

"Critical Stage": Extending the Right to Counsel to the Motion for New Trial Phase

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“CRITICAL STAGE”: EXTENDING THE RIGHT TO COUNSEL TO THE MOTION FOR NEW TRIAL PHASE

INTRODUCTION

Only in relatively recent times has the right to counsel for criminal defendants expanded to the level that we now take for granted; namely, that any indigent defendant facing prosecution for a crime has the right to free, effective assistance of counsel for his defense.¹ This development in Sixth Amendment jurisprudence, however, has not come without its share of ambiguity.

The current confusion over the reach of the Supreme Court's Sixth Amendment right to counsel doctrine² as it applies to criminal defendants in the post-trial setting has resulted in a split of authority at the circuit court level.³ The gravamen of the split is whether the period for filing a motion for new trial is a “critical

1. For a good overview of this history and the transition to the current constitutional framework for the Sixth Amendment's right to counsel, see ROBERT HERMANN ET AL., COUNSEL FOR THE POOR: CRIMINAL DEFENSE IN URBAN AMERICA (1977).

2. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial ... and to have the Assistance of Counsel for his defence.”) (emphasis added); see also *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (holding that the right to counsel does not extend to discretionary appeals); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (holding that the Sixth Amendment right to appointed counsel extends to misdemeanor prosecutions); *Douglas v. California*, 372 U.S. 353 (1963) (holding that the Equal Protection Clause of the Fourteenth Amendment mandated extension of the right to counsel to all appeals of right); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the Sixth Amendment right to counsel is made obligatory on the states by the Fourteenth Amendment); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (holding that indigent defendants have a Sixth Amendment right to counsel for all serious cases in federal courts).

3. Compare *United States v. Tajeddini*, 945 F.2d 458, 470 (1st Cir. 1991) (per curiam), overruled on other grounds by *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), *United States v. Lee*, 513 F.2d 423, 424 (D.C. Cir. 1975) (per curiam), and *United States v. Birrell*, 482 F.2d 890, 892 (2d Cir. 1973) (per curiam) (holding that criminal defendants do not have a right to counsel for post-appeal motions for a new trial), with *Kitchen v. United States*, 227 F.3d 1014, 1018-19 (7th Cir. 2000) (per curiam), *Robinson v. Norris*, 60 F.3d 457, 459-60 (8th Cir. 1995), and *Menefield v. Borg*, 881 F.2d 696, 699 (9th Cir. 1989) (holding, on particular facts, that the motion for new trial phase is a critical stage of the prosecution to which the right to counsel attaches).

stage" of the prosecution to which the right to counsel attaches.⁴ Although the Supreme Court has not addressed this particular question, this Note argues that a logical extension of prior Supreme Court precedent on the reach of the Sixth Amendment right to counsel and the reach of the Due Process and Equal Protection Clauses in related contexts does in fact compel coverage for this stage of the prosecution. Furthermore, the extension of this right to counsel to the post-trial phase of the prosecution is entirely consistent with the overall policy and rationale behind the Sixth Amendment. Resolution of this issue holds practical significance, not merely to prospective indigent criminal defendants, but to criminal defense lawyers and the government as well. In short, the matter is one of basic individual rights, commitment to constitutional norms, economic efficiency, and management of scarce judicial resources.

Part I of this Note provides an overview of the post-trial and postconviction review procedures available to criminal defendants. Part II examines the circuit split in question and provides a breakdown of this conflict over the right to counsel in post-trial motions for a new trial. Part III examines the history of the Sixth Amendment right to counsel jurisprudence, the rationale and policy behind the right, and an overview of Supreme Court precedent on the right to counsel. Part IV analyzes the post-trial problem in light of this history and provides precedent and argues that the right to counsel should extend throughout the period for filing this post-trial motion for a new trial. Finally, this Note concludes with a glimpse into possible practical policy concerns that support ensuring adequate and effective assistance of counsel for indigent criminal defendants at the motion for new trial stage.

4. In the recent Fifth Circuit case of *Mayo v. Cockrell*, the majority noted the above circuit split without deciding the issue of whether "the right to counsel attaches for some purposes during the post-trial, pre-appeal phase of the prosecution." 287 F.3d 336, 341 (5th Cir. 2002). In his dissent, Judge DeMoss argued that "the post-trial, pre-appeal time period for filing a motion for new trial is a critical stage of the proceedings during which a defendant is constitutionally entitled to effective assistance of counsel." *Id.* at 345 (DeMoss, J., dissenting).

I. OVERVIEW OF POST-TRIAL REVIEW PROCEDURES AVAILABLE TO CRIMINAL DEFENDANTS

Before engaging in an extended discussion of the current circuit conflict over whether the right to counsel attaches to a defendant's motion for new trial, it may be useful to begin with a brief overview of the three most common post-trial remedies available to convicted criminal defendants: the motion for new trial, the right to appeal, and the writ of habeas corpus. Having a working knowledge of each of these three post-trial review procedures (and their respective constitutional groundings) will prove helpful in a review of the problem addressed by the circuit courts, and will also help to illuminate why extension of the right to counsel is necessary in this particular context.

A. Motion for New Trial

Rule 33 of the Federal Rules of Criminal Procedure provides that “[u]pon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.”⁵ Although the Constitution is conspicuously silent on whether a criminal defendant has a right to a new trial, Congress, through the Judiciary Act of 1789, provided for defendants the possibility of granting new trials “for reasons for which new trials have usually been granted in the courts of law.”⁶ Simply put, this procedure

5. FED. R. CRIM. P. 33(a). “Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty, or within such further time as the court sets during the 7-day period.” FED. R. CRIM. P. 33(b)(2). For the purposes of this Note, and the sake of simplicity, the Federal Rule 33 Motion for New Trial will be used as the model “motion for new trial” with the understanding that each state has its own motion for new trial rule, more similar than not to the federal rule.

6. 1 Stat. 83 (1789). For a good overview of the history, development, and background of Rule 33 and the right to a Motion for New Trial, see LESTER B. ORFIELD & MARK S. RHODES, *ORFIELD’S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES* § 33 (2d ed. 1987). See also *Ogden v. United States*, 112 F. 523, 525 (3d Cir. 1902) (“The right to move for a new trial, and to have that motion considered upon the reasons presented for it, is an absolute one, and the granting or refusal thereof does not rest in the discretion of the court.”).

extended to those cases in which any convicted federal criminal defendant sought a new trial.⁷

The language of Rule 33 that allows the court to grant a new trial ("if the interest of justice so requires") has been held to mean that "the court may grant a new trial if it reaches the conclusion that a miscarriage of justice has resulted."⁸ In determining whether to grant a new trial, the power of the trial court judge is strong, for if the court decides to grant a criminal defendant a new trial, the prosecution may not appeal the decision.⁹ While district court judges' power may be great in this area, so too has been their discretion: they have not engaged in any easygoing application of this considerable remedy.¹⁰ To wit, as noted by one authority, "a new trial will not be granted if the defendant had a fair trial and the verdict is supported by the evidence."¹¹

B. Right to Appeal

The Supreme Court has clearly and consistently held that there is no constitutional protection for a defendant's right to appeal.¹² In dicta from *McKane v. Durston*,¹³ the Court rejected the notion that the states were constitutionally required to give convicted criminal defendants the avenue of appellate review. Specifically, the Court noted:

An appeal from a judgment of conviction is not a matter of absolute right, independently of [state] constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the

7. See ORFIELD & RHODES, *supra* note 6, at 283-84 (citing *Sparf v. United States*, 156 U.S. 51, 151, 175 (1895)).

8. *Id.* at 284 (internal citations omitted).

