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THE COLORADO COUNSEL CONUNDRUM: PLEA BARGAINING, MISDEMEANORS, AND THE RIGHT TO COUNSEL

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Colorado's procedures for handling misdemeanor prosecutions raise novel questions of Sixth Amendment law that have not been squarely addressed by state or federal courts. At the center of Colorado's counsel conundrum is a statute, Colorado Revised Statute § 16-7-301, which requires the prosecution to negotiate plea deals with a person charged with a misdemeanor before the defendant has an opportunity to meet with an attorney. There are strong incentives for defendants to accept a pre-counsel offer; indeed, by accepting an early, pre-counsel plea, a defendant may accrue sentencing or charge concessions from the prosecution.[1] Moreover, and more significant, for defendants who are not released on bail, the consequences of refusing a pre-counsel plea offer are even more immediate: such a defendant faces the Hobson's choice of pleading guilty to a crime without the advice or assistance of counsel and thus obtaining one's immediate release from custody, or remaining in jail for several more days until a second appearance when counsel is appointed.[2] That is to say, insisting on one's right to counsel in a misdemeanor case may come at a cost, both in terms of the ultimate sentence, and the length of the time they are subject to pretrial detention.[3] Even a defendant who is arrested for an offense for which jail is a most unlikely sentence[4] could

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1. COLO. REV. STAT. § 16-7-301 (4)(a)(I) (2011).

2. The Colorado rules provide for the appointment of counsel at the second appearance, which usually occurs three days after the initial appearance for persons in custody. By contrast, Federal Rule of Criminal Procedure 44 requires that counsel be appointed to defendants "from initial appearance through appeal, unless the defendant waives this right"; however, an attorney need not be provided if the federal court determines that the charged offense is a petty offense, defined as a case "for which the court determines that, in the event of conviction, no sentence of imprisonment will actually be imposed." Fed. R. Crim. P. 58(a)(3). *See also* 2 F. LEE BAILEY & KENNETH FISHMAN, HANDLING MISDEMEANOR CASES § 29:1 (2d ed. 2011) (identifying a circuit split as to whether the scope of Rule 44 is broader than, or coextensive with the federal constitutional right to counsel).

3. This is consistent with statistics from other jurisdictions demonstrating that the "most significant predictor of defendants entering a plea of guilty or no contest at arraignment was their custody status." *See, e.g.*, ALISA SMITH & SEAN MADDAN, NAT'L. ASS'N. CRIM. DEF. LAW., THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 15 (2011).

4. If a sentence of actual incarceration is not authorized by the statute, then existing case law precludes Sixth Amendment claims. Scott v. Illinois, 440 U.S. 367, 369, 372–74 (1979). This raises

be held in jail for days while he is awaiting the appointment of counsel and the next round of plea negotiations if he is not released on bail at the initial appearance.[5]

This is not a merely hypothetical problem. There are a variety of crimes for which a defendant might be detained in pretrial custody even on a charge for which he will not likely receive a sentence of imprisonment. For example, a first DUI offense will likely not result in a sentence of incarceration, but rather some probationary term and classes. However, it is not uncommon for such a defendant to be detained overnight prior to the initial appearance. Accordingly, a DUI defendant, and many others facing misdemeanors, will be forced to confront the option of accepting a pre-counsel plea offer from the prosecution, or spending an extra couple of nights in jail. Many defendants will, quite reasonably, opt for the prompt, pre-counsel resolution of their case.

In view of this reality, Colorado's pre-counsel plea bargaining system presents a trio of difficult Sixth Amendment questions, namely:

(1) At what point does the attachment of the right to counsel occur in Colorado (under *Rothgery v. Gillespie County*[6]);

(2) Does the negotiation and entry of an un-counseled misdemeanor plea constitute a critical stage for which appointment and presence of counsel is required (under, for example, *United States v. Wade*[7]); and

(3) Do sentences of time served or home arrest constitute "actual incarceration" (under the test announced in *Scott v. Illinois*[8])?

In short, Colorado's system for prosecuting misdemeanor offenses presents a constitutional conundrum that has important consequences for misdemeanor defendants, that is tantalizing for academics, and that is desperately in need of judicial review. This Article is designed for all three audiences. The direct constitutional analysis of Colorado's provisions is designed to serve as a guidepost for judges and litigators. Likewise, the thorough accounting of the gaps in the academy's collective knowledge about Sixth Amendment doctrine will hopefully spur additional empirical, historical, and doctrinal scholarship regarding the right to counsel in misdemeanor cases.

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an important question as to whether, in certain circumstances, the scope and duration of pretrial detention, standing alone, should suffice to trigger the right to counsel even if the crime does not authorize a sentence of incarceration. *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 203–04 (2008).

5. Jenny M. Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 367 (2011) (observing that the Colorado system has the effect of encouraging thoughtless waivers of the right to counsel).

6. 554 U.S. 191, 203 (2008).

7. 388 U.S. 218, 236 (1967).

8. 440 U.S. 367, 369 (1979) (holding that "actual imprisonment" is "the line defining the constitutional right to appointment of counsel").

In analyzing the Sixth Amendment concerns raised by these pre-counsel misdemeanor plea negotiations, we are mindful of the practical constraints on the criminal justice system. To be sure, the resources needed to provide defense counsel at every misdemeanant's initial appearance would be substantial, and the efficiencies of the current system are apparent.[9] Nonetheless, the Supreme Court has repeatedly emphasized that efficiency gains and resource constraints cannot trump the right to counsel.[10]

Part I of this Article provides a brief overview of the relevant Sixth Amendment law. Part II provides a comprehensive account of the prosecutorial policies and state-mandated procedures that are relevant to misdemeanor prosecutions in Colorado. Finally, Part III analyzes the nature and viability of constitutional challenges to Colorado's misdemeanor procedures. Colorado's system for misdemeanor prosecutions presents a valuable case-study for understanding the federal right to counsel—its scope, its limits, and the gaps in current doctrine as it applies to misdemeanor cases.

I. THE THREE-TIERED TRIGGER FOR THE RIGHT TO COUNSEL

The Sixth Amendment is the seminal protection for individuals facing criminal charges. An effective lawyer is often an essential catalyst for the meaningful realization of other constitutional and statutory rights to which a defendant is entitled.[11] Moreover, although "the trial may be the most dramatic and exciting part of the criminal process," it is beyond debate that deprivations of the right to counsel in the pretrial context will often affect a greater hardship on the defendant than the absence of coun-

9. Some scholars have argued that the political realities of indigent defense funding make the persistent clamoring for increased budgets impractical and misguided. *See* Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 464 (2007) (arguing that to solve "the indigent defense crisis, states should redirect resources now spent on [most misdemeanors] to reduce indigent defender caseloads so that those who represent defendants charged with more serious crimes will have more time to spend on those cases."); *id.* at 465–66 (pointing to empirical data suggesting that in low-level misdemeanors "counsel do not appear to provide significant benefit to the defendants"); *id.* at 466 ("Indeed, in the federal system, pro se misdemeanor defendants have better outcomes than every category of represented misdemeanor defendants, including those who retain attorneys and those represented by appointed counsel."). Likewise, a recent empirical study in Massachusetts has concluded that in certain contexts, providing counsel to civil litigants does not provide any statistical advantages. James D. Greiner, Cassandra Wolos Pattanayak, & Jonathan Hennessy, *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court*, SOCIAL SCIENCE RESOURCE NETWORK (2011), http://ssrn.com/abstract=1880078.

10. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344 (1963); *see also* Argersinger v. Hamlin, 407 U.S. 25, 41 (1972) (Burger, J., concurring) ("Were I able to confine my focus solely to the burden that the States will have to bear in providing counsel, I would be inclined, at this stage of the development of the constitutional right to counsel, to conclude that there is much to commend drawing the line at penalties in excess of six months' confinement. Yet several cogent factors suggest the infirmities in any approach that allows confinement for any period without the aid of counsel . . . ."); *see also* Hashimoto, *supra* note 9, at 477 ("*Argersinger* has had an enormous financial impact on states and counties—an impact arguably greater than that of *Gideon*.").

11. Powell v. Alabama, 287 U.S. 45, 70 (1932) (recognizing the right to "counsel as perhaps [a defendant's] most important privilege").

sel during the trial.[12] This is particularly true in view of statistics that consistently show that more than 90% of all criminal cases are resolved without a trial,[13] and the percentage is likely even higher for misdemeanors.[14] In recognition of these realities, the Supreme Court has expressly held that the right to counsel extends beyond the mere right to have a lawyer present during one's trial.[15]

The right to counsel in the pretrial setting is not, however, without limitation. As an initial matter, entirely distinct from the substantive merit of the alleged injury, three distinct threshold limitations must be satisfied: first, the right to counsel must have attached; second, the stage during which the alleged harm to the defendant occurred must be deemed "critical"; and third, the defendant must be sentenced to actual incarceration following his trial or plea. The remainder of this section will focus on describing the individual and aggregate effects of these limitations on the right to counsel, both as they apply generally and in Colorado specifically.

A. Attachment

The first limitation on the right to counsel, attachment, is controversial among academics.[16] The attachment requirement is essentially a doctrinal recognition that the right to counsel does not extend indefinitely back in time before the commencement of the criminal trial; in essence, the term "attachment" is a shorthand for the earliest point in a case when a defendant enjoys Sixth Amendment protections.[17] This temporal limitation is understood as a measure designed to give effect to the Sixth Amendment's text, which provides that only during "criminal prosecu-

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12. Justin Marceau, *Pretrial Ineffective Assistance*, U. PA. J. CONST. L. (forthcoming 2012).

13. *E.g.*, Brooks Holland, *A Relational Sixth Amendment During Interrogation*, 99 J. CRIM. L. & CRIMINOLOGY 381, 382 (2009) ("[T]he vast majority of today's criminal cases—90% or more—are resolved by negotiated disposition rather than trial."); Adam Liptak, *Supreme Court to Weigh Effects of Bad Plea Advice*, N.Y. TIMES, Oct. 30, 2011, http://www.nytimes.com/2011/10/31/us/supreme-court-to-hear-cases-involving-bad-advice-on-plea-deals.html?_r=1 ("Last year [2010], 97 percent of convictions in federal courts were the result of guilty pleas. In 2006, the last year for which data was available, the corresponding percentage in state courts was 94."); George Fisher, *Plea Bargaining's Triumph*, 109 Yale L.J. 857, 1012–13 (2000) ("[I]n modern American courtrooms . . . guilty-plea rates above ninety or even ninety-five percent are common.").

14. *See, e.g.*, SMITH & MADDAN, *supra* note 3, at 9 (reporting that in a Florida study, the authors found that "94% of misdemeanor cases are resolved before trial").

15. *See, e.g.*, Maine v. Moulton, 474 U.S. 159, 170 (1985); Kirby v. Illinois, 406 U.S. 682, 688 n.6 (1972) (citing Powell v. Alabama, 287 U.S. 45, 57 (1932)); United States v. Wade, 388 U.S. 218, 224–25 (1967); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE 4–4.1 (3d ed. 1993). As one Sixth Amendment scholar has observed, "a 'fair trial' implicates much more than the trial itself . . . [because] [d]efendants . . . rarely face their accusers during traditional courtroom proceedings . . . ." Holland, *supra* note 13, at 381–82.

16. There is a long and impressive line of scholarship assailing the attachment requirement as overly formalistic and inconsistent with the spirit of the Sixth Amendment. *See, e.g.*, *id.* at 381; Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right to Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1636 (2003).

17. *See, e.g.*, *Kirby*, 406 U.S. at 688–90.

tions" shall a defendant enjoy the right to counsel.[18] In other words, even though the right to counsel extends beyond representation at trial, the defendant must be facing something akin to a criminal prosecution before the right to counsel applies. But as a practical matter, a rigid insistence on the commencement of a criminal prosecution has the formalistic effect of depriving defendants of the right to counsel in many of the most important stages of their defense. For example, police interrogations and identifications routinely occur before the formal attachment of the right to counsel;[19] although the entire fate of one's case may turn on the advice and aid of counsel during an interrogation or identification, the Sixth Amendment's protections do not extend to these proceedings.[20] As relevant for the Colorado procedures discussed herein, the scope of the right is, therefore, often associated with formalism much more than with a functionalist inquiry of whether counsel would be valuable at a particular stage of the criminal process.[21] As Professor Metzger has explained, the Court's rigid insistence on the attachment requirement marks a "triumph of the letter over the spirit of the law."[22]

The right to counsel, then, has not been interpreted as providing a continuum of protections in the pretrial context. If the right to counsel has not attached, then the right to counsel provides no protections, not merely lesser protections.[23] Notably, the Court's elaboration on the point of attachment has been largely relegated to cryptic dicta, but a few notable data points stand out. For example, in *Kirby v. Illinois*,[24] the Court defined attachment as the point of "formal charge, preliminary hearing, indictment information, or arraignment."[25] Likewise, cases arising in the interrogation context identified the "arraignment"[26] or even just an arraignment on the complaint or "outstanding arrest warrant"[27] as the point of attachment.

For many states and the federal government, the point at which the right to counsel attaches for constitutional purposes is of merely academ-

18. U.S. CONST. amend. VI.

19. Although the protections of *Miranda v. Arizona* apply to all custodial interrogations, 384 U.S. 436, 500 (1966), the *Miranda* right to counsel is, as a practical matter, nothing more than a right to remain silent until the court appoints a lawyer. *See* Edwards v. Arizona, 451 U.S. 477, 485-87 (1981) (recognizing that the invocation of the right to counsel by a suspect requires only that police cease questioning until the defendant has met with his attorney).

20. Holland, *supra* note 13, at 384–85. *But cf.* Powell v. Alabama, 287 U.S. 45, 71 (1932) (noting that the right to counsel may not be so circumscribed as to preclude counsel from giving meaningful "aid in the preparation and trial of the case").

21. *Contra Kirby*, 406 U.S. at 689 (describing the attachment requirement as giving effect to the language of the Sixth Amendment, rather than as a "mere formalism").

22. Metzger, *supra* note 16, at 1671 (citing United States v. Moody, 206 F.3d 609, 615 (6th Cir. 2000)). "There are other pre-indictment procedures one might use to demonstrate how the bright-line [attachment] rule fails to honor the Sixth Amendment's promise." *Id.* at 1668 n.200.

23. *Kirby*, 406 U.S. at 689–90.

24. 406 U.S. 682 (1972).

25. *Id.* at 689.

26. Massiah v. United States, 377 U.S. 201, 205–06 (1964).

27. Brewer v. Williams, 430 U.S. 387, 391, 399–401 (1977).

ic interest. Most jurisdictions, including all federal districts, require the appointment of counsel at the first appearance of a defendant who has a right to counsel.[28]

Colorado, however, is a notable exception. Colorado law does not provide for the appointment of counsel at the defendant's first appearance even in cases where the defendant has a right to counsel.[29] Specifically, the rules in Colorado provide that for misdemeanor defendants the right to counsel is delayed until after the defendant speaks with the prosecutor about potential plea options.[30] In Colorado, then, the appointment of counsel may be delayed for days *after* the initial appearance.

