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THE BRIGHT LINE'S DARK SIDE: PRE-CHARGE ATTACHMENT OF THE SIXTH AMENDMENT RIGHT TO COUNSEL

Steven J. Mulroy*

Abstract: In this Article, Professor Mulroy discusses a current circuit split over whether the Sixth Amendment right to counsel can ever attach prior to a prosecutor filing a formal charge (i.e., an indictment or information). Relying on language in several Supreme Court opinions, some lower courts impose a bright-line rule stating that unless there has been such a formal charge (or unless the defendant has appeared before a judge), the right can never attach, in part because the Sixth Amendment's text refers to a "criminal prosecution" and an "accused." This rule can lead to harsh results—e.g., where a prosecutor takes advantage of an uncounseled defendant in pre-indictment plea negotiations, or where defense counsel in such negotiations provides unprofessional service, but there can be no claim for ineffective assistance of counsel.

The Article argues against a bright-line rule. Professor Mulroy argues that a proper understanding of the Amendment's text, the language of the relevant Supreme Court opinions explaining the *underlying reasons* for right to counsel protection, and pragmatic considerations of basic fairness all support a pre-charge right to counsel in at least some circumstances. He proposes a new rule: the right attaches whenever a prosecutor is involved in substantive communications with a defendant, either directly or through defense counsel. This rule would apply to: pre-charge plea and other negotiations; subpoenaed grand jury testimony; pretrial depositions taken pursuant to Rule 15 of the Federal Rules of Criminal Procedure; and similar situations. It derives analogous support from the "no contact" ethical requirement of Model Rule 4.2, and, as applied to custodial interrogations, harmonizes Sixth Amendment doctrine with Fifth Amendment case law.

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INTRODUCTION

Consider three situations involving potential ineffective assistance of counsel[1] claims by criminal defendants.

1. After the defendant is indicted, his attorney makes a minor but ultimately significant mistake in plea negotiations—say, she properly informs her client of the legal consequences of a guilty plea, but inaccurately describes the immigration consequences for the defendant, who is not a U.S. citizen.

2. Prior to indictment, the defense attorney neglects to inform the defendant of a favorable plea offer. The defendant materially suffers by not taking the plea offer—e.g., by receiving a substantially more severe sentence than he would otherwise have obtained.

3. Prior to indictment, the defense attorney fails to inform the defendant of a valid and obvious defense. She thus improperly advises her client to take a disadvantageous plea offer, and the defendant suffers as a result.

Under current law, only the defendant in Situation 1[2] can clearly obtain relief through a successful ineffective assistance of counsel claim,

1. "Ineffective assistance of counsel" claims assert that criminal defense counsel fell below a minimum level of professional competence, thus depriving the defendant of his Sixth Amendment right to the assistance of counsel. *See* Strickland v. Washington, 466 U.S. 668, 683, 686 (1984).

2. *See* Padilla v. Kentucky, 559 U.S. 356, 374 (2010) (holding that counsel engaged in ineffective assistance for failing to inform defendant that guilty plea triggered deportation).

even though the defense counsel's legal error in Situation 1 is less serious than in the other examples. In many federal circuits, defendants in Situations 2 and 3 cannot obtain relief because of a prevailing bright-line rule about when the Sixth Amendment right to counsel attaches,[3] a rule which the Sixth Circuit has criticized as "exalt[ing] form over substance"[4] and inconsistent with "the realities of present-day criminal prosecutions."[5] Under this bright-line rule, the right to counsel must be triggered by either: (1) a formal charge from the prosecutor,[6] either in the form of an indictment or information; or (2) an appearance before a judge, as in arraignment or first appearance.[7]

This rule stems from language in *United States v. Gouveia*,[8] where the Supreme Court ruled that the Sixth Amendment right to counsel attaches only after "the initiation of . . . criminal proceedings."[9] But the language used by the Court in *Gouveia* and subsequent cases actually does not compel strict adherence to the bright-line rule.[10] The Court's description

3. *See infra* Part III.

4. United States v. Moody, 206 F.3d 609, 615 (6th Cir. 2000) (quoting Escobedo v. Illinois, 378 U.S. 478, 486 (1964)).

5. Turner v. United States, No. 15-6060, 2017 WL 603848, at *7 (6th Cir. Feb. 15, 2017) (citing a draft version of this Article).

6. When a police officer initially arrests and books a suspect, he typically is said to "charge" the arrestee with a crime, both by orally informing the suspect at the time of arrest the crime(s) of which he is charged, and by filling out paperwork during booking. That is not the sense in which the Court (or this Article) uses the word "charge." Herein, "charge" (often modified as "formal charge") refers to legal papers filed in court by the prosecutor that initiate judicial proceedings. *See* Moran v. Burbine, 475 U.S. 412, 428–29 (1986); United States v. Boskic, 545 F.3d 69, 82–83 (1st Cir. 2008) (holding that criminal complaint document filed by law enforcement agents did not trigger the right to counsel). These normally take the form of an indictment or information. *See id.* at 83. They may or may not take the form of a criminal complaint. *See* Moore v. Illinois, 434 U.S. 220, 228 (1977) (mentioning, in holding that a preliminary hearing triggered the right, that a criminal complaint had already been filed in court); *Boskic*, 545 F.3d at 83 (holding that criminal complaint could not trigger the right, because, inter alia, such complaints do not "require, by statute or rule, the participation of a prosecutor.").

7. *See Moran*, 475 U.S. at 430; United States v. Gouveia, 467 U.S. 180, 191–92 (1984). In most of the cases discussed in *Moran* and *Gouveia*, the defendant did not appear before a magistrate at the relevant time, so the only issue regarding the attachment of the right to counsel is the presence or absence of a formal charge. *See generally Moran*, 475 U.S. 412 (1986); *Gouveia*, 467 U.S. 180 (1984). For this reason, this Article refers often to "pre-indictment" attachment as shorthand for attachment taking place before a formal charge, and in the absence of any appearance before a judge. Similarly, while an information, or possibly, a criminal complaint might suffice just as well as a grand jury indictment for these purposes, this Article refers to "pre-indictment" and "post-indictment" actions as shorthand.

8. 467 U.S. 180 (1984).

9. *Id.* at 189. The Court in *Gouveia* relied on a plurality opinion in *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

10. *See infra* section II.B and Part IV.

of the underlying purpose of the right to counsel, and the *reason* for drawing the line where it is, support recognition of the right even before an indictment, information, or appearance before a judge, at least in some circumstances.[11] Specifically, the right should be recognized at a minimum in pre-indictment plea negotiations, and also in other situations where the prosecutor has direct contact with the defense and the defendant needs expert legal advice to know how to respond.

The circuit courts are split on this issue. The Fifth,[12] Ninth,[13] Tenth,[14] Eleventh,[15] and D.C. Circuits[16] have derived and strictly enforced a bright-line rule. The First,[17] Third,[18] Fourth,[19] and Seventh[20] Circuits have all rejected the bright-line rule, either in holdings or in dicta. Several district courts have also rejected the bright-line rule.[21] The

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11. *See infra* section I.B.

12. United States v. Heinz, 983 F.2d 609, 612 (5th Cir. 1993) ("[T]he Sixth Amendment right to counsel does not attach until or after the time formal adversary judicial proceedings have been initiated.").

13. United States v. Hayes, 231 F.3d 663, 675 (9th Cir. 2000) (holding that the right to counsel did not apply pre-indictment to the target of a grand jury investigation).

14. United States v. Lin Lyn Trading, Ltd., 149 F.3d 1112, 1117 (10th Cir. 1998) (rejecting right to counsel with respect to evidence seized before indictment, because the right attaches only "at or after the initiation of adversary judicial criminal proceedings").

15. United States v. Waldon, 363 F.3d 1103, 1112 n.3 (11th Cir. 2004) ("reject[ing] . . . out of hand" ineffective-assistance claim by defendant subpoenaed to testify before grand jury prior to indictment) (citing United States v. Gouveia, 467 U.S. 180, 189 (1984)).

16. United States v. Sutton, 801 F.2d 1346, 1365–66 (D.C. Cir. 1986) (ruling that admission of conversations between defendant and coconspirator taped by FBI after defendant was represented by counsel but before any formal charges did not violate right to counsel, because only the "accused" have a right to counsel under the Sixth Amendment's plain text).

17. Roberts v. Maine, 48 F.3d 1287, 1291 (1st Cir. 1995) (recognizing the "possibility" that the right might attach before formal charges, indictment, or arraignment, although in "extremely limited" circumstances).

18. Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 892–93 (3d Cir. 1999) (en banc) (right to counsel attached after defendant was arrested and held in jail for more than a week but prior to the filing of an information by the district attorney and prior to arraignment).

19. United States v. Burgess, No. 96-4505, 1998 WL 141157, at *1 (4th Cir. Mar. 30, 1998) (per curiam) (noting that the Supreme Court "refused to draw a line at indictment") (citing Moore v. Illinois, 434 U.S. 220 (1977)).

20. United States v. Larkin, 978 F.2d 964, 969 (7th Cir. 1992) (holding that there is merely a rebuttable presumption that the right does not attach before formal charges are filed).

21. *See* United States v. Wilson, 719 F. Supp. 2d 1260, 1266 (D. Or. 2010) (holding that the Sixth Amendment right to counsel attached at pre-indictment plea negotiation, because the right "rests on the nature of the confrontation between the suspect-defendant and the government, rather than a 'mechanical' inquiry into whether the government has formally obtained an indictment"); United States v. Fernandez, No. 98 CR. 961 JSM, 2000 WL 534449 (S.D.N.Y. May 3, 2000) (the right to counsel attached when the defendant was represented and his attorney failed to inform him prior to the filing of formal charges of the possibility of a cooperation agreement with the prosecution); United States v. Busse, 814 F.Supp. 760, 763 (E.D. Wis. 1993) (Sixth Amendment right to counsel

Eighth Circuit has given differing indications,[22] as has the Second Circuit.[23] Most tellingly, the Sixth Circuit has opined that, while it interprets Supreme Court case law as indicating a bright-line rule, it is based on an untenable distinction, leading to "a triumph of the letter over the spirit of the law."[24]

There has been relatively little scholarship on this issue.[25] The issue is a significant one, for pre-indictment plea negotiations are not uncommon.[26] They are particularly common when there has been a charge in one court system, such as state or tribal, prior to prosecution in a different court system, such as federal.[27] They are becoming more common with the increased use of joint federal-state task forces in recent decades.[28] Cases raising the issue of whether the right can attach to pre-

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had attached when, during "pre-charge negotiations" the government had "committed itself to prosecut[ion]"); Chrisco v. Shafran, 507 F. Supp. 1312, 1319–20 (D. Del. 1981) (the right to counsel attached during plea negotiations which occurred prior to the commencement of adversary judicial proceedings).

22. *Compare* Perry v. Kemna, 356 F.3d 880, 896 (8th Cir. 2004) (Bye, J., concurring) ("[T]he Eighth Circuit has used language suggesting it would adopt the bright line approach."), *and* United States v. Ingle, 157 F.3d 1147, 1151 (8th Cir. 1998) ("[L]ooking to the initiation of adversary judicial proceedings, far from being mere formalism, is fundamental to the proper application of the Sixth Amendment right to counsel.") (quoting Moran v. Burbine, 475 U.S. 412, 431 (1986)), *with* United States v. Bird, 287 F.3d 708, 715–16 (8th Cir. 2002) (right to counsel attached prior to federal indictment where defendant had been arraigned in separate Indian tribal court proceeding on the same charge).

23. *Compare* United States v. Mapp, 170 F.3d 328, 334 (2d Cir. 1999) (no attachment of right to counsel where government placed cooperating witness in defendant's cell after state charges had been filed but before filing federal charges), *with* United States v. Mills, 412 F.3d 325, 329 (2d Cir. 2005) (right attached prior to federal indictment where challenged police interrogation occurred after state court prosecution on the same charge).

24. United States v. Moody, 206 F.3d 609, 616 (6th Cir. 2000). *See also* Turner v. United States, No. 15-6060, 2017 WL 603848 (6th Cir. Feb. 15, 2017) (criticizing the rule but acknowledging that the court is bound by the ruling in *Moody*).

