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People v. Bonner: An Unlikely Definition of Critical Stage, 2 J. Marshall J. of Prac. & Proc. 298 (1969)

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NOTES

PEOPLE v. *BONNER*: AN UNLIKELY DEFINITION OF CRITICAL STAGE

While recent decisions have contributed much in attempting to define the extent of the protection afforded by the sixth amendment[1] right to the assistance of counsel[2] in criminal proceedings, it is apparent that its full meaning still remains unclear.[3] One area of difficulty which has given rise to considerable controversy is that of determining at what point in a criminal prosecution an accused is entitled to the assistance of counsel,[4] and, additionally, the remedy available to a defendant when such right is violated. Thus, while recent decisions of the United States Supreme Court have made it clear that the right is not limited to the time of the actual trial, these decisions have avoided specification of any precise stage of the pretrial proceedings at which the right

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[1] The sixth amendment to the Constitution provides that:

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

U.S. CONST. amend. VI.

[2] For an exhaustive discussion of the right to counsel, *see* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955). *See also* Comment, *Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L. J. 1000 (1964); King, *Right to Counsel in State Courts: An Analysis of the Decisions of the Supreme Court of the United States with Reference to Indigent Defendants*, 8 CRIM. L. Q. 94 (1965). For an interesting treatment of the right to counsel through Betts v. Brady, 316 U.S. 455 (1942) but prior to Gideon v. Wainwright, 372 U.S. 355 (1963), which accurately predicted *Gideon*, *see* Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue On "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962). *See generally* Fellman, *The Right to Counsel Under State Law*, 1955 WIS. L. REV. 281; Adam, *The Right of an Accused to Counsel*, 54 ILL. B. J. 308 (1965). For a discussion of the right to counsel, as applied to misdemeanants, *see* Comment, 48 CALIF. L. REV. 501 (1960).

[3] The right to legal representation in criminal proceedings is also guaranteed by the Illinois Constitution. Art. II §9 provides:

> In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

[4] The issue being pressed to the extreme, more than one appellate court has been obliged to observe that "[o]ne is not entitled to counsel while he is committing his crime." Garcia v. United States, 364 F.2d 306, 308 (10th Cir. 1966). *See* Grier v. United States, 345 F.2d 523 (9th Cir. 1965). For a discussion of the stage in criminal proceedings at which an accused is entitled to the assistance of counsel as guaranteed by the Constitution *see* Annot., 5 A.L.R.3d 1269 (1966).

may be held to vest.[5] In determining whether there is a right to counsel at a given confrontation between the accused and the state, the Court looks to the nature and function of the proceeding.[6] Where the Court has determined that the nature and function of a particular confrontation or stage in the proceeding requires the constitutional right to counsel, the Court speaks of such stage as "critical." Thus, "critical stage" becomes the crucial term of art in this analysis.

In a recent case, *People* v. *Bonner*,[7] the Illinois Supreme Court was presented with the question of an accused's right to counsel at the preliminary hearing.[8] In urging that the sixth amendment right had become vested at this stage in the prosecution, the defendant argued that the preliminary hearing was first, a critical stage in the proceedings against him,[9] and secondly, that Illinois' statutory provisions entitled him to such assistance at the preliminary examination.[10] Thus, the Supreme

[5] *See* United States *ex rel.* Cooper v. Reincke, 333 F.2d 608 (2d Cir.), *cert. denied*, 379 U.S. 909 (1964): "[T]here is no arbitrary point in time at which the right to counsel attaches in pre-trial proceedings." *Id.* at 611.

[6] The court of appeals in *Cooper* commented:

> Even in [White v. Maryland], decided after [Gideon v. Wainwright], the Court did not refer to counsel 'at every stage.' Rather, the 'critical' point is to be determined both from the nature of the proceedings and from that which actually occurs in each case.

Id. at 611.

[7] 37 Ill.2d 553, 229 N.E.2d 527 (1967), *cert. denied*, 392 U.S. 910 (1968).

[8] The question of whether failure to appoint counsel to represent an accused at the preliminary hearing unconstitutionally denies the accused of assistance of counsel within the meaning of *Gideon* was before the United States Supreme Court in Pointer v. Texas, 380 U.S. 400 (1964). The court, however, disposed of the case on other grounds and therefore did not reach that issue. *Id.* at 402.

[9] In Illinois, the preliminary examination is a statutory proceeding, ILL. REV. STAT. ch. 38, §109 (1967).

> The purpose of the preliminary examination is to judicially determine if there is probable cause to hold the accused for trial, to inform him of the charges against him, fix bail, and perpetuate testimony.

ILL. ANN. STAT. ch. 38, §109, Committee Comments at 135 (Smith-Hurd 1964). It has also been held that the preliminary hearing:

> [I]s in no sense a trial in that the guilt or innocence of the accused is not finally determined, but simply a course of procedure authorized whereby a possible abuse of power by the prosecution may be prevented and a discharge of the accused effected or that he be held to answer, as the facts warrant.

State v. Langford, 293 Mo. 436, 443, 240 S. W. 167, 168 (1922). Although a preliminary examination is provided for by statute, the Illinois Supreme Court has held that:

> Despite the enactment of the statute there is no constitutional right to a preliminary hearing prior to indictment or trial . . . and we have consistently adhered to the view that where an indictment is returned containing full information of the crime with which an accused is charged, a preliminary hearing is not necessary.

People v. Petruso, 35 Ill.2d 578, 580, 221 N.E.2d 276, 277-78 (1966).

[10] Counsel in *Bonner* took a broad approach on appeal urging many assignments of error, amongst them being: (a) that defendant had a right to counsel at the preliminary examination; (b) that the United States Supreme Court had extended the right to counsel to every stage of the proceedings; (c) that the preliminary examination was a critical stage in the proceedings; (d) that the indictment returned against defendant did not charge an offense; (e) that a factual variance existed between the proof and the purported charge; and, (f) that the sentence of 1-20 years was excessive.

Court of Illinois was faced with the task of interpreting recent federal decisions regarding the meaning and definition of "critical stage," as well as the opportunity to re-examine the provisions of the Illinois Code of Criminal Procedure[11] pertaining to the right to counsel and to the nature of the proceeding known as the preliminary examination. The court concluded that the right to the assistance of counsel did not vest at this stage.

THE QUESTION OF CRITICAL STAGE

For years, the leading case involving the right to counsel at pretrial stages of criminal proceedings was that of *Crooker* v. *California*,[12] in which the defendant, a man of 31 years and a college graduate who had attended the first year of law school, was prosecuted for murder. After his arrest the defendant made a request for counsel which was denied. During subsequent interrogation he confessed to the crime. On appeal he urged that the confession admitted into evidence over his objection had been coerced from him by state authorities and that even if his confession was voluntary, it occurred while he was without counsel because of the previous denial of his request therefor.[13] After his conviction had been affirmed by the Supreme Court of California, the United States Supreme Court granted certiorari[14] "because of the serious due process implications that attend state denial of a request to employ an attorney."[15] The question upon which the grant of certiorari was based was whether "the defendant [was] denied due process of law by the refusal of the investigating officers to allow him to consult with an attorney upon demand being made to do so while he was in custody."[16] In an often cited passage, the Court stated:

> The right of an accused to counsel for his defense, though not firmly fixed in our common-law heritage, is of significant importance to the preservation of liberty in this country. . . . That

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[11] ILL. REV. STAT. ch. 38, §§100-26 (1967).

[12] 357 U.S. 433 (1958). The first of the modern cases involving the right to counsel is Powell v. Alabama, 287 U.S. 45 (1932), *rev'd*, 384 U.S. 436 (1966), in which the Court stated:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. 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 a 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 a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

287 U.S. at 68-69. This holding, however, was directed at the assistance of counsel at the trial of capital cases.

[13] 357 U.S. 433, 434 (1958).

[14] 354 U.S. 908 (1957).

[15] 357 U.S. 433, 434 (1958).

[16] 354 U.S. 908 (1957).

> right [is] secured in state prosecutions by the Fourteenth Amendment guaranty of due process . . . .[17]

The Court continued:

> [S]tate refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at trial on the merits . . . but also if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of that fundamental fairness essential to the very concept of justice.[18]

The Court concluded, however, that where, as here, the defendant was fully aware of his rights in the absence of counsel, use of a voluntary confession made by him after denial of his request to contact his attorney did not violate due process.[19]

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[17] 357 U.S. 433, 439 (1958). Interpretation of the constitutional guarantee of the right to counsel, as binding in state prosecutions, evolved through a number of landmark decisions. In Hurtado v. California, 110 U.S. 516 (1884), the Supreme Court inferred that in order for a constitutional guarantee to extend to the states it would have to contain an express provision to that effect. The Court soon began to depart from this rigid position and held that certain safeguards guaranteed by the Bill of Rights would be applied to the states via the due process clause in the fourteenth amendment, i.e. that certain concepts of justice specified in the Bill of Rights were implicit in the definition of due process. *See* Near v. Minnesota, 283 U.S. 697 (1931); Gitlow v. New York, 268 U.S. 652 (1925); Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226 (1896).

[18] 357 U.S. 433, 439 (1958).

[19] The Supreme Court originally held that the provisions in the Bill of Rights (including the right to counsel) were limited in their application to the federal system and were therefore not binding upon the states. *See, e.g.*, Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). The fourteenth amendment to the Constitution provides, in part, that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The extent to which the fourteenth amendment incorporates the rights guaranteed in the first ten amendments and makes them binding upon the states, is a collateral question, the answer to which is necessary to an understanding of the problems surrounding the right to counsel. It has been asserted that the fourteenth amendment embraces those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . ." Herbert v. Louisiana, 272 U.S. 312, 316 (1926).

