several members of the Court have already expressed their dissatisfaction with a blanket rule. The alternative seems to be the piecemeal "special circumstances" test which would look to the individual case before deciding if there was a right to counsel. If the Court refuses to extend *Goldberg* into the parole revocation hearing, then possibly the Court might be persuaded to apply an adulterated "special circumstances" test to the right to counsel in general. This may be the Supreme Court's analysis of the future for the right to counsel in parole revocation proceedings.

At one time the "critical stage" test seemed very viable while the "special circumstances" test seemed dead. These roles are almost reversed now. The "critical stage" test is not dead but it is most certainly stultified. The "special circumstances" test similar to the old *Betts* rule is not fully alive but that trend seems to be developing. All of this leaves the past and present of the right to counsel in well-defined compartments; however, the future of the extension of the right seems uncertain at best. One thing does seem certain. The right to counsel will not be one of the more rapidly expanding constitutional rights in the future.

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111. 408 U.S. 471 (1972).

112. The Court said, "We begin with the proposition that the revocation of parole is not part of the criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocation." 92 S. Ct. at 2600.

113. 92 S. Ct. at 2605.