25. *See* Brandon K. Breslow, *Signs of Life in the Supreme Court's Uncharted Territory: Why the Right to Effective Assistance of Counsel Should Attach to Pre-Indictment Plea Bargaining*, 62 FED. LAW. 35, 35 (2015) (reviewing the circuit split and arguing against a bright-line rule).

26. *See* William L. Gardner & David S. Rifkind, *A Basic Guide to Plea Bargaining*, 7 CRIM. JUST. 14, 16 (1992); David N. Yellen, *Two Cheers for a Tale of Three Cities*, 66 S. CAL. L. REV. 567, 569–70 (1992).

27. *See, e.g.*, United States v. Morris, 470 F.3d 596, 601 (6th Cir. 2007); *Mills*, 412 F.3d at 329; *Bird*, 287 F.3d at 715; *Mapp*, 170 F.3d at 334–35; United States v. Martinez, 972 F.2d 1100, 1104–06 (9th Cir. 1992).

28. *Turner*, No. 15-6060, 2017 WL 603848, at *9. For examples of cases, see United States v. Boskic, 545 F.3d 69, 82–83 (1st Cir. 2008) (Sixth Amendment right to counsel not violated by joint task force activity); *Morris*, 470 F.3d at 598–99 (Sixth Amendment violated through pre-indictment ineffective assistance in joint federal-state task force case). On the increasing use of such task forces, see Robin Campbell, *Issues of Consistency in the Federal Death Penalty*, 14 FED. SENT'G REP. 52, 53–54 (2001) (federal-state cooperation in capital cases is on the rise, and frequently takes

indictment plea discussions or in related situations will "continue to be litigated . . . until the Supreme Court explicitly resolves the issue."[29]

Further, the issue is of recent vintage. While the Court for decades has been stating generally that the right to counsel attaches at formal charge, during those decades there has been no occasion to examine that potential rule's impact on ineffective assistance of counsel claims involving plea negotiations, for the simple reason that it was not until 2012 that the Court expressly held that an ineffective assistance theory could even apply to plea negotiations.[30]

This Article will explain why, as a matter of first principles, interpretation of Supreme Court precedent, and basic reasons of procedural fairness, the circuit split should be resolved in favor of recognizing the attachment of the right to counsel, even prior to the filing by the prosecutor of a formal charge (or appearance before a magistrate), in certain circumstances. Part I provides background on Supreme Court doctrine on this question. It explains why the language of earlier Supreme Court cases, properly understood, does not preclude such recognition of the right. It also explains how the precise scenario posed here, about ineffective assistance of counsel in pre-indictment plea bargains, is a relatively new issue not contemplated by that older Supreme Court precedent. Part II examines the circuit split and the state of the law in the lower federal courts, and how the varying opinions' use of Supreme Court precedent illustrates that such precedent lends itself to more than one interpretation. Part III explains why flexibility is warranted in the rule regarding initial attachment of the right, and proposes that the right attach pre-indictment when the prosecutor has had adversarial contact with the accused, either directly or via defense counsel. Part IV explains the policy advantages of the proposed rule, including, inter alia, avoiding improper incentives for prosecutor, and achieving consistency with the analogous ethical "no-contact" rules.

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the form of joint state and federal task forces); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 711 n.291 (1997) ("state-federal task forces abound," with such cooperation becoming "increasingly commonplace"); John C. Jeffries & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L. J. 1095, 1124–25 (1995) (noting then-recent trend of increasing use of such task forces in organized crime cases, where they "are now the rule, rather than the exception").

29. *See* Breslow, *supra* note 25, at 38–39.

30. *See infra* section II.C; Missouri v. Frye, __ U.S. __, 132 S. Ct. 1399 (2012).

I. THE SIXTH AMENDMENT RIGHT TO COUNSEL

A. General

The Sixth Amendment provides that "[i]n all criminal *prosecutions*, the *accused* shall enjoy the right to," inter alia, (1) "a speedy and public trial"; (2) "an impartial jury"; (3) notice of the charges; (4) the right of confrontation of adverse witnesses and compulsory process; and, finally, (5) "the Assistance of Counsel for his defense."[31] The right to counsel uncontroversially includes the right for a paying client to bring a qualified attorney of his choice to the trial and related proceedings,[32] as well as the right of an indigent defendant facing jail time to have the prosecuting government provide a lawyer at its expense.[33] But the Supreme Court has also indicated that the right to counsel includes the right to the *effective assistance* of counsel.[34]

Ever since the Supreme Court's 1984 decision in *Strickland v. Washington*,[35] the Court has found that where defense counsel's assistance falls below a minimum standard of professional conduct, the defendant's Sixth Amendment right to effective assistance of counsel is violated.[36] A defendant so injured can obtain relief if he can establish both: (1) that his counsel, through identified acts or omissions, fell below a standard of reasonable competence; and (2) that there is a "reasonable probability" that but for such defective performance, the outcome of the hearing, trial, or sentencing would have been materially different.[37]

The Court has also interpreted the right to include having a lawyer present to assist the defendant at various "critical stages" of the criminal justice process, even before trial.[38] Many of the Sixth Amendment right to counsel cases involved the admissibility of a piece of evidence allegedly obtained in violation of the right to counsel. One such line of

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31. U.S. CONST. amend. VI (emphasis added). The Supreme Court has emphasized the words "prosecutions" and "accused" in interpreting when the Sixth Amendment right to counsel attaches. *See infra* notes 42–44 and accompanying text.

32. Luis v. United States, __ U.S. __, 136 S. Ct. 1083, 1089 (2016).

33. Argersinger v. Hamlin, 407 U.S. 25, 26–27 (1972).

34. Strickland v. Washington, 466 U.S. 668, 686 (1984).

35. *Id.* at 668.

36. *Id.* at 688.

37. *Id.* at 694.

38. United States v. Moody, 206 F.3d 609, 613 (6th Cir. 2000).

cases involves the use of "lineups" to have a witness identify a suspect.[39] Another even more common line of cases involves admissions from a defendant obtained through interrogation conducted outside the presence of defense counsel.[40] In cases like these, where the defendant argues that the challenged evidence should be excluded because it was obtained in violation of the Sixth Amendment, a crucial question was whether the Sixth Amendment right has even "attached" at the point in time in which the evidence was obtained.[41] Indeed, most of the Supreme Court cases clarifying when the Sixth Amendment right to counsel attaches are cases involving the admissibility of evidence.

In such cases, the Supreme Court, drawing on the text of the Sixth Amendment, has emphasized that the right to counsel applies only in "criminal prosecution[s]," and only to "the accused."[42] For there to be a "criminal prosecution" against an "accused," the Court has reasoned, a formal accusation must be made: the prosecutor must file charges, or else such charges must be presented to a magistrate.[43] Thus, unless the defendant has been brought before a judge on the charge in question, as in an arraignment or first appearance,[44] the Sixth Amendment right to counsel does not apply until the prosecutor brings formal charges.[45]

The Court first drew this line in *Kirby v. Illinois*,[46] when it rejected a claim for relief by a defendant arguing that he had a right to have an attorney present at a post-arrest, pre-indictment lineup.[47] In a plurality opinion, Justice Stewart wrote, in oft-quoted language, that the Sixth Amendment right to counsel attaches "at or after the initiation of adversary judicial proceedings—whether by way of formal charge,

39. *See* Gilbert v. California, 388 U.S. 263, 272 (1967); United States v. Larkin, 978 F.2d 964, 969 (7th Cir. 1992).

40. *See Moody*, 206 F.3d at 611 (defendant made incriminating statements to police prior to the filing of charges); United States v. Hayes, 231 F.3d 663, 669 (9th Cir. 2000) (defendant sought to suppress statements made to undercover agent prior to the filing of formal charges); Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 884 (3d Cir. 1999) (en banc) (defendant sought suppression of recorded statements made to a friend while in jail prior to the filing of an information or arraignment).

41. *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 430 (1986).

42. *Id.* at 430; *see also* United States v. Gouveia, 467 U.S. 180, 187 (1984).

43. *See Moran*, 475 U.S. at 429–31 (citing Maine v. Moulton, 474 U.S. 159, 180 & n.16 (1986)).

44. *See* Rothgery v. Gillespie County, 554 U.S. 191, 213 (2008) (initial appearance before a magistrate was enough to trigger attachment of the right, regardless of the presence or absence of participation by the prosecutor).

45. *Maine*, 474 U.S. at 180.

46. 406 U.S. 682 (1972).

47. *Id.* at 689–90.

preliminary hearing, indictment, information, or arraignment."[48] The plurality explained that this was more than "mere formalism" to use the formal "initiation of judicial criminal proceedings" as "the starting point," for:

> [I]t is only then the government has *committed itself to prosecute*, and only then that the *adverse positions* of government and defendant *have solidified*. It is then that a defendant finds himself *faced with the prosecutorial forces* of organized society, and *immersed in the intricacies of substantive and procedural criminal law*.[49]

Twelve years later, a majority of the Court reaffirmed this reasoning. In *United States v. Gouveia*, a prison inmate suspected of a crime was brought from the general prison population to administrative segregation for interrogation without defense counsel present. The Court held that the prisoner had no right to have counsel present during the interrogation, because the right to counsel had not yet attached.[50] The *Gouveia* Court quoted the above language from *Kirby*, as well as the Court's statement in a post-*Kirby* case stating that the right attaches "when the accused is confronted with both the intricacies of the law and the advocacy of the public prosecutor."[51] As the Court definitively put it in *Gouveia*, again quoting *Kirby*, the right attaches only "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[52] Later Supreme Court cases followed this rule.[53]

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48. *Id.* at 689.

49. *Id.* (emphasis added).

50. United States v. Gouveia, 467 U.S. 180, 192 (1984).

51. *Gouveia*, 467 U.S. at 188–89 (quoting United States v. Ash, 413 U.S. 300, 309 (1973)).

52. *Id.* at 188.

53. *See* Texas v. Cobb, 532 U.S. 162, 167–68 (2001) (citing *McNeil* language below, and rejecting argument that exclusion could apply to admissions concerning uncharged offenses which were "factually related" to a charged offense); McNeil v. Wisconsin, 501 U.S. 171, 175–76 (1991) (because right attached only "after initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment," Sixth Amendment required exclusion of only the incriminating statements made about offenses which had been formally charged, and not of statements relating to uncharged offenses); Moran v. Burbine, 475 U.S. 412, 431 (1986) (right to counsel does not attach until either a formal charge or appearance before a judge; thus, law enforcement's pre-indictment, uncounseled interrogation of suspect whose retained lawyer was trying to reach him did not violate the Sixth Amendment); Maine v. Moulton, 474 U.S. 159, 180 n.16 (1984) (admissions elicited in uncounseled interrogation would be admissible for as-yet-unindicted offenses, and inadmissible for offenses already charged).

B. Purpose of the Sixth Amendment Right to Counsel

At the same time, however, the Supreme Court has discussed the underlying purposes behind the Sixth Amendment right to counsel, and resulting guidelines for drawing the line at which the right attaches, using language which is amenable to a more functional, less formalistic approach. The language employed suggests two broad themes: (1) preventing the unaided lay defendant from being unfairly overwhelmed by the complexities of a criminal prosecution; and (2) recognizing the transition from investigation to accusation.[54]

1. Protecting the Lay Defendant

In *Gouveia* itself, the Court said that the "core purpose"[55] of the Sixth Amendment right to counsel, in the specific context of determining when the right attaches, is "assuring aid at trial and at 'critical' pretrial proceedings *when the accused is confronted with the intricacies of criminal law or with the expert advocacy of the public prosecutor*, or both."[56] Crucially, the Court has stated that the right to counsel "exists to protect the accused during trial-type *confrontations with the prosecutor*."[57] The jurisprudence on the Sixth Amendment right to counsel "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself" when brought up against "experienced and learned counsel" for the prosecution.[58] When the accused is confronted "by the procedural system, or by his expert adversary," such confrontation "might well settle the accused's fate and render the trial itself a mere formality."[59] This language certainly seems to apply to plea negotiations, whether pre- or post-indictment: because the negotiations might lead to a plea, they

54. Admittedly, the language in *Gouveia* and later cases could be read as shutting the door on any attachment of the right prior to formal charge or appearance before a judge. Justice Stevens, concurring in *Gouveia*, disapprovingly read the *Gouveia* majority opinion as going so far as to "foreclose the possibility that the right to counsel might under some circumstances attach prior to the formal initiation of judicial proceedings." *Gouveia*, 467 U.S. at 193 (Stevens, J., concurring). For the purposes of this Article, the distinction may be more semantic than real. If the opinions can be read as allowing extension to certain pre-indictment situations, they should be so interpreted. If they cannot, then the rule should be replaced with a more expansive, flexible rule. *See infra* section IV.C.

