
GULF
See Chart 1055)
SYMI (Ancient SYME)
Increasing about 5' annually
Var 2°35'E (1986)
MAGNETIC
Tilos
Anti Tilo (Askino nisi)
Piskopi Id (Kephala)
(See Chart of Rhodes I. including Khalkia I. with plans, No 1667)
Alimnia
KHALKI I.
Seskli
Patos I.
C.Monolithos
R H O D E S

Signs of Life in the Supreme Court's Uncharted Territory: Why the Right to Effective Assistance of Counsel Should Attach to Pre-Indictment Plea Bargaining

BRANDON K. BRESLOW

In 2012, the U.S. Supreme Court held in the companion cases of Lafler v. Cooper *and* Missouri v. Frye *that the right to effective assistance of counsel attached to the plea bargaining process. Unlike other "critical stages" at which the right to counsel attaches, plea bargaining does not only occur after an indictment has been returned.* Lafler *and* Frye *left open a question lower courts have spent decades addressing: whether the right to counsel would attach to pre-indictment plea bargaining or if lower courts must strictly adhere to the Court's bright-line test? This article seeks to provide guidance on answering that important question.*

On March 21, 2012, the U.S. Supreme Court issued decisions in two companion cases that extended the Sixth Amendment right to effective assistance of counsel to the plea negotiation process. In *Lafler v. Cooper*,[1] the Court held that counsel's failure to correctly advise a defendant of the possible sentencing outcomes when considering a plea offer, eventually causing him to reject the plea offer, amounted to ineffective assistance of counsel under the first prong of the test formulated in *Strickland v. Washington*.[2] The Court held the same in *Missouri v. Frye*,[3] when counsel's failure to communicate a plea offer to a defendant caused the offer to expire. Through these decisions, the Court added plea negotiations to the list of pretrial critical stages at which the Sixth Amendment right to effective assistance of counsel attaches.[4] The Sixth Amendment right to counsel, however, is arguably limited chronologically to post-indictment proceedings,[5] and plea bargaining does not occur only after an indictment has been returned. Therefore, a claim of ineffective assistance of counsel during pre-indictment plea negotiations conflicts with the chronology-focused bright-line test established for the attachment of the right to counsel in prior Supreme Court opinions.

This article is a guide for practitioners and courts to resolve this conflict, exploring both Supreme Court precedent on the importance and extent of the Sixth Amendment right to counsel and the holdings of circuit and district courts criticizing and rejecting the bright-line test. Based on the reviewed case law, particularly the historical importance of the right to effective assistance of counsel and plea bargaining, lawyers should continue to argue and courts should hold that the right to counsel attaches to pre-indictment plea negotiations.

The Supreme Court History of the Right to Counsel

While the Sixth Amendment to the U.S. Constitution established the right to counsel for the accused,[6] the Supreme Court has been the wind in the right's sails in both federal and state courts. The first substantive discussion of the right to counsel was in 1932 in *Powell v. Alabama*.[7] In *Powell*, the Court was asked to determine whether a conviction in a capital rape case was constitutional when a state trial court failed to give defendants an adequate opportunity to retain counsel prior to trial and to appoint counsel to the indigent defendants.[8] While *Powell* is considered to be the first right to coun-

sel case, the decision was not based on the Sixth Amendment.[9] The Court relied primarily on the due process clause of the 14th Amendment in holding that both the denial of the opportunity to retain counsel and the failure to appoint counsel were unconstitutional.[10] Regardless of its roots in the Sixth or 14th amendment, *Powell* stood for the proposition that a defendant unable to contribute to his defense due to "ignorance, feeble-mindedness, illiteracy or the like" had a right to counsel.[11]

Six years later, the Court directly addressed the Sixth Amendment right to counsel in *Johnson v. Zerbst.*[12] In *Zerbst*, the petitioner and a co-defendant were tried and convicted without the assistance of counsel for counterfeiting $20 Federal Reserve notes.[13] The Court determined that the district court's failure to appoint counsel to Johnson and his co-defendant was a jurisdictional bar to a valid conviction at trial in federal court and a violation of the Sixth Amendment right to counsel.[14] In the Court's majority opinion, Justice Hugo Black emphasized the importance of the right to the average defendant who faces the loss of his life or liberty at trial without the assistance of counsel.[15] *Zerbst* is now viewed as the landmark case establishing the right to counsel in federal court.[16]