The state of Texas also is among the minority of states that do not appoint counsel until after the initial appearance. The United States Supreme Court recently considered the Sixth Amendment implications of Texas's procedures for the appointment of counsel in *Rothgery v. Gillespie County*.[31] The procedural posture of the case was such that the constitutionality of denying counsel at an initial appearance was not before the Court; instead, it was a pure question of attachment: whether a defendant's first appearance is sufficient to trigger the attachment of counsel if the public prosecutor is not aware of or involved in that first appearance?[32] Specifically, the question before the Court was whether the Fifth Circuit was correct in affirming a summary judgment order in a § 1983 case on the grounds "that the Sixth Amendment right to counsel did not attach" at an initial appearance because prosecutors were not aware of or involved in that appearance.[33] Answering the question unequivocally, the Court held that "the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty," even if the public prosecutor is not aware of or present at the initial proceeding.[34] Thus, although Texas did not require the appointment of counsel for the first appearance or even the notification of the prosecution, an initial appearance was recognized as marking the point of attachment for the right to counsel.

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28. *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 203–04 (2008) ("We are advised without contradiction that not only the Federal Government, including the District of Columbia, but 43 States take the first step toward appointing counsel before, at, or just after initial appearance." (internal quotation marks omitted)). Of course, the mere appointment of counsel does not resolve questions as to the scope of ineffective assistance of counsel protections prior to trial. *See, e.g.*, Marceau, *supra* note 12 (discussing, in Section I(c), that the right to counsel does not apply to convictions that do not result in incarceration); *see also* Argersinger v. Hamlin, 407 U.S. 25, 33 (1972).

29. COLO. REV. STAT. § 16-7-301(1) (2011).

30. § 16-7-301(4)(a), *discussed in infra* Part II.

31. 554 U.S. at 191.

32. *Id.* at 194–95.

33. *Id.* at 197–98.

34. *Id.* at 194–95.

The unmistakable implication of *Rothgery* for Colorado is that the initial appearance of the defendant, where the defendant is informed of the "formal accusation"[35] against him, triggers the attachment of the Sixth Amendment right to counsel.[36] Under Colorado Criminal Procedure Rule 5, a defendant must be advised of his rights and the charges against him at the initial appearance;[37] the proceeding is, therefore, functionally identical to the proceeding at issue in *Rothgery*.

Notably, however, the Colorado courts are presently stuck in a rut of outdated Sixth Amendment precedent.[38] Treatises and lower courts continue to cite a Colorado Supreme Court decision from 1992, *People v. Anderson*, for the proposition that an initial appearance under Colorado Rule 5 is insufficient to trigger the attachment of the right to counsel.[39] This conclusion cannot survive the *Rothgery* decision. During the initial appearance in Colorado, commonly referred to as a Rule 5 proceeding, or more formally "the Crim. P. 5 proceeding," the defendant must be advised of the nature of the charges against him, his rights—including the right to counsel, to a jury, and the right against self-incrimination—and the terms of his bail, if he is bailable, are set.[40] Because *Rothgery* recognized that there was "'no doubt' that the right to counsel attached at the initial appearance,"[41] and because the inquiry is functional rather than technical—that is to say, the right to counsel attaches once there is "an

35. Because there are not formal charges for purposes of a felony case until after an indictment or initial appearance, the Supreme Court used the term "formal accusation" to designate the point when the right to counsel attaches. *See id.* at 194.

36. Colorado's current case law appears to be inconsistent with the federal standard on this point, articulated in *Rothgery*. People v. Anderson, 842 P.2d 621, 623–24 (Colo. 1992) (holding that an initial appearance does not trigger attachment).

37. COLO. R. CRIM. P. 5(c)(2) ("At the first appearance in the county court the defendant shall be advised in accordance with the provisions set forth [regarding felonies] . . . , except that [in misdemeanor cases] the defendant shall be advised that an application for the appointment of counsel shall not be made until after the prosecuting attorney has spoken with the defendant as provided in C.R.S. 16-7-301(4)(a)."). Under Rule 5, then, there is at least the possibility that prosecutors might meet with defendants to offer plea deals after the initial appearance. It seems, however, that the common practice is to meet with the misdemeanor defendants regarding plea offers prior to the initial appearance.

38. For example, the leading Colorado treatise has posited that "[t]he Colorado Supreme Court has adopted the same test for determining when the right to counsel attaches under the Colorado Constitution." 14 COLO. PRAC., CRIMINAL PRACTICE & PROCEDURE § 13.52 (2d ed. 2011) (citing *Anderson*, 842 P.2d at 623).

39. *Anderson*, 842 P.2d at 623. It is worth noting that apparently at the time of Anderson's initial appearance the prosecution had not yet filed a complaint (and no complaint had been filed). *Id.* Under the reasoning of *Anderson* it was significant that the prosecution had not yet "elected to prosecute the defendant [and] [f]or this reason, the [Rule] 5 proceeding did not constitute an initiation of an adversary judicial proceeding against the defendant." *Id.* But the *Rothgery* holding is clear that the "attachment rule [is] unqualified by prosecutorial involvement." 554 U.S. at 209–10 ("[A]n initial appearance following a charge signifies a sufficient commitment to prosecute regardless of a prosecutor's participation, indictment, information, or what the County calls a 'formal' complaint.").

40. COLO. R. CRIM. P. 5(a)(2).

41. *Id.* at 211 (citing Brewer v. Williams, 430 U.S. 387, 399 (1977)).

initial appearance before a magistrate'"[42]—there is no question that the Rule 5 proceeding signals the attachment of the right to counsel.

The failure of Colorado courts to expressly recognize that the Sixth Amendment attachment occurs at the Crim. P. 5 proceeding is probably more a product of the recency of the *Rothgery* decision than a reflection of inattention or disregard on the part of the Colorado courts.[43] In short order, a case turning on an attachment issue will present itself to the Colorado Supreme Court, and to be sure, the Colorado Supreme Court will be bound by the holding of *Rothgery* that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."[44]

B. Critical Stage

The attachment of the right to counsel is a necessary, but not a sufficient, condition for the full protections of the Sixth Amendment. In *Montejo v. Louisiana*, for example, the Supreme Court held that a defendant does not enjoy an unlimited right to have counsel's guiding hand at all points post-attachment; instead, the defendant's "right to have counsel present" extends only to "critical" stages of the criminal proceedings.[45] Viewed in this light, the determination that one's right to counsel has attached is, standing alone, a rather hollow constitutional victory for a defendant. Although a violation of the right to counsel can never arise before attachment, neither does the deprivation of counsel post-attachment constitute a constitutional injury unless the proceeding

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42. *Id.* at 199 (noting that the name of the proceeding is irrelevant; if there is a "hearing at which 'the magistrate informs the defendant of the charge in the complaint, and of various rights in further proceedings', and 'determine[s] the conditions for pretrial release,'" then the right to counsel attaches (alteration in original) (quoting WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 1.4(g) (3d ed. 2007))). Again, it is notable that in Colorado, apparently some proceedings appear to commence, via initial appearance under Rule 5, without a complaint being filed. *See Anderson*, 842 P.2d at 623. However, the absence of a formal complaint, no more than the absence of prosecutor involvement, is not dispositive—the *Rothgery* approach is clearly one of function over form: "[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *Rothgery*, 554 U.S. at 213. The initial appearance in Colorado clearly satisfies each of these criteria. *Contra Anderson*, 842 P.2d at 622–23.

43. The Supreme Court of Colorado has not yet had occasion to analyze the *Rothgery* decision, but the one Colorado case citing to *Rothgery* notes that the decision "refin[es] the test for attachment of the 6th Amendment right to counsel." People v. Wright, 196 P.3d 1146, 1148 (Colo. 2008).

44. *Rothgery*, 554 U.S. at 213.

45. 129 S.Ct. 2079, 2085 (2009) ("[O]nce the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings."); *see also Rothgery*, 554 U.S. at 212 ("Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings . . . .").

in question was a critical stage. As the Court has explained, "the enquiry into that right is a different one from the attachment analysis."[46]

That is to say, the right to the appointment and presence of counsel is not necessarily coextensive with the attachment of the right to counsel. As a result, the range of constitutional benefits that inhere from the attachment alone is relatively meager. The principal advantage to defendants resulting from attachment is the right to have counsel present for a variety of non-trial proceedings that have been recognized as critical stages. Most notably, formal police efforts designed to elicit incriminating statements from the defendant in the absence of an attorney run afoul of the right to counsel once the right has attached, even if the defendant is not in custody.[47] Likewise, whereas pre-attachment corporeal identifications do not implicate the right to counsel, once the right has attached, a defendant has the right to the presence of counsel at all in-person identification procedures.[48]

More generally, however, due to the distinction between the attachment of the right to counsel and the right to the presence and assistance of counsel, an understanding of what constitutes a critical stage is essential for all varieties of Sixth Amendment concerns, including the Colorado procedures for misdemeanor plea bargains at issue in this Article. Unfortunately, the United States Supreme Court's guidance on what constitutes a critical stage has been mind-boggling in its opacity.[49] For

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46. *Id.*

47. Prior to the attachment of the right to counsel, only the Fifth Amendment protects a defendant from coercive police interrogation techniques. Notably, the *Miranda* warnings, unlike the Sixth Amendment protections, are only triggered by custodial interrogation. *See* Rhode Island v. Innis, 446 U.S. 291, 298, 300–02 (1980). Moreover, so long as *Miranda* warnings are provided to the defendant, only the most conscience shocking behavior implicates Fifth Amendment concerns. *See, e.g.*, Spano v. New York, 360 U.S. 315, 320–24 (1959). Indeed, most confessions obtained after the provision of *Miranda* warnings will be deemed voluntary. *See* Kenji Yoshino, *Miranda's Fall*, 98 MICH. L. REV. 1399, 1412 (2000) (reviewing ALBERT CAMUS, THE FALL (Justin O'Brien, trans., Vintage Books 1991) ("[T]he officer . . . can be protected by the warning from many forms of subsequent scrutiny . . . ."). By contrast, once the right to counsel has attached, any efforts by law enforcement to deliberately elicit incriminating statements from the defendant give rise to Sixth Amendment claims, even if the defendant is not in custody. *See, e.g.*, Massiah v. United States, 377 U.S. 201, 205–07 (1964) (defendant was not in custody); Brewer v. Williams, 430 U.S. 387, 401 (1977).

48. United States v. Wade, 388 U.S. 218, 223–25 (1967) (lineup is a critical stage). *But see* Kirby v. Illinois, 406 U.S. 682, 688, 690 (1972) (declining to hold that all pre-trial identifications conducted without a defense attorney are per se during a critical stage because some identifications and lineups "[take] place long before the commencement of any prosecution whatsoever").

49. *See* D. Christopher Dearborn, *"You Have the Right to an Attorney," But Not Right Now: Combating Miranda's Failure by Advancing the Point of Attachment Under Article XII of the Massachusetts Declaration of Rights*, 44 SUFFOLK U. L. REV. 359, 388–89 (2011) (noting that the United States Supreme Court relies on language that is "susceptible to expansive interpretation" and "the Court's proffered bright-line rule has become increasingly arbitrary because most suspects face numerous trial-like confrontations long before the right to counsel attaches" (internal quotation marks omitted)); Hannah Misner, Comment, Maryland v. Shatzer: *Stamping a Fourteen-Day Expiration on* Miranda *Rights*, 88 DENV. U. L. REV. 289, 309 (2010) (noting that there is an "increasingly blurred line between the critical and non-critical stage[s] of criminal prosecutions"); Amanda Myra Hornung, *The Paper Tiger of* Gideon v. Wainwright *and the Evisceration of the Right to Appointment of Counsel for Indigent Defendants*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 495, 522 (2005)

example, in *United States v. Wade*,[50] the seminal case defining "critical stage," the Court merely identified as critical those proceedings in which the "presence of counsel . . . operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution."[51]

In light of such ambiguity of definition, it is generally more helpful to consider examples of proceedings that have been deemed "critical" and contrast them with those that have been viewed as "non-critical." For example, it is clear that all stages of a trial are critical stages;[52] likewise, arraignments,[53] preliminary hearings,[54] post-charge corporeal identifications,[55] police interrogations "occurring after the first formal charging proceeding,"[56] and sentencing proceedings[57] are all critical stages. By contrast, it seems that non-corporeal identifications,[58] pre-sentence interviews[59] pre-initial appearance police investigations,[60] and an array of other proceedings, such as consolidation hearings[61] and DNA hearings[62] are not critical stages. There is no clear pattern or means of predicting whether something will be deemed a critical stage beyond a case-by-case inquiry into how important a particular proceeding is to the ultimate outcome in a case. The best a lower court can do is to recognize as a critical stage "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."[63]

Despite the overall ambiguity as to what constitutes a critical stage, the Court's analysis of plea bargaining has been surprisingly clear. The

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("Because the Court has interpreted the attachment of the right to counsel at different stages under the criminal procedure rules of different states, there is room for debate about what constitutes a critical stage.").

50. 388 U.S. at 227–28.

51. *Id.* at 227.

52. *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 64 (1932).

53. Hamilton v. Alabama, 368 U.S. 52, 52–55 (1961) (applying Alabama law).

54. White v. Maryland, 373 U.S. 59, 60 (1963) (applying Maryland law).

55. *Wade*, 388 U.S. at 236–37.

56. Moran v. Burbine, 475 U.S. 412, 428 (1986). *But see* Texas v. Cobb, 532 U.S. 162, 171 n.2 (explaining that the right to counsel is offense specific and "there is no 'background principle' of our Sixth Amendment jurisprudence establishing that there may be no contact between a defendant and police without counsel present").

57. *See, e.g.*, Mempa v. Rhay, 389 U.S. 128, 137 (1967).

58. United States v. Ash, 413 U.S. 300, 321 (1973) ("[T]he Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender.").

59. *See, e.g.*, United States v. Hodges, 259 F.3d 655, 660 (7th Cir. 2001); United States v. Archambault, 344 F.3d 732, 736 n.4 (8th Cir. 2003); United States v. Washington, 11 F.3d 1510, 1517 (10th Cir. 1993).

60. *See, e.g.*, United States v. Tyler, 281 F.3d 84, 96 (3d Cir. 2002).

61. Van v. Jones, 475 F.3d 292, 315 (6th Cir. 2007) (applying Michigan law).

62. McNeal v. Adams, 623 F.3d 1283, 1288–89 (8th Cir. 2010).

63. United States v. Wade, 388 U.S. 218, 226 (1967). Or as one federal circuit court recently articulated the inquiry, "Whether it was a critical stage depends on whether there was a reasonable probability that [the defendant's] case could suffer significant consequences." Van v. Jones, 475 F.3d 292, 313 (6th Cir. 2007).

