2003

Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine

Pamela R. Metzger
Southern Methodist University, Dedman School of Law

Printed in U.S.A.
Vol. 97, No. 4

BEYOND THE BRIGHT LINE: A CONTEMPORARY RIGHT-TO-COUNSEL DOCTRINE

*Pamela R. Metzger**

INTRODUCTION

Defense counsel negotiates a plea bargain for her client; the client will receive a sentence reduction if, during her own prison term, she cooperates with the prosecution. While serving her sentence, the client fulfills her part of the bargain, but the government drags its feet in honoring its commitment to make a motion for sentence reduction. Because she has already been sentenced, the defendant has no attorney to represent her and, when she asks for one, the court says she has no right to counsel.

* * *

The prosecutor meets with an uncharged and uncounselled suspect and negotiates an agreement whereby the suspect will waive indictment and plead guilty on a future date. No attorney assists the suspect in these negotiations. When the suspect hires an attorney, the attorney commits malpractice and utterly destroys the plea negotiations. After the suspect, who is now a defendant, receives a lengthy sentence, he claims he received ineffective assistance of counsel. The court agrees that the attorney's malpractice was the direct cause of the failed negotiations. Nevertheless, the court rules against the defendant. Under Supreme Court law, the suspect had no right to counsel at the pre-charge negotiations because the government had not yet filed formal charges.

* * *

An indigent defendant has appointed counsel. The defendant pleads guilty and the judge directs him to "cooperate" with a probation officer who will interview him and write a presentence report. Although defense counsel knows that the probation officer will ask the defendant about sensitive subjects, such as his prior convictions and his conduct in this case, defense counsel does not attend the interview.

---

* Associate Professor of Law, Tulane Law School. For their invaluable assistance, the author expresses thanks to Professors Robert Force, Catherine Hancock, Jancy Hoeffel, and Keith Werhan. This Article would not have been possible without committed research hours provided by many students. The author especially wishes to thank Margaret Wyatt and Catherine Kendrick. And, of course, thanks to David Levitt, without whom this would not have been possible.

Later, the probation officer claims that the defendant lied during the interview. Accordingly, the officer asks the court to increase the defendant's sentence by six months for this "obstruction of justice." The defendant protests: he did not lie; rather, the probation officer's questions were unclear. The judge hears testimony, credits the probation officer's story, and imposes an enhanced sentence. Later, the defendant argues that his attorney's failure to attend the interview constitutes ineffective assistance of counsel. The judge denies his petition outright; because the probation officer is "an arm of the court," the presentence interview is not a "critical stage" and the defendant had no right to assistance of counsel.

* * *

The rhetoric of the Sixth Amendment is grand; the reality is grim. The rhetoric promises that: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[1] "[T]he accused is guaranteed that he need not stand alone against the State *at any stage of the prosecution, formal or informal. . . .* "[2] In reality, a mechanical and rote invocation of a rigid right-to-counsel doctrine deprives modern criminal defendants of counsel at proceedings that are truly critical stages of contemporary criminal procedure

The current right-to-counsel doctrine was developed in the 1970's. It created a bright-line rule still in effect today. The right to counsel attaches only at "critical stages" of a criminal prosecution. Under this critical stage doctrine, the right to counsel only attaches after the initiation of formal adversary proceedings and only applies to confrontations between the accused and the prosecution or law enforcement. In the years following the Supreme Court's development of the critical stage doctrine, national trends of mandatory sentencing and sentencing guidelines revolutionized criminal procedure and dramatically altered the roles of the system's key players.[3]

---

[1] U.S. CONST. amend. VI.

[2] United States v. Wade, 388 U.S. 218, 226 (1967) (emphasis added).

[3] The changes wrought by the guidelines have been explored in numerous scholarly works and court opinions. *See, e.g.*, KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998); United States v. Kikumura, 918 F.2d 1084, 1119 (3d Cir. 1990) (Rosenn, J., concurring); Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines, Remarks to the Judges of the United States District Court for the Northern District of Illinois* (Nov. 5, 1987), *in* 117 F.R.D. 459 (1987); Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); Kimberly S. Kelly, Comment, *Substantial Assistance Under the Guidelines: How* Smitherman *Transfers Sentencing Discretion from Judges to Prosecutors*, 76 IOWA L. REV. 187, 189 (1990); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231 (1989). As to particular changes in the role of the defense attorney, see Douglas A. Berman, *Defense Advocacy Under the Guidelines*, 11 FED. SENTENCING REP. 299 (1999).

Now, defense counsel's role outside the courtroom is substantially amplified. Among other things, counsel negotiates about the prosecutor's charging decisions, bargains over plea agreements, mediates between cooperating defendants and the government, assists the defendant in confronting the probation officer, and advocates in connection with proceedings ancillary to sentence. Applying the bright-line critical stage doctrine to these new realities of criminal practice creates illogical and patently unfair results. This Article shows how the critical stage doctrine has failed and proposes a new approach to the Sixth Amendment counsel guarantee, one that will assure fairness in modern criminal procedure.

Part I of this Article explores the historical evolution of the constitutional right to counsel under the Sixth Amendment. Part II offers an overview of mandatory minimum sentences, guideline sentences, and the associated phenomenon of cooperation with authorities. Part III reviews three specific examples of changes to federal criminal procedure and demonstrates how, when applied in these new contexts, the critical stage doctrine fails to guarantee the constitutionally mandated right to counsel. Finally, Part IV articulates a right-to-counsel doctrine that reflects and promotes basic Sixth Amendment values. It does so by culling from the case law three indicia that serve as hallmarks of when the right to counsel applies. These indicia are: (1) an adversariness-in-fact between an individual and the prosecution, regardless of whether formal proceedings have begun ("adversariness-in-fact"); (2) a substantial complexity in the procedural stage in question ("complexity"), regardless of whether that procedural stage is a formal 'confrontation'; and (3) potential prejudice to the individual that can be countered by providing counsel ("prejudice/benefit"). By examining the extent to which these three criteria inhere at a specific procedural stage, a court can determine whether that stage is one at which the right to counsel applies.

I. THE EVOLUTION OF THE RIGHT TO COUNSEL

The counsel guarantee has never been a rigid or static doctrine. Rather, it has been an evolving embodiment of the fair process norms of a given historical context. Thus, the modern Sixth Amendment counsel guarantee is, and should be, a radically different guarantee than that contemplated by the Framers. An examination of the jurisprudence regarding the right to counsel demonstrates how the constitutional right to counsel has historically responded to changing realities of criminal procedure.

A. The Origins of the Sixth Amendment Counsel Guarantee

Enshrining the right to counsel in the Bill of Rights was itself an evolutionary act by the Framers, one that reflected the colonists' evolving fair process expectations. Traditionally, English law attached no great weight

to the layperson's need for assistance of counsel in court proceedings.[4] Rather, during the mid to late 1700's, English law forbade the assistance of counsel in nearly all criminal cases.[5] The law required each defendant "to appear before the court in his own person and conduct his own cause in his own words."[6]

Scholars and historians offer various explanations of this prohibition on counsel.[7] Some point out that criminal prosecutions were initiated by private parties, who represented themselves; accordingly, self-representation by defendants was not thought to be unfair.[8] Others suggest that a 'level playing field' was enforced by a neutral judge who "viewed indictors, prosecutors, jury, and prisoner with impartial distrust."[9] Still others suggest that the English government banned counsel because the monarchy was too weak and too unstable to risk the possibility that defense counsel would achieve the acquittal of accused felons.[10]

In contrast, the colonists rejected the English "private party" prosecutions and adopted a strong public prosecutor system. In that system, a professional prosecutor confronted the private citizen. The colonial prosecutor knew the law, the jury system, and the judge more intimately than could any individual defendant. This gave the prosecutor an unfair advantage that colonial lawmakers could not justify.[11] The American impulse to determine legal rights by reference to the "settled usages and modes of proceeding" of English law gave way to the realities of an American society that demanded different protections.[12] Although the early American counsel guarantee was

---

[4] Powell v. Alabama, 287 U.S. 45, 60 (1932) (stating that "[i]f recognition of the right of a defendant . . . to have the aid of counsel depended upon the existence of a similar right at common law as it existed in England when our Constitution was adopted," the right to counsel could not be justified as a necessary component of due process).

[5] Faretta v. California, 422 U.S. 806, 823 (1974).

[6] *Id.* (quoting 1 POLLACK & MAITLAND, THE HISTORY OF ENGLISH LAW 211 (2d ed. 1909)). The sole exceptions were at the outer edges of criminal procedure—counsel was permitted both in misdemeanor and treason cases. Scholars have posited that this distinction arose precisely because those accused of misdemeanors and treason were prosecuted by England's only public prosecutor—the Crown. This ban on counsel in felony cases persisted until 1836 when Parliament gave criminal defendants the right to appear through counsel. *Powell*, 287 U.S. at 61 (citing 1 COOLEY'S CONSTITUTIONAL LIMITATIONS 698-700 (8th ed. 1927)); *Faretta*, 422 U.S. at 825.

[7] *See generally* JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 3-6 (2002). *See also Powell*, 287 U.S. 45 (1932).

[8] *Powell*, 287 U.S. at 63 (citing the original Constitution of Georgia (1777)).

[9] TOMKOVICZ, *supra* note 7, at 5 (quoting WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 11 (1955)).

[10] *Id.* at n.18 (citing to 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 355); *see also* J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660–1800 340-41 (1986); FRANCES H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 10 (1951).

[11] ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN JURISPRUDENCE 4 (1992); *see also* HELLER, *supra* note 10.

[12] Powell v. Alabama, 287 U.S. 45, 60, 65 (1932) (citing Lowe v. Kansas, 163 U.S. 81, 85 (1896)).

a departure from English practice, it quickly became an important and normative part of the colonists' expectations about procedural fairness. Accordingly, the new colonies emphasized the right to counsel as a guarantee against prosecutorial privilege and governmental overreaching.[13]

Some colonies fashioned the right to counsel as a constitutional protection. For example, the New Jersey constitutional right to counsel underscored the colonial view that counsel would level the playing field: "all criminals shall be admitted to the same privileges of witnesses and counsel, *as their prosecutors are, or shall be entitled to.*"[14] While less explicit in their intent to afford defendants a fighting chance against the prosecution, Maryland, Massachusetts, New Hampshire, and New York also constitutionally guaranteed criminal defendants the right to assistance of counsel.[15]

Other colonies enacted right-to-counsel legislation that made explicit the colonists' intent to empower citizens who faced the strength of public prosecutors.[16] As of 1660, any person indicted in Rhode Island had a statutory right to "procure an attorney to plead any poynt of law that may make for the cleaning of his innocencye."[17] The Rhode Island General Assembly deliberately departed from the British rule because it feared that an innocent person "yett may not be accomplished with soe much wisdome and knowl-

---

Many colonies rejected English precedent altogether: in Connecticut, the courts appointed counsel in any case in which a defendant needed, and was unable to retain, counsel. WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 25 (1955). Other states, like South Carolina, Delaware, and Pennsylvania, provided counsel to all indigent defendants charged in capital cases. *Id.* For a more thorough discussion of the colonial approach to the right to counsel, see TOMKOVICZ, *supra* note 7, at 9–21; *see also* HELLER, *supra* note 10, at 30–32; BEANEY, *supra*, at 15–21.

[13] These documents did not contemplate that the state would provide free representation; rather, the states merely guaranteed defendants the right to choose whether to retain counsel or to appear *pro se.* Faretta v. California, 422 U.S. 823, 828–30 (1974); *cf.* BEANEY, *supra* note 12, at 8–33. Beaney faults the *Powell* court's analysis of the colonists' right to counsel legislation and suggests that the issue was of little moment to the colonists. Beaney notes the English and American tradition of *sua sponte* judicial appointment of counsel and posits that this judicial intervention mooted many fairness concerns otherwise raised by criminal prosecutions against uncounselled defendants.

[14] N.J. CONST. art. XVI (1776) (emphasis added). Even earlier, in 1701, the Penn Charter of Pennsylvania promised, "all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors." *Powell*, 287 U.S. at 61 (quoting Penn Charter, art. V). The Delaware Charter of 1701 contained identical language. TOMKOVICZ, *supra* note 7, at 10 (citing Del. Charter of 1701 § V). The respective 1776 Constitutions of Pennsylvania and Delaware explicitly guaranteed citizens right to counsel. *Id.* at 10 n.56 (citing to De. Decl. of Rights and Fundamental Ruiles, para. 14 (1776)); *id.* at 10 n. 60 (citing PA. CONST. of 1776, Decl. of Rights of Inhabitants of the State of Pa., para IXV).

[15] DEL. DECL. OF RIGHTS § 14; MD. DECL. OF RIGHTS art. XXI; MASS. CONST. §13 (1780); N.H. CONST. art. XV; N.Y. CONST. art. VII, ss.7 (1777). For a detailed discussion of the counsel guarantee in the colonial era, see the Supreme Court's discussion in *Powell*, 287 U.S. 45 at 61–62.

[16] Reviewing non-constitutional colonial sources of law, the United States Supreme Court has concluded that "in at least twelve of the thirteen colonies the rule of the English common law [concerning access to counsel], has been definitely rejected and the right to counsel fully recognized." *Id.* at 64; *see also* TOMKOVICZ, *supra* note 7, at 11–13.

[17] *Id.* at 11 (citing 2 JOHN R. BARTLETT, COLONIAL RECORDS OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 239).

edge of the law" as was necessary to invent a meaningful defense.[18] Similarly, the South Carolina legislature justified a statutory right-to-counsel by asserting that defendants "ought to have proper assistance and all just and equal means" to defend themselves.[19] By the 1791 enactment of the Bill of Rights, Virginia, Delaware, Massachusetts, Pennsylvania, North Carolina, and New Hampshire all had statutes that granted some right to counsel.[20]

The Continental Congress asserted each citizen's right to assistance of counsel in criminal trials.[21] And, when the first Congress considered several proposals designed to guarantee fair play at criminal trials,[22] one such proposal guaranteed every citizen a right to appear through any counsel the citizen could secure.[23] This nascent right to counsel was constitutionalized as the Sixth Amendment counsel guarantee, one of several Sixth Amendment rights intended to minimize the public prosecutor's tremendous advantage[24] and to "breathe life into the promise" of other Sixth Amendment guarantees.[25]

Of course, the Sixth Amendment counsel guarantee had not yet evolved into the powerful right to counsel we know today. As revolutionary as the Sixth Amendment was, the Framers' vision was limited. To them, the Sixth Amendment guaranteed only that any criminal defendant who could secure counsel had a right to appear through that counsel.[26] And that guarantee did not extend to persons charged with state crimes. The federal constitution permitted each state to create its own rules about the right to counsel in criminal cases. Even after the adoption of the Fourteenth Amendment, the Sixth Amendment's counsel guarantee was not incorpo-

---

[18] *Id.* (quoting 2 BARTLETT, *supra* note 17, at 239).

[19] TOMKOVICZ, *supra* note 7, at 12 n.69–70 (quoting Act of Aug. 20, 1731, para. XLIII, 3 S.C. Stat. 274, 286 (1731)).

[20] *Id.* at 12–13.

[21] HELLER, *supra* note 10, at 21 (citing Declaration of Rights of Congress art. V (1774)). The legislative history of the Continental Congress indicates that its counsel guarantee passed without argument. *Id.*

[22] *Id.* at 27–30.

[23] *Id.*

[24] GARCIA, *supra* note 11, at 4; *see* Faretta v. California, 422 U.S. 806, 827 (1974); HELLER, *supra* note 10, at 17; AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 117 (1998) (The Framers designed the Sixth Amendment right to counsel to guarantee "basic fair play and symmetry" in criminal trials.).

[25] AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 139 (1997). The other Sixth Amendment guarantees are: the right to trial by jury; the right to a speedy and public trial; the right to confront and compel witnesses; and the right to notice of charges brought against the individual.

[26] United States v. Van Duzee, 140 U.S. 169 (1891). The federal criminal law provided for a statutory right to appointed counsel for those indigent defendants accused of capital crimes. Federal Crimes Act of 1790, 1 Statutes at Large 112, 118 (1790).

rated to the states.[27] Instead, the states made their own decisions about access to counsel.

Although there was no federal constitutional mandate of a right to counsel, as the American legal system evolved, the right to counsel grew steadily in state constitutions, statutes, and common law. By the early 1930's every state in the union had identified *some* circumstance in which the state was required to provide an attorney for an indigent defendant.[28] Those circumstances varied widely. Some states provided counsel in all criminal prosecutions, others only in cases of "serious" crimes; still others required the appointment of counsel only in capital cases.[29] This rough consensus that in *some* cases the state should provide counsel for a criminal defendant helped usher in the modern approach to the right to counsel.

B. The Right to Assigned Counsel

The history of the right to assigned counsel reflects, in part, the larger and more complex history of the Supreme Court's efforts to define the meaning of the Fourteenth Amendment.[30] Whereas the Bill of Rights set out specific limits on the power of the federal government,[31] the Fourteenth Amendment was couched in general terms. It prohibited the states from depriving "any person of life, liberty, or property, without due process of law"[32] but did not explain what due process required. Thus, whether the Fourteenth Amendment incorporated some or all of the guarantees of the Bill of Rights became an important issue confronting the Supreme Court.

In the context of the right to counsel, the Court first attempted to resolve that question in the famous "Scottsboro Boys" case.[33] There, the Court concluded that the Sixth Amendment right to counsel was not incorporated to the states; rather, state court defendants' only right to counsel arose from the Fourteenth Amendment due process clause. Nevertheless, the *Powell* Court's analysis reflected the same values that motivated the colonists to reject the English rule and favor a right to counsel. And its decision reflected the colonists' evolutionary intent: to create a level playing field for the defendant who faced a complex legal system, confronted an experienced prosecutor, and risked the loss of liberty or life.

---

[27] *See, e.g.*, Hurtado v. California, 110 U.S. 516 (1884).

[28] Powell v. Alabama, 287 U.S. 45, 65 (1932).

[29] *Id.*

[30] For a broad overview of the incorporation debate, see ANTHONY LEWIS, GIDEON'S TRUMPET 94–99 (1964). For a broad critique of all sides of the incorporation debate, see AKHIL REED AMAR, THE BILL OF RIGHTS (1998). A discussion of the reasons for incorporating the Sixth Amendment to the states is beyond the scope of this Article.

[31] *See, e.g.*, Barron v. Mayor and City Counsel of Baltimore, 32 U.S. 243 (1833) (noting that the Bill of Rights in general, and Fifth, Sixth, and Eight Amendments in particular, apply only to the federal government).

[32] U.S. CONST. amend. XIV.

[33] *See infra* Part I.B.1.

1. Powell v. Alabama *and the Fundamental Fairness Test.*—In *Powell v. Alabama*, the United States Supreme Court held that nine young African-Americans were deprived of due process under the Fourteenth Amendment when a trial judge assigned counsel to represent them on the morning of their capital trial. Thus, it was not that the "boys" (as the trial court called them) had no counsel. Rather it was that the defendants had abysmally poor counsel who had been appointed so late as to prevent counsel from conducting any investigation, consultation, or preparation for the case.[34] The Court held that such poor representation was the same as a denial of the right to counsel, and that denial "contravenes the due process clause of the Fourteenth Amendment to the Federal Constitution."[35]

Powell's holding was quite limited; it applied only to capital cases in which an indigent defendant was "incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy or the like[.]"[36] In such cases, due process of law required a court to assign counsel at "a time or under such circumstances" that counsel could provide meaningful assistance "in the preparation and trial of the case."[37]

Nevertheless, *Powell*'s impact was enormous.[38] For the purposes of this Article, *Powell*'s significance lay in two important aspects of the Court's analysis. First, *Powell* articulated two important principles—that fair process was an essential element of an adversary system of criminal procedure; and, that counsel could guarantee that fair process by providing some parity between the strength and skill of the prosecution and defense. Second, *Powell* demonstrated an important technique for Sixth Amendment right-to-counsel analysis; the Court made a concrete, real-world assessment of how counsel actually assists a criminal defendant.

In addressing the practical consequences of the failure to appoint counsel, the Court echoed the colonists' views about counsel and addressed the tremendous advantage a public prosecutor had over an unrepresented defendant. The Court acknowledged that the complexity of the legal system increased the prosecutor's advantage. Faced with the complex "science of law" and the rules of evidence, a layperson could not mount a meaningful defense.[39] The Court also considered the risk of substantial prejudice that might befall an unrepresented defendant. For example, that defendant

---

[34] *Powell*, 287 U.S. at 62.

[35] *Id.* at 61.

[36] *Id.* at 71.

[37] *Id.*; *see also* Betts v. Brady, 316 U.S. 455, 464 (1942) (discussing Avery v. Alabama, 308 U.S. 444 (1940), in which the court considered whether Alabama's appointment of counsel for Avery was "mere lip service").

[38] For a discussion of the court's interpretation of the Sixth Amendment counsel guarantee prior to the *Powell* decision, see HELLER, *supra* note 10. Of course, by the time the Court heard *Powell*, the "Scottsboro boys" were a cause celebré and their innocence was generally presumed by most of the public. *See* JAMES GOODMAN, STORIES OF SCOTTSBORO xi–xii (1994).

[39] *Powell*, 287 U.S. at 68–69.

might be convicted upon a defective indictment or be sentenced more harshly than the law allowed.[40] Counsel would mitigate those risks by reviewing the indictment, requiring strict compliance with the law, and generally holding the prosecution to its burden.[41]

Underlying its application of fair process principles to facts, was the Court's basic concern with assuring the integrity of the adversary system. To the *Powell* Court, the trial court's failure to provide the defendants meaningful assistance of counsel irreparably compromised the integrity of the outcome because the proceedings were thereafter so "lopsided" that neither fair process nor truthful results could have been obtained.

While it limited its holding to *Powell*'s particular facts, the *Powell* Court did set out the constitutional baseline for other criminal cases. Henceforth the constitution would require that a trial judge analyze whether due process required the appointment of counsel, *even if the defendant did not request such assistance.* Thus, in a due process context, the Court returned to the spirit of fair play that motivated the colonists who broke with English tradition and created a Sixth Amendment right to counsel. *Powell*'s holding, which required a meaningful appointment of counsel, was based upon a profound commitment to fairness in the adversarial system.