55. *Gouveia*, 467 U.S. at 189 (citing *Ash*, 413 U.S. at 309).

56. *Id.* at 181 (emphasis added).

57. *Id.* at 190 (emphasis added).

58. *Id.* at 189 (citing Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938)).

59. *Id.* (citing *Ash*, 413 U.S. at 310; United States v. Wade, 388 U.S. 218, 224 (1967)).

may very well "settle the accused's fate," and render the trial itself not just a mere formality, but wholly unnecessary.

In analogous contexts, the Court has emphasized the salience of the need for the untutored defendant to have a lawyer's expert assistance in navigating the intricacies of the criminal justice process. For example, in judging the propriety of police interrogations under the Fifth Amendment's privilege against self-incrimination and the related right to be given warnings under *Miranda v. Arizona*,[60] the Court has recognized a "Fifth Amendment right to counsel" in addition to a "Fifth Amendment right to silence."[61] Invocation of this Fifth Amendment right to counsel, by asking for a lawyer during custodial interrogation, affords the accused the greatest possible protection against interrogation: all questioning must cease, and cannot resume (outside the presence of defense counsel) regarding the crime of arrest, or any other crime, unless and until the suspect himself initiates substantive discussion of the investigation.[62] This protection, broader than that afforded someone who merely invokes the Fifth Amendment right to silence by asking for questioning to cease,[63] exists because a suspect asking for a lawyer is presumed to consider himself "unable to deal with the pressures of custodial interrogation without legal assistance."[64] The underlying rationale is that fundamental fairness requires that a defendant should not have to deal with sophisticated law enforcement officers without the aid of a lawyer. So too with the Sixth Amendment right to counsel: where an accused has to deal with a sophisticated prosecutor, the interests underlying the right are triggered.[65]

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60. Miranda v. Arizona, 384 U.S. 436, 479 (1966) (to protect the Fifth Amendment privilege against self-incrimination, procedural safeguards are required: the defendant "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires").

61. *See, e.g.*, Arizona v. Roberson, 486 U.S. 675, 685, 692 (1988). The existence of a separate Fifth Amendment right to counsel, parallel to the Sixth Amendment right to counsel in the interrogation context, can cause terminological confusion. This Article usually specifies "Sixth Amendment right to counsel," but, in the absence of any indication to the contrary, the phrase "right to counsel" refers to the Sixth Amendment right to counsel.

62. *Id.* at 680–81 (citing Edwards v. Arizona, 451 U.S. 477, 484–85 (1988)).

63. *See* Michigan v. Mosley, 423 U.S. 96, 104–05 (1975) (holding that if only the Fifth Amendment right to silence is invoked, questioning must cease, but can resume several hours later at law enforcement's initiative provided Miranda warnings are reissued).

64. *Roberson*, 486 U.S. at 683.

65. Granted, the analogy drawn here is not perfect. The Fifth Amendment right to counsel recognized in *Roberson* protects a defendant from custodial interrogation even by non-lawyer police officers, whereas the right argued for in this Article is to be protected from substantive dealings with

2. Transition from Investigation to Accusation

The other formulation of the right's starting point concerns the movement from investigation to prosecution. An example comes from the *Gouveia* Court's citation of the plurality opinion in *Kirby*,[66] which focuses on whether "the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified."[67]

By contrast, for the purposes of the Sixth Amendment right to a speedy trial, the Court has held that the Sixth Amendment can attach as early as arrest, *prior* to the filing of any formal charges.[68] But the Court in *Gouveia* distinguished the speedy trial right from the right to counsel. The former exists "to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges," and thus the clock indeed can start ticking with a pre-indictment arrest; but the latter exists to protect the accused during "confrontations with the prosecutor."[69]

But those two recognized characteristics of the Sixth Amendment right to counsel—(1) confronting the defendant with an "expert adversary" and the "intricacies of the law," and (2) having the government "committed . . . to prosecute," rendering the "adverse positions" of government and accused "solidified"—can manifest in situations prior to indictment as well.[70] And at least some Supreme Court opinions have recognized these situations.

In *Escobedo v. Illinois*,[71] the "granddaddy" of Sixth Amendment right to counsel cases,[72] the Court squarely held that the right could attach before formal charges were filed. In that case, the government had denied the defendant access to his lawyer while he was in custodial interrogation, but *before* formal charges were filed.[73] The Court nonetheless held that he had been denied his Sixth Amendment right to

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a prosecutor specifically. But the overall rationale—the need to provide protection to the lay defendant confronted with the complexities of the criminal law—is similar.

66. Kirby v. Illinois, 406 U.S. 682, 689 (1972).

67. United States v. Gouveia, 467 U.S. 180, 189 (1984) (citing *Kirby*, 406 U.S. at 689).

68. *See* United States v. McDonald, 456 U.S. 1, 6–7 (1982); United States v. Lovasco, 431 U.S. 783, 788–89 (1977).

69. *Gouveia*, 467 U.S. at 190.

70. *Id.* at 189–90.

71. 378 U.S. 478 (1964).

72. *Escobedo* and *Massiah v. United States*, 377 U.S. 201 (1964), are generally considered to be foundational cases setting out the modern emergence of the use of the Sixth Amendment right to counsel to combat abusive interrogation practices.

73. *Escobedo*, 378 U.S. at 48486.

counsel.[74] The Court explained it "should make no difference" that the suspect had not yet been "formally indicted."[75] Once the defendant had been denied an opportunity to consult with counsel, it was clear that law enforcement had shifted from a "general investigation" of a crime to an effort to get the defendant "to confess his guilt."[76] The Court held that where the investigation "is no longer a general inquiry into an unsolved crime but has *begun to focus on a particular suspect*," custodial investigation outside the presence of defense counsel violates the Sixth Amendment, at least where the suspect has requested and been denied consultation with counsel, and the police have not warned him of his right to silence.[77] According to the *Escobedo* court, it would "exalt form over substance" to refuse to recognize this shift in "focus" from general investigation to accusation.[78]

Since that time, the Court has reinterpreted *Escobedo* as a Fifth Amendment self-incrimination privilege case rather than a Sixth Amendment right to counsel case. In *Kirby*, the Court explained that "the Court in retrospect perceived that the 'prime purpose' of *Escobedo* was not to vindicate the . . . right to counsel as such, but, like *Miranda*, 'to guarantee the full effectuation of the privilege against self-incrimination.'"[79] This explanation is somewhat difficult to credit, given the number of times the *Escobedo* opinion explicitly characterizes the right at issue as the Sixth Amendment right to counsel.[80] But certainly

74. *Id.* at 485.

75. *Id*.

76. *Id.*

77. *Id.* at 490 (emphasis added).

78. *Id.* at 486, 490.

79. Kirby v. Illinois, 406 U.S. 682, 689 (1972) (quoting Johnson v. New Jersey, 384 U.S. 719, 729 (1966)). The quoted language from *Johnson*, an interrogation case, concerned the (arguably distinct) issue of whether *Escobedo* and *Miranda* would be applied retroactively. *Johnson*, 384 U.S. at 729. Because the *Johnson* Court was considering broadly whether the protections against abusive custodial interrogation should reach previously pending cases, and had no occasion to consider the specifics of Sixth Amendment right to counsel doctrine, it is not clear that the (possibly shorthand) *Johnson* language about the "privilege against self-incrimination" was really intended to recast *Escobedo* from a Sixth Amendment to a Fifth Amendment case. *Id.* Presumably such a significant reinterpretation of a major Supreme Court criminal procedure case would have been accomplished in more than one passing reference in one clause of a single sentence of the opinion. In this interpretation, *Kirby* used the imprecise language from *Johnson* as a means to eliminate a potentially contradictory precedent, *Escobedo*, without explicitly overruling it. At any rate, it is clear that despite the language of the *Escobedo* opinion relying on the Sixth Amendment, it no longer has precedential value as a Sixth Amendment case. *See also* Moran v. Burbine, 475 U.S. 412, 429–30 (1986) (quoting *Kirby* to reaffirm that *Escobedo* was later reinterpreted as a Fifth Amendment case).

80. *See, e.g.*, *Escobedo*, 378 U.S. at 479, 491; *Moran*, 475 U.S. at 429.

after *Moran v. Burbine*,[81] *Escobedo* no longer stands for the proposition that the Sixth Amendment right to counsel can attach prior to a formal charge or appearance before a judge. Nonetheless, the opinion's criticisms of the rigid formalism of the pre/post formal charge distinction continue to have merit.

3. Objections to the Bright-Line Rule

Other Supreme Court opinions have also acknowledged that the concerns underlying the Sixth Amendment right to counsel might manifest prior to the filing of a formal charge. Justice Stevens, concurring in *Gouveia*, emphasized that a bright-line rule at formal charge was unjustified.[82] He relied on *Escobedo*, as discussed above, as well as the language in the original *Miranda* opinion requiring warnings during custodial interrogation.[83] In *Miranda*, the Court stated that custodial interrogation was the point at which "our adversary system of criminal proceedings commences," even if the custodial interrogation preceded the filing of formal prosecutorial charges.[84] Justice Stevens also relied on lineup cases like *United States v. Wade*,[85] where the Court noted that under the Sixth Amendment, the accused is guaranteed counsel's presence not only at trial, but "at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."[86]

Further, certain lower courts have recognized that government actions taken pre-indictment can still implicate the Sixth Amendment right to counsel. For example, in *United States v. Stein*,[87] the government had coerced a private firm into canceling its policy of paying employees' attorney fees as a perquisite of employment.[88] This action in some cases prevented defendants from being able to afford attorneys of choice.[89] The Second Circuit affirmed the dismissal of the charges on the ground

81. 475 U.S. 412 (1986).

82. United States v. Gouveia, 467 U.S. 180, 193–96 (1984) (Stevens, J., concurring).

83. *Id.*

84. Miranda v. Arizona, 384 U.S. 436, 477 (1966).

85. 388 U.S. 218, 224 (1967).

86. *Gouveia*, 467 U.S. at 195 (Stevens, J., concurring) (quoting United States v. Wade, 388 U.S. 218, 226 (1967)); *see also Gouveia*, 467 U.S. at 199 (Marshall, J., dissenting) (agreeing with Justice Stevens that "in certain situations . . . . the government can transform an individual into an 'accused' without officially designating him as such through the ritual of arraignment").

87. United States v. Stein, 541 F.3d 130 (2d Cir. 2008).

88. *Id.* at 157.

89. *Id.*

that the government's misconduct, though occurring *before* indictment, plainly affected the employees' rights to counsel *after* they were indicted.[90] This decision appropriately avoids a formalistic approach. However, the Second Circuit has limited its own decision in *Stein* to situations where pre-indictment government action has impermissibly interfered with the ability of a suspect to obtain counsel of choice.[91]

C. Plea Bargain Negotiations

As noted above, the Court has said that the right to counsel attaches at "critical" stages of criminal proceedings.[92] It has long been recognized that these "critical" stages of the proceedings can include steps occurring before trial.[93] "Critical stages" include arraignments, post-indictment interrogations and lineups, and the entry of a guilty plea.[94] Recognition of the latter stage, entry of a guilty plea, means the possibility of invalidating a guilty plea because the defense lawyer improperly advises his client in the decision to plead guilty.[95] Where the defendant pleads guilty, there is usually a formal charge, and always a plea hearing before a judge.[96] Thus, using the preexisting framework from *Gouveia*, *Moran*, and similar cases, the right to counsel had clearly attached.

In recent years, the Supreme Court has clarified that plea bargain negotiations are also one of those "critical" pretrial stages. The cases involved situations in which the defendant did *not* initially plead guilty, and defense counsel was ineffective for her role in having the defendant not accept the plea deal and plead guilty. Starting with the 2012 decision in *Missouri v. Frye*,[97] the Court has recognized that defense counsel failures in plea bargain negotiations could give rise to an ineffective assistance of counsel claim.[98] In *Frye*, defense counsel failed to inform

90. *Id.* at 158.