The concept of due process of law as enunciated by the Supreme Court determines whether a provision of the Bill of Rights is incorporated into the fourteenth amendment and made binding upon the states. Due process has been defined in such terms as a "[p]rinciple of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Synder v. Massachusetts, 291 U.S. 97, 105 (1934); "[t]hat fundamental fairness essential to the very concept of justice." Lisenba v. California, 314 U.S. 219, 236 (1941); and as a principle "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937).

The practice of the Supreme Court has been to examine each case before it and determine on an ad hoc basis, whether due process had been denied. Thus the Court in Betts v. Brady, 316 U.S. 455 (1942), stated that:

> Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

Id. at 462.

In Gideon v. Wainwright, 372 U.S. 335 (1963), the Court declined to examine the case against the background of its own individual facts and circumstances, in order to examine whether due process had been denied the

In a strong dissent, concurred in by Justice Brennan, Justice Black, and Chief Justice Warren, Justice Douglas postulated that: "The demands of our civilization expressed in the Due Process clause require that the accused who wants a counsel should have one at any time after the moment of arrest."[20] The dissenting opinion held that the fact that the defendant was college educated and had completed one year of law school was immaterial, and that denial of the request for counsel in the instant case violated the requirements of due process.

Three years after *Crooker,* the Court again considered this question in *Hamilton* v. *Alabama.*[21] There, the defendant was convicted of murder. On appeal it was stipulated that he had been denied counsel at the arraignment.[22] Petitioner proceeded by way of coram nobis to the Supreme Court of Alabama which affirmed the conviction on the ground that the defendant failed to show that the denial of his recognized right to counsel at the arraignment resulted in any actual prejudice to him.[23] The United States Supreme Court granted certiorari[24] and expanding on its previous holding in *Crooker,* reversed the conviction

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defendant. Rather, the Court looked back at Betts v. Brady and, speaking through the majority voice of Mr. Justice Black, stated that:

> We accept *Betts v. Brady*'s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.

Id. at 342. *Gideon* therefore stands for the proposition that the right to counsel was incorporated by the due process clause of the fourteenth amendment. Thus, in 1963, the law had evolved from the position that a person charged with a felony was denied the aid of counsel to the position that the right to counsel was fundamental and essential to fair trial, affirming the proposition that:

> The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.

Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938).

[20] Crooker v. California, 357 U.S. 433, 448 (1958).

[21] 368 U.S. 52 (1961).

[22] In Illinois, the arraignment is also a statutory proceeding, ILL. REV. STAT. ch. 38, §113 (1967).

> The arraignment is nothing more than to call the prisoner to the bar of the court to answer the charge against him. The generally accepted purpose of the arraignment is threefold. It fixes the identity of the accused, informs him of the charge against him in a formal manner, and gives him an opportunity to be heard.
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> It is well established in most states that the arraignment is the beginning of the 'trial.'

ILL. ANN. STAT. ch. 38, §113-1, Committee Comments at 278 (Smith-Hurd 1964). *Cf.* People v. Terry, 366 Ill. 520, 9 N.E.2d 322 (1937).

[23] *Ex parte* Hamilton, 271 Ala. 88, 93, 122 So.2d 602, 607 (1960). For the procedural history of this case see *In re* Hamilton, 273 Ala. 504, 142 So.2d 868 (1962).

[24] 364 U.S. 931 (1961).

for the reason that no showing of actual prejudice is required: "When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted. . . . [because], the degree of prejudice can never be known."[25]

Thus, while *Crooker* had required that actual prejudice be shown to have resulted from a denial of the right to counsel at pretrial stages of criminal proceedings, *Hamilton* acknowledged that such prejudice would be presumed under certain facts and circumstances. More significantly, in *Hamilton* the Court began to lay the foundation for the development of the concept of the "critical stage" test. The Court observed that: "Arraignment under Alabama law is a critical stage in a criminal proceeding. . . . What happens there may affect the whole trial."[26]

In the subsequent case of *White* v. *Maryland*,[27] the Supreme Court affirmed its holding in *Hamilton*. After being arrested, the defendant, without benefit of counsel, was brought before the court for a preliminary hearing and there pleaded guilty to a charge of murder. Subsequently, at his arraignment, the defendant was provided with counsel and thereupon withdrew his plea of guilty and entered a plea of not guilty. At trial, the defendant's plea of guilty, made at the preliminary hearing, was admitted into evidence *without objection*. Ultimately, the defendant was found guilty and sentenced to death. On review, the Court of Appeals of Maryland affirmed the conviction.[28] Dealing with the defendant's contention that he was denied the right to counsel at the preliminary hearing, the court observed: "[T]here was no requirement . . . to appoint counsel for the

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[25] 368 U.S. 52, 55 (1961).

[26] *Id.* at 53-54. The Court noted that at the Alabama arraignment the defense of insanity must be pleaded or the opportunity is lost. Pleas in abatement must also be made at the time of arraignment. Thereafter such plea may not be made except in the discretion of the trial judge, and his refusal to accept it is not reviewable on appeal. *Id.* at 53. The Alabama Supreme Court held that in the absence of an allegation that the defendant had such a plea in abatement or defense of insanity, the failure of the court to appoint counsel at the arraignment, while constituting error, did not constitute reversible error. *Ex parte* Hamilton, 271 Ala. 88, 122 So.2d 602 (1960). The United States Supreme Court refused to consider whether or not the defendant had such a plea in abatement or defense of insanity. It is implicit in the holding that the Court is going to *presume* that failure to appoint counsel at a stage where rights or defenses must be therein asserted or be irretrievably lost is of significant prejudice to the accused. Such a stage is labeled a *critical stage*. When a defendant is denied the right to counsel at such a stage, the Court presumes prejudice without reaching or considering the actual merits of the case.

It is of interest that the Court reached this conclusion without apparent consideration of at least one other reason which has been given for holding that the assistance of counsel is needed at the arraignment: Plea bargaining, i.e. arranging for the defendant to plead guilty to a lesser charge. *See* Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780 (1956).

[27] 373 U.S. 59 (1963), per curiam.

[28] White v. State, 227 Md. 615, 177 A.2d 877 (1962), *rev'd*, 373 U.S. 59 (1963).

appellant at the preliminary hearing before the magistrate . . . nor was it necessary for appellant to enter a plea at that time."[29] In answering the appellant's contention that it was error to admit into evidence the former plea of guilty, the court held that:

> [N]o objection to the testimony as to the plea appears in the record and therefore the question is not properly before us, since it was not raised below and decided by the trial court. . . . However, we point out, without further discussion, that the contention is without merit.[30]

The United States Supreme Court granted limited certiorari,[31] restricted to the point of law raised in *Hamilton.* On review, the Court stated that denial of the right to counsel violates the requirements of due process without regard to ensuing prejudice, wherever the pretrial proceeding, regardless of the name by which it is called, constitutes a critical stage in the proceeding. In a footnote to the decision, the Court observed: "Although petitioner did not object to the introduction of [his former plea of guilty] . . . the rationale of *Hamilton* v. *Alabama* . . .does not rest . . . on a showing of prejudice."[32]

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[29] *Id.* at 625, 177 A.2d at 882.

[30] *Id.* at 619-20, 177 A.2d at 879.

[31] 371 U.S. 909 (1962).

[32] 373 U.S. 59, 60 n. (1963). White v. Maryland was a per curiam opinion which raised several questions which have yet to be answered. In *White,* the state obtained from the defendant a plea of guilty at the preliminary examination at a time when he was without counsel. Under the procedural rules of Maryland, the defendant was not required to enter a plea until arraignment. The Court seems to have reasoned that inasmuch as the defendant was to enter his plea at the arraignment, and since he entered his plea at the preliminary hearing, therefore, the preliminary hearing was "de facto" an arraignment. The Court, having earlier decided, in Hamilton v. Alabama, that the arraignment is a critical stage wherein the defendant is entitled to an requires the assistance of counsel, concluded that the preliminary examination in Maryland wherein a defendant is *allowed* to enter a plea is the equivalent of arraignment in other jurisdictions and therefore a critical stage which requires the assistance of counsel.

While the Maryland Supreme Court indicated that the fact that defendant was not *required* to enter a plea was controlling, *see* text at note 29 *supra,* the United States Supreme Court indicated that the fact that defendant could enter a plea at the preliminary hearing was decisive. This was expressly stated in the subsequent case of Pointer v. Texas, 380 U.S. 400 (1965).

