No. 15-6060

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN R. TURNER,

Petitioner-Appellant

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AND IN SUPPORT OF PETITIONER-APPELLANT

Adam Lamparello
Jennifer Kinsley
Counsel of Record
University Drive
Newport, KY 41099
adamlamparello@yahoo.com
201-317-5115
kinsleyj1@nku.edu
859-572-7998

Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Other Authorities

Interest of *Amicus Curiae*

The National Association for Public Defense ("NAPD") -- a national organization uniting nearly 14,000 public defense practitioners across the fifty states -- respectfully submits that leave to file should be granted because their members have a strong interest in the issue presented by this case. Specifically, NAPD's mission is to ensure strong criminal justice systems, advocate for policies and practices that provide effective defense for indigent defendants, achieve system-wide reform that increases fairness for such defendants, and offer education and support for public defenders and public defender leaders.

To that end, NAPD plays a vital role in advocating for defense counsel and the clients they serve. Furthermore, based on the experience of its members and the interests it champions, NAPD is uniquely situated to speak to issues of fairness and justice facing indigent criminal defendants. Because this case presents important questions concerning the scope of the Sixth Amendment right to counsel, NAPD possesses the expertise and interest to assist the Court in reaching a fair and just outcome.

Introduction

This Court should overturn its decision in *United States v. Moody*, 206 F.3d 609 (6th Cir. 2000), and hold that the Sixth Amendment right to counsel applies to pre-indictment plea negotiations. Specifically, the right to counsel should apply when: (1) a state or federal prosecutor is involved; (2) the prosecutor contacts an individual who will be subject to state or federal charges; (3) the prosecutor informs the individual of the particular charges that will be brought; and (4) the prosecutor attempts to resolve the matter, through a plea offer or other agreement, before seeking an indictment.[1]

Two reasons counsel in favor of adopting this rule. *First*, the underlying rationale of *Kirby v. Illinois*, 406 U.S. 682 (1972), supports extending the right to counsel to pre-indictment plea negotiations. The plurality in *Kirby* strongly suggested that the right to counsel attaches when the government has committed itself to prosecuting a particular individual, has solidified an adversarial relationship with that individual, and has confronted the individual with the complexities of procedural and substantive law. *See Kirby*, 406 U.S. at 680. In the

[1] This rule is narrow in scope and will not directly or indirectly affect the state's investigatory power. Indeed, to the extent that the right to counsel is implicated in the investigatory context, such right is protected under the Fifth Amendment right against compulsory self-incrimination, not the Sixth Amendment right to counsel. *See* U.S. Const. amend. V (stating in relevant part that "[n]o person shall be … compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law").

context of pre-indictment plea negotiations, all of these factors are present.

Second, in *Missouri v. Frye*, 132 S. Ct. 1399 (2012), the Supreme Court held that plea negotiations constituted a "critical stage" of a criminal proceeding and triggered the Sixth Amendment right to counsel. *See id.* at 1407-1408.

Argument

I. The Sixth Amendment Right to Counsel Attaches to Critical Stages of A Criminal Proceeding, Whether Formal or Informal, in Which The Adverse Positions of the Government and Defendant Have Solidified.

The Sixth Amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Supreme Court has interpreted the Sixth Amendment to require the assistance of counsel at "critical stages" of a criminal proceeding -- *whether formal or informal* -- where: (1) the government has demonstrated a commitment to prosecute; (2) the adversarial positions of the Government and defendant have solidified; and (3) a defendant is confronted with the intricacies of procedural and substantive law. *See Kirby*, 406 U.S. at 689. The reasoning upon which the Court's Sixth Amendment jurisprudence is predicated supports attaching the right to counsel to pre-indictment plea bargaining.