91. United States v. Medunjanin, 752 F.3d 576, 589–90 (2d Cir. 2014).

92. Montejo v. Louisiana, 556 U.S. 778, 786 (2009) (quoting *Wade*, 388 U.S. at 227–28).

93. Missouri v. Frye, __ U.S. __, 132 S. Ct. 1399, 1405 (2012) (describing it as "well settled").

94. *Id.*

95. *See* Padilla v. Kentucky, 559 U.S. 356, 374 (2010) (holding that to satisfy effective assistance of counsel, "counsel must inform her client whether his plea carries a risk of deportation"); Hill v. Lockhart, 474 U.S. 52, 60 (1985) (defendant did not provide sufficient information to show that had defense attorney provided accurate information regarding parole eligibility he would have pleaded not guilty and insisted on going to trial); McMann v. Richardson, 397 U.S. 759, 770 (1970) (holding a guilty plea based on "reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession").

96. *Frye*, 132 S. Ct. at 1406.

97. __ U.S. __, 132 S. Ct. 1399 (2012).

98. *Id.* at 1404–05, 1408.

her client of a favorable plea offer; because the defendant did not accept that deal, he later was forced to accept another, less advantageous one.[99] In *Lafler v. Cooper*,[100] decided the same day as *Frye*, defense counsel improperly advised the defendant to reject a favorable plea deal.[101] In both cases, the Court granted relief.[102] Because these cases are so recent, the earlier cases using bright-line language such as *Gouveia* and *Moran* had no occasion to consider pre-charge plea negotiations.

In both *Frye* and *Lafler*, the plea negotiations at issue happened to have occurred after the prosecutor filed formal charges.[103] But there is no reason that must always be the case: quite often, the prosecutor and defense can engage in plea talks prior to the filing of an indictment or information.[104]

II. LOWER COURT RULINGS

A. Circuits Adopting a Bright-Line Rule

Many circuit courts addressing the question have done a straightforward reading of the Supreme Court language in *Kirby v. Illinois*, adopting a bright-line rule for when the Sixth Amendment right to counsel attaches. For instance, the Second Circuit held in *United States v. Mapp*[105] that the right to counsel did not attach when a jail plant was placed in the defendant's cell to extract admissions from the defendant after the filing of state charges, and when the plant received information regarding a federal offense for which charges had not yet been filed.[106] The appellate panel cited *Gouveia*, *McNeil v. Wisconsin*,[107] and *Maine v. Moulton*[108] for the existence of a bright-line rule.[109] For similar reasons, the Fifth Circuit came to the same result, despite the fact that at the time of the relevant interrogation, the defendants were

99. *Id.* at 1411; Lafler v. Cooper, __ U.S. __, 132 S. Ct. 1376, 1391 (2012).

100. Lafler v. Cooper, __ U.S. __, 132 S. Ct. 1376 (2012).

101. *Lafler*, 132 S. Ct. at 1380.

102. *Frye*, 132 S. Ct. at 1411; *Lafler*, 132 S. Ct. at 1391.

103. *Frye*, 132 S. Ct. at 1401; *Lafler*, 132 S. Ct. at 1383.

104. *See, e.g.*, United States v. Busse, 814 F. Supp. 760, 761 (E.D. Wis. 1993); Chrisco v. Shafran, 507 F. Supp. 1312, 1314 (D. Del. 1981).

105. United States v. Mapp, 170 F.3d 328 (2d Cir. 1999).

106. *Id.* at 334.

107. 501 U.S. 171 (1991).

108. 474 U.S. 159 (1985).

109. *Mapp*, 170 F.3d at 334.

admittedly "targets" of a criminal investigation and had been subpoenaed to testify before the grand jury.[110]

In a briefer discussion, the Tenth Circuit held, relying on *Kirby* and *Moulton*, that the improper seizure of a record of communications between the defendant and his attorney did not violate the Sixth Amendment because it had occurred pre-indictment.[111] This result is notable for the fact that the court accepted the characterization of the materials as privileged communications between attorney and client, yet found no right to counsel violation because of the bright-line rule.[112] In an even briefer discussion, the D.C. Circuit rejected a right-to-counsel objection to pre-indictment taping of defendant's conversations after the government became aware that the defendant was represented by counsel, citing both *Gouveia* and the Sixth Amendment text's use of the words "accused" and "prosecution[]."[113] Finally, the Eleventh Circuit summarily rejected a Sixth Amendment argument in a footnote citing *Gouveia* for the existence of a bright-line rule.[114]

In the most thorough such discussion, the Ninth Circuit also adopted a bright-line rule in an en banc opinion, which is notable for the ambivalence of the majority and the spirited nature of the dissent. In *United States v. Hayes*,[115] the Ninth Circuit, relying on *Gouveia*, *Kirby*, *United States v. Ash*,[116] and *Moulton*, held that the right to counsel had not attached at the time of a pre-indictment interrogation, even though the prosecution had sent the defendant a target letter, subpoenaed him to testify before the grand jury, and had conducted a material witness deposition of the defendant pursuant to Federal Rule of Criminal Procedure Rule 15.[117] The majority opinion admitted it was "somewhat queasy" about this result, because "it looks like the government is trying to have its cake and eat it too" by doing some things (e.g., take a deposition) that normally do not occur until *after* charges are filed, while

110. United States v. Heinz, 983 F.2d 609, 611–12 (5th Cir. 1993). A dissent emphasized the violation of the professional ethics "no contact" rule, rather than the Sixth Amendment. *Id.* at 615–18; *infra* section V.B. (discussing the "no contact" rule).

111. United States v. Lin Lyn Trading, 149 F.3d 1112, 1117 (10th Cir. 1998).

112. *See id.*

113. United States v. Sutton, 801 F.2d 1346, 1365–66 n.14 (D.C. Cir. 1986).

114. United States v. Waldon, 363 F.3d 1103, 1112 n.4 (11th Cir. 2004).

115. 231 F.3d 663 (9th Cir. 2000).

116. 413 U.S. 300 (1973).

117. United States v. Hayes, 231 F.3d 663, 669–71 (9th Cir. 2000).

doing other things (interrogation outside the presence of counsel) which can only occur *before* charges are filed.[118]

A four-judge dissent went further, explicitly rejecting a "bright-line rule."[119] The dissent acknowledged and distinguished authority like *Kirby* and *Gouveia*, where the Supreme Court had rejected attachment of the right in relatively untroubling situations like police lineups, prison administrative detention, and failure of the police to notify a defendant of his attorney's attempts to make contact.[120] By contrast, the dissent reasoned, "in no case has the Court considered . . . anything resembling the court-ordered, pre-indictment taking and preserving of *actual trial testimony*[,]" which a Rule 15 deposition is designed to do.[121] The dissent here makes a persuasive point that the simplicity of the "bright-line rule" may fail to take proper account of unusual situations where the argument for a right to counsel is particularly compelling.

B. Circuits Rejecting the Bright-Line Rule

Indeed, there are circuits that have adopted a more flexible approach. In *Matteo v. Superintendent, SCI Albion*,[122] the Third Circuit Court of Appeals held that the defendant's right to counsel attached after he was arrested and held in jail for more than a week, but prior to the filing of information by the district attorney, and prior to arraignment.[123] Matteo's pre-indictment, pre-arraignment telephone conversations with a friend were recorded and he made incriminating statements used against him at trial.[124] The court ruled that Matteo's right to counsel had attached at the time of the recorded telephone conversations and that "he was entitled to the full protection of the Sixth Amendment."[125] Like the circuits enforcing the bright-line rule, the Third Circuit also relied on *Kirby* and *Gouveia*, but relied on the more general language about the underlying purposes of the right to counsel in addition to the oft-quoted language about "formal charge."[126] The court noted that "adversary judicial

118. *Id.* at 675–76.
119. *Id.* at 679–81 (Reinhardt, J., dissenting).
120. *Id.* at 678.
121. *Id.* (emphasis in original).
122. 171 F.3d 877 (3d Cir. 1999) (en banc).
123. *Id.* at 892–93.
124. *Id.*
125. *Id.* at 893.
126. *Id.* at 892.

proceedings" could include formal charges or a judicial hearing, but, quoting *Gouveia*:

> The right also may attach at earlier stages, when "the accused is confronted, just as at trial, *by the procedural system, or by his expert adversary*, or both, in a situation where the results of the confrontation might well *settle the accused's fate and reduce the trial itself to a mere formality*."[127]

Thus, the "crucial point" is when the defendant "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[128] The court reasoned that because Matteo was confronted with the "organized resources of an ongoing police investigation by agents who were well aware of his legal representation," he was entitled to the protection of the Sixth Amendment.[129]

The Seventh Circuit took a related but distinct approach in ruling that in the absence of an "initiation of adversary criminal justice proceedings" in the normal sense of formal charge or appearance before a judge, there is simply a *rebuttable presumption* against attachment of the right.[130] The defendant may rebut this presumption by showing that even though no "formal adversary judicial proceedings" had begun, the government had crossed the line from "fact-finder to adversary."[131] The court relied on a prior panel decision from within its circuit, which explained that the language of the main Supreme Court cases indeed listed formal charge and an appearance before a magistrate as examples of right-triggering events but was silent on whether that was an exhaustive list.[132] To illustrate its point, that earlier panel decision had pointed to language in the Supreme Court's decision in *Maine v. Moulton*: "*Whatever else it may mean*, the right . . . means *at least* that a

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127. *Id.* at 892 (quoting United States v. Gouveia, 467 U.S. 180, 189 (1984)) (emphasis added).

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

129. *Id.* at 893, 898. Although the court found that the Sixth Amendment protections were applicable in this case, they upheld the district court's decision denying Matteo's application for a federal writ of habeas corpus. The court held that the state court's decision was "neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States." *Id.* at 898.

130. United States v. Larkin, 978 F.2d 964, 969 (7th Cir. 1992).

131. *Id.* In *Larkin*, the court ruled that Larkin's participation in a grand jury directed lineup three months prior to his indictment did not create a situation that would show that the government had crossed the line from fact-finder to adversary. Therefore, this case did not allow Larkin to rebut the presumption that the right to counsel did not attach.

132. *Id.* (citing United States ex rel. Hall v. Lane, 804 F.2d 79, 82 (7th Cir. 1986)).

person is entitled to the help of a lawyer at or after the time that judicial proceedings are initiated[.]"[133]

The First Circuit has recognized in dicta that the line may not be that bright. In *Roberts v. Maine*,[134] the court rejected application of the right to counsel to a roadside request to take a blood-alcohol test, even where the defendant had been denied a request to call his lawyer.[135] But the court took pains to note that it recognized a "possibility" that the right could attach before formal charges, indictment, or arraignment, in circumstances where the "government had crossed the constitutionally significant divide from fact-finder to adversary."[136] These circumstances "must be extremely limited"; the court cited as an example only an instance where the government intentionally delayed formal charges for the purposes of holding a lineup outside the presence of defense counsel.[137] Even the roadside request for a blood-alcohol test in the case itself raised a "close[] question[,]" the court held, but was ultimately outside the scope of the right to counsel because, until the defendant either unlawfully refused the test or took it and failed it, the police could not decide whether to bring charges.[138] Less clear dicta from the Fourth Circuit suggests that "the Supreme Court has refused to draw a line at indictment to indicate the onset of criminal proceedings" sufficient to trigger the right to counsel, but cites only a Supreme Court case stating the uncontroversial (and unhelpful) proposition that a preliminary hearing can also so serve.[139]

Finally, there have been several district court rulings that have also recognized pre-indictment attachment, specifically in the context of pre-indictment plea negotiations. The United States Court for the District of Delaware acknowledged that there is "a strong argument that the [S]ixth [A]mendment right to counsel attaches during plea negotiations which occur prior to the commencement of adversary judicial proceedings."[140] The fact that the government is willing to offer a plea bargain is proof

133. *Lane*, 804 F.2d at 82 (citing Maine v. Moulton, 474 U.S. 159, 160 (1985)) (emphasis in *Lane*).

134. 48 F.3d 1287 (1st Cir. 1995).

135. *Id.* at 1290.

136. *Id.* at 1291 (quoting *Larkin*, 978 F.2d at 969).

