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Burger Court--1973 Term: Leaving the Sixties Behind Us, The--Forward

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FOREWORD—The Burger Court—1973 Term: Leaving the Sixties Behind Us

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The Supreme Court in the seventies, the Burger Court, is a champion of law and order. The pendulum, which swung so widely in favor of the accused under the late Chief Justice Warren, has returned and now traverses the adverse arc, presumably towards the greater protection of society.

However, implicit in the statement that the actions of the Burger Court are in the greater interests of the public is the belief that "nice" people are never arrested, that the average man-on-the-street will never be accused of a crime, that innocent people are never convicted, that the fourth amendment's prohibition of unreasonable searches or seizures is for someone else's protection. Where there is smoke, there is fire; indictment means guilt. Perhaps, just perhaps, these beliefs are not solidly founded in the realities of our criminal justice system. Perhaps the Warren Court was protecting the public, and the Burger Court is slowly eroding this protection, right-by-right.

This most recent October Term illustrates this point better than no other. Certainly this Court has been responsible for some outstanding decisions which were favorable to defendants, such as *Argersinger v. Hamlin*.[1] But this last year, the Burger Court refused to extend the "fruit of the poisonous tree" doctrine to a defendant whose *Miranda* rights were admittedly violated;[2] it denied indigents the right to court appointed counsel in the pursuit of discretionary review;[3] it chilled an indigent's exercise of his or her right to counsel by requiring, as a condition of probation, the payment of state-incurred costs for appointed counsel;[4] it allowed a complete search of an individual who was stopped for a mere traffic offense;[5] and it declined to enforce the exclusionary rule before a grand jury after an admittedly illegal search.[6] The Court overruled (*sub silentio*) *Preston v. U.S.*[7] by allowing a warrantless search of a car parked in a public lot one-half of a block from the police station.[8] Also, this disinclination to uphold what the Warren Court found to be basic rights of each and every citizen led the seventies Court to uphold the "general articles" of military law (which provide punishment for behavior "unbecoming an officer") against a constitutional attack, resulting in the defendant's spending some five years of his life in prison for criticizing the Vietnam War while in uniform and for refusing to train Green Berets headed for Southeast Asia.[9]

Note: through all this Justices Douglas, Brennan and Marshall filed their dissents.

It was not always so. At one time these Justices were part of the liberal majority who sat on the bench during the Warren years in the sixties. They, joined by Chief Justice Warren and Justices Black, Goldberg and later Fortas, were a court which made a fundamental contribution to the enforcement of the Bill of Rights by ordering that these liberties be observed in all courts of our land, federal or state.

It is often forgotten that, prior to the actions of the Warren Court, virtually none of the rights contained in the first ten amend-

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[1] 407 U.S. 25 (1972) (right-to-counsel extended to indigents on trial for misdemeanors where punishment by imprisonment is possible).

[2] Michigan v. Tucker, 417 U.S. 433 (1974); *see* Miranda v. Arizona, 384 U.S. 436 (1966).

[3] Ross v. Moffitt, 417 U.S. 600 (1974).

[4] Fuller v. Oregon, 417 U.S. 40 (1974).

[5] United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973).

[6] United States v. Calandra, 414 U.S. 338 (1974).

[7] 376 U.S. 364 (1974).

[8] Cardwell v. Lewis, 417 U.S. 583 (1974).

[9] Parker v. Levy, 417 U.S. 733 (1974). *See also* Secretary of Navy v. Avrech, ___ U.S. ___ (1974).

ments were applied to Americans in state courts. Although they were always deemed available to defendants accused of federal offenses, these rights were denied to those accused of equally serious state offenses, as well as to all defendants in misdeameanor cases.

In 1833 the issue as to whether the Bill of Rights was to be applied to state governments first came up. The Supreme Court held they were not.[10] In 1865 Senator Howard and Congressman Bingham introduced legislation in both houses of Congress to force application of these amendments to defendants in state courts. These bills resulted in the passage of the fourteenth amendment. Nevertheless, the Court in decision after decision continued to hold that the Bill of Rights still did not apply to defendants charged in state courts.[11]

It was not until the Court of the sixties and its doctrine of selective incorporation that the Bill of Rights received this wider application. In Justice Black's view, after the passage of the fourteenth amendment all of the constitutional liberties applied to state defendants. However Justice Harlan felt that the Bill of Rights should not become a straight jacket for our legal rights. Other Justices felt that there was no historical precedent which mandated their application in one fell swoop.[12]

The majority of the Warren Court did, however, accept the proposition that they could extend the eight key amendments to the states one at a time on a case-by-case basis whenever they determined that a specific provision was "fundamental to the American scheme of justice."[13]

Following this plan, the Warren Court, in 1961, determined in *Mapp v. Ohio*[14] that the exclusionary rule was part and parcel of the fourth amendment and, as such, must be applied to the states. In 1962 the Court held that the eighth amendment "cruel and unusual punishment" clause was obligatory on the states. *Robinson v. California.*[15] In 1963, the Court extended the right to counsel, guaranteed by the sixth amendment, to a state defendant. *Gideon v. Wainwright.*[16] In 1964 the Court decided that the fifth amendment privilege against self-incrimination was enforceable in state court. *Malloy v. Hogan.*[17] (This paved the way for *Miranda v. Arizona*[18] in 1966.)