9. *Id.* at 285-86.

10. *Id.* at 286.

11. *Id.* (citing *United States v. Weiss*, 168 F. Supp. 728 (W.D. Pa. 1958)). Some of the grounds commonly used in a motion for new trial include: bias and jury misconduct; misconduct of a prosecuting attorney; suppression of evidence; failure to produce a witness; violation of the right to counsel; improper jury instructions; rulings on evidence; and newly discovered evidence. *Id.* at 286-311.

12. WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 27.1(a), at 1255-56 (3d ed. 2000).

13. 153 U.S. 684 (1894).

offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review.¹⁴

Nearly one hundred years later, the Court effectively affirmed that view, again in dicta, when it noted that “[t]here is, of course, no constitutional right to an appeal.”¹⁵

Despite this obvious lack of constitutional support, the right to appellate review for criminal convictions has gained a foothold in every state and throughout the federal criminal justice system.¹⁶ Typically in the federal courts, and in most state courts, the right to appeal is provided to all defendants convicted of a felony.¹⁷ For misdemeanor convictions, usually some form of review is provided (commonly in the general trial court) with the option of subsequent discretionary appellate review.¹⁸

The Supreme Court also has held that once the state or federal government grants the defendant a statutory right to appeal, “it cannot condition that right in a manner that violates the constitutional guarantee of equal protection.”¹⁹ Of particular relevance to the analysis presented here, this concept of equal protection includes the idea that the defendant has a right to appointed counsel for his first appeal of right,²⁰ while the concept of due process mandates that the defendant have effective assistance of counsel on his appeal of right.²¹ These guarantees do not extend, however, to subsequent discretionary appellate reviews.²²

14. *Id.* at 915.

15. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

16. *See* LAFAVE ET AL., *supra* note 12, § 27.1(a), at 1256.

17. *Id.*

18. *Id.*

19. *Id.* § 27.1(b) (citing *Griffin v. Illinois*, 351 U.S. 12 (1956)).

20. *See Douglas v. California*, 372 U.S. 353, 358 (1963) (noting that the right to counsel in the appellate process ensures that the indigent defendant has meaningful access to the appellate process).

21. *See Evitts v. Lucey*, 469 U.S. 387, 402-05 (1985) (holding that the right to appellate counsel is limited to first appeal as of right).

22. LAFAVE ET AL., *supra* note 12, § 27.1(b), at 1256-57.

C. Federal Habeas Corpus: Collateral Review

The federal writ of habeas corpus constitutes a collateral remedy in that the defendant pursues the writ after all other opportunities for appellate review have been exhausted.²³ The source for this right is found in Article I of the Constitution, which provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."²⁴ The Judiciary Act of 1789 first defined this power of federal review by authorizing the federal courts to issue the writ of habeas corpus.²⁵ The Habeas Corpus Act of 1867 expanded the scope of the federal habeas writ by giving federal courts the "power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."²⁶ Though there has been considerable debate over the reach and import of this statutory remedy as well as the objective of Congress in adopting the 1867 Act, such issues are beyond the scope of this Note.²⁷

II. OVERVIEW OF THE CIRCUIT CONFLICT

In the abstract, the current circuit conflict may seem more like an argument over the issue of timing²⁸ than an irreconcilable constitutional impasse. As the following discussion will show, those circuits that have held that the right to counsel attaches to the motion for new trial stage have focused almost uniformly on both

23. *Id.* § 28.1(a), at 1292.

24. U.S. CONST. art. I, § 9, cl. 2.

25. See LAFAVE ET AL., *supra* note 12, § 28.1(a), at 1293.

26. Habeas Corpus Act of 1867, 14 Stat. 385 (1867) (current version at 28 U.S.C. § 2241 (2000)).

27. It is important for the purposes of this Note's analysis to keep in mind the collateral nature of the habeas writ. In its common law form, the habeas writ truly represented a collateral attack on the underlying judgment—in that the writ was an independent civil action in which a "petitioner challenged his continued detention by attacking the conviction on which his detention was based." LAFAVE ET AL., *supra* note 12, § 28.1(a), at 1292. Today, however, the designation of "post-appeal challenges ... as 'collateral' ... means simply that the remedy 'provide[s] an avenue for upsetting judgments [of conviction] that have become otherwise final.'" *Id.* (quoting *Mackey v. United States*, 401 U.S. 667 (1971)).

28. As pertaining to the motion for new trial and whether it comes before or after conclusion of direct appeal.

the timing and nature of the motion for new trial and the policies and rationale behind the Sixth Amendment right to counsel.²⁹

Conversely, those circuits that have denied extension of the right to counsel to this stage have conspicuously ignored the policies and rationale inherent in the Sixth Amendment guarantee and have focused instead on the timing of the motion for new trial, while giving minimal attention to the nature of the new trial motion as it relates to the entire trial continuum.³⁰

A. *Mayo v. Cockrell: Noting and Avoiding the Obvious*

The most recent circuit court to note, address, and effectively side-step the issue of whether the right to counsel attaches to a post-trial, post-appeal motion for new trial is the Fifth Circuit in *Mayo v. Cockrell*.³¹ In *Mayo*, the defendant was convicted of various felonies in Texas state court.³² Following the sentencing phase, Mayo informed his lawyer Mewis of his desire to appeal.³³ Mewis advised Mayo to hire another lawyer, because he did not handle appeals.³⁴ Neither Mewis nor his assistant on the case took any further action on the matter.³⁵

When the deadline for filing an appeal approached, and Mewis still had not heard from any prospective appellate lawyers, he held a meeting with Mayo in jail to ascertain whether Mayo had hired another lawyer.³⁶ Mayo informed Mewis that he was indigent and could not afford to hire an attorney.³⁷ Consequently, three days prior to the deadline to file a motion for new trial and notice of appeal, Mewis took Mayo to court, filed a notice of appeal and

29. See *Kitchen v. United States*, 227 F.3d 1014, 1018-19 (7th Cir. 2000) (per curiam); *Robinson v. Norris*, 60 F.3d 457, 459-60 (8th Cir. 1995); *Menefield v. Borg*, 881 F.2d 696, 699 (9th Cir. 1989), all discussed *infra* Part II.B.

