NOTES

PRECHARGE DIVERSION OF THE YOUTHFUL OFFENDER IN VERMONT: RIGHT TO COUNSEL†

The increased utilization of "diversion" techniques in the administration of juvenile justice in recent years can be attributed to the convergence of a number of factors. In the first place, the problem of our overburdened courts and prosecutors has emerged as a central one in the administration of justice.[1] This has occurred at the same time that increasing demands have been made to afford the juvenile defendant the same due process rights for the most part that are afforded the adult accused of crime.[2] This latter development, in turn, reflects an increased public awareness of the problem represented by the shockingly high rate of recidivism among juvenile offenders committed to conventional correctional facilities,[3] and an increased public sensitivity to the costs imposed by the stigma that attaches when an individual is labelled "delinquent" in consequence of his adjudication in formal juvenile proceedings.[4] Partly in response to these developments, those responsible for prosecuting juvenile offenders have turned increasingly to "diversion" techniques,[5] especially in those cases where informal "peace-

† The author became familiar with the subject matter of this note while completing a study on legal issues of diversion for the Vermont Governor's Commission on the Administration of Justice under grant # 76-PF-01-0050 of the Law Enforcement Assistance Administration (LEAA), as provided for by the Omnibus Crime Control and Safe Streets Act of 1968 as amended.

1. E. LEMERT, INSTEAD OF COURT: DIVERSION IN JUVENILE JUSTICE 4 (1971); N. KLAPMUTS, DIVERSION FROM THE JUSTICE SYSTEM 109 (Mar. 1974).

2. *See e.g., In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966); *In re* Winship, 397 U.S. 358 (1970). *See also* Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970) for an excellent commentary on the development of the juvenile justice system in the United States from its institutional beginnings in New York and Illinois to the present. *See* note 41 *infra*.

3. *See* LEMERT, *supra* note 1, at 11-13; NATIONAL ASSESSMENT OF JUVENILE CORRECTIONS, UNIV. OF MICH., ANN ARBOR, DIVERSION FROM THE JUVENILE JUSTICE SYSTEM 2-3 (1973); KLAPMUTS, *supra* note 1, at 108.

4. KLAPMUTS, *supra* note 1, at 108; DIVERSION FROM THE JUVENILE JUSTICE SYSTEM, *supra* note 3, at 1-3; E. SCHUR, LABELING DEVIANT BEHAVIOR: ITS SOCIOLOGICAL IMPLICATIONS (1971).

5. "Diversion" for the purposes of this note will refer to pretrial intervention programs which are characterized by formal eligibility criteria and required participation in some form of remedial or rehabilitative activity, and which function as a real alternative to court pro-

keeping" measures of the police have proven of no avail[6] and, at the same time, formal juvenile proceedings seem inappropriate.[7] Such "diversion" may take many forms, but at bottom it consists of the effort to obtain for the accused juvenile a non-penal disposition of his case on the condition that he satisfactorily performs certain duties supposedly tailored to his individual situation.[8]

In recent years three Vermont communities[9] have experimented with formal diversion programs directed at reducing the number of juveniles annually "petitioned"[10] and making available community-based treatment opportunities to youthful offenders.[11] Under the Vermont programs diversion is offered to juveniles under sixteen who are accused of a non-violent offense for the first time.[12] Avoidance of juvenile court proceedings depends upon successful performance of a "personal contract,"[13] which normally provides for restitution and apology, and may require participation in a counseling

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cessing. *See* ABA NATIONAL PRETRIAL INTERVENTION SERVICE CENTER, LEGAL ISSUES AND CHARACTERISTICS OF PRETRIAL INTERVENTION PROGRAMS *i* (1974) [hereinafter cited as PRETRIAL INTERVENTION]. "Precharge diversion" refers to any such program where the decision occurs prior to formal charging, whether by way of petition, indictment, information or arraignment, and where the threat of prosecution for the same offense remains for those who are deemed unsuccessful in the program. For a discussion of the goals and methods of diversion see Vorenberg and Vorenberg, *Early Diversion from the Criminal Justice System: Practice in Search of a Theory*, in PRISONERS IN AMERICA 151 (L. Ohlin ed. 1973); R. NIMMER, DIVERSION: THE SEARCH FOR ALTERNATIVE FORMS OF PROSECUTION (1974); Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L. J. 827 (1974) [hereinafter cited as *Pretrial Diversion*].

6. Peace-keeping measures such as warnings or referrals to counseling, often termed "street diversion," represent a major portion of police responses to juvenile offenses. Interview with Otto Dieter Trautz, Evaluation Specialist, Vermont Governor's Commission on the Administration of Justice, April 23, 1976.

7. See the discussion of the overreach of the juvenile court in LEMERT, *supra* note 1, at 5-6.

8. *Pretrial Diversion*, *supra* note 5; Balch, *Deferred Prosecution: The Juvenilization of the Criminal Justice System*, 38 FED. PROB. 46 (1974).

9. At present precharge diversion programs are operated in Chittenden, Washington and Windham Counties in Vermont.

10. "Petitioning" in the juvenile justice system is the counterpart of "charging" in the criminal justice system. Studies in Windham County indicate that the number of juveniles annually petitioned since the start of diversion has been significantly reduced. Interview with Paul Viera, Windham County Youth Service Bureau, Jan. 23, 1976.