In 1965 the sixth amendment right of confrontation was held to be binding upon the states, *Pointer v. Texas,*[19] and in 1967 two decisions held the rights of speedy trial and compulsory process were available to state defendants. *Klopfer v. North Carolina,*[20] *Washington v. Texas.*[21]

Similarly, in 1968, the Warren Court reversed the conviction of a 19 year old youth who had been denied a jury trial under Louisiana law. In so holding, the Court applied the sixth amendment right to trial by jury to state criminal prosecutions. *Duncan v. Louisiana.*[22]

In 1969 the cycle was completed, as the Court held the fifth amendment's prohibition against double jeopardy to be binding on the states. *Benton v. Maryland.*[23]

I recite this litany to show that the Warren Court, far from making new law as has been charged in certain sectors of our country, in fact merely restored to the American people that which many Americans thought belonged to them back in 1791 after they made the Bill of Rights a condition precedent to their ratifying the Constitution. As Justice Black wrote:

> The first ten amendments were proposed and adopted largely because of fear that Government might unduly interfere with prized individual liberties. The people wanted and demanded a Bill of Rights written into their Constitution. . . . The Fifth, Sixth and Eighth Amendments were pointedly aimed at confining exercise of power by courts and judges within precise boundaries, particularly in the procedure used for the trial of criminal cases.

[10] Barron v. Baltimore, 32 U.S. (7 Peters) 234 (1833).
[11] *See* Adamson v. California, 332 U.S. 46 (1946) (Black, J., dissenting); *see generally* W. CROSSKEY, POLITICS AND THE CONSTITUTION (1953).
[12] *See generally* Hartman, *The Great Debate,* 33 NLADA BRIEFCASE 58 (1972).
[13] Benton v. Maryland, 395 U.S. 784, 795 (1969).
[14] 367 U.S. 643 (1961).
[15] 370 U.S. 660 (1962).
[16] 372 U.S. 335 (1963).
[17] 378 U.S. 1 (1964).
[18] 384 U.S. 436 (1966).
[19] 380 U.S. 400 (1965).
[20] 386 U.S. 213 (1967).
[21] 388 U.S. 14 (1967).
[22] 391 U.S. 145 (1968).
[23] 395 U.S. 74 (1969) (overruling Palko v. Connecticut, 302 U.S. 319 (1937)).

> Past history provided strong reasons for the apprehensions which brought these procedural amendments into being and attest the wisdom of their adoption.[24]

This, then, was the major thrust of the Warren Court, to apply the Bill of Rights to the states and, for the first time, to provide for every American, whether in federal or state court, the liberties guaranteed by the Constitution.

In addition, in cases such as *In re Gault*[25] and *Specht v. Patterson*,[26] the Court extended the basic protections of the Bill of Rights to children accused of crime and to psychiatric commitment cases. Through all of these, we could see the death of a theory, the death of the fifty "laboratories." No longer could every state enforce its own laws, experimenting in the field of criminal jurisprudence. The United States Supreme Court had pre-empted the field and from that point on, it would be in the business of settling criminal disputes of constitutional dimension.

It is no wonder that a tremendous number of cases in the criminal field now crowd the dockets of the Supreme Court, where once civil cases predominated. This volume has also been stimulated by the burgeoning of defender systems throughout the country in response to *Gideon* and *Argersinger*. Now, not only must every issue in criminal justice be litigated in the Supreme Court, but for the first time there are also lawyers available to the poor to litigate the problems peculiar to poverty law.[27]

In the seventies the composition of the court changed. Chief Justice Warren retired, Justices Black and Harlan died, Justice Fortas left for personal reasons, and President Nixon appointed four judges, all from the Law and Order Bench—Rehnquist, Powell, Burger and Blackmun. These Nixon appointees, joined by Potter Stewart and Byron White, form the new majority, resulting in the now familiar six-to-three, with Douglas, Brennan and Marshall on the short end in case after case. This term was no exception. Justices Douglas, Brennan or Marhsall dissented in no less than 28 criminal cases this session, usually joining together.

Let us now try to analyze the cases in this term to see how they relate to cases decided by the Warren Court and earlier precedents.