30. See *United States v. Tajeddini*, 945 F.2d 458, 470 (1st Cir. 1991) (per curiam), *overruled on other grounds by* *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *United States v. Lee*, 513 F.2d 423, 424 (D.C. Cir. 1975) (per curiam); *United States v. Birrell*, 482 F.2d 890, 892 (2d Cir. 1973) (per curiam), all discussed *infra* Part II.C.

31. 287 F.3d 336 (5th Cir. 2002).

32. *Id.* at 337.

33. *Id.*

34. *Id.* at 337-38.

35. *Id.* at 338.

36. *Id.*

37. *Id.*

requested court-appointed appellate counsel.³⁸ Unfortunately for Mayo, however, his appellate counsel did not learn of his court appointment until after the deadline to file a motion for new trial had passed.³⁹ Given the underlying facts of the case, and the clear instance of juror misconduct which surely would have resulted in disqualification, the Fifth Circuit observed that “[h]ad counsel filed a motion for new trial and proven that [the juror] was absolutely disqualified from serving as a juror, the trial court would have had to grant a new trial, or the conviction would have been reversed on appeal.”⁴⁰

In *Mayo*, the majority defined the issue as “whether the period for filing a motion for new trial is a ‘critical stage’ of prosecution to which the right to counsel attaches.”⁴¹ The court managed to avoid answering this question because the state trial court had found that because of Mewis’ continued involvement, “Mayo was not denied counsel during the post-trial phase.”⁴² The state court made this finding despite the fact that both Mewis and Mayo’s appellate counsel signed affidavits swearing that Mayo was without representation during this period, and that no motion for new trial was filed.⁴³

In his dissent, Judge DeMoss narrowed the inquiry by noting that: “the proper focus here is on whether a defendant’s substantive rights are affected during the post-trial, pre-appeal time period for filing a motion for new trial under Texas law.”⁴⁴ Judge DeMoss’ framing of the issue fits squarely within the Supreme Court’s Sixth Amendment right to counsel paradigm—namely, determining whether the period at issue qualifies as a critical stage of the prosecution.⁴⁵ In the view of Judge DeMoss, the defendant had

38. *Id.*

39. *Id.*

40. *Id.* The juror misconduct in this case involved a juror’s misrepresentation in response to the juror questionnaire. In short, the juror asserted that she had never been accused in a criminal case, when in fact, she had a previous conviction for misdemeanor theft some years earlier. *Id.*

41. *Id.* at 339.

42. *Id.* at 340.

43. *Id.* at 342-43 (DeMoss, J., dissenting).

44. *Id.* at 344 (DeMoss, J., dissenting).

45. The inquiry is not whether the Supreme Court got the issue wrong (it has yet to confront this precise issue); rather, the question is whether the right to counsel is implicated in this setting. Judge DeMoss, as does this Note, argues that it is.

rebutted the Texas state law presumption that he was represented by counsel subsequent to his conviction.⁴⁶ As a consequence, Judge DeMoss concluded that “[f]or all practical purposes, [the defendant] did not have the assistance of counsel from the time that he was sentenced until [the time his newly appointed lawyer] learned of the court appointment.”⁴⁷

This Note argues, somewhat in line with Judge DeMoss, that the post-trial period⁴⁸ for filing a motion for new trial indeed qualifies as a critical stage of the prosecution, and that during such period, the substantive rights of the defendant are very much affected and at issue. To protect those rights and the integrity of the criminal justice system, it is imperative that indigent defendants be afforded the services of counsel during this stage of the prosecution. As the following sections illustrate, not everyone agrees.

B. Circuits in Favor of Extending the Right to Counsel

1. The Seventh Circuit: Kitchen v. United States

In *Kitchen v. United States*, the specific problem was whether the defendant, who had counsel, had *effective* counsel.⁴⁹ The Seventh Circuit Court of Appeals, however, first addressed the broader issue of whether a defendant “had a right to counsel for his pre-appeal motion for a new trial because ‘[w]here there is no constitutional right to counsel there can be no deprivation of effective assistance.’”⁵⁰ After conviction in federal court, the defendant Kitchen filed a motion for new trial under Rule 33 of the Federal Rules of Criminal Procedure while his direct appeal was still pending.⁵¹ In his motion for new trial, Kitchen asserted that he had new information about one of the government’s trial witnesses and that he had “discovered evidence that revealed a scheme by the government to prevent [the defendant’s key witness] from testifying at trial.”⁵² The

46. See *Mayo*, 287 F.3d at 342 (DeMoss, J., dissenting).

47. *Id.* (DeMoss, J., dissenting).

48. As distinct from the postconviction period. See *infra* Part II.B.3.

49. 227 F.3d 1014, 1017 (7th Cir. 2000).

50. *Id.* at 1017-18 (quoting *Coleman v. Thompson*, 501 U.S. 722, 752 (1991)).

51. *Id.* at 1017.

52. *Id.*

United States District Court for the Northern District of Illinois denied Kitchen's motion for new trial before the Seventh Circuit Court of Appeals decided the appeal of his conviction.⁵³ Although Kitchen wanted to appeal the denial of his motion for a new trial, his attorney "inadvertently failed to file a notice of appeal [of that denial], thus precluding [the circuit court's] review of the denial of Kitchen's motion for a new trial."⁵⁴

Following the Seventh Circuit's denial of Kitchen's direct appeal, Kitchen filed a motion for habeas corpus under 28 U.S.C. § 2255 in the district court.⁵⁵ In this motion, Kitchen "argued that he had been denied his right to effective assistance of counsel when his trial/appellate counsel failed to file a notice of appeal from the [district court's] denial of his motion for a new trial."⁵⁶

The district court denied Kitchen's habeas motion, although the court did assume that he had a right to counsel for the motion for new trial stage.⁵⁷ The court simply found that Kitchen had failed to show prejudice stemming from his attorney's failure to file such notice of appeal.⁵⁸

The Seventh Circuit granted certiorari on the following issue: "Whether petitioner was denied effective assistance of counsel due to his attorney's admitted failure 'through inadvertence' to file a notice of appeal from the district court's denial of [a post-trial, as opposed to a post-appeal] motion for a new trial."⁵⁹ Because the first question was whether defendant had *any* right to counsel, the Seventh Circuit noted that "[t]he timing of Kitchen's motion for a new trial is an important factor supporting his right to counsel in prosecuting the motion and in an appeal from an adverse determination in the district court."⁶⁰ The court further noted that the very nature of a Rule 33 motion for new trial bolsters the defendant's claim of a right to counsel: "[I]n a [motion for new trial] proceeding,

53. *Id.*

54. *Id.* It is also important to note that the circuit court, in denying Kitchen's appeal of his conviction, did not have the benefit of considering his Rule 33 motion. *Id.*

55. *See id.*

56. *Id.*

57. *Id.*

58. *Id.* Under the doctrine of harmless error, if a defendant cannot show that he was prejudiced by ineffective assistance of counsel, he will not be granted relief.