2. The Sixth Amendment Analysis of the Right to Appointed Counsel.—Powell did not reflect any preconception about a right to appointed counsel nor was *Powell* an attempt to bestow a new federal constitutional right by way of the Fourteenth Amendment. When *Powell* was decided, there was no federal constitutional right to appointed counsel. The Sixth Amendment merely guaranteed the right to any counsel a defendant could obtain.[42] Six years after *Powell*, the Supreme Court considered whether the Sixth Amendment required the appointment of counsel in all federal prosecutions.

a. One step forward.—In *Johnson v. Zerbst*, the Supreme Court considered the case of two United States marines, arrested and changed with possession and use of counterfeit money.[43] In January of 1935, on a single day, the marines were "arraigned, tried, convicted, and sentenced to four and on-half years in the penitentiary."[44] Upon consideration of the defendants' petition for a writ of habeas corpus, the Supreme Court held that the Sixth Amendment right to counsel withheld "from federal courts in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."[45]

---

[40] *Id.*

[41] *Id.*

[42] United States v. Van Duzee, 140 U.S. 169 (1891).

[43] Johnson v. Zerbst, 304 U.S. 458, 460 (1938).

[44] *Id.*

[45] *Id.* at 463 (citations omitted).

Although the *Zerbst* Court did not rely upon the due process clause of the Fifth or Fourteenth Amendments, it nevertheless echoed both *Powell*'s principled due process analysis and *Powell*'s practical, results-oriented concerns about the integrity of an adversary proceeding in which untrained laypersons faced a complex legal system and confronted a professional adversary.

As in *Powell*, the Court considered the complexity of the criminal justice system and concluded that it was an "obvious truth" that "the average defendant" lacked "professional legal skill[s] to protect himself."[46] In contrast, the defendant faced a professional adversary who was an "experienced and learned counsel."[47] The complexity of the legal system meant that matters "simply, orderly and necessary to the lawyer," might nevertheless be "intricate, complex and mysterious" to the "untrained layman."[48]

Quoting directly from *Powell,* the Court insisted that the "the right to be heard" means the "the right to be heard by counsel."[49] Characterizing the counsel guarantee as an "essential barrier[] against arbitrary or unjust deprivation of human rights,"[50] the Court declined to follow the historical rule that the counsel guarantee conferred only the right to be heard through any counsel a defendant could procure. Instead, the Court held that the Sixth Amendment counsel clause required the appointment of counsel to all indigent defendants in federal criminal cases because appointment of counsel would "level the playing field" and promote truly adversarial proceedings. Thus, the Court gave meaning to the Sixth Amendment's promise by conforming its counsel guarantee to the realities of the criminal justice system.

This absolute mandate was a marked departure from *Powell*'s case-by-case approach to the right to counsel. After *Zerbst*, federal courts would appoint counsel for even the most sophisticated and intelligent indigent federal criminal defendant. Still, state courts continued to be governed by state constitutions, state statutes, and the case-by-case 'fundamental fairness' rule articulated in the *Powell* decision.

b. Two steps back.—In *Betts v. Brady,* a decade after *Powell*, and only four years after *Zerbst*, the Supreme Court had an opportunity to take another step forward. The Court could have merged the holdings of *Powell* and *Zerbst*, extending the Sixth Amendment right to appointed counsel to defendants charged in state courts.[51] Or, the Court could have held that the Fourteenth Amendment guarantee of "fundamental fairness" was coextensive with the federal right to the assistance of appointed counsel. Instead,

---

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at 462.

[51] GARCIA, *supra* note 11, at 8 (commenting that, in wake of *Powell* and *Zerbst*, *Betts* was illogical and counterintuitive).

the Court's opinion was a regrettable, but short-lived, retreat from the principles articulated in *Powell* and *Zerbst*. Although *Betts* paid lip service to the fair process ideals of *Powell* and *Zerbst*, its holding belied that rhetoric.

Betts considered whether a state court defendant had been deprived of any constitutional rights when he was convicted and sentenced without the assistance of counsel.[52] Declining to extend the right to appointed counsel to all state court defendants, the Supreme Court held that the Fourteenth Amendment's due process clause did not incorporate the Sixth Amendment counsel guarantee.[53] Therefore, state court defendants were entitled to appointed counsel only under the general guarantees afforded by the Fourteenth Amendment due process clause, and only if the case presented "special circumstances" indicating that a trial without counsel would violate "fundamental fairness essential to the very concept of justice."[54]

Not surprisingly, as the law of the land, *Betts* proved thoroughly unsatisfactory. *Betts* provided state courts with little or no guidance as to when due process required the appointment of counsel and courts struggled with the fine calculations required to determine whether an uncounselled defendant had been denied due process.[55] As a consequence, federal courts heard an increasing number of post-conviction claims alleging that a particular petitioner had been deprived of due process of law in a particular case under a particular set of circumstances. This proved highly inefficient and led to anomalous results. In 1963, the Supreme Court reconsidered *Betts*.[56]

c. Gideon v. Wainwright.—Clarence Earl Gideon was an itinerant drifter and gambler, accused of stealing from a local pool hall. Gideon, who was ultimately acquitted, spent two years in a state penitentiary while he fought for and won the right to appointed counsel. In a case that lacked "special circumstances," Gideon nevertheless claimed that he had a Sixth Amendment right to the assistance of counsel. Overruling *Betts*, the Supreme Court held that the Sixth Amendment's right to counsel had full force and effect in state court prosecutions.[57]

---

[52] *Betts*, 316 U.S. at 457. The *Betts* Court surveyed state constitutions and concluded that, in the majority of states, "it was the considered judgment of the people, their representatives, and their courts that the appointment of counsel is not a fundamental right." It is worth noting that the Court's sweeping generalization ignored the substantial body of state common and statutory law favoring the appointment of counsel for indigent criminal defendants.

[53] *Id.*

[54] Crooker v. California, 357 U.S. 433, 439 (1958) (citations omitted) (citing Lisenba v. California, 314 U.S. 219, 236 (1941)).

[55] Gideon v. Wainwright, 372 U.S. 335, 337–38 (1963) ("Since 1942, when *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 2595, was decided by a divided Court, the problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts.").

[56] *Id.* at 338.

[57] *Id.* at 342.

The Supreme Court denied that *Gideon* announced a new rule. Rather, the Court asserted that *Betts* had been an "abrupt break with its own well-considered precedents" concerning the fundamental fairness of appointing counsel to indigent defendants.[58] The Court reviewed its holdings in *Powell* and *Zerbst* and focused on those cases' evident concern with "a fair system of justice."[59] In so doing, it considered what assistance was necessary to give meaning to the Sixth Amendment's promise of fair process.

First, as it had in *Powell* and *Zerbst*, the Court considered the practical realities of the criminal justice system confronting Gideon.[60] It compared the relative resources of an indigent defendant and a professional prosecutor, noting that "[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime."[61] Then, the Court assessed society's expectations about fairness in the criminal justice system and concluded that there was a "widespread belief that lawyers in criminal courts are necessities, not luxuries."[62] Most importantly, the Court concluded that where an outmatched and outmaneuvered layperson confronted a professional prosecutor in the complex arena of criminal law, there could be no fair process. "[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[63] Accordingly, the Court held that Sixth Amendment guarantee to appointed counsel was "fundamental and essential to a fair trial" and was incorporated to the states through the Fourteenth Amendment.[64]

d. United States v. Wade.—In *United States v. Wade*,[65] the Court expanded on *Gideon*'s promise by holding that the Sixth Amendment right to counsel "in all criminal prosecutions"[66] extended to pretrial proceedings whenever such assistance was necessary to guarantee a fair trial. It did so by considering whether Billy Joe Wade, who was accused of bank robbery, had a right to have his attorney's assistance at a pre-trial line-up identification procedure.[67]

Addressing Wade's right-to-counsel claim, the Court characterized its Sixth Amendment jurisprudence as an evolving doctrine, designed to identify and construct a right to counsel that guaranteed procedural fairness.

---

[58] *Id.* at 343–44.

[59] *Id.*

[60] In this regard, by asserting that counsel's constitutional function was to even the playing field between defendant and prosecutor, *Gideon* harkened back to the earliest colonial precedents.

[61] *Id.* at 344.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 342 (quoting Betts v. Brady, 316 U.S. 455, 471 (1942)).

[65] 388 U.S. 218 (1967).

[66] U.S. CONST. amend. VI.

[67] *Id.* at 220.

Accordingly, the Court eschewed historical limitations in favor of modern solutions that fit the new realities of criminal procedure.

The Court noted that the Framers themselves envisioned a counsel guarantee that would respond to the actualities of the American system. It then discussed changes in American criminal procedure. It observed that when the Framers drafted the Sixth Amendment, "there were no organized police forces;"[68] rather, a defendant "confronted the prosecutor . . . and the evidence was marshaled, largely at the trial itself."[69] The Court contrasted that simple procedure with the complex "machinery" of 1960's law enforcement, which might "involve[] critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality."[70] It then concluded that the plain wording of the Sixth Amendment was sufficiently broad to encompass a right to counsel whenever modern criminal proceedings posed a significant risk to a defendant's fair trial and that risk which could be avoided or mitigated by counsel's assistance.[71]

Having laid the theoretical groundwork for its Sixth Amendment analysis, the Court asked whether, at this "pretrial confrontation of the accused . . . the presence of his counsel [was] necessary to preserve the defendant's basic right to a fair trial."[72] To answer that question, the Court once again focused on the "real world" of criminal practice.

The Court considered two factors. First, it evaluated the line-up's "potential substantial prejudice" ("prejudice") to Wade's case. Second, it considered whether counsel's participation at the proceeding would meaningfully benefit the defendant by helping him avoid or mitigate that prejudice ("benefit").[73]

As to the prejudice analysis, the Court revisited *Powell* and other fundamental fairness cases for the proposition that pretrial proceedings might be the most critical period of any criminal prosecution.[74] The Court considered the extent to which an identification procedure conducted without defense counsel might "crucially derogate from a fair trial."[75] The court identified two specific risks Wade faced: first, a false identification based on unduly suggestive procedures "riddled with innumerable dangers;"[76] and

---

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 225 ("The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defense'.").

[72] *Id.* at 227.

[73] *Id.*

[74] *Id.* at 225.

[75] *Id.* at 228.

[76] *Id.* (expressing serious concern about suggestive identification practices and discussing the types of procedures that create that risk). Those procedures include creating a lineup in which all "but the suspect were known to the identifying witness;" participants other than the suspect were "grossly dis-

second, the likelihood that once a jury heard a witness state "that's the man," a jury would credit the false identification.[77] As to both risks, the Court concluded there was "grave potential for prejudice."[78]

In its "benefit" analysis, the Court took a practical approach. It recognized that counsel's presence might itself be a deterrent to suggestive identification procedures. As to the possible outcome at trial, the Court considered how counsel might undermine an eyewitness identification. An effective cross-examination would require counsel to reconstruct the lineup for the jury, thereby exposing any improprieties. Could an attorney who did not attend the lineup "reconstruct the manner and mode of [a] lineup identification[?]"[79] The Court rejected the possibility that counsel could obtain the necessary information from another source. First, the accused could not adequately assist counsel since he might not understand or identify any "improper influences."[80] Second, the victim could not be considered an objective observer. Finally, the other lineup participants would be law enforcement officers or individuals undiscoverable by the defense.[81] Thus, defense counsel's presence at the proceeding was necessary; otherwise, counsel could not otherwise conduct effective cross-examination about this highly prejudicial evidence.[82]

Underlying the Court's analysis was a profound commitment to the idea that defense counsel guaranteed the integrity of the adversary system. Indeed, when the United States argued that affording a right to counsel at a lineup might permit a defendant to successfully impeach correct identifications, thereby obtaining acquittals for the guilty,[83] the Court's response was unequivocal. A vigorous defense counsel "plays a vital role" in the adversary system: it would be "contrary to the basic assumptions upon which

---

similar in appearance to the suspect;" only the suspect wore the type of clothing the witness had seen; the witness is primed to make an identification when the police tell the witness "they have caught the culprit;" and then let the witness view the suspect alone. *Id.* at 233.

[77] *Id.* at 236. *See also id.* at 235 (noting that "the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification," meaning that "[t]he trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation."); *id.* at 228 (discussing wrongful convictions based on "the vagaries of eyewitness identification").

[78] *Id.* at 236.

[79] *Id.* at 230.

[80] *Id.* at 230–31.

[81] *Id.* at 231.

[82] *Id.* at 239. This prejudice/benefit analysis was a flexible approach that was designed to respond to changes in police practices and criminal procedure. The Court did not presume that lineups would always be critical stages of a criminal prosecution. Rather, the Court assumed that changes in police practices might eliminate the risks that made a lineup a critical stage, thereby "remov[ing] the basis" for a right to counsel at the procedure.

[83] *Id.* at 239. The government also argued that recognizing a right to counsel at lineups might delay important investigative work. The Court pointed out that any delay could be avoided by obtaining substitute counsel who could "eliminate the risks" of the identification proceeding by providing the suspect's attorney with the information necessary to conduct effective cross-examination. *Id.* at 241.

[the] Court has operated in Sixth Amendment cases" to waive aside a right to counsel because counsel might thereby better assist the accused.[84]

e. Mempa v. Rhay.—In *Mempa v. Rhay*, the Court used its prejudice/benefit analysis to affirm that the Sixth Amendment conferred a right to counsel at sentence.[85] *Mempa* considered a sentencing statute that permitted a judge to impose and defer a felony sentence by placing the defendant on probation.[86] A probation violation would give rise to a subsequent proceeding at which the court would terminate the probation and impose the maximum custodial sentence authorized by law.[87] However, the judge would also give the state parole board a highly subjective recommendation about how much time the defendant should actually serve. The board would then rely on that recommendation in deciding when to parole the defendant.[88] The question before the Court was whether a defendant had a right to counsel at this second sentence proceeding.

The Court conducted its Sixth Amendment analysis by referring to earlier sentencing cases decided under *Betts*' "special circumstances" rule. In particular, the Court looked to *Townsend v. Burke*, a sentencing case in which the Supreme Court had held that the absence of counsel during Townsend's sentencing violated due process.[89] At Townsend's sentence, the judge was under the misconception that Townsend had been convicted of numerous prior offenses. After a brief review of what he believed to be Townsend's criminal history, the judge sentenced Townsend to "[t]en to twenty in the Penitentiary."[90] The Court noted that Townsend had a due process right not to be sentenced "on misinformation or misreading of court records."[91] Therefore, on due process grounds, the Supreme Court reversed Townsend's sentence.[92]

Applying *Townsend* to *Mempa*, the Court first held that, stripped of its special circumstances analysis, *Townsend* "illustrates the critical nature of sentencing."[93] Using its Sixth Amendment prejudice/benefit analysis, the

---

[84] *Id.* at 237–38. In later cases, the Supreme Court retreated from this absolute view. *See, e.g.*, Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (no right to appointed counsel in misdemeanor cases unless defendant is sentenced to jail because extension of the right would "impose unpredictable, but necessarily substantial costs").

[85] Mempa v. Rhay, 389 U.S. 128, 135 (1967).

[86] *Id.* at 130.

[87] *Id.* at 135

[88] *Id.* at 131 n.2, 135.

[89] *Id.* at 134 (citing Townsend v. Burke, 334 U.S. 736 (1948)).

[90] *Townsend*, 334 U.S. at 740.

[91] *Id.* at 740.

[92] *Id.* at 741. Under the special circumstances rule, the Court had held that Townsend's uncounselled plea of guilty did not, in and of itself, violate due process. *Id.* at 740 (citing Bute v. Illinois, 333 U.S. 640 (1948) (holding that an uncounselled defendant's plea of guilty is not a *per se* violation of the due process clause)); *id.* at 739.

[93] *Mempa*, 389 U.S. at 134.

Court noted that the risk of possible prejudice to a defendant was high because he might be sentenced "on the basis of assumptions concerning his criminal record which were materially untrue."[94] The benefit to be conferred by counsel was obvious; counsel would have mitigated that potential prejudice by correcting the record. Accordingly, the Sixth Amendment right to counsel inhered at sentencing.

Having concluded that felony defendants had a right to counsel at sentencing, the Court next considered whether the deferred sentencing procedure at issue was, in fact, an adversary sentence proceeding.[95] First, the Court took a hard look at the proceedings below. The defendants had responded to allegations about new criminal conduct and probation officers had testified, without being subjected to any cross-examination.[96] The judge made factual findings that resulted in the imposition of a jail sentence. In addition, the judge made a recommendation to the parole board, which helped determine the length of the defendants' incarceration.[97] Finally, at that proceeding, the defendants had one last opportunity to move to withdraw their previous pleas of guilty to the underlying offense and obtained their first opportunity to appeal the imposition of the sentence.[98]

Considering the significant risks posed by the proceeding, the Court rejected the State's position that the revocation proceeding was a "mere formality" and not a sentence. "[W]hether it be labeled a revocation of probation or a deferred sentencing," a defendant faced substantial potential prejudice that counsel could mitigate.[99] For example, by "marshaling the facts, [and] introducing evidence of mitigating circumstances" counsel might influence the Court's recommendation to the parole board.[100] Similarly, counsel could ensure the defendant would be fully aware of "certain legal rights [that might] be lost if not exercised."[101]

Of course, *Mempa* did more than announce a right to counsel at sentence. Like *Wade*, it spoke to the critical importance of taking a flexible and "real world" approach to the counsel guarantee. And, like *Wade,* it also

---

[94] *Townsend*, 334 U.S. at 741.

[95] The State never argued that there was no right to counsel at sentence. Rather, the State argued that the defendants had been 'sentenced' when they received their probation and deferred sentence. According to the State, the subsequent imposition of the maximum term of incarceration was part of a probation revocation proceeding, not a 'sentence' proceeding. Therefore, the State insisted, no right to counsel inhered.

[96] *Mempa*, 389 U.S. at 131–32.

[97] *Id.* at 135.

[98] *Id.*

[99] *Id.* at 137.

[100] *Id.*

[101] *Id.* The Court also considered the practicality of giving indigent defendants a right to counsel at sentence. Responding to the State's contention that such a right would overtax the system, the Court concluded that "trial counsel appointed for the purpose of the trial or guilty plea would not be unduly burdened by . . . the deferred sentencing stage of the proceeding." *Id.* at 137.

demonstrated the Court's commitment to examining substance rather than relying on semantics.

Notwithstanding the Court's rulings in *Wade* and *Mempa*, the Court still faced complex questions about the right to counsel.[102] Among those questions were two of particular relevance to this Article. Does a defendant in a criminal case have a right to counsel at all procedural stages? If so, when would such a right begin and end?[103] The Supreme Court's "critical stage" doctrine answers these questions. Unfortunately, its answers have proved inadequate to guarantee a meaningful right to counsel in the twenty-first century.

3. The Bright-Line Critical Stage Doctrine[104].—The critical stage doctrine can be stated succinctly. First, the right to counsel attaches only after the initiation of adversary criminal proceedings by "formal charge, preliminary hearing, indictment, information, or arraignment."[105] Second,

---

[102] This Article does not discuss the significant but short-lived right-to-counsel doctrine espoused in *Escobedo v. Illinois*, 378 U.S. 478 (1964). *Escobedo* appeared to establish a Sixth Amendment right to counsel in during stationhouse interrogations. Immediately following *Escobedo*, the Supreme Court decided *Miranda v. Arizona* and adopted a broad prophylactic rule addressing the Fifth Amendment privilege against self-incrimination. 384 U.S. 436 (1966). The scholarly consensus is that the Court thereafter abandoned the *Escobedo* Sixth Amendment reasoning in favor of a Fifth Amendment analysis. *See, e.g.*, W. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.4(c) (3d ed. 2000). There is a significant body of case law and scholarly literature that addresses whether the right to counsel inheres in interrogation by law enforcement and law enforcement agents. For discussion of this aspect of the right to counsel, see James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informations: Truth, Fair Play, and the Massiah Doctrine*, 22 U.C. DAVIS L. REV. 1 (1998) and James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975 (1986).

[103] The Court's right to counsel rulings raised other questions concerning the types of case in which the right applied and the manner in which states would provide appointed counsel. For a discussion of the types of cases at which the Sixth Amendment counsel right applies, see Lassiter v. Dep't of Soc. Serv., 452 U.S. 18 (1981) (finding no Sixth Amendment right to counsel in proceeding to terminate parental rights); Scott v. Illinois, 440 U.S. 367 (1979) (finding a right to counsel in misdemeanor cases resulting in actual imprisonment); Middendorf v. Henry, 425 U.S. 25 (1976) (finding no Sixth Amendment right to counsel in court martial proceedings); Argersinger v. Hamlin, 407 U.S. 25 (1972) (finding a right to counsel in misdemeanor cases resulting in actual imprisonment); *In re* Gault, 387 U.S. 1 (1967) (finding due process right to counsel, not a Sixth Amendment right to counsel, where juvenile in civil proceeding may face loss of liberty). For a discussion of the practical difficulties in implementing the *Gideon* decision, see Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986).

[104] The term "critical" was first used to describe stages of criminal procedure in a Sixth Amendment context in *Powell v. Alabama*, when the Court described the pretrial period as "perhaps the most critical period of the proceedings." 287 U.S. at 57. This result was obtained by searching the Lexis Supreme Court database for the terms "counsel" and "critical" and "Sixth Amendment" in the same document. Although the terms do appear together in cases prior to *Powell*, none address the right to counsel nor do they presage the development of the critical stage doctrine. Later, the Court used the term "critical" to describe stages of the criminal process in cases such as *Coleman v. Alabama*, 399 U.S. 1, 7 (1970); *White v. Maryland*, 373 U.S. 59, 60 (1963); and *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961).