Court's post-*Gideon* right to counsel jurisprudence has consistently recognized the process of plea bargaining as a critical stage.[64] As one commentator recently concluded, "[p]lea bargaining is [a] critical stage, not only because it is 'an essential component of the administration of justice,' but also because ninety-five percent of convictions end in plea bargains."[65] The view that plea bargaining is a critical stage is hardly a novel conclusion, and instead rests on over thirty years of right to counsel jurisprudence. In 1984, the Court announced in *Strickland v. Washington*[66] the modern standard for evaluating whether counsel provided constitutionally adequate or effective representation.[67] Just one year later, the Court applied this newly minted standard to the plea process in *Hill v. Lockhart*.[68]

In *Hill*, the defendant alleged that his decision to plead guilty was tainted by the ineffective assistance of his attorney in failing to adequately advise him as to his eligibility for parole.[69] While the Court ultimately rejected his claim on the merits, it recognized that a defendant would satisfy the prejudice prong of *Strickland*'s ineffective assistance of counsel test if he could establish that but for the errors or omissions by counsel, there was a "reasonable probability that . . . he would not have pleaded guilty and would have insisted on going to trial."[70] The *Hill* decision, therefore, explicitly identifies the process of pleading guilty as a critical stage of the criminal case for purposes of the Sixth Amendment. Moreover, the Court's decisions from this Term, *Missouri v. Frye* and *Lafler v. Cooper*, explicitly extend the right to counsel protections to plea bargaining even when the fair trial right is not implicated – that is even where the defendant pleads not guilty.[71] Accordingly, the plea process—

64. *See e.g.*, Padilla v. Kentucky, 130 S.Ct. 1473, 1486 (2010) (noting that the Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel"). Even prior to *Gideon*, the Court recognized the central role of plea bargaining to a fair justice system. *See* Williams v. Kaiser, 323 U.S. 471, 475 (1945).

65. David A. Perez, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532, 1539 (2011) (quoting Santobello v. New York, 404 U.S. 257, 260 (1971)).

66. 466 U.S. 668 (1984).

67. *Id.* at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

68. 474 U.S. 52 (1985).

69. *Id.* at 53–55.

70. *Id.* at 59. In some jurisdictions, the prejudice inquiry requires not only a showing that it is reasonably likely that the defendant would have accepted the plea, but also that the trial judge would have accepted the terms of the agreement. *But see* 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 21.3 (b) (3d ed. 2011) ("Under the majority view, this standard does not require a defendant to prove that the trial judge would have accepted the plea agreement." (internal citations omitted)).

71. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (noting that "[i]n 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"). *See also* Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) (noting that the "criminal justice today is for the most part a system of pleas, not a system of trials.").

whether it is a guilty or a not guilty plea—triggers a series of duties for competent counsel, including, among others, to investigate the facts and law surrounding the charges, to advise the client as to the risks associated with a trial as compared to a plea, and to advise the client as to the consequences of pleading guilty.[72] The Court recently interpreted this latter duty of competent counsel to hold that competent representation requires the defense attorney to advise his client not only of the direct consequences of a guilty plea, but also of at least some collateral consequences.[73]

To be clear, then, it is settled as a matter of Sixth Amendment law that the process of evaluating a plea offer is a critical stage of the criminal proceeding for which the appointment and presence of counsel are constitutionally required.[74] Colorado law is equally clear on this point, recognizing that the "entire plea bargaining process" is a critical stage to which the full protections of the Sixth Amendment apply.[75]

C. Actual Incarceration

The third cognizability hurdle in the right to counsel realm is the actual incarceration rule. Although all felony prosecutions require the appointment of counsel,[76] misdemeanor prosecutions only implicate the right to counsel when the defendant is sentenced to actual incarceration.[77] As a result, for misdemeanor prosecutions, even if the right to counsel would have attached, and even if the proceeding in question is otherwise a critical stage of the criminal process, if the defendant is not eventually sentenced to incarceration, the right to counsel cannot be violated. Neither the incompetence of counsel, nor even the complete failure to ap-

72. 4 LAFAVE ET AL., *supra* note 70, § 21.3(b) (cataloguing the duties and responsibilities of counsel during the plea process).

73. Padilla v. Kentucky, 130 S.Ct. 1473, 1483 (2010) (requiring advisements regarding the clear immigration consequences of one's guilty plea).

74. The United States Supreme Court recently announced that a defense attorney's errors during plea negotiations leading to not guilty plea could constitute a Sixth Amendment violation of the right to effective assistance of counsel, despite the fact that the defendant received a fair trial. Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) ("[D]efense counsel has the duty to communicate formal offers from the prosecution . . . [and by] allow[ing] the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires."); Lafler v. Cooper, 132 S. Ct. 1376, 1387 (2012) ("If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.").

75. *See, e.g.*, Carmichael v. People, 206 P.3d 800, 805 (Colo. 2009).

76. *See* Gideon v. Wainwright, 372 U.S. 335, 342–44 (1963). The *Gideon* case did not explicitly resolve the issue, but it is generally read as requiring the appointment of counsel for all felony prosecutions. *See, e.g.*, Lily Fu, *High Crimes from Misdemeanors: The Collateral Use of Prior, Uncounseled Misdemeanors Under the Sixth Amendment,* Baldasar *and the Federal Sentencing Guidelines*, 77 MINN. L. REV. 165, 170 (1992) ("[C]ourts widely interpreted the right to counsel announced in *Gideon* to extend only to accused felons and not to accused misdemeanants.").

77. Scott v. Illinois, 440 U.S. 367, 373–74 (1979).

point an attorney, constitutes a Sixth Amendment violation if the defendant is not actually incarcerated.[78]

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence."[79] Despite this absolutist language, several states concluded that the right to appointed counsel did not apply to petty offenses.[80] The Supreme Court clarified the scope of the Sixth Amendment in this arena in *Argersinger v. Hamlin*[81] by squarely rejecting the "premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer."[82] The Court noted that it was "by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more"[83] and thus held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[84] Moreover, the *Argersinger* decision does not limit its discussion of the importance of counsel in misdemeanor cases to trial. The Court explained:

> Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor as well as in felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.
>
> In addition, the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result.[85]

Thus, for both plea bargaining and trials, *Argersinger* made clear that unless a defendant knowingly and intelligently waived the right to

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78. The mere possibility under the statute for a sentence of incarceration does not implicate the Sixth Amendment. However, there is a split of authority as to whether a federal judge's failure to make a finding during the initial appearance that incarceration is not permitted violates the federal rules. Laurie L. Levenson, FEDERAL CRIMINAL RULES HANDBOOK FCRP 44 (2011). ("Under the federal rules, the right to counsel extends to all offenses, petty and serious alike. However, if the federal magistrate judge commits on the record prior to trial that any sentence will not include imprisonment, defendant need not be assigned counsel pursuant to Rule 44.").

79. U.S. CONST. amend. VI.

80. *See* discussion *infra* Part I.

81. 407 U.S. 25 (1972).

82. *Id.* at 30–31.

83. *Id.* at 33.

84. Id. at 37. As a leading treatise has observed, "The reference in this sentence and others to a felony resulting in imprisonment might be taken to suggest that a felony which would not result in imprisonment also would not require appointed counsel. However, . . . numerous subsequent opinions . . . [establish] an absolute right to appointed counsel in all felony cases, making no reference to the punishment imposed." LAFAVE ET AL., *supra* note 70, at §11.2(a).

85. *Argersinger*, 407 U.S. at 34.

counsel, he could not be imprisoned unless he was appointed counsel. The question left unresolved by *Argensinger*, however, was whether the right to counsel existed in cases where there was no "loss of liberty" through incarceration.[86]

In *Scott v. Illinois*, the Court resolved this issue by holding that counsel is not required in all misdemeanor cases in which "imprisonment is an authorized penalty."[87] Instead, the Court held that the right to counsel requires "only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."[88] In other words, non-appointment of counsel does not violate the Sixth Amendment in misdemeanor cases where a sentence of imprisonment is authorized, but not imposed. In this way, the Court avoided what it regarded as an extension of the Sixth Amendment that would threaten to "create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States."[89]

In short, the scope of the right to counsel is limited by three distinct requirements. First, the right to counsel is never implicated before the attachment of the right. Second, even when the right to counsel has attached, the right only requires the assistance of counsel at those stages that are critical to the fairness and reliability of the criminal proceeding. And third, even where the right would otherwise have attached and the proceeding implicates the fundamental fairness of the criminal process, the right to counsel does not apply if the defendant is not sentenced to actual incarceration.

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86. *Id.* at 37 ("We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here petitioner was in fact sentenced to jail.").

87. 440 U.S. 367, 368–69 (1979).

88. *Id.* at 373-74. The Court also stated, "the central premise of *Argersinger* - that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment - is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Id.* at 373. It warrants reiterating the obvious—State constitutions and rules of criminal procedure may provide more robust protections. A state constitution might be interpreted so as to recognize that *Scott* has no application as a matter of state law, and likewise Federal Rule 44, regarding the appointment of counsel, might be construed to require a trial court's finding that incarceration will not be imposed at the initial appearance if the defendant is to be forced to proceed without counsel. To date, however, commentators have concluded that the Colorado courts have regarded both the state and federal right to counsel as co-extensive. *See, e.g.*, ROBERT J. DIETER, 13 COLO. PRAC., CRIMINAL PRACTICE & PROCEDURE § 13.5 n. 1 (2d Ed. 2011) (noting that Colo. Const. art. II, § 16 is the state protection for the right to counsel and recognizing that "Colorado has not chosen to interpret this right more expansively than the Sixth Amendment guarantee").

89. *Scott*, 440 U.S. at 373. Another case relevant to whether the right to counsel applies is *Nichols v. United States*, which holds that "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." 511 U.S. 738, 749 (1994); *see also* Alabama v. Shelton, 535 U.S. 654, 662–65 (2002) (distinguishing *Nichols* in the context of a suspended sentence).

Having described these three limitations on the right to counsel, the next section of this Article explains the Colorado-specific procedures for prosecuting misdemeanors,[90] before analyzing Colorado's system in light of these three limitations.[91].

II. THE COLORADO PROCEDURES FOR PROSECUTING MISDEMEANOR CASES

A. Statutory Requirements

The Colorado legislature has adopted a simplified set of procedures for commencing prosecution in misdemeanor and petty offense cases.[92] In contrast to the more robust processes required for felony prosecutions (including the requirement of a preliminary hearing and information or a grand jury indictment),[93] the misdemeanor procedures permit a prosecution to be conducted on the basis of a complaint alone.[94] Moreover, Colorado has specific rules governing plea bargains. Most notably, Colorado Revised Statute § 16-7-301 sets forth the specific duties and responsibilities of district attorneys during plea agreements and discussions.[95] The statute specifically limits the circumstances in which a prosecutor may discuss a plea bargain with a defendant without the presence of counsel:

> He should engage in plea discussions or reach plea agreements with the defendant only through or in the presence of defense counsel except where the defendant is not eligible for appointment of counsel, or refuses appointment of counsel and has not retained counsel, or [if it is a misdemeanor, petty, or traffic offense].[96]

For all felony cases, then, the prosecutor is affirmatively prohibited from speaking with a defendant unless the defendant's attorney is present, or the defendant specifically waives his right to counsel. By contrast, for misdemeanor prosecutions the rule is exactly the opposite—that is, prosecutors are not just permitted, but specifically required to engage in plea discussions with the defendant before the appointment of counsel. Colorado Revised Statute § 16-7-301(4)(a) provides that:

> In misdemeanors, petty offenses, or offenses under title 42, C.R.S. [traffic offenses], the prosecuting attorney is obligated to tell the de-

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90. *See infra* Part II.

91. *See infra* Part III.

92. COLO. REV. STAT. § 16-2-101 (2011); COLO. R. CRIM. P. 4.1; *see also*, Robert J. Dieter, *Commencement of Criminal Proceedings—Introduction*, 14 COLO. PRAC., CRIMINAL PRACTICE & PROCEDURE § 2.1 (2d ed. 2011).

93. *See* § 16-5-101 (2011); COLO. R. CRIM. P. 7; *see also* COLO. R. CRIM. P. 3.

94. *See* § 16-2-104 (2011).

95. § 16-7-301.

96. § 301(1).

> fendant any offer that can be made based on the facts as known by the prosecuting attorney at that time.[97]

These statutorily mandated plea discussions must occur *before* the appointment of counsel. The statute specifies "[t]he application for appointment of counsel and the payment of the application fee shall be deferred until after the prosecuting attorney has spoken with the defendant" about potential plea offers.[98]

Defenders of the statute, however, would likely be quick to point out the codified protections that apply to misdemeanor defendants. Most notably, during these pre-counsel plea negotiations prosecutors are required to "advise the defendant that the defendant has the right to retain counsel or seek appointment of counsel," and that the defendant "is under no obligation to talk to the prosecuting attorney."[99] These warnings tend to understate the practical harm that results from exercising one's right to counsel. Specifically, for a person detained in jail, conditioning his immediate release on a guilty plea will oftentimes be too tantalizing to pass up. Warnings or not, if he asserts his right to counsel, the prosecutor will inform him that he may have to remain incarcerated until his second appearance. To be sure, foregoing counsel in order to forego another night in jail will be a reflexive decision for many defendants.[100]

If an agreement as to the proper disposition of the case is reached between the prosecutor and the unrepresented defendant, the prosecutor must "inform the court of the proposed plea agreement and the recommended penalty."[101] As with other plea offers, the court ultimately has discretion to either accept or reject the agreed-upon disposition.[102] Specifically, the court must "exercise an independent judgment in deciding whether to grant charge or sentence concessions."[103] If the court rejects the plea agreement, it must give the defendant the option to withdraw the guilty plea.[104] Moreover, if a defendant does not accept the pre-counsel plea, consistent with the warnings required by statute, the defendant has

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97. § 301(4)(a).
98. *Id.*
99. *Id.*
100. *See* Nancy Amoury Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Concessions*, 59 VAND. L. REV. 69, 147 (2006) ("[D]omestic defendants in the main agree to self-convict because they expect to receive shorter sentences. Indeed, the fact that sentence discounts motivate domestic defendants to plead guilty virtually goes without saying in the plea-bargaining literature. It is simply understood that defendants prosecuted in Western criminal justice systems seek to minimize their incarceration time.").
101. § 16-7-301(4)(a)(I).
102. *See* COLO. R. CRIM. P. 11(f)(5).
103. Young v. People, 30 P.3d 202, 206 (Colo. 2001) (quoting COLO. R. CRIM. P. 11(f)(5)).
104. *Id.*; *see also* COLO. R. CRIM. P. 32(d) ("If the court decides that the final disposition should not include the charge or sentence concessions contemplated by a plea agreement . . . the court shall so advise the defendant and the district attorney and then call upon the defendant to either affirm or withdraw the plea of guilty or nolo contendere."); People v. Wright, 559 P.2d 249, 251 (Colo. App. 1976).