59. *Id.*

60. *Id.* at 1018.

a defendant 'must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented [defendant]—like an unrepresented defendant at trial—is unable to protect the vital interests at stake."⁶¹

In light of these considerations, the court noted that without having fully pursued his motion for new trial first, Kitchen never would have had the opportunity to present the new evidence in his direct appeal.⁶² Consequently, the court found that "[t]he outcome of Kitchen's motion for a new trial (including the outcome of an appeal from an adverse judgment[]) could have had a substantial impact on the course of his criminal proceedings."⁶³

In reaching this decision, the court distinguished between those cases where the motions for new trial are used as collateral attacks and those in which the attacks are not collateral.⁶⁴ The difference, apparently, is one of timing. The court found the post-trial, *post-appeal* motions for new trial were collateral attacks on the defendant's conviction.⁶⁵ Presumably the court in *Kitchen* was stating that when a motion for new trial is filed after resolution of the defendant's direct appeal, then the motion for new trial is collateral because the judgment was already final by virtue of the direct appeal having been decided. Alternatively, the court held that the post-trial, *pre-appeal* motion for new trial does not qualify as a

61. *Id.* (quoting *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (referring particularly to a direct appeal)).

62. *Id.*

63. *Id.* (noting that the motion "would not have, under any circumstances, entitled him to release, but were the motion to be granted, Kitchen would have received a second trial and an opportunity to present a (presumably) enhanced defense").

64. *See id.* at 1019. A collateral attack is defined as: "[a]n attack on a judgment entered in a different proceeding. A petition for a writ of habeas corpus is one type of collateral attack." BLACK'S LAW DICTIONARY 255 (7th ed. 1999). These attacks (like the writ of habeas corpus) typically are civil in nature and are initiated after the judgment of conviction has become final. *See supra* note 27.

65. *Kitchen*, 227 F.3d at 1019 (noting that "[w]hen made following the outcome of a direct appeal, a Rule 33 motion plainly is 'collateral' in the usual sense of that term.") (internal citations omitted).

collateral attack.⁶⁶ This distinction is relevant because of the implications involved in the critical stage dichotomy.⁶⁷

2. *The Ninth Circuit: Menefield v. Borg*

In *Menefield v. Borg*, the Ninth Circuit directly confronted the issue of whether a defendant has the right to counsel at the motion for new trial phase,⁶⁸ although unlike the court in *Kitchen*, it did not focus on the timing of the new trial motion.⁶⁹ The Ninth Circuit instead focused on the more general importance of counsel in the adversary system and the unique nature of the motion for new trial mechanism as compared with appellate remedies.⁷⁰

In this case, Menefield represented himself at trial in California state court, and after being convicted of several felony counts, he requested that the court appoint counsel to assist him in preparing and filing a motion for new trial.⁷¹ The state court refused and Menefield's subsequent pro se motion for new trial was later

66. *Id.* In fact, the court made an effort to distinguish those cases the government cited (*United States v. Tajeddini*, 945 F.2d 458 (1st Cir. 1991) (per curiam), *overruled on other grounds by Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *United States v. Lee*, 513 F.2d 423 (D.C. Cir. 1975) (per curiam); *United States v. Birrell*, 482 F.2d 890 (2d Cir. 1973) (per curiam) (all discussed *infra* Part II.C)) on these very grounds. Specifically, the court noted that

timing is critical in the present issue, and because the [motions for new trials] in the cited cases from other circuits were filed and decided *after* the first appeal of right, they were characterized as collateral attacks, and it is well established that there is no constitutional right to counsel in collateral proceedings.

Kitchen, 227 F.3d at 1019 (emphasis added) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987)).

67. See discussion *infra* Part IV.

68. 881 F.2d 696, 698 (1989).

69. This is likely due to the fact that the defendant filed his motion for new trial prior to pursuing and exhausting his subsequent state court appeals.

70. *Menefield*, 881 F.2d at 698-99.

71. *Id.* at 696-97.

denied.⁷² After Menefield exhausted his state court options,⁷³ he filed for a writ of habeas corpus in federal court.⁷⁴

The Ninth Circuit, in reversing the district court's dismissal of Menefield's habeas motion and holding that the right to counsel attaches to the motion for new trial stage, focused on the policy of the adversary system and whether the motion for new trial stage represents a "critical stage" of the prosecution.⁷⁵ The court emphasized that "[o]ur adversary system is premised on the theory that the clash of trained counsel will best serve the court's truth-seeking function ... [that] [w]ithout the 'guiding hand of counsel,' the defendant may be unable to muster an adequate defense."⁷⁶ Keeping this general policy in mind, the court then honed in on whether the motion for new trial stage qualified as a "critical stage" of the prosecution.⁷⁷

The Ninth Circuit paid close attention to three factors the Supreme Court previously enumerated as relevant in determining whether a particular proceeding qualifies as a "critical stage" of the prosecution: (1) whether "failure to pursue strategies or remedies results in a loss of significant rights"; (2) whether "skilled counsel would be useful in helping the accused understand the legal confrontation"; or (3) whether "the proceeding tests the merits of the accused's case."⁷⁸ If any one of these factors is present, then the

72. *Id.* at 697. Essentially, the state court denied the defendant's request for counsel due to concerns relating to efficiency and judicial economy. *Id.* ("[I]f I appointed counsel at this point, we would have to get the entire transcript done, he would have to read every word of it") (quoting the trial judge in the case).

73. Although the Ninth Circuit did not delineate which state court options the defendant exhausted, it is safe to presume that these exhausted options included any and all available appeals at the state court level.

74. *Menefield*, 881 F.2d at 697.

75. *See id.* at 698. In contrast, the district court below focused on the practicalities (or more accurately, the impracticalities) involved in the defendant's particular case. In particular, since the defendant had represented himself pro se prior to and during the trial, the court reasoned that appointing counsel at this late stage would simply be too difficult and, in any event, the defendant could simply raise the same issues on appeal. *See id.* at 697; *see also supra* note 72.

76. *Id.* at 698 (citing *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963)).