[105] Kirby v. Illinois, 406 U.S. 682, 689 (1972). In dicta, some Courts of Appeals have suggested that the "formal initiation" rule give way when the circumstances clearly indicate that the "adverse positions of government and defendant" have solidified. *See, e.g.*, Roberts v. Maine, 48 F.3d 1287, 1291

the right to counsel applies only to those proceedings that are "trial-like" procedures at which the defendant personally confronts the prosecutor or the intricacies of the criminal justice system.[106] These are bright-line rules, not subject to exceptions or modifications.

This bright-line approach to the critical stage doctrine has largely swallowed up the flexible and realistic right-to-counsel analysis so prominently featured in *Gideon*, *Wade*, and *Mempa*.[107] However, the contemporary contours of criminal procedure require that the Court once again consider the reality, and not the rhetoric, of the Sixth Amendment promise.

a. Kirby v. Illinois.—In *Kirby v. Illinois*, the Court announced a restrictive rule for when the right to counsel attaches and thereby substantially contracted the scope of its previous Sixth Amendment inquiry. Whereas *Wade* inquired about potential prejudice and the utility of counsel, *Kirby* imposed temporal and procedural limits upon that right without regard to any risks an uncounselled defendant faced. The Court relied in large measure upon the assumption that criminal cases began, progressed, and ended in a linear, trial-oriented way. The Court held that the right to counsel inheres only after the initiation of adversary criminal proceedings through "formal charge, preliminary hearing, indictment, information, or arraignment."[108]

Kirby's facts would easily have lent themselves to a *Wade*-type analysis. The police arrested Thomas Kirby and took him to the police station. They then brought a robbery victim to the station where, upon seeing Kirby

---

(1st Cir. 1995) (right to counsel may attach before indictment or arraignment); Matteo v. Superintendent, 171 F.3d 877, 892 (3d Cir. 1998), *cert. denied*, 528 U.S. 824 (1999) (right to counsel may attach, even if formal adversary proceedings have not begun if "accused is confronted, just as at trial, by the procedural system, or by his expert adversary, or by both") (quoting United States v. Gouveia, 467 U.S. 180, 189 (1984)); United States *ex. rel.* Hall v. Lane, 804 F.2d 79, 82 (7th Cir. 1986) (unclear whether a criminal "prosecution" can start before formal adversary proceedings begin); United States v. Larkin, 978 F.2d 964, 969 (7th Cir. 1992) (right to counsel may attach before formal charges if government steps over "the constitutionally significant divide from fact-finder to adversary") (quoting *Hall*, 804 F.2d at 82)). Two reported federal court opinions—both at the district court level—have endorsed in principle the idea that the Sixth Amendment right to counsel can attach in the absence of formal adversary proceedings. *See* Chrisco v. Shafran, 507 F. Supp. 1312, 1318–19 (D. Del. 1981); United States v. Busse, 814 F. Supp. 760, 763 (E.D. Wis. 1993).

[106] United States v. Ash, 413 U.S. 300 (1973). The Sixth Amendment right to counsel extends only through sentencing. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973). The Supreme Court has also ruled, on Due Process and Equal Protection grounds, that the state must provide an indigent defendant with counsel's assistance on the first appeal of right. *See* Douglas v. California, 372 U.S. 353 (1963); Evitts v. Lucey, 469 U.S. 387 (1985). In this author's opinion, the Supreme Court should have decided these cases on Sixth Amendment grounds. Although it is beyond the scope of this Article, there are strong legal and policy reasons to prefer a specific Sixth Amendment analysis over a generalized substantive due process or equal protection analysis. *See* Graham v. Connor, 490 U.S. 386 (1989) (stating that, wherever possible, the Court prefers to rely upon a specific amendment instead of turning to a substantive due process analysis).

[107] *See* discussion *infra* Part II.

[108] *Kirby*, 406 U.S. at 689.

in a holding cell, he identified Kirby as his attacker.[109] Almost two months later, a grand jury indicted Kirby. Only then did the court appoint counsel to represent him. Relying on *Wade*, Kirby's attorney moved to suppress the "show-up" identification, arguing that Kirby had a right to have counsel present at this pre-indictment identification proceeding.

Had the Court followed the inquiry laid out in *Wade*, it would have asked whether, under the facts of Kirby's case, the 'show-up' identification was a "critical confrontation . . . where the results might well settle the accused's fate and reduce the trial itself to a mere formality."[110] Or, the Court might have recalled its holdings in *Powell,* where it held that the right to the assistance of counsel is central to the validity of the adversary system and that the deprivation of counsel can create such inequality between adversaries that any resulting outcome lacks fundamental fairness.[111] Instead, a plurality of the Court ignored the prejudice/benefit analysis and failed to address the fairness implications heretofore so prominently featured in the Court's right-to-counsel jurisprudence. The *Kirby* court never considered whether the show-up identification rendered Kirby's trial a "mere formality," nor did it seriously consider whether counsel's presence might have helped Kirby avoid the substantial prejudice that inheres at a show-up identification.

Although the plurality conceded that the counsel guarantee was not limited to assistance at trial, it asserted that the phrase "criminal prosecution" limited the Sixth Amendment's counsel guarantee to those proceedings in which "adversary judicial proceedings have been initiated."[112] This narrow reading of the text of the counsel guarantee was utterly foreign to the Court's previous Sixth Amendment jurisprudence. None of the Court's major right-to-counsel cases considered the meaning of the term 'prosecution.' *Gideon* had clearly announced that the Framers' vision of the criminal justice system did not limit the operation of the counsel guarantee. Even as a textual exposition, the Court's opinion was a dismal failure. The Court never discussed what the Framers' understanding of the term 'prosecution' might have been, nor did it offer any support for its assertion that the "evolving" understanding of the right to counsel should be limited by the Framers' understanding of that term. To the extent that the Court conducted any analysis, it was a historical analysis of its own cases. The Justices surveyed several significant right-to-counsel cases and concluded they all arose in a procedural posture "at or after the initiation of adversary judicial criminal procedures."[113] The Court then transformed this previously

---

[109] *Id.* at 689.

[110] *Id.* at 699 (citations omitted).

[111] *Powell*, 287 U.S. at 68.

[112] *Kirby*, 406 U.S. at 688.

[113] *Id.* at 689. The sole exception to that trend was *Escobedo v. Illinois*, a case the Court had already limited to its specific facts. *Id.*

undiscussed common denominator into an indispensable element of the right to counsel. Henceforth, the *Kirby* plurality concluded, the right to counsel would only attach "at or after the initiation of adversary judicial criminal procedures."[114] It would not matter whether those procedures were termed "formal charge, preliminary hearing, indictment, information, or arraignment."[115]

The *Kirby* plurality stressed that it did not intend the "adversary judicial criminal proceedings" boundary as a "mere formalism."[116] Rather, the plurality asserted that formal criminal proceedings were "the starting point of our whole system of adversary criminal justice."[117] Only after starting formal criminal proceedings would the government have "committed itself to prosecute" thereby solidifying the "adverse positions of government and defendant."[118] This concern with the adverse positions of government and defendant, a search for 'adversariness-in-fact,' was rhetorically similar to the Court's language in earlier cases. However, the insistence that procedural postures determine constitutional entitlements was a radical departure.

Some justices relied upon this aspect of the plurality opinion to conclude that the right to counsel could attach prior to the initiation of formal adversary proceedings if adversary positions had solidified and the government was truly committed to prosecuting the defendant.[119] This has not been the accepted view. The Supreme Court has held that Kirby sets out a bright-line rule: the right to counsel attaches only after the initiation of formal adversary proceedings.[120]

Thus, *Kirby* began the Court's march toward a narrow and rigid rule firmly delineating the point at which the Sixth Amendment right to counsel attaches. Having drawn a bright line, the Court then considered which post-attachment proceedings would give rise to that right. In *United States v.*

---

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.* Whatever the merit of that view was in 1972, it is no longer a correct statement of fact. For a discussion of the prevalence of pre-charge plea bargaining in which the government and the defendant are clearly adversaries, see *infra* Part III.A.

[119] United States v. Gouveia, 467 U.S. 180, 193 (1984) (Stevens, J., concurring) ("[*Kirby*] does not foreclose the possibility that the right to counsel might under some circumstances attach prior to the formal initiation of judicial proceedings.").

[120] *See* United States v. Ash, 413 U.S. 300, 303 n.3 (1973) ("*Kirby v. Illinois* forecloses application of the Sixth Amendment to events before the initiation of adversary criminal proceedings."). *Kirby* was followed by a long series of decisions shoring up the artificial boundaries it had established. *See, e.g., Gouveia*, 467 U.S. at 180; *see also* McNeil v. Wisconsin, 501 U.S. 171, 175 (1995) (noting *Kirby*'s limit on attachment of the Sixth Amendment's counsel guarantee makes the guarantee offense-specific: the right to counsel does not attach as to crimes under investigation, even if the right has already attached as to a formally charged crime). The Court's offense-specific doctrine, which it recently expanded in *Texas v. Cobb*, 532 U.S. 162 (2001), merits challenges similar to those posed in this Article. However, that topic is well beyond the scope of this piece.

Ash, the Court concluded that the right to counsel would arise only at proceedings that are "trial-like confrontations."[121]

b. United States v. Ash.—As in *Wade* and *Kirby*, the issues in *Ash* were posed in the context of an identification case. A government informer accused Ash of bank robbery. The prosecutor showed eyewitnesses five "mug shots" of men who generally fit the robber's description, Ash's photograph was among them. Four witnesses tentatively identified Ash as the robber.[122] Approximately two months later, a grand jury indicted Ash on robbery charges.[123]

In preparation for trial, the prosecutor asked the eyewitnesses to view a photographic array of five individuals, one of whom was Ash.[124] At trial, and over the objections of defense counsel, the Court admitted the photographic array into evidence.[125] On appeal, Ash and his attorney argued that the prosecution violated Ash's Sixth Amendment right to counsel because Ash's attorney had not been present for the photo-identification procedure.[126] Relying on *Wade*, Ash argued that without observing the procedure, his attorney could not prepare a meaningful cross-examination about the identification procedure.[127]

A Supreme Court majority ruled against Ash and, in so doing, substantially reinterpreted *Wade*. Writing for the Court, Justice Blackmun first reiterated the history of the Court's Sixth Amendment right-to-counsel cases.[128] Acknowledging the Court's historical commitment to a "real world" approach, Justice Blackmun asserted that from "changing patterns of criminal procedure and investigation"[129] came an expanded understanding of the right to counsel.[130] Although the Court gave a nod to the prejudice/benefit analysis so prominently featured in *Wade*, it declined to rest its decision on that reasoning.[131] Instead, the majority asserted that *Wade*'s outcome had depended upon the fact that Wade had been present at the line-

---

[121] *Ash*, 413 U.S. at 303. Because of changes in criminal procedure, this limitation has had disastrous consequences. *See* discussion *infra* Part III.

[122] *Ash*, 413 U.S. at 302.

[123] *Id.*

[124] Although the crime was committed in 1965, the trial date was set nearly three years later, in 1968. By then, the Supreme Court had decided *United States v. Wade* and announced its rule regarding the right to counsel at critical pretrial stages. *Id.* at 303.

[125] *Id.* at 304.

[126] *Id.* at 305. Ash's case reached the Supreme Court nearly one year after the decision in *Kirby v. Illinois*. Because *Kirby* "forecloses application of the Sixth Amendment to events before the initiation of adversary criminal proceedings," Ash did not argue that he had a right to counsel at the initial showing of the "mug shots." *Id.* at 303 n.3.

[127] United States v. Wade, 388 U.S. 218, 228–29 (1967).

[128] *Ash*, 413 U.S. at 306.

[129] *Id.* at 310.

[130] *Id.*

[131] *Id.* at 314–15.

up and was therefore personally "confronted" by the prosecution.[132] In support of this view, the Court argued that its recent Sixth Amendment decisions had all involved "trial-like confrontations" at which the lawyer "continued to act as a spokesman for, or advisor to, the accused."[133] Thus the Court converted its previous focus on equality between adversaries into a concern about the form in which the adversary interests were expressed.

As it had in *Kirby*, the Court considered the systemic consequences of its decision and noted that applying *Wade* outside of this "confrontation" context would "result in drastic expansion of the right to counsel."[134] By placing this restrictive gloss on *Wade*, the Court announced a new rule: an event constitutes a "critical stage" only when the accused confronts the "procedural system" or an "expert adversary."[135] Accordingly, the Court held that because Ash was not present at the identification procedure, he was not entitled to have his counsel present either.[136]

Requiring the right to counsel to depend upon whether the stage in question was a "trial-like confrontation" was a radical departure from *Wade*. Wade's right to counsel had not depended upon the fact that the line-up was an adversary situation analogous to a trial confrontation.[137] Nor had Wade's right to counsel depended upon the fact that counsel might have advised him about his behavior or demeanor at the lineup.[138] Rather, Wade's right to counsel had depended entirely upon two factors: (1) he was in an adversary relationship with the government; and, (2) his counsel's presence at the lineup was necessary to guarantee the meaningful cross-examination that would be necessary to provide "effective assistance of counsel" at the subsequent adversary trial.[139]

---

[132] *Id.* at 314.

[133] *Id.* at 312. As Justice Brennan aptly noted in his dissent, the *Massiah* case addressed whether federal agents could eavesdrop upon the statements of an indicted defendant. *Id.* at 339 n.17 (Brennan, J., dissenting). Thus, not all of the Court's recent Sixth Amendment cases involved confrontations.

[134] *Id.* at 316 (citing with approval United States v. Bennett, 409 F.2d 888, 899–900 (2d Cir. 1969) (stating that the right to counsel is intended "to prevent the defendant himself from falling into traps devised *by a lawyer* on the other side and to see to it that all available defenses are proffered.") (emphasis added)).

[135] *Id.* at 310. An extended critique of the Court's ruling in *Ash* is beyond the scope of this Article. However, one may fairly assert that the majority "stretches" to refashion *Wade*'s ruling. *See, e.g., id.* at 322–44 (Stewart, J., concurring).

[136] *Id.* at 317.

[137] Although *Wade* had referred to the identification proceeding as a "pretrial confrontation," nowhere had the Court restricted its analysis to stages that involved "trial-like" confrontations. *See, e.g.*, United States v. Wade, 388 U.S. 218, 227–28 (1967).

[138] *Ash*, 413 U.S. at 324 n.* (Stewart, J., concurring).

[139] *Id.* (Stewart, J., concurring). The *Wade* court did not consider whether the proceeding was trial-like; it considered only whether "counsel's absence at [pretrial] stages . . . might derogate from [the defendant's] right to a fair trial." *Wade*, 388 U.S. at 226. Had the Court intended to make confrontation the *sine qua non* of the right to counsel, it had ample opportunity to do so in *Wade*, when it distinguished a lineup from other types of prosecutorial trial preparation, such as analysis of hair, clothing, and blood. According to the Court, those examinations were not critical stages because the general state of scien-

Thus, from *Wade*'s expansive promise, the Court retreated to a critical stage doctrine in which the right to counsel was limited to those situations that involved "trial-like confrontations."[140] This narrow understanding of when and why the counsel guarantee should apply led the Court to ask whether counsel's cross-examination "can serve as a substitute for counsel [assisting] at the pretrial confrontation"?[141] Yet, the Court maintained that the Sixth Amendment counsel guarantee had evolved and expanded when "new contexts appear [that present] the same dangers that gave birth initially to the right itself."[142] As set forth in Part II, *infra*, the new federal sentencing scheme exemplifies one such novel context.

II. MANDATORY SENTENCING, SENTENCING GUIDELINES, AND COOPERATION

The federal criminal justice system operates within the mathematical construct of legislated mandatory minimum sentences and the United States Sentencing Guidelines.[143] Under mandatory sentencing structures, a court is required to impose a specific mandatory term of incarceration, even if the court believes that the sentence is unjust. A defendant's criminal conduct, criminal history, and specific offense characteristics are assigned numerical values. These numerical values are assigned certain presumptive sentencing consequences. Taken together, mandatory sentences and the guidelines system impose both a statutory "floor" below which a court may not sentence a defendant, and a presumptive range of incarceration within which the court must usually sentence the defendant.[144] However, the United

---

tific knowledge about those analyses gave defense counsel ample opportunity to conduct meaningful cross-examination about the state's scientific conclusions. *Id.* at 228.

[140] *Ash*, 413 U.S. at 311. This narrowing of the types of "stages" that were critical did not affect the court's determination about the type of cases in which there was a right to counsel. *Argersinger v. Hamlin*, 407 U.S. 25 (1972), held that the Sixth Amendment counsel guarantee protected those charged with misdemeanor cases if their conviction resulted in actual imprisonment. *Argersinger* is notable for its consideration of counsel's role in plea bargaining. The *Argersinger* Court explicitly addressed the prevalence of "assembly-line" plea bargaining in misdemeanor cases and recognized that a misdemeanor defendant would need the "guiding hand of counsel" to help him decide whether to enter into a plea bargain. *Id.* at 32.

[141] *Ash*, 413 U.S. at 316. While some element of this inquiry had loomed in the *Wade* opinion, *Wade* imagined that the critical stage determination would be fluid. For example, a legislative or policy decision that altered police procedures might remedy the potential prejudice in the pretrial confrontation, divesting that confrontation of the peril that had made it a critical stage. *Wade*, 388 U.S. at 239.

[142] *Ash*, 413 U.S. at 311.

[143] Mandatory and guidelines sentencing systems were enacted in many states during the 1980's and 1990's. *See* Kevin R. Reitz, *The Cutting Edge of Sentencing Reform*, 8 FED. SENTENCING R. 64 (1995). This Article will focus on the interaction of mandatory and guidelines sentencing in the federal criminal justice system.

[144] Prior to the enactment of the sentencing guidelines, a United States District Court Judge had unfettered discretion to impose any sentence within the statutory range. These judicial sentences were virtually unreviewable. THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING LAW AND PRACTICE 1515 (2002); *accord*, 8A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 35.03[2] (3d ed. 2003)

States Code also provides that cooperation with authorities establishes an avenue to avoid compulsory sentencing.[145] This cooperation incentive adds an additional twist to the new contexts in which right-to-counsel decisions are made.[146]

A. Mandatory Sentencing

In general, the terms "mandatory sentencing" and "mandatory minimum sentencing" refer to legislatively imposed minimum terms of incarceration. In the federal system, mandatory sentences appear most often as mandatory sentencing ranges (*e.g.*, from zero to twenty years; from five to forty years; from ten years to life).[147] These mandatory sentences are triggered only when a prosecutor files an indictment alleging the requisite statutory criteria and a defendant is convicted under that statute.

Mandatory minimum sentences have existed since the earliest days of the United States.[148] However, mandatory sentencing remained rare throughout the eighteenth and nineteenth centuries. The Narcotics Control Act of 1956 represented Congress' first attempt to adopt a comprehensive mandatory sentencing structure. That act was perceived as a dismal failure and Congress repealed the statute in 1970.[149]

In 1984, Congress again enacted a mandatory sentencing scheme. This statutory construct was intended primarily to fight the "war on drugs" but also included mandatory punishments for gun crimes. For two decades, Congress has continued to expand the number and reach of mandatory sentences. Today, mandatory sentences in the federal system are a prominent

---

(noting that prior to the sentencing guidelines "illegal sentences [were] essentially only those which exceed[ed] the relevant statutory maximum or violate[d] double jeopardy or [were] ambiguous or internally contradictory").

[145] 18 U.S.C. § 3553(e) (2000). The so-called 'safety valve' provisions of 18 U.S.C. § 3553(f) create a limited exception to the mandatory minimum sentences for certain first time offenders who do not cooperate but who have 'truthfully provided to the Government all information the defendant has concerning the same offense or offenses." *Id.* § 3553(f)(5). This 'safety valve' is limited to non-violent participants who lack any leadership role in the offense. *Id.* § 3553(f)(2), (4). The safety valve's provision of information clause is distinguished from cooperation inasmuch as the safety valve rewards candor, whereas cooperation rewards success in providing substantial assistance.

[146] *See infra* Part II.C.

[147] Mandatory sentencing may occur in several circumstances: as a result of conviction under certain statutory provisions (all convictions under a particular statute carry a fixed sentence); as a result of conviction under one part of a statutory scheme (convictions for drug trafficking carry different mandatory minimum sentences based upon the quantity of drugs distributed); or as a consequence of the status of the victim or the defendant (repeat offenders face enhanced mandatory minimum sentences).

[148] In 1790, the United States punished some crimes with a mandatory death sentence. U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (1991) (citing 1 Stat. 112, 113 (1790)). Some of these mandatory death penalties were later amended so that the minimum sentence was life in prison and the maximum sentence was death. *Id.*

[149] 21 U.S.C.A. §§ 717–774 (1956) (repealed 1970).

feature of the statutory structure and prosecutors routinely select charges that carry mandatory sentences.[150]

B. The United States Sentencing Guidelines

The 1984 Sentencing Reform Act was a watershed in the practice of federal sentencing.[151] The Act created the United States Sentencing Commission ("Commission") to promulgate a sentencing system that would promote honesty in sentencing, eliminate sentencing disparity, and ensure the proportionality in sentencing.[152] That sentencing system is known as the United States Sentencing Guidelines ("Guidelines").

Under the Guidelines, sentences are prescribed in terms of sentencing ranges, for example from forty-six to fifty-seven months. Sentencing ranges are calculated on a chart. The vertical axis represents the offense level as calculated in accordance with instructions that measure offense severity, offender conduct, and special victim-related factors. The horizontal axis measures the defendant's criminal history. Determination of the offense level and the criminal history category is itself a complex process requiring multiple decisions about factual matters, such as the defendant's role in the offense, which are weighed incrementally. The court determines the two key values, offense level and criminal history, and the court plots those values on the sentencing guideline chart. Their intersection results in a presumptive range of time for which the offender should be incarcerated. Judges have limited discretion to depart from these guidelines and any departures must be justified on the record.

The United States Sentencing Guidelines prescribe sentences based upon both the crime, as well as actual relevant conduct. The relevant conduct guideline[153] requires that "all acts, omissions committed, aided and abetted, counseled, commanded, induced, procured or willfully caused by the defendant" be counted toward the offense level.[154] The Commission also defines relevant conduct to include "all reasonably foreseeable acts and omissions by others in furtherance of jointly undertaken criminal activity."[155] As a result, criminal activity not covered by the specific statutory

---

[150] U.S. SENTENCING COMM'N, *supra* note 148, at 11; Jed S. Rakoff, *Four Postulates of White Collar Practice*, 1993 N.Y. L.J. 3; Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137 (1995).