an absolute right to a court-appointed attorney unless the prosecutor provides a "written statement that incarceration is not being sought."[105] In other words, in any misdemeanor case where a plea agreement is offered before the initial appearance, but rejected by the defendant, the remaining interactions between the parties resemble the interactions between the defense and the prosecution in a felony case. In particular, when the statutorily required un-counseled plea negotiation does not yield an agreement, an indigent defendant is provided court-appointed counsel,[106] and once counsel is retained or appointed, the prosecutor may only engage in further plea discussions when defense counsel is present.[107]

On the other hand, if the court determines that the proposed plea agreement is acceptable, a variety of Colorado statutes and rules require the judge to advise the defendant, once again, of his right to a court-appointed attorney before accepting the guilty plea.[108] For example, Rule 11 of the Colorado Rules of Criminal Procedure requires the trial judge to create a record demonstrating, among other things, that the defendant understands the charges against him, that the plea is voluntary and knowing, and that he has the right to a jury and to counsel if he does not plead guilty.[109] Only after these advisements and findings have been satisfied may the court accept a guilty plea.[110]

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105. § 18-1-403 ("Except as provided in section 16-5-501, C.R.S., all indigent persons who are charged with or held for the commission of a crime are entitled to legal representation and supporting services at state expense . . . ."); Sanchez-Martinez v. People, 250 P.3d 1248, 1255 (Colo. 2011) (stating that a misdemeanor defendant has the "right to be represented by counsel, and if he is indigent and faces incarceration, he has a right to court-appointed counsel"); People v. Garcia, 981 P.2d 214, 218 (Colo. App. 1998) ("[A]n indigent defendant is entitled to legal representation and supporting services at state expense."). If the defendant is convicted, but not actually sentenced to any incarceration, there can be no Sixth Amendment violation. However, some federal courts have recognized that the failure to make a pretrial determination as to whether incarceration is a possible penalty requires the appointment of counsel—that is, if the penalty is not explicitly taken off the table, then an attorney must be provided even if no incarceration ultimately results. *See, e.g.*, United States v. Downin, 884 F. Supp. 1474, 1479 (E.D. Cal. 1995); 2 BAILEY & FISHMAN, *supra* note 2, § 29:1 (noting the split of federal authority on this issue).

106. § 16-7-301(4)(a)(II). It is also worth noting that under Colorado Rule of Criminal Procedure 5(c)(2), the court must advise the defendant that "an application for the appointment of counsel shall not be made until after the prosecuting attorney has spoken with the defendant as provided in C.R.S. 16-7-301(4)(a)." Thus, if the prosecution has not engaged in plea discussions prior to the initial appearance, or informed the defendant that there is no pre-arraignment offer, the defendant will be advised by the Court that the appointment of counsel must be deferred until after such meetings occur.

107. *See* § 16-7-301(4)(a)(II) ("If a plea agreement has not been reached and the defendant chooses to retain an attorney, or the defendant meets the requirements [for appointment of counsel], the court shall appoint counsel and all discussions with the defendant outside of the presence of counsel shall cease."); *see also* § 16-7-301(4)(b) ("[I]f counsel is retained by the defendant, or if counsel is appointed for the defendant, when it appears that the effective administration of justice will thereby be served, the prosecutor may engage in additional plea discussions with the counsel for the defense for the purpose of reaching a plea agreement.").

108. *See* § 16-7-301(4)(a) (requiring advisements in the context of the pre-counsel pleas); COLO. R. CRIM. P. 11(b) (requiring general advisements by the court when accepting a guilty plea); § 16-7-207 (2011) (requiring general advisements by the judge at a defendant's initial appearance).

109. COLO. R. CRIM. P. 11; *see also* People v. Wade, 708 P.2d 1366, 1369–70 (Colo. 1985).

110. COLO. R. CRIM. P. 11(b); *see also* COLO. R. CRIM. P. 5(c)(2).

B. An Example of Common County Court Practice: The City and County of Denver

In order to place the Colorado rules for misdemeanor plea negotiation in context, it is useful to consider the actual day-to-day practice in Colorado's most populated county: Denver.

In all of the county courts of Denver, the plea process begins with the defendant viewing a standardized set of recorded warnings.[111] All defendants, whether in or out of custody, are required to either watch a video advisement, listen to an audio advisement, or read a written advisement of their rights before speaking to the district attorney. The advisement, contained in the appendix, explains to the accused the procedures of the forthcoming initial appearance and provides an overview of the individual constitutional and statutory rights, including the right to counsel, to which each defendant is entitled. Other rights described in the advisement include the right to bail, the right to a jury trial, the right to a speedy trial, and the right to remain silent.

After receiving the standard advisement, and before the initial appearance, a district attorney speaks directly with each defendant in the manner required by CRS § 16-7-301. That is, the prosecutor meets with the defendant and, after reiterating that the defendant has a right to counsel if he does not wish to plead guilty, "tell[s] the defendant any [plea] offer that can be made based on the facts as known by the prosecuting attorney at that time."[112] This communication of a plea offer occurs before the initial appearance, but only moments before: the plea offer is generally communicated to the defendant in the courtroom in the moments immediately prior the initial appearance and arraignment on the complaint.

If the defendant agrees to the prosecution's pre-counsel plea offer, then the defendant is given a written Rule 11 advisement form. One side of the form sets out the proposed disposition that will be presented to the court and contains the enumerated constitutional and statutory rights the defendant waives by pleading guilty. The other side of the form includes the statutory language describing the crime to which the defendant is pleading guilty and the minimum and maximum penalties the court can impose. Once the defendant signs the Rule 11 form, the district attorney informs the court of the proposed disposition, including the agreed upon penalty, and then tenders the signed form to the court. The judge then gives an oral advisement of the Rule 11 warnings and makes several findings on the record: first, that the defendant's plea is entered knowing-

111. This practice has been verified by the authors through discussions with attorneys practicing in the District.

112. § 16-7-301(4)(a).

ly, voluntarily, and intelligently; and second, that there is a factual basis, or valid waiver of the establishment of a factual basis, for the plea.[113]

In Denver County, then, any defendant who enters a pre-counsel guilty plea at his arraignment is advised of his right to trial, including, specifically, the right to counsel, no less than four times: (1) by a video, audio, or written advisement before speaking with the district attorney; (2) by the district attorney herself, when a plea is offered; (3) through the written Rule 11 advisement; and (4) by the court, before a guilty plea is accepted.

If the district attorney is unable to make a plea offer, or no agreement is reached before the initial appearance, the court will arraign the defendant on the complaint and proceed with the initial appearance in a manner similar to a felony prosecution.[114] Of course, the advantages of taking an early, pre-counsel plea offer may be substantial for the defendant. A defendant may only be able to obtain immediate release if he accepts the prosecution's offer; indeed, defendants not released on bail will not even be appointed counsel until their next court appearance. Moreover, a defendant who refuses the initial plea, at the very least, risks the possibility of higher penalties or charges if the initial plea offer is revoked or altered.[115]

To date, there has only been one direct challenge to Colorado's system of requiring misdemeanor defendants to talk with prosecutors about possible plea options before the appointment of counsel, and the issue was not resolved on the merits. The civil complaint challenging the system was dismissed without prejudice on standing grounds, and only recently has an amended complaint been filed.[116] Consequently, the legal

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113. The absence of a recording or transcript would likely render the waiver of counsel impermissible. As a general matter, the knowing and voluntary waiver of rights accompanying a plea must be directly evidenced in a transcript or recording. *See, e.g.*, Boykin v. Alabama, 395 U.S. 238, 242–43 (1969); *see also* State v. Combs, No. 07CA009173, 2007 WL 4554241, at *5 (Ohio Ct. App. Dec. 28, 2007) (noting that it is "impossible to determine whether [a defendant] was advised of her right to counsel and voluntarily waived that right in open court" when there is no record).

114. *See* COLO. REV. STAT. § 16-7-207(1) (2011).

115. Out of custody defendants will be given a new court date to appear before the trial court judge and provided information on how to apply for a court-appointed public defender if they cannot afford to retain counsel.

116. Courtroom Minutes, Colorado Criminal Defense Bar v. John W. Suthers, 10-cv-02930-JLK (July 28, 2011); *see also* Jessica Fender, *Judge Asks for New Complaint in Indigent Defense Lawsuit*, DENVER POST, July 28, 2011, http://www.denverpost.com/breakingnews/ci_18568810 ("[Judge] Kane dismissed the defense attorneys' complaint, giving them 60 days to re-file and possibly to find indigent people who had been harmed by the state law that requires those charged with a misdemeanor to discuss a plea with prosecutors before receiving counsel."). A second amended complaint was filed on January 20, 2012. Second Amended Complaint, Colo. Criminal Def. Bar v. Suthers, No. 10-CV-02930-JLK-BNB (D. Colo. Jan. 20, 2012). Of particular note, one factual allegation in in the amended complaint is that "[i]ndigent defendants whose applications for counsel are deferred . . . have already appeared before a judicial officer to learn the charges against them and the potential restrictions on their liberty . . . [and therefore] [t]he Sixth Amendment right to counsel has already attached." *Id.* at 38–39. To be sure, the timing of these discussions, and whether they occur pre or post-attachment, could have Constitutional significance. The authors own observations and

issues surrounding this unique Colorado practice remain largely undeveloped and much more the subject of media and public speculation than precise legal analysis.[117] The following section comprehensively reviews the viability of Sixth Amendment challenges to each aspect of Colorado's misdemeanor plea bargaining system both in anticipation of the inevitable litigation on these questions, and in furtherance of a more complete understanding of the limitations of claims arising under the Sixth Amendment's right to counsel.[118]

III. COLORADO'S SYSTEM UNDER THE SIXTH AMENDMENT MICROSCOPE

There are several features of the Colorado system for prosecuting misdemeanors that raise important and novel questions of Sixth Amendment law. Colorado provides a valuable test case for understanding the limitations on the right to counsel in the pretrial context. Previous scholarship has tended to focus on pre-attachment interrogation as the most compelling gap in the right to counsel doctrine's current protections, but Colorado's pre-counsel plea system presents a scenario that is equally daunting for the un-counseled defendant. For example, Sixth Amendment scholar Brooks Holland has argued that there is no pretrial context for which the "advice of counsel matter[s] more than during an interrogation."[119] But scholars like Holland have not considered procedures like those in place in Colorado. The danger of an interrogation without counsel has been identified as the risk of pitting an untrained, often nervous

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conversations with prosecutors suggest that the vast majority of plea discussions with unrepresented misdemeanor defendants pursuant to Colo. Rev. Stat. § 16-7-301(4) occur *prior* to their first appearance.

117. *See* P. Solomon Banda, *Colorado Lawsuit Challenges State's Public Defender Law*, ASSOCIATED PRESS, Feb. 1, 2011, http://www.legalnews.com/detroit/860667 ("Doug Wilson, Colorado's public defender, estimated it would cost up to $6 million to add 55 attorneys and support staff to handle an estimated 15,000 to 17,000 additional cases to comply with the Supreme Court decision."); Felisa Cardona, *Suit Argues All Defendants Deserve Counsel from the Start*, DENVER POST, Dec. 9, 2010, http://www.denverpost.com/recommended/ci_16812574; Christina Dickinson, *Lawsuit Challenges Colo. Public Defender Law*, ASSOCIATED PRESS, Jan. 30, 2011, http://www.9news.com/news/local/story.aspx?storyid=178759&catid=222; Jessica Fender, *Judge Asks for New Complaint in Indigent Defense Lawsuit*, DENVER POST, July 28, 2011, http://www.denverpost.com/breakingnews/ci_18568810.

118. A class of individual defendants who suffered extended pretrial incarceration because of the delayed appointment of counsel procedures would have standing to challenge the Colorado procedures. Moreover, the Supreme Court has previously recognized that challenges to pretrial detention procedures qualify for an exception to the mootness rule such that the issue could be fully litigated even if the defendants' cases have been concluded. *See* Gerstein v. Pugh, 420 U.S. 103, 111 n.11 (1975) ("Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly capable of repetition, yet evading review." (internal quotation marks omitted)).

119. Holland, *supra* note 13, at 384.

defendant against a skilled prosecutor, which results in the defendant making decisions that do not protect his interests.[120]

Notably, however, at least as much is at stake when a defendant engages in plea bargaining discussions without the assistance of counsel. There is no portion of a non-capital case that is more important than the process of formally and officially waiving all rights, including the right to a jury, the right to counsel, and the right to contest one's guilt, and this is a process that occurs dozens of times per day, without counsel, across the state of Colorado. Colorado's rules requiring prosecutors to engage defendants in plea discussions, while mandating that the appointment of counsel be "deferred,"[121] presents a series of unresolved questions about the scope of Sixth Amendment protections in the pretrial context.

A. Plea Bargaining Without Counsel as a Sixth Amendment Violation

If a proceeding is deemed critical whenever the proceeding has the "inherent potential for prejudice . . . which the presence of counsel can avert,"[122] then plea negotiations, perhaps more than any single event, other than the criminal trial itself, embody the characteristics of a proceeding that justify requiring the presence of counsel.[123] Consistent with this view, plea bargaining has been recognized as a critical stage of the criminal process. In *Padilla v. Kentucky*,[124] for example, the Court observed, "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."[125] Accordingly, the Colorado rule providing that "the prosecuting attorney is obligated" to make a plea offer to the defendant before the appointment of counsel[126] raises the specter of a critical stage being routinely conducted in the absence of counsel.

The timing of the prosecution's plea offer to a pro se defendant is potentially dispositive as to whether Colorado's statutorily mandated pre-counsel plea bargaining is merely disconcerting or, instead, unconstitutional. The applicable Colorado rules do not specify when the prosecutor should negotiate with the defendant, but appear to anticipate that it will happen, at least on occasion, after the initial appearance. The governing Colorado statute is notably vague on timing, explaining only that for

120. *See, e.g.*, McNeil v. Wisconsin, 501 U.S. 171, 180 n.1 (1991) (citing Michigan v. Jackson, 475 U.S. 625, 633–34 (1986)).

121. COLO. REV. STAT. § 16-7-301(4)(a) (2011).

122. Megan E. Burns, Note, *The Presentence Interview and the Right to Counsel: A Critical Stage Under the Federal Sentencing Structure*, 34 WM. & MARY L. REV. 527, 571 (1993) (citing United States v. Wade, 388 U.S. 218, 236–37 (1967)).

123. *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (stating that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system" (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)) (internal quotation mark omitted)).

124. 130 S. Ct. 1473 (2010).

125. *Id.* at 1486.