Following *Zerbst* and *Powell*, it was a complex journey for the right to reach state courts. While *Powell* applied to a state court proceeding in Alabama, it was limited strictly to its facts. The Court held in *Betts v. Brady*[17] in 1942 that state courts were not required to appoint counsel in *every* case of an indigent defendant to comply with the due process clause of the 14th Amendment, but only in those cases where a trial without the appointment of counsel would offend "the common and fundamental ideas of fairness and right."[18] The Court's decision was based on a survey of the states' constitutions and statutes at the time, a majority of which did not mandate the appointment of counsel.[19] The Court clarified more than a decade later that the holding in *Betts* was limited to the appointment of counsel and did not apply to defendants willing to foot the bill for their own counsel.[20]

The direction of the wind swiftly changed when the Court explicitly overturned *Betts* in 1963.[21] In *Gideon v. Wainwright*, the Court reviewed a Florida trial court's denial of the defendant's request to have counsel appointed for his felony trial.[22] The Court agreed with the premise stated in *Betts* that the 14th Amendment makes provisions of the Bill of Rights "fundamental and essential to a fair trial" obligatory on states, but it held that the right to counsel is certainly among those provisions.[23] The Court found it to be an "obvious truth," based on *Zerbst* and *Powell*, that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[24] *Gideon* provided a much-needed course correction as now state defendants, regardless of their financial status, can assert their right to counsel.

While the right to counsel *at trial* was clear for all defendants following *Gideon*,[25] whether the right to counsel applied to pretrial events, and if so which ones, was still unanswered.[26] It was clear from *Powell* that the right to counsel extended to a defendant's arraignment.[27] Building on the language from *Powell*, the Court eventually extended the right to counsel to what it called "critical stages of the proceedings."[28] The Court recognized in *United States v. Wade* that there are critical stages prior to trial "where the results might well settle the accused's fate and reduce the trial itself to a mere formality,"[29] and that "the presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution."[30] The Court has since determined several pretrial stages to be "critical," including a post-indictment lineup,[31] a psychiatric examination of the accused,[32] and a preliminary hearing where certain rights of the defendant may be lost.[33] Plea negotiations are the most recent addition to the Supreme Court's list of critical stages.[34] Recognizing that "plea bargains have become so central to the administration of criminal justice system,"[35] the Court, in both *Lafler* and *Frye*, found that plea negotiations were a critical stage at which the right to effective assistance of counsel attached because the criminal justice system is "for the most a system of pleas, not a system of trials."[36] Furthermore, *Frye* arguably expanded the definition of a pretrial critical stage by stating that the negotiation of a plea is the "critical point" for a defendant, rather than a trial.[37]

The Bright-Line Test

Shortly following the adoption of the "critical stages" test in *Wade*, a similar case came before the Court in 1972 addressing whether the right to counsel applied at a *pre-indictment* lineup.[38] In *Kirby v. Illinois*, the distinction from *Wade* as to when the lineup occurred made the necessary difference for the Court to drop an anchor on the right to counsel. The Court, in declining to apply the right to counsel at the lineup, stated in a plurality opinion that *Powell* "makes it clear that the right attaches at the time of arraignment" and that all of the prior cases regarding critical stages "involved points of time at or after the initiation of adversary criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[39] In its reasoning, the Court specified:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.[40]

By making this purely chronological distinction as to when a case becomes "adverse," *Kirby* established a bright-line test to determine when the right to counsel attaches. The Court has continued to uphold the bright-line test using *Kirby's* reasoning regarding solidified adverse positions.[41]

Lower Courts Respond to the Bright-Line Test

Following *Kirby*, the U.S. Court of Appeals have split as to whether to strictly follow the bright-line test. The Second,[42] Fifth,[43] Eighth,[44] Ninth,[45] Tenth,[46] Eleventh,[47] and D.C.[48] circuits strictly follow *Kirby*'s language regarding the "initiation of judicial criminal proceedings." The First, Third, Fourth, and Seventh circuits use much broader language from *Kirby* to reject the formal nature of the bright-line test, but none of these circuit courts of appeal have definitively held that the right to counsel attaches at a pre-indictment stage. Finally, the Sixth Circuit stands strongly opposed, in dicta only, to the bright-line test, but it has ultimately adhered to the test in its rulings.