[151] 28 U.S.C. § 994 (2000).

[152] U.S. SENTENCING GUIDELINES MANUAL § 1A3 (2002). The Sentencing Reform Act is a subsection of the Comprehensive Crime Control Act of 1984. The Commission's powers and responsibilities are set forth in 28 U.S.C. § 58 (2000). The statutory description of how guideline sentencing is to be implemented is found in 18 U.S.C. § 27 (2000).

[153] U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2002).

[154] *Id.* § 1B1.3(a)(1)(A).

[155] *Id.* § 1B1.3(a)(1)(B).

charge may nevertheless form the basis for an increased guidelines sentence.[156]

Because judges have no discretion in imposing mandatory sentences and limited discretion in imposing guidelines sentences, prosecutorial charging decisions dictate sentencing results and consequently become powerful tools for plea bargaining.[157] Absent a substantial assistance motion by the prosecutor,[158] guidelines results cannot trump mandatory sentences.

Parties can also bargain over guidelines issues; however, these bargains do not bind probation officers or judges.[159] Guidelines plea agreements can take many forms and the parties can bargain about variables such as offense conduct, offender behavior, relevant conduct, victim characteristics, and criminal history.[160] These guidelines sentence agreements generally fall into two categories: guideline recommendation agreements and fact stipulation agreements. In a guidelines recommendation agreement, the prosecutor promises to recommend to the court that the defendant be sentenced within a particular guidelines range, or to a particular point within the applicable range, or to a precise number of months. The defendant may also persuade the prosecutor to recommend that the court make particular findings with respect to controversial guidelines questions likely to arise at the sentence proceeding. Because a government recommendation cannot bind either the probation officer or the judge, guidelines recommendation agreements rarely result in sentences outside of normal guideline procedures.[161] Alternatively, the parties may bargain to obtain stipulated facts relevant to the guideline calculation. Again, such stipulations do not prevent a probation officer from challenging their accuracy, or the court from making a different factual finding. Finally, the parties may bargain over the benefits a defendant may receive by cooperating with authorities.

---

[156] For example, if a defendant is charged with the sale of one ounce of crack cocaine, the defendant's offense level calculation begins with a "base offense level" of twenty-one to twenty-seven months. If, however, the court finds that the defendant sold that same packet of drugs for an organization that sells more than fifty grams of cocaine base, the defendant's base offense level carries a guidelines range of 121-151 months. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1.

[157] In some situations, the court may impose a federal sentence that is lower than the prescribed statutory mandatory minimum. These cases occur if the government moves to reduce a defendant's sentence under U.S. SENTENCING GUIDELINES MANUAL § 5K1.0 (2002) or FED. R. CRIM. P. 35 in recognition of a defendant's substantial assistance. Alternatively, a first-time offender may be eligible for a statutory "safety valve" that enables the court to sentence below the mandatory minimum sentence.

[158] Cooperation is discussed *infra* Part II.C.

[159] However, parties can negotiate a binding sentence agreement under Fed. R. Crim. P. 11(e)(1)(C). In that type of plea agreement, if the judge refuses to impose the agreed-upon sentence, the defendant can withdraw his guilty plea.

[160] PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES 7–6, 7–17 (Phylis Skloot Bamberger et al. eds., 5th ed. 2000).

[161] *Id.* at 7–17.

C. Cooperation as an Alternative to Mandatory and Guidelines Sentencing

By statute, cooperation with authorities is now a central feature of criminal procedure. Upon the motion of the United States Attorney's Office, a district court judge can sentence a cooperating defendant to a term of imprisonment below the applicable guidelines[162] and below any applicable mandatory minimum sentence.[163] Alternatively, the government can file a motion pursuant to Fed. R. Crim P. 35(b). Thereafter, the judge can reduce a previously imposed sentence to a level below either the guidelines range or any mandatory minimum sentence, in order to reflect substantial assistance rendered or realized after the original sentence.[164] Although providing information in exchange for leniency is an old practice,[165] mandatory and guidelines sentences make "the stick . . . far heavier . . . and the carrot . . . larger."[166]

Unlike other plea agreements, a cooperation agreement only requires the prosecution to make vague and largely unenforceable promises about sentence outcomes.[167] The defendant promises to provide complete and truthful information. The defendant also agrees to disclose all past criminal activities. Further, the defendant agrees to testify in grand jury or trial proceedings and, when asked, to participate in monitored telephone conversations or engage in other surveillance-type activities, such as wearing a wire. The agreement also requires the defendant to agree to postpone his sentence until his cooperation is deemed complete.[168]

In exchange, the government makes only one promise: if the defendant provides substantial assistance in the investigation and prosecution of another individual, the prosecution will make a motion to the sentencing judge for a reduction of the defendant's sentence.[169] Several caveats, and

---

[162] U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002).

[163] 18 U.S.C. § 3553(e) (2000).

[164] FED. R. CRIM. P. 35(b). As will be discussed *infra* Part III.C, there are some restrictions on the timing and extent of Rule 35 departures.

[165] As described in the so-called Whisky cases, English common law permitted a suspect to inform against his accomplice; if the accomplice was convicted, the informer would receive a pardon. United States v. Ford, 99 U.S. 594, 599 (1878). Immunity from prosecution in exchange for cooperation was a common feature of nineteenth century criminal practice in the United States. *Id.* (describing immunity as a reward for cooperation as an "established usage").

[166] Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 86 (1995).

[167] The description of cooperation agreements is based not only upon my years of practice in the Southern and Eastern Districts of New York, but also my review of cooperation agreements during the two years that I spent as a Visiting Professor at Washington and Lee Law School. There I supervised the Alderson Legal Assistance Program, a clinic that assisted the women incarcerated at the Federal Prison Camp in Alderson, West Virginia. In that capacity, I reviewed cooperation agreements entered into by women who had been prosecuted in districts all across the country.

[168] This is the proverbial "Sword of Damocles" hanging over the defendant's head.

[169] If the motion is made at sentence, it is made pursuant to U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002). If the motion is made after an initial sentence, it is made pursuant to FED. R. CRIM. P. 35(b).

even an explicit threat, accompany this promise. First and foremost, the government is to be the sole judge of whether the defendant has truthfully and completely cooperated. The decision as to whether the cooperation rises to the level of substantial assistance will be left to the sole discretion of the prosecutor's office.[170] Often a cooperation agreement does not specify the extent of the departure the government will request.[171] And, even if it did, that request would not be binding upon the sentencing court. Finally, if the defendant fails to perform under the terms of the agreement, the prosecutor's office retains the right to use the defendant's statements against him at a subsequent prosecution for false statements.

Ultimately, the cooperation agreement is a gamble, in which the defendant assumes the risk. The parties expect the defendant's sentence to be tempered by the court's eventual ruling.[172] But, if the cooperation comes to naught, or if the government deems the defendant's cooperation insubstantial, a defendant has no right to withdraw his plea, and he suffers the full penalties prescribed by law. The prosecutor's exclusive determination of whether the defendant has provided substantial assistance is unassailable unless the defendant can show that the government withheld the promised motion for unconstitutional reasons.[173]

III. LEARNING FROM EXAMPLES: HOW APPLYING THE CRITICAL STAGE DOCTRINE TO CONTEMPORARY PROCEDURE CREATES UNFAIR RESULTS

This part of the Article challenges the wisdom of the critical stage doctrine by showing how its application to contemporary stages of criminal prosecutions creates unfairness. The critical stage doctrine cannot guarantee a meaningful right to counsel when its rigid and narrow criteria are applied to new and non-traditional stages in a criminal prosecution. As to each example, this Article first explains the contemporary practice that creates the right-to-counsel dilemma. Then, using examples culled both from reported

---

[170] *See* Richman, *supra* note 166, at 102 n.114.

[171] *See* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 532 (1992) (noting that in one of the three districts examined by the authors, prosecutors made a promise about a specific sentence); United States v. Robert, 5 F.3d 365, 367 (9th Cir. 1993) (plea agreement promises that if defendant provides substantial assistance, government will recommend that the court cut the guidelines sentence in half); United States v. Jimenez, 992 F.2d 131, 133 (7th Cir. 1993) (plea agreement promises that if defendant provides substantial assistance, the government will request a twenty-five percent reduction in the guidelines range). For a discussion of the strategic benefits of deliberately vague promises, see Richman, *supra* note 166, at 96–97.

[172] For a discussion comparing traditional plea-bargaining with cooperation bargaining, see Richman, *supra* note 166, at 93.

[173] Wade v. United States, 504 U.S. 181, 182–83 (1992). Some lower courts have also held that the government has an obligation to act in "good faith." *See, e.g.*, United State v. Rexach, 896 F.2d 710, 714 (2d Cir. 1990).

and unreported cases, this Article demonstrates how in these new situations the critical stage doctrine fails contemporary criminal defendants.

Subpart A examines the phenomenon of pre-charge bargaining in which adversary positions solidify and plea bargaining ensues long before formal adversary proceedings begin. Subpart B explores the tremendous importance of presentence interview as a confrontation that may have irrevocable consequences for plea and sentencing outcomes. Finally, subpart C takes a closer look at the phenomenon of government cooperation and the federal procedure for sentencing reductions that makes an otherwise "collateral" proceeding the true imposition of sentence.

A. Pre-Charge Bargaining

Plea bargaining generally involves negotiating a resolution to a case in which a prosecutor or grand jury has already filed charges.[174] In pre-charge bargaining, the parties negotiate to determine what charges the prosecutor will file.

In the federal system, if pre-charge bargaining is successful, the parties agree that the defendant will waive her right to a grand jury indictment and the United States Attorney will file a criminal information alleging the violation of an agreed-upon statute.[175] The defendant pleads guilty to the information and is sentenced accordingly.[176] For reasons discussed below, when pre-charge bargaining is unsuccessful, the negotiations may lead to the prosecutor filing charges that are more serious than those she had previously contemplated. Unsuccessful pre-charge bargaining may provide the prosecutor with otherwise undiscoverable evidence that she may use to convict the defendant at trial or to enhance the defendant's sentence.

1. Pre-Charge Bargaining in Contemporary Procedure.—While mandatory sentencing and the United States Sentencing Guidelines have increased the importance and prevalence of all types of plea bargaining, they

---

[174] Typically, plea bargaining means that the defendant agrees to plead guilty and give up his right to trial. In return, the prosecutor agrees to drop certain charges or to agree to a particular sentence. *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1921 (1992).

[175] For further discussion of the merits of waiving indictment, see Plato Cacheris, *Responsibilities of a Criminal Defense Attorney*, 30 LOY. L.A. L. REV. 33 (1996). Alternatively, the parties may agree that the defendant will plead guilty to a particular charge; the prosecutor then presents that charge to a grand jury. This practice is generally used when the defendant is cooperating with authorities and the parties wish to keep that cooperation secret. Parties may also resort to charge bargaining when a defendant has provided truthful information but that information has not substantially assisted authorities or when the parties agree that the sentencing judge is unlikely to award a sentencing discount that the parties feel is merited. For speculation about the statistical correlation between low substantial assistance rates and high charge bargaining rates in some federal districts, see Daniel Richman, *The Challenges of Investigating Section 5K1.1 in Practice*, 11 FED. SENTENCING REP. 75 (1998).

[176] This type of plea bargaining reflects that "as is often true in the criminal justice system" a defendant may be "less concerned with the proof of her guilt or innocence than with the severity of her punishment." Mitchell v. United States, 526 U.S. 314, 327 (1999).

have created a particularly powerful incentive to engage in pre-charge bargaining.[177] Although the guidelines attempt to limit the consequences of charge bargaining, mandatory minimum sentences and overlapping statutory provisions make charge bargaining and pre-charge bargaining the most effective way of limiting penal consequences. "[B]y deciding what to charge, how to charge, and what aggravating factors to present or withhold, the United States Attorney knows . . . what sentence he wishes to impose and what sentence will in fact be imposed."[178] If defense counsel can influence the charging decision, she can mitigate the sentence.

However, charge bargaining is only part of the pre-charge negotiations in the federal system. Guidelines can profoundly alter the intended consequences of a charging agreement. Whereas a mandatory minimum sentence still exposes the defendant to a wide range of sentencing possibilities, limited only by the statutory maximum sentence, guidelines prescribe a far more precise range.[179] When the statute of conviction exposes the defendant to a long term of imprisonment, guidelines plea bargains can limit the defendant's exposure, thereby blunting the sting of the statutory maximum. Conversely, when the guidelines prescribe a lengthy term of incarceration, prosecution under a statute with a relatively short maximum sentence will cap the guidelines at the statutory maximum, thereby blunting the guide-

---

[177] David N. Yellen, *Two Cheers for A Tale of Three Cities*, 66 S. CAL. L. REV. 567, 569–70 (1992) (noting that guidelines have increased pre-indictment charge bargaining); *accord* WAYNE R. LAFAVE ET AL., *supra* note 102, at 983–93 ("Because the federal sentencing guidelines provide an incentive to engage in pre-indictment plea bargaining, it is not surprising that a considerable amount of such bargaining now occurs."); *see also* PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES, *supra* note 160, at 7–26 (arguing pre-indictment plea negotiations are more likely to result in a successful charge agreement). Moreover, empirical evidence indicates that after prosecutors indict, only two percent of defendants successfully bargain for a plea to an offense that carries a lesser mandatory minimum sentence than those required by the offenses charged in the indictment. UNITED STATES SENTENCING COMM'N, *supra* note 148, at 44. Prosecutors also charge defendants under the highest mandatory minimum sentence warranted by the alleged offense in approximately three quarters of all cases. *Id.*

[178] United States v. Boshell, 728 F. Supp. 632, 637 (E.D. Wash. 1990) (McNichols, C.J.); *see also* United States v. Roberts, 726 F. Supp. 1359, 1367–68 (D.D.C. 1989), *rev'd sub nom*, United States v. Mills, 925 F.2d 455 (D.C. Cir. 1991).

> [T]he real allocution now takes place in the back rooms of the U.S. Attorney's Office where [a prosecutor] decides on such subjects as whether to charge the defendant with a five-year or twenty-year felony; whether to indict on a count calling for a consecutive sentence, or one without such a requirement; whether to include in the record, or not, that the defendant had a weapon at the time of the offense; and the like.

United States v. Doe, 934 F.2d 353 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 896 (1991); *accord* Steven J. Schulhofer & Ilene J. Nagel, *Plea Bargaining Under the Federal Sentencing Guidelines*, 3 FED. SENTENCING REP. 218, 219 (1991) ("In a guidelines system, whoever controls the relevant facts *and charges* controls the sentence.") (emphasis added). For an insightful discussion about the policy issues raised by wide-ranging prosecutorial discretion, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV 505 (2001).

[179] If a Guidelines analysis prescribes a sentence that falls above or below the statutory mandatory minimum or maximum sentences, the statutory limits will control and the Guidelines sentence will only by applied to the extent that it conforms with statutory limitations.

lines' impact. Therefore, bargaining about sentencing guidelines can also enhance the parties' abilities to make accurate predictions about the sentence most likely to be imposed.

So, how does pre-charge bargaining happen? What is the procedure? The answers vary from case to case. Federal pre-charge bargaining is an entirely extra-judicial and unregulated process.[180] Some pre-charge bargaining occurs between prosecutors and unrepresented defendants because the execution of a search warrant or the "word on the street" suggests to the defendant that law enforcement wants to talk to him. In white-collar cases, some pre-charge bargaining is initiated by attorneys.[181] However, unsophisticated attorneys may be unaware of the procedural intricacies of the federal system and may, therefore, not understand the import and the urgency of pre-charge bargaining and cooperation.

When experienced federal criminal defense practitioners are involved, pre-charge negotiations reflect an awareness of the defendant's rights and calculated decisions about whether and how to waive those rights. The negotiations thus occur on a somewhat level playing field: each side is represented by a skilled and trained professional who recognizes and addresses the risks and rewards that this process entails.[182] These pre-charge negotiations may include complex defense presentations to prosecutors, at which defense attorneys argue for lesser charges or no charges at all.[183] Defense attorneys present evidence that might otherwise be unobtainable by the prosecution; they proffer facts about the case or offer statements by the defendant who might otherwise have claimed Fifth Amendment protection against self-incrimination. Moreover, defense counsel do so under standard "proffer" agreements that limit the government's future use of any statement a defendant makes during a negotiation session.[184] Negotiations can

---

[180] Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FDMLR 2117, 2118 (1998).

[181] "Sophisticated defense counsel know that their opportunity to argue innocence or their opportunity to argue leniency" arises in these informal pre-charge negotiations. Daniel C. Richman, *Panel Discussion: The Expanding Prosecutorial Role From Trial Counsel to Investigator and Administrator*, 26 FORDHAM URB. L.J. 679, 684 (1999). Judge Lynch suggests that many defense attorneys are ignorant of these procedures because the "education and training of lawyers is not about this phantom accusatory system in which everybody is going to go to trial, and everything important happens in court." *Id.* at 696; *accord* Cacheris, *supra* note 175, at 99.

[182] However, as will be explained *infra* Part III.C, if defense counsel fails to adequately protect her client, the client has no recourse.

[183] Cacheris, *supra* note 175, at 107.

[184] Proffer agreements, often called "Queen-for-a-Day" agreements, grant a type of "use" immunity to statements made during the proffer. However, prosecutors generally write the agreements in a manner that permits them to use the proffered statements to pursue investigative leads, to impeach the suspect (should he later testify), and/or to enhance the sentencing guidelines range at the conclusion of the suspect's criminal prosecution. These agreements may be short-lived agreements or may be part of an overall plea agreement. For a discussion of these agreements, see Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 42 (1992).

also address the production of documents, the timing or limitation of subpoena compliance, restitution, or cooperation in the prosecution of others.

However, when uncounselled individuals negotiate with prosecutors or when inexperienced attorneys get involved, the situation is entirely different. Once an uncounselled, targeted individual meets with prosecutors or law enforcement, his fate will depend entirely upon the integrity of his adversary. An individual who does not understand the complexities of the federal sentencing system may not know for what benefit he should bargain. A defendant is unlikely to know enough to ask for proffer protections. If he does receive a proffer agreement, it is unlikely that he will understand its complexities. If pre-charge bargaining fails, the defendant may well have sealed his fate at trial by providing statements and evidence that will guarantee his conviction.[185] And the defendant's admissions of criminal conduct will be used to increase his guidelines calculation.[186] Defendants who negotiate directly with the prosecution rarely understand the risks they face: statements and evidence that they provide in the course of negotiations frequently become the weapons the prosecution uses to convict them after negotiations turn sour.

Pre-charge bargaining in the federal system has an extra dimension that adds to its importance in determining outcomes: cooperation with law enforcement. As noted earlier, the provision of "substantial assistance" is often the only way for a defendant to reduce his sentence below both guidelines ranges and mandatory sentences.[187] However, the requirement that a defendant provide substantial assistance means that a defendant's information must be useful. A defendant who cooperates with authorities after all of his coconspirators have already cooperated or pled guilty does not provide substantial assistance, regardless of his candor in confessing and naming names.[188] As a result, many defense attorneys advise their clients to provide substantial assistance before formal adversary proceedings have begun so that they can win the race to the courthouse door.[189]

An agreement to cooperate requires delicate negotiations. The process moves forward through a series of "auditions" that test the likelihood of the defendant's successful performance.[190] Successful cooperation generally

---

[185] A defendant may effectively be bound to the version of events he provides. Cacheris, *supra* note 175, at 102.

[186] U.S. SENTENCING GUIDELINES MANUAL § 1B1.8 (2002).

[187] Sentence reductions can occur at the sentence, pursuant to § 5K1.1 of the Guidelines. Alternatively, the Court can resentence a defendant pursuant to Fed. R. Crim. P. 35. *See also* 18 U.S.C. § 3551.

[188] U.S. SENTENCING GUIDELINES MANUAL § 5K1.1, cmt. background (2002).

[189] Cooperation negotiations can begin in a variety of ways. A defendant can contact the government, directly offering information in exchange for charging and sentencing benefits. Some soon-to-be defendants reach out in response to government signals that they may soon be arrested. Other defendants seek such self-help measures following their convictions.

[190] First, the prosecutor will set up a proffer meeting. The purpose of this meeting is to determine whether a cooperation agreement seems likely. A standard Queen-for-a-Day agreement offers the defendant limited

requires the defendant to "provide truthful, complete and accurate information" to the government.[191] In exchange, the government agrees to file a motion asking the district court to reduce the defendant's sentence so long as the defendant provides substantial assistance.[192] It is a standard feature of these cooperation agreements that the government's "determination of whether the defendant has cooperated fully and provided substantial assistance, and [its] assessment of the value, truthfulness, completeness and accuracy of the cooperation" is binding upon the defendant.[193]

Moreover, cooperation and full disclosure carry sentencing risks, risks that may be hidden from the unrepresented individual. For example, because guidelines sentences are based upon "relevant conduct," a candid admission by a cooperator may form the basis for a severe sentencing enhancement.[194] In negotiated cooperation, many defense attorneys obtain for their clients a cooperation agreement that limits the ways in which the government can use information volunteered by the defendant as part of his cooperation.[195] Absent such an agreement, sentence-enhancing information provided by a defendant can and will be used to calculate his guidelines range.[196] With or without counsel, despite their strong motivation to reduce their sentences, cooperating defendants struggle to give candid responses to government questioning. The risks inherent in any cooperation debriefing are exacerbated when a defendant is unprepared for the proffer and lacks experienced counsel to assist him. The government's questions may confuse a cooperator who may be too nervous or too unsophisticated to understand what information the government is seeking.[197] Intimidated by the interview process, a cooperator may not always focus on his best interests; after all, the uncounselled defendant knows only that the government, which arrested him (or has threatened to do so), is now asking him to answer incriminating questions. The cooperating defendant has a complex and confusing relationship with prosecutors and law enforcement.[198] On the one hand, the government seems to be offering him a place, of sorts, on the government team. On the other hand, the defendant and the government

---

protection against the use of his statements at trial. If the proffer suggests that further negotiations are warranted, the prosecutor generally prepares a draft of a proposed cooperation agreement.