Miranda in Trouble

The first case we shall discuss is the important case of *Michigan v. Tucker*,[28] in which the new Nixon majority attempts to restrict the scope of *Miranda v. Arizona*.[29] *Miranda* contained four admonitions that the police must give to a suspect taken into custody. The arrestee must be informed that (a) he has the privilege of remaining silent, (b) anything he says can and may be used against him, (c) he has a right to counsel during interrogation and (d) if he is indigent, the state will appoint counsel for him. It is this last warning which was not given to the defendant Tucker.

There is no question that the *Miranda* decision applied to the fact situation in *Tucker*. In determining the retroactivity and scope of *Miranda*, the Supreme Court held that all cases tried after June 13, 1966 (the date of the *Miranda* decision), would come under the *Miranda* order. *Johnson v. New Jersey*.[30] Although in *Tucker* the arrest and limited warnings took place prior to June 13, 1966, the case did not come to trial until after *Miranda* had taken effect.

Several of the Justices of the Burger majority seemed to think that inasmuch as these police warnings had been given prior to the date of the *Miranda* decision, the Court should not be too strict in applying those rules. After all, the statements which the defendant gave the police were not used against him at trial. Instead, a witness, whose name was disclosed to the police by Tucker during the custodial interrogation, was allowed to testify against the accused at trial. Justice Rehnquist, writing for the majority, concluded that *Miranda* applies only to the using at trial of statements made by the defendant. It will not be used to exclude the testimony of the derivative witness, because the police were obviously unaware of the forth-

[24] Adamson v. California, 332 U.S. 46, 70–71 (1946) (Black, J., dissenting).
[25] 387 U.S. 1 (1967).
[26] 386 U.S. 605 (1967).
[27] *See generally*, L. BENNER and B. LYNCH, THE OTHER FACE OF JUSTICE (1973).
[28] 417 U.S. 433 (1974).
[29] 384 U.S. 436 (1966).
[30] 384 U.S. 719 (1966).

coming *Miranda* decision when they interrogated the defendant and learned the identify of the witness.

This analysis fails, however, because it has always been clear that from June 13, 1966, to date, every case tried would be governed by the *Miranda* rules. To deviate from that doctrine at this late date without explicitly reversing the earlier decision is hypocrisy.

Of course the *Tucker* case is further complicated by another doctrine—fruit of the poisonous tree. Simply stated, it is that any evidence illegally derived cannot be used for any purpose whatsoever. This doctrine was first enunciated in *Elkins v. United States*[31] where the Court barred evidence taken illegally by federal officials from being used in a state court. It has been reaffirmed in cases such as *Wong Sun v. United States*[32] where statements taken from a witness whose location had been illegally discovered were held to be inadmissible against the defendant for any purpose.

These two doctrines, *Wong Sun* and *Miranda*, were solid in the law until the date of this decision. *Tucker*, however, denies the enforcement of the poisoned fruit doctrine where a defendant had been given an incomplete *Miranda* warning. The fruit, the name of the supposed (but injurious) alibi witness, was not suppressed. The majority held that since the voluntariness of the witness' statements was not called into question, the testimony was admissible at trial.

In lone dissent[33] Justice Douglas pointed out that this decision weakens the thrust of both *Miranda* and of the doctrine of the fruit of the poisonous tree.

This decision is wrong in that it flies in the face of the logic of both *Miranda* and *Wong Sun*. Furthermore it encourages the police to fail to give defendants their full *Miranda* warnings, with the hope that some information will be given from which they might derive damaging evidence at trial. This is contrary to the policy behind the *Miranda* decision. *Miranda* was an attempt to discourage the police from employing back room tactics (with physical and psychological rubber hoses), to discourage the police from not fully advising the accused of his or her rights and to erase the anomaly of the illiterate first offender hanging himself through ignorance of his rights while the syndicate gangster, with full knowledge and lawyers available, might walk the streets. The *Tucker* decision joins the Burger Court's earlier holding in *Harris v. New York*,[34] in effectively diluting the impact of *Miranda*. Both are open to severe criticism, and both ignore the reason behind the *Miranda* warnings and the rationale of the *Miranda* decision. *Michigan v. Tucker* opens further the door to the emasculation of the *Miranda* doctrine. In the next term we may see this work of the Warren Court restricted again or, more honestly, overruled completely.

The Exclusionary Rule

This last term the Burger Court handed down its decision in *Calandra v. United States*,[35] further limiting the scope of the Warren Court's once strong exclusionary rule.[36] For some time now, Chief Justice Burger and Justices Powell, Rehnquist and Blackmun have been commenting adversely on the rule, which was extended to state prosecutions by the Warren Court in *Mapp v. Ohio*.[37]

The new majority attack on the venerable exclusionary rule was launched by Chief Justice Burger in his dissenting opinion in *Bivens v. Six Unknown Agents*.[38] In that case, petitioner had alleged that on November 26, 1965,

[31] 364 U.S. 206 (1960).