137. *Id.* (citing *Larkin*, 978 F.2d at 969); *see also* Bruce v. Duckworth, 659 F.2d 776, 783 (7th Cir. 1981) (same).

138. *Id.*

139. United States v. Burgess, No. 96-4505, 1998 WL 141157, at *1 (4th Cir. Mar. 30, 1998) (per curiam) (citing Moore v. Illinois, 434 U.S. 220, 228 (1977)).

140. Chrisco v. Sharan, 507 F. Supp. 1312, 1319 (D. Del. 1981).

that it has "made a commitment to prosecute," thereby solidifying the adverse positions of the government and the defendant "in much the same manner as when formal charges are brought."[141] Similarly, the Wisconsin Eastern District Court held that "[t]here is support for the position that, under certain circumstances, the [S]ixth [A]mendment right to counsel attaches prior to the time formal criminal charges have been filed.[142] In *United States v. Busse*,[143] the defendant, through counsel, engaged in plea negotiations prior to any adversary judicial proceedings.[144] The court reasoned that because the government engaged in "pre-charge negotiations," it had "committed itself to prosecute," and therefore, the Sixth Amendment right to effective counsel attached.[145]

C. A Candid Statement of the Dilemma

Perhaps the best discussion of the issue comes from the Sixth Circuit decision *United States v. Moody*.[146] In this pre-indictment plea negotiation case, the court read Supreme Court case law as establishing a bright-line rule; made clear that it disagreed with such a rule; and reluctantly concluded that it was "beyond [the Circuit's] reach to modify this rule, even in this case where the facts so clearly demonstrate that the rights protected by the Sixth Amendment are endangered."[147]

The court candidly acknowledged that the prosecutor's involvement in pre-indictment plea negotiations "raises the specter of the unwary defendant agreeing to surrender his right to a trial in exchange for an unfair sentence without the assurance of legal assistance to protect him."[148] Were it not for the delay of the prosecutor in filing charges in that case, the court acknowledged, the defendant would have been entitled to the effective assistance of counsel in responding to the plea offer.[149] Further, by offering a specific plea deal, the prosecutor was "committing himself to proceed with prosecution."[150] Thus, the rule it was enforcing was "a mere formality" that "exalt[s] form over

141. *Id.*
142. United States v. Busse, 814 F. Supp. 760, 763 (E.D. Wis. 1993).
143. 814 F. Supp. 760 (E.D. Wis. 1993).
144. *Id.* at 763.
145. *Id.*
146. 206 F.3d 609 (6th Cir. 2000).
147. *Id.* at 614.
148. *Id.* at 615.
149. *Id.*
150. *Id.*

substance" and "requires that we disregard the cold reality that faces a suspect in pre-indictment plea negotiations."[151]

Turner v. United States,[152] decided this year, took up the theme. The court acknowledged that "[w]hether they occur before or after the filing of formal charges, it is undisputed that the plea negotiation process is adversarial by nature and the average defendant is ill equipped to navigate the process on his own."[153] They require defendants to "navigate the complex web of federal sentencing guidelines, computations that confound even those who work with them often."[154] Thus, the rigid bright-line rule "does not allow for the realities of present-day criminal prosecutions."[155] This explains why so many circuits have departed from the bright-line rule.[156]

The *Moody* opinion correctly grasps the practical realities of pre-indictment plea bargaining and the need to recognize a right to counsel. It also correctly criticizes the bright-line rule as being overly rigid and unjust. What it may not correctly do, however, is interpret the language of the relevant Supreme Court precedents.

III. THE PROPER DIVIDING LINE: INVOLVEMENT OF THE PROSECUTOR

A proper examination of the Supreme Court precedent, aided by an analysis of the text of the Sixth Amendment itself and the practical realities of the modern criminal justice system, suggests that the better dividing line is between instances where the defendant is dealing just with law enforcement, and those where the defendant is dealing with prosecutors. In the latter case, the Sixth Amendment right to counsel should attach.

A. Supreme Court Precedent

Undoubtedly, there is ample language in the Supreme Court's opinions in recent decades suggesting the existence of an inflexible bright-line rule. *Kirby* and *Gouveia* contain no shortage of oft-quoted

151. *Id.* at 615–16. A concurring opinion echoed the majority's dissatisfaction with what it construed to be a rigidly inflexible, unrealistic Supreme Court rule. *Id.* at 617–18 (Wiseman, J., concurring).

152. 2017 WL 603848 (6th Cir. Feb. 15, 2017).

153. *Id*. at *9.

154. *Id*.

155. *Id*.

156. *Id*. at *7 (citing a draft version of this Article).

language suggesting as much,[157] although they also contain other language capable of a more capacious reading.[158]

Two years after *Gouveia*, the Court declined to recognize the possibility of a pre-indictment right, even when law enforcement was actively and improperly keeping a defense lawyer from being able to see his client, in order to allow custodial interrogation to occur without the assistance of counsel.[159] The Court once again recited the standard language requiring either "formal charge, preliminary hearing, indictment, information or arraignment."[160] Seven years later, the Court ruled similarly, allowing information obtained from interrogations outside the presence of defense counsel to be used only as it related to *uncharged* offenses.[161]

But in all these cases, from *Kirby* onward, whether they involved police lineups or interrogations, the defendant faced law enforcement officials, not prosecutors.[162] This is material, when one considers the underlying purpose of the Sixth Amendment right to counsel. Involvement of law enforcement does not by itself demonstrate that "the government [is] committed . . . to prosecute,"[163] because only a prosecutor can make that decision. Thus, law enforcement officials are not by themselves empowered to "solidif[y]" the adverse relationship between the government and the defendant.[164] And, obviously, only the

157. *See supra* section II.A.

158. *See supra* section II.B.

159. Moran v. Burbine, 475 U.S. 412, 429–31 (1986). *See also* Maine v. Moulton, 474 U.S. 159, 180 n.16 (1985) (admissions elicited in uncounseled interrogation would be admissible for as-yet-unindicted offenses and inadmissible for offenses already charged).

160. *Moran*, 475 U.S. at 429. On the other hand, the Court explained that the underlying reason for the rule was the need to begin the right to counsel protection when "the government's role shifts from investigation to accusation", when "the assistance of one versed in the 'intricacies . . . of law' is needed to assure that the prosecution's case encounters 'the crucible of meaningful adversarial testing.'" *Id.* at 430–31 (quoting United States v. Cronic, 466 U.S. 648, 656 (1984)). Arguably, once the prosecution engages in plea negotiations with the defendant, these criteria are met.

161. McNeil v. Wisconsin, 501 U.S. 171, 175 (1991) (Sixth Amendment right to counsel "does not attach until a prosecution is commenced.").

162. *See McNeil*, 501 U.S. at 173 (after initial appearance for armed robbery, defendant was questioned by detective about a murder); *Moulton*, 474 U.S. at 163–65 (defendant made incriminating statements to cooperating witness prior to being indicted for the new charge); United States v. Gouveia, 467 U.S. 180, 184 (1984) (Sixth Amendment rights did not attach during time held in administrative detention unit of federal prison when defendants were held prior to indictment); Kirby v. Illinois, 406 U.S. 682, 684 (1972) (identification by victim occurred at police station shortly after arrest).

163. *See Gouveia*, 467 U.S. at 189.

164. *See id.* at 189–90 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972) (describing attachment of the Sixth Amendment right when the adverse government-defendant relationship has "solidified")); United States v. Moody, 206 F.3d 609, 615–16 (6th Cir. 2000) ("There is no question

prosecutor can provide "the expert advocacy of the public prosecutor" contemplated by the Court, or the "confrontations with the prosecutor" that will "settle the accused's fate."[165] Indeed, in distinguishing the Sixth Amendment speedy trial right from the Sixth Amendment right to counsel, the Court in *Gouveia* discussed the underlying purpose of the latter as protecting the defendant from "confrontations with the prosecutor."[166]

As set out above,[167] relevant Supreme Court opinions contain general underlying principles describing the reasons for delineating a starting point for the right to counsel: confronting the accused with the law's "intricacies" and the prosecutor's "expert advocacy"; "commit[ing]" to prosecution and thus "solidifying" the adverse relationship. The opinions then declare a test that attempts to summarize the results flowing from those underlying considerations: formal charge or appearance before a judge. Where the challenged governmental conduct involves law enforcement, the bright-line rule follows nicely from the underlying principles. But where the prosecutor is involved, the bright-line rule arguably does not. Perhaps the Court was able to use (overly) definitive language because it had not yet been forced to face the more difficult case, one involving a prosecutor rather than law enforcement, which would have required the Court to consider a more expansive statement of its test.

Indeed, *Kirby* and its pre-2012 progeny could *not* have faced the more difficult case, because in that era, the Court had not yet even recognized an ineffective assistance of counsel claim for lawyer incompetence causing a defendant to *reject* a favorable deal. Prior to 2012, the only ineffective assistance claims accepted by the Court in the context of plea deals were cases where the defense counsel improperly advised his client

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in our minds that at formal plea negotiations, where a specific sentence is offered to an offender for a specific offense, the adverse positions of the government and the suspect have solidified").

Arguably, there may be circumstances where law enforcement agents by themselves could so solidify the adverse relationship. *Escobedo* spoke of the time when the "focus" of law enforcement interrogation efforts shifted from a general investigation to obtaining incriminating information about the suspect. Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964). Perhaps *Escobedo* had it right, and subsequent Supreme Court decisions scaling back on the (admittedly fuzzier) "focus" approach have it wrong. That question is outside the scope of this Article. What is clear, though, is that as between the two, law enforcement has less ability to "solidify" the adverse relationship of the parties than the prosecution.

165. *Gouveia*, 467 U.S. at 189–90; *see also Moody*, 206 F.3d at 614 (6th Cir. 2000) (applying this same argument to prosecutor-involved plea negotiations).

166. *Gouveia*, 467 U.S. at 190.

167. *See supra* sections II.A and II.B.

to *accept* a plea deal.[168] In such instances, there will eventually be: (1) the filing of charges; and (2) a plea hearing before a judge at which the defense lawyer continues to advise his client, either of which suffices to trigger the Sixth Amendment right to counsel.[169] Thus, it was not even possible until 2012 to test the rigidity (or lack thereof) of the supposed bright-line rule.

B. Sixth Amendment Text

Perhaps more fundamentally, the involvement of a prosecutor may answer the concerns based on the text of the Sixth Amendment itself. Presumably, prior to an indictment or information, if only law enforcement officers are pressing for an admission, lineup, or even plea bargain, it is harder to speak of a "criminal prosecution[]" under the Amendment's text, and hence also harder to speak of an "accused." Once a prosecutor has decided to prosecute, and is far enough along to engage in plea negotiations, it makes more sense to consider this a "criminal prosecution[]"—though, admittedly even then, one can plausibly insist that it is not technically a "prosecution[]" until the prosecutor files charges.

Similarly, once the prosecutor is involved, it makes more sense to think of the suspect as an "accused." Indeed, the argument that a pre-indictment suspect negotiating a plea is an "accused" seems even stronger than the argument that such a person is at that point already subject to "prosecution[]." "Prosecution" seems more of a technical legal term than "accused": "accused" can apply to persons informally accused as literal denotation, whereas the word "prosecution[]" does not normally indicate anything other than formal criminal proceedings (unless used figuratively).

Black's Law Dictionary defines "prosecution" as a "criminal proceeding in which an accused person is tried,"[170] which could be read as requiring initiation of formal proceedings, but might also be susceptible to a broader reading. Depending on the edition, the dictionary defines "accused" far more broadly. One edition defines it as

168. *See* Padilla v. Kentucky, 559 U.S. 356, 374 (2010) (defendant's Sixth Amendment rights were violated when he accepted plea deal on advice of attorney, but attorney failed to notify him of deportation consequence); Hill v. Lockhart, 474 U.S. 52, 56 (1985) (when defendant enters plea of guilty on advice of counsel, "the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases'" (citing McMann v. Richardson, 397 U.S. 759, 771 (1970))).

169. *See* Moran v. Burbine, 475 U.S. 412, 428–29 (1986).