[191] United States v. Ming He, 94 F.3d 782, 786 (2d Cir. 1996).

[192] *Id.*

[193] *Id.*

[194] PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES, *supra* note 160, at 7–15, 7–17.

[195] *Id.* at 7–17 (citing to U.S. SENTENCING GUIDELINES MANUAL §1B1.8). Statements made to the government without the protection of a cooperation agreement will be used to enhance a defendant's guidelines range. *Id.*

[196] *Id.* (citing to U.S. SENTENCING GUIDELINES MANUAL §1B1.8(b)(5)); *see also, e.g.*, United States v. Cruz, 156 F.3d 366 (2d Cir. 1998) (relying on proffer to increase guidelines sentence when defendant proffered information to government but ultimately did not enter into cooperation agreement).

[197] *Ming He*, 94 F.3d at 790.

[198] *Id.*

have fundamentally adverse interests and, if negotiations break down, the government can withdraw its promised help and protection. In that event, litigation about those failed negotiations will pit the unrepresented defendant against the full weight of the government: it will be his word against the word of prosecutors and law enforcement.[199]

Under the critical stage doctrine, the right to counsel attaches only "at or after the initiation of judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Therefore, by definition, pre-charge bargaining occurs prior to the time when the right to counsel attaches under the *Kirby* rule. However, the modern machinery of criminal prosecution is so finely developed that it is often "a mere formality" that the government has yet to indict a defendant.[200] Pre-indictment negotiations are increasingly common;[201] yet, the rigid critical stage doctrine means that there is a blanket rule that no right to counsel inheres in these proceedings no matter how concretely adversary they really are.

In order to illustrate the problem, this Article examines the reported decision of the Sixth Circuit in *Moody v. United States*.[202] As will be shown below, this type of bright-line critical stage doctrine cannot guarantee fair process or fair results. Pre-charge bargaining is an important aspect of effective advocacy. When the government has committed itself to prosecuting an individual and its failure to file formal charges is a mere formality, a defendant should have the right to the assistance of counsel.

---

[199] *Id.*

[200] *See, e.g.*, United States v. Moody, 206 F.3d 609, 615 (6th Cir. 2000). There are other pre-indictment procedures one might use to demonstrate how the bright-line *Kirby* rule fails to honor the Sixth Amendment's promise. The issue also arises in other types of pre-charge investigations. *See* United States v. Lin Lyn Trading, Ltd., 149 F.3d 1112 (10th Cir. 1998) (no Sixth Amendment violation where, prior to indictment, investigating agents seized confidential attorney-client privileged documents); United States v. Sutton, 801 F.2d 1346 (D.C. Cir. 1986) (no Sixth Amendment violation when, prior to indictment, government tape recorded conversations of suspect who had retained counsel in connection with government investigation); United States v. Watson, 871 F. Supp. 988 (N.D. Ill. 1994) (government conditions cooperation agreement upon uncounselled cooperator's agreement to waive assistance of counsel); Sabatier v. Dabrowski, 586 F.2d 866 (1st Cir. 1978) (no right to counsel at extradition proceedings); McDonald v. Burrows, 731 F.2d 294 (5th Cir. 1984) (same); Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980) (same); Dunkin v. Lamb, 500 F.Supp. 184 (D. Nev. 1980) (same); Judd v. Vose, 813 F.2d 494 (1st Cir. 1987) (reasoning that Sixth Amendment right to counsel does not attach while extradited defendant is en route to extraditing state unless state has formally charged him); United States v. Mandujano, 425 U.S. 564 (1976) (no Sixth Amendment right to counsel during grand jury proceedings because formal charges had not yet been filed). For a discussion of the right to counsel following the removal of cases from tribal courts, see United States v. Percy, 250 F.3d 720, 726 (9th Cir. 2001) (suggesting no Sixth Amendment violation when federal agents interview an uncounselled defendant after his tribal court arraignment on charges "inextricably intertwined" with those being investigated by the federal agents).

[201] *Moody*, 206 F.3d at 611.

[202] *Id.* at 615.

2. Moody's Blues.—Mark Moody was a cocaine dealer.[203] While investigating a large cocaine conspiracy, the FBI obtained and executed search warrants for Moody's home and his business.[204] When the FBI executes a search warrant, any intelligent individual understands that an arrest is more than likely; Moody was no exception. After the FBI searched his home and business, Moody read the writing on the wall and went to the FBI to offer his cooperation.[205] Moody was unrepresented for almost two months while he met with FBI agents and federal prosecutors. In those meetings, Moody provided the FBI with significant information. Previously, the FBI recovered only one kilogram of cocaine linked to Moody and his coconspirators.[206] Moody provided the FBI with proof that the conspiracy dealt in more than 12 kilograms of cocaine.[207]

The prosecutor proposed a plea bargain: Moody would continue to cooperate and would testify at any trial of his coconspirators. In exchange, the government would charge Moody under a statute that carried a maximum sentence of five years (sixty months) of incarceration.[208] Moody retained counsel to advise him about the merits of the plea agreement.[209] His attorney rejected the offer without even inquiring about the evidence that Moody had provided to the FBI.[210]

Thereafter, the government indicted Moody and charged him with conspiracy to distribute cocaine under 21 U.S.C. § 846.[211] As a result, Moody faced a mandatory minimum sentence of ten years (120 months) and a guidelines sentence that would reflect the government's evidence that Moody's relevant conduct included eighteen kilograms of cocaine.[212]

---

[203] *Id.* at 611.

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.* at 611 n.1.

[208] This proposed plea agreement is an excellent example of how charge bargaining can cap a defendant's sentence exposure, thereby blunting the consequences of the sentencing guidelines. When the prosecution made this offer, Moody's sentencing guidelines exposure was well over 120 months of incarceration. (Absent any adjustment for criminal history, role in the offense or offense enhancement, the base offense level for twelve kilograms of cocaine begins at 121-151 months.) The most applicable statutes of conviction would have been 21 U.S.C. § 846 or § 841, each carries a minimum sentence of 120 months and a maximum sentence of life. By offering Moody a charge with a five year maximum, the prosecutor effectively removed the statutory risk and eliminated the guidelines as a serious source of sentence enhancement. The five-year statutory maximum was the key to this proposed bargain; had the prosecutor offered Moody a plea to 21 U.S.C. § 841(C), which carries a statutory minimum of zero and a maximum of twenty years (240 months), Moody would have been exposed to a guidelines sentence of up to the statutory maximum of 240 months.

[209] *Moody*, 206 F.3d at 611.

[210] *Id.*

[211] *Id.*

[212] This increased his guidelines offense level by eight points; from a level twenty-six for one kilogram of cocaine, to a level of thirty-four for eighteen kilograms of cocaine. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2002).

Moody pleaded guilty and the court found that the applicable sentencing guidelines range was 235–293 months of incarceration.[213] Based on Moody's substantial assistance, the government moved for a downward departure to a sentence of 168 months.[214] The district court departed even further and imposed a sentence of 120 months of incarceration.[215]

Not surprisingly, Moody felt that his attorney had provided him ineffective assistance. After all, by following his attorney's advice, Moody had more than quadrupled his guidelines sentencing exposure (from five years to more than twenty years) and had increased his maximum statutory sentence from five years to life. Moreover, Moody's statutory mandatory minimum sentence of ten years was twice as long as the maximum sentence he faced under the prosecution's first offer.

On collateral attack, Moody alleged that he had received ineffective assistance of counsel during his plea negotiations.[216] The district court evaluated the question of ineffective assistance under the two-part *Strickland* test: to demonstrate ineffective assistance of counsel, a defendant must prove that (1) counsel's performance fell below an objective standard of reasonableness; and (2) the deficient performance caused actual prejudice that produced an unreliable or fundamentally unfair outcome.[217] The court concluded that counsel's performance fell below an objective standard of reasonableness.[218] As to the prejudice prong, the court held, "but for [his counsel's] ineffective assistance, Moody would not have rejected the government's first offer of a plea agreement."[219] Moreover, Moody had "suffered prejudice by his subsequent exposure to a substantially higher sentence."[220] Accordingly, the district court vacated the judgment and resentenced Moody as if he had pleaded guilty under terms of the original plea offer.[221]

On appeal, the government did not argue that Moody's counsel had provided effective assistance.[222] Because counsel's prejudicial errors oc-

---

[213] *Moody*, 206 F.3d at 611.

[214] *Id.*

[215] *Id.* Although the opinion is unclear, it appears that the government motion was for a departure under § 5K1.1 of the Guidelines and not under 18 U.S.C. § 3553(e). Therefore, the district court could not impose a sentence of less than ten years. *Moody*, 206 F.3d at 612. After his sentence, Moody continued to cooperate with the prosecution and he testified at the trial of one of the drug suppliers. *Id.* The opinion is silent as to whether Moody anticipated receiving or actually did receive a subsequent departure downward pursuant to Fed. R. Crim. P. 35(b).

[216] Moody made other claims not relevant to this Article. They are discussed at *Moody*, 206 F.3d at 612.

[217] Strickland v. Washington, 466 U.S. 668, 687–88 (1984).

[218] *Moody*, 206 F.3d at 612.

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.*

curred before Moody had been formally charged, the ineffective assistance occurred before the right to counsel had attached; the government argued therefore that the ineffective assistance had no constitutional significance. Thus, Moody had no Sixth Amendment right to counsel and no remedy for the substantial prejudice caused by his lawyer's abysmal performance.

Looking at the Supreme Court's right-to-counsel jurisprudence, the Sixth Circuit felt bound to honor the Court's bright line rule that there is no right to counsel until formal adversary proceedings have begun.[223] Accordingly, the Sixth Circuit reluctantly concluded that Moody had no Sixth Amendment claim. The Sixth Circuit's opinion illustrated both the absurdity and the tragedy in applying the old critical stage analysis to the new realities of criminal procedure.

The Sixth Circuit acknowledged that there was a clear adversariness-in-fact between Moody and the prosecution: "Moody was faced with an expert prosecutorial adversary," who had clearly "commit[ed] himself to proceed with prosecution."[224] That proposed bargain was "a formalized offer" reflecting the reality of the situation: it was a "mere formality that the government had not indicted Moody."[225] Because the prosecution had engaged in "formal plea negotiations," and offered "a specific sentence . . . for a specific offense," it was clear that "the adverse positions of the government and the suspect [had] solidified."[226] The Sixth Circuit also noted the complexity of the issues confronting Moody. He was asked to consider "a plea bargain which he needed legal expertise to evaluate."[227]

Under those circumstances, the Sixth Circuit correctly observed that it was "a triumph of the letter over the spirit of the law to hold that Moody had no right to counsel . . . only because the government had not yet filed formal charges."[228] The Court's holding forced the "ponderable realization that this is an occasion when justice must of necessity yield to the rule of law . . . ."[229]

---

[223] *Id.* at 613 (referring to United States v. Gouviea, 467 U.S. 180, 193 (1984) (Stevens, J., concurring); Kirby v. Illinois, 406 U.S. 682, 688 (1972); Moran v. Burbine, 475 U.S. 412, 430 (1986)).

[224] *Moody*, 206 F.3d at 614.

[225] *Id.* at 615.

[226] *Id.* at 613.

[227] *Id.*

[228] *Id.* Because Moody's case involves plea bargaining, the results seem particularly unjust and out of step with Supreme Court jurisprudence that has long recognized a right to counsel during the plea bargaining process. *See* Hill v. Lockhart, 474 U.S. 52 (1985) (Sixth Amendment entitles defendant to right to effective assistance of counsel in plea proceedings); McMann v. Richardson, 397 U.S. 759 (1970) (suggesting that defendant has right to counsel in evaluating benefit of waiving trial and pleading guilty); Hamilton v. Alabama, 368 U.S. 52, 55 (1961) (requiring counsel to advise defendant how to "plead intelligently").

[229] *Moody*, 206 F.3d at 616.

B. *Changes in the Importance of the Presentence Investigation and the Presentence Interview*

In the guidelines sentencing system, the presentence report is central to federal criminal practice. Accordingly, the probation officer who authors the report has an enlarged role in the sentencing process. These changes have created a radical shift in the landscape of the sentencing procedure.

1. Changes in the Probation Officer's Role.—In the pre-guidelines system, the presentence report described "the defendant's character or personality . . . his or her problems or needs . . . [and] his or her relationships with people."[230] The goal of this presentation was to help "the reader understand the world in which the defendant lives."[231] The presentence report was emphatically not a prosecutorial resource for sentencing enhancements.[232] The defendant was the report's "primary source" and the Probation Department feared that a defendant's "candor and openness" might be "stifled if the report is available for prosecutorial or investigative use."[233]

As a result, the probation officer's role was advisory. The probation officer served a social work function in the courthouse, assisting the court in developing an individualized sentence that fit the offender, not the offense. The probation officer did not make any "fact finding" decisions about the crime committed. Rather, the probation officer had a limited investigative role. The probation officer did not decide whether the defendant or the government had provided an accurate account of the offense. Instead, the probation officer wrote a presentence report that contained two versions of the offense: one from the prosecution's point of view and the other from the defendant's standpoint.[234] Prior bad acts by the defendant, such as drug abuse or undiscovered criminal conduct, were reported only if they would help the court to understand a defendant's motivations or to predict a defendant's possible future behavior.[235] The probation officer's approach to the defendant was a therapeutic one in which the officer, who

---

[230] Division of Probation, Administrative Office of the U.S. Courts Pub. No. 105, The Presentence Investigation Report 1 (1978).

[231] *Id.*

[232] According to the 1978 Probation Department monograph, "[p]rosecutorial use of a presentence report is incompatible with the purpose of the report as a sentencing and correctional tool." *Id.* at 3.

[233] *Id.* Prior to mandatory guidelines, sentencing probation officers had a long history of functioning as "specialized social worker[s]." As a result, the parties to a criminal case viewed the probation officer as neutral or as an ally of the defendant seeking a more lenient rehabilitative sentence. Sharon M. Bunzel, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933, 945 (1995).

[234] Division of Probation, Administrative Office of the U.S. Courts Pub. No. 105, The Presentence Investigation Report 6 (1978); *see also* Keith A. Findley & Meredith J. Ross, Comment, *Access, Accuracy and Fairness: The Federal Presentence Investigation Report Under Julian and the Sentencing Guidelines*, 1989 WIS. L. REV. 837, 843 n.28.

[235] Division of Probation, Administrative Office of the U.S. Courts Pub. No. 105, The Presentence Investigation Report 4 (1978).

would later supervise the defendant's probation, began rehabilitative efforts.[236]

Now, under the federal sentencing guidelines, the probation officer is the "keeper" of the sentencing system[237] and the guardian of the guidelines.[238] In this system, the probation makes a preliminary ruling about the facts of the case[239] and the applicable law.[240] She does so by conducting a mandatory presentence investigation and preparing a sentencing guidelines report.[241] Her presentence report may determine the defendant's sentence.[242] It purports to describe the offense conduct and provides a corresponding guideline calculation of the base offense level, specific offense characteristics, victim-related enhancements, and criminal history. As will be discussed, *infra*, this report includes the probation officer's narrative as well as subjective conclusions and analysis that supports the officer's sentencing calculation.[243] In the event of a proposed departure, the probation officer recommends whether and to what extent the court should depart. The officer also recommends to the court where, within the applicable guidelines range, the court should sentence the defendant.

This presentence report is radically different than those prepared in the pre-guidelines era. The guidelines presentence report contains one "factual" description of the offense conduct, which is presented in a narrative form that implies that the probation officer conducted independent research.[244] In fact, probation officers rarely conduct any independent inves-

---

[236] The Probation Office anticipated that the interview itself "may have both a salutary and traumatic effect on the defendant. The crisis of the situation often brings about a reevaluation of the offender's personal situation. Thus it is an excellent time to develop a positive atmosphere for the subsequent supervisory relationship." *Id.*

[237] Marcia Chambers, *Probation Officers Sit in Judgment*, NAT'L L.J., Apr. 16, 1990, at 13.

[238] Judy Clarke, *Ruminations on Restrepo*, 2 FED. SENTENCING REP. 135 (1989).

[239] *See* Findley & Ross, *supra* note 234, at 859 (arguing that, under the guidelines system, accuracy in the presentence report has a greater importance than it did in the pre-guidelines era).

[240] Benjamin Coleman, *In Defense of Hopper: The Burden of Proof for Dramatic Increases Under the Guidelines*, 12 FED. SENTENCING REP. 225, 226 (2000) (arguing that the presentence report "becomes the centerpiece of the sentencing process[:] . . . it becomes the preliminary findings of the court").

[241] A defendant cannot waive the presentence report. FED. R. CRIM. P. 32(b); U.S. SENTENCING GUIDELINES MANUAL § 6A1.1 (2002). The Court can decline to order a presentence report but must put its reasons on the record. FED. R. CRIM. P. 32(b)(1); U.S. SENTENCING GUIDELINES MANUAL § 6A1.1 (2002).

[242] Some probation officers describe their guidelines role as that of a "punisher." Harry Joe Jaffe, *The Presentence Report, Probation Officer Accountability, and Recruitment Practices: Some Influences of Guidelines Sentencing*, 53 FED. PROBATION 12 (1989).

[243] United States v. Ming He, 94 F.3d 782, 790 (2d Cir. 1996).

[244] *See, e.g.*, Findley & Ross, *supra* note 234, at 859 (citing Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1613, 1656–58 (1980)). Information provided by the government and reported by the Probation Officer often includes damning and conclusory statements about the defendant as a "major drug dealer" or "organized crime member." *Id.* As a former federal defender and as former director of a clinic that assisted women in federal prison, I have reviewed hundreds of presentence reports. In my

tigation into the facts of the offense. Rather, the description of the offense often reflects "factual" information excerpted exclusively from the prosecutor's files.[245]

After conducting her investigation, the probation officer adds and subtracts guidelines numbers, calculating criminal history, offense adjustments, role adjustments, and enhancements based on post-arrest conduct (such as acceptance of responsibility or obstruction of justice). If the prosecution and defense have entered into guidelines stipulations or recommendation agreements, the probation officer is free to disagree and even to advocate for a different result than the one the parties jointly desire.

Careful attorneys do legal research on guidelines issues so that they can present their guidelines arguments to the probation officer *before* the officer drafts the presentence report and takes a position on the guidelines.[246] After all, "[i]t is far more difficult to dislodge a conclusion formalized by being written into a [presentence report] than it is to influence the formation of that conclusion in the first place."[247]

The probation officer must share her report with the parties within thirty-five days of the scheduled sentence.[248] The parties then have two weeks to file written objections to the report. Counsel must review the presentence report with the defendant line-by-line because facts not denied will be deemed admitted.[249] Moreover, the federal rules permit district judges to "adopt portions of the presentence report when making findings of fact under the guidelines" without holding a hearing.[250]

If a party files an objection, the probation officer can meet with the parties to discuss the objections,[251] or the officer can re-open the presen-

---

experience, the presentence report depicts the government's version of the offense as factual: "[t]his officer spoke with the assigned Assistant United States Attorney and learned that the defendant's conduct involved . . . ". In contrast, the presentence report generally reports the defendant's account of the offense conduct in more dubious terms: "[t]he defendant claims that her conduct . . . ".

[245] This was my experience and the experience of many of my former colleagues in the Southern and Eastern Districts of New York. Commentators agree that the standard probation report relies heavily, if not exclusively, upon the prosecutor's version of events. *See, e.g.*, John M. Dick, *Allowing Sentence Bargains to Fall Outside of the Guidelines Without Valid Departures: It Is Time for the Commission to Act*, 48 HASTINGS L.J. 1017, 1033 (1997). This practice is particularly unfair since prosecutors may pick and choose which parts of their files they want to reveal to the probation officer; prosecutors are under no obligation to share exculpatory material or mitigating information with the probation officer.

[246] Donald A. Purdy, Jr. & Gustavo A. Gelpi, *Federal Sentencing Advocacy: Tips for Beginning Practitioners*, 11 CRIM. JUST. 26, 29 (1997).

[247] Bowman, 12 FED. SENTENCING REP. 188.

[248] FED. R. CRIM. P. 32(b)(5)(A). Ordinarily, this disclosure will include the probation officer's sentencing recommendation. However, either the court or the local rules may prohibit disclosure of the recommendation. *Id.*

[249] *See* FED. R. CRIM. P. 32(b); Purdy & Gelpi, *supra* note 246, at 30.

[250] FED. R. CRIM. P. 32(c)(1).

[251] *Id.* 32(b)(5)(B).

tence investigation. By no later than one week before the sentencing, the probation officer must provide the parties and the court with the final presentence report.[252] If the revised report has not resolved the contested matters, the probation officer prepares an addendum that describes outstanding sentencing disputes and probation officer's factual and legal conclusions about how the dispute should be resolved.

To resolve any remaining sentencing disputes, the court can hear argument and may take testimony about disputed factual matters.[253] At the sentence, the probation officer can assume a variety of roles. For example, the officer may be a factual witness to a dispute about a statement made during the presentence interview. The officer may participate in the legal argument over the guidelines,[254] or may speak privately with the judge about factual or legal matters.[255] Some probation officers act as guidelines experts, consulting with the court at a sidebar conference that the parties cannot attend. Some probation officers team up with the prosecution; officers literally sit at the prosecutor's table.[256]

If the court resolves a sentencing dispute with a finding of fact that differs from the probation officer's conclusions, the court will amend the presentence report. Otherwise, the court adopts the presentence report as its own findings of fact. Perhaps as a result of the probation officer's transformation from a rehabilitation planner to sentence calculator, the probation officer's relationship with defense counsel has changed. Whereas the preguidelines relationship between defense counsel and probation officer was "more amicable than adversarial,"[257] now, defense attorneys are no longer willing to speak frankly with probation officers. Many defense attorneys view the probation officer as the prosecutor's ally who works "to review and then raise the guideline calculations."[258] Some defense attorneys view

---

[252] *Id.* 32(b)(5)(C).