A. The Historical Development of the Sixth Amendment Right to Counsel.

In *Kirby,* a plurality of the Court determined that the Sixth Amendment right to counsel attaches when judicial proceedings have been initiated against a defendant. *See id.* at 688. However, the reasoning underlying *Kirby* strongly suggests that the right to counsel should attach whenever the government's position evolves from investigative to adversarial:

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

Id. at 689 (emphasis added). Basing the right to counsel on whether the government has "committed itself to prosecute," and thus shifted from an investigatory to adversarial posture, makes eminent sense. If individuals were categorically denied counsel simply because the government had not yet sought an indictment, *Kirby* would be reduced to a "mere formalism" and potential defendants would be forced to navigate the legal process without the assistance necessary to ensure fairness, due process, and appropriate outcomes.

B. The Court's Pre- and Post-*Kirby* Jurisprudence Strongly Supports Attaching the Sixth Amendment Right to Counsel to Pre-Indictment Plea Negotiations.

The Court's pre- and post-*Kirby* jurisprudence suggests that the Court countenanced a pragmatic, rather than formalistic, assessment of whether counsel is necessary to safeguard an individual's right to counsel. In *U.S. v. Wade*, for example, the Court emphasized that the right to counsel "encompasses counsel's assistance *whenever necessary to ensure a meaningful defense*." 388 U.S. 218, 225 (1967) (emphasis added). In so holding, the Court explained as follows:

> [I]n addition to counsel's presence at trial, the accused is guaranteed that he *need not stand alone against the State* at any stage of the prosecution, *formal* ***or informal***, *in court* ***or out***, where counsel's absence might derogate from the accused's right to a fair trial. *The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment.*

Id. at 226-227 (emphasis added); *see also Moran v. Burbine*, 475 U.S. 412, 431 (1986) (focusing primarily on whether the government shifted from an accusatorial to an investigatory posture).

To be sure, the right to counsel is not based on a rigid interpretation of the words "criminal prosecution," but rather on the "most basic right [of] a criminal defendant--his right to a fair trial." *Wade*, 388 U.S at 224 (brackets in original). Accordingly, the point at which adversary criminal proceedings are initiated is irrelevant to whether counsel's assistance is necessary to provide effective advice regarding the government's plea offer.

Notwithstanding, the circuit courts are split regarding the scope and application of *Kirby,* with some holding that the plurality limited the right to counsel to critical stages occurring at or after the initiation of judicial proceedings. *See, e.g., United States v. Heinz*, 983 F.2d 609 (5th Cir. 1993); *United States v. Lin Lyn Trading, Ltd.*, 149 F.3d 1112, 1117 (10th Cir. 1998). In *Moody*, this Court reluctantly adopted this approach, expressing "frank dissatisfaction with its decision that held that the right to counsel did not protect a defendant during pre-indictment plea negotiations." James S. Montana & John A. Galotto, *Right to Counsel: Courts Adhere to Bright-Line Limits*, 16-SUM Crim. Just. 4, 5 (2001) (discussing *Moody*, 206 F.3d 609).

Other circuits, however, "rely upon the broader language in *Kirby* … and focus on the true point at which 'the government has committed itself to prosecute.'" *Id.* (quoting *Kirby*, 406 U.S. at 689). These courts recognize that the right to counsel may attach to pre-indictment plea negotiations if the government has shifted from an investigative to adversarial posture. *See, e.g., Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995) ("[the] right to counsel might conceivably attach before any formal charges are made, or before an indictment or arraignment"); *Matteo v. Superintendent*, 171 F.3d 877, 892 (3d Cir.), *cert. denied*, 528 U.S. 824 (1999) (holding that the right to counsel "may attach at earlier stages [before the initiation of criminal proceedings]" if the defendant "is confronted, just

as at trial, by the procedural system, *or by his expert adversary*, or by both") (brackets in original) (emphasis added); *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992), *cert. denied*, 507 U.S. 935 (1993) (noting that, in some circumstances, the right to counsel may attach in a pre-indictment setting if, "despite the absence of formal adversary judicial proceedings, the government had crossed the constitutionally significant divide from fact-finder to adversary") (internal citation omitted).