[32] 371 U.S. 471 (1963).

[33] Justice Brennan filed a separate opinion, joined in by Justice Marshall, concurring in the result. The basis for their concurrence, however, is their reading of *Johnson, supra* note 30, and how *Miranda* should be retroactively applied. They did not agree with the reasoning used by the majority. *See* 417 U.S. at 453 (Brennan, J., concurring).

[34] 401 U.S. 222 (1971) (confession taken in violation of *Miranda* can be used at trial for purposes of impeaching the defendant).

For an excellent discussion of the relationship of this case to the work of the Burger Court see Dershowitz and Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971).

[35] 414 U.S. 338 (1974).

[36] The rule, which provides that evidence illegally obtained from an accused may not be used against him or her, was first established for federal courts in Weeks v. United States, 232 U.S. 383 (1914).

[37] 367 U.S. 643 (1961).

[38] 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).

while he was in his own apartment, six federal narcotics agents entered his premises without a warrant and without probable cause. They arrested Bivens for alleged narcotics violations. The petitioner was manacled in front of his wife and children while the agents threatened to arrest the entire family. The apartment was searched from stem to stern. This suit was brought by petitioner in federal district court for $15,000 in damages from each agent. The district court dismissed the case.[39] The court of appeals affirmed,[40] but the Supreme Court granted certiorari and reversed the dismissal. Chief Justice Burger, in dissent, pointed out that if deterrence was the rationale for the exclusionary rule, then this case illustrated the failure of that rule to deter the police from making improper searches and seizures. Therefore, he argued, the exclusionary rule ought to be abandoned, since it had failed to achieve the mission assigned to it.

Last term in *Schneckloth v. Bustamonte*[41] Justices Powell, Blackmun and Rehnquist, in a concurring opinion, questioned whether violations of the fourth amendment could be raised by way of collateral attack. The attack in *Bivens* was in dissent, in *Schneckloth* concurrence, but this term the Burger majority has launched an attack with more tangible results.

The Court in *Calandra v. United States* abolished the exclusionary rule in the presentation of evidence to grand juries. Federal agents had illegally seized papers belonging to Calandra. These were presented to the grand jury. Calandra moved to suppress the material at this stage and asked that he not be required to answer any questions in front of the grand jury based on the suppressed evidence. The district court granted this motion; the court of appeals affirmed. The Supreme Court reversed, over the vigorous dissent of Justices Douglas, Brennan and Marshall. The dissent pointed out that this case was on all fours with *Silverthorne Lumber Company, Inc. v. United States*.[42] In that 1920 case federal agents had unlawfully seized papers belonging to the Silverthornes and their corporation and had presented the documents to a grand jury. The district court ordered the materials returned. The grand jury returned the papers, but attempted to recoup them by issuing a subpoena duces tecum. The Silverthornes refused to comply with the subpoena and were convicted of contempt. The United States Supreme Court, speaking through Mr. Justice Holmes, reversed this conviction, holding that "the essence of the provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all."[43] Mr. Justice Brennan said, in *Calandra*: "*Silverthorne* plainly controls this case. Respondent, like plaintiff in error in *Silverthorne*, seeks to avoid furnishing the grand jury with evidence that he would not have been called upon to supply but for the unlawful search and seizure . . . . [O]nly if *Silverthorne* is overruled can its precedential force to compel affirmance here be denied."[44]

The majority of the Court held that the exclusionary rule should not apply to grand jury proceedings. They reasoned that the rule's deterrent effect on police misconduct was less important than protecting the grand jury proceedings from delay and disruption. The majority ignored the point made by the dissent that the exclusionary rule is not merely designed to deter police activity, but also attempts to give content and meaning to the fourth amendment's prohibition against unreasonable searches and seizures and to prevent the sanctioning of such misconduct by the courts.

The effect of the majority's holding is to open the door to abuse by the police due to the lack of sanctions against unreasonable searches and seizures. This decision can also be compared to *Harris v. New York*[45] which held that even if *Miranda* warnings were not given, the defendant's incriminating statements could be used in court against him as impeachment if he took the stand in his own defense and testified contrary to what he had told the police in the station's backroom. When the *Harris* decision came down many commentators felt that it had weakened the thrust of the decision of

[39] 276 F. Supp. 12 (E.D.N.Y. 1967).
[40] 409 F.2d 718 (2d Cir. 1969).
[41] 412 U.S. 218 (1973).
[42] 251 U.S. 385 (1920).
[43] *Id.* at 392.
[44] 414 U.S. at 362 (Brennan, J., dissenting) (footnote omitted).
[45] 401 U.S. 222 (1971).

the Supreme Court in *Miranda v. Arizona*.[46] They pointed out that if the police were not allowed to use any confession obtained in violation of *Miranda*, there would be no incentive for the police to ever question a defendant without giving him his *Miranda* warnings. If, however, such a confession in the absence of the warnings could be utilized by the police or by the prosecution to "keep the defendant honest," some police officers might be tempted to take a confession in violation of *Miranda* so that it could at least be used for purposes of impeachment.

