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## Sixth Amendment--Right to Counsel of Prisoners Isolated in Administrative Detention

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## SIXTH AMENDMENT—RIGHT TO COUNSEL OF PRISONERS ISOLATED IN ADMINISTRATIVE DETENTION

United States v. Gouveia, 104 S. Ct. 2292 (1984).

### I. INTRODUCTION

The sixth amendment guarantees the assistance of counsel to a person accused of an offense in a criminal prosecution.<sup>1</sup> Precisely when the right to counsel attaches, however, is unclear. Some Supreme Court decisions hold that an individual is entitled to the assistance of counsel only at or after the initiation of adversary judicial proceedings.<sup>2</sup> In contrast, other opinions find that the right to counsel may attach prior to the initiation of formal judicial proceedings.<sup>3</sup>

In *United States v. Gouveia*,<sup>4</sup> the Supreme Court considered

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<sup>1</sup> The sixth amendment of the United States Constitution provides:

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

U.S. CONST. amend. VI.

<sup>2</sup> See *United States v. Gouveia*, 104 S. Ct. 2292, 2297 (1984); *Estelle v. Smith*, 451 U.S. 454 (1981); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Powell v. Alabama*, 287 U.S. 45 (1932). A "formal charge, preliminary hearing, indictment, information or arraignment" can initiate adversary judicial proceedings. *Gouveia*, 104 S. Ct. at 2298 (quoting *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972)).

<sup>3</sup> See *Gouveia*, 104 S. Ct. at 2300-03 (Stevens, J., concurring); *id.* at 2303-04 (Marshall, J., dissenting); *United States v. Wade*, 388 U.S. 218 (1967) (all pretrial confrontations should be reviewed in determining whether an accused is entitled to counsel); *Escobedo v. Illinois*, 378 U.S. 478 (1964) (the right to counsel may attach prior to the formal indictment); see also *infra* notes 71-74, 78-81, 103-05, 115-19 and accompanying text.

<sup>4</sup> 104 S. Ct. 2292 (1984). *United States v. Gouveia* involved the consolidation of six appellants' claims arising from two separate cases. In the first case, inmates Reynoso, Segura, Ramirez, and Gouveia were convicted in the United States District Court for the Central District of California of first degree murder and conspiracy to commit murder in the death of a fellow inmate. See *infra* note 23 and accompanying text. The inmates appealed. *United States v. Gouveia*, 704 F.2d 1116, 1117 (9th Cir. 1983).

In the second case, inmates Mills and Pierce were indicted for the first degree murder of a fellow inmate and the conveyance of a weapon in prison. See *infra* note 24. The district court dismissed the charges on the grounds that Mills and Pierce had been de-

whether the sixth amendment guarantees an indigent inmate the right to counsel prior to indictment if the inmate is confined to administrative detention and under criminal investigation.<sup>5</sup> The Court held that an indigent inmate isolated in administrative segregation is not entitled to appointed counsel prior to the initiation of adversary judicial proceedings.<sup>6</sup> This decision departs from the Court's prior emphasis on securing a fair trial for an "accused."

This Note begins with a summary of the facts in *Gouveia*. It then reviews the Court's majority, concurring, and dissenting opinions. In the discussion, the Note analyzes how the Court's decision misconstrues precedent and ignores important policy considerations. The Note concludes that the inmates in *Gouveia* should have been appointed counsel before the formal commencement of adversary proceedings.

## II. THE DECISION IN *UNITED STATES V. GOUVEIA*

### A. THE FACTS

On November 11, 1978, prison officials at the Federal Correctional Institution in Lompoc, California, found inmate Thomas "Hoppe" Trejo stabbed to death in cell A-18.<sup>7</sup> An autopsy disclosed that Trejo had received forty-five stab wounds around his heart.<sup>8</sup> Federal Bureau of Investigation (FBI) officials and prison authorities initiated independent investigations following Trejo's death.<sup>9</sup> Prison officials immediately suspected that inmates Adolpho

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nied their rights to counsel and speedy trial under the sixth amendment. *United States v. Mills*, No. 80-278 (D. Cal. Aug. 14, 1980) (available Sept. 15, 1984, on LEXIS, Genfed library, Briefs file). On appeal, the Court of Appeals for the Ninth Circuit reversed the dismissal and remanded for trial. *United States v. Mills*, 641 F.2d 785 (9th Cir.), *cert. denied*, 454 U.S. 902 (1981). At the trial, Mills and Pierce were convicted of first degree murder and conveyance of a weapon in prison. *See infra* note 24. The inmates appealed their convictions. *Gouveia*, 704 F.2d at 1117.

The court of appeals, sitting en banc, consolidated the inmates' appeals to consider whether the appellants were denied their sixth amendment right to counsel while they were confined to administrative segregation. *Id.* The Supreme Court's review focused on the same issue. *See Gouveia*, 104 S. Ct. at 2296 n.1.

<sup>5</sup> 104 S. Ct. at 2296. The Court specifically focused its review in *Gouveia* on inmates who lacked the financial resources to retain private counsel. *Id.*

<sup>6</sup> *Id.* at 2300.

<sup>7</sup> *Id.* at 2295; *see also* Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, *Gouveia*, 104 S. Ct. 2292 (1984), *rev'g Gouveia*, 704 F.2d 1116 (9th Cir. 1983) (available Sept. 15, 1984, on LEXIS, Genfed library, Briefs file) [hereinafter cited as Petition for Writ of Certiorari].

<sup>8</sup> *Gouveia*, 104 S. Ct. at 2295; Brief for the United States, *Gouveia*, 104 S. Ct. 2292 (1984) (available Sept. 15, 1984, on LEXIS, Genfed library, Briefs file) [hereinafter cited as Brief for United States].

<sup>9</sup> *Gouveia*, 104 S. Ct. at 2295. The United States Attorney's Office for the Central

Reynoso and William Gouveia had murdered Trejo.<sup>10</sup> At that time, they placed Reynoso and Gouveia in the institution's Administrative Detention Unit (ADU).<sup>11</sup>

The FBI interviewed Gouveia about his knowledge of Trejo's murder on December 6, 1978.<sup>12</sup> Later that month, prison officials continued their investigation of the stabbing incident by conducting disciplinary hearings.<sup>13</sup> During the hearings, prison authorities concluded that Respondents were involved in Trejo's murder.<sup>14</sup> Accordingly, they ordered that Respondents remain isolated in the ADU.<sup>15</sup> Despite Respondents' repeated requests for appointed counsel,<sup>16</sup> they were not afforded the assistance of counsel during

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District of California also opened a file on Trejo's murder and assigned a staff member to investigate the incident by November 29, 1978. Brief for Respondent William Gouveia, *Gouveia*, 104 S. Ct. at 2292 (1984) (available Sept. 15, 1984, on LEXIS, Genfed library, Briefs file) [hereinafter cited as Brief for Gouveia].

<sup>10</sup> *Gouveia*, 104 S. Ct. at 2295. Prison officials later linked inmates Robert Ramirez and Philip Segura to the alleged murder. *Id.* Because the charges against Ramirez and Segura were identical to those facing Gouveia and Reynoso, this casenote limits its discussion to Gouveia and Reynoso. See *supra* note 4.

<sup>11</sup> *Gouveia*, 104 S. Ct. at 2295; see also *infra* note 15 and accompanying text. Reynoso was released from administrative detention on November 22, 1978. *Gouveia*, 104 S. Ct. at 2295. Following further inquiries into the stabbing, however, prison authorities returned Reynoso to the ADU on December 4, 1978. *Id.*

<sup>12</sup> Brief for Gouveia, *supra* note 9. The FBI agent read Gouveia his rights prior to the interview "as if he were an accused in a criminal case." *Id.*

<sup>13</sup> When inmates violate prison regulations, they generally are subjected to a disciplinary hearing. See *Hewitt v. Helms*, 459 U.S. 460, 463-64 (1983); *Wolff v. McDonnell*, 418 U.S. 539, 562 (1974). Prison authorities use disciplinary proceedings to evaluate the inmates' alleged misconduct and to impose appropriate sanctions. *Wolff*, 418 U.S. at 562. Disciplinary hearings also elicit confrontations between "inmates who are being disciplined and those who would . . . furnish evidence against them." *Id.*

<sup>14</sup> *Gouveia*, 104 S. Ct. at 2295.