126. § 16-7-301(4)(a).

misdemeanor prosecutions, the "prosecuting attorney is obligated" to make a plea offer to the defendant based on the facts known to the prosecution "at that time" and explaining that the application for defense counsel must "be deferred until after the prosecuting attorney has spoken with the defendant" regarding the plea offer.[127] Colorado Rule of Criminal Procedure 5, by contrast, specifically anticipates that some pre-counsel plea discussions will occur after the initial appearance.[128] Rule 5 provides:

> At the first appearance in the county court the defendant shall be advised in accordance with the provisions set forth in subparagraphs (a)(2)(I) through (VII) of this Rule, except that the defendant shall be advised that an application for the appointment of counsel shall not be made until after the prosecuting attorney has spoken with the defendant as provided in C.R.S. 16-7-301(4)(a).[129]

In other words, the Colorado rule explaining the procedures for an initial appearance specifically provide that a defendant must be advised of his right to counsel, but with the caveat that this right does not apply until after the statutorily required pre-counsel plea discussions have occurred. If the rule anticipates the need for this proviso at the time of the initial appearance, then it must also anticipate that at least in some circumstances the required plea discussions will occur *after* the initial appearance. To this extent, Colorado's procedures for pre-counsel plea negotiations present a clear Sixth Amendment violation. Where an offer and discussion of a plea occurs after the initial appearance has commenced, and without the presence of defense counsel, the right to counsel is violated—the right has attached and the plea discussion is a critical stage. This is a straightforward Sixth Amendment violation.

In many counties, however, the actual practice does not so clearly conflict with established federal law on the right to counsel because the timing of the prosecution's plea offer to a pro se defendant appears to precede the attachment of the right to counsel.[130] In Denver County, for example, these pre-counsel plea negotiations, to the best of the authors' understanding, always occur before the initial appearance, at which time the right to counsel has not attached, at least not as a matter of clearly established federal law.[131] Moreover, the authors of this Article have observed or spoken to prosecutors in other counties where the practice of

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127. *Id.*

128. *See* COLO. R. CRIM. P. 5(c)(2).

129. *Id.*

130. If the Colorado procedures do not violate existing Supreme Court precedent, then a Sixth Amendment challenge on federal habeas review would likely fail. *See* 28 U.S.C. 2254(d)(1) (1996) (conditioning relief on the state court's deviation from "clearly established Federal law").

131. *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 199 (2008) ("[T]he right to counsel attaches at the initial appearance before a judicial officer . . . [when] the magistrate informs the defendant of the charge in the complaint, and of various rights in further proceedings, and determine[s] the conditions for pretrial release . . . ." (citations omitted) (internal quotation marks omitted)).

the trial court judge ensures that the defendant is not engaging in post-initial appearance plea bargaining without the aid of counsel. For example, it appears to be a routine practice for many judges, before commencing an initial appearance, to ask the misdemeanor defendant whether he has had an opportunity to discuss possible plea offers with the prosecution. When the defendant states that he has not yet spoken with the prosecution as required by statute, the judge delays the initial appearance and demands that the prosecution promptly meet with the defendant to discuss plea options.[132] Based on observations by the authors and conversations with misdemeanor lawyers, the common practice, then, is for these pre-counsel plea negotiations to occur exclusively pre-initial appearance.

This is not to say that defendants receiving such offers have sufficient bargaining power to offset the extraordinary risks associated with waiving all of their trial rights just because the criminal proceeding has not formally commenced.[133] But just as government efforts to deliberately elicit incriminating statements from defendants (perhaps through the use of informants or recording devices) before attachment have been held not to violate the Sixth Amendment, the weight of Sixth Amendment precedent defining the outer temporal reaches of the right to counsel pretrial supports the view that defendants who engage in plea negotiations prior to "the first appearance before a judicial officer"[134] are not covered by the right to counsel.[135]

Of course, not all commentators have recognized the implications of the attachment issue in this context. For example, shortly after the *Rothgery* decision was handed down in 2008, a note in the *Harvard Law Review* concluded that in Colorado "*Rothgery* will significantly alter the current practice: misdemeanor defendants' right to counsel will no longer be conditioned on the defendant first speaking directly with the prosecutor to discuss a potential plea."[136] This conclusion, however, appears to

132. The Colorado Rules of Criminal Procedure require that an "arrested person shall be taken without unnecessary delay before the nearest available county court." COLO R. CRIM. P. 5(c). The routine aspects of booking a newly arrested defendant do not constitute an unnecessary delay. However, delay designed to further investigative goals is likely to violate Rule 5. *Cf.* Mallory v. United States, 354 U.S. 449 (1957) (recognizing that as a matter of federal law confessions obtained because of a failure to present the defendant without unnecessary delay are excluded). Delays to obtain prosecutorial advantage in a plea negotiation are no more defensible than delays designed to elicit a confession and should be regarded as unnecessary for purposes of Rule 5.

133. As one commentator has noted, Colorado's approach creates "troubling incentive structure . . . clearly constructed to encourage waiver of the right to counsel . . . [because a] defendant who has already accepted such a bargain and stands before the judge ready to enter the plea is unlikely to suddenly assert his newfound right to counsel." Roberts, *supra* note 5, at 367.

134. *Id.* at 194.

135. Scholars have urged an abandonment of the rigid attachment inquiry in favor of a fact specific inquiry that would assess the importance of counsel in a given context. Under this standard, whether adopted as a matter of federal or state law, the plea bargaining without counsel that occurs in Colorado would likely run afoul of the right to counsel. *See, e.g.*, Metzger, *supra* note 16, at 1671, 1668 n.200.

136. Note, *Sixth Amendment—Attachment of the Right to Counsel*, 122 HARV. L. REV. 306, 312 (2008).

assume that the plea negotiations required by statute in Colorado do not occur until after the first appearance. In any county where the prosecutor's duty to discuss potential plea offers with defendants is carried out before the initial appearance, the note's conclusion that the Colorado system is inconsistent with the existing Sixth Amendment strictures is far from clear.

Stated more directly, although the denial of counsel resulting in a guilty plea is generally grounds for relief under the Sixth Amendment, there is no ground for relief before the formal attachment of the right.[137] Thus, an unwise guilty plea may not have a remedy in the right to counsel if the harm occurs before attachment. By the same token, a defendant who is offered and rejects an extremely favorable plea deal and realizes after counsel is appointed that refusing the plea was a serious mistake, will not be able to seek relief under the Sixth Amendment despite the recent *Frye* and *Lafler* decisions. That is to say, neither the defendant who unwisely pleads guilty, nor the defendant who unwisely refuses to plead guilty, has an established claim under the Sixth Amendment.[138] Only if the prosecutor waits to offer a plea deal until after the initial appearance, or if the prosecutor engages in further plea discussions with the defendant after the initial appearance and before counsel is appointed, is the path to Sixth Amendment relief well established.[139]

Consequently, in order to demonstrate a right to counsel injury for State acts before an initial appearance, a court would need to adopt a broader conception of attachment in this context. There are at least two conceivable bases for arguing that attachment occurs before the initial appearance under Colorado's misdemeanor prosecution procedures. First, plea negotiations before the initial appearance could trigger the right to counsel under a manifestly broad reading of *Rothgery*. On such a reading, the video or audio warnings that defendants receive before the pre-counsel plea discussions would constitute the point of attachment. In support of this view is the fact that that once a defendant is required to watch a video advising him of his rights and the limitations on his liberties, he almost certainly understands his situation as one in which the "adverse positions of the government and defendant have solidified."[140]

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137. Cf. Hill v. Lockhart, 474 U.S. 52, 57–58 (1985) (recognizing the right to effective assistance of counsel at time of a guilty plea).

138. Even in the context of felony an unwise or uncounseled not guilty plea may violate the Sixth Amendment under recently decided decisions. *See, e.g.*, Missouri v. Frye, 132 S. Ct. 1399 (2012); Lafler v. Cooper, 132 S. Ct. 1376 (2012). However, the protections extending to a not guilty plea are, to be sure, no broader in scope than the protections for a guilty plea. Accordingly, if the right has not attached, it cannot be violated.

139. *See, e.g.*, Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (noting that the Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel"); Massiah v. United States, 377 U.S. 201, 204–05 (1964) (recognizing that a post-attachment critical stage—including mere interrogation—requires the appointment of counsel).

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

It is no answer that the prosecutor herself is not yet aware that the defendant was arrested or charged, for the right to counsel attaches even in the absence of assent by the prosecutor.[141] On the other hand, the point of attachment has traditionally been linked to formal charges or a "preliminary hearing, indictment, information, or arraignment."[142] A video played on a courtroom or jailhouse monitor without the presence of counsel, a judge, or any other judicial officers has little in common with a judicial proceeding. Although *Rothgery* embraces a more functionalist assessment of what constitutes the point of attachment for the right to counsel by liberating attachment from the requirement of a formal charge, the mere playback of a pre-recorded video is a far cry from an in-court appearance by the defendant. It may therefore be difficult to fairly conceive of viewing the video as the point at which the "government has committed itself to prosecute."[143]

A second, stronger argument for attachment before the initial appearance is that the prosecution's offer of a plea deal is itself the point of attachment. To the extent that *Rothgery* reflects a movement toward a functional analysis of pretrial Sixth Amendment rights,[144] there may be room to argue that efforts to negotiate with a defendant, particularly when those negotiations happen in the courtroom just moments before the initial appearance, are themselves sufficiently indicative of a "commit[ment] . . . to prosecute"[145] as to give rise to Sixth Amendment attachment. After all, the attachment inquiry is, as the Court explained in *Kirby v. Illinois*,[146] whether "the adverse positions of government and defendant have solidified" such that a "defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[147] Certainly some misdemeanor plea offers present complexities and intricacies no less compelling than the initial appearance itself. Indeed, the initial appearance is a rather pro forma event if the defendant has already taken stock of the "substantive and procedural" law and made the decision to plead guilty.[148] The negotiation of a plea offer suggests a level of formality and finality far higher than when the police focus investigative energies in the direction of a defendant by interrogating him, or plant an informant

141. Rothgery v. Gillespie Cnty., 554 U.S. 191, 194–95 (2008).
142. *Id.* at 198.
143. *Id.* (citing *Kirby*, 406 U.S. at 689).
144. The *Rothgery* Court reiterated the holding in *Kirby*, emphasizing that the attachment inquiry is not to be understood as one of "mere formalism." *Id.* at 198 (quoting *Kirby*, 406 U.S. at 689). The Court also stated "the constitutional significance of judicial proceedings cannot be allowed to founder on the vagaries of state criminal law, lest the attachment rule be rendered utterly 'vague and unpredictable.'" *Id.* at 199 n.9 (quoting Virginia v. Moore, 553 U.S. 164, 175 (2008)).
145. *Kirby*, 406 U.S. at 689.
146. 406 U.S. 682 (1972).
147. *Id.*
148. *Id.*

in his presence, such that the right to counsel might fairly be understood to have attached.[149]

In short, although the process of negotiating a plea is among the most critical stages of a criminal case, if such bargaining occurs before attachment, the Sixth Amendment is entirely inapplicable. To date, the Supreme Court has extended the point of attachment back only as far as the defendant's initial appearance before a judicial officer. However, the attachment of the right to counsel appears to be evolving in a functionalist matter, such that even initial appearances conducted without the consent or knowledge of the prosecution trigger the attachment of the Sixth Amendment. Attachment has become a proxy for the beginning of a criminal prosecution in whatever form it may take. Consequently, at least in circumstances such as those presented by a Colorado misdemeanor prosecution, either the video playback or the actual plea offer and discussion may suffice to trigger attachment.[150] Notably, however, applying the right to counsel to pre-initial appearance events would represent a break from current Sixth Amendment attachment doctrine.

B. The Plea Colloquy and Entry of a Plea Without Counsel as a Sixth Amendment Violation

Assuming that the plea negotiations with unrepresented misdemeanor defendants required by Colorado law do not violate the Sixth Amendment, it is necessary to consider whether the plea colloquy con-

149. Scholars like Professor Metzger have proposed doctrinal revisions to the attachment rule that would also encompass pre-counsel plea negotiations like those that occur in Colorado. Metzger, *supra* note 16, at 1689 ("That challenge is best met by evaluating right-to-counsel questions with reference to factual indicia that demonstrate the need for counsel. These indicia can be culled from the Supreme Court's Sixth Amendment cases and can be deemed the hallmarks of a case that requires the 'guiding hand of counsel' to insure a fair process. The indicia a court should consider are: (1) adversariness-in-fact between the individual and the prosecution ('adversariness-in-fact'); (2) complexity in the procedural stage in question ('complexity'); and (3) potential prejudice to the individual, which prejudice can be countered by providing counsel ('prejudice/benefit').").

150. The issue of pre-initial appearance plea negotiations arises primarily in misdemeanor cases because only a misdemeanor defendant can plead guilty at an initial appearance. Persons accused of felonies are entitled to either an indictment or preliminary hearing, and thus the assembly-line plea process cannot be so easily front-loaded. Notably, however, one scholar has identified the problem of pre-charge plea bargaining in the context of felony cases where a defendant bargains for a particular sentence and then waives his right to indictment. *See* Metzger, *supra* note 16, at 1665 ("Federal pre-charge bargaining is an entirely extra-judicial and unregulated process. Some pre-charge bargaining occurs between prosecutors and unrepresented defendants because the execution of a search warrant or the 'word on the street' suggests to the defendant that law enforcement wants to talk to him. In white-collar cases, some pre-charge bargaining is initiated by attorneys."). Indeed, there are instances of gross incompetence on the part of defense counsel that have greatly increased a defendant's charges or sentences but for which there is no remedy because the errors of counsel occurred pre-attachment. *Id.* at 1668 (noting that the "rigid critical stage doctrine means that there is a blanket rule than no right to counsel inheres in these [plea] proceedings no matter how concretely adversary they really are" and using United States v. Moody, 206 F.3d 609, 611 (6th Cir. 2000) to illustrate). Professor Metzger's conclusions, if correct, could be a death knell to arguments that the plea negotiations in Colorado are themselves a critical stage; however, Metzer's article predates the more functionalist approach to defining adversary proceedings that was ushered in by the *Rothgery* decision.

ducted in the absence of counsel at the initial appearance is inconsistent with the right to counsel. The right to counsel attaches no later than the time when the initial appearance commences; thus, if the plea colloquy is a critical stage, then conducting the proceeding without counsel seems to constitute a Sixth Amendment violation.

In *Padilla v. Kentucky*, the Court emphasized that the "negotiation of the plea bargain" was the relevant critical stage,[151] and that it was the failure of counsel to properly advise the client and "give correct advice" during this stage that raised Sixth Amendment concerns.[152] However, the only question presented in *Padilla* was whether counsel's failure to correctly advise at the plea bargaining stage violated the Sixth Amendment.[153] Where the Court has considered the entry of a plea itself (or the colloquy), it has suggested that this is a freestanding critical stage. The leading case is *Iowa v. Tovar*,[154] in which the Court observed, "[t]he *entry* of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a 'critical stage'" at which the right to counsel adheres."[155] Likewise, in another context the Colorado Supreme Court has concluded that all proceedings relating to plea bargaining—in fact, "the entire plea bargaining process"—are critical stages.[156] Clearly, then, Colorado's initial appearance is a critical stage of proceedings, at least when it involves a plea colloquy.