11. *Id.*

12. It is a consistent requirement in all three programs that the juvenile not have had any prior record of offenses.

13. The personal contract, tailored by diversion counselors and the juvenile, is designed to maximize the goal of individualized response to offenders.

program.[14] The juvenile and his parents make this contract with a Youth Service Bureau[15] or community diversion board[16] to which the state's attorney has delegated the authority to carry out certain functions associated with diversion: to make initial recommendations regarding suitability for diversion, to fashion "personal contracts" with eligible youths, and to make determinations as to whether diversion has been successful or unsuccessful.[17] In instances where a divertee fails to substantially perform his contract, the state's attorney generally reserves the option to initiate proceedings.[18]

Although diversion generally represents an attractive alternative to prosecution in court, it could easily work to the juvenile's detriment. A juvenile who accepts diversion may make substantial sacrifices of time and money only to be deemed "unsuccessful"[19] and returned for proceedings in juvenile court. Moreover, he may then find himself in a less secure position than if he had initially rejected

14. In Washington County, the contract requires restitution and apology; in Windham County the contract may require restitution, labor, apology, or presence at an initial counseling session. No contract is signed in Chittenden County, but a divertee is required to talk with counselors.

15. "The Youth Service Bureau is a noncoercive, independent public [citation omitted] agency established to divert children and youth from the justice system by (1) mobilizing community resources to solve youth problems, (2) strengthening existing youth resources and developing new ones, and (3) promoting positive programs to remedy delinquency-breeding conditions [italics omitted]." S. NORMAN, THE YOUTH SERVICE BUREAU: A KEY TO DELINQUENCY PREVENTION 8 (1972). *See* YOUTH DEVELOPMENT AND DELINQUENCY PREVENTION ADMINISTRATION, HEW, THE CHALLENGE OF YOUTH SERVICE BUREAUS (1973) for a discussion of the role which the YSB plays in diversion throughout the United States. *See also* KLAPMUTS, *supra* note 1, at 114.

16. A community diversion board is usually comprised of community members such as local businessmen, clergy, teachers, and parents as well as law enforcement officials.

17. Most state's attorneys will rely entirely upon the judgment of the diversion board or Youth Service Bureau. However, it is within the prosecutor's discretion to determine the standards of success.

18. State's attorneys in both Chittenden and Washington Counties reserve the option to initiate proceedings; the prosecutor in Windham County is presently experimenting with relinquishing this option. State's attorneys in all counties maintain, however, that as a practical matter they never prosecute an unsuccessful divertee, but rather wait to initiate court action if and when there is a second offense. Interview with William Sorrell, Deputy State's Attorney, Chittenden County, Vt., Feb. 17, 1976.

19. The manner in which a diversion participant (divertee) is deemed successful and terminated from a program raises issues under the equal protection and due process clauses of the fourteenth amendment. *See* PRETRIAL INTERVENTION, *supra* note 5, at 53.

the offer of diversion since he may have inadvertently waived some of his constitutional protections by his participation in the diversion program.[20]

Several issues of constitutional dimension implict in the diversion process have been recognized by commentators and have aroused their concern because of the widespread increase in the use of such programs.[21] Since the duration of a diversion program may exceed six months, the issue of an accused's right to a speedy trial is raised.[22] The use of diversion as a condition of pretrial release raises the issue of excessive bail under the eighth amendment.[23] Requirements of program participation, such as apology and restitution, and the possibility that diversion records might be used as

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20. Balch, *supra* note 8, at 50.

21. *See generally* PRETRIAL INTERVENTION, *supra* note 5. *See also* ABA NATIONAL PRETRIAL INTERVENTION SERVICE CENTER, LEGAL ISSUES IN ADDICT DIVERSION (1975) [hereinafter cited as ADDICT DIVERSION]; Skoler, *Protecting the Rights of Defendants in Pretrial Intervention Programs*, 10 CRIM. L. BULL. 473 (1974); Balch, *supra* note 8; Goreliek, *Pretrial Diversion: The Threat of Expanding Social Control*, 10 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 16, 180 (1975). Note, *Pretrial Diversion from the Criminal Process: Some Constitutional Considerations*, 50 IND. L. J. 783 (1975) [hereinafter cited as *Some Constitutional Considerations*]. The Law Enforcement Assistance Administration has made $10,000,000 available as of April 1976 for the operation of programs to divert juveniles at any point between apprehension and adjudication. Its program announcement contains Suggested Standards for Safeguarding the Constitutional Rights of Juveniles." Pertaining to the right to counsel the standards read: "5. That the right to counsel be granted at all critical stages of the diversion process, including intake and termination hearings or other procedures." U.S. DEPARTMENT OF JUSTICE, PROGRAM ANNOUNCEMENT: DIVERSION OF YOUTH FROM THE JUVENILE JUSTICE SYSTEM 29 (Supp. IV 1976). *Cf. Pretrial Diversion, supra* note 5, at 852 where the author concludes that the full panoply of rights is unnecessary in the diversion setting, and Leonard, *Deferred Prosecution Program*, 8 THE PROSECUTOR 316 (1972); NATIONAL DISTRICT ATTORNEYS ASSOCIATION, A PROSECUTOR'S MANUAL ON SCREENING AND DIVERSIONARY PROGRAMS 130, 133, 147 (undated).

22. PRETRIAL INTERVENTION, *supra* note 5, at 7; *Some Constitutional Considerations, supra* note 21, at 796. For recent case law interpreting the right to a speedy trial on the Supreme Court level and in Vermont, see United States v. Marion, 404 U.S. 307 (1971); Barker v. Wingo, 407 U.S. 514 (1972); Cabrera v. Smith, 308 F. Supp. 389 (D. Vt. 1969); State v. Dragon, 130 Vt. 570, 298 A.2d 856 (1972). See also Administrative Order No. 17, Supreme Court of Vermont (1973).