The Circuit Courts Fade the Bright-Line Test

The First Circuit rejected the bright-line test in 1995.[49] In *Roberts v. Maine*, the defendant was arrested for operating a vehicle with a suspended license after being pulled over for driving erratically.[50] The officer suspected the defendant was driving under the influence of alcohol, so the officer began to read him an implied consent form for a blood test to determine his level of intoxication.[51] The defendant immediately requested several times to call his attorney to determine whether he should consent to the blood test, but the officer refused.[52] The defendant ultimately did not consent, and he was eventually convicted for operating a motor vehicle under the influence and operating on a suspended license.[53] Following the denial of his appeals in state court, the federal district court dismissed the defendant's habeas corpus petition, which argued that the right to counsel attached at the point that the officer refused to allow him to speak with his counsel.[54]

The First Circuit stated that while "the initiation of adversary judicial proceedings" was "normally by way of formal charge, preliminary hearing, indictment, information, or arraignment," it recognized "*the possibility* that the right to counsel might conceivably attach before any formal charges are made, or before an indictment or arraignment, in circumstances where the government had crossed the constitutionally significant divide from fact-finder to adversary."[55] While noble in adopting a broader and more case-specific test than the bright-line test, the court stated that pre-indictment instances where the right to counsel would attach were rare, and it could not cite any in its opinion.[56] Although the court found this case "appealing" and "admittedly close," it held that the right to counsel did not attach because the officer "had not yet crossed the constitutional divide between investigator and accuser."[57]

The Third Circuit faded the bright-line test in 1999 without any hesitation or explanation, albeit needlessly considering the defendant had already undergone his preliminary arraignment.[58] The court stated, "The right also may attach at earlier stages, when 'the accused is confronted, just as at trial, by the procedural system, or by his expert adversary, or by both, in a situation where the results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality.'"[59] The court then formulated its own test for when the right to counsel attached, focusing on "the moment [the defendant] 'finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'"[60]

The Fourth Circuit addressed a set of facts and legal issues similar to those that gave rise to *Kirby* in *United States v. Burgess*.[61] The defendant, accused of an armed bank robbery, was brought to the police station for a lineup prior to his indictment and without counsel.[62] He appealed his conviction, asserting that he was entitled to have counsel present at the lineup.[63] The court acknowledged the bright-line test but stated the "crucial inquiry is whether authorities have committed themselves to prosecute, signifying the point at which the 'adverse positions of government and defendant have solidified.'"[64] The Fourth Circuit held that the right to counsel had not attached because the government had not assumed an adversarial role at that point.[65] In recognizing a "crucial inquiry" as to whether the right to counsel has attached, the court relied heavily on the Seventh Circuit's opinion in *United States v. Larkin*.[66] *Larkin* addressed the same facts as *Burgess*, and, therein, *Kirby*: the right to counsel at a pre-indictment lineup.[67] The Seventh Circuit altered the bright-line test to create a rebuttable presumption for the defendant to show "the government had crossed the constitutionally significant divide from fact-finder to adversary."[68]

The Sixth Circuit Calls for Change

The Sixth Circuit has not only handed down the most compelling circuit court decision on the attachment of the right to counsel to pre-indictment stages,[69] but it has also addressed exactly the conflict this article aims to resolve. In *United States v. Moody*,[70] decided in 2000, the defendant was part of a conspiracy to transport and deal cocaine between Florida and Tennessee.[71] Following the execution of search warrants by the Federal Bureau of Investigation (FBI), Moody approached the FBI and offered to cooperate.[72] Six interviews occurred between the FBI and Moody, without the assistance of counsel, and an assistant U.S. attorney for the Eastern District of Tennessee was present during the first and last interviews.[73] During the interviews, Moody made several self-incriminating statements, and government attorneys offered him a deal that would limit his sentence to a maximum of five years incarceration if he agreed to plead guilty to a conspiracy charge and continued to cooperate with the government.[74] Moody sought the advice of an attorney.[75] The attorney contacted the government nearly a month after he was retained to reject the plea offer, but he did not inquire into the substance of the interviews or Moody's self-incriminating statements in them.[76]

Moody was later indicted on more serious charges, and the same attorney advised him to plead guilty "because there was no way to overcome the self-incriminating statements Moody had made during his voluntary FBI interviews."[77] After pleading guilty, the district court sentenced Moody to 120 months, double the maximum sentence he would have faced if he accepted the government's first plea offer.[78] Following sentencing, Moody filed a motion in the district court to vacate, set aside, or correct his sentence due to his attorney's ineffective assistance of counsel in rejecting the government's first plea offer.[79] The district court granted Moody's motion, resentenced him to the original offer of five years, and affirmed upon reconsideration.[80] The government appealed the district court's resentencing, arguing that the right to counsel had not attached at the time of the first plea offer.[81]

The Sixth Circuit reversed the district court's decision with the utmost hesitation and certainly not silently.[82] The court found that although plea bargaining was a critical stage at which the right to counsel would normally attach, the Supreme Court narrowed the attachment of the right to the bright-line test, and therefore it did not have the power to grant relief to Moody on his ineffective assistance of counsel claim.