This approach is consistent with the practical realities of prosecutorial decision-making:

> It is clear that in many cases the point of "commencement to prosecute" is reached prior to the filing of formal charges. In many federal cases, the point of commitment is reached no later than the time that a prosecution memo is approved by a supervisor. In the many types of federal prosecutions that must be approved by the U.S. Department of Justice (DOJ), the point of commitment may be reached even earlier--at the time the DOJ approves prosecution and transmits the file to the local U.S. attorney's office.

Montana & Galotto, 16-SUM Crim. Just. at 11-12.

Furthermore, adherence to the *Moody* rule -- without regard to any of the justifications upon which the *Kirby* plurality relied -- incentivizes prosecutors to circumvent the constitutional safeguards afforded to criminal defendants simply by manipulating the timing of a plea offer. *See id.* at 11 ("by fore-closing [sic] the attachment of the right to counsel prior to the initiation of formal charges, the *Moody* and *Hayes* cases have unintentionally provided an incentive to law

enforcement to pursue aggressive investigative techniques against represented persons even in the late stages of a criminal investigation").

For these reasons, the Court should reexamine and reverse its holding in *Moody*.

II. The Sixth Amendment Right to Counsel Applies to the Plea Bargaining Process.

In *Missouri v. Frye*, the Supreme Court held that plea negotiations constitute a "critical phase" of a judicial proceeding and thus trigger the Sixth Amendment right to effective assistance of counsel (and by implication, the right to counsel). 132 S.Ct. at 1407-8; *see also Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) ("the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel"). Writing for the majority in *Frye*, Justice Kennedy stated as follows:

> The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours 'is for the most part a system of pleas, not a system of trials,' it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. 'To a large extent … horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.'

Frye, 132 S.Ct. at 1407 (quoting R.E. Scott and W.J. Stuntz, *Plea Bargaining as*

Contract, 101 Yale L. J. 1909, 1912 (1992)) (emphasis in original).

The Court's holding in *Frye* should extend to pre-indictment plea negotiations because there is no practical difference between plea agreements that are offered pre- or post-indictment. In both instances, defendants must make strategic choices that involve forfeiting the right to a trial by jury and that often result in a deprivation of liberty. In other words, constitutional rights are no less imperiled, and the necessity of counsel's assistance no less imperative, simply because a plea offer occurs before or after a grand jury indictment. And the government's commitment to prosecute is no less apparent, its position no less solidified, and the relevant law no less complex, merely because the plea is offered before indictment.

Ultimately, the problem with adhering to the *Moody rule* is that the underlying precedent upon which this Court reluctantly adopted such a rule -- *Kirby* -- was decided in an era when: (1) pre-indictment plea bargaining was extremely rare; (2) the federal sentencing guidelines -- which caused a proliferation in pre-indictment plea bargaining -- did not exist; and (3) the Supreme Court had not yet held, as it did in *Frye*, that the Sixth Amendment attaches to the plea bargaining process. Thus, given the dramatic changes in the legal landscape in the decades following *Kirby*, this Court should adopt a rule that reflects the practical realities of modern-day criminal procedure, in which the government often shifts

from an investigative to adversarial posture, and solidifies its commitment to prosecute an individual *before* an indictment is obtained.[2]

By way of analogy, in *Riley v. California,* 134 S.Ct. 2473 (2014), the Supreme Court underscored the importance of adopting workable rules that reflect modern-day realities -- and that decades-old precedent could not foresee. In unanimously holding that the search incident to arrest doctrine, which is intended to protect officers' safety and prevent evidence destruction (*Chimel v. California,* 395 U.S. 752 (1969)), did not justify warrantless searches of cellular telephones, the *Riley* Court emphasized that, at the time *Chimel* was decided, cellular telephones did not exist and searches incident to arrest were confined to finite objects (e.g., a cigarette pack or plastic container) found on or near the arrestee's person. *See id.* at 2484 ("[e]ven less sophisticated phones … which have already faded in popularity … have been around for less than 15 years. Both phones are based on technology nearly inconceivable just a few decades ago, when *Chimel* and *Robinson* were decided").