23. U.S. CONST. amend. VIII; PRETRIAL INTERVENTION, *supra* note 5, at 25-26; ADDICT DIVERSION, *supra* note 21, at 58-59. For a discussion of Vermont cases interpreting the right to bail under the eighth amendment of the United States Constitution and Chap. II, § 40 of the Vermont Constitution see R. Angres, Legal Issues in Diversion, Review and Comment 28-30, 1976 (unpublished study for the Vermont Governor's Commission on the Administration of Justice) [hereinafter cited as GCAJ Study].

evidence against the participant in a subsequent court proceeding raise the issue of self-incrimination under the fifth amendment.[24] These and other issues have prompted administrators and critics of these programs to question whether diversion as presently operated provides participants the full panoply of due process protections guaranteed by the fourteenth amendment.[25]

A critical question is whether a juvenile is guaranteed the right under the due process clause to be represented by counsel in diversion proceedings when such proceedings occur prior to formal charging, as they do in all the Vermont programs. Although all deferred-prosecution programs hold a potential for abuse of constitutional rights,[26] existing guidelines require the assistance of counsel at some stage of the diversion process only in those programs in which the opportunity of diversion is offered after formal charging.[27] While precharge diversion also presents a situation where constitutional rights may be significantly prejudiced, the courts have not yet recognized a right to the assistance of counsel under the sixth amendment in the precharge diversion context.[28]

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24. Balch, *supra* note 8, at 49; Skoler, *supra* note 21, at 488; Dean, *Deferred Prosecution and Due Process in the Southern District of New York*, 39 FED. PROB. 23, 24-25 (1975); *Some Constitutional Considerations*, *supra* note 21, at 798-99; GCAJ Study, *supra* note 23, at 26-27.

25. The administrators of diversion programs in Chittenden County and Washington County are in the process of evaluating their programs and considering new guidelines. Windham County has instituted a modified diversion program on an experimental basis to determine its potential for removing due process objections. Divertees are still required to execute the contract, but they are informed that once they sign they are free to disregard it without the threat of future prosecution for the same offense. Thus the element of deferred prosecution, and a large portion of the concomitant coercion, is eliminated.

26. *See* Balch, *supra* note 8, at 50; Goldberg, *Pretrial Diversion: Bilk or Bargain*, 6 NLADA BRIEFCASE 490, 493 (1973).

27. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, STANDARD 2.2 OF PROCEDURE FOR DIVERSION PROGRAMS, COURTS 32-41 (1973); ADDICT DIVERSION, *supra* note 21, at 83. California's postcharge drug diversion statute was recently amended to provide for the right to counsel. CAL. PENAL CODE § 1000.1(a) (West 1976), *amending* CAL. PENAL CODE § 1000.1 (West Supp. 1975). *See* Jacobson and Marshall, *Defender Operated Diversion—Meeting Requirements of the Defense Function*, 23 NLADA BRIEFCASE 137 (1975) for a discussion of the role which public defenders could play in operating diversion in a constitutionally proper fashion.

28. Interview with Arnold Hopkins, Director of the National Pretrial Intervention Service Center of the American Bar Association Commission on Correctional Facilities and Services, Mar. 23, 1976. *See* ADDICT DIVERSION, *supra* note 21, at 89.

This note will examine current Vermont diversion programs to determine whether recognition of a right to counsel under the sixth amendment is necessary to safeguard the constitutional rights of the participants. A brief overview of Supreme Court decisions interpreting the right to counsel will be presented and the precharge diversion practices used in the Vermont programs will then be tested under the analysis which has been developed by the Supreme Court. The note concludes that the right to counsel under the sixth amendment[29] must be provided if formal precharge diversion programs are to pass constitutional muster.

I. Scope of the Right to Counsel

The sixth amendment states that "in all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."[30] It is well settled that the right to counsel attaches during trial,[31] but in the last forty years the Supreme Court has extended the right to instances occurring well before and after trial.[32] The right to assistance of counsel has been recognized prior to trial at arraignment proceedings,[33] preliminary hearings,[34] and post-indictment line-ups.[35] After trial, counsel has been required at sent-

29. There may be several other bases for requiring counsel in precharge diversion: the fifth amendment provides a basis for assistance of counsel in situations where the right against self-incrimination is endangered; the fourteenth amendment provides for counsel in situations which are fundamentally unfair. The sixth amendment right to counsel is the most effective because where the Supreme Court has recognized this right it has attached a "per se" rule of exclusion to evidence obtained in the absence of counsel. *See* Note, *The Pretrial Right to Counsel*, 26 Stan. L. Rev. 399, n. 108 (1974) for a discussion of the inadequacy of the right to counsel under the fifth and fourteenth amendments.

30. U.S. Const. amend. VI:

> 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.* (Emphasis added).