However, the court went to express its displeasure with the bright-line test and its holding in the present case:

> Although Moody was faced with an expert prosecutorial adversary, offering him a plea bargain which he needed legal expertise to evaluate and which would have constituted an agreement if accepted by him despite the lack of formal charges, and although by offering the specific deal the Assistant United States Attorney was committing himself to proceed with prosecution, we must uphold the narrow test of the Supreme Court.[83]

The court concluded its opinion by calling the reversal of the district court, and in turn the bright-line test the court was required to follow, a "triumph of the letter over the spirit of the law" and "an occasion where justice must of necessity yield to the rule of the law."[84]

Fourteen years later, in *Kennedy v. United States*,[85] the Sixth Circuit was confronted with same issue *Moody* presented regarding the right to effective assistance of counsel during pre-indictment plea bargaining.[86] While Kennedy was being investigated for drug trafficking, his attorney advised him he could reduce his sentencing exposure by pleading guilty.[87] When Kennedy sought out a second attorney's advice, he was told by that attorney that the government was bluffing and advised not to accept a plea deal.[88] Kennedy complied by rejecting the plea offer, and he was indicted for multiple drug-trafficking, firearms, and money-laundering charges.[89] He later pleaded guilty and was sentenced to 180 months of incarceration.[90]

On appeal, Kennedy argued that but for the ineffective assistance of his second counsel during the pre-indictment plea bargaining, he would have taken the plea deal and that the bright-line test did not apply since *Lafler* and *Frye* expressly held that the right to effective assistance of counsel attaches to plea negotiations.[91] The court affirmed Kennedy's conviction in a much shorter opinion than *Moody*, explaining that it was bound by the bright-line test and its own precedent because *Lafler* and *Frye* did not explicitly abrogate *Kirby*.[92]

District Courts Break the Mold

In the more than 40 years since *Kirby*, only three district courts have held the right to counsel attached to pre-indictment stages of a prosecution, and all of them were to plea negotiations. Less than a decade after *Kirby*, in *Chrisco v. Shafran*,[93] Willie Chrisco filed a § 1983 claim[94] arguing an officer of the Delaware State Police deprived him of his Sixth Amendment right to counsel during pre-indictment plea negotiations.[95] Chrisco claimed that law enforcement told him he could not speak with his attorney regarding their plea discussions and that his counsel could not be present during the meetings.[96] At the time of the plea discussions, Chrisco had no formal charges filed against him.[97] Although the District Court for the District of Delaware determined the discussions between Chrisco and the government were not in fact formal plea negotiations, the court held that the right to counsel could attach to pre-indictment plea negotiations regardless of the bright-line test "because the fact that the government is willing to engage in plea bargaining is proof that the government has made a commitment to prosecute and that the adverse positions of the government and the defendant have solidified in much the same manner as when formal charges are brought."[98] The court stressed in its holding the importance and purpose of counsel at *all* plea negotiations.[99]

In 1993, the District Court for the Eastern District of Wisconsin echoed the holding of *Chrisco* when it heard a § 2255 motion to vacate a sentence based on ineffective assistance of counsel during pre-indictment plea bargaining.[100] In *United States v. Busse*, an assistant U.S. attorney (AUSA) contacted the defendant's counsel, who represented him in a bankruptcy proceeding, regarding a pending criminal investigation against the defendant.[101] The AUSA offered defendant's counsel a plea deal prior to the indictment that the defendant rejected due to ineffective legal advice.[102] The court held that the right to counsel attached to the pre-indictment plea negotiations because the government had committed itself to prosecute by actively engaging in plea negotiations with the defendant's counsel.[103]

More recently, in 2010, the District Court for the District of Oregon turned its back on the precedent of the Ninth Circuit and held the right to counsel attached to pre-indictment plea negotiations.[104] In *United States v. Wilson*, the defendant, following his arrest for conspiracy to commit drug trafficking, began to assist the government's agents in finding co-defendants and locating contraband.[105] Prior to an indictment being brought, Wilson asked to speak with an AUSA to obtain a plea deal.[106] The AUSA requested the Criminal Justice Act (CJA) panel administrator appoint counsel to Wilson,[107] and an attorney was appointed to meet with the AUSA for plea negotiations.[108] The AUSA offered Wilson a six-year plea deal, but the government refused his counsel's discovery request. Wilson's counsel advised Wilson that he could not give him an opinion on the proposed deal without discovery.[109] When the AUSA rejected Wilson's counsel's counter-offer of full immunity, and all plea negotiations ceased.[110] The government indicted Wilson and on the eve of trial extended a plea offer of 188 to 235 months imprisonment that was rejected.[111] Wilson was convicted, sentenced to 240 months imprisonment, and filed a § 2255 motion to vacate his sentence based on ineffective assistance of counsel.[112]