170. *Prosecution*, BLACK'S LAW DICTIONARY (10th ed. 2014).

a "person who has been subjected to actual restraints on liberty through arrest *or* a person against whom a formal indictment or information has been returned."[171] This definition allows a mere arrest, without a formal charge, to suffice to convert a suspect into an "accused." Indeed, the illustrative example sentence provided specifically contemplates as much.[172] An older version defines it in a similarly broad manner to include "the defendant in a criminal case[,]"[173] which does not by its terms require a formal charge. But the most recent definition supports a "bright-line" reading: "someone who has been blamed for wrongdoing, especially a person who has been arrested and brought before a magistrate or who has been formally charged with a crime (as by indictment or information)."[174] This seems to track perfectly the *Kirby*/*Gouveia*/*Moran* language relied on for the bright-line rule.

C. The Arbitrariness of the Bright-Line Rule Where Prosecutors Are Involved

If one says that the right to counsel does not exist in pre-indictment plea negotiations involving a prosecutor, then there would be no violation even if the prosecutor negotiated directly with a lay defendant without any counsel at all—or, for that matter, even if the prosecutor deliberately bypassed defense counsel to conduct plea negotiations with the lay defendant.[175] It is one thing to allow interrogation of a pre-indictment suspect outside the presence of counsel. But when it comes to actual negotiations, we properly frown upon a sophisticated prosecutor deliberately exploiting a less experienced lay defendant.[176]

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171. *Accused*, BLACK'S LAW DICTIONARY (7th ed. 1999).

172. *Id*. ("[A]lthough Jordan was being vigorously questioned, he did not actually become an accused until the officer arrested him").

173. *Accused*, BLACK'S LAW DICTIONARY 39 (4th ed. 1968).

174. *Accused*, BLACK'S LAW DICTIONARY (10th ed. 2014).

175. This deliberate effort to deal with an uncounseled defendant, even though one is aware that defense counsel is available, is similar to the behavior in *Moran v. Burbine*, except that the behavior in *Moran* involved interrogation, not plea negotiations, and was conducted by law enforcement, not prosecutors. Moran v. Burbine, 475 U.S. 412, 415–16 (1984). Of course, the prosecutor's discussion of the merits of the case with an adverse party represented by counsel might render the prosecutor subject to disciplinary action by the bar. *See* MODEL RULES OF PROF'L CONDUCT Rule 4.2 (AM. BAR ASS'N 2014). But the possibility of later disciplinary action for ethics violations is a separate issue from the constitutionality of the action. At any rate, it might not constitute an ethics violation, depending on the circumstances and the jurisdiction. For example, the defense lawyer may represent the defendant in other matters, but not yet be definitively retained for the criminal matter at issue. For further discussion of Model Rule 4.2 as analogous here, see *infra* section V.B.

176. To be sure, any resulting plea agreement ultimately would be examined at a plea hearing, and the defendant would have the assistance of counsel at the plea hearing and during the run-up to

Consider two cases involving similar charges, offenses, and defendants. In both, the prosecutor interrogates the defendant without defense counsel present, pressing hard for a tough plea deal, and the unsophisticated defendant, overwhelmed by legal complexities, makes unnecessary and inadvisable admissions which seal his fate, despite the fact that viable defenses exist. In the first case, the prosecutor says, "I am going to indict you tomorrow. Agree to this deal right now, or I'm sending you up the river." In the second case, the prosecutor says, "I just indicted you yesterday. Agree to this deal right now, or I'm sending you up the river." Under the conventional view, the admissions would be admissible at trial in the first case but inadmissible in the second; the right to counsel is violated only in the second, and not in the first.[177]

What principled basis could exist for distinguishing between these two situations? In both cases, the "accused is confronted with the intricacies of the criminal law[] or with the expert advocacy of the public prosecutor."[178] In both cases, the "government has committed itself to prosecute," and "the adverse positions of government and defendant have solidified."[179] Both involve "confrontations with the prosecutor" which could "settle the accused's fate."[180]

One might say that in the first case, it was not *certain* that the prosecutor would indict. But that uncertainty hardly lessens the degree to which the accused struggles with the law's intricacies, or the prosecutor's expert advocacy. The distinction has slightly more plausibility when one examines the language about whether the "government has committed itself to prosecute," and whether the "adverse positions" of the parties have "solidified." Arguably, until the formal charges are actually filed, the government has not "committed" to prosecute, and the adverse positions of the parties are not fully "solid[]." After all, the prosecutor can always change her mind.

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the hearing. But given the dynamics of negotiation, and the difficulty of "walking back" a concession made during negotiations once agreed to, one can easily imagine situations where the after-the-fact review of the plea deal by defense counsel would be no substitute for having defense counsel present during the initial plea negotiations.

177. To simplify and dramatize, I use a hypothetical where the prosecutor deals directly with an uncounseled defendant. But the difference in outcome would obtain just as much if there were a negligent, ineffective defense counsel involved in both plea negotiations, with one negotiation taking place the day before indictment, and the other the day after.

178. *See* United States v. Gouveia, 467 U.S. 180, 181 (1984); United States v. Moody, 206 F.3d 609, 618 (6th Cir. 2000) (Wiseman, J., concurring) (defendants in the "perilous encounter" of a pre-indictment plea negotiation "need and should be entitled to counsel in order to navigate these troubled waters").

179. *Gouveia*, 467 U.S. at 189.

180. *Id.* at 190.

But this argument does not bear close scrutiny. After all, even after a prosecutor files an indictment, she can always change her mind and dismiss the indictment, thus liquefying the previously solid adverse party relationship. As a practical matter, a prosecutor is not likely to inform the defendant that she will file charges, or take the time to engage in plea negotiations, unless she is relatively certain that charges will be filed. And the slight chance that she will change her mind about filing does not take away from the fact that *at the relevant moment*, the government has "committed" itself to prosecute, and the adverse relations between the parties is pretty solid.

The distinction is just as arbitrary if we consider cases where the defendant is represented by counsel. The Supreme Court has accepted ineffective assistance of counsel claims where defense counsel failed to inform his client of a favorable plea offer from the prosecution, causing the defendant to miss out on the favorable deal.[181] It has also accepted such a claim where the defense counsel improperly advised his client to reject a favorable plea deal offer.[182] One can imagine other situations where ineffective assistance relief would be appropriate, such as where defense counsel caused his client to unwisely reject a plea offer by improperly characterizing the nature of the offer or the legal consequences it would trigger. Regardless of the nature of the ineffective assistance of counsel, it seems arbitrary to say it is a constitutional violation if it takes place during a plea negotiation the day after indictment, but not if it takes place two days before.[183]

Of course, any bright-line rule can be accused of arbitrariness, if you imagine roughly comparable situations that straddle the bright line. That is the inherent vice of bright lines. The inherent virtue is that they provide clarity, consistency, predictability, and ease of application.[184] Such bright line rules are particularly useful in criminal procedure, where the doctrine has gotten very complex, and is often to be implemented by non-lawyer law enforcement officials who must make quick judgments on the spot.[185] But this "judgment on the fly" rationale

181. Missouri v. Frye, __ U.S. __, 132 S. Ct. 1399, 1406 (2012).

182. Lafler v. Cooper, __ U.S. __, 132 S. Ct. 1276, 1280 (2012).

183. *See Moody*, 206 F.3d at 615 (noting that pre-indictment plea bargaining with uncounseled defendants "raises the specter of the unwary defendant agreeing to surrender his right to trial in exchange for an unfair sentence without the assurance of legal assistance to protect him").

184. Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 917 (2007) (stating that without bright-line rules, "[I]t is often unfair, and consequently impractical, for enforcement officials to bring criminal proceedings").

185. *See, e.g.*, United States v. Robinson, 414 U.S. 218, 235 (1973) (applying a bright-line rule for the Fourth Amendment. It is also useful when trying to educate the public about their rights.).

is more persuasive in the context of police officers doing searches in the field, as opposed to detectives who may have time to consult counsel before initiating a custodial interrogation or lineup.

D. A Proposed Rule

1. Generally

Based on the above, one can derive a rule governing the attachment of the Sixth Amendment right to counsel. Such a rule would continue to provide that the filing by a prosecutor of formal charges such as indictment, information, or complaint, as well as the appearance of the defendant before a magistrate on the charge in question, would suffice to trigger the Sixth Amendment right to counsel. But the new rule would *also include those instances in which a prosecutor has contact with a suspect about the substance of the case (other than as a witness), either directly or through counsel*.

This rule avoids the arbitrariness and injustice described above, and better furthers the underlying purposes of the right as articulated by the Supreme Court.[186] But it still retains most of the clarity and ease of application of the bright-line rule.

This rule would reach plea bargaining situations, for the reasons discussed above. It might also apply to other types of negotiations, such as negotiations on cooperating with the investigation in exchange for immunity; negotiations on the surrender of a wanted person; negotiations on the turning over of potentially incriminating evidence; and negotiations on the terms under which someone will take the police to point out something (like the location of a body). The rule would also apply to communications concerning the grand jury testimony of the suspect, or depositions taken in preparation for trial pursuant to Federal Rule of Criminal Procedure 15. An attorney's help is needed in trying to decide whether to testify at grand jury, or whether to assert the Fifth Amendment self-incrimination privilege during grand jury or deposition testimony.

In many instances, these situations arise after a formal charge has been filed, and the attachment of the Sixth Amendment right to counsel is not at issue. But the presence or absence of a formal charge (or an

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When teaching law students about the Sixth Amendment right to counsel, for example, it is easy to be able to say that, absent an appearance before a judge on the crime in question, or the filing of an indictment, information, or criminal complaint, there is no Sixth Amendment right to counsel.

186. *See supra* section I.B.

appearance by the defendant before a magistrate) should not be controlling. Even absent a formal charge, where the prosecutor communicates with a suspect about these matters, the Sixth Amendment would be interpreted to afford the suspect the right of assistance of counsel. Where a defense attorney is involved, but fails to perform with reasonable competence, an ineffective assistance of counsel claim could be asserted. If the prosecutor elicits incriminating statements from the defendant during these interactions without counsel present, those statements would be inadmissible absent valid waiver.

This rule would *not* require that the state actually furnish counsel any earlier in the process than it currently does. There is often some period of delay between the time an indigent defendant is initially formally charged, or arraigned, and the time that the court appoints counsel.[187] This time varies widely across jurisdictions.[188] But it would provide for the exclusion of deliberately elicited, uncounseled testimony, and the availability of an ineffective assistance of counsel claim. In other words, the rule would simply require that the same consequences flow from similar prosecutor-led negotiations and interactions, regardless of whether they occurred before or after the formal charge (or first appearance before a judge).

This rule has the advantage of clarity. It does not require the balancing of many factors, or a fuzzy "totality of the circumstances" approach. Where the prosecutor communicates with the defendant to effectuate negotiation, or to discuss formal testimony like a grand jury or a deposition, a suspect needs the assistance of counsel, regardless of whether the formality of filed charges has occurred.

2. Application to Interrogations

Applying the proposed rule to interrogations is more of a gray area. Where the prosecutor communicates with a suspect about the substance of the case, the defendant must contend with the "intricacies of the criminal law" and the "expert advocacy" of the prosecutor. It may not be clear whether that is enough to say that the prosecutor has "committed" to prosecute, or whether the adversary relationship has "solidified." But that Supreme Court criterion was always more descriptive than functional. Providing the untrained lay defendant with needed assistance

187. Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 334 (2011); Rothgery v. Gillespie Cty., 554 U.S. 191, 213 (2008) (holding that a six-month period between initial arrest/incarceration and eventual appointment of counsel was excessive delay).

188. Colbert, *supra* note 187, at 334 n.9.

on legal complexities, and balancing the unfair advantage an experienced prosecutor has in negotiating with unsophisticated defendants, are clear, functional goals. We know what harm is sought to be avoided. But references to an adversary relationship "solidifying" because of a "commitment" to prosecute do not clearly indicate what harm is sought to be prevented. Rather, it is just another way—a metaphorical, imprecise way—of simply restating the fact that the prosecution has in fact begun.

On balance, where the prosecutor grills a suspect to obtain admissions, the reasons underlying the Sixth Amendment right to counsel argue convincingly for attachment of the right. The participation of the government's lawyer—the lawyer responsible for making charging decisions, agreeing to plea deals, and presenting the government's case to the court—means that a suspect needs a lawyer's help with the law's complexities and the superior sophistication of the trained, experienced government lawyer. But the underlying reasons for the right to counsel would *not* apply if the prosecutor were merely interviewing a potential witness, one who was not a target of the investigation.