77. *Id.*

78. *Id.* at 698-99 (citing *Mempa v. Rhay*, 389 U.S. 128, 135 (1967); *United States v. Ash*, 413 U.S. 300, 311 (1973)).

right to counsel attaches.⁷⁹ Under this constitutional framework, the Ninth Circuit found that the motion for new trial phase was in fact a critical stage of the prosecution.⁸⁰

Central to the Ninth Circuit's decision in *Menefield* was the particular role of the trial judge in a motion for new trial:

Unlike an appellate court, the trial judge hearing a motion for a new trial reviews the evidence de novo and examines the record independently. The trial court "is under the duty to give the defendant the benefit of its independent conclusion as [to] the sufficiency of credible evidence to support the verdict." The trial judge sits as the "13th juror" in evaluating the weight of the evidence against the defendant. As a practical matter, the motion for a new trial is the defendant's last opportunity for an unconstrained review on the merits of the evidence against him. On appeal, both jury conclusions and the factual decisions of the trial court are either immune from review or treated under a highly deferential standard.⁸¹

This focus on the role of the trial judge illuminates the court's concern with the substantial rights of the defendant at stake during the motion for new trial proceeding and the concomitant potential loss of those rights without having effective counsel to take full advantage of the legal framework. These concerns, though by no means exhaustive, supplement those initial concerns of timing and collateral attack that were at the forefront of the Seventh Circuit's decision in *Kitchen*.⁸²

3. *The Eighth Circuit: Robinson v. Norris*

In *Robinson v. Norris*, the Eighth Circuit considered the writ of habeas corpus of defendant Robinson who claimed that he "had been unconstitutionally deprived of counsel to pursue his motion for new trial" under Arkansas state law.⁸³ In ruling that the right to

79. *Id.* at 699.

80. *Id.*

81. *Id.* (internal citations omitted).

82. See *supra* Part II.B.1.

83. 60 F.3d 457, 459 (8th Cir. 1995). The motion for new trial under Arkansas state law is virtually identical to the motion for new trial under Rule 33 of the Federal Rules of

counsel did attach to the motion for new trial stage, the court noted a distinction between the post-trial phase and the postconviction phase.⁸⁴

Specifically, the court discussed previous Eighth Circuit precedent, which noted that while the Supreme Court's decision in *Coleman v. Thompson*⁸⁵ held "there is no constitutional right to postconviction counsel, [that decision] did not limit the right of effective trial counsel post-trial, 'as distinct from postconviction.'"⁸⁶ The distinction, though perhaps less than clear, is paramount, and breaks down as follows:

	<i>Post-Trial Proceedings</i>	<i>Postconviction Proceedings</i>
Definition	These proceedings are still considered part of the trial continuum and do not implicate collateral attack issues. ⁸⁷	These proceedings are altogether outside of the trial continuum and implicate collateral attack concerns.
Examples	Motion for New Trial, Direct Appeal (Appeal of Right)	Writ of Habeas Corpus, Discretionary Appeal
Result	Right to Counsel Attaches	Right to Counsel Does Not Attach

Criminal Procedure. See ARK. CODE ANN. § 16-91-113(c)(1) (Michie 2003) (stating "[a] conviction shall be reversed and a new trial ordered where the Supreme Court finds that the conviction is contrary to the constitution or the laws of Arkansas, or for any reason determines that the appellant did not have a fair trial").

84. *Robinson*, 60 F.3d at 459. The distinction between the two phases is laid out in the table above.

85. 501 U.S. 722 (1991).

86. *Robinson*, 60 F.3d at 459 (quoting *Dawan v. Lockhart*, 980 F.2d 470, 474 n.5 (8th Cir. 1992)).

87. The Supreme Court provided a helpful distinction between being part of the trial continuum and being outside of it in *Pennsylvania v. Finley*:

Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceedings itself, and is in fact considered to be civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction.

481 U.S. 551, 556-57 (1987) (internal citations omitted).

Because the basis of the defendant's new trial motion in *Robinson* was the claim of ineffectiveness of counsel at the post-trial and direct appeal phases, the motion was not a postconviction collateral proceeding.⁸⁸ As a result, the court held that the motion for new trial proceeding, at its core in *Robinson*, was in fact a critical stage to which a defendant is entitled the Sixth Amendment privilege of counsel.⁸⁹

C. Circuits Against Extending the Right to Counsel to the Motion for New Trial Phase

1. The First Circuit: United States v. Tajeddini

In *United States v. Tajeddini*, the First Circuit considered this issue while reviewing the appeal of Tajeddini's habeas petition alleging ineffective assistance of counsel.⁹⁰ Essentially, Tajeddini argued that he was "entitled to the appointment of counsel in connection with his motion for new trial based on newly discovered evidence."⁹¹ While noting the decision of the Ninth Circuit in *Menefield* upholding such a right,⁹² the First Circuit declined to extend such protection to the appellant here. Specifically, the court held that the Sixth Amendment does not entitle a federally convicted defendant to appointment of counsel for a new trial motion.⁹³

The First Circuit paid particular attention to the fact that in those circuits where such a right had been denied, "the convicted defendants had appointed counsel on appeal and filed their motions

88. *Robinson*, 60 F.3d at 459-60.

89. *Id.* at 460.

90. 945 F.2d 458 (1st Cir. 1991) (per curiam), *overruled on other grounds by* *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). In *Flores-Ortega*, the Supreme Court abrogated *Tajeddini* to the extent that it held an attorney's failure to file a notice of appeal without defendant's consent is per se deficient. *Flores-Ortega*, 528 U.S. at 480. *Tajeddini* remains good law, however, for its holding that a defendant who did not take a direct appeal is not entitled to appointment of counsel in connection with a motion for new trial.

91. *Tajeddini*, 945 F.2d at 469-70.

92. Specifically, that "a motion for new trial was a critical stage and that a defendant who had proceeded pro se at trial was entitled to appointed counsel in connection with his motion for new trial." *Id.* at 470 (citing *Menefield v. Borg*, 881 F.2d 696 (9th Cir. 1989)).

93. *Id.*

for new trial *after* the conclusion of appellate proceedings.⁹⁴ The mere fact that Tajeddini did not take a direct appeal was not material in the court's analysis.⁹⁵ In fact, the court observed that it did "not see why the convicted defendant who forgoes a direct appeal and whose conviction has become final should be treated differently from the defendant who has chosen to appeal, with respect to entitlement to counsel, on a collateral attack on the conviction."⁹⁶ So, in other words, the court's decision and analysis relied on the notion that a motion for new trial filed after either the conclusion of a direct appeal or after the time for filing a direct appeal has expired constitutes a collateral attack—one in which, as the court held, the right to counsel does not attach.⁹⁷

2. *The District of Columbia Circuit: United States v. Lee*

The D.C. Circuit confronted this very same issue in *United States v. Lee*.⁹⁸ Here, the defendant Lee appealed his conviction for triple first-degree murder, alleging—among other things—error in the "denial of [his] request for assistance of counsel in the presentation of the motion for a new trial."⁹⁹

The D.C. Circuit held for the United States, noting simply that "[t]here is no right to the appointment of counsel for a new trial motion, and certainly not after an appeal."¹⁰⁰ Again, much like the First Circuit's decision in *Tajeddini*, the D.C. Circuit's analysis centered on the issue of timing and the corollary concerns relating to collateral attacks.¹⁰¹ The court did not undertake any independent analysis of whether the motion for new trial phase is a critical stage of the prosecution. Instead, the court simply averred that it

94. *Id.* (emphasis added).