In *Wilson*, the court began by rejecting the "mechanical inquiry" of the bright-line test in favor of a more flexible standard focusing on "the nature of the confrontation between the suspect-defendant and the government."[113] Looking at the totality of the circumstances, the court stated:

> The adversarial nature of the August 2001 plea negotiation, combined with the possibility that petitioner's right to trial might be sacrificed or lost, makes clear that it was a critical stage of the criminal process. The AUSA facilitated the appointment of counsel for petitioner for a formal plea negotiation, told petitioner he would be indicted, and then presented petitioner with a specific plea bargain that, if accepted, would have required him to surrender his constitutional right to trial, and serve six years in prison. This is proof that the government made a commitment to prosecution, and that the parties' adverse positions had solidified in much the same way as when formal charges are filed. This was not a casual conversation, but a formal negotiation. The AUSA made clear that petitioner was facing "serious charges" that would "undoubtedly expose him to a lengthy sentence," and then offered a specific term of imprisonment in exchange for petitioner's continued cooperation. Under these specific circumstances, the August 2001 plea negotiation was the functional equivalent of the initiation of formal adversarial proceedings against petitioner.[114]

Further, the court noted that calling for the appointment of counsel under the CJA and not having the right to effective assistance attach would mock the appointment of counsel.[115] In deciding not to "elevate form over substance," the court held that the pre-indictment plea negotiations were a critical stage at which the right to counsel attached.[116]

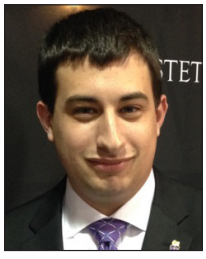
Extending the Right to Counsel

The conflict between the Sixth Amendment right to effective assistance of counsel during pre-indictment plea negotiations and the strict application of the bright-line test will continue to be litigated, just as it was in the Sixth Circuit in *Kennedy*, until the Supreme

Court explicitly resolves the issue.[117] Considering the frequency and importance of pre-indictment plea negotiations as well as the adversarial nature of all plea negotiations,[118] the conflict should be resolved in favor of attaching the right to effective assistance of counsel to *all* plea negotiations.

The answer starts with the Supreme Court's holdings in *Lafler* and *Frye* that plea bargaining itself is a critical stage in today's criminal justice system.[119] In 2009, 97 percent of federal convictions and 94 percent of state convictions were the results of guilty pleas.[120] Furthermore, plea bargaining that results in a guilty plea conserves the financial expense of a trial, allows for defendants to admit their wrongdoing to victims and the public, and, most important to the defendant, can provide more favorable sentencing outcomes than after a conviction at trial.[121] The *Zerbst* court would likely agree that an average defendant faced with the complex nature of federal sentencing cannot stand alone against the prosecutor to negotiate a plea deal that is fair; the defendant is entitled to the effective assistance of his or her attorney in such a situation because his or her liberty, even if only for a single more day, is at stake.[122]

This rationale does not change when the same plea negotiations occur prior to an indictment. In reality, these benefits are even more important pre-indictment when the prospective defendant can offer to spare the government the burden of obtaining an indictment and the negotiations can dictate the charges actually filed.[123] Furthermore, the prospective defendant is still faced by a prosecutor who is willing to let him or her plead guilty, and that willingness indicates a commitment to prosecute equivalent to a "formal charge, preliminary hearing, indictment, information, or arraignment."[124] As seen in circuit court cases and district court cases such as *Wilson*, the case has at that point shifted from investigatory to adversarial,[125] and it is the point at which the case becomes *adversarial* that at least four circuit courts agree should be the determining factor as to when the Sixth Amendment right to effective assistance of counsel attaches. A strict application of the bright-line test in this scenario, such as in *Kennedy*, ignores this reasoning from *Kirby*, and, more important, it is a "triumph of the letter over the spirit of the law"[126] that will leave substantiated ineffective assistance of counsel claims categorically denied. ⊙



Brandon K. Breslow is a third-year Juris Doctor candidate at Stetson University College of Law in St. Petersburg, Florida, and a law clerk at Kynes, Markman & Felman PA, in Tampa, Florida. After graduation, he plans to practice in federal court, focusing on criminal litigation and appeals. He would like to thank Professor Ellen Podgor and attorneys Katherine Yanes and James Felman for their continued support of this article and his legal education, as well as his family (Barbara, Josh, and Lara) for always believing in him. Any opinions and errors are his own.