Although it is normally law enforcement agents, rather than the prosecutor, who conduct witness interviews that are generally investigative in nature, there are occasions when a prosecutor may get involved. This is particularly the case where a prosecutor is leading a high-profile or long-term investigation—for example, into an organized criminal enterprise. A prosecutor overseeing such an investigation may participate in questioning a witness who is not a target of the investigation, rendering the interaction to be more accurately characterized as an "interview" rather than an "interrogation." Requiring that all such interviewees be afforded the right to counsel would likely be unduly burdensome to the government. One could of course give the prosecutor a choice: either arrange for defense counsel, or else let law enforcement agents conduct the interview without her. But the presence of the prosecutor in witness interviews can add value in some circumstances, making it harder to argue that a prosecutor must forego this opportunity to avoid the burden of arranging for defense counsel. Thus, it would be best to apply the rule only to "interrogations" of "suspects," and not "interviews" of potential "witnesses."

The difficulty, of course, is distinguishing between the two scenarios. One formulation would be to revive the *Escobedo* approach, in which the right attaches when the "focus" of the investigation turns from

general investigation to obtaining evidence against a suspect.[189] But the Court has rejected this formulation in later cases.[190] And this formulation has the disadvantage of being fuzzier and harder to implement than a bright-line rule. There are certain definite markers which could serve in making the distinction, such as whether the interviewee has received a target letter.[191] But not only would such a marker fail to effectively deal with all necessary cases, it would also be subject to manipulation: just as a prosecutor might be incentivized to delay formal charges to engage in hard bargaining with unsophisticated defendants,[192] so too might a prosecutor be incentivized to delay sending a target letter.[193]

Ultimately, then, the best dividing line between "interviews" and "interrogations" is the one which the Court has long used in other contexts: custodial interrogation. The Court has long recognized that custodial interrogations are inherently coercive, requiring special protections for the unaided suspect.[194] Where law enforcement has enough suspicion regarding a suspect to haul him in for questioning against his will, the adversary relationship between government and suspect has "solidified," and it is fair to consider the interviewee an "accused." At this point, there is little doubt that the suspect needs a lawyer's aid to match the legal expertise of the prosecutor.

This dividing line has the advantage of somewhat harmonizing Fifth Amendment self-incrimination doctrine with Sixth Amendment right to counsel doctrine in the context of interrogations. The patchwork quilt set of rules governing interrogations under the Fifth Amendment, Sixth Amendment, and Due Process Clause can confuse police, suspects, and

189. *See* Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964).

190. *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 429, 432 (1984) (observing that *Escobedo*'s purpose was "to guarantee full effectuation of the privilege against self-incrimination" and holding that "the possibility that the encounter [between a suspect and law enforcement] may have important consequences at trial, standing alone, is insufficient to trigger Sixth Amendment right to counsel").

191. A "target letter" is a letter a prosecutor sends to a suspect advising him or her of a pending criminal investigation and suggesting that he or she consult with or retain counsel. *See Target letter*, BLACK'S LAW DICTIONARY (10th ed. 2014). *But see* United States v. Mansfield, No. 4:14-CR-25-HLM, 2014 WL 6879054, at *5 (N.D. Ga. Dec. 4, 2014) (citing United States v. Mshihiri, No. 13-184(DSD/JJK), 2014 WL 348571, at *9 n.3 (D. Minn. Jan 31, 2014)) (holding that receipt of a target letter alone does not trigger Sixth Amendment right to counsel because target letters do not initiate formal charges).

192. *See infra* Part IV.

193. The presence of a subpoena would also likely not effectively serve as such a marker because subpoenas can be served upon witnesses as well as suspects.

194. *See* Miranda v. Arizona, 384 U.S. 436, 469–70 (1966); Dickerson v. United States, 530 U.S. 428, 442 (2000).

courts alike.[195] At least where a prosecutor is involved, using custodial interrogation as a dividing line (even pre-charge) would make the Sixth Amendment right to counsel and the Fifth Amendment-based *Miranda* protections coextensive.[196]

Any such rule is subject to objections that it would unduly burden the prosecution, frustrate the search for truth, and hamper the crime-fighting effectiveness of law enforcement. Certainly, the Supreme Court has made it clear that it does not wish to hamper law enforcement during pre-formal charge interrogation.[197] But the interrogation contemplated by these cases is that done by law enforcement officials. Such interrogation would not be affected by this proposed rule, which only governs the behavior of prosecutors. For interrogation by law enforcement, we already have both *Miranda* (if the suspect is in custody) or else generic Due Process Clause considerations (i.e., the "shock the conscience" standard) [198] to govern improper behavior.

3. Serial State/Federal Prosecutions

A special note is warranted about the proposed rule's application to cases in which a state prosecution leads to a later federal prosecution on the same offense, or vice versa; or similar situations in which a tribal prosecution leads to a state or federal prosecution, or vice versa. Such

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195. *See, e.g.*, Miller v. Fenton, 474 U.S. 104, 109–12 (1985) (collecting cases standing for various constitutional tests regarding the permissibility of use of confessions obtained in custodial interrogations at criminal trials). For a scholarly discussion on the conflation of the Fifth Amendment, Sixth Amendment, and Due Process considerations implicated in custodial interrogations, and the need for a clearer rule than case law has given us, see Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1831–36 (1987).

196. Of course, it would not automatically trigger the Fifth Amendment "right to silence" or the Fifth Amendment "right to counsel." The former would need to be affirmatively invoked by the suspect saying something equivalent to "I don't want to answer any more questions." *See* Michigan v. Mosley, 423 U.S. 96, 103–04 (1975). The latter would be invoked by the suspect saying the equivalent of, "I want my lawyer." *See* Edwards v. Arizona, 451 U.S. 477, 484–85 (1981) ("[A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him").

197. *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 425 (1986) (rejecting adoption of a rule requiring law enforcement to inform a suspect of an attorney's attempts to contact the suspect because "practical considerations counsel against its adoption").

198. *See* Chavez v. Martinez, 538 U.S. 760, 764 (2003) ("Convictions based on evidence obtained by methods that are 'so brutal and so offensive to human dignity' that they 'shock the conscience' violate the Due Process Clause."); *Miranda*, 384 U.S. at 479 (A suspect in custody "must be warned prior to any questioning . . . that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.").

cases are not uncommon.[199] Often, the first prosecution will be concluded, and the second will thereafter commence. Under the "dual sovereign" doctrine, such a subsequent prosecution would not violate the Double Jeopardy Clause.[200] A question arises as to whether actions by the first prosecutor could trigger right to counsel protections applicable to the second prosecution. (For the purposes of simplicity, the first prosecution will be assumed to be the state prosecution and the second the federal prosecution, although the order could be reversed, and a tribal court substituted for either.)

Under the bright-line rule approach, once the state concludes prosecution, the federal prosecutor has complete freedom of action to interrogate the defendant, arrange for a lineup, engage in plea negotiations and the like, using information obtained from the state prosecution, up until the time of the federal indictment or first appearance. Indeed, the federal prosecutor can actively participate in plea negotiations in the state prosecution, and cooperate in an arrangement whereby the state prosecution is dismissed on condition of the defendant pleading guilty to an anticipated federal prosecution.[201] If defense counsel in the state case improperly advised the defendant on how to respond to the prosecutor, thus prejudicing the defendant in the federal case, the bright-line rule would afford no relief, because, despite

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199. *See, e.g.*, United States v. Morris, 470 F.3d 596, 598 (6th Cir. 2007) (federal prosecutors indicted defendant for the same charges in federal court that state had charged him with when he rejected state's plea offer, even though he had been unable to fully communicate or plan a defense strategy with appointed counsel in crowded, un-private courthouse "bull pen" cell); United States v. Mills, 412 F.3d 326, 326–27 (2d Cir. 2005) (after defendant was charged by state authorities, federal prosecutors indicted defendant for the same firearms charge based on statements obtained from defendant without presence of counsel in investigation of state law charge); United States v. Red Bird, 287 F.3d 709, 711–12 (8th Cir. 2002) (after defendant was charged with rape in Rosebud Sioux Tribal Court, federal prosecutors indicted defendant for the same alleged offense based on statements and DNA evidence obtained without defendant's counsel present); United States v. Mapp, 170 F.3d 328, 332–34 (2d Cir. 1999) (defendant indicted on federal charges after related state law charges were dismissed "due to evidentiary and speedy trial problems"); United States v. Martinez, 972 F.2d 1100, 1101–02 (9th Cir. 1992) (defendant indicted on federal firearm charges after being arrested on state law firearm charges that were later dropped).

200. Puerto Rico v. Sanchez Valle, __ U.S. __, 136 S. Ct. 1863, 1867 (2016) (explaining dual sovereign rule). Under the dual sovereign rule, a federal prosecution can follow a state prosecution on the same offense (or vice versa) without violating the Constitution's Double Jeopardy Clause prohibition on placing someone in jeopardy twice for the same offense, because each prosecution comes from a separate sovereign government. *Id.* Only the occurrence of two consecutive prosecutions for the same offense by the same sovereign violates Double Jeopardy. *Id.* This doctrine also applies if one of the sovereign entities involved is a Native American tribal nation. *Id.* at 1872.

201. *See* Brief of Appellant at 9–11, Turner v. United States, No. 15-6060 (6th Cir. Mar. 14, 2016) (describing exactly this situation).

the interconnection between the two prosecutions, the second prosecution would not yet have formally begun.[202]

In both of these cases, interaction of the bright line rule with other doctrines leads to unsatisfactory results. Would the proposed rule address this? As I propose it, the rule would provide that the Sixth Amendment right to counsel would apply in the subsequent federal case once the right was triggered in the initial state case. Otherwise, state law enforcement could deliberately violate a defendant's Sixth Amendment rights to obtain needed information, only to pass the information off to federal law enforcement, which would be empowered to use the illicit information.[203]

IV. POLICY REASONS FOR THE PROPOSED RULE

A. Avoids Incentivizing Delay of Formal Charge

The proposed rule has several policy advantages over the rigid bright-line rule that currently prevails in most circuits. For one thing, the bright-line rule can incentivize the prosecutor to delay indictment to engage in hard bargaining with unsophisticated defendants.[204] Where the suspect is indigent or otherwise lacking in privately retained counsel prior to the filing of formal charges—in other words, in the vast majority of cases[205]—the prosecutor will know that waiting to file charges will provide the chance to negotiate with an uncounseled suspect.

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202. *Id.*

203. This is already the rule where one sovereign obtains evidence through a Fourth Amendment violation and attempts to pass off such ill-gotten evidence to a different sovereign. *See* Elkins v. United States, 364 U.S. 206, 223 (1960) (overruling the "silver platter" doctrine, formerly allowing such use of Fourth Amendment-violative evidence); Rios v. United States, 364 U.S. 253, 255–56 (1960) (holding that evidence obtained in an unreasonable search by state officers was to be excluded from federal criminal trial). A similar rule should apply with respect to Sixth Amendment right to counsel violations. If courts did apply a similar rule forbidding one sovereign to hand over Sixth Amendment-violative evidence to another sovereign "on a silver platter," the same logic would argue for a ruling that a prosecutor's plea negotiations (or similar activity) on behalf of one sovereign would trigger attachment of the Sixth Amendment right to counsel in a subsequent prosecution for the same offense by a different sovereign.

204. *See* United States v. Moody, 206 F.3d 609, 617–19 (Wiseman, J., sitting by designation, concurring) (making this same observation); *id.* at 616 (majority noting that "[b]ut for the delay of the prosecution in filing charges, [the defendant] clearly would have been entitled to the effective assistance of counsel").

205. In 1998, approximately sixty-six percent of felony defendants in the federal criminal justice system and more than eighty percent in the state system were represented by publicly funded counsel. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), www.bjs.gov/content/pub/pdf/dccc.pdf [https://perma.cc/2YTS-Y89U] (special report).