However, the fact that the initial appearance is a critical stage occurring post-attachment does not, without more, mean that the absence of a lawyer at this proceeding violates the Sixth Amendment. Indeed, the quoted language from *Tovar* declaring that the entry of a plea is a critical stage is mere dicta. The Court's ultimate holding is that heightened warnings regarding the dangers of proceeding without counsel are not required when a defendant waives counsel and pleads guilty pro se.[157] In essence, while obliquely concluding that the plea colloquy is a critical stage requiring the presence of counsel, the Court in *Tovar* directly approved not only un-counseled guilty pleas, but also un-counseled guilty pleas with limited elaborations as to the risks of waiving the right to an attorney.[158] Emphasizing that the Constitution "does not force a lawyer

151. 130 S.Ct. 1473, 1486 (2010).
152. *Id.* at 1483.
153. *Id.* at 1478.
154. 541 U.S. 77 (2004).
155. *Id.* at 81 (emphasis added) (citing White v. Maryland, 373 U.S. 59, 60 (1963)).
156. Carmichael v. People, 206 P.3d 800, 805 (Colo. 2009).
157. *Tovar*, 541 U.S. at 87–89.
158. *Id.* at 87–90. As to the plea in question, the Court summarized the facts as follows: "Some hours after his arrest, Tovar appeared before a judge in the Iowa District Court for Story County. The judge indicated on the initial appearance form that Tovar appeared without counsel and waived application for court-appointed counsel. The judge also marked on the form's checklist that Tovar was 'informed of the charge and his . . . rights and receive[d] a copy of the Complaint.'" *Id.* at 82 (citation omitted).

upon a defendant,"[159] the Court explained that a waiver of the right to counsel before a plea entry and colloquy does not require the full force of warnings that are required under *Faretta v. California*[160] when a defendant wishes to waive counsel and proceed to trial pro se.[161] The warnings required to waive counsel for trial are, according to the *Tovar* reasoning, more extensive than the warnings required to waive counsel and to plead guilty pro se.[162] In the guilty plea context, even if the defendant "lacked a full and complete appreciation of all of the consequences flowing from his waiver, it does not defeat the State's showing that the information it provided to him satisfied the constitutional minimum."[163]

Read broadly, then, *Tovar* threatens to have serious import for analyzing the constitutionality of the Colorado misdemeanor plea process.[164] In *Tovar*, a unanimous Supreme Court concluded that truly "minim[al] admonishments" suffice to render a pro se plea a valid waiver of the right to counsel.[165] *Tovar* held that the Constitution does not require the trial court to advise the defendant who is considering a pro se guilty plea of the advantages that defense counsel might offer in such circumstances.[166] Indeed, the unanimous Court emphasized that the standard advisements during a plea colloquy—the right to counsel, the nature of the charges, the other rights waived by a guilty plea, and the range of punishment that the defendant could face—are sufficient to render a plea knowing and voluntary, even where the defendant is pro se.[167] Accordingly, although the plea colloquy and entry of the plea is considered a critical stage, the absence of counsel does not automatically, or even presumptively, give

159. *Id.* at 87–88.

160. 422 U.S. 806, 835 (1975) (holding that a defendant "should be made aware of the dangers and disadvantages of self-representation so that the record will establish that he knows what he is doing and his choice is made with eyes open" (internal quotations omitted)).

161. *See* Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1121 (2011) (contrasting the warnings required for a defendant to proceed pro se at trial and the warnings required by *Tovar* to plead guilty pro se). "Before pro se defendants plead guilty, courts do not even have to ask whether they are aware that consulting with an attorney might be a good idea." *Id.* Notably, the Court has recognized a similar divergence in the protections of pro se defendants in the context of competence to proceed to trial pro se and competence to plead guilty. A higher standard of competence is required for a defendant to proceed pro se at trial, *Indiana v. Edwards*, 554 U.S. 164, 177-79 (2009), than is required for a defendant to plead guilty, *Godinez v. Moran*, 509 U.S. 389, 400-01 (1993).

162. *Tovar*, 541 U.S. at 88–89.

163. *Id.* at 92 (quoting United States v. Ruiz, 536 U.S. 622, 629 (2002)) (noting that on a collateral attack it is the defendant's burden to prove that he did not competently and intelligently waive his right to the assistance of counsel).

164. For a thoughtful and thorough critique of *Tovar*, see Hughes, *supra* note 161, at 1114–15 ("*Tovar* provides an example of the Court falling prey to a binary vision of innocence because it shows the Court prioritizing actual innocence above safeguarding constitutional protections.").

165. *Tovar*, 541 U.S. at 91–92; *see also* Hughes, *supra* note 161, at 1092.

166. *Tovar*, 541 U.S. at 91–92. As Professor Hughes points out, *Tovar* "does not require a trial court to inform a pro se defendant that an attorney may provide an independent opinion of whether it is wise to plead guilty," nor does it require the trial court to "tell a defendant that without an attorney the defendant risks overlooking a defense." Hughes, *supra* note 161, at 1115.

167. *Tovar*, 541 U.S. at 90–93.

rise to a constitutional injury.[168] Stated more directly, if a defendant voluntarily and knowingly waives his right to counsel, even in the absence of any heightened warnings about the risks of pro se plea agreements, the prospect of a successful Sixth Amendment claim is in serious doubt.[169]

On the other hand, *Tovar* could perhaps be limited to its facts such that in some prosecutions, even misdemeanor prosecutions, the pre-plea waiver of counsel would be understood to require more robust warnings to the defendant than are required at a normal plea hearing. *Tovar* was characterized by the Court as a routine drunk driving plea based on evidence of intoxication.[170] Significantly, the Court noted that Tovar never "articulate[d] . . . the additional information counsel could have provided, given the simplicity of the charge."[171] Perhaps in a more complicated case, a case where the prosecution's evidence was not dispositive of guilt (unlike the breathalyzer in *Tovar*), the Court would be willing to acknowledge the critical role that defense counsel plays at the plea colloquy.

The *Tovar* decision suggested that the expansiveness of the plea warnings may vary depending on the context such that more thorough

168. Arguably, the most damaging misstep that the defendant could make during a plea colloquy would be to make admissions as to new, not yet charged crimes and thus facilitate additional criminal proceedings against himself. However, any error or omission by counsel in this regard may be outside of the constitutional scope of the right to counsel insofar as the right to counsel is offense specific—that is to say, errors of defense counsel contributing to the prosecution of an uncharged crime, while lamentable and perhaps ethically unsound, do not run afoul of the Sixth Amendment as currently interpreted. *See, e.g.*, Texas v. Cobb, 532 U.S. 162, 167–68, 174 (2001).

169. In a felony, even the indictment can be waived (except in capital cases). FEDERAL PROCEDURE, LAWYERS EDITION § 22:725 (2011), available at Westlaw FEDPROC. Accordingly, if Colorado's system of misdemeanor prosecutions is regarded as constitutional, it is possible that such pre-plea, assembly-line style proceedings could become more prevalent in felony cases. As with a misdemeanor, meeting with the defendant prior to the initial appearance might be considered pre-attachment and outside the purview of the Sixth Amendment, and if the defendant was willing to waive all of his rights at a judicial proceeding, including the right to counsel and the right to be charged by an indictment or information, it is theoretically possible that persons charged with felonies could appear without counsel and plead guilty during their initial appearance, all without the appointment of counsel. There are practical and statutory reasons why this result seems unlikely in the near future.

170. *Tovar*, 541 U.S. at 82, 92–93.

171. *Id.* at 93. In *Tovar*, the Court specifically noted that the waiver of counsel was adequate in view of the "the particular facts and circumstances surrounding [this] case." *Id.* at 93 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). As a practical matter, however, it seems that federal courts agree that a defendant is entitled to waive his right to counsel at a plea hearing, without particularly onerous warnings about the related risks from the trial court. *See, e.g.*, Georgetown Law Journal Annual Review of Criminal Procedure, *Guilty Pleas*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 414, 449 n.1326 (2010) (compiling circuit court opinions applying *Tovar*). Particularly interesting is *King v. Bobby*, 433 F.3d 483, 492–94 (6th Cir. 2006), which upheld a trial court's determination that the defendant had waived counsel prior to pleading guilty to several theft related offenses even though the defendant himself had never explicitly waived counsel. ("The facts of this case are atypical of most waiver-of-counsel cases because King did not straightforwardly assert his right to self-representation, and even told the trial court twice that he did not wish to represent himself. Nonetheless, by rejecting all of his options except self-representation, King necessarily chose self-representation."); *see also* FED. R. CRIM. P. 11(b)(1)(D) (refusing to require any detailed enunciation of the costs associated with waiving counsel).

warnings could be required in more complicated cases.[172] Indeed, the Court's reasoning in *Tovar* is grounded in the actual-innocence-centric notion that the danger of appointing counsel is that "the defendant [may] delay[] his plea in the vain hope that counsel could uncover a tenable basis for contesting or reducing the criminal charge," thus causing the "prompt disposition of the case" to be impeded.[173] Arguably, then, where the crime at issue is more complicated and the facts more disputed, the appointment of counsel would not have the same sort of attenuated connection to innocence that undergirds the reasoning of *Tovar*—that is to say, efforts to establish innocence may not be in "vain" when the crime charged is more complicated and the facts more contestable.[174]

Moreover, there are some potentially significant procedural distinctions between the misdemeanor plea process in Colorado and the proceedings in *Tovar*. These differences suggest that the waivers given during the Colorado plea colloquy are not sufficient to avoid concerns regarding the right to counsel. In *Tovar*, the defendant waived his right to counsel at an initial appearance and then subsequently appeared at an arraignment without counsel.[175] At the second appearance, Tovar confirmed that he did not wish to have counsel appointed, rejected an offer of an attorney by the court, and pled guilty.[176] *Tovar*, then, presents a scenario in which the defendant expressed his desire to proceed without the assistance of counsel before a judicial officer on multiple occasions. By contrast, in Colorado, a misdemeanor defendant waives counsel only once before a judicial officer and does so at the same time that he pleads guilty. The formal waiver of counsel under the Colorado procedures is significantly more compressed and expedited, and these slight differences may prove constitutionally significant.[177] In justifying its holding

172. *Tovar*, 541 U.S. at 92–93.

173. *Id.* at 93; *see also* Hughes, *supra* note 161, at 1117–20 (quoting this same language in support of the critique that *Tovar* is overly focused on factual innocence to the detriment of legal, or "unmodified" innocence).

174. At least one commentator has noted that, to date, "state courts—which also have an interest in judicial expediency—have almost invariably followed *Tovar* rather than interpreting their own state constitutions." Hughes, *supra* note 161, at 1118. However, some states appear to provide for greater protections than those required in *Tovar*, such as requiring that the waiver of counsel be in writing. *See* State v. Combs, No. 07CA009173, 2007 WL 4554241, at *4 (Ohio Ct. App. Dec. 28, 2007) ("In petty offense cases, involving a penalty of no more than six months incarceration, all waivers of counsel must be made on the record in open court. In serious offense cases, involving penalties including more than six months of incarceration, any waiver of counsel must be made both on the record in open court and in writing filed with the court." (citations omitted)). There are a variety of misdemeanor offenses in Colorado that present issues that are far more complicated than the questions of proof raised in an intoxication case. *See, e.g.*, COLO. REV. STAT. § 18-9-111 (2011) (harassment); § 18-6-803.5 (violation of protection order); § 18-4-401 (theft); § 18-4-501 (criminal mischief); § 18-3-206 (menacing).

175. *Tovar*, 541 U.S. at 82.

176. *Id.*

177. It should be noted that persons facing misdemeanor charges in Colorado are effectively advised of their right to counsel four times: once by video, once by the prosecutor, once on the Rule 11 form, and once on the record during the colloquy. Only one of these waivers is on the record and

in *Tovar*, the Court specifically described the multiple levels of waiver that were given and noted that this was not a situation in which the guilty plea alone was deemed sufficient to waive all counsel rights:

> [W]e need not endorse the State's position that nothing more than the plea colloquy was needed to safeguard Tovar's right to counsel. Preliminarily, we note that there were some things more in this case. Tovar first indicated that he waived counsel at his initial appearance, affirmed that he wanted to represent himself at the plea hearing, and declined the court's offer of "time to hire an attorney" at sentencing, when it was still open to him to request withdrawal of his plea . . . .[178]

Consequently, the Colorado procedures for misdemeanor pleas during the initial appearance raise an issue not decided in *Tovar*. Rather than three distinct on-the record waivers of counsel, a Coloradan facing misdemeanor charges who wishes to take advantage of the pre-initial appearance plea offer is effectively given "nothing more than the plea colloquy"[179] in terms of a judicially supervised waiver of the right to counsel. This appears to be the precise position that the *Tovar* Court refused to endorse.

Furthermore, Colorado's one-shot approach to waiving counsel perhaps implicates Sixth Amendment concerns unique from those decided in *Tovar*. A strong argument can be made that the spirit and purpose of the Sixth Amendment support a narrow reading of *Tovar* such that, when the procedures vary from those approved in *Tovar*, the waiver of counsel before a guilty plea requires warnings similar to those required under *Farretta*. The fact that Tovar had at least three distinct opportunities to assert his right to counsel before a judge certainly seems materially distinguishable from the one-shot plea colloquy waivers that occur in Colorado misdemeanor cases. And arguably, in cases where the charges against the defendant are more contestable because of a lack of definitive proof of guilt, such as a breathalyzer exam, the waiver of counsel requires more thorough and detailed warnings than those approved in *Tovar*.

In sum there are reasoned bases for concluding that *Tovar* does not compel the conclusion that Colorado's procedures are constitutionally sound. Presently, however, the best that can be said for defendants in this context is that the law regarding the requirement for waiver of counsel before a plea in a case more complicated than, or procedurally distinguishable from *Tovar*, remains unclear and undeveloped.

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before a neutral judge. Nonetheless, like the circumstances in *Tovar*, there are multiple opportunities for a defendant to invoke the right to counsel.

178. *Tovar*, 541 U.S. at 90-91 (citations omitted).

179. *Id.* at 90 (discussing Iowa law).