95. *Id.*

96. *Id.*

97. *See id.* Note, however, that the court made no mention (nor did it conduct an independent analysis) of whether the motion for new trial phase is a critical stage of the prosecution. This lack of analysis renders the court's decision almost conclusory in nature.

98. 513 F.2d 423 (D.C. Cir. 1975) (per curiam).

99. *Id.* at 424. The defendant argued that this right arose under 18 U.S.C. § 3006A (2000).

100. *Id.*

101. *See id.* (noting "it is plain that neither 18 U.S.C. § 3006A nor (Fed.) R.Crim.P. 44 mandated the assignment of counsel to assist in the presentation of a motion for a new trial subsequent to the completion of the appellate process").

was within the discretion of the trial judge to appoint counsel in such a scenario.

3. *The Second Circuit: United States v. Birrell*

In *United States v. Birrell*,¹⁰² the Second Circuit dealt with this same issue on grounds almost identical to those the D.C. Circuit relied on in *Lee*. In this case, the defendant Birrell appealed the district court judge's order denying his motion for the appointment of counsel for his *second* motion for new trial on the grounds of newly discovered evidence.¹⁰³ In disposing of this appeal, the Second Circuit observed that "neither 18 U.S.C. § 3006A nor [Federal Rule of Criminal Procedure] 44 mandated the assignment of counsel to assist in the presentation of a motion for a new trial subsequent to the completion of the appellate process."¹⁰⁴ The court made no independent inquiry into or analysis of the issue. Nor did it consider the issue of a pre-appeal motion for new trial and whether a right to counsel attaches to such a motion. Indeed, the court arrived at its decision without delving into any case law or constitutional analysis. Ultimately, the court simply stated that whether to appoint counsel in such a situation rests entirely with the discretion of the trial judge.¹⁰⁵

III. HISTORY OF RIGHT TO COUNSEL JURISPRUDENCE AND ANALYSIS OF SUPREME COURT PRECEDENT

Although there is a notable conflict between the circuits on the issue of whether the right to counsel attaches at the motion for new trial stage, at first glance, the fissure does not seem irreconcilable. Primarily, the difference appears to be in the timing associated with the filing of such motions; specifically, whether the motion for new trial was filed before or after conclusion of the defendant's direct appeal. In circumstances when the motion was filed before, courts have held that the right to counsel attaches.¹⁰⁶ When the motion is

102. 482 F.2d 890 (2d Cir. 1973) (per curiam).

103. *Id.* at 891-92.

104. *Id.* at 892. The court made no mention of the Sixth Amendment in its analysis.

105. *Id.*

106. *See supra* Part II.B.

filed after, courts have held that the right to counsel does not attach.¹⁰⁷ As this Note argues, however, such timing issues, although important, should not alone be entirely dispositive of the matter. Rather, an appropriate inquiry and analysis into whether the right to counsel extends to the post-trial, post-appeal motion for new trial stage requires a consideration of the history of the Sixth Amendment Right to Counsel and the Supreme Court jurisprudence developing and outlining that right. Upon a careful consideration of these factors, extension of the right to counsel to the motion for new trial will seem more obviously appropriate.

A. The Text of the Sixth Amendment

It is only natural that perhaps the most helpful and illuminating place to start with this analysis is the text of the Sixth Amendment itself, which states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.¹⁰⁸

To begin with, as noted by some legal scholars, the Amendment's first phrase, "[i]n all criminal prosecutions," indicates that [S]ixth [A]mendment rights commence only at the initiation of an adversary proceeding, be it by indictment, arraignment, or criminal complaint.¹⁰⁹ Thus, the key language immediately focuses one's attention on whether the petitioner is being prosecuted for a crime. That determination by no means ends the inquiry, however, for it

107. See *supra* Part II.C.

108. U.S. CONST. amend. VI.

109. Rhea Kemble Brecher, *The Sixth Amendment and the Right to Counsel*, 136 U. PA. L. REV. 1957, 1957 (1988). In this article, Brecher argues that the Sixth Amendment, while important and vital, contains only a limited privilege that neither the courts nor practitioners should endeavor to expand.

tells us nothing about when the right ends or to what extent it reaches.

In *United States v. Cronin*, the Supreme Court noted that the text of the Sixth Amendment

requires not merely provision of counsel to the accused, but "Assistance," which is to be "for his defence." Thus, "the core purpose of the counsel guarantee was to assure "Assistance" at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor."¹¹⁰

This language suggests that the guarantee of assistance of counsel is limited to the trial phase. Nothing in the language of the Sixth Amendment, however, suggests such a limitation in time. Certainly, neither an accused's defense, nor the intricacies of posing it, ends merely because the trial concludes with a conviction.¹¹¹ The appropriate inquiry then becomes at what point the right to counsel guarantee ends.¹¹² The most logical place to turn for assistance in such an inquiry is the policy and rationale underlying the right to counsel guarantee.

B. The Policy and Rationale Behind the Right to Counsel Guarantee

If the text of the Sixth Amendment is less than clear about the question of how far the right to counsel guarantee extends, then an examination of the policy and rationale behind the provision should provide an appropriate measure of insight into where to start.¹¹³ An

110. 466 U.S. 648, 654 (1984) (emphasis added) (citing *United States v. Ash*, 413 U.S. 300, 309 (1973) (holding that a defendant whose lawyer provides no meaningful assistance may be constructively denied the assistance of counsel)).

111. In fact, the Supreme Court has clearly held that a criminal defendant does have a constitutional right not only to counsel, *Douglas v. California*, 372 U.S. 353 (1963), but to effective assistance of counsel for his first appeal of right in criminal cases. See *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (holding that "[a] first appeal of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney"). Such a right, however, arises from the Due Process Clause, not the Sixth Amendment.

112. Or, alternatively, at what point does the prosecution and all of its critical stages end.

113. In *United States v. Cronin*, the Supreme Court echoed a similar thought when it wrote that "[t]he substance of the Constitution's guarantee of the effective assistance of

appreciation of the adversarial system and its unique concerns lies at the heart of Sixth Amendment policy. Simply put, inherent in the very idea of the adversarial system is the notion that both sides ought to be zealously represented.¹¹⁴ Without such representation on both sides of the case, justice presumably will suffer.¹¹⁵ As one scholar noted: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."¹¹⁶

Along these lines, the Supreme Court consistently has supported the policy behind the right to counsel guarantee.¹¹⁷ In *Gideon v. Wainwright*, the Supreme Court declared that:

[L]awyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.¹¹⁸

This right to counsel is thus embedded in the very fabric of this country's judicial system.¹¹⁹ Understanding that the requirements of the adversarial system in the criminal law context demand effective and competent counsel on both sides certainly informs the

counsel is illuminated by reference to its underlying purposes." 466 U.S. 648, 655 (1984).