> In this Court we do not find it necessary to decide one aspect of the question petitioner raises, that is, whether failure to appoint counsel to represent him at the preliminary hearing unconstitutionally denied him the assistance of counsel within the meaning of *Gideon* v. *Wainwright* . . . . In making that argument petitioner relies mainly on *White* v. *Maryland* . . . in which this Court reversed a conviction based in part upon evidence that the defendant had pleaded guilty to the crime at a preliminary hearing where he was without counsel. Since the preliminary hearing there, as in *Hamilton* v. *Alabama* . . . was one in which pleas to the charge could be made, we held in *White* as in *Hamilton* that a preliminary proceeding of that nature was so critical a stage in the prosecution that a defendant at that point was entitled to counsel. But the State informs us that at a Texas preliminary hearing, such as is involved here, pleas of guilty or not guilty are not accepted and that the judge decides only whether the accused should be bound over to the grand jury and if so whether he should be admitted to bail. Because of these significant differences in the procedures of the respective States, we cannot say that the *White* case is necessarily controlling

Finally, in *Escobedo* v. *Illinois*,[33] the Court again examined its definition of critical stage and, in referring to the right to counsel at the in custodial interrogation stage of criminal proceedings, observed that:

> It was a stage surely as critical as was the arraignment in *Hamilton* v. *Alabama* . . . and the preliminary hearing in *White* v. *Maryland*. . . . What happened at this interrogation could certainly 'affect the whole trial.' . . .[34]

Having examined the concept of a critical stage on three occasions, the Supreme Court has set forth the test for determining that stage which constitutes a critical stage, that is: What happens there *may* or *could* affect the subsequent trial.[35]

The sixth amendment guarantee of the right to counsel "encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.' "[36] It would appear that the courts are gradually coming to recognize that where the need for counsel exists, there should be a right to counsel. In its analysis of the right to counsel, the Court has developed the concept of the critical stage. Although never explicitly defined by the Court, an analysis of the aforementioned cases seems to reveal two elements which must be present before the Court will determine that a confrontation between the accused and the state constitutes a critical stage in the proceedings: (1) events must transpire therein which may affect the subsequent trial, and (2) the assistance of counsel must be necessary to assure that these events affect the subsequent trial only to the measure per-

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> as to the right to counsel. Whether there might be other circumstances making this Texas preliminary hearing so critical to the defendant as to call for appointment of counsel at that stage we need not decide on this record, and that question we reserve.

Id. at 402-03.

In *White*, the taking of a plea from the defendant and its subsequent introduction into evidence in the ensuing trial was actual prejudice. The Court chose not to address itself to this point, but observed that denial of the right to counsel violated the requirements of due process without regard to ensuing prejudice, whenever the pretrial proceeding, regardless of the name by which it is called, constitutes a critical stage in the proceeding. Thus it appears that the Court chose to rely on its finding that the Maryland preliminary examination constituted an arraignment and refused to consider the question of the right to counsel at what is generally understood to be a preliminary hearing.

Of greater import, however, is the holding of the Court that an objection to the introduction of the plea of guilty was not necessary. Seemingly this would shift the duty of excluding such reversible error from counsel for the defense to the prosecution and the court.

[33] 378 U.S. 478 (1964).

[34] *Id.* at 486.

[35] Presuming that a court utilizes the greatest care in formulating its decisive utterances, the Court did not say that what happened there must affect or was likely to affect the subsequent trial. Rather, the Court phrased its utterance in prospective or subjunctive terms. In so doing, it shifted the focus from the alleged prejudice to the inherent nature of the proceedings itself.

[36] United States v. Wade, 388 U.S. 218, 225 (1967). *See* Note, *United States v. Wade: A Case of Mistaken Identity*, 1 J. MAR. J. PRAC. & PROC. 285 (1968).

mitted by law. The decisions of the Court in this area lend themselves to an interpretation that two different and distinct functions of counsel exist.[37]

Initially, the function of counsel is to guide the accused as to the existence and exercise of his legal prerogative and thereby prevent the occurrence of events which the state has no right to have occur. In *White,* this function of counsel was manifest in that the state obtained from the defendant a plea of guilty at the preliminary examination,[38] where the defendant was not required to make any plea at that time. To give the right meaning and substance, any evidence or testimony obtained from the accused during the period of denial of counsel is, under the exclusionary rule,[39] rendered inadmissible.[40] It was, therefore, held that the plea of guilty, made at a time when the defendant was without counsel, could not be introduced into evidence at the subsequent trial. In *Hamilton,* the Court seemed to recognize the function of counsel as protecting against the occurrence of prejudicial events.[41] There, the defendant appeared at arraignment without counsel. At the arraignment, certain defenses had to be raised or rights asserted therein, or they would be irretrievably lost. The Court, refusing to consider whether, in fact, the defendant had such rights or defenses as could have been asserted, held that where a defendant fails to assert a right during a time when he was without counsel, such failure to assert the right was deemed due to the absence of counsel (as opposed to the nonexistence of such a right or defense) and the nonexercise of such right was prejudicial. The remedy in *Hamilton*

[37] In United States v. Wade, 388 U.S. 218 (1967), holding that an accused is entitled to representation at the lineup, the Court seems to find a new function of counsel: that of witness for the defense. Inasmuch as counsel can in no way prevent an unreasonable lineup from taking place, the primary value to the accused of the requirement of counsel's presence appears to be his ability to testify as an eye witness at a motion to suppress the identification.

[38] The Court, however, held that a preliminary hearing at which an accused is allowed to enter a plea is "de facto" the equivalent of arraignment and that all rights which attach at the arraignment stage of the prosecution therefore attach at a preliminary hearing at which the defendant is allowed to enter his plea. *See* authority cited at note 32 *supra.*

[39] *See* Mapp v. Ohio, 367 U.S. 643 (1961).

[40] *Crooker* is thus distinguishable from *White, Hamilton* and *Escobedo,* in that the Court found as a finding of fact that the defendant was aware of the existence and method of exercise of his basic rights; therefore the assistance of counsel was found not to be necessary. *See* text following note 18 *supra.*

[41] The scope of *Hamilton* is, however, much broader than this. *Hamilton,* besides impliedly recognizing one function of counsel to be that of preventing the occurrence of an event which the state had no right to have occur, i.e. the lapse of the defendant's right to raise certain pleas in abatement and the defense of insanity, seems to recognize another function of counsel: that of making certain favorable events occur. This appears to explain the Court's holding that no attempt would be made to determine whether the defendant actually had such a defense or plea in abatement and that instead, prejudice would be presumed. *See* authority cited at note 26 *supra.*

was to expunge the record of the arraignment in which the defenses lapsed and in which the defendant was without counsel. Inasmuch as the arraignment is an essential step in a valid trial,[42] it followed automatically that the judgment was reversed. Once again, in *Escobedo,* the function of counsel as one who prevents the occurrence of prejudicial events is apparent. There, the defendant, abandoning his fifth amendment privilege against self-incrimination, made incriminating statements against himself to the officials who had him in custody. The Court, holding that an intelligent waiver of a defendant's fifth amendment privilege cannot take place until the defendant is afforded an opportunity to consult with counsel,[43] found that this evidence was obtained from the accused at a time when he was without the assistance of counsel and that, as in *White,* such evidence was inadmissible at the subsequent trial.

The second function of counsel, as illustrated by *Gideon* v. *Wainwright*[44] and its progeny, is to bring about the occurrence of events favorable to the defense; that is, to raise affirmative matters beneficial to the defense by examination of witnesses and introduction of evidence and to argue the client's cause to judge and jury. In analyzing this second function of counsel, it is observed that a less apparent prejudice results from the failure to afford counsel at a point where his assistance might have produced matter favorable to the defense. This is the field of "might have beens." Where an unfavorable event occurs which need not have taken place had the defendant had the assistance of counsel, the Court may point to that event and observe: But for the denial of counsel, this specific prejudice would have been eliminated.[45] Where events fail to occur due to the failure of the state to afford the right to counsel, the Court cannot speculate as to what might have been. Here the Court must say, as in *Hamilton,*[46] "we do not stop to determine whether prejudice resulted . . . . [because] the degree of prejudice can never be known."[47] Where an accused is denied the right to cross-examine witnesses,[48] the degree of prejudice can never be known and the Court declines to speculate as to whether cross-examination might have uncovered favorable matter. Expanding upon the second function of counsel, it is insufficient that the defen-

[42] *See* authority cited at note 22 *supra.*

[43] Escobedo v. Illinois, 378 U.S. 478, 490 n. 14 (1963).

[44] 372 U.S. 335 (1963). *See* authority cited at note 19 *supra.*

[45] This is not necessarily true. However, where the defendant is entitled to the assistance of counsel and that right is denied, a court would appear "more than justified" in presuming that counsel, had he been available, would have taken every conceivable step in the defense of the accused.

[46] *See* authority cited at note 41 *supra.*

[47] 368 U.S. 52, 55 (1961).

[48] *See, e.g.,* Pointer v. Texas, 380 U.S. 400 (1965); Alford v. United States, 282 U.S. 687 (1931).

dant merely be represented at trial or at those stages where evidence is obtained from him which might be used at trial. If counsel is to be effective in bringing about the occurrence of events favorable to the defense, it follows that he must have a realistic opportunity to investigate and prepare the case. It has been held that counsel must be made available well enough in advance of trial to enable him to investigate and prepare the defense. In *Powell* v. *Alabama,*[49] the Court observed:

> [D]uring perhaps the most critical period of the proceedings against these defendants . . . when consultation, thorough going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.[50]

In *DeToro* v. *Pepersack,*[51] the defendant had been tried and convicted of homicide in Maryland. Having exhausted his state remedies,[52] DeToro applied for a writ of habeas corpus in the federal courts, urging that the denial of the right to counsel at the preliminary hearing, wherein defendant had pleaded not guilty, vitiated his conviction. Relying heavily upon *Powell,* the petitioner urged that he had a right to counsel at every step in the proceedings.[53] Rejecting this contention, the court found that:

> [T]he thrust of Powell's admonition that an accused has a right to counsel 'at every step in the proceedings against him,' as borne out by subsequent decisions, including Hamilton and White, seems to be that if the effectiveness of legal assistance ultimately furnished an accused is likely to be prejudicial by its prior denial, the earlier period may be deemed a critical stage in the judicial process and a conviction obtained in such circumstances is rendered invalid.[54]

One court,[55] at least, agreed with the proposition urged in *DeToro* and held that counsel must be assigned at the preliminary hearing when he might be helpful in investigating and preparing the case. That decision was subsequently vacated, in *Harris* v. *Wilson,*[56] a habeas corpus proceeding, where the United States District Court for the Northern District of California, Southern Division, having examined the cases of *Powell, Hamilton* and *White,* observed that: "[A]ny stage where the advice of counsel

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[49] 287 U.S. 45 (1932).