Endnotes

[1]132 S. Ct. 1376, 1384 (2012).

[2]*See Strickland v. Washington,* 466 U.S. 668 (1984).

[3]132 S. Ct. 1399, 1408 (2012).

[4]*See United States v. Wade,* 388 U.S. 218, 224 (1967) ("Our cases have construed the Sixth Amendment guarantee to apply to critical stages of the proceedings.").

[5]*See Kirby v. Illinois,* 406 U.S. 682 (1972) (plurality opinion), (holding that the Sixth Amendment right to counsel attaches "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.").

[6]U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defense.").

[7]287 U.S. 45 (1932).

[8]*Id.* at 49.

[9]*See generally* Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, Criminal Procedure § 11.1(a), at 579 (5th ed. 2009) (discussing the Court's reliance on the "fundamental fairness" interpretation of due process under the 14th Amendment rather than the right to counsel).

[10]*Powell*, 287 U.S. at 71 ("We are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.").

[11]*Id.* (holding "where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court … to assign counsel for him as a necessary requisite of due process of law.").

[12]304 U.S. 458 (1938).

[13]*Id.* at 460.

[14]*Id.* at 467 ("Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty.").

[15]*Id.* at 462-63 ("[The Sixth Amendment] 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. That which is simple, orderly, and necessary to the lawyer-to the untrained layman-may appear intricate, complex, and mysterious.").

[16]*See* John J. Tomkovicz, The Right to the Assistance of Counsel: A Reference Guide to the United States Constitution 2, at 27 (2002).

[17]316 U.S. 455 (1942), *overruled by Gideon v. Wainwright,* 372 U.S. 335 (1963).

[18]*Id.* at 461-62 ("The Sixth Amendment … applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment."). *See also* LaFave, et al., *supra* note 9, § 11.1(a), at 583.

[19]*Id.* at 471.

[20]*See Chandler v. Fretag,* 348 U.S. 3, 5 (1954) ("Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified.").

[21]*Gideon v. Wainwright,* 372 U.S. 335 (1963).

[22]*Id.* at 336-37.

[23]*Id.* at 342.

[24]*Id.* at 344.

[25]The only major case to follow on the right to counsel at trial was

Argersinger v. Hamlin, 307 U.S. 25 (1972), which clarified that the right also attached to petty offenses when the defendant faced any sentence of imprisonment.

[26]*See generally* Tomkovicz *supra* note 16, at 81; LaFave, et al., *supra* note 9, § 11.2(b), at 596-99.

[27]*See Powell v. Alabama,* 287 U.S. 45, 57 (1932) (referring to the period from defendants' arraignment to the beginning of their trial as "the most critical period of the proceedings."). *See also Hamilton v. Alabama,* 368 U.S. 52, 54 (1961).

[28]*See United States v. Wade,* 388 U.S. 218, 224 (1967) ("Our cases have construed the Sixth Amendment guarantee to apply to critical stages of the proceedings.") (internal quotation marks omitted).

[29]*Id.* at 224.

[30]*Id.* at 227.

[31]*Id.* at 236.

[32]*Estelle v. Smith,* 451 U.S. 454, 470 (1981).

[33]*Hamilton v. Alabama,* 368 U.S. 52, 54 (1961).

[34]*See Missouri v. Frye,* 132 S. Ct. 1399, 1408 (2012) (holding that "defense counsel has a duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."); *Lafler v. Cooper,* 132 S. Ct. 1376 (2012) (holding that the defendant was entitled to relief under the right to counsel when he rejected a plea offer based on counsel's incorrect advice).

[35]*Frye*, 132 S. Ct. at 1407.

[36]*Lafler*, 132 S. Ct. at 1388.

[37]*Frye*, 132 S. Ct. at 1407.

[38]*Kirby v. Illinois,* 406 U.S. 682 (1972) (plurality opinion).

[39]*Id.* at 688-89.

[40]*Id.* at 689.

[41]*See Moran v. Burbine,* 475 U.S. 412, 432 (1986) (holding that it was not a Sixth Amendment violation to not suppress statements taken by the government's agents without the presence of hired counsel prior to "the formal initiation of adversary judicial proceedings."); *United States v. Gouveia,* 467 U.S. 180, 189 (1984) (affirming the bright-line test in *Kirby* and stating that the purpose of the Sixth Amendment is to protect "the unaided layman at critical confrontations with his adversary.").