Sometimes, this may result in a plea agreement little different from what would have resulted had a defense lawyer been present. But sometimes it will allow the prosecutor to take advantage of an "unwary defendant," and get him to agree to "an unfair sentence."[206] Indeed, pre-indictment plea negotiations seem to have become more of an issue in recent decades.[207] They are disfavored by some courts, because they allow for less supervision by courts and prosecutors' supervisors, and thus can undermine the uniform sentencing goals of the United States Sentencing Guidelines.[208]

Underscoring this concern is the overwhelming importance of plea bargaining in our criminal justice system. The number of cases concluded by plea agreements has increased in recent years, rising from 84 percent in 1990 to 97 percent in 2011.[209] Currently, approximately 97 percent of all federal criminal cases, and 93 percent of all state criminal cases, are resolved through plea bargain.[210] The Supreme Court has recognized that "criminal justice today is for the most part a system of pleas, not a system of trials."[211] Plea bargaining is "not some adjunct to the criminal justice system; it *is* the criminal justice system."[212] Thus, in today's criminal justice system, "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."[213]

For this reason, the Supreme Court has emphasized the great need to ensure that defendants have effective representation by counsel at this crucial state.[214] Therefore, it seems inadvisable to affirm a rule that would make the presence or absence of this protection turn on the happenstance of whether a formal charge had been filed, or, even worse,

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206. *Moody*, 206 F.3d at 615.

207. *See id.* at 617 (Wiseman, J., concurring) (citing criminal justice statistics and law review scholarship).

208. *Id.*; William L. Gardner & David S. Rifkind, *A Basic Guide to Plea Bargaining* 7 CRIM. JUST. 14, 16 (1992); (citing David N. Yellen, Comment, *Two Cheers for a Tale of Three Cities*, 66 S. CAL. L. REV. 567, 569 (1992)).

209. Gary Fields & Jon R. Emshwiller, *Federal Guilty Pleas Soar as Bargains Trump Trials*, WALL ST. J., Sept. 24, 2012, at A1.

210. Missouri v. Frye, __ U.S. __, 132 S. Ct. 1399, 1407–08 (2012) (citing DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, TABLE 5.22.2009, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, http://www.albany.edu/sourcebook/pdf/t5222009.pdf [https://perma.cc/V3ZD-CY83]).

211. Lafler v. Cooper, __ U.S. __, 132 S. Ct. 1376, 1388 (2012).

212. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) (emphasis in original).

213. *Frye*, 132 S. Ct. at 1407.

214. *See Lafler*, 132 S.Ct. at 1388; *Frye*, 132 S.Ct. at 1407-1408.

to allow a prosecutor to game the system by delaying formal charges until after initial plea inquiries have been made.

Similarly, the bright-line rule can also incentivize the prosecutor to delay filing charges so as to allow for the interrogation of suspects without defense counsel present. The Second Circuit reasoned similarly in a case involving a prosecutor who interrogated a defendant represented by counsel outside the presence of defense counsel.[215] Construing the legal ethics "no-contact" rule to apply pre-indictment as well as post-indictment, the court explained, "were we to construe the rule as dependent upon indictment, a government attorney could manipulate grand jury proceedings to avoid its encumbrances."[216]

B. Consistency with Ethical Rules

Allowing the prosecutor to negotiate plea deals with an uncounseled defendant, which the bright line rule does, certainly runs against the spirit of the policy concerns underlying the right to counsel as articulated in *Gouveia* and related cases. It also runs against the spirit of a lawyer's professional ethical responsibilities.[217] Prosecutors from nearly all states[218] and the federal government[219] are bound by some version of the American Bar Association's Model Rule 4.2, which mandates that "a lawyer shall not communicate about the subject of [a] representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."[220] The purpose of the rule is similar to that of the Sixth Amendment right to counsel: i.e., to "protect a person . . . against possible overreaching by other lawyers, and the

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215. United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988).

216. *Id.*

217. *Cf.* Texas v. Cobb, 532 U.S. 162, 178 (2001) (Breyer, J., dissenting) (citing Model Rule 4.2 in arguing for broader Sixth Amendment right to counsel protection when uncounseled suspect confessed to a crime which was not formally charged, but which was "factually related" to an offense formally charged).

218. *See* Montejo v. Louisiana, 556 U.S. 778, 790 (2009).

219. *See* OFFICES OF THE U.S. ATTORNEYS, UNITED STATES ATTORNEYS' MANUAL § 296, https://www.justice.gov/usam/criminal-resource-manual-296-communications-represented-persons-issues [https://perma.cc/453J-ADVU]. Although in years past the U.S. Justice Department took the position that state "no-contact" ethics rules did not apply to federal prosecutors, *see, e.g.*, United States v. McDonnell Douglas Corp., 132 F.3d 1252, 1257–58 (8th Cir. 1998), that position was ultimately foreclosed by Congress' 1998 passage of the "McDade Amendment," providing that federal prosecutors were subject to the state and local ethical rules where they practiced. See 28 U.S.C. § 530B (2012).

220. MODEL RULES OF PROF'L CONDUCT Rule 4.2 (AM. BAR ASS'N 2014).

uncounseled disclosure of information relating to the representation."[221] The plain language of this well-known, bedrock rule of legal ethics makes clear that its application does *not* require that the party contacted by the lawyer be considered to be "adverse." The Rule does make allowances for a prosecutor to contact a party as part of her official duties "prior to the commencement of criminal or civil enforcement proceedings," but only for "investigative activities."[222]

Courts have ruled that the ethical "no-contact" rule can, at least in some instances, apply to a prosecutor pre-indictment.[223] Thus, once a suspect retains counsel prior to being formally charged, ethical rules can in some circumstances prevent the prosecutor from having direct communications with the suspect about the case.[224] Heightening Rule 4.2 case law's value as analogy, courts have clarified that "investigative" contacts would not violate the Rule, but have stated that adversarial contacts would[225]—drawing the precise line at issue with respect to the Sixth Amendment right to counsel. Among the factors weighing in favor of applying the rule pre-indictment are the presence of custodial interrogation, the initiation of administrative proceedings, and the presence of a grand jury investigation of the suspect.[226] Presently, a prosecutor may still employ investigative techniques that are "authorized by the law," even where a defendant is represented by counsel, and the government is aware of the representation.[227] For example, use of undercover informants to obtain information is still within the scope of permissible investigatory procedures.[228] The rule applies only to

221. *Id.* cmt. 1.

222. *Id.* cmt. 5.

223. United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988) (holding prosecutors must abide by the Model Code of Professional Conduct, even before an indictment, for a rule permitting otherwise might incentivize a "government attorney [to] manipulate grand jury proceedings to avoid its encumbrances"); United States v. Talao, 222 F.3d 1133, 1139 (9th Cir. 2000) (explaining that a prosecutor's ethical duties begin "at the latest" at the moment of indictment, and may begin beforehand). *But see* United States v. Ryans, 903 F.2d 731, 739–40 (10th Cir. 1990) (holding that Rule 4.2 does not apply to "the investigative phase of law enforcement").

224. *See* cases cited *supra* note 223.

225. *See id*.

226. *See id.*

227. MODEL RULES OF PROF'L CONDUCT Rule 4.2 (AM. BAR ASS'N 2014).

228. *See* United States v. Brown, 595 F.3d 498, 516 (3d Cir. 2010) (affirming a conviction obtained using evidence obtained by an informant who surreptitiously recorded a suspect who was represented by counsel prior to the indictment); United States v. Tracy, No. 96-1100, 1997 U.S. App. LEXIS 5352, at *4–6 (2d Cir. Mar. 13, 1997) (same); United States v. Worthington, No. 89-5417, 1990 U.S. App. LEXIS 12838, at *9–11 (4th Cir. July 31, 1990) (same).

government attorneys and not government agents broadly.[229] Being represented by counsel alone is not enough to shield a suspect from tactics like fake subpoena attachments that help "elicit incriminating statements from a suspect."[230] All these factors support crossing the line from investigation to accusation.

Crucially, in the context of custodial interrogation, courts will not find a Rule 4.2 violation when the people physically present in the interrogation are only law enforcement personnel, or non-lawyer confidential informants.[231]

Many of these applications of Model Rule 4.2 support the proposed rule discussed above. The prohibition turns on "investigative" contacts developing into non-investigative, adversarial ones. The presence of administrative proceedings (analogous to Rule 15 depositions) or grand jury proceedings point in favor of adversarial contacts, as does the physical presence of the prosecutor.

Of course, ethical rules governing prosecutor contact with a defendant are not coextensive with the analogous Sixth Amendment rules. In some cases, Rule 4.2 can provide more protection. The Comments to Model Rule 4.2 make clear that "[t]he fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule."[232] Under the Sixth Amendment, if the defendant initiates contact with agents of the government to discuss his case, they may talk freely with him, whereas the Model Rule forbids such communication even if initiated by the adverse party represented by counsel.[233] And the Sixth Amendment rules

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229. *See* United States v. Thompson, 35 F.3d 100, 104–05 (2d Cir. 1994) (affirming a district court's denial of a defendant's motion to suppress where the defendant cooperated with an I.N.S. investigation into his citizenship despite having counsel).

230. *See* United States v. Carona, 660 F.3d 360, 365 (9th Cir. 2011) (prosecutors provided informant with fake documents in order to elicit incriminating statements from defendant); *Hammad*, 858 F.2d at 840 (holding that the prosecutor overstepped the "broad powers of his office" when he issued a fake subpoena to "create a pretense that might help the informant elicit admissions from a represented suspect").

231. United States v. Binday, 804 F.3d 558, 593 (2d Cir. 2015) ("legitimate investigative techniques" by government officials is "authorized by law" prior to the indictment of a defendant who is represented by counsel); *Ryans*, 903 F.2d at 739 (holding that Model Code DR 7-104(A)(1) "was not intended to preclude undercover investigations of unindicted suspects merely because they have retained counsel"); United States v. Koerber, 966 F. Supp. 2d 1207, 1232 (D. Utah 2013) (holding that "*covert or undercover* noncustodial, pre-indictment *ex parte* contact by law enforcement personnel in the investigative phase of a matter is 'authorized by law' for purposes of the no-contact rule" (emphasis added)).

232. MODEL RULES OF PROF'L CONDUCT Rule 4.2 cmt. 5 (AM. BAR ASS'N 2014).

233. Montejo v. Louisiana, 556 U.S. 778, 790–91 (2009); *see also* MODEL RULES OF PROF'L CONDUCT Rule 4.2 cmt. 2 (AM. BAR ASS'N 2014).

apply only after the Sixth Amendment right to counsel attaches by way of, at least, formal charge or appearance before a judge, while the Model Rule's applicability does not depend on the filing of a lawsuit. But the ethical rule nonetheless serves as a useful analogy.

C. A Limited Effect

Finally, this rule will not open the floodgates. There is a legitimate fear that a rule too expansive will hamper law enforcement, rendering ordinary investigative contacts too burdensome. But the proposed rule is limited to situations where the prosecutor personally has substantive contact about the case with the accused, either directly or through counsel. As such, it would not prevent prosecutors from using confidential informants and jail plants to interrogate suspects.[234] Nor would it prevent law enforcement agents from interrogating suspects in custody, as long as the prosecutor was not involved. Even if the prosecutor wanted to be personally involved in a pre-charge interrogation as part of an ongoing investigation, the prosecutor would merely have to limit personal involvement to noncustodial interrogation.

CONCLUSION

The Sixth Amendment right to counsel is an essential bulwark of fairness in our criminal justice system. But it is only as effective as we interpret it. A rigid line drawn at formal charge creates arbitrary distinctions; denies attorney assistance to those who need it; allows for improper interrogations, lineups, and negotiations; incentivizes prosecutors to delay formal charges to game the system; and sends the wrong signal about professional ethics and the "no contact" rule. These costs are particularly troubling in an era of increasing use of pre-indictment plea negotiations.

None of these costs are offset by the supposed salutary clarity, predictability, and administrative ease of the bright-line rule, because there is a comparably clear-cut alternative rule that avoids the above evils: triggering attachment of the right when a prosecutor engages in substantive contact with an accused. Far from being a sacrifice of the black letter law to pragmatic demands, such a rule is actually consistent with text and doctrine. It has the additional advantage of advancing justice.

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234. United States v. Henry, 447 U.S. 264, 274 (1980) ("when government intentionally creates a situation likely to induce [defendant] to make incriminating statements without the presence of assistance of counsel," the defendant's Sixth Amendment right to counsel is violated.).