31. Johnson v. Zerbst, 304 U.S. 458 (1938); Gideon v. Wainwright, 372 U.S. 335 (1963).

32. For a review of cases, see J. Cook, Constitutional Rights of the Accused: Trial Rights ch. 3, §§ 23-35 (1974).

33. Hamilton v. Alabama, 368 U.S. 52 (1961).

34. White v. Maryland, 373 U.S. 59 (1963).

35. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

encing,[36] probation revocation hearings (where sentencing has been deferred),[37] and in other situations where substantial issues are raised and the absence of counsel would be prejudicial.[38] The right to counsel has also been recognized at the appellate stage of proceedings where appeal was of right.[39] The Supreme Court has further required observance of the right in proceedings in juvenile court where the juvenile faces the possibility of incarceration.[40] Lower courts have since expanded recognition of the right to counsel to stages of juvenile proceedings which are analogous to adult proceedings where protections have been accorded.[41]

In its interpretation of the sixth amendment right to counsel with respect to pretrial situations, the Supreme Court has employed a two-part test. In the first part of this test the Court focuses upon the phrase, "In all Criminal prosecutions" and seeks to determine whether a particular confrontation is a criminal prosecution within the meaning of the sixth amendment.[42] Secondly, the Court analyzes the confrontation to determine whether it is necessary "for his defence," or, stated in the language of the cases, whether it presents a "critical stage" of criminal proceedings.[43] In the line of cases ex-

36. Townsend v. Burke, 334 U.S. 736 (1948).

37. Mempa v. Rhay, 389 U.S. 128 (1967).

38. Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

39. Douglas v. California, 372 U.S. 353 (1963).

40. *In re* Gault, 387 U.S. 1 (1967).

41. *In re* Robert F., 30 App.Div.2d 933, 934, 293 N.Y.S.2d 873, 874 (1968) (counsel necessary at dispositional hearing); Steinhauer v. State, 206 So.2d 25 (Fla. 1968) (counsel required at hearings in juvenile court to determine whether juvenile can be waived to adult court); People *ex rel.* Decker v. Martin, 57 Misc.2d 57, 291 N.Y.S.2d 408 (1968) (counsel required at probation revocation proceedings); Reed v. Duter, 416 F.2d 744 (7th Cir. 1969) (counsel necessary for effective review on appeal); Gillard v. Cook, 528 S.W.2d 545 (Tenn. 1975) (juvenile given benefit of the doubt as to the necessity of counsel in "home placement" revocation proceedings).

42. U.S. CONST. amend. VI. In *Hamilton v. Alabama* the Court determined that the arraignment stage in Alabama, which presented the accused with legal decisions which might substantially affect the trial process, was a "criminal prosecution" sufficient to invoke the sixth amendment right to counsel. 368 U.S. at 52. In *United States v. Wade* and *Gilbert v. California* the Court found the right to counsel applicable to pretrial lineups because of "the dangers . . . and suggestibility inherent in the context of the pretrial identification." *Wade*, 388 U.S. at 235.

43. *Hamilton*, 368 U.S. at 54. In Coleman v. Alabama, 399 U.S. 1, 9 (1970) the Court held that a preliminary hearing was a "critical stage" because the assistance of counsel could contribute significantly to the overall effectiveness of defense at trial or possibly preclude further proceedings altogether.

tending the right to counsel in pretrial situations from *Powell v. Alabama*[44] in 1932 to *Coleman v. Alabama*[45] in 1970, the Supreme Court developed a "functional analysis"[46] in which the function of the right to counsel was identified as the protection of the defendant's right to a fair trial. The pretrial right to counsel was not made a function of any particular stage in the chronology of criminal proceedings. Rather, the analysis adopted in the cases addressed a single question: "whether counsel's absence might derogate from the accused's right to a fair trial."[47]

In *Kirby v. Illinois*,[48] however, the Supreme Court limited the impact of the prior sixth amendment cases by placing substantial emphasis on the chronology of events. A plurality of the Court held that "the explicit guarantees of the Sixth Amendment are applicable" only where a "criminal prosectuion" has been commenced. The Court noted that heretofore criminal prosecution had been found to have commenced only at the time of or after the initiation of formal proceedings, "whether by way of formal charge, preliminary hearing, indictment, or arraignment."[49] The opinion stated that the "onset of formal prosecutorial proceedings" occurs when: (1) "the government has committed itself to prosecute," (2) "adverse positions . . . have solidified" and (3) "a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[50]

While the plurality opinion thus described the nature of formal prosecutorial proceedings and listed instances in which defendants had been successful in establishing the sixth amendment claim, the opinion did not expressly limit the right to counsel to situations after indictment nor did it state that "formal charge, preliminary hearing, indictment, or arraignment" constituted an exclusive list of events which trigger the right to counsel. The meaning of *Kirby* is susceptible to differing interpretations. On the one hand, the

44. 287 U.S. 45 (1932).
45. 399 U.S. 1 (1970).
46. *The Pretrial Right to Counsel*, *supra* note 29.
47. *Wade*, 388 U.S. at 226.
48. 406 U.S. 682 (1973).
49. *Id.* at 689.
50. *Id.*

opinion may be interpreted as setting forth a bright-line test under which there is no right to counsel until after formal charging. On the other hand, it may be understood as suggesting examples of the circumstances in which the right to counsel attaches and setting forth criteria on which it is based. Under this latter view, the applicability of the right to counsel in any fact setting which differs from that addressed in *Kirby* must be analyzed in terms of these criteria.