[253] *Id.*

[254] *See* United States v. Govan, 152 F.3d 1088 (9th Cir. 1998) (probation officer responds directly to defense counsel's sentencing arguments); United States v. Montoya, 24 F.3d 1248 (10th Cir. 1994) (probation officer cites to case law in advocating guidelines position); United States v. Sifuentez, 30 F.3d 1047, 1048 (10th Cir. 1994) (court cautions against probation officer straying from "analyzing departure grounds to . . . excessive and impermissible advocacy or argument").

[255] For example, the probation officer may give a confidential sentencing recommendation to the court. The court need not share that recommendation with the defendant. FED. R. CRIM P. 32(b)(6)(A); United States v. West, 15 F.3d 119 (8th Cir. 1994) (court may keep recommendation confidential); United States v. Humphrey, 154 F.3d 668 (7th Cir. 1998) (same).

[256] *See, e.g.*, United States v. Turner, 203 F.3d 1010 (7th Cir. 2000).

[257] Presumably, the same, or worse, might be said about the relationship between the defendant and probation officer. Certainly, to the extent the guidelines system has increased "the adversarial dimension of the relationship between defense counsel and probation officers," it has also increased the adversarial relationship and dangerous consequences of interactions between defendants and probation officers. J. Vincent Romero, *The Relationship Between Defense Counsel and the Probation Officer Under the Guidelines*, 11 FED. SENTENCING REP. 312, 1 (1999).

[258] United States v. Washington, 146 F.3d 219 (4th Cir. 1998). In one case, a probation officer

the probation officer as a junior prosecutor.[259] Others view the probation officer as an advocate for the Commission and the guidelines system.[260]

2. The Critical Importance of the Presentence Interview.—In this guidelines system, the presentence interview takes on new importance. When parties appeal a sentence, the presentence report is often the most important evidence of how and why a court erred. Before the guidelines, the parties rarely, if ever, included the presentence report in the appellate record;[261] now, by law, the presentence report is a mandatory part of the record on appeal.[262] Prior to the guidelines system, defense attorneys rarely concerned themselves with the outcome of the presentence interview. Now, the probation officer's interview of the defendant can have real and quantifiable sentencing consequences.[263] Some federal judges even alert defendants at the end of a plea allocution about the probation officer's interview, warning that "anything [you] say to the probation officer can be used against [you] at sentencing."[264]

---

caused law enforcement to create a new laboratory report in an effort. STITH & CABRANES, *supra* note 3, at 1260 (citing Jan Piotrowski, *The Enhanced Role of the Probation Officer in the Sentencing Process*, 4 FED. SENTENCING REP. 1996–97 (1991)); *see also* Felicia Sarner, *"Fact Bargaining" Under the Sentencing Guidelines: The Role of the Probation Department*, 8 FED. SENTENCING REP. 328 (1996).

[259] The positions of the Probation Officer's Advisory Group ("POAG") to the U.S. Sentencing Commission certainly reflect advocacy positions that a prosecutor's group might also take. For example, a recent POAG position paper urged the Commission to limit defense counsel's ability to vacate prior sentences that might otherwise be used to enhance a defendant's sentence. The group characterizes this legitimate defense advocacy as a "manipulation" of the federal sentence. Meeting Minutes, Probation Officers Advisory Group to the United States Sentencing Commission, 3 (July 26–27, 2001), *at* http://www.ussc.gov/POAG/min6_26_01.PDF.

[260] Indeed, even when defendants and prosecutors take a unified position about guidelines calculations (for example, with plea bargains that include guidelines stipulations), probation officers may oppose the negotiated agreement, advocating instead what the officer believes to be a correct guidelines outcome. Those who suggest that the probation officer does not advocate for the Commission need look only at the Probation Officer's Advisory Group which was formed to "assist the Commission in carrying out its statutory responsibilities . . . and to represent U.S. Probation Officers (USPOs) in the area of sentencing." United States Probation Officers Advisory Group to the United States Sentencing Commission, Charter, *at* http://www.ussc.gov/POAG/charter.html.

[261] Findley & Ross, *supra* note 234, 846 n.37 (citing U.S. Court of Appeals for the Fourth Circuit, Notice to Counsel in Criminal Appeals Raising Issues Related to the Legality of a Criminal Sentence (Dec. 3, 1987); U.S. Court of Appeals for the Ninth Circuit, Notice to Counsel for Appellants in Criminal Cases (Mar. 1, 1988)).

[262] 18 U.S.C. § 3742(d)(2) (2000). There has also been a corresponding increase in the numbers of appeals that address sentencing issues. In 1988, one year after the guidelines' effective date, there were only 225 federal appeals that challenged the defendant's sentence. In 2000, sixty-one percent of appeals filed in the federal courts raised at least one sentencing issue. U.S. Sentencing Comm'n, 2000 Sourcebook of Federal Sentencing Statistics, *at* http://www.ussc.gov/ANNRPT/2000/table55.pdf.

[263] PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES, *supra* note 160, at 7–28.

[264] STITH & CABRANES, *supra* note 3, at 1262. The Federal Rules Committee recently recognized the importance of representation at the presentence interview by requiring probation officers to give defense counsel "adequate notice" of the time and place of the presentence interview. While this change underscores the general recognition of the important role counsel can play in the presentence investiga-

Although the Guidelines Manual encourages cooperation and candor, a defendant's cooperation and candor with the probation officer can have mixed results. For example, if a defendant cooperates in the interview, the probation officer may form a more favorable impression of the defendant. Frank admissions about past misconduct, criminal history, drug use, and participation in the crime may tip the scale in the defendant's favor when the probation officer has to make judgment calls about guidelines calculations and sentencing recommendations.[265] Yet, those same admissions may result in increases in the defendant's guidelines calculation.[266]

Attorneys experienced in federal criminal practice appreciate the dangers of this new presentence interview. They prepare for the presentence interview in much the same way as they would prepare for legal argument before the court.[267] Because the probation officer will question the defendant about his personal history, criminal history, drug use, and the offense conduct, responsible defense counsel prepare a client for the interview in much the same way as they would prepare a client to testify at trial.[268] The client must be able to give the interviewer "an accurate version of facts" but must be taught to avoid revealing "relevant conduct or past criminal conduct" that may increase the guidelines calculation.[269] With unsophisticated or awkward clients, counsel may need to submit a written statement of the offense instead of letting the client answer the probation officer's questions.[270] A review of the completed presentence report may demonstrate that the probation officer relied upon the defendant's statements at the presentence interview to increase the guidelines calculation. When the defense contests the probation officer's conclusions, the issue becomes a fight over who said what at the presentence interview. Of course, only one party's statements are generally at issue: the defendant's. In disputes over what

---

tion, the rule misses the mark. Counsel's opportunity to attend is extended as a courtesy, not as a right. Moreover, the rule offers the attorney a choice about whether she will attend the interview. The rule does not permit the defendant to decide whether he wants his attorney to attend.

[265] HUTCHINSON ET AL., *supra* note 144, at 1515.

[266] *Id.*

[267] Purdy & Gelpi, *supra* note 246, at 29.

[268] *Id.* The interview itself is so fraught with risks that some expert defense attorneys advise against permitting the probation officer to interview the defendant at all. *Id.*; *accord*, HUTCHINSON ET AL., *supra* note 144, at 1515 ("[D]efense counsel must evaluate whether it is in the defendant's best interest to cooperate with the probation officer."). Some defense attorneys permit the interview, but condition the interview itself on the probation officer's explicit agreement not to ask about certain topics. AN INTRODUCTION TO FEDERAL GUIDELINE SENTENCING 16 (5th ed. 2001). When I practiced in the Eastern District of New York, we had an agreement with the Probation Department that, in drug courier cases, the interview could be conducted without defense counsel. In exchange, the Probation Department promised not to ask the defendant about the offense, his criminal history, or any past history of drug abuse. In addition, the Probation Department agreed to recommend downward adjustments for the defendant's acceptance of responsibility and minimal role in the offense.

[269] Purdy & Gelpi, *supra* note 246, at 29–30.

[270] *Id.* While it has "always been good practice for the defense to have a written statement regarding the offense," in a guidelines era "this defense practice is now an absolute necessity." *Id.* at 29–31.

the defendant said at the interview, judges may be predisposed to credit the testimony of the officer who is a repeated institutional player and an "arm of the court" over the testimony of a defendant.[271] If an attorney is not there to witness the confrontation, the outcome of such a hearing is a foregone conclusion.

A defendant need not expose himself to the risks of providing information that will increase his guidelines range; he retains his Fifth Amendment privilege against self-incrimination during the presentence procedure.[272] However, despite the many risks of a presentence interview, a defendant may be ill-served by a decision not to answer the probation officer's questions. A practitioner's guide explains: "the presentence interview holds many perils" but "refusal to submit to an unrestricted presentence interview" can "jeopardize the adjustment for acceptance of responsibility or adversely affect other incidents of the sentence."[273] In the face of this Hobson's choice, experts can only suggest that "counsel make an informed decision as to the best course in the context of the particular case."[274] The bottom line is this: the presentence interview of the defendant has powerful and tangible consequences for the defendant's sentencing guidelines calculation, and the probation officer's subjective opinion of the defendant's statements and demeanor has a measurable and often irrevocable impact upon the sentencing outcome.[275]

---

[271] For example, in *United States v. Cortes*, the guidelines required the district court to determine whether defendant had admitted that he knew certain funds were drug proceeds. 922 F.2d 123, 128 (2d Cir. 1990). Because defense counsel was not present at the presentence interview, the court heard testimony from the probation officer and defendant about what defendant said at the interview. Unsurprisingly, the court credited the probation officer's testimony and increased the defendant's guidelines level by two points. This deference to the probation officer reflects the view of some judges that the probation officers are the "court family." Certainly they are privileged family members who can and do have ex parte communications with the court. Coleman, *supra* note 240, at 226; *see also* United States v. Johnson, 935 F.2d 47, 50 (4th Cir. 1991); United States v. Humphrey, 154 F.3d 668 (7th Cir. 1998); United States v. Sifuentez, 30 F.3d 1047 (9th Cir. 1994); United States v. Belgard, 894 F.2d 1092 (9th Cir. 1990).

[272] Mitchell v. United States, 526 U.S. 314, 319 (1999) (holding that in federal sentencing system a plea of guilty is not a waiver of right to assert Fifth Amendment privilege against self-incrimination in connection with sentencing hearings and a defendant's refusal to testify at a sentencing hearing does not entitle the court to draw an adverse inference in making guidelines fact-finding). It is unclear whether and to what extent *Mitchell* would prevent a court from concluding that a defendant's silence at the presentence interview precludes a guidelines adjustment for acceptance of responsibility.

[273] AN INTRODUCTION TO FEDERAL GUIDELINE SENTENCING, *supra* note 268, at 17. Some district courts have acknowledged that the advice counsel gives in concerning the presentence interview may constitute ineffective assistance of counsel. *See, e.g.*, United States v. Sarno, No. 97C2733, 1998 WL 547302 (N.D. Ill. Aug. 27, 1998); United States v. Daily, 970 F. Supp. 628 (N.D. Ill. 1997); D'Amico v. United States, Nos. 94 Civ. 3825, 7S 88 Cr. 919, 1995 WL 234651 (S.D.N.Y. Apr. 21, 1995) (assuming that trial counsel's advice about handling presentence interview could constitute ineffective assistance of counsel).

[274] AN INTRODUCTION TO FEDERAL GUIDELINE SENTENCING, *supra* note 268, at 17.

[275] Probation officers readily concede that an officer's "subjective determination" about a defendant's presentence interview performance may determine whether a defendant receives a downward ad-

3. The Need for Counsel at the Presentence Interview.—In connection with guidelines calculations based on offender conduct, a defendant's "casual, ill-considered or inaccurate answers, offered [at the presentence interview] without a full understanding of the potential consequences, may result in a substantial increase in the recommended period of incarceration."[276] Yet, if defense counsel fails to show up for the presentence interview and, as a consequence, the defendant blurts out information that increases his sentence, the defendant has no claim that the statements were taken in violation of his right to counsel.

Commentators insist that it is "critical" that counsel accompany her client to the presentence interview, particularly in cases that involve disputes over guidelines adjustments or enhancement.[277] Counsel should have a clear advocacy agenda for the presentence interview.[278] At the interview itself, counsel should "protect [the] client from the negative impact of his or her own admissions or dissembling."[279]

Reported cases demonstrate the measurable consequences of conduct at the probation interview. In *United States v. Dingle*, the preliminary presentence report indicated that the total amount of cocaine involved was approximately nine and a half kilograms.[280] Later, the defendant Earl Scott met with the probation officer for a presentence interview; his attorney did not attend.

At the interview, Scott admitted to five years of weekly drugs sales of between one and two kilograms of cocaine.[281] Based on Scott's statements, the probation officer revised the report and held Scott responsible for fifty kilograms of cocaine, more than five times the amount contemplated by the preliminary report.[282] Measured in guidelines terms, the interview caused a four point increase in Scott's base offense level, and a correspondingly substantial increase in the recommended range of incarceration.[283]

---

justment for the acceptance of responsibility. Meeting Minutes, *supra* note 259, at 1. Under these circumstances, it is difficult to imagine how a defense attorney who does not attend the interview could construct a meaningful cross-examination and undermine the officer's description of the defendant's statements and demeanor that led to the conclusion that the defendant was not entitled to the adjustment.

[276] United States v. Herrera-Figueroa, 918 F.2d 1430, 1433 (9th Cir. 1990).

[277] PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES, *supra* note 160, at 7–28 ("It is imperative . . . that defense counsel accompany the client to the presentence interview."); *accord* Purdy & Gelpi, *supra* note 246, at 29; AN INTRODUCTION TO FEDERAL GUIDELINE SENTENCING, *supra* note 268, at 16. "Because the presentence interview holds many perils . . . defense counsel should attend the interview." *Id.*; *see also* United States v. Davis, 919 F.2d 1181, 1186 (6th Cir. 1990) (speculating on defense counsel's failure to attend the presentence interview, the court said "[i]f this had been a civil case, one wonders whether the lawyer would let his client be deposed without counsel being present").

[278] *See, e.g.*, Purdy & Gelpi, *supra* note 246, at 29–30.

[279] *Id.* at 29.

[280] United States v. Dingle, Nos. 90-5083, 90-5084, 1991 WL 217017 (4th Cir. Oct. 28, 1991).

[281] *Id.* at *3.

[282] *Id.*

[283] *Id.*

Had Scott's attorney properly considered the possible consequences of the presentence interview, he would have advised Scott not to answer questions about his conduct. Scott could still have answered questions about such matters as his personal history, family background, and medical history. Or, counsel could have advised Scott not to attend the interview at all.[284] Instead, Scott's attorney failed to provide any meaningful assistance in connection with the interview.

Similarly, in *United States v. Gordon*,[285] the defendant pled guilty to drug offenses. Gordon's counsel did not attend the presentence interview. At the interview, the probation officer questioned Gordon about his role in the drug dealing; Gordon allegedly attempted to minimize his role in the transactions.[286] As a result, the probation officer recommended that the court not award Gordon the two-point downward adjustment for acceptance of responsibility.[287]

The facts are fairly obvious: counsel's failure to attend the presentence interview resulted in admissions that increased the defendant's sentence. The holdings are equally clear: there is no right to counsel at the presentence interview. What is perplexing is the obvious disconnect between the rhetoric of Sixth Amendment rights and the application of those rights to the presentence interview. None of the Courts of Appeals that have examined this issue have reached beyond the bright-line analysis.[288] Instead, the Courts of Appeals have engaged in a perfunctory inquiry: is the probation officer the defendant's adversary? The perfunctory answer? The probation officer serves the court and thus she is not the defendant's adversary. These courts wrongly end their inquiry here, rather than considering the extent to which the probation officer influences sentencing outcomes. Accordingly, they erroneously hold that defendants are not entitled to the assistance of counsel at the presentence interview.

Nevertheless, some courts are sympathetic to the problems created when the bright-line right-to-counsel rule is applied to the presentence interview. While refusing to extend the constitutional right to counsel, the First Circuit acknowledges how important counsel's presence can be but as-

---

[284] The interview added four points to Scott's guidelines calculations; under the then-existing version of the Guidelines, the most Scott had to gain from the presentence interview was a recommendation that his guidelines range be reduced by two points for the acceptance of responsibility. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (1991). The district court could have awarded Scott that two-point sentence reduction simply on the basis of his guilty plea or on the basis of an admission that did not specify the quantities involved in his prior drug transactions. There was simply no reason for Scott to have provided the relevant conduct information to the probation officer.

[285] United States v. Gordon, 4 F.3d 1567 (10th Cir. 1993).

[286] *Id.* at 1571.

[287] U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2002).

[288] Some courts have reserved ruling on the issue. *See, e.g.*, United States v. Cortes, 922 F.2d 123 (2d Cir. 1990); United States v. Rogers, 921 F.2d 975 (10th Cir. 1990); United States v. Simpson, 904 F.2d 607 (11th Cir. 1990).

sumes that "because the probation department's policy is to allow defense counsel to attend presentence interviews," the issue of ineffective assistance for failure to attend the interview is unlikely to occur.[289] The First Circuit's optimism is unwarranted. So long as defense counsel's attendance at the interview is a rule-based courtesy, conditioned on counsel's "timely request," some defense counsel will make untimely requests and others will choose not to attend. Moreover, extending the courtesy to counsel does nothing to extend a right or even a voice to the truly interested party, the defendant. A rule-based decision to "allow" defense counsel to attend the interview is not the same as acknowledging a constitutional right to counsel.

Under these circumstances, logic dictates that the right to counsel should exist at the presentence interview. As the Second Circuit noted, albeit in the context of a proffer session, a defendant may need the assistance of counsel, either to properly understand the questions posed or to maintain the courage and confidence necessary to give truthful answers to difficult questions.[290] From a defendant's perspective, the presentence interview is a similarly difficult procedure and one that also requires the "guiding hand of counsel." Denying defendants the assistance of counsel at the presentence interview is contrary to the fundamental values driving the Sixth Amendment right to counsel. For Sixth Amendment purposes, it matters not whether an individual probation officer acts as an advocate for the prosecutor or the Commission, or even whether the officer advocates for the defendant. As will be seen in Part IV.B, the substitution of meaningful Sixth Amendment inquiry for rote invocations of the critical stage doctrine demonstrates the right to counsel inheres at the presentence interview.[291]

C. Sentence Reductions Under Rule 35(b)

By its nature, sentencing has an element of finality. Absent a successful appeal of the sentence, few American jurisdictions permit a defendant to return to court in the days, weeks, or years following a sentence to declare that "things have changed; I've changed; I deserve a new sentence." In the federal system, the abolition of parole has increased the finality of the judicially imposed sentence. Prisoners sentenced under the Sentencing Reform Act will serve all of their time, less any good time reduction.

Prior to the Sentencing Reform Act, there was a limited mechanism for reducing a lawfully imposed sentence. Under the pre-1987 version of Rule 35, either party had 120 days from the imposition of a sentence to move to reduce the sentence.[292] While the rule permitted judges to make dramatic sentencing changes, even from a jail sentence to a probationary sentence, it

---

[289] United States v. Ocasio-Rivera, 991 F.2d 1, 3 n.3 (1st Cir. 1993).

[290] United States v. Ming He, 94 F.3d 782 (2d Cir. 1996).

[291] Extending the right to counsel to the presentence interview is clearly the better view." PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES, *supra* note 160, at 7–29.

[292] FED. R. CRIM. P. 35(b) (1944) (amended 1987).

was rarely used and was almost never a procedure explicitly contemplated by the parties in their plea bargaining. Rather, the old Rule 35(b) motion was a request for leniency.[293] The proceeding was intended as a "final glance backward"[294] by the district court so that the court could determine whether, in hindsight, the sentence imposed "seems unduly harsh."[295] The motion was to be decided in the discretion of the trial court[296] and the standard of review was the abuse of that discretion.[297]

In the new world of federal criminal procedure, efforts to obtain a sentence reduction occupy a prominent place. This radical change from previous practice has been accomplished by inducing defendants to help prosecute and convict other individuals. Under the new system, the revised Rule 35(b) provides for a post-judgment sentence reduction based upon one single factor: the defendant's substantial assistance to authorities in the investigation and prosecution of others. The reduction motion can be made only by the prosecutor. Under most circumstances, the motion must be filed within one year of the date of sentencing.[298]

1. Cooperation with Authorities.—There was once an era when a cooperator was scorned by cops, counsel,[299] and criminals alike as an 'in-

---

[293] United States v. DeCologero, 821 F.2d 39 (1st Cir. 1987); United States v. Hill, 826 F.2d 507, 509 (7th Cir. 1987); United States v. Ames, 743 F.2d 46, 48 (1st Cir. 1984) (per curiam); Poole v. United States, 250 F.2d 396, 399 (D.C. Cir. 1957).

[294] *DeCologero*, 821 F.2d at 41.

[295] *Ames*, 743 F.2d at 48; *accord* United States v. Distasio, 820 F.2d 20, 24 (1st Cir. 1987).

[296] Brown v. United States, 359 U.S. 41 (1959) (Warren, J., dissenting); Roth v. United States, 255 F.2d 440 (2d Cir. 1958); United States v. Brummett, 786 F.2d 720, 723 (6th Cir. 1986).

[297] The right to counsel does not extend to post-conviction proceedings and courts almost unanimously viewed these old Rule 35(b) motions as collateral: a defendant had no right to the assistance of counsel in the filing of a Rule 35(b) motion. Accordingly, even if an attorney negligently failed to timely file a viable 35(b) motion, the defendant could not claim ineffective assistance of counsel. *Hill*, 826 F.2d at 509. Hill cites *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (no right to effective assistance of counsel at post-conviction proceeding) and compares *Voytik v. United States*, 778 F.2d 1306 (8th Cir. 1985) (remedy for counsel's failure to timely file motion for sentence reduction under pre-1987 version of Fed. R. Crim. P. 35(b)) with *United States v. Nevarez-Diaz*, 648 F. Supp. 1226, 1229 (N.D. Ind. 1986) (no remedy for counsel's failure to timely file motions for sentence reduction under pre-1987 version of Fed. R. Crim P. 35(b)).

