

# Nixon Justices Outvoted 5-4 in

By John P. MacKenzie  
Washington Post Staff Writer

The four appointees of President Nixon lined up in solid dissent yesterday as the Supreme Court ruled, 5 to 4, that invalid prior convictions may not be used to discredit the credibility of a defendant who takes the witness stand.

Outnumbered by the five senior members of the court, the newest justices complained, in three separate dissen-

ting opinions, that the majority was extending a right to the accused in an unwarranted fashion.

The lineup of justices created a picture of new members, critical of Warren Court rulings, opposing the older justices, some of whom had themselves criticized past decisions but who showed their determination to adhere to legal precedent.

In the case of a Texas habit-

ual offender named Otis Loper, the majority held that it was error for lower courts to disregard the evidence that prior convictions used to impeach him as a witness in his own behalf were probably obtained when Loper was not represented by a lawyer.

Justice Potter Stewart was joined by Justices William O. Douglas, William J. Brennan Jr., Thurgood Marshall and — in part — by Byron R. White in calling for a new federal

habeas corpus proceedings for Loper.

Dissenting were Chief Justice Warren E. Burger and Justices Harry A. Blackmun, Lewis F. Powell Jr. and William H. Rehnquist, all of whom have joined the court since President Nixon vowed to "change the thrust" of high court decisions.

Stewart said yesterday's result was necessary unless decisions which applied the constitutional right to counsel were going to be "forsaken."

## Defendants' Rights Case

THE WASHINGTON POST  
Thursday, March 23, 1972 A 5

In one dissent, Burger and Powell said that if one of those decisions, handed down five years ago, meant what the majority said it meant, "we should overrule that decision without delay." The majority, he said, had produced an "extravagant result" which "does violence" to common sense.

Underlying the dispute is the traditional but controversial prosecution practice of bringing up the defendant's criminal record if he decides to testify in his own behalf.

Prior convictions, ordinarily deemed highly prejudicial and inadmissible, can be brought to the jury's attention in the name of attempts to impeach the witness's credibility. However, the court in recent years has drawn the line at the use of convictions obtained in violation of the 1963 right-to-counsel decision, *Gideon v. Wainwright*, which has been applied retroactively to past trials.

Loper contended in federal court that his 1947 conviction

—and 50-year prison term—for statutory rape of his step-daughter should be set aside because several invalid burglary convictions had been used against him.

Stewart agreed, noting that the trial was entirely a credibility contest between Loper and the 8-year-old complaining witness. Thus, he said, the criminal record was used for the impermissible purpose of establishing guilt.

Dissenters contended that the majority had no way of

being sure that Loper had not been provided with a lawyer or waived counsel when he was found guilty by Mississippi and Tennessee courts in the 1930s and 1940s. At that time, however, few courts were insuring that accused persons had counsel.

Justice White's limited concurrence said he agreed with the majority "as our past cases now stand." White dissented in the 1967 decision that was challenged by Burger.