Since *Kirby*, courts and commentators have adopted each of these views. On the theory that *Kirby* represents a bright-line test, some courts have denied the right to counsel in identification procedures occurring before indictment.[51] In the second circuit and several other jurisdictions, however, courts have interpreted *Kirby* as leaving the determination of what constitutes formal proceedings to be made in light of local procedures.[52]

Thus, in analyzing the right to counsel in the diversion setting in Vermont, emphasis should be placed on the criteria by which the

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51. *See* Hall v. Florida, 395 F.Supp. 1044 (M.D. Fla. 1975) (coroner's inquest was not an adversary proceeding under *Kirby*); Martin v. State of Indiana, 521 F.2d 682, 685 (7th Cir. 1975) (where record did not reveal whether lineup occured before or after filing of formal charges, the Court of Appeals, citing *Kirby*, remanded the cause for a determination of that point). For other cases denying the right to counsel prior to indictment see People v. Reese, 54 Ill.2d 51, 294 N.E.2d 288 (1973); Commonwealth v. Lopes, 287 N.E.2d 118 (Mass. 1972); State v. Northup, 303 A.2d 1 (Me. 1973). *Cf.* Moore v. Oliver, 347 F.Supp. 1313 (W.D. Va. 1972), where the district court refused to interpret *Kirby* as allowing counsel where there had been a formal change but no indictment, stating:

> . . . the language of the opinion is by no means clear as to when the Sixth Amendment right does attach. . . . [but] it would be a twist of logic to . . . expand a right which the express holding purports to limit. *Id.* at 1318-19.

The Supreme Court of Michigan, in People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974), accepted *Kirby* as establishing a bright-line test but rejected the test and held that the right to counsel in a lineup or photographic display attaches at arrest. For commentary accepting *Kirby* as establishing a bright-line test, see Note, *The Right to Counsel Does Not Extend to a Pre-Indictment Identification Proceeding*, 24 SYR. L. REV. 845 (1973).

52. *See* United States *ex rel.* Robinson v. Zelker, 468 F.2d 159, 163 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973). Judge Oakes decided that since there had been an issuance of an arrest warrant and that New York statutes equated an arrest warrant issued upon information with an indictment, the right to counsel should be allowed under *Kirby*. *Id.* at 161, n. 2. The dissent disputed this equation. *Id.* at 166. For other cases extending the right to counsel before indictment see Arnold v. State, 484 S.W.2d 248 (Mo. 1972); State v. Tingler, 31 Ohio St.2d 100, 285 N.E.2d 710 (1972); Dickson v. State, 492 S.W.2d 267 (Tex.Crim.App. 1973). For commentary in support of these interpretations see Note, *The State Response to Kirby v. Illinois*, 1975 WASH. U.L.Q. 423; Note, The Right to Counsel at Pretrial Identifications, 78 W. VA. L. REV. 84 (1975).

Court defined "the onset of formal prosecutorial proceedings" in order to determine whether they are present at the time diversion is offered.[53] It should be recognized that *Kirby* may not even be controlling in the diversion setting because juveniles are involved and the proposition that *Gault* requires the juvenile justice system to parallel its adult counterpart has recently been rejected by the Supreme Court.[54] Nonetheless, the criteria set forth in the case must be recognized as the starting point for analysis.

In *United States v. Ash*,[55] the Supreme Court identified additional prerequisites to recognition of the pretrial right to counsel. It placed emphasis upon the confrontation itself, stating that in addition to being "critical" it must also be "trial-like . . . involving opportunities for prosecuting authorities to take advantage of the accused."[56] The Court further reasoned that for the opportunity of such prejudice to occur, the accused must be physically present and faced with significant legal decisions which require the assistance of counsel in order to avoid prejudice so substantial that it cannot be cured by counsel at trial.[57] The *Ash* decision denied counsel in an identification procedure (photographic display) which occurred *after* the initiation of "formal prosecutorial proceedings." As a re-

53. Precharge diversion, by definition, is a procedure which does not contemplate charging or "petitioning" at any point in its process, but nevertheless presents a prospective divertee with substantial potential for prejudice to constitutional rights. Thus, to deny the protection of counsel in the precharge diversion context *because* there is no charge would be to extend a most unfortunate interpretation of *Kirby* to an integrally different situation. ADDICT DIVERSION, *supra* note 21 at 89; Interview with Arnold Hopkins, *supra* note 28. Mr. Hopkins indicates that the question of whether *Kirby* is applicable is hotly disputed between public defenders and prosecutors. At present some prosecutors are willing to provide for a prediversion hearing and a legal diagnosis to determine the weight of the case against the accused, but not for a right to counsel.

54. "If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it." McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971). *See In re* Winship, 397 U.S. 358, 366 (1970); Kent v. United States, 383 U.S. 541, 562 (1966); *In re* Gault, 387 U.S. 1, 30 (1967). In Jackson v. State, 17 Md.App. 167, 300 A.2d 430 (1973), the court intimated that *Wade* and *Gilbert* might not be applicable in juvenile proceedings but the court declined to answer the question of whether juvenile proceedings are "adversary criminal proceedings" under *Kirby*. 17 Md.App. at 174, 300 A.2d at 435.

55. 413 U.S. 300 (1973).

56. *Id.* at 312.

57. *Id.* at 316.

sult, a person who claims the sixth amendment right to counsel in a pretrial situation must not only satisfy the chronological requirements of *Kirby*, but also the *Ash* requirement that the accused be present at a "trial-like adversary confrontation."[58]

Thus, to establish that sixth amendment assistance of counsel is required in precharge diversion, analysis must show either that *Kirby* and *Ash* were not sound decisions, or that their facts are distinguishable and that recognition of a right to counsel in the precharge diversion setting is nonetheless consonant with the reasoning of these cases. The former premise has been ably argued;[59] this note will address the latter premise. The first problem is to determine whether the offer of the diversion alternative occurs after the onset of a "criminal prosecution" under the meaning of that term as refined by *Kirby*. The second problem is to determine whether it is a "critical stage" under the criterion of *Ash*.