[50] *Id.* at 57. *Powell,* however, was not concerned with the preliminary hearing. The period referred to by the Court was that between arraignment and trial.

[51] 332 F.2d 341 (4th Cir.), *cert. denied,* 379 U.S. 909 (1964).

[52] DeToro v. State, 227 Md. 551, 177 A.2d 847 (1962); DeToro v. Warden, 231 Md. 635, 190 A.2d 783 (1963).

[53] *See* authority cited at note 12 *supra.*

[54] DeToro v. Pepersack, 332 F.2d 341, 343-44 (4th Cir. 1964).

[55] Harris v. Wilson, 239 F. Supp. 204 (N.D. Cal.), *vacated,* 351 F.2d 840 (9th Cir. 1965), *cert. denied,* 383 U.S. 951 (1966).

[56] *Id.*

would 'affect the whole trial', is a 'critical point' at which, absent valid waiver, counsel must be appointed if the defendant is unable to obtain his own."[57] After making some general observations regarding the nature of the preliminary examination in California, the court declared:

> Perhaps the most convincing reason that presence of defense counsel at Preliminary Examination might 'affect the whole trial' is the fact that the Examination is an initial adversary confrontation. The rest of the judicial proceedings can be completely avoided if the defendant achieves a victory at this stage . . . . Furthermore, prosecution witnesses may be cross-examined and the defense may proffer its own witnesses. In all of these matters, the absence of defense counsel could have a crucial effect on the accused's opportunity to obtain a complete termination of the criminal proceedings at this early stage.[58]

The court continued:

> The fact that the Preliminary Examination is a species of criminal pre-trial discovery is another reason for requiring appointment of counsel at this point. On cross-examination, counsel could elicit information helpful for the defense. What is discovered at this point could affect the defense strategy for the rest of the criminal proceedings.[59]

One major objective sought to be achieved in the American system of jurisprudence is the guarantee to all defendants of a fair trial.[60] The United States Supreme Court has determined that certain provisions of the Bill of Rights are fundamental and essential to a fair trial and must be afforded a state criminal defendant if the guarantee is to have meaning and substance.[61] One such right is the sixth amendment right to counsel. Thus, the Court has recognized that:

> [T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.[62]

Therefore: "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' "[63]

The Court has also recognized that there not only exists a duty to provide counsel at trial but also a duty to provide counsel well enough in advance of trial so that he may properly investigate and prepare his case for "[n]either . . . [counsel] nor court

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[57] *Id.* at 209.
[58] *Id.* at 210.
[59] *Id.*
[60] An examination of the federal cases leads to the conclusion that it is the duty of the Court to see that the accused is "denied no necessary incident of a fair trial." Powell v. Alabama, 287 U.S. 45, 52 (1932).
[61] As to incorporation of various provisions of the Bill of Rights within the fourteenth amendment definition of due process, *see* authority cited at note 19 *supra.*
[62] Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938).
[63] *Id.* at 462.

. . . [can] say what a prompt and thorough-going investigation might disclose as to the facts."[64] Inasmuch as the state's legal machinery is put into motion at the time of the accused's arrest and since a collateral arm of the state is fully investigating the facts and circumstances of the case for the state,[65] might not a court rationally conclude, as in *Harris,* that fundamental fairness requires that the accused should have the right to put his own legal machinery into motion contemporaneously?[66]

The Illinois View

The Illinois Supreme Court has recognized that the right to counsel is not confined to representation during the actual trial but may extend to pretrial proceedings.[67] In the case of *People* v. *Morris,*[68] the court noted:

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[64] Powell v. Alabama, 287 U.S. 45, 58 (1932). The major question left unanswered, except for the attempt made by the court in Harris v. Wilson, note 51 *supra,* is the method of combatting the prejudice to the investigation resulting from delay in the appointment of counsel. What if the accused has an alibi witness who disappears in the interval between the time that the accused is arrested and counsel is appointed? Would a court speculate that counsel might or might not have been able to restrain his disappearance, take his deposition for the purpose of perpetuating testimony, or even arrange to have him held as a material witness or might a court decree that the degree of prejudice could never be known? Might the defendant first be required to establish that such a witness existed or would a mere allegation suffice?

Just why the Supreme Court has not chosen to find that fundamental fairness requires the appointment of counsel from the time of arrest is not clear. On its face, any delay in appointment of counsel is diametrically opposed to prompt and thorough going investigation. By the same reasoning any delay equally prejudices the thoroughness of the investigation. It would seem that a meaningful "prompt and thorough investigation" implies an immediate investigation which requires appointment of counsel at the time of arrest.

[65] Whether the official investigation is made on behalf of the prosecution or whether made in the interests of justice, with the state objectively attempting to collect information which may either implicate or exonerate the accused, is a substantial question beyond the scope of this note. Whether our system is adversarial or whether it is accusatorial and what ramifications flow from each concept is a closely related question also beyond the scope of this note. However, for two recent decisions of the United States Supreme Court wherein the system has been labeled adversarial, *see* Miranda v. Arizona, 384 U.S. 436 (1966), and Giles v. Maryland, 386 U.S. 66 (1967), (dissenting opinion of Justice Harlan joined by Justices Black, Clark and Stewart).

[66] This point was made in the minority opinion of People v. Bonner where it was stated that: "The State was represented by an attorney, but the defendant's request for a continuance to retain an attorney was overridden." 37 Ill.2d 553, 567, 229 N.E.2d 527, 535 (1967). It is somewhat curious that the United States Supreme Court would, as in *Hamilton,* refuse to consider whether the defendant actually had a defense of insanity or plea in abatement which could have been raised at the arraignment and presume prejudice but would not consider that a delay in the appointment of counsel per se prejudices his ability to investigate the case. Perhaps the answer lies in the suggestion made by the Court in Pointer v. Texas:

> Whether there might be other circumstances making this Texas preliminary hearing so critical to the defendant as to call for appointment of counsel at that stage we need not decide on this record, and that question we reserve.

380 U.S. 400, 403 (1965). Since that time, the question has not come before the Court.

[67] People v. Morris, 30 Ill.2d 406, 410, 197 N.E.2d 433, 435 (1964).

[68] 30 Ill.2d 406, 197 N.E.2d 433 (1964).

> [D]ue process is violated by the lack of counsel before trial whenever the pretrial circumstances are such that the accused is so prejudiced thereby as to infect his subsequent trial with an absence of fundamental fairness essential to the very concept of justice.[69]

However, in considering the right of an accused to representation at the preliminary hearing stage of the proceedings, the *Morris* court found that in Illinois:

> [T]he scope and purpose of preliminary proceedings are in general to ascertain whether a crime charged has been committed and, if so, whether there is probable cause to believe that it was committed by the accused.[70]

The court, focusing particularly upon the nature and function of the preliminary hearing, examined the criminal procedure followed in Illinois and found no danger of prejudice inherent in the preliminary hearing which would warrant a presumption of prejudice or require the assistance of counsel.[71] The court therefore held that: "A preliminary hearing in Illinois is not a critical stage where rights or defenses must be raised or lost and neither is it a proceeding at which pleas are made or received."[72] It was the conclusion of the *Morris* court, therefore that, absent a showing of prejudice, in Illinois an accused does not have the right to counsel at the preliminary hearing stage of the proceedings.

Not until the recent case of *People* v. *Bonner* did the Illinois Supreme Court clearly express its test for determining whether

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[69] *Id.* at 411, 197 N.E.2d at 435. This is substantially the same proposition of law as stated in Crooker v. California, 357 U.S. 433, 439 (1958). *See* text at note 18 *supra.* The expression "so prejudiced" implies that a certain degree of prejudice exists, i.e. that so much prejudice exists "as to infect the subsequent trial with an absence of fundamental fairness essential to the very concept of justice." 357 U.S. at 439. The *White* and *Hamilton* opinions, which were cited by the court in *Morris,* stand for the proposition that where counsel is denied at a critical stage, a court will not consider or speculate upon the degree of prejudice and will presume, *from the fact that counsel was denied* at such a stage, that such prejudice resulted therefrom, as to infect the subsequent trial.

[70] 30 Ill.2d 406, 411, 197 N.E.2d 433, 436 (1964).

[71] *Id.* at 412, 197 N.E.2d at 436. "There is neither claim nor showing that the absence of counsel at the preliminary hearing prejudiced the defendants in any manner or fatally infected their subsequent trial . . . ."

[72] *Id.* at 411, 197 N.E.2d at 436. In making this statement the court relied heavily upon the analysis of the United States Supreme Court in Hamilton v. Alabama, 368 U.S. 52 (1961), in which the Supreme Court began to develop the concepts of critical stage and presumption of prejudice. In *Hamilton,* the Court found that there was actual prejudice in that certain defenses available to the defendant would have been "irretrievably lost, if not then and there asserted. . . . " 368 U.S. at 54. The Court, however, went further and established the critical stage test as being a stage where events might transpire which could affect the subsequent trial. *See* text at note 26 *supra.* The *Morris* court perhaps took too narrow a view of the *Hamilton* case, in that it looked only to the statement referring to actual prejudice, i.e. that certain defenses available would have been lost if not then and there asserted, and totally ignored the statement referring to presumed prejudice, i.e. a stage where events might transpire which could affect the subsequent trial. The analysis of the *Morris* court therefore seems to miss the prospective and subjunctive test established by *Hamilton* and relies upon the showing of actual prejudice in that case as the decisive factor.

a given proceeding is a critical stage. In *Bonner*, the defendant was accused of attempted rape.[73] Three days after his arrest he was taken before a judge for a preliminary examination, at which time he requested a continuance for the express purpose of engaging private counsel. The court disregarded the request and proceeded with the examination to determine whether there was probable cause to submit the case to the grand jury. Prosecution witnesses were examined and the court bound the defendant over to the grand jury.[74] A pretrial motion to dismiss the indictment, based on the earlier denial of the asserted right to counsel at the preliminary examination, was also denied, and after his subsequent conviction, Bonner urged this denial as an assignment of error.