So too after *Calandra*, the abolition of the exclusionary rule in grand jury proceedings leads police to believe that the results of improper searches and seizures will be admissible in court for some purposes and, therefore, might induce some police to violate the constitutional rights of citizens in the hope of achieving what they would consider a public good.

The dissenting justices were especially distressed by the majority's view sanctioning judicial condonation of improper acts by the police. They pointed out that one of the purposes of the exclusionary rule was to insure that courts are not made parties to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Furthermore, public confidence in the judiciary would be eroded if it participated in such unlawful acts.

Finally, Justice Brennan predicted that this decision will be used to "bootstrap" future decisions of the Court leading to the ultimate abolition of the exclusionary rule:

> In *Mapp*, the Court thought it had "close[d] the only courtroom door remaining open to evidence secured by official lawlessness in violation of Fourth Amendment rights." . . . The door is still ajar. As a consequence, I am left with the uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to reopen the door still further and abandon altogether the exclusionary rule in search and seizure cases.[47]

The spectre of this fear lurks not only in the *Calandra* decision, but its presence pervades other decisions of the Burger Court as well, as the civil liberties established in the sixties continue to be chipped away in the seventies in the new majority's search for law and order.

The End of the Equal Protection Doctrine for the Indigent

With this year's decision in *Ross v. Moffitt*[48] the long line of decisions guaranteeing equal rights for the indigent defendant has come to an end. This line dates back to *Powell v. Alabama*[49] in which the Supreme Court guaranteed the guiding hand of counsel to the indigent accused of a capital crime. This doctrine was extended to anyone accused of a felony in *Gideon v. Wainwright*,[50] and to anyone accused of a crime with incarceration as punishment in *Argersinger v. Hamlin*.[51] The necessity of counsel at "critical stages" was decided in *Coleman v. Alabama*[52] and *Kirby v. Illinois*.[53]

The necessity of counsel at the appellate level was decided in *Douglas v. California*,[54] which guaranteed the right of an indigent defendant to the assistance of counsel in the preparation of the first appeal as of right. The Supreme Court explicitly reserved for a future decision the question of appointing counsel for defendant's discretionary or secondary level appeal.[55] This was the backdrop against which the case of *Ross v. Moffitt* appeared on the docket of the Supreme Court. The Burger Court held that the appointment of counsel would be limited to first appeals as of right (as

[46] *See* note 34 *supra*.
[47] 414 U.S. at 365 (Brennan, J., dissenting) (cite omitted).

[48] 417 U.S. 600 (1974).
[49] 287 U.S. 45, 69 (1932).
[50] 372 U.S. 335 (1963).
[51] 407 U.S. 25 (1972).
[52] 399 U.S. 1 (1970) (preliminary hearings).
[53] 406 U.S. 682 (1972) (post-indictment lineups).
[54] 372 U.S. 353 (1963). *See also* Draper v. Washington, 372 U.S. 487 (1963) (indigent entitled to free transcript on appeal); Lane v. Brown, 372 U.S. 477 (1963) (indegent may not be precluded from appeal by discretionary action of public defender); Smith v. Bennett, 365 U.S. 708 (1961) (filing fee for processing habeas corpus action may not bar indigent); Burns v. Ohio, 360 U.S. 252 (1959) (indigent may not be barred by filing fee on motion for leave to appeal); Griffin v. Illinois, 351 U.S. 12 (1956) (transcript, necessary to appeal, must be provided without cost to indigent).
[55] 372 U.S. at 356.

in *Douglas*). Moffitt was charged with two separate forgeries and had had court-appointed counsel at both trials. He appealed both cases to the North Carolina court of appeals and was provided counsel at public expense in both appeals. In one case the appointed counsel asked to be appointed to assist in filing a request for discretionary review by the North Carolina supreme court. In the other case the public defender took the case to the state supreme court, but review was denied. Request was made to the trial court for appointment of counsel for preparing a petition for writ of certiorari from the United States Supreme Court. In both cases, the requests for counsel to complete the appellate process were denied. Moffitt sought collateral relief in the federal courts, and the United States Court of Appeals for the Fourth Circuit held unanimously that he was entitled to counsel in both cases. The Supreme Court reversed.