II. Precharge Diversion as a Stage Occurring After the Onset of Formal Prosecutorial Proceedings

When an individual is offered diversion, the offer represents a willingness on the part of the prosecutor that final disposition of a case could occur at this juncture. He has not "screened"[60] the alleged offender and decided to dismiss proceedings, but has instead retained a degree of control over the individual which is just short of formal charging.[61] The investigative phase of proceedings has been completed and no further identification of the offender is sought. In this respect the facts in the diversion setting are clearly distinguishable from the situation addressed in *Kirby*, in which the

58. *Id.* at 312.

59. *The Pretrial Right to Counsel*, *supra* note 29, at 412-13.

60. "Screening" refers to a prosecutor's dismissal of charges or decision not to press charges in cases where he deems the evidence insufficient or in his opinion where the offense does not merit legal sanctions.

61. This practice may be viewed as an abuse of prosecutorial discretion when it results in a juvenile facing adjudication without the full protection of the constitution. *See* GCAJ Study, *supra* note 23, at 4-9 for an examination of the role of prosecutorial discretion in precharge diversion. *See also* Morse v. Municipal Court, 13 Cal.3d 149, 118 Cal.Rptr. 14, 529 P.2d 46 (1974); People v. Superior Court (On Tai Ho), 11 Cal.3d 59, 113 Cal.Rptr. 21, 520 P.2d 405 (1974); Sledge v. Superior Court, 11 Cal.3d 70, 113 Cal.Rptr. 28, 520 P.2d 412 (1974) interpreting the role of the prosecutor under California's diversion statute for drug-related offenses. Cal. Penal Code § 1000 (West Supp. 1975).

Court was concerned with whether a preindictment showup constituted a criminal prosecution. In *Kirby* the police were still investigating the crime and supposedly had not formed any opinions as to the guilt of the suspect; thus, the prosecution of the defendant had not yet begun.[62] In the precharge diversion context, police have arrested a juvenile and determined to their complete satisfaction that he is guilty of the offense.[63] By the time diversion is offered disposition of the case rests solely in the prosecutor's hands. Although the contract which prescribes the divertee's obligations is signed by the diversion board, the consideration—potential freedom from future proceedings—is provided by the state's attorney.

The contract may require apology, restitution, counseling, labor, or a combination of some or all of these. Because the divertee must attend the counseling sessions, pay the money, and do the work or suffer the loss of divertee status, his freedom to operate autonomously has been limited; he has become subject to the kind of restrictions which are usually reserved for those charged or convicted of crime. In this manner diversion constitutes a curtailment of individual liberty,[64] a form of precharge probation with the prosecution assuming the role of probation board.[65] By displaying its willingness to make ultimate disposition of a case, by invoking the specter of its prosecutorial power to strike a bargain and enforce it, and by effecting a curtailment of liberty through the diversion contract, the prosecution has done at least two of the things which *Kirby* identified as signifying the onset of prosecutorial proceedings: it has both solidified its position adversely to the accused, and subjected him to the prosecutorial forces of organized society.

Furthermore, the offer of diversion presents a special danger that a juvenile defendent may become "immersed in the intricacies of substantive and procedural law" without realizing it. Because

62. Society's interest in effective police investigation unimpeded by the intervention of counsel has been recognized as the basis for the *Kirby* ruling. ADDICT DIVERSION, *supra* note 21, at 85. Justice Brennan in his dissent attacks the plurality's unwillingness to admit that an arrest creates the problems for which counsel's protections are needed. *Kirby*, 406 U.S. at 698-700.

63. Interview with William Sorrell, *supra* note 18.

64. Gerstein v. Pugh, 420 U.S. 103, n. 26 at 125 (1975). *See Some Constitutional Considerations*, *supra* note 21, at 800 n.69.

65. Balch, *supra* note 8, at 47.

formal precharge diversion employs only deferral, and not dismissal, of prosecution, the threat of potential damage to an accused's legal position remains, though it may become submerged as attention is focused on the opportunity for the non-penal diversion alternative. However, when a divertee is unsuccessfully terminated, his experience in diversion may result in significant prejudice at his subsequent trial.[66]

One of the most significant functions of counsel is to perceive and deal with technical aspects of justice system proceedings which may severely prejudice or entirely preclude the exercise of constitutional rights at trial.[67] Since acceptance of diversion may result in a partial or total relinquishment of constitutional rights,[68] it is important that these rights be validly waived prior to such acceptance. Because waiver would require the divertee to make "voluntary, intentional and intelligent"[69] decisions regarding matters of an intricate legal nature, the assistance of counsel is an optimal means of ensuring the fairness and validity of the waiver, and may be particularly necessary since juveniles are involved.[70]

Despite the presence of the elements of "formal prosecutorial proceedings" as identified in *Kirby*, in the Vermont diversion situation the problem remains that an offer of diversion does not actually constitute formal prosecution in the traditional sense. However, the Court in *Kirby* identifies the posture of police and prosecutor vis-à-vis the accused as a key factor in determining whether there had been an initiation of formal proceedings.[71] By its description of the facts of the case, it implies that because Kirby had not been charged, the police and prosecutor had not focused

66. PRETRIAL INTERVENTION, *supra* note 5, at 12.

67. Coleman v. Alabama, 399 U.S. 1, 9 (1970).

68. *See* text accompanying notes 22-24, *supra*.

69. Carnley v. Cochran, 369 U.S. 506, 516 (1962).

70. PRETRIAL INTERVENTION, *supra* note 5, at 12. *See also*, *In re* Gault, 387 U.S. 1, 44 (1967) where Justice Fortas discusses the need for additional protections regarding *Miranda* warnings for juveniles; and Ferguson and Douglas, *A Study of Juvenile Waiver*, 7 SAN DIEGO L. REV. 39, 54 (1970), where it was reported that in an experiment designed to determine the level of understanding of *Miranda* warnings to juveniles, 96% failed to understand them but nonetheless waived their rights.