114. See *id.* at 656 (noting that "[t]he right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing"); *Herring v. New York*, 422 U.S. 853, 862 (1974) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."); see also *Strickland v. Washington*, 466 U.S. 668, 685 (1984) ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."); *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.").

115. Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956).

116. *Id.*

117. See *supra* notes 113-14 and accompanying text.

118. 372 U.S. 335, 344 (1963).

119. See *Polk v. Dodson*, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.").

judgment over how and to what extent the right should reach. The pervasive and underlying policy rationale behind this constitutional guarantee more than argues for its extension to the motion for new trial phase; rather, it absolutely compels it.

C. Supreme Court Precedent Dealing with the Right to Counsel Guarantee

1. Critical Stage of the Prosecution

The Supreme Court previously has held that criminal defendants have a Sixth Amendment right to effective assistance of counsel at every "critical stage" of prosecution and through the conclusion of direct appeal.¹²⁰ Critical stages of the prosecution include every stage of the prosecution which implicates substantial rights of the accused.¹²¹ Furthermore, the Supreme Court has noted that whether a period is a critical stage of the prosecution turns on whether, at the time at issue, "the accused required aid in coping with legal problems or assistance in meeting his adversary."¹²²

In short, "the starting point for the criminal prosecution is the initiation of 'adversary judicial proceedings.'"¹²³ Stages where the Supreme Court has found the Sixth Amendment right to counsel to exist include: psychiatric interview;¹²⁴ sentencing;¹²⁵ pretrial lineup;¹²⁶ preliminary hearings,¹²⁷ and direct appeals of right.¹²⁸ Determining the prosecution's ending point is a more difficult proposition.

120. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The source for the extension of this right to the phase after direct appeal is the Due Process Clause of the Fourteenth Amendment, not the Sixth Amendment. *See id.*; *see also McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (noting that "[i]t has long been recognized that the right to counsel is the right to effective assistance of counsel").

121. *See Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

122. *United States v. Ash*, 413 U.S. 300, 313 (1973).

123. LAFAYE ET AL., *supra* note 12, § 11.2(b), at 569. The authors note that "[i]t is at that point that the individual becomes an 'accused' person entitled to the application of the Sixth Amendment guarantee." *Id.*

124. *See Estelle v. Smith*, 451 U.S. 454, 471 (1981).

125. *See Mempa*, 389 U.S. at 128.

126. *See United States v. Wade*, 388 U.S. 218 (1967).

127. *See White v. Maryland*, 373 U.S. 59 (1963).

128. *See Douglas v. California*, 372 U.S. 353 (1963).

In the most minimalist terms, one could state correctly that once the prosecution has begun, it continues at least until the end of the trial stage and through sentencing.¹²⁹ In addition, the Supreme Court consistently has held that both due process and equal protection mandate that an indigent defendant be afforded a right to counsel for his first appeal as of right.¹³⁰ In contrast, the criminal defendant has no constitutional right to counsel for discretionary appeals.¹³¹

2. Additional Considerations

One must necessarily keep in mind the level of importance that the Supreme Court has afforded the right to counsel in its jurisprudence. In *Gideon v. Wainwright*, the Court noted that the right to counsel was "so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment."¹³² Justice Sutherland put forth one of the most eloquent articulations of the justifications for the right to counsel doctrine in the landmark decision of *Powell v. Alabama*, in which he wrote:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman ... is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he

129. See LAFAVE ET AL., *supra* note 12, § 11.2(b), at 570.

130. See *Evitts v. Lucey*, 469 U.S. 387, 394 (1985) (holding that the Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right); *Douglas*, 372 U.S. at 357 (holding that "where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel ... an unconstitutional line has been drawn between rich and poor").

131. See *Ross v. Moffitt*, 417 U.S. 600, 610 (1974) (holding that while due process requires states to provide counsel to indigent defendants for direct appeals of right, it does not require that states provide counsel to indigents for their discretionary appeals).

132. 372 U.S. 335, 340 (1963) (quoting *Betts v. Brady*, 316 U.S. 455, 465 (1942)).

have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.¹³³

Thus, as previously noted, the guarantee of right to counsel arises not only in the Sixth Amendment context, but in the due process context as well. In fact, it is these very due process concerns that give rise to the more compelling arguments in favor of extending the right to counsel in the motion for new trial phase.¹³⁴

IV. EXTENSION OF THE RIGHT TO COUNSEL TO THE MOTION FOR NEW TRIAL STAGE

A. A Brief Recap of the Conflict Among the Circuit Courts

As currently stated, the conflict boils down to a matter of timing and constitutional interpretation. In those circuits that have held that the right to counsel attaches to the motion for new trial stage, the courts have focused on the timing of the motion for new trial,¹³⁵ the nature of the motion for new trial,¹³⁶ and the policies behind ensuring each side has effective representation in the adversary system.

Conversely, in those circuits that have held that the right to counsel does not attach to the motion for new trial stage, the courts, each confronting factual scenarios in which the motion for new trial was filed *after* the defendants' direct appeals were exhausted, have uniformly categorized such attacks as collateral in nature.

133. 287 U.S. 45, 68-69 (1932). *Powell* was actually decided "under the then prevailing 'fundamental fairness' interpretation of Fourteenth Amendment due process." LAFAVE ET AL., *supra* note 12, § 11.1(a), at 696. Although "the Court later discarded the fundamental fairness interpretation in favor of a selective incorporation analysis that made the Sixth Amendment directly applicable to the states (through the Fourteenth Amendment)," the Court's interpretation of the Sixth Amendment relied in large part on Justice Sutherland's analysis in *Powell. Id.*

134. See discussion *infra* Part IV.

135. Specifically, courts have examined whether it was filed before or after the defendant's direct appeal was exhausted. See *supra* Parts II-III.

136. For example, the fact that the trial judge can review the evidence *de novo* and can independently examine the record. See *Menefield v. Borg*, 881 F.2d 696, 699 (9th Cir. 1989). This practice stands in stark contrast to the standard of review afforded to a direct appeal, which in most matters is relegated to the "sufficiency of evidence" or "clearly erroneous" standard (a much more highly deferential standard to the lower court's finding and hence, much more difficult for the defendant to prevail).

Uniformly, these courts have held¹³⁷ that the right to counsel does not extend to such situations.¹³⁸

In one sense then, the conflict may seem to be nothing more than a treatment of different factual scenarios whereby all is actually reconcilable given the fact that those courts in favor of extension dealt with motions for new trials that came before exhaustion of direct appeals of right, and those that ruled against extension dealt with those motions that were filed after exhaustion of direct appeals of right. Though intellectually alluring, and partly true, such analysis does not capture the full measure of the conflict at the heart of this divided jurisprudence,¹³⁹ nor does it give due reverence to the unique nature of the motion for new trial device.¹⁴⁰ To be sure, the unique advantages offered by the motion for new trial, as compared to the procedures and respective standards of review applicable to direct appeals and writs of habeas corpus, necessarily raise the question: Should we treat these motions differently based solely on the timing of their filing?