<sup>15</sup> *Id.* The Code of Federal Regulations provides the following description of administrative detention: "Administrative detention is the status of confinement of an inmate in a special housing unit in a cell either by himself or with other inmates which serves to remove the inmate from the general population." 28 C.F.R. § 541.22 (1982). A prison warden may "place an inmate in administrative detention when the inmate's continued presence in the general population poses a serious threat to . . . other inmates or to the security or orderly running of the institution," when the inmate is awaiting a hearing for or investigation of a violation of prison regulations, and when the inmate is awaiting "investigation or trial for a criminal act." *Gouveia*, 104 S. Ct. at 2295.

Inmates confined to administrative segregation face more restrictions on their daily activities than inmates in the general prison population. In *Gouveia*, for example, Respondents could not interact with inmates in the general prison population while they were detained in the ADU. 704 F.2d at 1118. In addition, Respondents lost the opportunity to participate in many prison programs. *Id.* Respondents, however, did retain access to legal materials, regular visitation rights, daily exercise periods, unmonitored phone calls, and the right to hire private counsel. *Id.*

<sup>16</sup> Brief for United States, *supra* note 8. Although "inmates held in administrative detention are not denied access to counsel," *Gouveia*, 704 F.2d at 1119, each respondent in this case lacked the financial resources to hire an attorney. *Id.* Thus, *Gouveia* speci-

either their disciplinary hearings or their confinement in administrative segregation.<sup>17</sup>

In June, 1980, a federal grand jury indicted Respondents on two charges: first degree murder and conspiracy to commit murder.<sup>18</sup> Respondents did not obtain appointed counsel, however, until their arraignment in federal court on July 14, 1980.<sup>19</sup> Thus, Respondents were confined in administrative detention for over twenty months without the assistance of appointed counsel.<sup>20</sup>

Before their trial began, Respondents sought the dismissal of their indictments.<sup>21</sup> The district court denied the motion to dismiss, and Respondents were forced to trial.<sup>22</sup> At trial, Respondents were convicted of both murder and conspiracy to commit murder.<sup>23</sup> Respondents appealed their convictions to the Court of Appeals for the Ninth Circuit.<sup>24</sup>

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cally decides whether the sixth amendment guarantees indigent inmates the appointment of counsel while confined in administrative segregation. See *supra* note 5 and accompanying text.

<sup>17</sup> *Gouveia*, 104 S. Ct. at 2295.

<sup>18</sup> *Id.* Respondents were charged with first degree murder in violation of Section 1111 of the United States Code, as well as conspiracy to commit murder pursuant to Section 1117 of the United States Code. Section 1111(a) provides:

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

18 U.S.C. § 1111(a) (1976).

Section 1117 defines conspiracy to commit murder as follows:

If two or more persons conspire to violate sections 1111, 1114, or 1116 of this title, and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

18 U.S.C. § 1117 (Supp. 1983).

<sup>19</sup> *Gouveia*, 104 S. Ct. at 2295.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* In support of their motion to dismiss the indictments against them, Respondents posited three arguments: (1) the 19-month delay between the stabbing incident and the grand jury indictment violated their fifth amendment right to due process; or alternatively, (2) that their 20-month isolation in the ADU without appointed counsel infringed on their sixth amendment right to counsel; and (3) that the lengthy delay before indictment violated their right to a speedy trial guaranteed by the sixth amendment. *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* For a further description of the offenses, see *supra* note 18 and accompanying text.

<sup>24</sup> *Gouveia*, 104 S. Ct. at 2295. As note 4, *supra*, states, *Gouveia* addressed the consolidated appeals of six respondents from two separate cases. The case involving four of the respondents, *Gouveia*, Reynoso, Segura and Ramirez, is discussed in the text and

In a closely divided opinion,<sup>25</sup> the court of appeals, sitting en banc, reversed the appellants' convictions.<sup>26</sup> The court limited its review to whether the sixth amendment guarantees the appointment of counsel to indigent inmates prior to indictment if the inmates are isolated in administrative detention and under investigation for criminal activities.<sup>27</sup> The majority of the court of appeals held that under these circumstances, the sixth amendment requires the appointment of counsel to an indigent inmate confined in the ADU for more than ninety days.<sup>28</sup> Accordingly, the court found that Respon-

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preceding footnotes. The facts of the case relating to the remaining two respondents, Mills and Pierce, are discussed below.

On August 22, 1979, inmate Thomas Hall was murdered in the "E" unit of the Federal Correctional Institution in Lompoc, California. Petition for Writ of Certiorari, *supra* note 7. Hall was stabbed 10 times with a knife made in prison. *Id.* Prison authorities suspected inmates Robert Mills and Richard Pierce of Hall's murder and confined them to the ADU. *Gouveia*, 104 S. Ct. at 2295. The prison records indicate that respondents were isolated in the ADU "pending investigation or trial for a criminal act." *Mills*, No. 80-278.

In early September, the Unit Disciplinary Committee, comprised of the inmates' counselor and case managers, conducted a disciplinary hearing concerning Mills and Pierce. *Id.* At that hearing, the Committee informed Mills and Pierce that "based on confidential sources, the government had concluded that they were responsible for the murder of Thomas Hall." *Id.* During the hearing, the Committee denied respondents' repeated request for appointed counsel. *Id.* About September 13, 1979, prison authorities summoned the inmates to a hearing in front of the Institutional Disciplinary Committee conducted by senior prison administrators. *Id.* Again, prison officials told Mills and Pierce that "they were guilty of the Hall murder." *Id.* They ordered that Mills and Pierce continue to be detained in administrative segregation. *Gouveia*, 104 S. Ct. at 2295. Prison authorities again denied Respondents' request for appointed counsel. *Mills*, No. 80-278.

On March 27, 1980, after seven months in the ADU, a federal grand jury indicted Respondents on charges of first degree murder and conveyance of a weapon in prison. *Id.* Inmate Pierce also was charged with assault. *Gouveia*, 104 S. Ct. at 2296. Respondents were not appointed counsel until their arraignment on April 21, 1980. *Id.* At that time, they were released from the ADU. *Id.* Thus, Mills and Pierce were isolated in administrative detention for eight months without access to appointed counsel. *Id.*

Before their trial began, Respondents filed a motion seeking the dismissal of their indictments. *Id.* at 2296. Respondents argued that their eight-month detention in the ADU without the appointment of counsel violated their sixth amendment right to counsel. *Id.* In addition, Respondents claimed that the lengthy delay before their indictment violated their fifth amendment right to due process and their sixth amendment right to a speedy trial. *Id.* The district court dismissed the indictment. *Id.* The court of appeals, however, reversed the district court's decision and remanded the case for trial. *Id.* At trial, Respondents were convicted on all counts. *Id.* Respondents appealed their convictions. *Id.*

<sup>25</sup> *Gouveia*, 704 F.2d at 1116. The court of appeals decided to reverse the convictions by a vote of 6-5.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1119.

<sup>28</sup> *Id.* at 1125. To qualify for appointed counsel under the sixth amendment in cases like this one, the court of appeals stated that the inmate must:

(1) be held in isolation for more than 90 days,

dents' sixth amendment right to counsel had been violated<sup>29</sup> by their twenty-month isolation in administrative detention.<sup>30</sup> Thus, the court reversed Respondents' convictions and dismissed their indictments.<sup>31</sup>

In reaching its decision, the majority of the court of appeals distinguished *Gouveia* from other right to counsel cases because *Gouveia* involved prisoners.<sup>32</sup> The majority stated that although a suspect must be accused to be guaranteed the right to counsel, suspects already incarcerated and subjected to prison authority may be accused for purposes of the sixth amendment when suspects outside of prison are not.<sup>33</sup> To determine what constitutes an accusation for purposes of the sixth amendment, the majority established a test de-

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(2) request the assistance of counsel,

(3) establish indigency, and

(4) show that one of the reasons he is confined to the ADU is because he is being investigated for a criminal act or awaiting trial.