In order to understand the gravity of this decision and its effect upon the doctrine of equal protection as it applies to indigent clients, one must first understand the rationale of the *Douglas* decision. It held that whatever avenue of review was available to a rich defendant must be equally available to an indigent. If the state supreme court did not review any criminal cases, the indigent would not need any special considerations. But the state court does provide such review, and the indigent does need special consideration as this review is undeniably costly. As Justice Rehnquist, writing for the majority in *Moffitt*, conceded, "The[se] decisions discussed above stand for the proposition that a state cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons." [56] Therefore, if the state supreme court reviews petitions prepared by counsel retained by rich clients, it must, of necessity, be prepared to review petitions by indigents, and supply counsel when necessary to make this review meaningful.

It is important to note that perhaps the hardest work in the law, requiring the greatest skill, is the formulating of petitions for review in the United States Supreme Court or in state supreme courts, where the court does not *have* to hear every case presented to it. It requires the greatest ability of counsel to capsulize the arguments and raise the issues in a lawyer-like manner, to provide the court with a clearly framed problem, capable of forming the basis of a decision to grant or to deny review. As Justice Haynsworth put it in the *Moffitt* case in the court of appeals:

> An indigent defendant is as much in need of assistance of a lawyer in preparing and filing a petition for a certiorari as he is in the handling of an appeal as of right. In many appeals, an articulate defendant could file an effective brief by telling his story in simple language without legalisms, but the technical requirement for applications for writs of certiorari are hazards which one untrained in the law could hardly be expected to negotiate.[57]

And Justice Haynsworth quoted one commentator as saying:

> 'Certiorari proceedings constitute a highly specialized aspect of appellate work. The factors which [a court] deems important in connection with deciding whether to grant certiorari are certainly not within the normal knowledge of an indigent appellant.' Boskey, The Right to Counsel in Appellate Proceedings, 45 Minn. L. Rev. 783, 797 (1961).[58]

In the Supreme Court, Justices Douglas, Brennan and Marshall again dissented, quoting Justice Haynsworth at length. They concluded:

> *Douglas v. California* was grounded on concepts of fairness and equality. The right to discretionary review is a substantial one, and one where a lawyer can be of significant assistance to an indigent defendant. It was correctly perceived below that the "same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals." [59]

The import of this decision is clear. No longer will indigent defendants be able to pursue their rights of appeal through to the state or United States highest courts. An affluent accused can "take his case all they way up," but

[56] 417 U.S. at 607.

[57] 483 F.2d at 653.

[58] *Id. See* Magnum Co. v. Coty, 262 U.S. 159, 163 (1923); Farness, Withy & Co. v. Yang-Tsze Insurance Association, 242 U.S. 430, 434 (1917).

[59] 417 U.S. at 619 (Douglas, J., dissenting).

the poor defendant must be satisfied with one chance.

The Question of Recoupment or "Chilling" the Right to Counsel

In 1972 the Supreme Court decided, in *James v. Strange*,[60] that a Kansas statute, requiring an indigent defendant to repay the state for the cost of appointed counsel, was unconstitutional in that its provision denied defendant/debtors the normal defenses of the voluntary debtor, thus amounting to a violation of the equal protection guaranteed to indigents. The defendant in *Strange* was ordered to pay $500 for the services of his court appointed attorney, should he become able to do so. Appeal of this order to a three-judge federal court was successful, and the statue was declared unconstitutional on its face, in that it would have a "chilling effect" on the exercise of the right to counsel. A poor defendant with a family might be afraid to fight his case fully, if he knows that the lawyer's fees would hang over his head, win or lose. Furthermore, since a jury trial would cost him more in attorney's fees than a trial to the bench, he might be inclined to forego the former "luxury." Such a situation would be antithetical to the reasoning of the Court in *Griffin v. Illinois*[61] where it was held that, "[T]he quality of justice should not depend upon a person's pocketbook." [62] On appeal, the United States Supreme Court sustained the finding of unconstitutionality, but on the narrower grounds of the defendant's position as debtor.

This term, in *Fuller v. Oregon*,[63] the Court held that an Oregon defendant could be given probation, conditioned upon his repayment of counsel and investigator fees should he be able to do so. The Oregon recoupment statute did not contain the provisions which were held unconstitutional in *Strange*. The Burger Court decided that this difference alleviated the taint, despite the point made by the dissent (Brennan and Marshall) that no other debtor could go to jail for defaulting, while Fuller's probation could be revoked for the same action.