[42]*See United States v. Medunjanin,* 752 F.3d 576, 585 (2d Cir. 2014) ("The Supreme Court has long recognized that the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the Defendant.").

[43]*See United States v. Heinz,* 983 F.2d 609, 612-13 (5th Cir. 1993) ("Current law teaches that the Sixth Amendment right to counsel does not attach until or after the time formal adversary judicial proceedings have been initiated. … This is so despite the fact that some earlier Supreme Court cases seem to imply that a more functional test for the attachment of the Sixth Amendment right to counsel is appropriate.").

[44]*See United States v. Morriss,* 531 F.3d 591, 594 (8th Cir. 2008) (calling *Kirby's* bright-line test a "long-standing rule.").

[45]*See United States v. Hayes,* 231 F.3d 663, 675 (9th Cir. 2000) ("In sum, the Supreme Court, this court, and every other circuit to consider a similar issue has adhered to the rule that adversary judicial proceedings are initiated by way of formal charge, preliminary hearing, indictment, information, or arraignment. This is a clean and clear rule that is easy enough to follow.").

[46]*See United States v. Lin Lyn Trading Ltd.,* 149 F.3d 1112, 1117 (10th Cir. 1998).

[47]*See Philmore v. McNeil,* 575 F.3d 1251, 1257 (11th Cir. 2009).

[48]*See United States v. Sutton,* 801 F.2d 1346, 1365 (D.C. Cir. 1986).

[49]*Roberts v. Maine,* 48 F.3d 1287, 1291 (1st Cir. 1995).

[50]*Id.* at 1288.

[51]*Id.* at 1289.

[52]*Id.*

[53]*Id.*

[54]*Id.* at 1290.

[55]*Id.* at 1290-91 (emphasis added).

[56]*See id.* at 1291 ("Such circumstances, however, must be extremely limited and, indeed, we are unable to cite many examples.").

[57]*Id.*

[58]*Matteo v. Superintendent, SCI Albion,* 171 F.3d 877, 892 (3d Cir. 1999).

[59]*Id.* (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)).

[60]*Id.* (quoting *Kirby v. Illinois,* 406 U.S. 682, 689 (1972)).

[61]*United States v. Burgess,* 141 F.3d 1160, at *2 (4th Cir. 1998).

[62]*Id.* at *1.

[63]*Id.*

[64]*Id.* (quoting *Kirby*, 406 U.S. at 689).

[65]*Id.* at *2.

[66]978 F.2d 964, 969 (7th Cir. 1992).

[67]*Id.*

[68]*Id.* (quoting *Hall v. Lane,* 804 F.2d 79, 82 (7th Cir. 1986)) (A defendant may rebut this presumption by demonstrating that, despite the absence of formal adversary judicial proceedings, "the government had crossed the constitutionally significant divide from fact-finder to adversary.").

[69]*See generally* James S. Montana and John A. Galotto, *Right to Counsel: Courts Adhere to Bright-Line Limits*, 16 Crim. Just., Summer 2001, at 4.

[70]206 F.3d 609 (6th Cir. 2000).

[71]*Id.* at 611.

[72]*Id.*

[73]*Id.*

[74]*Id.*

[75]*Id.*

[76]*Id.*

[77]*Id.* The sentencing guidelines range for those charges was from 235 to 293 months, and the government requested a downward departure to 168 months for his cooperation.

[78]*Id.* at 612.

[79]This motion is a proper remedy for ineffective assistance of counsel under 28 U.S.C § 2255 (2012).

[80]*Id.* The district court's standard for prejudice to Moody in the rejection of the first plea offer is the standard established 12 years later by the Supreme Court in *Lafler v. Cooper*, 132 S.Ct. 1376 (2012).

[81]*Id.*

[82]*Id.* ("Although logic, justice, and fundamental fairness favor the district court's position, more recent Supreme Court and Sixth Circuit cases have interpreted these principles to find that "critical stages" of criminal proceedings begin only after the initiation of formal judicial proceedings.").

[83]*Id.*

[84]*Id.* at 616.

[85]756 F.3d 492 (6th Cir. 2014).

Right to Counsel continued on page 44

E-DISCOVERY continued from page 33

Raised by the Need To Classify Documents as Either Responsive or Non-Responsive," Desi V Workshop in Rome, Italy, June 14, 2013. www.umiacs.umd.edu/~oard/desi5/additional/Baron-Jason-final.pdf.