[298] Fed. R. Crim. P. 35(b) was recently revised to permit courts limited authority to grant motions for sentence reductions made more than one year after the imposition of sentence. Previously, the one year time limit was jurisdictional. United States v. McDowell, 117 F.3d 974 (7th Cir. 1997); United States v. McWilliams, 194 F.R.D. 652 (E.D. Wis. 2000). Under the old law, the sole exception to this one-year limit occurred if the "defendant's substantial assistance involve[d] information or evidence not known by the defendant until one year or more after sentence is imposed." FED. R. CRIM. P. 35(b). Now, the Rule permits a later motion if (a) "information provided by the defendant to the government within one year of sentencing . . . did not become useful" until more than one year after the sentence; or (b) the defendant could not reasonably have anticipated the usefulness of the information until more than one year after sentence; and, upon recognizing its usefulness, promptly provided it to the government. FED. R. CRIM. P. 35(b)(2)(B), (C) (2002).

[299] Even under the guidelines regime, some criminal defense attorneys refuse to represent clients who cooperate with the government. *See, e.g.*, Richman, *supra* note 166, at 69 n.1 (citing the affidavit

former,' a 'stool pigeon,' and a 'rat.' Now, cooperation with law enforcement is a routine part of criminal procedure. Substantial sentencing rewards for cooperation are imbedded into the statutory and guidelines sentencing structure. As noted above, based on successful cooperation, a prosecutor (and a prosecutor alone) may move for a sentence below the guidelines range and even below the statutory mandatory minimum.[300] While much has been written about the way modern federal criminal practice has altered the balance of power within the system, little has been said about the way cooperation has changed defense counsel's role.[301] Yet, defense attorneys play a vital role in the cooperation process,[302] and the cooperation process has expanded the type of work criminal defense attorneys do.

Rule 35 practice is often the result of both negotiations and cooperation agreements. In some Rule 35 cases, substantial assistance is a bargained-for element of the plea agreement. Sometimes, the parties contemplate that the substantial assistance motion will occur at the initial guidelines sentencing proceeding. When that happens, if the cooperation is successful, the government moves under the guidelines for a downward departure pursuant to U.S.S.G. § 5K1.1.[303] In other cases, whether by design or by happenstance, the departure motion is deferred until a date uncertain, a date that is usually within one year of the guidelines sentence.

Although the new Rule 35(b) motion is often a form of consideration explicitly bargained for in the plea agreement, courts continue to cling to the analysis employed for consideration of pre-1987 claims for ineffective assistance of counsel. Relying on the letter of the critical stage doctrine, courts have held that a motion for sentence reduction under Rule 35(b) is a collateral proceeding at which a defendant has no right to the assistance of counsel.[304]

---

filed by attorney Barry Tarlow in United States v. Lopez, 765 F. Supp. 1433 (N.D. Cal. 1991), *rev'd*, 989 F.2d 102 (9th Cir. 1993), *amended and superseded by* 4 F.3d 1455 (9th Cir. 1993)); *see also id.* at 118 n.168 (the Michael Metzger referenced throughout Richman's article is no relation to the author).

[300] 18 U.S.C. § 3553 (2000).

[301] For example, Daniel Stiller's article, *Deepening the Distrust Between Federal Defendant and Federal Defender*, 11 FED. SENTENCING REP. 304 (1999), suggests that the guidelines have fundamentally altered the relationship between public defender and indigent defendant, aggravating the "inherent distrust" the client has for counsel. He does not address the vital role counsel can and should play in the cooperation negotiation process.

[302] Richman, *supra* note 166, at 73–74.

[303] U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002).

[304] United States. v. Palomo, 80 F.3d 138 (5th Cir. 1996); United States v. Kimberlin, 898 F.2d 1262, 1265 (7th Cir. 1990); United States v. Ahern, 836 F. Supp. 492, 495 (N.D. Ill. 1993); United States v. Nevarez-Diaz, 648 F. Supp. 1226, 1230–31 (N.D. Ind. 1986); Silano v. United States, 621 F. Supp. 1103, 1105 (E.D.N.Y. 1985); United States v. Hamid, 461 A.2d 1043, 1044 (D.C. 1983). In *Co-operating Clients*, Richman suggests that the court's almost inevitable deference to the government's characterization of the defendant's cooperation marginalizes the role that defendant's counsel can play in advocating at the sentence reduction hearing. Richman, *supra* note 166, at 105. Although courts are

2. When a Sentence is Not a Sentence.—In Rule 35 cases, the harm worked by application of the critical stage doctrine to these proceedings can be divided into two types: harm to the defendant's ability to cooperate and harm to the sentencing outcome when the government files (or intends to file) a motion for sentence reduction under Rule 35(b). These harms are particularly unfair because they result solely from the timing of the substantial assistance motion and are no reflection upon the extent or success of the defendant's cooperation.[305]

At sentences in which all parties expect there to be a subsequent Rule 35(b) motion, the refusal to extend the right to post-sentence counsel is truly egregious. The uncounselled defendant is severely impaired in her ability to render substantial assistance and thereby complete her part of the bargain that she entered into with the government.[306] The impairment stems from the crucial role counsel plays in assuring that the cooperation bargain comes to fruition.

In *United States v. Ming He*, a case arising under § 5K1.1, the Second Circuit discussed counsel's role in the cooperation process.[307] The court rejected the idea that counsel's role in cooperation is "minimal because the defendant need only answer questions truthfully."[308] Instead, the court looked to the "real world" to see how counsel could assist a cooperating defendant. First, counsel can smooth her client's way; she can "translate" what may be confusing or intimidating questions and help her client stay focused during the debriefing process.[309] Second, counsel can remind her

---

instructed by the guidelines to give great weight to the government's evaluation of the defendant's assistance, Richman imagines too narrow a role for counsel. As will be set forth *infra* at Part III, counsel can play a vital role not only in the government's decision to file a motion but also in the court's decision about the extent of the departure.

[305] In the far-flung reaches of the federal court system, each district has different practices with respect to the choice of using § 5K1.1 motions or Rule 35 motions. Thus, the district of prosecution or the random allotment of a case to a particular judge may be the sole reason that a cooperation departure is raised under Rule 35(b) instead of § 5K1.1. For example, in the "rocket docket" courthouse of the Eastern District of Virginia, the judges routinely refuse to delay sentences until a defendant's cooperation is completed. As a consequence, cooperators in that district are sentenced under Rule 35(b). Daniel C. Richman, *The Challenges of Investigating Section 5K1.1 in Practice*, 11 FED. SENTENCING REP. 75 (1998). *See, e.g.*, United States v. Speed, 53 F.3d 643 (4th Cir. 1995) (explaining that parties were not entitled to a continuance of sentence pending government determination of whether defendant had provided substantial assistance).

[306] In order to protect the privacy of the individuals whose cases I have reviewed, I have presented here a single hypothetical defendant whose circumstances are a compilation of several individual cases. Documentation of the individual cases are on file in my office.

[307] In a case decided after this Article was written, but before it was published, the Ninth Circuit held that presentence cooperation is a critical stage at which a defendant is entitled to the effective assistance of counsel. United States v. Leonti, 326 F.3d 1111 (9th Cir. 2003).

[308] United States v. Ming He, 94 F.3d 782, 789 (2d Cir. 1996).

[309] *Id.* at 790. For example, I have been involved in debriefing sessions at which the prosecutor asked questions about "money laundering conspiracy." My client had an eighth grade education and spoke little English. Not surprisingly, he insisted he had never joined a conspiracy and that he knew nothing about "washing money." Had I not been there, the session might have been terminated because

client that "while he is seeking the assistance and protection of the government, that entity does not share the defendant's interests, even after the execution of a 'cooperation agreement'."[310] Where appropriate, defense counsel may "assist the defendant in clarifying his answers to ensure that they are complete and accurate."[311] As noted earlier, if a hearing becomes necessary, an attorney who attended the debriefing can serve as a witness to her client's debriefing performance.[312] Or, counsel can effectively cross-examine other witnesses to the debriefing (such as a case agent) by reconstructing for the court the events of the debriefing interview.[313] Defense counsel would thus play an important part in assisting her client in his effort to show he provided substantial assistance.[314]

A defendant cooperating prior to the imposition of sentence would clearly have a right to counsel's assistance at a proffer session or debriefing.[315] Yet, a defendant has no right to his counsel's assistance if he is forced to fulfill his part of the plea bargain through post-sentence cooperation. This patently unfair result flies in the face of the rule set down in *Mempa*:

> Whether it be called a sentence, a resentence or a post-judgment motion for sentence reduction should be irrelevant. What matters is that the proceeding carries the significant risk that the defendant will be sentenced on incomplete or erroneous information and only counsel's assistance could significantly lessen the extent of that prejudice.[316]

---

the prosecutor clearly did not believe the defendant. When I rephrased the questions and asked "who asked you to handle the money?" and "who else helped with the money?," my client was able to answer and the debriefing continued. *See also* Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 619–20 (1999).

[310] *Ming He*, 94 F.3d at 790.

[311] *Id.* Responsible defense counsel debrief their clients well in advance of any meeting with the government. Thus, they are in a position to assist a client over "rough spots" where the client has difficulty telling his story.

[312] *Id.*

[313] *Id.* (noting that this function is "analogous to the role defense counsel plays in avoiding prejudice at a lineup identification") (citing United States v. Wade, 388 U.S. 218, 236–37 (1967)).

[314] *Id.* at 782. In *Ming He*, the prosecution made a lukewarm § 5K1.1 motion. The defense argued that the prosecution had violated Ming He's right to counsel when, contrary to counsel's instructions, the government debriefed Ming He outside his counsel's presence. Although the Second Circuit declined to address the Sixth Amendment issue, it relied upon its power to "supervise the administration of justice" to hold that "cooperating witnesses are entitled to have counsel present at debriefing." *Id.* at 793. As noted in *Ming He*, had these issues played out in a Rule 35 context, Ming He would not even have had counsel available to him to make these arguments.

[315] *See, e.g.*, United States v. Leonti, 326 F.3d 1111 (9th Cir. 2003); United States v. Jones, Criminal No. 02-527, 2001 WL 127300 (E.D. La. June 10, 2003) (where cooperation is "crucial to the plea agreement . . . "it was constitutionally ineffective for [attorney] to allow the [debriefing] session to go forward without him").

[316] *See supra* Part I.B.2.

While there are no statistics documenting requests for assistance of counsel in Rule 35 proceedings, reported case law demonstrates that inmates can and do request the assistance of their appointed counsel to help facilitate or enforce written plea bargain agreements that contemplate Rule 35 motions. However, under the critical stage doctrine, a defendant is not entitled to counsel in Rule 35 because those proceedings are "post-sentence" or "collateral" proceedings.[317] These rulings underscore the absurdity of assessing the right to counsel based on the formalities associated with the proceeding. Indeed, the Supreme Court's ruling in *Mempa* seems to speak directly to the Rule 35(b) issue.[318] In *Mempa*, the Court emphatically insisted that a defendant had the right to counsel at a "deferred sentence" proceeding that arose as a consequence of the defendant's post-sentence conduct when all parties to the previous sentence understood that such future conduct would result in a resentence.[319]

In these cases, the participants may share a sense that the current sentencing procedure is, at best, a dry run and, at worst, a sham. Judges will impose a severe sentence and state, "I'm looking forward to seeing the Rule 35 motion" in your case. Under these circumstances, it is irresponsible and intellectually dishonest to assert that the Rule 35(b) sentencing hearing is a post-conviction matter. It is not. It is an integral part of the underlying plea negotiation and a continuation of the sentencing procedure, a procedure at which the defendant has an absolute right to counsel.[320]

The injustice in connection with the Rule 35(b) proceeding is clear. In the plainest instance, the injustice occurs when the government, through carelessness or inadvertence, fails to file a timely motion for sentence reduction under Rule 35(b). Most courts hold that the Rule 35(b) time limit is a jurisdictional matter and therefore a court cannot grant an untimely motion for sentence reduction.

Proving the old adage "out-of-sight, out-of-mind," prosecutors can and do forget to monitor the one-year deadline for the filing of Rule 35(b) motions.[321] Other prosecutors, for strategic reasons, delay filing the Rule

---

[317] United States v. Palomo, 80 F.3d 138 (5th Cir. 1996); United States v. Whitebird, 55 F.3d 1007 (5th Cir. 1995). Some court-appointed attorneys also adhere to the view that they have no responsibility for assisting a client who seeks a Rule 35(b) motion, even if that motion was contemplated as part of the plea bargain. They believe their representation ends when the defendant is sentenced. The author has, on file, correspondence from appointed attorneys discussing the limits of their representation of indigent defendants.

[318] Mempa v. Rhay, 389 U.S. 128, 137 (1967).

[319] *Id.*

[320] The judicial stinginess in this arena is hard to understand since the Criminal Justice Act, which establishes an appointed counsel system for the federal courts, provides for the appointment of counsel in "ancillary matters." 18 U.S.C. § 3006 (2000). Nevertheless, several courts have specifically held that 35(b) proceedings are not ancillary.

[321] The author has records on file documenting circumstances in which the Assistant United States Attorney forgot to file the § 5K1.1.

35(b), only to discover that the court will not hear the motion.[322] In cases where it seems that a prosecutor may miss the Rule 35(b) deadline, defense counsel could serve a critical function-by monitoring the prosecutor's calendar and issuing a reminder about the need for timely filing. If the deadline is approaching and the government shows no signs of filing a Rule 35(b), counsel can move to compel the government to specifically perform its part of the plea bargain.

Even if the government timely files the Rule 35(b) motion, counsel should appear at the resentence to serve as her client's advocate. The Rule 35(b) motion is, for all practical purposes, identical to a motion for departure under U.S.S.G. § 5K1.1.[323] The only real difference between the two is in their timing.[324] Accordingly, in considering a Rule 35(b) motion, the sentencing court considers the same five factors it considers when ruling on motions for downward departure under U.S.S.G. § 5K1.1: (1) the usefulness of the defendant's assistance; (2) the truthfulness, completeness, and reliability of that information; (3) the nature and extent of his assistance; (4) the impact of assistance on the defendant and his family; and (5) the timeliness of the defendant's assistance.[325] Thus, while a government motion is the sole trigger for a 35(b) motion, a government motion may not contain all the information that the court will consider when imposing a sentence.

For example, a defendant has direct, first-hand experience with the dangers he incurred through his cooperation.[326] The defendant may also have information, not available to the government, about the extent to which his cooperation influenced other individuals' decisions to plead guilty.[327] Indeed, as to each of the five factors, the defendant and the government may have different information and different views. Based on the fact that the defendant has unique and highly relevant insights to provide at a Rule 35(b) sentence, the Second Circuit has held that, when the government files a Rule 35(b) motion for sentence reduction, the defendant has a right to reply to or comment about the government's submission.[328] But this

---

[322] *See, e.g.*, United States v. Doe, 270 F.3d 413 (6th Cir. 2001) (finding that the government deliberately delayed filing Doe's Rule 35(b) motion because it thought it might need Doe as a witness at a later trial).

[323] United States v. Gangi, 45 F.3d 28, 30 (2d Cir. 1995).

[324] *Id.*; United States v. Smith, 839 F.2d 175 (3d Cir. 1988); United States v. Howard, 902 F.2d 894, 896 (11th Cir. 1990); *see also* United States v. Perez, 955 F.2d 34, 35 (10th Cir. 1992); United States v. Doe, 940 F.2d 199, 203 n.7 (7th Cir. 1991).

[325] *Gangi*, 45 F.3d at 31.

[326] *Id.*

[327] For example, the government may argue that since all targeted coconspirators pled guilty, the defendant's substantial assistance was limited. The defendant may know through friends, family, or associates that it was the threat of his testimony that convinced the coconspirators to plead guilty.

[328] *Gangi*, 45 F.3d at 31.

limited right only begs the Sixth Amendment question. The right to be heard is "of little avail without the corresponding right to counsel."[329]

Of course, if the prosecution makes a motion for departure under § 5K1.1, the defendant has a constitutional right to counsel.[330] When the prosecution files a sentence reduction motion under U.S.S.G. § 5K1.1, defense counsel receives a copy of the prosecution's motion. If the prosecution's motion fails to accurately describe the defendant's cooperation, defense counsel will file her own submission, adding details that the prosecution may have overlooked and providing information relevant to the departure but likely to be known only to defense counsel.[331] Defense counsel can submit her own account of the cooperation. She can describe the extent of the risk to which her client was exposed,[332] she can contest the government's account of her client's efforts,[333] she can even present evidence or call witnesses to testify about the impact of her client's cooperation.[334] Counsel can make oral argument to the court, she can answer the court's questions, she can rebut the government's contentions, and she can urge the court to grant a departure that is even greater than that requested by the government. When necessary, counsel can also move to compel the government to honor its promise to file the departure motion.[335]

Yet, when the government moves for a sentence reduction under Rule 35(b), the rigid critical stage doctrine classifies the proceeding as a "collateral" motion and the right to counsel never applies to collateral proceedings. The illogic is stunning. Sentences with sentence reduction motions, and Rule 35(b) resentences are, in essence, identical proceedings, where courts

---

[329] Johnson v. Zerbst, 304 U.S. 462 (1938).

[330] Mempa v. Rhay, 389 U.S. 128, 135 (1967).

[331] *Gangi*, 45 F.3d at 31.

[332] U.S. SENTENCING GUIDELINES MANUAL § 5K1. A defendant who cooperates from inside the prison system faces serious safety risks. In jailhouse parlance: "snitches get stitches." *See, e.g.*, United States v. Roberts, 726 F. Supp. 1359, 1376 n.76 (D.D.C. 1989) ("Whenever a defendant cooperates with law enforcement by identifying confederates, his safety in the correction system and elsewhere is in serious jeopardy."), *rev'd on other grounds sub nom* United States v. Mills, 925 F.2d 455 (D.C. Cir. 1991).

[333] *See, e.g.*, United States v. Ming He, 94 F.3d 782, 790 (2d Cir. 1996).

> [D]efense counsel can serve as a potential witness at sentencing to the fact that her client fully performed the promise that he made to the government. This reconstruction of the debriefing interview at sentencing—were the district court to hold an evidentiary hearing—is analogous to the role defense counsel plays in avoiding prejudice at a lineup identification.

Id. The right to counsel implications of this role are discussed *infra* Part IV.

[334] In assisting a woman seeking a Rule 35 sentence reduction, I obtained from the attorney of a convicted co-conspirator a letter verifying that the cooperator's willingness to testify was a direct cause of the co-conspirator's decision to plead guilty.

[335] Richman, *supra* note 166, at 90. Richman describes the critical role defense counsel plays "as a monitor, even a guarantor, of the government's performance." *Id.* at 91. Richman posits that, as a repeat player in the "snitch marketplace," defense attorneys can bring into use market pressures and "information pooling" to insure that prosecutors have an incentive to honor their bargains. *Id.* at 74. By what mechanism can the unrepresented defendant do the same?

consider the same factors in assessing sentences. However, the timing of the proceeding now dictates whether a defendant has a right to counsel.

IV. A PROPOSAL FOR CHANGE

Having identified the inadequacies of the critical stage doctrine, the question remains: what is to be done about the problem? After all, the lesson learned from cases like *Betts* seems to be that case-by-case analyses of the right to counsel do not work. They are inefficient, unpredictable, and burdensome to trial and appellate courts. However, the current rule fails to satisfy the ends for which it was intended. This Article proposes that, lest we throw the baby out with the bath water, we retain the conclusions that the bright-line test has established: the right to counsel *always* inheres in the period between the filing of formal charges and the imposition of sentence. Thus, courts need not conduct any new analysis about the right to counsel at these traditionally 'critical' stages. However, when considering the right to counsel at the margins of the critical stage doctrine, courts should ignore the critical stage doctrine and instead should analyze whether the stage is one at which the Sixth Amendment right to counsel applies.[336]

The modern machinery of criminal justice presents unique threats to the constitutional promise of fair play in criminal prosecutions. Once again the time has come for Sixth Amendment jurisprudence to evolve to meet a new challenge. That challenge is best met by evaluating right-to-counsel questions with reference to factual indicia that demonstrate the need for counsel. These indicia can be culled from the Supreme Court's Sixth Amendment cases and can be deemed the hallmarks of a case that requires the "guiding hand of counsel" to insure a fair process. The indicia a court should consider are: (1) adversariness-in-fact between the individual and the prosecution ("adversariness-in-fact"); (2) complexity in the procedural stage in question ("complexity"); and (3) potential prejudice to the individual, which prejudice can be countered by providing counsel ("prejudice/benefit").

Each of these indicia is discussed briefly below.

* * *

Adversariness-in-Fact

This factor assesses whether the government and the individual are clearly adversaries, *i.e.*, whether the potential for an adversary relationship has solidified. Thus, this factor reflects the fundamental premise that counsel lends meaning to the adversary process by guaranteeing some approximate equality of adversaries. This factor weighs in favor of the right to

---

[336] For a discussion of possible 'firm' attachment points for the Sixth Amendment right to counsel, see Joseph Grano, Rhode Island v. Innis*: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1 (1979).

counsel whenever there is particularized adversariness between the government and an individual, such that the absence of counsel will give the government an unfair advantage or will determine the outcome of the proceeding. This assessment of adversariness-in-fact, rather than formal adversariness, recognizes that the government may well commit itself to prosecuting but delay filing a formal charge. It addresses the Sixth Amendment's focus on criminal "prosecutions" without devolving into formulaic restrictions about what types of proceedings mark the beginning of a prosecution. With its requirement of particularized adversariness between the government and one individual, this factor also recognizes that not every investigation is itself the initiation of a criminal prosecution.