*Id.* at 1124. Once the inmate has established these elements, prison officials have three options. They may (1) show that the inmate is not being detained because an investigation is underway or a trial for a criminal act is pending, (2) appoint counsel, or (3) release the inmate from the ADU into the general prison population. *Id.*

The court of appeals, relying on current federal prison regulations, *see* 28 C.F.R. § 541.11 (1982), decided that an indigent inmate confined to the ADU because of a pending criminal investigation is entitled to appointed counsel after 90 days in isolation. *Gouveia*, 704 F.2d at 1124. Prison regulations specify that one may be confined in the ADU for disciplinary reasons for a maximum of 90 days. *Id.* The 90-day limit consists of a maximum 30 days in isolation while awaiting a disciplinary hearing and 60 days in disciplinary segregation. *Id.* Accordingly, the court concluded that "[i]solation for more than ninety days . . . is necessarily for some purpose other than discipline." *Id.*

<sup>29</sup> 704 F.2d at 1125.

<sup>30</sup> *Id.* at 1118.

<sup>31</sup> *Id.* at 1127. The court also reversed the convictions of respondents Mills and Pierce and dismissed the indictments against them. *Id.*

<sup>32</sup> *Id.* at 1120. The majority recognized that in *Kirby v. Illinois*, 406 U.S. 682 (1972) (plurality opinion), the Court held that the right to counsel attaches only at or after the initiation of formal adversary proceedings. 704 F.2d at 1119-20. The court of appeals, however, declined to follow *Kirby* because it did not address the peculiar situation of inmates confined in prison. *Id.* at 1120.

<sup>33</sup> 704 F.2d at 1120. The majority noted that an inmate suspected of committing a crime in prison encounters different obstacles than a suspect outside of prison. *Id.* at 1122. Upon arrest, a suspect outside of prison is arraigned without a lengthy delay. *Id.* (citing FED. R. CRIM. P. 5(a)). When a suspect is already in prison, however, "[f]ormal charges need not be brought until the government is ready for trial because the suspect can be isolated without being arrested." *Id.* at 1122. Thus, the standard used to trigger the right to counsel for suspects outside a prison may be ineffective in a prison setting. For example, if an arrest is required to trigger the right to counsel, an inmate may be effectively accused of a criminal act in prison but nevertheless be denied the assistance of appointed counsel because the inmate was not "arrested" in connection with the alleged offense. *See id.* The court of appeals concluded that "[t]o insist that an inmate is not 'accused' until formal charges are initiated is to ignore reality." *Id.* But *see infra* note 44 and accompanying text.

rived from the reasoning of a sixth amendment speedy trial case.<sup>34</sup> The test requires a complete evaluation of the federal authorities' conduct in connection with the suspect.<sup>35</sup> Using this test, if the government's actions elicited the conduct the sixth amendment guarantee was designed to prevent, the suspect may be "accused" for purposes of the sixth amendment.<sup>36</sup>

After applying this test to the facts of *Gouveia*, the majority of the court of appeals concluded that, in *Gouveia*, administrative detention served an accusatory purpose.<sup>37</sup> The majority classified Respondents' confinement in the ADU as accusatory because Respondents were being investigated for criminal activities while isolated in administrative segregation.<sup>38</sup> Furthermore, the majority found that Respondents had confronted government prosecutorial forces prior to indictment.<sup>39</sup> In addition, the majority explained that confining Respondents to the ADU for more than ninety days impeded their ability to prepare an adequate defense because they were unable to investigate the criminal charges against them.<sup>40</sup> Accordingly, the majority held that Respondents were denied their sixth amendment right to counsel during their extended isolation in administrative detention.<sup>41</sup>

The dissent in the court of appeals opinion, however, concluded that none of Respondents' constitutional rights had been violated.<sup>42</sup> The dissent found that the right to counsel guaranteed by the sixth amendment is triggered only by the initiation of adversary judicial criminal proceedings,<sup>43</sup> whether the suspect is in prison or

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<sup>34</sup> *Id.* at 1120 (citing *United States v. Marion*, 404 U.S. 307 (1971)); see also *infra* notes 43, 58-62 and accompanying text.

<sup>35</sup> *Gouveia*, 704 F.2d at 1120; see also *Escobedo*, 378 U.S. at 485-86 (where the Court found that police officers' antagonistic conduct during preindictment interrogation was sufficient to render the petitioner accused).

<sup>36</sup> *Gouveia*, 704 F.2d at 1120. The sixth amendment right to counsel guarantee was designed to prevent (1) situations where a suspect would be required to stand alone against government prosecutorial forces, and (2) prejudice to a suspect's right to fair trial. See *Gouveia*, 104 S. Ct. at 2298; see also *infra* notes 56-57 and accompanying text.

<sup>37</sup> *Gouveia*, 704 F.2d at 1120.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* As a result of prison disciplinary proceedings, prison officials found Respondents guilty of murder and subjected them to prison discipline. *Id.*

<sup>40</sup> *Id.* at 1122.

<sup>41</sup> *Id.* at 1125.

<sup>42</sup> *Id.* at 1129 (Wright, J., dissenting).

<sup>43</sup> *Id.* at 1127 (Wright, J., dissenting). The dissent relied upon *Kirby*, 406 U.S. 682 (1972), for the proposition that the right to counsel attaches only at or after the initiation of formal adversary proceedings. According to *Kirby*, adversary judicial proceedings include the "formal charge, preliminary hearing, indictment, information or arraignment." 406 U.S. at 688-89; see also *supra* note 2 and accompanying text.

By contrast, the dissent noted that the sixth amendment right to speedy trial may



not.<sup>44</sup> The dissent also noted that even without relying on the sixth amendment right to counsel to ensure a fair trial, Respondents had adequate protection against government interference with the preparation of their case.<sup>45</sup> Both the "ethical responsibility" required of the government prosecutor and the due process standards in the Constitution guarantee fairness in the adversary criminal process.<sup>46</sup>

The Supreme Court granted certiorari,<sup>47</sup> limited to the issue of whether the sixth amendment entitles an indigent inmate the assistance of appointed counsel prior to the formal indictment proceeding if prison authorities confine the inmate to administrative detention while the inmate's involvement in a criminal act is being investigated.<sup>48</sup>

#### B. THE MAJORITY OPINION

The Supreme Court reversed the court of appeals decision,<sup>49</sup> holding that Respondents were not entitled to the assistance of counsel during their preindictment segregation in the ADU.<sup>50</sup> More specifically, the majority found that "the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant."<sup>51</sup> The majority based its opinion on prior court decisions that considered the sixth amendment right to counsel outside a prison setting.<sup>52</sup>

The majority found that both the language and the purpose of the sixth amendment support the conclusion that the right to counsel attaches *only* at or after the start of adversary judicial proceed-

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attach at points other than the formal initiation of adversary criminal proceedings. *Gouveia*, 704 F.2d at 1127 (Wright, J., dissenting). The dissent contended, however, that the majority confused the sixth amendment right to counsel with the sixth amendment guarantee of speedy trial when it ruled that an inmate confined to the ADU for more than 90 days while being investigated for a criminal act stands accused for purposes of the sixth amendment right to counsel. *Id.* (Wright, J., dissenting). The right to counsel extends only to trial-like confrontations between the suspect and federal authorities. *Id.* (Wright, J., dissenting). Thus, the dissent concluded that, until indicted, Respondents "faced no confrontation for which the right to counsel was designed." *Id.* (Wright, J., dissenting); see *supra* notes 34-36 and accompanying text; see also *infra* notes 58-62 and accompanying text.

<sup>44</sup> *Gouveia*, 704 F.2d at 1127-28 (Wright, J., dissenting). But see *supra* notes 32-33 and accompanying text.

<sup>45</sup> *Gouveia*, 704 F.2d at 1128 (Wright, J., dissenting); see also *infra* notes 64-69.

<sup>46</sup> 704 F.2d at 1128 (Wright, J., dissenting).

<sup>47</sup> *United States v. Gouveia*, 104 S. Ct. 272 (1983).

<sup>48</sup> *Gouveia*, 104 S. Ct. at 2296; see also *supra* note 27 and accompanying text.