[19]Hon. John M. Facciola and Philip Favro, *Safeguarding The Seed Set: Why Seed Set Documents May Be Entitled to Work Product Protection*, 8 Fed. Cts. Law. Rev. (Feb. 2015), www.fclr.org/fclr/articles/pdf/safegaurding-final-publication.

[20]*See* Fed. R. Civ. Proc. 34(b)(2)(E).

[21]For a brief and understandable explanation of metadata, see "What is Metadata Scrubbing, and Is It Good for Business?" Executive Counsel, July/August, 2006. www.krollontrack.com/Publications/metadata_scrubbing.pdf.

[22]*Martin v. N.W. Mut. Life Ins. Co.,* Case No. 804CV2328T23MAP, 2006 WL 148991, at *2 (M.D. Fla. Jan. 5, 2006) (noting that such an excuse "is frankly ludicrous").

[23]*James v. Nat'l Fin. LLC,* C.A. No. 8931-VCL, 2014 WL 6845560, at *12 (Del. Ch. Dec. 5, 2014).

RIGHT TO COUNSEL continued from page 40

[86]*Id.* at 493.

[87]*Id.* at 492.

[88]*Id.*

[89]*Id.*

[90]*Id.*

[91]*Id.* at 493.

[92]*Id.* at 494.

[93]507 F. Supp. 1312 (D. Del. 1981).

[94]A lawsuit filed under 42 U.S.C. § 1983 is a civil rights claim against a government agency or agent for violating the plaintiff's constitutional rights.

[95]*Chrisco*, 507 F. Supp. at 1314.

[96]*Id.* at 1318.

[97]*Id.* at 1319.

[98]*Id.* ("Recognizing the important role played by counsel in plea bargaining, I conclude that there can be factual contexts in which the sixth amendment right to counsel attaches prior to the time formal criminal charges have been filed.").

[99]*Id.* at 1319-1320 (stating the importance of counsel to be present is "to ensure that any decision or agreement by the defendant to plead guilty is knowing, voluntary and intelligent.").

[100]*United States v. Busse,* 814 F. Supp. 760, 763-64 (E.D. Wis. 1993).

[101]*Id.* at 761.

[102]*Id.* at 761-762.

[103]*Id.* at 763-64.

[104]*United States v. Wilson,* 719 F. Supp. 2d 1260, 1268 (D. Or. 2010).

[105]*Id.* at 1264.

[106]*Id.*

[107]For more information on the appointment of counsel through the Criminal Justice Act, see 18 U.S.C. § 3006A (2012).

[108]*Wilson*, 719 F. Supp. 2d at 1264.

[109]*Id.*

[110]*Id.*

[111]*Id.* at 1265.

[112]*Id.*

[113]*Id.* at 1266.

[114]*Id.* at 1267.

[115]*Id.* at 1267-68.

[116]*Id.* at 1268.

[117]At the time of publication, this author is unaware of any Supreme Court petitions for a writ of certiorari that would allow the Court to directly address this issue. While there is a circuit split as to whether the bright-line test should be strictly applied, which would be sufficient for the Court to take the case under Supreme Court Rule 10(a), it would likely take an appeal from a circuit court case that rules consistent with the opinion in this article in order for the Court to weigh in on this important issue.

[118]*See Wilson*, 719 F. Supp. 2d at 1268 (describing the plea negotiations as "adversarial" for the purposes of attaching the Sixth Amendment right to counsel).

[119]*See Missouri v. Frye,* 132 S. Ct. 1399, 1408 (2012); *Lafler v. Cooper,* 132 S. Ct. 1376 (2012).

[120]*Frye*, 132 S. Ct. at 1407.

[121]*See id.* at 1407-08. *See also* Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process:* Missouri v. Frye *&* Lafler v. Cooper, 46 Loy. L.A. L. Rev. 457, 469 (2013).

[122]*Johnson v. Zerbst,* 304 U.S. 458, 463 (1938) ("That which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex, and mysterious.").

[123]*See United States v. Moody,* 206 F.3d 609, 615-16 (6th Cir. 2000) ("There is no question in our minds that at formal plea negotiations, where a specific sentence is offered to an offender for a specific offense, the adverse positions of the government and the suspect have solidified.").

[124]*Kirby v. Illinois,* 406 U.S. 682, (1972) (plurality opinion).

[125]*United States v. Wilson*, 719 F. Supp. 2d 1260, 1267 (D. Or. 2010) ("Courts look to whether the prosecution has committed itself to prosecute, and whether the adverse positions of the government and defendant have solidified, such that the accused finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.").

[126]*Moody*, 206 F.3d 616.