It is important to note that none of the Justices seemed alarmed about the "chilling effect" to the extent that the Kansas or the three-judge court were in *James v. Strange*.[64] Whatever the force of the *Fuller* decision will be, in tandem with *Ross v. Moffitt*, these cases effectively cut the opportunity for indigent defendants at both the trial and appellate levels to be represented by counsel to the fullest extent contemplated by law.[65] At the trial level the defendant may hesitate to accept appointed counsel rather than accept an open-ended bill for services. On appeal he or she will be foreclosed from the assistance of counsel at one of the most important steps in the case.

Whether this will aid in reducing the backlog of the courts or cut down on the costs of indigent representation is yet to be seen, but it is a far cry from the grand principles established in *Douglas v. California* and *Gideon v. Wainwright*.

Prison Cases—The Right to Counsel

Contrary to the over-all trend of its decisions, the Burger Court has, in past terms, extended the right-to-counsel, as guaranteed in the due process clause of the fourteenth amendment, to defendants at probation and parole revocation hearings.[66] This term the Court limited the role of counsel in a similar situation.

In *Wolff v. McDonnell*[67] the new majority were asked to decide which of the many rights previously held to be implicit in the fourteenth amendment's due process clause should be granted to prisoners facing prison disciplinary hearings with possible punishment by solitary confinement and loss of "good-time." [68] The Court held that, although some rights apply,

[60] 407 U.S. 128 (1972).
[61] 351 U.S. 12 (1956).
[62] *Id.* at 19.
[63] 417 U.S. 40 (1974).

[64] James v. Strange, 323 F. Supp. 1230 (D. Kans. 1971).

[65] This represents a significant number of the cases crowding our criminal dockets. According to the National Defender Survey conducted by the National Legal Aid and Defender Association in 1972, 65 per cent of the felony cases and 47 per cent of the misdemeanor cases required public counsel.

[66] Gagnon v. Scarpelli, 411 U.S. 778 (1973) (parole); Morrissey v. Brewer, 408 U.S. 471 (1972) (probation).

[67] 418 U.S. 539 (1974).

[68] "Good-time" refers to the accumulation of time to be deducted from a sentence, earned by extended periods of good behavior. This can be awarded either by a statutory scheme or by prison discretionary decisions or both.

neither the right to counsel, nor the right to confront the witnesses against him or her, are constitutionally guaranteed a prisoner. Justices Douglas, Brennan and Marshall, as in so many of these cases, joined in dissent.

The Abolition of the Warrant Requirement in Automobile Cases

In *Cardwell v. Lewis*[69] the familiar six-to-three configuration was given a welcome rest. A plurality of four justices[70] upheld the warrantless seizure of an automobile from a public parking lot while the defendant was held in custody at the nearby police station. Defendant Lewis was suspected of murder. At the request of the police, he drove to the police station, parking his car in a commercial lot. He was arrested, and the keys to his car and his parking lot claim ticket were taken from him. The warrantless search of the impounded car turned up incriminating evidence. The decision of the Court upheld the use of this evidence at trial.

Justice Blackmun, for the plurality, argued that the search of an automobile is far less intrusive on fourth amendment rights of an individual than would be the search of his person or his house, therefore the standard in requiring warrants for these searches need not be as strict.

The dissenting Justices pointed out that although there is a line of cases establishing a precedent for distinguishing automobile search cases from other searches, any distinction was based upon the mobility of the auto. In the case at bar, it was argued, the car was inaccessible to the defendant, with no possibility of being moved.

The possible impact of this case on the warrant requirement, or absence thereof, in auto searches is highlighted by comparing it to the landmark Warren Court decision in *Preston v. United States*.[71] Justice Black speaking for a unanimous Court, carefully delineated under what circumstances warrantless searches and seizures of automobiles would be allowed. Defendant Preston's conviction was reversed when the warrantless search of his car parked in a garage while he was in police custody was held to be in violation of his constitutional rights. The Court held that if a warrant were absent, the search was limited to one incident to an arrest or in specific exigent circumstances.

The *Preston* case would seem to be tacitly overruled by *Cardwell*. Certainly the care with which the Warren Court examined what used to be a special, limited exception to a general rule is no where in evidence in the plurality decision. Whether a later case with the compelling weight of a majority opinion will more clearly delineate the Court's position in this area remains to be seen.

Search of Dwellings

Consistent with its expansion of all exceptions until they threaten the existence of the rule, the Burger Court allowed a third-party consent for a search to justify the warrantless search of an entire house.

In *United States v. Matlock*[72] the Court approved the search, absent a warrant, of defendant's living quarters on the theory that a third party had given valid consent. The police knocked at the Matlock's dwelling. His girlfriend answered. The police asked if they could search the defendant's living quarters. The areas searched included a bedroom shared by Matlock and this girlfriend. The evidence found was used to convict the defendant.