71. The Court referred to the situation in *Kirby* as "a routine police investigation," 406 U.S. at 690.

their attention on him in a manner which would induce them to abuse his rights.[72] The situation presented by precharge diversion in Vermont, however, is distinguishable in that the police have caught their offender and the prosecution has focused its energies towards final disposition of the matter.[73] The presumption of guilt[74] employed by the police and prosecutor in this context, though acted upon in the best of faith, is an attitude which could easily lead to the abuse of a juvenile's constitutional rights.[75] Although both police and prosecutor feel they are affording the juvenile a significant benefit,[76] determination of guilt on the street by police and imposition of prosecutorial pressure without judicial determination of probable cause fail to provide even the minimum protections guaranteed by the due process clause.[77] A strict application of the "formal prosecutorial proceedings" standard of *Kirby* which ignored the distinctive features of diversion would allow the prosecutor to operate independent of judicial restraints; "the events which would trigger the sixth amendment [would be] in the control of the prosecution," which would be able to "commit itself to prosecute and solidify its position while artificially postponing the initiation of formal charges."[78] The diversion situation satisfies the requirement of the lineup cases that there be the "potential of substantial prejudice," and it is distinguishable from the situation addressed in *Kirby*. Thus, to deny the right to counsel in this context would be to "exalt form over substance."[79]

III. Precharge Diversion as a "Critical Stage" of Criminal Proceedings

When diversion is initially offered, the process is explained to

72. *Cf.* 406 U.S. at 698 (Brennan, J., dissenting).

73. Interview with William Sorrell, *supra* note 18.

74. Balch, *supra* note 8, at 49.

75. The *Gault* opinion discussed at length the failure of the *parens patriae* approach of the juvenile justice system. By approaching the problem of juvenile crime with the attitude that the juvenile is guilty, but that justice officials can straighten him out best without observance of formal legal protections, diversion may present the juvenile with "the worst of both worlds." *Gault*, 387 U.S. at 18, n. 23 (citing *Kent*, 383 U.S. at 556).

76. Interview with William Sorrell, *supra* note 18.

77. *Cf.* Gerstein v. Pugh, 420 U.S. 103 (1975).

78. Addict Diversion, *supra* note 21, at 89.

79. Escobedo v. Illinois, 378 U.S. 478, 486 (1964).

the juvenile and his parents by an employee of the diversion board, usually an off-duty probation officer.[80] Because successful performance of the diversion contract will preclude proceedings on the alleged offense, the lure of this significant benefit causes juveniles and their parents to eagerly accept the offer of diversion without consultation with counsel.[81] Since the great majority of divertees are successful,[82] the decision to accept diversion does not appear to be "critical."

The practical success of diversion deceives both those who accept diversion and those who offer it. Because those who offer it are often unaware of its potential for abuse, their explanation of diversion to the juvenile and his parents is frequently inadequate. Nonetheless, because the potential for damage to constitutional rights of an unsuccessful divertee exists, it is necessary to determine whether the offer of the diversion alternative presents a "critical stage" of prosecution so as to trigger the sixth amendment right to counsel.

In the line of cases from *Hamilton* to *Coleman* which set forth the "critical stage" test, the Court analyzed sixth amendment claims in light of the relationship of the event to the stated function of the right to counsel—the preservation of a defense at trial.[83] No chronological limitation was imposed upon the test[84] which was satisfied when the element of "potential substantial prejudice" was present. These cases stand for the proposition that ". . . the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."[85] To determine whether precharge diversion procedures may constitute a "critical stage" of prosecutorial proceedings, it is

80. It is noted in the *Gault* decision that the probation officer cannot be considered the "friend" of the juvenile in the eyes of the law and "cannot act as counsel for the child." 387 U.S. at 36.

81. Interview with Claudia Jacobs, Acting Director, Washington County Youth Services Commission, Feb. 21, 1976.

82. The incidence of recidivism during participation in diversion has been remarkably low. Only a handful of cases have been terminated as unsuccessful. Interview with Paul Viera, *supra* note 10.

83. *Wade*, 388 U.S. at 226; *Kirby*, 406 U.S. 682; *Ash*, 413 U.S. 300.

84. *The Pretrial Right to Counsel*, *supra* note 29, at 412-13.

85. *Wade*, 388 U.S. at 226.

necessary to examine the nature of the information the divertee is given about his alleged offense at the time diversion is offered, and the nature of the rights endangered by precharge diversion.

A. *Notice of Alleged Offense*

Diversion is offered before formal charging; thus a prospective divertee is without official formal notice of the offense(s) for which the prosecution seeks to hold him responsible. Without such notice an accused may find it difficult or even impossible to determine the correctness or legal sufficiency of the case against him.[86] Even when formal charges are available for scrutiny, the assistance of counsel in this regard has been deemed critical.[87] It would appear that in the absence of formal notice the need for counsel to assess an accused's position is even more compelling. Neither the successful nor unsuccessful divertee should be subjected to restrictions under a diversion program in cases where governmental interference is either unwarranted or legally impermissible.[88] Without the assistance of counsel the divertee is left to the legally insufficient protection of the integrity of the prosecutor.[89]

B. *Endangered Rights*

Although there are subtle disadvantages in diversion even for those who are successfully terminated,[90] the pronounced dangers lie in the potential abuse of rights which an unsuccessful divertee may suffer if terminated and returned for prosecution.