In weighing this factor, a court should ask: has the government evidenced its intent to prosecute either formally or through informal means, such as grand jury investigation, plea bargaining, or pre-charge discussions with the suspect or with defense counsel? A court should also ask whether, had any such discussions between the parties broken down, the government would then have initiated formal charges. A court should also inquire whether it is a temporal fortuity that the case falls outside the traditional span of the critical stage doctrine. This factor would thus address pre-indictment and post-sentence cases and those cases in which there has been either inadvertent or deliberate manipulation of the process in order to circumvent the defendant's right to appointed counsel.[337]

Procedural Complexity

This factor considers the extent to which the defendant confronts intricacies of the criminal procedure system that may be "mysterious, intricate and complex" or may have consequences that are unpredictable for the layperson. In addressing this factor, a court should consider whether the proceeding involves intricacies of criminal procedure that would be unknown and unsuspected by a layperson. A court should consider not only the complexity of the actual procedure, but also the complexity of the consequences that may flow from the proceeding. This consideration echoes the Court's concern in *Wade* that a defendant in a line-up might speak or act in a way that has trial consequences unimaginable to the layperson. Similarly, a defendant may now confront players in the criminal justice system (such as pretrial services officers or probation officers) who pose seemingly simple questions, the answers to which have serious implications for trial or sentence. It is these collateral consequences that are truly "mysterious, intri-

[337] *See, e.g.*, Bruce v. Duckworth, 659 F.2d 776, 783 (7th Cir. 1981) (government deliberately delayed formal charges in order to evade attachment of right to counsel and permit lineup without counsel present); *see also* United States v. Hall, 804 F.2d 79, 83 (7th Cir. 1986) (state cannot delay formal charging proceedings in order to "suspend the right to counsel until it has neatly tied its case together and obtained, unmonitored, the desired line-up identifications" (quoting United States *ex rel.* Burton v. Cuyler, 439 F. Supp. 1173, 1181 (E.D. Pa. 1977), *aff'd* 582 F.2d 1278 (3d Cir. 1978)).

cate" and unknowable to a layperson. Where such complexities exist, this factor weighs in favor of the right to appointed counsel.

Prejudice and Benefit

This factor addresses whether the proceeding exposes the defendant to substantial potential prejudice at trial or sentence and whether counsel's assistance at the proceeding will mitigate that potential for prejudice. This factor is, in large measure, a restatement of the prejudice/benefit analysis used in *Wade* and *Mempa*. Where the proceeding carries a risk of substantial potential prejudice to the outcome of a trial or sentence, the balance tips toward a finding of a right to counsel. Thus, if the effects of the proceeding are irrevocable, this factor will weigh heavily in favor of finding a right to counsel.[338]

As to counsel's ability to lessen the potential prejudice, this consideration recognizes that the Sixth Amendment right to counsel is not merely a cosmetic right. If counsel's assistance is necessary to enable a meaningful representation: for example, through cross-examination at trial or at sentence, then this factor tips in favor of affording a right to counsel. This factor also favors a right to counsel when a defendant must communicate with a third party who is not an adversary (such as the judge or a probation officer) and the defendant's statements will affect the outcome at trial or sentence. In that circumstance, if the defendant faces substantial potential prejudice, his counsel's presence may help avoid a miscommunication. If the parties cannot agree upon what was said, counsel can cross-examine and reconstruct for the court what occurred at the proceeding.

* * *

If a court considers these three factors and determines that the Sixth Amendment requires the appointment of counsel that ends the inquiry. Efficiency and law enforcement concerns should not be considered if the court finds that counsel is necessary to effectuate the Sixth Amendment's promise. The Sixth Amendment right to counsel brooks no balancing test of its merit and the right is not intended to advance crime control goals.[339]

For the sake of thoroughness, this Article takes my proposal for a "test drive" in the pre-charge negotiation, the presentence interview, and the Rule 35(b) resentence. Each example demonstrates how the three-factor analysis promotes a meaningful assessment of whether the right to counsel inheres in any given situation.

---

[338] *See, e.g.*, Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (arraignment is stage at which defendant has right to counsel because "[w]hat happens there may affect the whole trial. Available defenses may be . . . irretrievably lost if not then and there asserted.").

[339] *See, e.g.*, Herbert Packer, *Two Models of Criminal Process*, 113 U. PA. L. REV. 1 (1964); *see also* Peter Aranella, *Rethinking the Functions of Criminal Procedure*, 72 GEO. L.J. 18 (1983).

A. Pre-Charge Bargaining

In pre-charge bargaining, there are an infinite number of scenarios in which a defendant might claim that the right to counsel applies. The challenge is to articulate when police or prosecutors cross over a line that gives rise to the Sixth Amendment right to counsel. This Article uses Moody's case as an example.

* * *

Adversariness-in-fact

An analysis of the adversariness-in-fact in *Moody* aptly illustrates why identifying a pre-charge right to counsel may be difficult. When Moody's lawyer rejected the prosecutor's plea agreement, it seems clear that the requisite adversarial positions existed. The government had committed itself to prosecute and had demonstrated that commitment by making Moody a formal offer of a plea bargain.[340] The proposed plea bargain was a concrete agreement demonstrating the government's strategic and tactical decisions about how it wanted to both prosecute and reward Moody.[341]

However, analysis of this factor at an earlier stage in Moody's cooperation, for example on the day Moody knocked at the FBI's door, might well produce at a different result. The execution of the search warrants (which themselves required probable cause) indicated that the government was investigating Moody with an eye toward prosecuting him. But that alone would not mean that the adversary relationship between Moody and the government had solidified, nor would it mean that the government was committed to prosecuting Moody. And Moody cannot transform his situation into a more adversarial one simply by knocking on the FBI's door and thereby awarding himself a right to counsel.

The most difficult question is how to evaluate this factor had Moody claimed a right to counsel during the period after he made his initial proffer of information, but before the government offered him a plea agreement. Under those circumstances, a court would need to undertake a careful factual analysis to determine whether there was an adversariness-in-fact that suggested that the defendant needed counsel's assistance to assure a fair trial or sentence. The court might look to such factors as whether the prosecutor had been involved with the debriefings, either formally or in-

---

[340] With respect to pre-charge bargaining, a minority of Courts of Appeals have suggested that the right to counsel may attach prior to formal adversary proceedings if the government crosses the constitutionally significant divide from fact-finder to adversary. United States v. Larkin, 978 F.2d 964, 969 (7th Cir. 1992), *cert. denied*, 507 U.S. 935 (1993) (quoting United States *ex rel.* Hall v. Lane, 804 F.2d 79, 82 (7th Cir. 1986)); *accord* Roberts v. Maine, 48 F.3d 1287 (1st Cir. 1995) (recognizing "the possibility that the right to counsel might conceivably attach before formal charges" and citing United States v. Larkin); *see also Hall*, 804 F.2d at 83. In *United States v. Yunis*, 681 F. Supp. 909, 929 (D.D.C. 1988), a district court held that the government's clear commitment to prosecute defendant meant that right to counsel inhered, even before formal initiation of judicial proceedings.

[341] United States v. Moody, 206 F.3d 609 (6th Cir. 2000).

formally. The court might also consider whether the government had prepared and delayed filing a complaint or warrant for Moody's arrest. Discussions about possible sentences, plea agreements, restitution, or immunity might also indicate the extent to which the parties' adversary positions had solidified.[342]

Procedural Complexity

An assessment of this factor in pre-charge bargaining clearly weighs in favor of the appointment of counsel. This factor evaluates not just the complexity of the debriefing procedure but the extent to which it may have complex consequences that a layperson can neither understand nor anticipate. The contemporary federal criminal justice system operates under an intricate system of mandatory sentences and guidelines sentences. Several treatises are devoted to explaining that system to practitioners. A layperson like Moody cannot possibly navigate the complex waters of this sentencing scheme.

In contrast, one might imagine a pre-charge scenario in which the police sought straightforward evidence from Moody, such as his fingerprints or a DNA sample. The actual giving of the sample would not be a procedure sufficiently complex to weigh in favor of the appointment of counsel. The inking procedure, for example, carries no hidden risks, no complex consequences, and no unstated expectations. The fact that counsel might wish to make legal arguments about the admissibility or reliability of the evidence, is irrelevant to the question of whether counsel should be present for the investigative procedure.

Prejudice and Benefit

Proffering information or negotiating a plea bargain is a situation fraught with risk for any lay person. Absent counsel's guiding hand, the government may successfully seek to obtain as many incriminating statements as possible to guarantee that, if the deal falls through, the defendant cannot reasonably expect to win at trial.[343] If a defendant lacks counsel's assistance and advice, he may foolishly reject a good bargain or ignore the necessity of prompt cooperation.

In Moody's case, the potential prejudice was manifest as was the ability of competent counsel to mitigate that prejudice. The prejudice was twofold. First, the government used Moody's statements against him for

---

[342] The fact that the government is engaging in plea negotiations may itself indicate a commitment to prosecute. *See* United States v. Sikora, 635 F.2d 1175, 1180 (6th Cir. 1980) (Wiseman, J., dissenting).

[343] Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 50 n.188 (1992). Proffer agreements routinely permit the government to use leads derived from proffered statements and permit the use of those statements at trial in the event that the defendant takes the stand and makes contrary assertions.

charge and sentence purposes, thereby substantially increasing both his possible and his actual sentence. Second, Moody refused what was, by any standards, a plea bargain he should have accepted. Competent counsel could have minimized or avoided these harms.

If we consider federal pre-charge bargaining generally, we can also see how the prejudice/benefit indicia favor a right to counsel. Counsel's assistance at a proffer or at negotiations is critical; she can take notes, review them with the witness, clear up any confusion or faulty memory,[344] or testify as to her client's statements if the government subsequently disputes whether or to what extent her client cooperated.

As negotiations progress, defense counsel could identify lesser offenses or offenses that carry no mandatory minimum to which a defendant might plead and propose that the charge be alleged in the indictment or information.[345] Defense counsel can investigate and request a plea at the "going rate" for the crime alleged in the jurisdiction of prosecution.[346] And, counsel can advocate for the selection of a charge that carries less serious guidelines consequences.[347]

* * *

Because all three factors indicate strongly that counsel's assistance was necessary to guarantee that Moody received fair process, Moody had a Sixth Amendment right to the assistance of counsel.

B. The Presentence Interview

The presentence interview falls outside the ambit of the critical stage doctrine because the defendant confronts the probation officer and not the government. The stated logic is that, because the probation officer is an "arm of the court," the defendant does not confront his adversary[348] and therefore is not in need of counsel's assistance.[349] However, the courts are asking the wrong question: they are asking for whom the probation officer works, when they should be asking whether, in view of the work the officer

---

[344] *Id.* at 44 n.157.

[345] Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systematic Approach*, 2 CLINICAL L. REV. 73, 104 (1995) (discussing counsel's role in identifying and advocating for lesser charges).

[346] *Id.* at 105.

[347] *Id.* at 112.

[348] United States v. Johnson, 935 F.2d 47, 50 (4th Cir. 1991) (constitutional right to counsel may "not be invoked in the absence of adversarial proceedings"); United States v. Rogers, 921 F.2d 975, 979–82 (10th Cir. 1990); United States v. Gordon, 4 F.3d 1567, 1592 (10th Cir. 1993); United States v. Tisdale, 952 F.2d 934, 939–40 (6th Cir. 1992); United States v. Jackson, 886 F.2d 838, 843–44 (7th Cir. 1989) (right to counsel inheres only when the proceeding in question is of an "adversary character").

[349] *See, e.g.*, *Gordon*, 4 F.3d at 1571 (citing United States v. Morrison, 449 U.S. 361, 364 (1981)).

does, the assistance of counsel is necessary to provide fair process and fair results at sentence.[350]

* * *

Adversariness-in-fact

In the context of the presentence interview, the ordinary adversariness-in-fact indicia do not require any analysis. The machinery of the criminal justice system has been set in motion. The government has charged the defendant. The defendant has either pleaded guilty or been convicted at trial and will face his professional adversary at sentence. There is thus no question as to whether the right to counsel has attached. The issue is whether that right inheres at a confrontation between the defendant and a third-party who plays an influential role in the sentencing process. That question is answered through examination of the second and third factors.

Procedural Complexity

The presentence interview is an outwardly simple procedure that will lead to myriad and complex consequences. Even lawyers find the guidelines a baffling puzzle. At the presentence interview, simple answers to simple questions may have hidden and contingent consequences, comprehensible only to those versed in the minutiae of the sentencing guidelines. If a defendant admits to heretofore unknown criminal conduct, that admission can result in an increase in his Criminal History Category. If the probation officer believes that the defendant lied during the interview, the parties may have to litigate under U.S.S.G. § 3C1.1.[351] If the probation officer finds the defendant to be insincere in his professed remorse, the parties will litigate whether the defendant receives no adjustment, or a two-point adjustment, or a three-point adjustment for the acceptance of responsibility under U.S.S.G. § 3E1.1.[352] This factor clearly weighs in favor of the right to counsel.

Prejudice and Benefit

There can be no doubt that grave prejudice can occur at the presentence interview. Admissions of criminal conduct can increase the defendant's criminal relevant conduct. Misunderstandings arising out of

---

[350] *See, e.g.*, PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES, *supra* note 160, at 7–29.

> The Supreme Court's Sixth Amendment jurisprudence teaches that the right to counsel attaches at 'critical' stages in the criminal process where 'the results might well settle the accused's fate.' [U]nder the guidelines regime, an admission to a probation officer may dictate a substantially increased sentence. Moreover, the presentence interview is designed to elicit information relevant to the guidelines sentencing factors. In a very real sense, therefore, the presentence interview is critical to the ultimate sentencing determination.

Id. (citations omitted).

[351] U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2002).

[352] *Id.* § 3E1.1.

nervousness, confusion, embarrassment, or timidity may be interpreted as an obstruction of justice. A demeanor or description of the offense that appears insincere may cost the defendant a three-point downward adjustment for the acceptance of responsibility.[353] An attorney can help insure that these "unnecessary misunderstandings between the probation officer and the defendant" do not occur.[354]

If the probation officer and the defendant disagree about what occurred at the interview, the defendant faces a grave risk that the judge will credit the probation officer's testimony. As it was in *Wade*, it is difficult here to image how counsel could effectively rebut claims about statements her client made, or the demeanor her client had, at a presentence interview that counsel did not attend.

Counsel's advice to the defendant forewarning him about the proceeding will not suffice to ameliorate the potential harms.[355] Although probation officers assert that they are neutral investigators and guidelines "accountants," there are significant subjective elements to the probation officer's conclusions.[356] And a probation officer with a "law enforcement" inclination may lead an uncounselled defendant into making a statement that justifies a sentence enhancement.

* * *

Thus, all three proposed indicia of a need for counsel are present and the right to counsel should extend to the presentence interview.

C. Rule 35(b) Proceedings

Where the parties to a Rule 35 proceeding have signed a cooperation agreement, the extension of the right to counsel seems a natural and just application of the Supreme Court's holding in *Mempa*. After all, the *Mempa* Court emphatically insisted that a defendant had the right to counsel at a "deferred sentence" proceeding regardless of its name. The court considered the purposes of the Sixth Amendment counsel guarantee and concluded that the provision of counsel at the deferred sentence was the only way to accomplish those purposes. Nevertheless, despite *Mempa*, a signifi-

---

[353] *Id.*

[354] FED. R. CRIM P. 32 advisory committee's note on 1994 amendments. The notes envision that the "burden should rest on defense counsel." *Id.* The Committee makes no suggestion as to what course to follow if a defendant wants counsel to be present and counsel does not attend.

[355] *See, e.g.*, Gary M. Maveal, *Federal Presentence Reports: Multi-tasking at Sentencing*, 26 SETON HALL L. REV. 544, 581-86 (1996) (discussing presentence investigation and possible consequences of probation officers' biases).

[356] Lucien B. Campbell & Henry J. Bemporad, *Introduction to Federal Guideline Sentencing*, 10 FED. SENTENCING REP. 323 (1998); Pamela B. Lawrence & Paul J. Hofer, *An Empirical Study of the Application of the Relevant Conduct Guideline § 1B1.3*, 10 FED. SENTENCING REP. 16 (1997) (significant variations in application of relevant conduct rules when identical information provided to forty-six probation officers).

cant body of law holds that a Rule 35(b) proceeding is not a critical stage. Accordingly, this part of the Article analyzes the Rule 35(b) cooperation process by considering whether it bears the hallmarks of a proceeding at which counsel is required.

* * *

Adversariness-in-fact

In post-judgment cooperation, if no appeal is pending, the government and the defendant are not, in any formal sense, adversaries. As some courts have correctly noted, the defendant in a Rule 35(b) cooperation does not face any new risks. The sentence has been lawfully imposed and the Rule 35(b) proceeding is merely a benefit that the defendant seeks and that the government can choose to confer or withhold.

This facile analysis conceals the true nature of Rule 35(b) agreements and thereby mistakes a formality (the defendant has been sentenced) for a finality (the defendant has received a final sentence). In fact, the defendant's sentence was, at worst, a "dry run" and, at best, a halfway step to the completed bargain that contemplated post-judgment assistance.

Has the government committed itself to prosecute? Yes, as to the underlying charge. However, that case has ended, albeit temporarily. Has the government evinced any intention to file new charges? No. However, as in pre-charge bargaining, a truly adversary relationship has been hidden by a convenient fiction. Notwithstanding the existence of the cooperation agreement, the government and the defendant are not allies and the imposition of a "preliminary sentence" does not change the parties' allegiances. If the government fails to honor its bargain, the defendant has legal recourse; claims under *Santobello v. New York* can compel the government to provide specific performance of a plea bargain.[357] If the sentenced defendant fails to keep his part of the bargain, the government has a powerful weapon in inaction. Accordingly, the defendant and the government are adversaries in a process that holds the defendant's sentence in the balance. Moreover, this is a case in which temporal fortuity is the cause of the Sixth Amendment inquiry; had the same facts presented themselves in a 5K1.1 situation, the defendant would have access to counsel.[358] Accordingly, this factor weighs in favor of the right to counsel.

Procedural Complexity

The fact that a sentence, however temporary, has been imposed mitigates, to some extent, the complexities facing the defendant. A lawful sentence has been imposed. Absent a timely motion by the government, that

---

[357] Santobello v. New York, 404 U.S. 257, 257 (1971).

[358] United States v. Leonti, 326 F.3d 1111, 1120 (9th Cir. 2003); *but see* United States v. Ming He, 94 F.3d 782, 788 (2d Cir. 1996) (suggesting but not holding that the Sixth Amendment provides for the right to counsel and that this right is protected by relying on the supervisory power of the court).

sentence is final. This simple reality means that the procedural complexity factor weighs against the extension of the right to counsel. The triggering procedure is not a complex one; the government need only file a motion. Because the sentence has been imposed and the Rule 35 clock is now ticking, this increases the extent to which analysis of this factor will depend heavily upon the prejudice/benefit analysis.

Prejudice/Benefit

Risks endemic to the cooperation process will plague the Rule 35 cooperator. If the government needs to continue to debrief the defendant, the defendant may be too nervous or too intimidated to provide all the information he otherwise could. An unsuccessful debriefing would obviously have a prejudicial impact on the defendant's ability to perform under his plea bargain and receive the benefit of his bargain, a subsequent motion for sentence reduction under Rule 35. Counsel can mitigate this potential prejudice by preparing her client for and by participating in debriefing sessions with the prosecution.

The defendant faces even greater risks under Rule 35 procedures than he would as a cooperating defendant under § 5K1.1. The defendant is serving a lawfully imposed sentence. Absent a timely government motion for sentence reduction, that sentence will stand. Thus, the defendant faces a substantial risk that the government will, either deliberately or inadvertently, fail to timely file the motion, thereby rendering the defendant's "temporary" sentence a permanent one. In such a circumstance, counsel could completely obviate that potential prejudice by reminding the prosecutor to timely file the motion or, if necessary, by seeking the court's assistance in requiring the prosecutor to honor the plea bargain. An incarcerated defendant lacks easy access to the courts.

Alternatively, the prosecutor might timely file the motion but fail to accurately describe the factors the court must consider in assessing the extent of any departure.[359] In that case, the risk to the defendant is that he will be sentenced on an incomplete record and will receive a sentence substantially greater than he might have if the court were aware of all relevant facts. Particularly as the defendant has no right to appear at a Rule 35 resentence, counsel would provide a crucial counterbalance to the prosecution's presentation. In contrast to a defendant unfamiliar with guidelines practice, counsel can focus on, and illuminate for the court, those aspects of the defendant's cooperation that merit a substantial departure from the guidelines.

* * *

[359] *See* discussion *supra* Part II.

As noted earlier, a Rule 35 motion for downward departure carries all of the risks, and potential rewards, of a sentence. When evaluated by reference to the Court's traditional inquiry about whether counsel is essential to fair process at sentence, it becomes clear that, despite the lack of procedural complexity, the right to counsel should inhere to Rule 35(b) proceedings.

CONCLUSION

The Sixth Amendment right to counsel was designed to counterbalance the tremendous advantage the government has in a criminal prosecution.[360] For symbolic and practical reasons, the counsel clause is the "touchstone" of the Sixth Amendment.[361] It is the tool by which our criminal justice system protects the accused, secures a truly adversary proceeding, and thereby promotes the systemic goal of fair process.[362] If we are to honor the Sixth Amendment's promise, we must continue in the Supreme Court's tradition of an evolving jurisprudence and respond to the changing realities of our criminal justice system by reimagining the right to counsel.

---

[360] GARCIA, *supra* note 11, at n.3 (citing Wardius v. Oregon, 412 U.S. 470, 480 (1977) (Douglas, J., concurring) (describing the awesome power of indictment, "the virtually limitless resources of government investigators" and Constitutional imperative to "redress the advantage that inheres in a government prosecution")).

[361] *Id.* at 2. *Accord* Lakeside v. Oregon, 435 U.S. 333, 341 (1978) ("In an adversary system of justice, there is no right more essential than the right to the assistance of counsel.").

[362] HELLER, *supra* note 10, at 143 ("The guarantees of the Sixth Amendment were intended to assure . . . a fair trial."); Kimmelman v. Morrison, 77 U.S. 365, 374 (1986) (The right to counsel "assures the fairness, and thus the legitimacy, of our adversary process.") (quoting Gideon v. Wainwright, 372 U.S. 335, 344 (1963)).