C. *Even if Colorado's System Otherwise Violates the Sixth Amendment, Does the Absence of Any Actual Incarceration Render a Conviction Constitutional?*

Even if Colorado's procedures for pre-counsel plea bargaining otherwise violate the right to counsel, the absence of a sentence of actual incarceration would render the misdemeanor convictions constitutional. That is to say, regardless of whether the plea bargaining before the initial appearance is a critical stage, and regardless of whether the waiver of counsel during the plea colloquy is inadequate, if the defendant is not sentenced to a term of incarceration, the Sixth Amendment is not implicated.[180] Actual incarceration is a necessary prerequisite of a Sixth Amendment violation.[181]

There are three possible ways in which the actual incarceration rule could apply to misdemeanor plea bargains in Colorado. First, if the system otherwise violates the right to counsel and the defendant is sentenced to a term of jail, even if only a single day, the Sixth Amendment is violated. Equally obvious, if a defendant is sentenced to no incarceration, then the misdemeanor plea in that case did not violate the Sixth Amendment, no matter how inadequate the waiver of counsel. The situation is less tidy than this binary description suggests, however, because questions are raised by sentences of probation, time-served, and in-home detention.

In *Alabama v. Shelton*,[182] the Court held that the right to counsel is violated when a defendant is denied counsel and sentenced to a suspended sentence without the assistance of counsel.[183] The majority reasoned that "[a] suspended sentence is a prison term imposed for the offense of conviction" because "[o]nce the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense, [and thus] [t]he uncounseled conviction . . . results in imprisonment."[184] In other words, even though the defendant is only subjected to incarceration if he violates the terms of probation, because the suspended sentence results in punishment for the prior un-counseled conviction, and not for the probation violation, the Sixth Amendment is violated.[185]

Shelton's clear rule that the right to counsel applies to suspended sentences for incarceration does not, however, necessarily apply to un-

180. *See* Scott v. Illinois, 440 U.S. 367, 372-74 (1979).
181. *Id.*
182. 535 U.S. 654 (2002).
183. *Id.* at 662.
184. *Id.* (citation omitted) (internal quotation marks omitted).
185. *Id*; *see also id.* at 667 ("Deprived of counsel when tried, convicted, and sentenced, and unable to challenge the original judgment at a subsequent probation revocation hearing, a defendant in Shelton's circumstances faces incarceration on a conviction that has never been subjected to 'the crucible of meaningful adversarial testing.'" (quoting United States v. Cronic, 466 U.S. 648, 656 (1984))).

counseled convictions resulting in a straight probation sentence.[186] In the case of a suspended sentence, the defendant is actually sentenced to incarceration—with the sentence only activated by a subsequent probation violation. In contrast, a defendant subjected to probation is not actually sentenced to incarceration for the initial offense; instead, the sentence of incarceration, if any, is punishment for contempt, in the form of the probation violation.[187] Some courts have held that *Shelton* therefore does not apply to straight sentences of probation, since the sentence of incarceration does not flow from the tainted (un-counseled) original conviction.[188]

If the Court ultimately embraces such a formalist reading of *Shelton*, then it would impose a very minimal limitation on states that utilize straight probation. In theory, a defendant in Colorado could plead guilty to straight probation without implicating the right to counsel. That is, so long as the sentence was straight probation, such that the violation of probation will result in punishment for contempt alone, as opposed to a sentence linked to the crime of conviction, the Sixth Amendment would not impose any limitations on the pre-counsel misdemeanor plea.[189] Notably, however, Colorado does not currently provide for sentences of straight probation.[190] Thus, unless the terms of a sentence of probation are statutorily amended, sentencing a Colorado defendant to probation implicates the right to counsel.

Finally, and most challenging for purposes of defining the scope of the Sixth Amendment in this context, are sentences of in-home detention

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186. *Cf.* Gagnon v. Scarpelli, 411 U.S. 778, 789–90 (holding that there is no absolute right to counsel at a probation revocation hearing); *id.* at 789 (noting that although "the right of an accused to counsel in a criminal prosecution" is beyond question, the right to counsel at probation revocation is "more limited . . . because he has [already] been convicted of a crime" for which the right to counsel applied).

187. *See, e.g.*, 3 LAFAVE ET AL., *supra* note 70, § 11.2(a) (discussing circuit court precedent supporting this conclusion).

188. *See, e.g.*, United States v. Perez-Macias, 335 U.S. 421, 426–27 (5th Cir. 2003); United States v. Pollard, 389 F.3d 101, 104 (4th Cir. 2004).

189. *See, e.g.*, *Perez-Macias*, 335 F.3d at 427 ("The *Shelton* Court expressly refused to address whether its holding applies to a sentence of probation uncoupled with a suspended sentence."); Joshua S. Stambaugh, Alabama v. Shelton: *One Small Step for Man, One Very Small Step for the Sixth Amendment's Right to Counsel*, 31 PEPP. L. REV. 609, 651–52 (2004) (criticizing *Shelton's* holding as arbitrary line-drawing, going against the "spirit of *Powell* and *Gideon*"); Adam D. Young, *An Analysis of the Sixth Amendment Right to Counsel As It Applies to Suspended Sentences and Probation: Do* Argersinger *and* Scott *Blow A Flat Note on* Gideon*'s Trumpet?*, 107 DICK. L. REV. 699, 713 (2003) ("The concept of liberty in the American criminal justice system far exceeds the single notion of actual imprisonment."). *But see* Harvard Law Review, *Criminal Law and Procedure*, 116 HARV. L. REV. 252, 262 (2002) ("If state legislatures respond to *Shelton* by creating probation-only criminal penalties, *Shelton* may not yield the negative consequences that the dissent and the amicus foresaw. Rather, courts will merely guarantee that, prior to serving actual jail time, a criminal defendant will have the benefit of counsel at the proceeding directly responsible for the incarceration.").

190. COLO. REV. STAT. § 16-11-206(5) (2011) (allowing for any sentence that may have been originally imposed when a defendant violates probation); *see also* Robert J. Dieter, *Probation—Sentence Following Revocation*, 15 COLO. PRAC., CRIMINAL PRACTICE & PROCEDURE § 20.48 (2d ed.) ("If the court revokes the probation, the court may then impose any sentence that the court had authority to impose at the original sentencing.").

and sentences of time served for persons charged with misdemeanor offenses. Case law directly on point is scant. The case most directly on point is an unpublished decision of the Montana Supreme Court, which reasons that home arrest should be treated the same as imprisonment for Sixth Amendment purposes insofar as it was "an alternative form of imprisonment rather than an alternative to imprisonment."[191] Other cases, addressing the issue less directly appear to conflict with this result. For example, the double jeopardy prohibition on multiple punishments requires that defendants receive credit for all time served in pretrial detention,[192] and this requirement is codified in a federal statute requiring credit for time served in "official detention" by federal court defendants.[193] Applying this statute, the Supreme Court has held that a defendant released on bail but subject to onerous restrictions is not subject to custody for purposes of the time served credit,[194] and numerous lower courts have applied this reasoning and explicitly held that in-home detention is not custodial for purposes of accruing credits for time served.[195] Likewise, for purposes of calculating a defendant's criminal history under the federal sentencing guidelines, circuit courts have held that in-home detention is not "a sentence of imprisonment."[196] Of course, these cases from the federal sentencing context turn solely on questions of statutory construction and do not preclude the conclusion, reached by the Montana Supreme Court, that such punishments implicate the Sixth Amendment. To be sure, sentences of home detention are designed to be punitive and have an incarcerative quality to them. Nonetheless, the general tenor of judicial hostility towards extending the privileges and entitlements associated with incarceration to in-home detentions is, at the very least, illuminating as to how courts might respond to a claim that a sentence of in-home detention constitutes actual incarceration for purposes triggering the protections of the right to counsel.

The question of whether a sentence of time served based on time spent in pretrial detention can satisfy the requirement of actual incarceration is a similarly unresolved and creates an interesting Sixth Amendment thought experiment. To illustrate the difficulty surrounding this issue, imagine that a defendant is arrested late on Friday night in Denver

191. The Montana Supreme Court held that a defendant who was given a twenty day sentence of "home arrest" was actually imprisoned for Sixth Amendment purposes. State v. Morigeau, No. 99-569, 2000 WL 898762, at *2 (Mont. Jul. 6, 2000) ("The State argues that home arrest, which allows the arrestee considerably more liberty than exists in a prison environment, is not the equivalent of imprisonment.").

192. North Carolina v. Pearce, 395 U.S. 711, 718–19 (1969).

193. 18 U.S.C. § 3585(b) (2011).

194. Reno v. Koray, 515 U.S. 50, 60–61 (1995) (refusing to consider a release from custody, no matter how restrictive the conditions, an "official detention" as a matter of statutory interpretation).

195. Georgetown Law Journal Annual Review of Criminal Procedure, *Sentencing Guidelines*, 39 GEO. L.J. ANN. REV. CRIM. PROC. 699, 769 n.2238 (2010) (compiling cases on this point).

196. *See, e.g.*, United States v. Jones, 107 F.3d 1147, 1165 (6th Cir. 1997) (citing United States v. Phipps, 68 F.3d 159, 162 (7th Cir.1995)).

for a drunk driving offense or an animal cruelty crime, and that the defendant is held in the city jail until his initial appearance on Monday morning.[197] Imagine further that the prosecutor approaches this defendant just before the initial appearance and offers him a plea deal of time served plus community service or some classes if he pleads guilty at the initial appearance.[198] A sentence of community service (or classes) does not require the appointment of counsel, but the question is whether incarceration that is already complete at the time of the conviction can count as actual incarceration that triggers the right to counsel. As with the in-home detention issue, Colorado courts will have a relatively clean slate insofar as there seems to be only a minimal amount of case law or academic literature on the relationship between a sentence of time served and the *Argersinger* actual incarceration requirement.[199]

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197. Both of these crimes are misdemeanors that carry a potential sentence of incarceration. COLO. REV. STAT. § 42-4-1307 (2011) (driving under the influence); § 18-9-202 (cruelty to or neglect of animals). Some class one misdemeanors can carry jail sentences of up to two years. *E.g.*, People v. Young, 859 P.2d 814, 817 (Colo. 1993) ("Class one misdemeanor offenses punishable by a maximum sentence of two years in the county jail, include such offenses as assault in the third degree; cruelty to or neglect of animals; jury tampering; criminal simulations; and possession of contraband in the second degree." (citations omitted)).

198. A first DUI offense carries a sentencing range from a minimum of five days up to a maximum of one year in jail, as well as a fine and community service. However, the statute dictates that both the jail time and fine may be suspended if the defendant agrees to classes and other probation terms. COLO. REV. STAT. § 42-4-1307(3), (6) (2011). As a practical matter, the probation and drug and alcohol classes are the most likely sentence for a first offense DUI. Notably, some other offenses, such as third-degree assault, also carry the risk of substantial jail time; however, the Colorado Victim's Rights Statute, § 24-4.1-302.5(1)(e), requires the prosecution to consult with the victim prior to the "disposition of the case." Paradoxically, the victim's rights statute has the effect of providing misdemeanor defendants increased access to counsel insofar as the pre-counsel pleas occurring at initial appearances appear to be impermissible under the plain terms of the victim's rights statute.

199. The majority of courts that have considered the issue have held that sentences of "time served" do not constitute "actual imprisonment" for Sixth Amendment right to counsel purposes. *See, e.g.*, Glaze v. Warden Ridgeland Corr. Inst., 481 F. Supp. 2d 505, 510 (D.S.C. 2007) (noting that although defendant "spent ten days in jail . . . he did so because he . . .could not post bail" and explaining that there is not any "[clearly] established federal law supporting his claim that a 'time-served' sentence constitutes an imposition of a term of imprisonment such that it may not be imposed absent the benefit of counsel"); State v. Brown, 995 So. 2d 1034, 1037–38 (Fla. Dist. Ct. App. 2008) ("We reject the defendant's argument that by awarding him forty-eight hours of credit for the time he spent in jail after his arrest and before entering his plea, the trial court necessarily imposed a term of imprisonment on his conviction."); *id.* (distinguishing between jail time that was a result of arrest, and jail time that was a result of one's conviction); McLaurin v. State, 882 So. 2d 268, 272 (Miss. Ct. App. 2004) (holding there was no Sixth Amendment violation where defendant "received no further jail time after having pled guilty . . . and [p]retrial incarceration is of no consequence"), Nicholson v. State, 761 So. 2d 924, 931 (Miss. Ct. App. 2000) (holding where defendant's sentence included "48 hrs. in jail Time Served" court concluded that because defendant "did not received any further prison or jail time" his "prior misdemeanor DUI did not result in a sentence of imprisonment").

However, a number of courts, including the Sixth Circuit (in an unpublished decision) have come to the opposite conclusion. United States v. Cook, 36 F.3d 1098 (6th Cir. 1994) (holding that defendant's uncounseled conviction "for which he received one day (time served) . . . was not valid under *Scott* and *Nichols* for purposes of sentence enhancement"); State v. O'Neill, 746 N.E.2d 654, 659 (2000) ("We thus hold that where an indigent misdemeanor defendant is not advised of his right to or provided with counsel, the court may not sentence that defendant to incarceration. This is true even if the defendant need not report to jail due to the credit he is given for time served."); *see also* Roosevelt City v. Curry, 143 P.3d 309, 313 (Utah Ct. App. 2006) (recognizing in dicta the

This clean slate allows for several possible approaches. On the one hand, a literal application of *Argersinger* suggests that if a defendant is sentenced to time served, then a conviction obtained without either the presence of counsel, or a valid waiver of counsel, would violate the Sixth Amendment. A defendant in such circumstances would be sentenced to a jail term, his criminal record would reflect this sentence of incarceration, and any future sentences would potentially be aggravated by the defendant's record of actual incarceration. As such, the right to counsel seems to have natural application.

On the other hand, there is good reason to believe that a sentence of time served does not implicate the right counsel. In misdemeanor cases for which a sentence of time served is imposed, the amount of time served will always be relatively short, almost always totaling less than a week.[200] More importantly, the "time served" will be exactly the same whether the prosecutor (1) requests a sentence of time served; (2) merely seeks a sentence of probation or community service; or (3) dismisses the charges outright. That is to say, the duration of the actual incarceration is neither enhanced nor aggravated by the inclusion of time served as part of the sentence (or as the entire sentence) in the plea deal. Thus, to count a sentence of time served as a sentence of actual incarceration is to raise questions about whether a mere fine following a night in jail, or even an outright dismissal of the case after spending a night in jail, implicates the right to counsel just as strongly as a six-month jail sentence. Does a plea bargain that does not specify any incarceration but follows a night of pretrial detention implicate the right to counsel?[201] Considered in this light, it seems that pre-initial appearance incarceration may not implicate the Sixth Amendment right to counsel, but rather, is more profitably considered as a freestanding constitutional question.[202]

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danger of a "trial court routinely imprisoning minor offenders before trial, knowing full well that no counsel would be appointed and that the ultimate sentence would be probation and time served. Such a practice would effectively sidestep the requirements of the Sixth Amendment by allowing the imprisonment of misdemeanor offenders convicted without the benefit of counsel"); *id.* (encouraging "trial courts and counsel on both sides of criminal matters to consider the implications of pretrial confinement in relation to the constitutional rights of defendants").