<sup>49</sup> *Gouveia*, 104 S. Ct. at 2300. Justice Rehnquist wrote the majority opinion. He was joined by Chief Justice Burger and Justices Blackmun, O'Connor, Powell, and White.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 2297; see also *supra* note 43 and accompanying text.

<sup>52</sup> See *infra* notes 32-33 and accompanying text.

ings.<sup>53</sup> First, the Court found that the sixth amendment specifies the presence of both a "criminal prosecution" and an "accused" in connection with the right to counsel.<sup>54</sup> The majority held that an inmate is not accused until the initiation of formal adversary proceedings because it is not until that point that the government actually has committed itself to prosecute the inmate.<sup>55</sup> Second, the Court held that the purpose underlying the right to counsel is to guarantee to the accused the assistance of counsel "at critical confrontations with his adversary."<sup>56</sup> Thus, the majority found that inmates confined in administrative detention have no right to appointed counsel prior to the initiation of adversary proceedings because, before that time, inmates are not confronted by experienced public prosecutors and the intricacies of criminal law.<sup>57</sup>

The Court also rejected the analogy, relied on by the court of appeals, that because the sixth amendment right to speedy trial can attach before the initiation of formal adversary proceedings,<sup>58</sup> the right to counsel also attaches prior to the commencement of formal proceedings in some situations.<sup>59</sup> The Court held that the right to counsel and the right to speedy trial are distinct rights designed to protect different interests.<sup>60</sup> The right to counsel protects individuals during trial-like confrontations with prosecutors.<sup>61</sup> The right to speedy trial, however, protects individuals against undue impair-

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<sup>53</sup> *Gouveia*, 104 S. Ct. at 2298.

<sup>54</sup> *Id.*; see also *supra* note 1 and accompanying text.

<sup>55</sup> *Gouveia*, 104 S. Ct. at 2298 (citing *Kirby*, 406 U.S. at 689). Although the majority did not address specifically what constitutes a "criminal prosecution," the majority implied that proceedings including a "formal charge, preliminary hearing, indictment, information, or arraignment" would satisfy the criminal prosecution requirement. *Id.* at 2298.

<sup>56</sup> *Id.* Critical confrontations between the accused and their adversary traditionally occur at trial. In cases where an individual is confronted with an expert adversary and intricate legal issues before trial, however, the Court has extended the right to counsel to pretrial proceedings. *Id.*; see also *Wade*, 388 U.S. at 224. Pretrial proceedings are classified as critical confrontations when the results of the proceeding might settle the accused's fate and render the trial meaningless. *Gouveia*, 104 S. Ct. at 2298.

<sup>57</sup> The majority reasoned that "the average defendant does not have the professional legal skill to protect himself" when confronted with the complexities of criminal law and the experience of a government prosecutor. *Gouveia*, 104 S. Ct. at 2298 (quoting *Johnson*, 304 U.S. at 462-63).

<sup>58</sup> *Id.* at 2299; see also *supra* note 44. The Court's sixth amendment speedy trial cases have held that the right to speedy trial may attach as early as "arrest and holding [the suspect] to answer a criminal charge." *Gouveia*, 104 S. Ct. at 2299 (quoting *United States v. McDonald*, 456 U.S. 1, 6-7 (1982)).

<sup>59</sup> *Gouveia*, 104 S. Ct. at 2299; see also *supra* note 43.

<sup>60</sup> *Gouveia*, 104 S. Ct. at 2299; see also *supra* note 43.

<sup>61</sup> *Gouveia*, 104 S. Ct. at 2299 (citing *McDonald*, 456 U.S. at 8). For additional background on the right to counsel, see *supra* notes 56-57 and accompanying text.

ments of their liberty.<sup>62</sup>

Although the Court recognized that the sixth amendment guarantee of representation by counsel enhances the fairness of an accused's trial,<sup>63</sup> the Court held that appointing indigent inmates counsel prior to their indictment is not necessary to ensure this right.<sup>64</sup> The majority found that the fifth amendment guarantee of due process<sup>65</sup> and the statute of limitations associated with each offense<sup>66</sup> adequately protect inmates' rights to a fair trial prior to the initiation of formal proceedings.<sup>67</sup> The Court held that the due process protection, and implicitly statutes of limitation, require the dismissal of a case against an accused should delay in the initiation of formal proceedings prejudice an accused's defense.<sup>68</sup> Thus, ordering the appointment of counsel prior to the initiation of formal adversary proceedings was unnecessary.<sup>69</sup>

#### C. THE CONCURRING OPINION

Although Justice Stevens, joined by Justice Brennan, concurred in the judgment reached by the Court that Respondents had no

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<sup>62</sup> Specifically, the majority explained the purpose of the right to speedy trial as follows:

[T]he speedy trial right exists primarily to protect an individual's liberty interest, 'to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by an arrest and the presence of unresolved criminal charges.'

*Gouveia*, 104 S. Ct. at 2299 (quoting *McDonald*, 456 U.S. at 8).

<sup>63</sup> See *supra* note 36.

<sup>64</sup> *Gouveia*, 104 S. Ct. at 2299.

<sup>65</sup> The majority explained the function of the fifth amendment due process clause as follows:

The Fifth Amendment requires the dismissal of an indictment even if it is brought within the statute of limitations, if the defendant can prove that the government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense.

*Gouveia*, 104 S. Ct. at 2300 (citing *United States v. Lovasco*, 431 U.S. 783, 789-90 (1977); *Marion*, 404 U.S. at 324).

<sup>66</sup> The statute of limitations applicable to each offense protects an inmate against the potential prejudice of extended preindictment delays by prohibiting the prosecution from bringing stale charges against him. *Id.* (citing *Lovasco*, 431 U.S. at 788-89; *Marion*, 404 U.S. at 322).

<sup>67</sup> *Id.* at 2299; see also *supra* notes 45-46 and accompanying text. The majority in the court of appeals decision raised the possibility that prejudice to an inmate's rights could arise from preindictment delays. See *supra* notes 40-41 and accompanying text. The court of appeals held that a delay in the initiation of formal adversary proceedings would prejudice the inmates' rights if the government used the delay to prepare a case against the inmates while they were isolated in the ADU without the assistance of appointed counsel. *Gouveia*, 704 F.2d at 1122.

<sup>68</sup> *Gouveia*, 104 S. Ct. at 2300.

<sup>69</sup> *Id.*

right to appointed counsel prior to indictment,<sup>70</sup> Justice Stevens wrote separately to emphasize two points. First, Justice Stevens found that, contrary to the majority's position, the Court's prior decisions recognize that an accused may have a right to assistance of counsel prior to the initiation of formal adversary proceedings.<sup>71</sup> Justice Stevens contended that these cases established a test to provide an accused with counsel if the accused needed the assistance of counsel at a particular pretrial confrontation to preserve a fair trial.<sup>72</sup> Second, Justice Stevens asserted that suspects can be "sufficiently 'accused' " prior to the commencement of formal charges against them to trigger the sixth amendment right to counsel.<sup>73</sup> Justice Stevens reasoned that if authorities confront suspects to facilitate the development of cases against them, then these suspects have become accused and have a right to counsel even though no formal charges have been filed against them.<sup>74</sup>

Justice Stevens found no evidence, however, that Respondents' confinement in the ADU served an accusatorial function.<sup>75</sup> Because Respondents were not accused, Justice Stevens found no reason to determine whether the failure to appoint counsel prior to the initiation of formal proceedings jeopardized Respondents' rights to a fair trial.<sup>76</sup> Thus, the concurrence concluded that failing to provide Respondents with appointed counsel while they were isolated in the ADU did not violate the sixth amendment.<sup>77</sup>

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<sup>70</sup> *Id.* (Stevens, J., concurring).

<sup>71</sup> *Id.* (Stevens, J., concurring). See also *supra* note 3 and accompanying text.

<sup>72</sup> *Gouveia*, 104 S. Ct. at 2302 (Stevens, J., concurring) (citing *Wade*, 388 U.S. at 227). The concurring Justices recognized that the right to counsel under the sixth amendment was contingent upon the nature of the confrontation between the accused and the State as opposed to the formal initiation of adversary proceedings. The concurrence asserted that "in 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.* (Stevens, J., concurring) (quoting *Wade*, 388 U.S. at 226).