When an individual consents to diversion it is often implied

86. Coleman v. Alabama, 399 U.S. 1, 9 (1970). *See Some Constitutional Considerations, supra* note 21, at 794.

87. *Id.*; Powell v. Alabama, 287 U.S. 45 (1932).

88. Dean, *supra* note 24, at 25.

89. Balch, *supra* note 8, at 49. Gerstein, 420 U.S. 103, where the Supreme Court held that the fourth amendment requires judicial determination of probable cause as a prerequisite to extended restraint on liberty following arrest (counsel was deemed not critical as its absence would not impair defendant's case at trial on the merits). The Court considered determination of probable cause by the prosecutor alone to be insufficient.

90. Whether a divertee is successful or unsuccessful, if he is arrested for another offense he will be treated as a recidivist. Thus, a juvenile who has never been petitioned or adjudicated will nonetheless be treated as a second offender. Interview with Paul Viera, *supra* note 10.

that he has waived his sixth amendment right to speedy trial for the duration of the program.[91] The Supreme Court has recognized three interests as being protected by the right to a speedy trial: 1) protection from oppressive pretrial confinement; 2) limitation on anxiety and concern of the accused; and 3) *protection against prejudice to the right to an effective defense at trial* (emphasis added).[92] The potential divertee is likely to be so tempted by the diversion alternative that he fails to foresee that if he is unsuccessful and returned for juvenile proceedings six months later, he will not only have waived his right to a speedy trial but thereby compromised his chance for an effective defense at trial. Thus it is clear that counsel should be present to ensure that waiver of the right to a speedy trial—whether express or implied—is made "intelligently and understandingly."[93]

A second problem is presented when a divertee is required to apologize and/or make restitution to a victim as a condition of diversion. The individual's right against self-incrimination may be endangered. Although a divertee does not make a formal guilty plea, evidence of his acceptance of moral responsibility could be highly prejudicial if admitted into evidence at a subsequent trial to establish guilt or to impeach credibility.[94] It may be argued that only guilty individuals will accept the requirements of apology and restitution, but this does not remove the threat to the privilege against self-incrimination which is afforded to guilty and innocent alike. Moreover there is subtle pressure for an innocent (or legally immune) individual to opt for diversion, whatever it requires, when it represents the path of least resistance from an economic, emotional, or tactical point of view.

Vermont diversion programs operate on an understanding between prosectuor and the Youth Service Bureau that diversion records will be destroyed in all cases, whether successful or not, and that no information gathered in the process will ever be used against

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91. PRETRIAL INTERVENTION, *supra* note 5, at 8.

92. Barker v. Wingo, 407 U.S. 514 (1972).

93. Carnley v. Cochran, 369 U.S. 506, 516 (1962).

94. Balch, *supra* note 8 at 49, *citing to* A PROSECUTORS MANUAL, *supra* note 21, at 147; *Some Constitutional Considerations, supra* note 21, at 798-99. *See* Harris v. New York, 401 U.S. 222 (1971).

a divertee in court.[95] There is, however, no statutory privilege protecting such information and once again the divertee is at the mercy of the prosecution to protect his rights for him. Certainly these rights may be waived, but the assistance of counsel in the waiver process is of vital importance and may be indispensable when dealing with juveniles.[96]

Thus, the issues raised regarding notice of accusations, speedy trial, and self-incrimination provide examples of ways in which the decision to divert prior to formal charging may have a critical effect on the trial process itself. Under the reasoning of *Kirby* and *Ash*, substantial prejudice to rights necessary for defense at trial, attributable to the adverse "prosecutorial forces of organized society,"[97] are demonstrated. "[T]rial-like confrontations . . . [offering] opportunities for prosecuting authorities to take advantage of the accused"[98] are revealed in the substantial potential for prosecutorial overreaching.

IV. Conclusion

In deferred-prosecution diversion occurring prior to formal charging, there is significant potential for prejudice of a defendant's rights at trial. The position of the prosecutor in this scheme is clearly such that prosecution has "commenced" under the functional analysis presented by the cases from *Powell* to *Coleman*. Moreover, the circumstances are sufficiently similar to those which the plurality in *Kirby* maintained would herald the commencement of prosecution for sixth amendment purposes. Additionally, diversion under the described circumstances entails potential prejudice to rights entitled to sixth amendment protection under decisions from *Powell* to *Ash*.[99]

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95. Interview with Paul Viera, *supra* note 10; Interview with Claudia Jacobs, *supra* note 81.

96. *Gault*, 387 U.S. at 44. *See* Pretrial Intervention, *supra* note 5, at 12.

97. *See* pp. 154 to 156 *supra*.

98. *Ash*, 413 U.S. at 312. *See* pp. 156 to 159 *supra*.

99. As the Court stated in *Ash*: "The Court has consistently applied a historical interpretation of the guarantee and has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself." 413 U.S. at 311. Precharge diversion presents such a new context.

If diversion is to fulfill its promise as a means of providing a more humane and appropriate societal response to behaviour that is considered antisocial, it cannot accomplish this by maintaining governmental control while denying necessary constitutional protections.[100] Whatever value precharge diversion may have, it must be measured after diversion procedures have satisfied the mandates of due process.

Robert J. Angres

100. "It is hoped that we will not have to wait another 200 years for the administrators of diversion programs to learn the lessons of *Gault*." Comment by Robert West, Defender General of Vermont at Jan. 15, 1976 meeting of Governor's Supervisory Board.