200. The Fourth Amendment requires that, at the very least, a probable cause determination be made within 48 hours of all warrantless arrests, unless there is some "extraordinary circumstance." *See, e.g.*, Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56–57 (1991) ("[A] jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*. . . . Where an arrested individual does not receive a probable cause determination within 48 hours . . . the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance.").

201. Nicholson v. State, 761 So. 2d 924, 931 (Miss. Ct. App. 2000) ("Nicholson would have this Court find that if a defendant upon initial arrest for DUI spent some time in jail, any guilty plea thereafter without counsel would be constitutionally unsound.").

202. Unfortunately for defendants, the constitutional propriety of pretrial detention, well beyond the brief period of time between an arrest and initial appearance, has been approved by the United States Supreme Court. The Court has rejected arguments that pretrial detention violates the presumption of innocence embodied by due process. United States v. Salerno, 481 U.S. 739, 747–48 (1987); Bell v. Wolfish, 441 U.S. 520, 538–39 (1979); *see also* Shari Lewis, United States v. Saler-

In sum, even assuming Colorado's system otherwise implicates the right to counsel, unless a misdemeanor defendant is sentenced to a term of incarceration, the Sixth Amendment is not violated. There remains considerable uncertainty, however, as to which misdemeanor sentences constitute incarceration so as to trigger the right to counsel. Sentences of time served and even a sentence of home detention potentially fall outside the well settled law in this area and provide litigation opportunities for lawyers seeking to define the outer bounds of the actual incarceration requirement. Such litigation is essential to efforts to flesh out the contours of the right to counsel more generally, and it is critical to the constitutionality of Colorado's specific misdemeanor plea bargaining rules.

D. Other Issues: Errors by the Prosecution, the Problem of Collateral Consequences, and Retroactivity

The Colorado procedures for misdemeanor pre-counsel pleas provide a nearly inexhaustible and intractable set of constitutional questions. Without attempting to identify every point of constitutional friction under the current misdemeanor plea procedures, a few final issues that are likely to arise warrant, at the very least, passing attention.

First, there is a range of prosecutorial errors or missteps that could render an otherwise constitutional procedure impermissible. For example, improper threats by the prosecutor during the negotiations without counsel, such as threatening charges for which there is no good faith basis to charge, would render the eventual plea involuntary.[203] Likewise, if the prosecutor suggests that he is a neutral or detached party who is able to provide disinterested advice to a defendant, this would run afoul of ethical obligations and justify a more exacting set of procedures for waiving counsel.[204] Moreover, if the defendant is given incomplete or

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no: *Destruction of the Presumption of Innocence?*, 32 ST. LOUIS U. L.J. 573 (1987); Craig Ethan Allen, *Pretrial Detention and the Loss of Innocence*, United States v. Salerno, 11 HAMLINE L. REV. 331, 347–48 (1988) ("Justice Rehnquist's opinion in *Bell v. Wolfish*, which stripped the presumption of innocence away from pretrial detainees, was a devastating blow to the rights of accused persons."); LeRoy Pernell, *The Reign of the Queen of Hearts: The Declining Significance of the Presumption of Innocence—A Brief Commentary*, 37 CLEV. ST. L. REV. 393, 400 (1989) (concluding that in *Salerno* the "Supreme Court dealt the death hand to the notion of a pretrial presumption of innocence"); Harvard Law Review Association, *The Supreme Court, 1986 Term*, 101 HARV. L. REV. 169, 175 (1987) ("The *Salerno* Court silently reduced the presumption of innocence to nothing more than an allocation of the burden of proof at trial."). Likewise, the Court has held that pretrial detention does not violate the Eighth Amendment. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 760-61 (1987) (Marshall, J., dissenting) (reacting against the assumption in the majority opinion that the eighth amendment is a limit on the excessiveness of bail but not a substantive right to bail).

203. *See, e.g.*, Brady v. United States, 397 U.S. 742, 750 (1970) ("Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant."); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

204. COLO. R. PROF'L CONDUCT 4.3 (2008) (prohibiting a lawyer from pretending to be disinterested and barring a lawyer from giving legal advice to an unrepresented party with interests contrary to his own client's).

misleading advisements before speaking with the prosecutor, a failure to provide the defendant an attorney would implicate the right to counsel in ways that likely could not be remedied by the standard plea colloquy provided in Colorado.

In addition, the Colorado procedures for misdemeanor pleas also raise concerns regarding proper advisements as to collateral consequences. Under *Padilla*, defense counsel has an affirmative duty to advise his client of obvious immigration consequences that flow from a conviction, whether the conviction is a felony or a misdemeanor.[205] As discussed above, when a defendant is facing felony charges or actual incarceration, he is entitled to counsel unless he knowingly and voluntarily waives counsel after proper advisements. A waiver of counsel that is adequate to waive the benefits of an attorney's advice in deciding whether to plead guilty would presumably also constitute a waiver of counsel as to advice regarding the collateral consequences of a guilty plea. That is to say, if a defendant knowingly and voluntarily waives the assistance of counsel for purposes of deciding whether to plead guilty, then the defendant cannot complain about the absence of reasoned advice as to either the direct or collateral consequences of his pro se plea. On the other hand, where a defendant is not entitled to counsel, for example, where the prosecution agrees at the earliest stage of the case that she will not seek any incarceration,[206] then it is conceivable that both the judge and the prosecutor will inform the defendant that he does not have a right to appointed counsel. And there is good reason for such an advisement as it reflects the current state of Colorado and Sixth Amendment law. However, the *Padilla* case may signal a new realm of right to counsel rights that are, as of yet, not fully formed. Where, for example, a misdemeanor defendant never meets with counsel, is advised that he does not have a right to counsel, and is offered a plea of probation or community service that would likely lead to direct immigration consequences, perhaps there is a right to counsel,[207] or at least specific, detailed warnings from the judge at the time of the plea colloquy.[208]

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205. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010). Padilla was convicted of a felony, transporting a large quantity of marijuana, in violation of 8 U.S.C. § 1227(a)(2)(B)(i). *Id.* at 1477, n.1.

206. COLO. REV. STAT. § 16-5-501 (2011).

207. *See* John D. King, *Beyond 'Life and Liberty': The Evolving Right to Counsel*, 47 HARV. C.R.-C.L. L. REV. (forthcoming 2013) ("Although *Padilla* involved a felony charge . . . the deportation consequences would have been the same if the defendant had been charged with [a misdemeanor] . . . [and if] the prosecutor had agreed prior to trial not to seek jail time, the defendant would not have had any federal constitutional right to counsel. *Padilla* seems to confer a right to the *effective* assistance of counsel, then, on a class of defendant who has no right to counsel at all under the *Scott* doctrine.")

208. Presently, the Colorado plea advisements—the Rule 11 form—include a general statement that a conviction may carry immigration consequences. However, the warning is generic and, apparently, not required by Colorado law. People v. Pozo, 746 P.2d 523, 526 (Colo. 1987) ("[A] trial court is not required to advise a defendant *sua sponte* of potential federal deportation consequences of a plea of guilty to a felony charge when accepting such plea."); People v. Nguyen, 80 P.3d 903, 905

In *Padilla*, the Court stressed that "[t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important" and emphasized that legal advice regarding immigration consequences is "an integral part–indeed, sometimes the most important part of" representation for persons who are considering pleading guilty.[209] The Court's explicit recognition that something other than the trial, and something other than the criminal consequences, may constitute the most important aspect of appointed counsel's duties, threatens to fundamentally rework the orientation of the right to counsel.[210] Whereas the prior right to counsel cases suggested that the right was fundamentally oriented towards ensuring a full and fair trial, *Padilla* suggests that certain ancillary duties of counsel are equally, if not more, important. These duties are, then, on the brink of being recognized as critical stages.[211] Accordingly, a defendant who pleads guilty without the assistance of counsel regarding collateral consequences, and without, at the very least, thorough warnings from the judge as to potential collateral consequences, may have a claim under the Sixth Amendment or, more likely, the Due Process Clause.[212] To date the Court has only visited the collateral consequences issue in the context of a felony conviction; however, the requirement that defendants receive reliable warnings about collateral consequences that are closely related to the criminal process seems more, not less, important in the realm of misdemeanor convictions where the immigration consequences will often be more severe than the actual sentence sanctioned by statute.[213] Accordingly, although this issue is not unique to Colorado, in considering the constitutional defects with its current misdemeanor system, Colorado courts would be wise to address the relationship between misdemeanor pleas and *Padilla*.[214]

(Colo. App. 2003) After *Padilla*, there is good reason to believe that warnings are required, and the generic Rule 11 statements may not be adequate.

209. *Padilla*, 130 S. Ct. at 1480.

210. Presently there is no scholarship on this question, and this is a gap in the literature that needs to be filled.

211. *But see* United States v. Cronic, 466 U.S. 648, 658 (1984) (concluding that the purpose of counsel is simply to facilitate a fair trial).

212. Due process has a longstanding history as a supplementary provider of counsel rights; it routinely applies to provide counsel-type protections where the Sixth Amendment does not apply. *See, e.g.*, Douglas v. California, 372 U.S. 353, 356–57 (1963) (holding that due process requires the appointment of counsel for an indigent defendant's "first appeal granted as a matter of right"); Evitts v. Lucey, 469 U.S. 387, 396 (1985) (holding that an appeal "is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney").

213. *See* King, *supra* note 207 ("Indeed, in the misdemeanor context, where amount of potential incarceration is quite low but the collateral consequences significant, the use of incarceration as a proxy for seriousness is especially crude.")

214. Indeed, if counsel has an obligation to advise a defendant of collateral consequences when the defendant is facing felony charges and substantial incarceration, then it seems that the importance of advising a defendant of such collateral consequences is of *even greater* constitutional concern when the only substantial consequence of the conviction is an immigration or other collateral consequence. On the other hand, the budget constraints are such that Colorado legislatures, without a directive from the courts, may fail to address this concern. The State of Colorado, through its Republican Attorney General, joined an amicus brief warning that a decision in favor of Padilla

Finally, it is worth noting that if Colorado's process for pre-initial appearance plea bargaining is held unconstitutional under the Sixth Amendment, it is arguable that this rule will be retroactively applicable.[215] Generally, new rules of constitutional law only apply prospectively such that prisoners whose convictions are already final may not benefit from the new rule.[216] Where, however, the new rule is one of substantive law or a watershed rule of procedure, the constitutional rule is given retroactive effect.[217] Although the concept of a watershed rule of procedure defies easy definition, the Supreme Court has repeatedly admonished that those rules worthy of being regarded as watershed rules are generally defined by reference to right to counsel protections.[218] Consequently, new elaborations on the scope of the right to counsel enjoy a presumption of retroactivity.[219] Applying this principle to the present context, if *Gideon* and *Argersinger* compel the conclusion that Colorado's misdemeanor procedures are incompatible with the Sixth Amendment right to counsel, then the new rule of procedure ought to apply retroactively.[220]

"would likely break the back of the plea agreement system." Brief for the States of Louisiana, Alabama, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Kansas, Maryland Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington & Wyoming and the National District Attorneys Association as Amici Curiae in Support of Respondent at *1, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651), 2009 WL 2564713.

215. In light of the persuasive academic commentary concluding that the Supreme Court is less likely to expand constitutional rights where the creation of the right will impose extremely large systemic costs, the potential retroactivity of this rule may be a practical impediment to its legal development. *Cf.* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90, 98 (1999); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 20–21 (2002).

216. Teague v. Lane, 489 U.S. 288, 310 (1989).

217. Whorton v. Bockting, 549 U.S. 406, 416 (2007). Recently the Court observed that "in the years since *Teague*, we have rejected every claim that a new rule satisfied the requirements for watershed status." *Id.* at 418.

218. *Id.* at 419 (recognizing *Gideon* as "the only case that we have identified as qualifying under this exception"); *see also* David E. Johnson, *Justice for All: Analyzing* Blakely *Retroactivity and Ensuring Just Sentences in Pre-*Blakely *Convictions*, 66 OHIO ST. L.J. 875, 945 (2005).

219. Accordingly, in the wake of *Alabama v. Shelton*'s elaboration on *Argersiner*, lower courts were quick to recognize the rule's retroactive application. *See, e.g.*, Talley v. State, 640 S.E.2d 878, 882 (S.C. 2007) ("We conclude the new rule announced by *Shelton* is a watershed rule of criminal proceeding because the right to counsel undeniably implicates the fundamental fairness and accuracy of the proceeding."); Howard v. United States, 374 F.3d 1068, 1077 (11th Cir. 2004) ("Every extension of the right to counsel from *Gideon* through *Argersinger* has been applied retroactively to collateral proceedings by the Supreme Court." (citing a compilation of retroactively applied right to counsel cases)). Likewise, some courts have held that *Padilla* applies retroactively. *See, e.g.*, Amer v. United States, No. 1:06CR118–GHD, 2011 WL 2160553, at *3 (N.D. Miss. May 31, 2011) ("Both the language of *Padilla* and the application of *Teague*'s test indicate that the *Padilla* [holding] should apply retroactively."). It seems, however, that most courts have concluded that "*Padilla* is not as sweeping and fundamental as that of *Gideon*, and it does not, therefore, rise to the status of a watershed rule that must be applied retroactively." People v. Kabre, 905 N.Y.S.2d 887, 899 (N.Y Crim. Ct. 2010); *accord* United States v. Chang, 2011 WL 3805763, at *1 (10th Cir. 2011).

220. The fact that it is retroactive does not necessarily mean there is a procedure for vindicating the right. Bars on successive post-conviction petitions may still deprive some prisoners of the benefit of the new rule.

CONCLUSION

In *Argersiner*, the Supreme Court rejected as factually erroneous claims that the social costs of providing attorneys to persons facing incarceration was too high.[221] When the Colorado Supreme Court addresses the question of whether the appointment of counsel is required for all misdemeanor plea discussions, it will not enjoy this luxury. There is little doubt that the appointment of counsel for all first appearances in misdemeanor cases would require an enormous expenditure of resources. Pragmatic costs aside, however, the pre-counsel plea procedures mandated by statute in Colorado raise a host of constitutional concerns. The answers regarding how the right to counsel interacts with the Colorado procedures is far from certain, but the need for litigation presenting these questions is long overdue. This Article raises these questions and is intended to serve as the first step in what promises to be a long discussion about the scope of the right to counsel protections under the Colorado procedures for misdemeanor plea bargaining. By considering Colorado's specific procedures, this Article also provides a vehicle for exploring the surprisingly under-examined and unresolved boundaries of the vital Sixth Amendment concepts of attachment, critical stage, and incarceration.

221. Argersinger v. Hamlin, 407 U.S. 25, 37 n.7 (1972) ("[T]he Nation's legal resources are sufficient to implement the rule we announce today.").