Bonner's first contention on appeal was that all stages in a criminal prosecution are critical stages. Relying upon the admonition of the United States Supreme Court in *Powell* v. *Alabama*,[75] that a defendant "requires the guiding hand of counsel at every step in the proceedings against him,"[76] Bonner urged that the recent cases of *Escobedo* v. *Illinois*[77] and *Miranda* v. *Arizona*[78] had extended the right to counsel to every step in the proceedings.

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[73] The complaining witness was attacked on a Chicago street at 3:00 A.M. The assailant pulled her to the ground and removed her undergarments. The victim, screaming and struggling, bit her assailant's hand. An eyewitness observed the attack and summoned the police. The witness and police interrupted the attack in progress and when the assailant fled, they pursued and apprehended the defendant after a short chase. The defendant lived a great distance from the scene of the attack and had no explanation for being at the scene of the crime; his finger was bleeding from a bite which he claimed was inflicted by a dog. The defendant contended that he was running from the scene because he heard a shot (fired by the police at the assailant) and was afraid.

[74] 37 Ill.2d 553, 556, 229 N.E.2d 527, 529 (1967).

[75] 287 U.S. 45 (1932).

[76] *Id.* at 69. This admonition, however, has never been held to grant to a defendant the right to counsel at every step in the proceedings. *See* text at notes 51-54 *supra*. The proposition, however, is not without judicial recognition. *See, e.g., In re* Groban, 352 U.S. 330 (1957) (dissenting opinion of Justice Black): "This Court has repeatedly held that an accused in a state criminal prosecution has an unqualified right to make use of counsel at every stage of the proceedings against him." *Id.* at 344.

[77] 378 U.S. 478 (1964).

[78] 384 U.S. 436 (1966). Here the Court began with the proposition that: "The denial of the defendant's request for his attorney . . . undermined his ability to exercise the privilege . . . to remain silent if he chose or to speak without any intimidation . . . ." *Id.* at 466. To combat the pressures of incustodial police interrogation and to provide a full opportunity for the exercise of the privilege against self-incrimination, the Court developed specific warnings that would adequately and effectively apprise the accused of his rights. In so doing, the Court shifted from a position that a request for counsel was necessary to invoke the right, to a position that the protection of the right exists until intelligently waived. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458 (1938) for the early position of the Court on the conditions precedent to an intelligent waiver of constitutional rights.

Following the holding in *Miranda*, the Illinois Supreme Court conceded in *Bonner* that: "[A]n accused's right to representation should not be made to depend upon his request for it." 37 Ill.2d 553, 561, 229 N.E.2d 527, 532 (1967).

As previously indicated, in the discussion of *Harris* v. *Wilson*,[79] a logical extension of the federal critical stage test would appear to be that all pretrial stages are critical, inasmuch as events transpire therein which might or could prejudice a subsequent trial from the moment that the investigation begins to focus on the accused.

As an alternative proposition to his initial contention that all stages are critical, it was suggested in *Bonner* that the preliminary examination in Illinois was by definition a critical stage at which important rights could be lost and at which events transpired which might or could affect the subsequent trial. In support of this proposition, the appellant noted that at the preliminary examination the defendant: (a) for the first time learned the state's case against him; (b) had the opportunity to cross-examine witnesses before their testimony became hardened and fixed; and (c) could enter a plea of guilty to a lesser charge.[80] Additionally it was argued that Illinois statutory provisions entitled the defendant to the assistance of counsel at the preliminary examination.[81]

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[79] 239 F.Supp. 204 (N.D. Cal.), *vacated*, 351 F.2d 840 (9th Cir. 1965), *cert. denied*, 383 U.S. 951 (1966). *See* text at notes 55-59 *supra*.

[80] 37 Ill.2d at 559, 229 N.E.2d at 531. Other than denial of the right to cross-examine by skilled counsel, defendant could not show any act of actual prejudice and was therefore forced to urge the court to consider the proposition of *Hamilton*, that the court should not stop to determine whether prejudice resulted because the degree of prejudice could never be known. It will be recalled that where the right to counsel is denied at a critical stage in the proceedings, prejudice is presumed to have occurred, while actual prejudice must be shown where the right is denied at a non-critical stage in the prosecution. The gravamen of the problem facing Bonner was that since he was unable to show actual prejudice resulting from the denial of counsel at the preliminary examination (other than the right to cross-examine witnesses called by the state), he was obliged to convince the court that the preliminary examination was a critical stage where prejudice should be presumed.

In developing the concept of presumed prejudice, the United States Supreme Court began with a determination that the right to counsel extended to certain pretrial proceedings, holding that:

> [S]tate refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at trial on the merits, . . . but also if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of that fundamental fairness essential to the very concept of justice.

Crooker v. California, 357 U.S. 433, 439 (1958). It will be noted that this holding of the Court, while recognizing the right to counsel in pretrial proceedings, also recognized limitations of the right in that (a) it applied only to certain cases and (b) it implied that a request for counsel was necessary to invoke the right. In this context it must be remembered that the *Crooker* case was decided five years prior to the case of Gideon v. Wainwright, 372 U.S. 335 (1963).

Moving forward from its position in *Crooker*, that actual prejudice must be shown, the Court held in Hamilton v. Alabama, 368 U.S. 52 (1961) that: "When one pleads to a capital charge without benefit of counsel, . . . the degree of prejudice can never be known." *Id.* at 55. Thus, the Supreme Court held that there were facts and circumstances in which prejudice need not be shown but would be conclusively presumed.

[81] 37 Ill.2d at 560, 229 N.E.2d at 531-32. It might also be argued that

In stating the Illinois test for critical stage, the Illinois Supreme Court in *Bonner* ignored what appears to be the trend of *Hamilton, White* and *Escobedo* and looked instead to the decision of the Federal Court of Appeals for the Fourth Circuit in *DeToro* v. *Pepersack*,[82] a case which antedated *Escobedo*, and held that:

> [A] stage in the proceedings against an accused is properly designated as 'critical,' irrespective of how it is labeled, when events transpire there which are likely to prejudice his subsequent trial.[83]

The Illinois test would appear to depart from the test enunciated in *Hamilton, White* and *Escobedo*. The federal test for determining whether a given confrontation is a critical stage is whether events transpire therein which might or could affect the subsequent trial. Thus, the federal test directs that the *possibility* of prejudice determines whether a stage is critical. The Illinois test, by applying a standard of whether events transpire which are likely to affect the subsequent trial directs that *probability* of prejudice determines whether a stage is critical.[84] The Illinois test is an intermediate position, between the requirement that actual prejudice be shown and the current federal definition of critical stage. Apparently, for a stage in an Illinois proceeding to be deemed critical, it must be shown that prejudice would more likely than not result from a denial of counsel.

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any stage temporarily following a critical stage is itself a critical stage. However, since the proper definition of critical stage is one in which events transpire which may or could affect the subsequent trial, to say that any stage, regardless of whether events transpire there which may or could affect the subsequent trial, is critical because it follows a stage where events transpire which may or could affect the subsequent trial is to ignore the basic criterion of prejudice altogether.

[82] 332 F.2d 341 (4th Cir. 1964). *See* text at notes 51-54 *supra*.

[83] 37 Ill.2d 553, 558, 229 N.E.2d 527, 531 (1967).

[84] While the Court had stated in Hamilton v. Alabama, 368 U.S. 52 (1961) that "we do not stop to determine whether prejudice resulted . . . . [because], the degree of prejudice can never be known." *Id.* at 55, the court of appeals in DeToro v. Pepersack, 332 F.2d 341 (4th Cir. 1964), took the position that it would have to be shown that prejudice would more likely than not result from the denial of counsel. Thus, the court stated that:

> [A]n accused is denied rights afforded him under the sixth amendment when he is subjected to an arraignment or to a preliminary hearing without the assistance of counsel, where events transpire that are likely to prejudice his ensuing trial.

Id. at 343.

DeToro was decided two months prior to Escobedo v. Illinois. The Court in *Hamilton* had said: "What happens there may affect the whole trial." 368 U.S. at 54. The Court in *Escobedo* stated: "What happened at this interrogation could certainly affect the whole trial." 378 U.S. at 486.

Prior to these holdings, the Court insisted on a showing of actual prejudice. The Court, therefore, was expressing that prejudice must be shown. In moving from the term "must" to the term "may" it is suggested that the Court still required a showing of probability of prejudice and that the *DeToro* statement of the law was sound. However, when the Court adopted the term "could" into the definition, it would seem that it was then only necessary for the defendant to show a possibility of prejudice resulting from the denial of counsel and that the more stringent requirements had been abandoned.

Having defined a critical stage as one in which there exists a probability of prejudice, the court applied this standard to the contentions raised by Bonner. First considering whether the right to counsel had been extended by the United States Supreme Court by *Escobedo* and *Miranda* to every step in the proceedings, the court, without elaboration, held that:

> [I]t [did] not read [*Escobedo* and *Miranda*] . . . as constituting a departure from the 'critical stage' test enunciated in [the] . . . earlier decisions of [*White* and *Hamilton*] . . . or as announcing an extension of the right to counsel to every step in the proceedings against an accused.[85]

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[85] 37 Ill.2d 553, 558-59, 229 N.E.2d 527, 531 (1967). The court emphasized, in justification of its position, that *Escobedo* was limited to an in-custody interrogation situation and stood only for the proposition that this situation was deemed to be a critical stage.