<sup>73</sup> *Id.* (Stevens, J., concurring).

<sup>74</sup> *Id.* (Stevens, J., concurring).

<sup>75</sup> *Id.* at 2303 (Stevens, J., concurring). The concurring Justices assumed Respondents were confined to the ADU for security reasons. *Id.* (Stevens, J., concurring). They found no evidence that Respondents were isolated in administrative detention to aid prosecutorial efforts or to facilitate an investigation of the inmates' murders. *Id.* (Stevens, J., concurring). But see *supra* notes 9, 24 and accompanying text; *infra* notes 82-83 and accompanying text.

<sup>76</sup> *Gouveia*, 104 S. Ct. at 2303 (Stevens, J., concurring).

<sup>77</sup> *Id.* (Stevens, J., concurring).

## D. THE DISSENTING OPINION

Justice Marshall dissented from the Court's holding.<sup>78</sup> He contended that the scope of the sixth amendment right to counsel is not restricted to confrontations that occur at or after the commencement of the formal adversary process.<sup>79</sup> The dissent claimed that the Constitution guarantees an individual who is effectively "accused"<sup>80</sup> the assistance of appointed counsel *before* the initiation of formal judicial proceedings.<sup>81</sup>

In this case, Justice Marshall found that respondents' preindictment segregation in the ADU did serve an accusatorial function.<sup>82</sup> The dissent noted that the government partially justified detaining Respondents in administrative segregation because federal officials were investigating them on criminal charges.<sup>83</sup> Given the government's statement, Justice Marshall concluded that prison authorities denied Respondents their constitutional right to counsel when they refused Respondents' requests for appointed counsel during their preindictment isolation in the ADU.<sup>84</sup>

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<sup>78</sup> *Id.* (Marshall, J., dissenting).

<sup>79</sup> *Id.* (Marshall, J., dissenting); *see also supra* notes 71-72 and accompanying text. *But see supra* notes 51-57 and accompanying text.

<sup>80</sup> *See supra* notes 73-74 and accompanying text. Justice Marshall agreed with the concurring Justices that individuals effectively are accused when they are deprived of their liberty or subjected to investigations that will further the prosecution's efforts to convict them. *Gouveia*, 104 S. Ct. at 2304 (Marshall, J., dissenting).

<sup>81</sup> *Gouveia*, 104 S. Ct. at 2303-04 (Marshall, J., dissenting).

<sup>82</sup> *Id.* at 2304 (Marshall, J., dissenting). *But see supra* note 75 and accompanying text.

<sup>83</sup> The government's admission about pending criminal investigations pertained to all six respondents. *Gouveia*, 104 S. Ct. at 2304 (Marshall, J., dissenting).

The dissent further supported its conclusion with respect to Mills and Pierce with the factual findings of the district court. *Id.* (Marshall, J., dissenting). The district court had found the following:

By the evening of August 22, 1979, when the defendants were placed in segregation, the finger of suspicion had already been pointed toward them. As government counsel conceded during argument, had the defendants been at large on the evening of the murder, under the circumstances of this case they would have been promptly arrested, taken before a magistrate and provided with counsel.

*Mills*, No. 80-278; *see also supra* note 24.

<sup>84</sup> *Gouveia*, 104 S. Ct. at 2305 (Marshall, J., dissenting). Because the majority disposed of the sixth amendment issue by finding that no constitutional rights had been abridged, *see supra* note 50 and accompanying text, it did not have to address the issue of what remedy would have been appropriate. *Id.* at 2304 (Marshall, J., dissenting). Because Justice Marshall found that the court of appeals correctly held that Respondents' sixth amendment rights had been violated, he had to determine an appropriate remedy. *Id.* at 2304-05 (Marshall, J., dissenting); *see also supra* notes 28-31 and accompanying text. Justice Marshall concluded that the court of appeals' decision to dismiss the indictments against Respondents was correct. *Gouveia*, 104 S. Ct. at 2305 (Marshall, J., dissenting).

## III. DISCUSSION AND ANALYSIS

Although the Court found that limiting the right to counsel only to periods at or after the initiation of formal adversary proceedings is consistent with its prior decisions, a close reading of the Court's prior decisions does not support this conclusion. Indeed, the decision in *Gouveia* departs from the Court's prior emphasis on guaranteeing the representation of counsel necessary to ensure individuals assistance when they are confronted with the adversarial forces of the State and to facilitate a fair trial. These important policy considerations suggest that an individual may be entitled to the assistance of counsel before formal judicial proceedings commence.

A. APPLICATION OF PRIOR DECISIONS TO *GOUVEIA*

The *Gouveia* majority relied on its decisions in *Brewer v. Williams*,<sup>85</sup> *Coleman v. Alabama*,<sup>86</sup> and *United States v. Wade*<sup>87</sup> to reach its conclusion that the right to counsel attaches only at or after the formal initiation of adversary proceedings.<sup>88</sup> Although the fact patterns in each of these cases involved confrontations after the initiation of adversary proceedings,<sup>89</sup> the language in these decisions definitely extended the right to counsel to situations occurring prior to the commencement of formal adversary proceedings. In addition, the Court's holdings in *United States v. Ash*,<sup>90</sup> *Escobedo v.*

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<sup>85</sup> 430 U.S. 387 (1977).

<sup>86</sup> 399 U.S. 1 (1969).

<sup>87</sup> 388 U.S. 218 (1967).

<sup>88</sup> See *supra* note 51 and accompanying text.

<sup>89</sup> In *Williams*, *Coleman*, and *Wade*, formal adversary proceedings clearly had commenced prior to the incidents that triggered the right to counsel inquiry. For example, in *Williams*, the Court addressed the respondent's right to counsel during a postarrest interrogation. 430 U.S. at 390-93. In *Coleman*, the Court considered whether the petitioners were entitled to appointed counsel during a preliminary hearing. 399 U.S. at 8-10. In *Wade*, the Court deliberated whether subjecting the respondent to a post-indictment lineup in the absence of his attorney violated his sixth amendment right to counsel. 388 U.S. at 227-28.

See also *Estelle v. Smith*, 451 U.S. 454 (1981) (an individual indicted for murder who was subjected to a psychiatric examination while held in prison was entitled to the assistance of counsel during the examination); *Massiah v. United States*, 377 U.S. 201 (1964) (incriminating statements deliberately elicited by federal agents from an individual free on bail after indictment for narcotics activities in the absence of his attorney deprived the individual of the assistance of counsel guaranteed by the sixth amendment).

Accordingly, the Court has had few, if any, opportunities to evaluate whether an individual should be afforded the assistance of counsel before the initiation of formal judicial proceedings. Thus, the majority's narrow interpretation of the right to counsel in *Gouveia* may be explained by the Court's effort to act consistently with its prior decisions instead of focusing on the language and spirit of the sixth amendment.

<sup>90</sup> 413 U.S. 300 (1973).

*Illinois*,<sup>91</sup> and *Miranda v. Arizona*<sup>92</sup> extended the right to counsel to incidents before the formal initiation of judicial proceedings.

In *Brewer v. Williams*,<sup>93</sup> for example, the Court found that police officers deprived respondent Williams of his constitutional right to assistance by counsel when they subjected Williams to a postarrest interrogation in the absence of his attorney.<sup>94</sup> In *Williams*, however, the Court did not limit the right to counsel to situations that occur after the origination of the formal adversary process. The *Williams* Court held that, *at a minimum*, the sixth amendment guarantees an individual the right to counsel at or after the point when formal judicial proceedings commence against him.<sup>95</sup> Although the facts in *Williams* did not require the Court to articulate a broad interpretation of the scope of the sixth amendment right to counsel,<sup>96</sup> the Court's language in *Williams* certainly did not preclude the possibility that one may be entitled to the assistance of counsel prior to the initiation of adversary proceedings in a situation like that in *Gouveia*.<sup>97</sup>

Similarly, the language in both *Coleman v. Alabama*<sup>98</sup> and *United States v. Wade*<sup>99</sup> indicates that the right to counsel may attach before formal adversary proceedings commence. The Court in *Coleman* held that the sixth amendment guarantees individuals representation by counsel at critical pretrial confrontations, including preliminary hearings, arraignments, and pretrial lineups.<sup>100</sup> In *Wade*, the Court found that the sixth amendment entitled the respondent to

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<sup>91</sup> 378 U.S. 478 (1964).