Until this case, the most extensive search allowed by the Supreme Court in a third-party consent situation had involved the search of a duffel bag.[73] This case represents a stretching of the consent exception beyond any previous limits. The Court sanctioned three separate searches of the house (including the kitchen, pantry, living room and upstairs bedroom) even though no attempt was made by the officers to procure a search warrant on any of these occasions.

Justice Douglas, in dissent said that the authorities should have obtained a search warrant

[69] 417 U.S. 583 (1974).

[70] The opinion was written by Justice Blackmun, joined by Chief Justice Burger and Justices White and Rehnquist. A four-man dissent was written by Justice Stewart, joined by Justices Douglas, Brennan and Marshall. Justice Powell took no part in the consideration or decision of this case.

[71] 376 U.S. 364 (1964). *See also* Carroll v. United States, 267 U.S. 132 (1925).

[72] 415 U.S. 164 (1974).

[73] Frazier v. Cupp, 394 U.S. 731 (1969).

where there was an opportunity to do so, absent any grave emergency (such as imminent loss of evidence or danger to human life or safety). The dissent further argued that the search in this case could never have been supported by a warrant describing with particularity the places and things to be searched. If the search could not have been authorized by warrant, "[i]t is inconceivable that a search conducted without a warrant can give more authority than a search conducted with a warrant." [74]

According to Justice Douglas, this case is a substantial departure from previous Supreme Court cases requiring special circumstances to support an exceptional, warrantless search.[75] (Justices Brennan and Marshall, in their dissent, reaffirmed their dissent in last term's *Schneckloth v. Bustamonte*[76] decision, that a person cannot give consent to search without knowledge of a right to deny access.) The facts of this case are clouded by the shared status of the bedroom, but, nevertheless, the decision contributes to the general reversal of the affirmative steps taken by the Warren Court.

Fourth Amendment Rights on the Decline

The most serious step backward taken by the Burger Court, a step away from the belief that the Bill of Rights are guaranteed to each citizen in every court, is evidenced by the decisions in *Robinson v. United States*[77] and *Gustafson v. Florida.*[78] The question to be resolved was the scope of an allowable search of a person validly stopped and arrested for a traffic citation.

Three important points must be kept in mind while discussing these cases:

(1) There was a valid stop in each case, with no question as to probable cause;

(2) There was only a search of the person, not an automobile search;

(3) The remaining constitutional question is limited to the allowable scope of such a search incident to a traffic arrest.

In *Robinson* a police officer stopped the defendant because it was believed that he was driving without a current license. Probable cause for the arrest was conceded. The search resulted in a crumpled cigarette pack being discovered in a coat pocket. Inside the pack, opened by the officer, were 14 capsules of a substance later identified as heroin. The officer did not hesitate to open the pack, even though there was no claim that there was any fear of a concealed weapon within.

In *Gustafson* the car which was stopped had been observed weaving across the center line "three or four times." It also had out-of-state plates. The driver, a student, was found to be without his operator's license. He was arrested, and a search revealed a cigarette pack. The officer opened this and found marijuana cigarettes. Gustafson was charged with possession, and the marijuana was introduced against him at trial.

These cases departed from the rule established in a majority of jurisdictions, where the police could not conduct warrantless searches of "mere traffic violators."

In dissent, the liberal minority of three conceded that the officer should have the right to pat down any person stopped to protect the officer against hidden weapons, even a traffic arrestee. They made an analogy to stop-and-frisk decisions decided in past terms. They refused, however, to agree that any previous cases gave rise to the decisions in either case. (The majority rejected the stop-and-frisk analogy because those cases arose from situations without probable cause for arrest, while here this was not argued.)

The implications of this decision are frightening. Every person driving a car who is stopped for a traffic violation may be spread-eagled and searched, with no particular object of the inspection ever formulated. Prior to these cases, there was no encouragement for the police to conduct more than a mere pat-down for weapons in traffic arrests. Now that anything the police turns up can lead to a conviction, the police may be motivated to make

[74] 415 U.S. at 187 (Douglas, J., dissenting).
[75] *See* Jones v. United States, 357 U.S. 493 (1958); McDonald v. United States, 335 U.S. 451 (1948); Trupiano v. United States, 334 U.S. 699 (1948); Johnson v. United States, 333 U.S. 10 (1948).
[76] 412 U.S. 218 (1973).
[77] 414 U.S. 218 (1973).
[78] 414 U.S. 260 (1973).

arrests for manufactured traffic violations in order to search for possible contraband.

More important is the way the Burger Court achieves its objective of withdrawing from positions established in the sixties. Instead of a decision with integrity, admitting an affirmative will to change procedure, we are subjected to a review of the past cases, used to support a new position. For now the outlook remains ominous, at best a disturbing uncertainty. The pendulum continues, further and further from the liberal position of the sixties. Our hope lies in the expectation that it may soon reach the end of its tether and begin the long swing back.