What must be borne in mind is that *Escobedo* and *Miranda* were primarily concerned with the fifth amendment privilege against self-incrimination. In this context, the Court held that the accused must be made aware of his sixth amendment guaranty of the right to counsel before an intelligent waiver of his fifth amendment right could be effective. It was expressly held in *Miranda* that the authorities could refrain from providing counsel to the accused without violating his *fifth amendment privilege*, so long as they did not question him during that time. 384 U.S. at 474. It was not before the Court and the Court did not intimate whether a denial of request for counsel at that time would be violative of the *sixth amendment right*.

A further example of how the Illinois Supreme Court ministerprets *Escobedo* and *Miranda*, by failing to recognize that the sixth amendment right to counsel must be afforded an accused before he can intelligently waive or exercise his fifth amendment privilege against self-incrimination, is found in People v. Murdock, 39 Ill.2d 553, 237 N.E.2d 442 (1968). In *Murdock*, the accused was charged with burglary, rape and murder. A coroner's inquest was held at which the accused was called to testify. The coroner, who presided at the hearing, admonished the accused that anything he might testify to could be used against him at a future trial. The accused was also advised of his right to remain silent but was not advised of his right to counsel. No offer to provide counsel to the accused, if indigent, was made. The accused waived his privilege against self-incrimination and made damaging statements against his interests which were subsequently introduced at his subsequent trial over objection.

The court took cognizance of a statute, ILL. REV. STAT. ch. 31, §18.1 (1967), which provided that any witness appearing at the inquest shall have the right to be represented by counsel. The court held, however, that the aforementioned statute: "[H]as never been construed to give an indigent witness the right to free counsel, even though such witness was then suspected of murdering the decedent." 39 Ill.2d at 557, 237 N.E.2d at 445.

The *Murdock* court noted that "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected," 39 Ill.2d at 558, 237 N.E.2d at 445, citing Mempa v. Rhay, 389 U.S. 128, 134 (1967). However, the court concluded that a coroner's inquest is not such a stage of a criminal proceeding and therefore the accused did not have the right to appointed counsel. Thus, the coroner's inquest is not a critical stage. It was observed by the court that the Illinois rule is that any failure to advise the defendant of his constitutional rights and failure to provide him with counsel are only attendant circumstances in deciding whether a confession is voluntary, citing People v. Musil, 37 Ill.2d 373, 227 N.E.2d 751 (1967). However, this rule appears to be in conflict with the holding of the United States Supreme Court in Mempa v. Rhay, *supra*. The Illinois court resolved this conflict, by observing that *Mempa* applied to sentencing, a critical stage, while *Musil* involved a coroner's inquest, a non-critical stage.

That an accused cannot intelligently waive or exercise his privilege against self incrimination without being first afforded an opportunity to avail himself of counsel — the proposition deduced from *Escobedo* and

Considering whether the right to counsel should be extended to every step in the proceedings, the court, measuring appellant's contention against a standard of probability, followed *Morris* in holding that all stages do not inherently have such elements as would necessarily give rise to a probability of prejudice warranting a presumption of prejudice.[86]

In his second contention, Bonner conceded that perhaps all stages were not critical, but suggested that the preliminary examination was a critical stage in that the defendant: (a) for the first time learned the state's case against him; (b) had the opportunity to cross-examine witnesses before their testimony became hardened and fixed; and (c) could enter a plea of guilty to a lesser charge.[87] Again without elaboration, the court flatly rejected this contention.[88] Applying the Illinois test for critical

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Miranda — was ignored by the Illinois Supreme Court. Justice Schaefer, in a separate opinion, briefly stated his view of the applicable law. First observing that this coroner's inquest was non-civil and, therefore, a criminal or quasi-criminal proceeding in which the criminal defendant was called to testify and in which substantial rights of the accused were affected, ergo a critical stage, Justice Schaefer observed that: "[T]he defendant was not advised of his right to be represented by counsel, and he can not be said to have waived that right." 39 Ill.2d at 566, 237 N.E.2d at 449.

A very interesting question, but one which is beyond the scope of this note, is whether the United States Supreme Court will extend the proposition of *Escobedo* and *Miranda* to administrative proceedings. In *In re* Groban, 352 U.S. 330 (1957), the Court held that there was a privilege against self-incrimination in an administrative hearing conducted by a fire marshall into the cause of a fire where arson was suspected but that there was no right to counsel. How can the witness intelligently exercise or waive his privilege without being first afforded an opportunity to avail himself of counsel?

[86] It is doubtful, even under the federal test, that the critical stage test applied to affirmative events transpiring at a confrontation between the state and the accused, would become the basis for a holding that all stages are critical. It would seem that if the right to counsel were to be extended to all stages of the prosecution from arrest onward, then such extension would more rationally be founded upon prejudice to complete investigation and preparation resulting from delay in appointment of counsel. *See* text at notes 59-66 *supra*.

[87] 37 Ill.2d at 559, 229 N.E.2d at 531. In this context, compare the contentions in *Bonner* with those of appellant in Harris v. Wilson. *See* text at notes 58-59 *supra*.

[88] While the Illinois Supreme Court refused to expressly answer this contention, the proposition was considered at length in DeToro v. Pepersack, which was cited by the court in support of its definition of critical stage. It was held in *DeToro* that:

> Maryland provides alternative methods of gaining the information sought by [defendant] . . . through cross-examination at the preliminary hearing. The State provides for the deposition of witnesses unable to attend a trial or hearing, for the production and inspection by the accused of material seized by the State from him or others, and for furnishing a list of the names and addresses of witnesses to be called by the State to prove its case in chief. These procedures are no more restrictive than those afforded the accused in the federal system, and in some ways more liberal. It appears, therefore, that [defendant] . . . had other means available whereby he could have obtained that which he claims he would have preferred to have gained through cross-examination. In view of the existence of these alternatives, we are constrained to hold that an accused would not be likely to suffer an actual as distinguished from a theoretical prejudice at his later trial.

332 F.2d 341, 345 (4th Cir. 1964). *But see* Pointer v. Texas, 380 U.S. 400

stage, requiring a showing of probability of prejudice, the court concluded that it could *not* say that: "[T]he denial of counsel at this proceeding results in the likelihood of ensuing prejudice enabling the proceeding to be characterized as a critical stage."[89] Despite the fact that Bonner's contentions were consistent with the trend established by the United States Supreme Court, although this particular question has never been squarely before it,[90] nevertheless, the Illinois Supreme Court has concluded: "[W]e see no basis for saying that the right to counsel arises upon preliminary hearing, or that fundamental fairness requires it."[91]

THE QUESTION OF A STATUTORY GUARANTEE

While *Bonner's* first theories on appeal were based on the definition of critical stage and the prejudice resulting from denial of the sixth amendment guarantee to the assistance of counsel at the preliminary examination, his alternative theory was based on the contention that Illinois' statutory provisions guarantee a criminal defendant the right to counsel at a preliminary examination.

Section 103-3 of the Illinois Code of Criminal Procedure provides that:

> (a) Persons who are arrested shall have the right to communicate with an attorney of their choice and a member of their family by making a reasonable number of telephone calls or in any other reasonable manner.[92]

In addition, section 103-4 of the Code provides:

> Any person committed, imprisoned or restrained of his liberty for any cause whatever and whether or not such person is charged with an offense shall, except in cases of imminent danger of escape,

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(1965), where a key witness testified at the preliminary examination while the defendant was without counsel. The witness became unavailable at the time of trial and the prosecution introduced the transcript of his testimony at the preliminary examination as direct evidence. In reversing the conviction, the Court held that the sixth amendment right "to be confronted with the witnesses against him" included the right of cross-examination. Therefore, denial of the right to effective cross-examination of witnesses constitutes a violation of a constitutionally protected right and requires reversal.

[89] 37 Ill.2d 553, 560, 229 N.E.2d 527, 531 (1967).

[90] *See* authority cited at note 66 *supra*.

[91] 37 Ill.2d 553, 557, 229 N.E.2d 527, 530 (1967). This utterance is but a variation on an earlier theme of the court. The Illinois Supreme Court, faced with the question of at what point in the proceedings counsel must be appointed, resolved the question by holding that: "[T]he fact [that] the legislature has seen fit to now require the matter of counsel to be resolved at the preliminary examination is not to say that due process requires it." People v. Bernatowicz, 35 Ill.2d 192, 198, 220 N.E.2d 745, 748 (1966).

[92] ILL. REV. STAT. ch. 38, §103-3 (1967). The Committee Comments to this section state that:

> The right of a person in custody to communicate with an attorney is grounded in the Due Process clause of the 14th Amendment to the United States Constitution and Article II, Section 2 of the Illinois Constitution.

ILL. ANN. STAT. ch. 38, §103-3, Committee Comments at 13 (Smith-Hurd 1964).

> be allowed to consult with any licensed attorney at law of this State whom such person may desire to see or consult, alone and in private at the place of custody, as many times and for such period each time as is reasonable.[93]

The above quoted sections of the Code of Criminal Procedure are directory and carry with them no remedy which is of direct benefit to the defendant.[94] The redress for violation of the rights set out in sections 103-3 and 103-4 is an indirect penal action against an official who deprives an accused of these rights.[95]

The preliminary examination in Illinois is a statutory proceeding.[96] Section 109-1 of the Code provides that a person arrested shall be taken before a judge and that:

> (b) (2) The judge shall . . . . [a]dvise the defendant of his right to counsel and if indigent shall appoint a public defender or

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[93] ILL. REV. STAT. ch. 38, §103-4 (1967). The Committee Comments to this section provide that:

> This section is not deemed to be in conflict with section 113-3 of the Code which deals with the problem of counsel for any accused who has not obtained such by the time he is required to plead to the charge on arraignment. Section 103-4 says he has a right to consult with counsel *at any time* after being taken into custody: Section 113-3 says that when the time for arraignment arrives he shall be allowed counsel before pleading for the charge and if he has not obtained counsel by that time the court shall give him an opportunity to do so . . . . Section 113-3 is intended to *supplement the basic right* afforded by section 103-4.