<sup>92</sup> 384 U.S. 436 (1966).

<sup>93</sup> 430 U.S. 387 (1977).

<sup>94</sup> *Id.* at 397-99.

<sup>95</sup> *Id.* at 398.

<sup>96</sup> In *Williams*, police officers transported respondent Williams from Davenport to Des Moines after he had been arrested and arraigned. *Id.* at 390-93. During the trip, the officers questioned Williams about the disappearance of a girl they thought he murdered. *Id.* Later at trial, the district court held that the information obtained during the trip to Des Moines was inadmissible as evidence because Williams had been denied his sixth amendment right to counsel. *Id.* at 394-95. The Supreme Court subsequently affirmed that Williams was entitled to representation by counsel when he was interrogated by government officers because the adversary process had already commenced against him. *Id.* at 401. Because the adversary process clearly had commenced when the right to counsel issue arose, however, the *Brewer* Court did not consider the circumstances under which the right to counsel might attach if the adversary process had not yet been initiated.

<sup>97</sup> See *supra* note 95 and accompanying text; see also *Gouveia*, 104 S. Ct. at 2300 (Stevens, J., concurring).

<sup>98</sup> 399 U.S. 1 (1969).

<sup>99</sup> 388 U.S. 218 (1967).

<sup>100</sup> *Coleman*, 399 U.S. at 7-10.

the assistance of counsel during a postindictment lineup.<sup>101</sup> Despite the references in the holdings of *Coleman* and *Wade* to situations after the formal initiation of adversary proceedings, the language in those cases in no way restricts the right to counsel to incidents that follow the commencement of formal criminal proceedings. *Coleman* adopted the language of *Wade* concerning the right to counsel.<sup>102</sup> The language in *Wade* suggests that an individual is entitled to representation by counsel prior to the initiation of the formal adversary process. Specifically, the Court held that a court must "scrutinize any pretrial confrontation to determine whether the presence of counsel is necessary to preserve the defendant's basic right to a fair trial."<sup>103</sup> To determine whether an attorney's presence was required in a specific situation, the *Wade* Court focused on the nature of the confrontation between the suspect and the State rather than whether formal adversary proceedings had been initiated against the accused.<sup>104</sup> Moreover, in *Wade*, the Court found that the sixth amendment guarantees the assistance of counsel "whenever necessary to assure a meaningful 'defence [sic].'"<sup>105</sup> Indeed, the language in *Wade* extends the right to counsel to potentially prejudicial confrontations that occur before the initiation of formal judicial proceedings. Based on the Court's language in *Wade*, the *Gouveia* majority erred in holding that Respondents were not entitled to the assistance of appointed counsel during their isolation in the ADU simply because formal adversary proceedings had not commenced.

Support for the position that the right to counsel attaches before the formal initiation of adversary proceedings is not limited to the language of prior Court decisions. The Court's findings in *United States v. Ash*,<sup>106</sup> *Escobedo v. Illinois*,<sup>107</sup> and *Miranda v. Arizona*<sup>108</sup> also support the conclusion that an individual is entitled to repre-

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<sup>101</sup> *Wade*, 388 U.S. at 236-37.

<sup>102</sup> See *Coleman*, 399 U.S. 1 (1969). Because *Coleman* adopted the language of *Wade* concerning the right to counsel, only the language and reasoning of *Wade* are discussed in the text.

<sup>103</sup> *Wade*, 388 U.S. at 227 (emphasis in original); see *Coleman*, 399 U.S. at 7. To analyze whether a specific situation requires the presence of counsel, the *Wade* Court focused on two issues: (1) whether the particular confrontation could substantially prejudice the defendant's rights, and (2) whether the presence of counsel would reduce that prejudice and facilitate a fair trial. *Wade*, 388 U.S. at 227; see also *Coleman*, 399 U.S. at 9.

<sup>104</sup> See *Wade*, 388 U.S. at 226; see also *Gouveia*, 104 S. Ct. at 2302 (Stevens, J., concurring).

<sup>105</sup> *Wade*, 388 U.S. at 224-25 (emphasis added).

<sup>106</sup> 413 U.S. 300 (1973).

<sup>107</sup> 378 U.S. 478 (1964).

<sup>108</sup> 384 U.S. 436 (1966).



sentation by counsel prior to the commencement of the formal criminal process.

In *United States v. Ash*, the Court developed a test to determine when an individual is entitled to the assistance of counsel.<sup>109</sup> The test called for "an examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary."<sup>110</sup> Although originally the right to counsel guarantee was designed to insure an accused the assistance of counsel at trial,<sup>111</sup> later the right to counsel was extended to critical pretrial events where the accused needed assistance.<sup>112</sup> The Court in *Ash* held that a pretrial lineup may trigger the sixth amendment right to counsel<sup>113</sup> because an accused's fate may be decided by the "trial" that occurs at the pretrial confrontation as opposed to in the courtroom.<sup>114</sup> Thus, the right to counsel guarantee was not restricted to events following the formal initiation of judicial proceedings.

In *Escobedo v. Illinois*, police held the petitioner in custody and interrogated him about a fatal shooting before indictment.<sup>115</sup> The Court held that in this context, petitioner had a right to counsel even though formal adversary proceedings had not been initiated at the time of interrogation.<sup>116</sup> The Court noted that when the petitioner's request to consult with his attorney was denied, the investi-

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<sup>109</sup> The Court considered whether an accused has the right to counsel at a postindictment photo display conducted by the government to determine whether a potential witness can identify the alleged offender. 413 U.S. at 303. The Court found that the pretrial photo identification was unlikely to prejudice the accused. *Id.* at 317. The Court held that because the accused was not present during the photo display, he was not confronted with the prosecutorial forces of his adversary. *Id.* Thus, the sixth amendment does not guarantee the assistance of counsel at the photographic identification session. *Id.* at 321.

<sup>110</sup> *Id.* at 313.

<sup>111</sup> *Id.* at 309.

<sup>112</sup> *Id.* at 310-11.

<sup>113</sup> Using its test as a guide, the Court in *Ash* confirmed its decision in *Wade* that an individual is entitled to representation by counsel during a critical pretrial lineup. *Id.* at 314. Although the pretrial lineup in *Wade* took place after the indictment, see *Wade*, 388 U.S. at 219-20, the rationale for providing the assistance of counsel at a postindictment lineup is also applicable to a lineup that occurs before the formal initiation of adversary proceedings. In *Ash*, the Court found that the right to counsel may attach at any lineup that resembles a trial-like confrontation where counsel would "render '[a]ssistance' in counterbalancing any 'overreaching' by the prosecution." *Ash*, 413 U.S. at 314.

<sup>114</sup> 413 U.S. at 311 (citing *Wade*, 388 U.S. at 235-36).

<sup>115</sup> 378 U.S. at 479.

<sup>116</sup> *Id.* at 485. The dissent in *Kirby*, 406 U.S. at 697 (plurality opinion), agreed with the Court in *Escobedo* that the right to counsel guarantee should not be affected by the commencement of formal adversary proceedings. The dissent argued that "The initiation of adversary judicial criminal proceedings is completely irrelevant to whether counsel is necessary at a pretrial confrontation in order to safeguard the accused's

gation was no longer a general inquiry into "an unsolved crime."<sup>117</sup> Under these circumstances, the Court held that "[p]etitioner had become accused, and the purpose of the interrogation was to 'get him' to confess his guilt."<sup>118</sup> The Court concluded that when the pre-indictment interrogation shifts from investigatory to accusatory and seeks a confession from the suspect, the accused is entitled to the assistance of counsel based on the sixth amendment.<sup>119</sup>

In *Miranda v. Arizona*, the suspect was held in police custody and interrogated before formal charges had been filed against him.<sup>120</sup> The Court held that a suspect is guaranteed the assistance of an attorney during custodial interrogation to reduce the possibility of prejudice resulting from abuse of the interrogation process.<sup>121</sup>

The decisions of the Court in *Ash*, *Escobedo*, and *Miranda* do not support the position of the majority in *Gouveia* that the "right to counsel attaches only at or after the time that adversary proceedings have been initiated."<sup>122</sup> Instead, those cases conclude that the right to counsel may be triggered before adversary proceedings begin. In *Ash*, the Court recognized that the accused may need the assistance of counsel before formal proceedings begin to effectively deal with complex legal questions and experienced adversaries.<sup>123</sup> Both *Escobedo* and *Miranda* emphasize that an individual is entitled to repre-

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constitutional rights to confrontation and the effective assistance of counsel at his trial." *Id.*

<sup>117</sup> *Escobedo*, 378 U.S. at 485 (citing *Spano v. New York*, 360 U.S. 315, 317 (1960) (Stewart, J., concurring)).