---

[2] As an example of the frequency at which prosecutors seek pre-indictment pleas, the New Jersey court system has solidified an entire pre-indictment plea negotiation procedure. In many New Jersey state courts, informal court hearings – known as "events" – take place before a case is referred to a grand jury. While a defendant is screened for potential indigence and eligibility for public defenders at pre-indictment events, counsel is not automatically present. Defendants are then referred to pretrial diversion, drug court, and other alternative programs without having an opportunity to speak to a lawyer. *See* New Jersey Judiciary Criminal Division Overview (2007), at p. 14 (available at: http//njcourts.gov/courts/assets/criminal/criminaloverview.pdf) (last viewed May 31, 2017).

As such, warrantless searches of cellular telephones, which have vast storage capacities and often contain many of the "papers and effects" protected by the Fourth Amendment (e.g., private photographs, addresses, and bank statements) infringed on fundamental privacy protections in a manner that searches of cigarette packs or plastic containers did not. *See id.* at 2488 ("The United States asserts that a search of all data stored on a cell phone is 'materially indistinguishable' from searches of these sorts of physical items. That is like saying a ride on horseback is materially indistinguishable from a flight to the moon"). Thus, based on the advances in technology that occurred in the decades following *Chimel*, the Court held that warrantless searches of cellular telephones incident to arrest violated the Fourth Amendment. *See id.* at 2495.

The same reasoning applies here. When *Kirby* was decided, pre-indictment plea bargaining was extremely rare.[3] The federal sentencing guidelines did not

---

[3] Illustrative of the current common practice of negotiating pre-indictment pleas are the following news articles, all of which discuss case outcomes that resulted from informal plea negotiations before actual criminal charges were filed: 1) https://www.washingtonpost.com/local/public-safety/former-dc-elementary-school-teachers-child-sex-abuse-case-is-delayed/2017/03/22/37e145a0-0f0e-11e7-9d5a-a83e627dc120_story.html?utm_term=.ad7f3c7d2694; 2) http://www.njherald.com/20161220/plea-off-table-for-hardyston-man-in-marijuana-candy-possession-case#; 3) http://archive.northjersey.com/news/crime-and-courts/former-detective-accepts-plea-deal-in-court-1.1528992; 4) http://www.copblock.org/172063/cop-block-founder-ademo-freeman-offered-plea-deal-before-indictment/; and 5) http://www.cbsnews.com/news/edwards-offered-misdemeanor-plea-deal-before-indictment-according-to-reports/.

exist. The Supreme Court had not yet held that the Sixth Amendment attaches to plea negotiations. Consequently, given the unforeseeable developments that occurred in the decades following *Kirby* -- like those that occurred in the wake of *Chimel* -- and the accompanying infringements on basic Sixth Amendment protections, this Court should hold that the right to counsel attaches when: (1) a state or federal prosecutor is involved; (2) the prosecutor contacts an individual who will be subject to state or federal charges; (3) the prosecutor informs the individual of the particular charges that will be brought; and (4) the prosecutor attempts to resolve the matter, such as through a plea offer, before seeking an indictment. Such a rule will also enable a "pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." *Patterson v. Illinois*, 487 U.S. 285, 288 (1988). In the pre-indictment plea bargaining context, those dangers are manifest -- and multiple -- and require the assistance of counsel to ensure that the criminal justice system operates with the fairness necessary to maintain its legitimacy.

Conclusion

For the foregoing reasons, NAPD respectfully submits that the decision of the panel below should be reversed.

/*s/ Adam Lamparello*
Adam Lamparello

/*s/ Jennifer Kinsley*
Jennifer Kinsley

Certificate of Compliance

1. This brief complies with the page-length limitation of this Court's briefing letter and Fed. R. App. P. 29(a)(5) because this brief is less than one-half the length allowed for the Petitioner-Appellant's principal brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 6 Cir. R. 32(b)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

Certificate of Service

I hereby certify that on this 2nd day of June 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Adam Lamparello
Adam Lamparello

/s/ Jennifer Kinsley
Jennifer Kinsley