ILL. ANN. STAT. ch. 38, §103-4, Committee Comments at 15 (Smith-Hurd 1964) (emphasis added).

[94] By contrast and analogy, section 103-5 of the Code provides that a defendant must be tried within 120 days from the date he was taken into custody (the four-term rule) and carries with it the provision that: "Every person not tried in accordance with [this provision] . . . shall be discharged from custody or released from the obligations of his bail or recognizance." ILL. REV. STAT. ch. 38, §103-5(d) (1967).

It is not apparent why violation of an accused's right to a speedy trial should result in his discharge from custody and for all practical purposes have the effect of an acquittal, while a violation of an accused's right to counsel should merely result in an action against the peace officer for official misconduct. Due process requires that an accused be given a speedy trial. *See* Klopfer v. North Carolina, 386 U.S. 213 (1967); People v. Funches, 17 Ill.2d 529, 162 N.E.2d 393 (1959). It therefore follows that where an accused is denied a speedy trial, due process is, by definition, violated. However, since holding a person in custody may or may not be justified, the denial of the right to counsel reduces itself to a probability that due process is violated in this regard. Nevertheless, it seems somewhat anomalous that violation of the one right results in what amounts to acquittal and violation of the other right results in the mere possibility that the officer will have misconduct charges pressed against him.

[95] Section 103-8 provides:

> Any peace officer who intentionally prevents the exercise by an accused of any right conferred by this Article or who intentionally fails to perform any act required of him by this Article shall be guilty of official misconduct . . . .

ILL. REV. STAT. ch. 38, §103-8 (1967). The Committee Comments to this section state that:

> Section 103-8 makes mandatory the duty of peace officers in regard to the basic rights of persons in custody, and requires that a failure to perform such duties must be done intentionally instead of intentionally or recklessly as provided in section 33-3(a) of the Criminal Code of 1961.

ILL. ANN. STAT. ch. 38, §103-8, Committee Comments at 38 (Smith-Hurd 1964).

[96] ILL. REV. STAT. ch. 38, §109 (1967). *See* authority cited at note 6 *supra*.

licensed attorney at law of this State to represent him in accordance with the provisions of Section 113-3 of this Code.[97]

Section 113-3 of the Code, referred to in section 109-1, states, in part, that:

> (a) Every person charged with an offense shall be allowed counsel before pleading to the charge. If the defendant desires counsel and has been unable to obtain same before arraignment the court shall recess court or continue the cause for a reasonable time to permit defendant to obtain counsel and consult with him before pleading to the charge.
>
> (b) In all cases, except where the penalty is a fine only, if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel. If there is no Public Defender in the county or if the defendant requests counsel other than the Public Defender, the court may appoint as counsel a licensed attorney at law of this State. . . .[98]

Section 109-3 of the Code of Criminal Procedure is a statement of the formalities of the examination. Subsection (b)[99] of 109-3 provides that the defendant may waive the preliminary examination but that the State may nevertheless cause witnesses to be examined for the purpose of perpetuating testimony.[100] Subsection (c) makes provision for sequestation of witnesses.[101] Thus, section 109-3 makes reference to the taking of evidence, to the examination of witnesses, and to the defendant's statement or testimony.

Although a preliminary examination is provided for by statue, the Illinois Supreme Court has held that: "Despite the enactment of the statute . . . there is no constitutional right to

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[97] ILL. REV. STAT. ch. 38, §109-1(b)(2) (1967). Interpreted in People v. Bonner, 37 Ill.2d 553, 560, 229 N.E.2d 527, 531-32 (1967).

[98] ILL. REV. STAT. ch. 38, §113-3(a)-(b) (1967).

[99] ILL. REV. STAT. ch. 38, §109-3(b) (1967). The complete text of this section is as follows:

> If the defendant waives preliminary examination the judge shall hold him to answer and may, or on the demand of the prosecuting attorney shall, cause the witnesses for the State to be examined. After hearing the testimony if it appears that there is not probable cause to believe the defendant guilty of any offense the judge shall discharge him.

[100] The dissenting opinion in People v. Bonner referred to §109-3(b) and stated that it:

> [E]mphasizes the importance of the preliminary hearing as a means of perpetuating testimony by its provision that the defendant can not waive preliminary examination, nor can the judge dispense with it, if the prosecuting attorney demands that the witnesses for the State be examined.

37 Ill.2d 553, 567, 229 N.E.2d 527, 535 (1967). For a limitation on such use, where the right to counsel is not afforded to the accused, compare Pointer v. Texas, 380 U.S. 400 (1965). *See* discussion at note 50 *supra*.

[101] ILL. REV. STAT. ch. 38, §109-3(c) (1967). The complete text of this section is as follows:

> During the examination of any witness or when the defendant is making a statement or testifying the judge may and on the request of the defendant or State shall exclude all other witnesses. He may also cause the witnesses to be kept separate and to be prevented from communicating with each other until all are examined.

a preliminary hearing prior to indictment or trial. . . ."[102]

The defendant in *Bonner* insisted that his request for counsel at the preliminary examination should have been honored. In considering the meaning of the aforementioned statutes when read in conjunction with each other, the defendant read the provisions of section 103-4 as controlling and suggested that, inasmuch as the statute vested an accused with the right to counsel from the time of his arrest, this right could be asserted at any time thereafter.[103] While admitting that section 109 was silent as to the right to counsel at the preliminary examination, the defendant nevertheless contended that inasmuch as the right to counsel was resolved by section 103-4, any further explanation of the right to counsel which added nothing to section 103-4 would be redundant. Bonner therefore concluded that section 103-4 had to be read in conjunction with every other statute dealing with the same subject matter and that the right to counsel at any time after arrest, provided in section 103-4, could be invoked at any stage in the proceedings. Thus, Bonner distinguished his case from *People* v. *Morris* in that he had made a demand for counsel while the defendant in *Morris* had not.[104]

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[102] People v. Petruso, 35 Ill.2d 578, 580, 221 N.E.2d 276, 277 (1966); People v. Bonner, 37 Ill.2d 553, 229 N.E.2d 527 (1967). This question has most often arisen in a situation where a defendant, having been indicted by the grand jury, insists that the seemingly nonessential preliminary hearing be held anyway. *See, e.g.*, Bayless v. United States, 381 F.2d 67, 71 (9th Cir. 1967).

The purpose of the preliminary examination is to determine whether there is probable cause to hold the accused, *see* note 9 *supra*. Therefore, where probable cause has been established by the return of an indictment, there would seem to be little if any reason to hold a preliminary examination. This has moved the court to state that: "[W]e have consistently adhered to the view that where an indictment is returned containing full information of the crime with which an accused is charged, a preliminary hearing is not necessary." People v. Petruso, 35 Ill.2d 578, 580, 221 N.E.2d 276, 277-78 (1966). It does not follow, however, that because there is no right to a preliminary examination, that there are no rights at a preliminary examination where one is held. A reading of the statute indicates that while there is no absolute right to a preliminary examination, the accused is given certain rights thereunder where one is in fact held.

[103] In this context the substance of the first two contentions are proximate. In his first contention, *Bonner* urged that the *statutory* provision of section 103-4 assured him of the right to counsel from the time when he was "committed, imprisoned, or restrained of his liberty for any cause whatever." In his second contention, *Bonner* urged that the constitutional guarantee of the sixth amendment, as applied by the fourteenth amendment, assured him of the right to counsel from the time he was subject to incustodial interrogation, i.e. from the time when he was "committed, imprisoned, or restrained of his liberty for any cause whatever." Either proposition will necessarily result in the conclusion that all steps in a criminal prosecution are critical.

[104] It must be remembered that the right to counsel under section 103-4 depends upon a demand being made by the accused. Whereas, the state may be under a legal duty to advise the defendant of his rights, the defendant must still demand his right to counsel under section 103-4. Bonner made such a demand at the time when he was at the preliminary examination. Inasmuch as he was at the preliminary examination at the time of the demand, the majority of the court refused to look beyond the provisions of section 109, pertaining to the preliminary hearing. Obviously *all* of the de-

The reasoning which underlies and supports the contention that the right to counsel is guaranteed by statute from the time of arrest is the same reasoning which supports the contention that the preliminary examination is a critical stage in the proceedings. It may be generally said that the statutory guarantee is simply a codification of the federal standard. The comments of the committee that drafted section 103-3 support this conclusion.[105] Thus, although several propositions of law appear to have been advanced by appellant, in fact Bonner urged but one point: That an accused has the right to be represented by counsel at a preliminary examination.[106] In support of this proposition appellant postulated that the preliminary examination was a critical stage in the proceedings and that representation at such a hearing was guaranteed by statute.