<sup>118</sup> *Id.* at 485. The Court found that at the time of the interrogation, "[p]etitioner had, for all practical purposes, already been charged with murder." *Id.* at 486.

<sup>119</sup> *Id.* at 492. The Court found that the presence of counsel was necessary to advise the petitioner of his rights during interrogation. *Id.* at 486. Rights not declared during the interrogation process may be lost forever. *Id.* The Court reiterated the petitioner's need for counsel with its conclusion that "what happened at this interrogation could certainly 'affect the whole trial.'" *Id.* (citing *Hamilton v. Alabama*, 368 U.S. 52, 59 (1961)).

<sup>120</sup> *Id.* at 477.

<sup>121</sup> The *Gouveia* majority noted that the decision in *Miranda* was based on the fifth amendment privilege against self-incrimination as opposed to the sixth amendment right to counsel. *Gouveia*, 104 S. Ct. at 2298 n.5. Accordingly, the majority asserted that *Miranda*'s holding that an individual is entitled to the assistance of counsel prior to the initiation of adversary proceedings under the fifth amendment does not necessarily contradict *Gouveia*'s holding that the right to counsel attaches at or after the commencement of judicial proceedings under the sixth amendment. *Id.* Although analytically precise, this technical splitting of fifth and sixth amendment rights ignores the shared goal of both constitutional provisions, ensuring the accused a fair trial. *Wade*, 388 U.S. at 226. In fact, the Supreme Court has suggested that the reasoning in the right to counsel cases decided under the fifth amendment may be applicable to cases decided under the sixth amendment. *Id.*

<sup>122</sup> *Gouveia*, 104 S. Ct. at 2297.

<sup>123</sup> 413 U.S. at 307-11.

sentation by counsel at *any* interrogation that becomes accusatory, instead of investigatory, to protect individual's rights from prejudice.<sup>124</sup> In *Gouveia*, Respondents clearly were accused before the initiation of formal adversary proceedings.<sup>125</sup> In fact, during prison interrogations, authorities told Respondents that they knew Respondents were responsible for the prison murders.<sup>126</sup> Respondents in *Gouveia*, moreover, were forced to stand alone against experienced adversaries during potentially prejudicial proceedings before the formal criminal prosecution commenced.<sup>127</sup> Thus, according to *Ash*, *Escobedo*, and *Miranda*, Respondents in *Gouveia* were entitled to the assistance of counsel during their isolation in the ADU.

#### B. POLICY CONSIDERATIONS

In addition to departing from the principles established in its prior decisions, the Court's holding in *Gouveia* that the sixth amendment right to counsel attaches only at or after the commencement of formal adversary proceedings ignored two important policy considerations. First, the sixth amendment guarantee of counsel was designed to ensure that individuals are not forced to stand alone against the State during the prosecution.<sup>128</sup> Specifically, the Court has recognized that defendants confronted with the substantive and procedural intricacies of the law generally do not have the skills required to effectively defend themselves.<sup>129</sup> In addition, laymen lack the expertise needed to respond to the prosecution of professional

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<sup>124</sup> See *supra* notes 115-19 and accompanying text for a discussion of *Escobedo*; *supra* notes 120-21 and accompanying text for a discussion of *Miranda*.

<sup>125</sup> See *infra* notes 142-47 and accompanying text.

<sup>126</sup> See *infra* note 144 and accompanying text.

<sup>127</sup> See *infra* notes 148-57 and accompanying text.

<sup>128</sup> See *supra* note 36. The government claimed that an inmate is not forced to stand alone during an investigation in prison. Brief for United States, *supra* note 8. The inmate may select any prison staff member to assist him during the proceeding. *Id.* Inmates, however, have expressed concern that staff members may elicit information to frame them instead of assist them. *Id.*

<sup>129</sup> *Ash*, 413 U.S. at 309; see also *Escobedo*, 378 U.S. at 486. The *Ash* Court found that 'Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.'

413 U.S. at 307 (quoting *Powell*, 287 U.S. at 69).

counsel.<sup>130</sup> Because defendants may be confronted with the prosecutorial forces of the State before formal judicial proceedings begin,<sup>131</sup> the right to counsel should be available prior to the formal initiation of the adversary process.

Second, the sixth amendment right to counsel seeks to ensure a fair trial by protecting individuals' rights from being prejudiced.<sup>132</sup> Rights not asserted during pretrial proceedings may be irretrievably lost.<sup>133</sup> Thus, representation by counsel during the pretrial process would help prevent prejudice to an accused's rights. In previous decisions,<sup>134</sup> moreover, the Court has concluded that the presence of counsel when a suspect is being investigated "enhances the integrity of the fact-finding" procedure.<sup>135</sup> Counsel's presence during an investigation can often facilitate a fair trial by preventing the legitimate use of a discovery process from growing into unjust abuse.<sup>136</sup>

In *Gouveia*, however, the majority found that the sixth amendment right to counsel was not required to protect a suspect from the potentially prejudicial effects of a delay by the government in the initiation of formal charges.<sup>137</sup> Instead, the majority held that the fifth amendment due process guarantee and the statute of limitations for each offense provide the suspect adequate protection against prejudice.<sup>138</sup> Although the fifth amendment does seek to guarantee the accused a fair trial by requiring the dismissal of a case against him should the delay in the commencement of formal pro-

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<sup>130</sup> *Ash*, 413 U.S. at 309. The assistance of counsel guaranteed by the sixth amendment attempts to minimize the State's advantage when the accused is confronted with the experience of a professional prosecutor. *Id.*; see also *Johnson*, 304 U.S. at 462-63.

<sup>131</sup> See *infra* notes 148-49 and accompanying text.

<sup>132</sup> See *supra* note 36.

<sup>133</sup> See *supra* note 119.

<sup>134</sup> See, e.g., *Miranda*, 384 U.S. at 436; *Escobedo*, 378 U.S. at 478.

<sup>135</sup> *Miranda*, 384 U.S. at 466.

<sup>136</sup> *Id.* Those who oppose providing individuals with counsel before formal judicial proceedings commence claim that the availability of appointed counsel during that time would reduce the number of confessions obtained by police. See *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part). The Court in *Escobedo*, however, rejected this argument. The Court found that

[n]o system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with the system.

*Escobedo*, 378 U.S. at 490 (emphasis in original). In *Wade*, the Court emphasized that "counsel can hardly impede legitimate law enforcement; on the contrary, . . . law enforcement may be assisted by preventing the infiltration of taint in the prosecution's evidence." *Wade*, 388 U.S. at 238.

<sup>137</sup> See *supra* notes 63-64 and accompanying text.

<sup>138</sup> See *supra* notes 65-69 and accompanying text.

ceedings prejudice the suspect's defense,<sup>139</sup> the fifth amendment does not protect an accused from the prejudice that may occur if he is forced to stand alone against a State prosecutor during an adversary confrontation.<sup>140</sup> Thus, the sixth amendment right to counsel must be applied to protect the rights of an accused who is confronted with the intricacies of the law and the expertise of a public prosecutor prior to the actual commencement of adversary proceedings.

Given the policy considerations of the sixth amendment right to counsel,<sup>141</sup> the facts in *Gouveia* support the position that Respondents in that case should have been appointed counsel prior to the initiation of adversary proceedings. The facts in *Gouveia* indicate that Respondents were "accused" during their isolation in the ADU.<sup>142</sup> For example, Respondents' prison records state that they were confined to the ADU "pending investigation or trial for a criminal act."<sup>143</sup> In addition, during the hearings inside the prison, authorities concluded that Respondents were responsible for the murders in question and informed Respondents of their conclusion.<sup>144</sup> The government conceded, moreover, that had respondents not been incarcerated at the time of the murders, police

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<sup>139</sup> See *supra* note 68 and accompanying text.