The *Bonner* court, in considering the question of a statutory guarantee to representation by counsel at the preliminary examination, refused to consider section 103-4 and contented itself with an examination limited solely to sections 109-1[107] and 113-3.[108] As admitted by the defendant, these two sections are silent as to the right to representation at the preliminary examination. The court thus held that sections 109-1 and 113-3:

> [M]ust be read in conjunction and when so read it becomes manifest that the legislature intended that an accused receive the benefit of appointed counsel only at that stage in the judicial process when he is to plead to the charge against him.[109]

The majority of the court thus interpreted section 109-1 as merely directing the judge presiding over the preliminary examination to appoint counsel to represent the accused at the arraignment[110] and as providing that in the event a preliminary examination was not held, or where the judge presiding over the preliminary examination did not so appoint counsel, section 113-3 directed the judge presiding over the arraignment to appoint counsel before requiring the accused to plead to the charge. The court therefore concluded that there was no right to counsel prior to the time that the accused was *required to plead* to the

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fendant's rights at such examination are not specified in the statute pertaining to that hearing.

[105] ILL. ANN. STAT. ch. 38, §103-3, Committee Comments at 13 (Smith-Hurd 1964). *See* authority cited at note 59 *supra*.

[106] In this context, it is somewhat curious that the court answered this proposition by declaring that "an accused does not have a constitutional right to a preliminary hearing," 37 Ill.2d 553, 559-60, 229 N.E.2d 527, 531 (1967), seemingly falling into the problem discussed in note 102 *supra*.

[107] ILL. REV. STAT. ch. 38, §109-1 (1967). *See* text at note 97 *supra*.

[108] ILL. REV. STAT. ch. 38, §113-3 (1967). *See* text at note 98 *supra*.

[109] People v. Bonner, 37 Ill.2d 553, 560, 229 N.E.2d 527, 532 (1967).

[110] The court quoted §113-3(a), *see* text at note 98 *supra*, laying emphasis on the provisions that the accused was to have counsel "*before pleading to the charge.*" People v. Bonner, 37 Ill.2d 553, 560, 229 N.E.2d 527, 532 (1967). Thus, the determining factor to the majority was whether or not a plea was required.

charge against him. Seemingly blind to the existence of section 103-4, the court observed: "[W]here the proceedings are not of a critical nature and therefore no right to counsel exists without a showing of actual prejudice, a mere request for counsel does not create the right to it."[111]

The minority opinion, written by Mr. Justice Schaefer, pointed out that this question could not be resolved without a consideration of section 103-4 of the Code. The minority took the position that the right to counsel at any time after arrest is established by section 103-4 and that other provisions in the Code merely supplement the basic guarantee of this section. Therefore, Justice Schaefer postulated that the various provisions regarding the right to counsel should be construed as being cumulative and consistent, rather than conflicting. Authority for this proposition was to be found in the comments of the committee drafting the Code, which the dissenting opinion quoted:

> 'This section (103-4) is not deemed to be in conflict with section 113-3 of the Code which deals with the problem of counsel for any accused who has not obtained such by the time he is required to plead to the charge on arraignment. Section 103-4 says he has a right to consult with counsel at any time after being taken into custody: Section 113-3 says that when the time for arraignment arrives he shall be allowed counsel before pleading to the charge and if he has not obtained counsel by that time the court shall give him an opportunity to do so. . . . Section 113-3 is intended to supplement the basic right afforded by section 103-4.'[112]

In interpreting the provision of section 109-1, requiring that the judge at the preliminary hearing must advise the accused of his right to counsel and that if the accused is indigent, must appoint counsel in accordance with the provisions of section 113-3, the minority urged that this reference to section 113-3 merely:

> [R]elates to the kinds of cases — felony or misdemeanor — in which attorneys are to be appointed, to the attorney to be appointed, — the public defender or other counsel, — and to the fees of appointed attorneys other than the public defender, both in capital and non-capital cases. . . .[113]

Therefore, the court held that: "The right to appointed counsel, if indigent, is restricted by section 113-3 to those cases in which the penalty is other than a fine only."[114]

The minority protested the construction of the majority of the court that the reference to section 113-3 contained in section 109-1 only required the judge presiding at the preliminary examination to appoint counsel at the arraignment, and

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[111] People v. Bonner, 37 Ill.2d 553, 561, 229 N.E.2d 527, 532 (1967).
[112] *Id.* at 565, 229 N.E.2d at 534.
[113] *Id.* at 564-65, 229 N.E.2d at 534.
[114] *Id.* at 565, 229 N.E.2d at 534.

pointed out that if the majority's construction were correct, section 109-1 would add nothing to section 113-3[115] since section 113-3 already provided for counsel at the arraignment. The dissenting justices concluded that "[t]he right to be represented by appointed attorney exists at the preliminary hearing; that right is not, as the majority holds, deferred until the defendant is arraigned."[116] Further, the limitations found in sections 109-1 and 113-3 are:

> [I]ntended to confine the requirement that attorneys be appointed to represent indigents at preliminary hearings to the class of cases in which attorneys are required to be appointed to represent indigents upon arraignment.[117]

Justice Schaefer did not feel it necessary to discuss the question of critical stage. He observed that:

> [T]he General Assembly has determined that a defendant is entitled to counsel at his preliminary hearing. It has provided that a defendant held on any charge is entitled to be represented by counsel at his preliminary hearing, and that 'except where the penalty is a fine only,' an indigent defendant is entitled to have counsel appointed to represent him at his preliminary hearing.[118]

It was emphasized however that:

> [S]ection [109-3] of the Code emphasizes the importance of the preliminary hearing as a means of perpetuating testimony by its provision that the defendant can not waive preliminary examination, nor can the judge dispense with it, if the prosecuting attorney demands that the witnesses for the State be examined.[119]

Justice Schaefer, with whom Chief Justice Solfisburg joined in dissenting, thus impliedly urged that the preliminary hearing in Illinois was such a critical stage in the proceedings as to require the assistance of counsel.

CONCLUSION

Although a preliminary examination is provided for by statute, the Illinois Supreme Court has held that "[d]espite the enactment of the statute there is no constitutional right to a preliminary hearing prior to indictment or trial . . . ."[120] In *People* v. *Bonner,* it was not contended that the defendant had a right, either by constitution or by statute, to a preliminary

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[115] It was first observed that the Code of Criminal Procedure is explicit in its recognition of the right to counsel, even prior to the preliminary examination. It was then emphasized that:

> The comments of the committee that drafted the Code . . . make it clear that section 113-3, which governs the right to counsel at arraignment, was intended to supplement rather than to swallow up the provisions of the Code that govern the right to counsel at earlier stages of the proceedings.

People v. Bonner, 37 Ill.2d 553, 566, 229 N.E.2d 527, 534 (1967).

[116] People v. Bonner, 37 Ill.2d 553, 566, 229 N.E.2d 527, 535 (1967).

[117] *Id.* at 566, 229 N.E.2d at 535.

[118] *Id.*

[119] *Id.* at 567, 229 N.E.2d at 535.

[120] People v. Petruso, 35 Ill.2d 578, 580, 221 N.E.2d 276, 277 (1966).

examination. Rather, it was contended that inasmuch as a preliminary hearing was held, the defendant's request for assistance of counsel should have been honored. If no preliminary examination was held there would be no formal examination of witnesses and no presentation of evidence; consequently, there would be no possibility of resulting prejudice to the accused. However, when such a hearing is held and the sworn testimony of witnesses is recorded and received, and where evidence may be presented, the possibility of resulting prejudice arises and the assistance of counsel is needed for protection of the accused.

The court, in answering Bonner's contention that he had a right to counsel at the preliminary examination, held that "an accused does not have a constitutional right to a preliminary hearing. . . ."[121] Though not erroneous per se, this response did not answer the question of law presented by appellant.

Considering the contention of the appellant that the preliminary examination in Illinois is a critical stage in the proceedings where events transpire which might result in prejudice to an accused, it would appear that conclusions reached by the minority had greater support in law and are more consistent with recent holdings of the United States Supreme Court. In affording to defendants the right to counsel it is well to recall the underlying principles as pronounced in *Escobedo* v. *Illinois* that:

> We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No 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 that system.[122]

The requirements of due process would seem to dictate that an accused be given the same full technical and professional assistance to establish his innocence that the state has within its command to establish his guilt.[123] By the same token that the

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[121] People v. Bonner, 37 Ill.2d 553, 559-60, 229 N.E.2d 527, 531 (1967).

[122] 378 U.S. 478, 490 (1964).

[123] In United States v. Wade, 388 U.S. 218 (1967), the Court moved closer to a position that the accused should have the assistance of counsel from the time of his arrest. The court of appeals had held that: "[T]he lineup, held as it was, in the absence of counsel, already chosen to represent appellant, was a violation of his Sixth Amendment rights. . . ." Wade v. United States, 358 F.2d 557, 560 (5th Cir. 1966). On review, the United States Supreme Court observed that:

> [T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern crimi-

right to counsel at the formal trial "is a very hollow thing when, for all practical purposes, the conviction is already assured by pretrial examination,"[124] the presumption of innocence is likewise a hollow thing when proof of innocence is prejudiced and conviction is assured by denial of the asssistance of counsel and lack of access to the full technical and professional facilities afforded by counsel.

To this argument the Illinois Supreme Court has answered that the defendant must show, by the facts and circumstances of his case, that failure to appoint counsel resulted in substantial prejudice, *i.e.* facts and circumstances which are likely to prejudice the subsequent trial. However, it would seem that the degree of prejudice can never be known. It would therefore follow that the federal test should be applied and that prejudice should be presumed.

Robert M. Gray

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nal prosecution, our cases have construed the Sixth Amendment guaranty to apply to 'critical' stages of the proceedings.
388 U.S. 218, 224 (1967). Thus, United States v. Wade brought forth the rule that the lineup was a critical stage in the proceedings. Can it be rationally urged that the preliminary examination is any less critical?

[124] *In re* Groban, 352 U.S. 330, 344 (1957) (dissenting opinion of Mr. Justice Black).