<sup>140</sup> See *supra* note 65. The fifth amendment also fails to protect the interests of society from prejudice. If a delay in the initiation of formal charges prejudices a suspect's defense, the fifth amendment requires the dismissal of the case against the suspect. See *supra* notes 65, 68 and accompanying text. Thus, the fifth amendment forces a court to choose between hearing a prejudice-free case and convicting the guilty. See Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388-89 (1964). Alternatively, the sixth amendment seeks to protect an individual's rights from prejudice without letting a guilty person go unpunished. By guaranteeing the accused the assistance of counsel during the pretrial process, the sixth amendment helps insure a fair trial. Brief for *Gouveia*, *supra* note 9. Thus, the sixth amendment prevents the prejudice that prompts the fifth amendment to dismiss a case against an accused and instead facilitates prejudice-free judicial proceedings through which a court can decide whether to punish or release a suspect.

<sup>141</sup> See *supra* notes 128, 132 and accompanying text.

<sup>142</sup> See *supra* notes 12, 24, and 28; see also *infra* notes 143-47. In addition, the district court deciding the *Mills* case held that "when the defendants were placed in segregation, the finger of suspicion had already been pointed toward them." *Mills*, No. 80-278.

<sup>143</sup> *Id.*; see also Petition for Writ of Certiorari, *supra* note 7; Brief for United States, *supra* note 8.

<sup>144</sup> See *supra* notes 14, 24 and accompanying text. During the hearings, Respondents repeatedly requested the assistance of appointed counsel. See *supra* notes 16-17, 24 and accompanying text. Prison authorities denied their requests, however. *Id.* When the petitioner's request to consult with his attorney was denied in *Escobedo*, the Court held that the petitioner had become accused. See *supra* notes 117-18 and accompanying text. Thus, prison officials' refusal to provide Respondents in *Gouveia* with appointed counsel is another indication that Respondents were "accused" during their isolation in the ADU.

would have arrested them.<sup>145</sup> Such an arrest would have mandated an adversary judicial proceeding and the appointment of counsel.<sup>146</sup> Thus, Respondents' isolation in the ADU served an accusatory function<sup>147</sup> and counsel should have been provided.

Respondents, moreover, clearly were confronted with the prosecutorial forces of the State while they were confined to the ADU without the assistance of counsel. For example, the FBI interrogated respondents and subjected them to physical examinations during their isolation.<sup>148</sup> Bureau of Prisons' authorities also questioned Respondents while they were confined to administrative detention.<sup>149</sup> In addition, confining Respondents to administrative segregation prejudiced their ability to prepare an adequate defense because they were unable to investigate the criminal charges against them.<sup>150</sup> The government, for example, interviewed witnesses,<sup>151</sup>

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<sup>145</sup> *Mills*, No. 80-278.

<sup>146</sup> *Id.*

<sup>147</sup> *Gouveia*, 104 S. Ct. at 2304 (Marshall, J., dissenting).

<sup>148</sup> See *Mills*, No. 80-278; see also Brief for Gouveia, *supra* note 9.

<sup>149</sup> See *Mills*, No. 80-278; see also Brief for Gouveia, *supra* note 9.

<sup>150</sup> See *infra* notes 151-55 and accompanying text; *supra* notes 12-14, 24 and accompanying text. In response to Respondents' plea for the assistance of counsel while confined to the ADU, the government claimed that it was not clear that counsel would contribute to Respondents' ability to develop an effective defense. See Petition for Writ of Certiorari, *supra* note 7. The government contended that even inmates not confined to the ADU find it difficult to develop a defense while an investigation is pending against them. *Id.* Moreover, the government noted that providing the assistance of counsel prior to the formal initiation of adversary proceedings presented three additional problems: (1) federal authorities would need to develop new procedures to guide the assignment of appointed counsel to inmates; (2) the presence of counsel in prison during an investigation could disrupt the institution's routine; and (3) the government lacks the additional funds required to provide inmates with counsel before formal proceedings commence against them. *Id.*

<sup>151</sup> While Respondents were isolated in the ADU without the assistance of counsel, it was clear that the government actively was conducting an investigation of the prison murders. In connection with the *Mills* case, for example, the government interviewed over 145 witnesses. See *Mills*, No. 80-278. The government also interviewed over 100 witnesses in connection with Trejo's murder. See Brief for Gouveia, *supra* note 9. By the time Respondents were appointed counsel at arraignment, however, many of their potential witnesses were no longer confined to the Federal Correctional Institution in Lompoc. See Brief for United States, *supra* note 8. As Gouveia's attorney pointed out, 62 of the 67 prisoners who might have been present during Trejo's murder were released from Lompoc by the time Gouveia was appointed counsel. Brief for Gouveia, *supra* note 9. Because respondents knew most of the inmates by nickname only, it would be virtually impossible to locate those individuals who were no longer confined in Lompoc to ask them to testify. *Mills*, No. 80-278. Even if the former inmates could be located, witnesses' memories are likely to fade during an extended delay between the incident and questioning. *Id.*; see also Brief for United States, *supra* note 8; Brief for Gouveia, *supra* note 9. Thus, Respondents' lengthy detention in the ADU without representation by counsel resulted in prejudicial effects at trial. See Brief for Gouveia, *supra* note 9.

memorialized testimony,<sup>152</sup> and preserved physical evidence<sup>153</sup> during Respondents' extended isolation in the ADU. By the time Respondents were appointed counsel, however, witnesses and physical evidence critical to Respondents' defense were unavailable.<sup>154</sup> Moreover, during oral argument, the government conceded that if Respondents had been represented by appointed counsel while they were confined in administrative detention, their ability to mount an effective defense against the government, if charged, would have been enhanced.<sup>155</sup>

Thus, the majority's decision in *Gouveia* also is inconsistent with the Court's emphasis on guaranteeing assistance of counsel whenever necessary to assure the accused a fair trial.<sup>156</sup> By limiting the right to counsel to incidents following the formal commencement of judicial proceedings, the majority forces an individual to stand alone against the State at critical, potentially prejudicial pretrial events.<sup>157</sup>

#### IV. CONCLUSION

In *Gouveia*, the Court relied on its prior decisions in holding that a person is not entitled to the assistance of appointed counsel prior to the formal initiation of adversary proceedings. Those decisions, however, do not support the majority's position. Instead, the language of earlier decisions extends the right to counsel to critical events that occur before formal judicial proceedings begin. The Court's decision, moreover, conflicts with the policy considerations that emphasize the importance of assuring the accused that they may obtain an effective defense and a fair trial, and that they need not stand alone against the State. Indeed, a close examination of the facts in *Gouveia* indicates that Respondents were "accused" during their extended isolation in administrative detention. More important, representation by counsel during that period would have protected Respondents' rights from prejudice and guaranteed them the assistance of counsel during confrontations with the adversary

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<sup>152</sup> Respondents also claimed that they were prejudiced because without the assistance of counsel, they were unable to memorialize the testimony of witnesses needed for trial. Brief for Gouveia, *supra* note 9. Although the government's files are usually available to an inmate, the contents were withheld from Respondents in this case because they were classified as confidential. *Id.* Respondents' counsel found, moreover, that the limited amount of government information disclosed was unreliable. *Id.*

<sup>153</sup> Because of the lengthy delay before they were appointed counsel, Respondents complained they were unable to preserve physical evidence that would have been beneficial to their defense at trial. See *Mills*, No. 80-278; see also Brief for Gouveia, *supra* note 9.

<sup>154</sup> See *supra* notes 151 and 153.

<sup>155</sup> See Brief for United States, *supra* note 8.

<sup>156</sup> See *supra* note 105 and accompanying text.

<sup>157</sup> See *supra* notes 128-36 and accompanying text.

forces of the State. Thus, the majority in *Gouveia* erred when it concluded that Respondents' sixth amendment rights were not violated during their extended isolation in administrative detention.

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