B. Getting Around the Collateral Attack Problem and the Prototypical Case

It is not a good answer simply to aver that the bar on collateral attacks dispenses with the convicted defendant's right to counsel for all motions for new trial filed after exhaustion of appellate

137. Without, one might add, much independent constitutional or statutory analysis of their own.

138. See *supra* Part II.C.

139. Recall that even the District of Columbia Circuit in *United States v. Lee* held that "[t]here is no right to the appointment of counsel for a new trial motion, and certainly not after an appeal." 513 F.2d 423, 424 (D.C. Cir. 1975) (*per curiam*). In other words, the court effectively, and rather succinctly, dismissed the idea of extending the right to counsel to the motion for new trial stage—regardless of when it was filed.

140. Consider the following argument put forth by members of the Advisory Committee in 1943, criticizing then-Rule 31(c) for not giving criminal defendants sufficient protection because the grounds for a new trial with no time limit were too narrow:

As a device for correcting gross injustices the motion for a new trial is in our judgment superior to the writ of habeas corpus. The motion would be made in the court by which the judgment was rendered; the writ is ordinarily sought elsewhere. The fact that the writ, if sustained, results in an order of release may conceivably present double jeopardy problems in the event of a new trial.

ORFIELD & RHODES, *supra* note 6, § 33, at 280.

remedies.¹⁴¹ Such an answer ignores the reality and substance of the motion for new trial,¹⁴² and the fact that nothing of substance changes between the motion for new trial filed before appellate review and the motion filed after direct (as opposed to discretionary) appellate review.¹⁴³ In fact, the only motions for new trial that do not have self-imposed time limitations upon their filing are those made on the grounds "that the defendant has been deprived of a Constitutional right" or on the ground of newly discovered evidence.¹⁴⁴ Therefore, to impose a distinction on the motion for new trial remedy based solely on the matter of its timing seems altogether suspect. In short, it is the nature of the motion for new trial—as a remedy wholly separate and distinct from the appellate remedies¹⁴⁵—that should control the analysis.

Perhaps the problem can best be demonstrated by reference to the prototypical case, which usually involves the following basic elements:

- (1) a criminal defendant convicted of a crime;
- (2) who chooses to file a motion for new trial
 - (a) either before his direct appeal of right, or
 - (b) after conclusion of his direct appeal of right.

This Note argues that because of the unique nature of the motion for new trial, courts should treat it as an extension of the trial or post-trial stage rather than as a postconviction proceeding¹⁴⁶—regardless of its timing. Simply put, where the motion for new trial (a) is heard before the original trial judge and (b) has a less

141. This is, however, what the Supreme Court did in *Pennsylvania v. Finley*, noting that "[w]e have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions ... the right to appointed counsel extends to the first appeal of right, and no further." 481 U.S. 551, 555 (1987).

142. As compared to the direct appeal or writ of habeas corpus.

143. This is especially true when it is the original trial court that is hearing the motion for new trial. In those situations, it would be altogether dishonest to classify such a motion as a "collateral attack"—for the disposition of the case, and hence the conviction, could hardly be considered final.

144. ORFIELD & RHODES, *supra* note 6, § 33, at 282.

145. This point holds true whether the appellate remedies are direct or discretionary.

146. Like the writ of habeas corpus or discretionary appellate review.

deferential standard of review than the appellate remedy,¹⁴⁷ it should not be treated as a collateral attack on the conviction.

Support for this type of argument can be gleaned from the Supreme Court's decision in *Ross v. Moffitt*. In *Ross*, the Court held that the Due Process Clause does not mandate that states provide counsel to indigent defendants for their discretionary appeals.¹⁴⁸ In making this finding, the Court relied heavily on the differences between the trial and appellate stages of the criminal proceeding.¹⁴⁹ Specifically, the Court noted that "[t]he purpose of the trial stage ... is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt," and that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."¹⁵⁰ On the other hand, the Court noted that "it is ordinarily the defendant, rather than the State, who initiates the appellate process" and that the defendant "needs an attorney ... as a sword to upset the prior determination of guilt."¹⁵¹

Admittedly, this rationale can cut both ways with respect to the motion for new trial remedy. As such, a valid counterargument states that because the motion for new trial comes after the verdict, it is more akin to an appeal—it is, in essence, a tool used "to upset the prior determination of guilt."¹⁵² Such an argument, however, ignores the delicate distinction that exists between post-trial remedies and postconviction remedies.¹⁵³ That distinction is paramount, for postconviction remedies are deemed collateral attacks (and hence, immune to the right to counsel mandates of the Sixth Amendment), whereas post-trial remedies are not. In practice then, a motion for new trial, heard before the original trial judge, would be closer in nature to a postverdict motion for judgment of acquittal rather than a motion for appeal.¹⁵⁴ The postverdict motion for

147. Which is almost always the case. See *supra* note 136 and accompanying text.

148. 417 U.S. 600 (1974).

149. *Id.* at 611.

150. *Id.* (quoting *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)).

151. *Id.* at 610-11.

152. *Id.* at 611.

153. See *supra* Part II.B.3.

154. When evaluating a defendant's motion for judgment of acquittal under Federal Rule of Criminal Procedure 29, the court must determine whether "any rational trier of fact could have found the essential elements of the [charged] crime beyond a reasonable doubt."

judgment of acquittal is not, under any formulation, considered a postconviction or collateral remedy.

C. For Matters of Symmetry: Substantial Rights Involved and "Critical Stages"

Further support for the extension of the right to counsel to the motion for new trial phase can be discerned upon a simple application of the Supreme Court's "critical stage" criteria put forth in *Mempa v. Rhay*.¹⁵⁵

The motion for new trial stage is indeed a "critical stage" of the prosecution because the defendant *does* require assistance "in coping with the legal problems or assistance in meeting his adversary."¹⁵⁶ This is especially true in cases like *Mayo*¹⁵⁷ in which the defendant is both indigent and incarcerated and does not have ready access to resources to avail himself of the procedures and protections of the legal system.¹⁵⁸ Even absent those circumstances of obvious success, the motion for new trial is a remedy unique from those that follow it,¹⁵⁹ and its likelihood of success or failure should be incidental to the procedures afforded its use.¹⁶⁰

Furthermore, the potential for obtaining a new trial through the new trial motion clearly implicates "substantial rights of a criminal accused."¹⁶¹ This is most evident in those cases in which the defendant's trial would have been vacated had the court reached the substance of the motion. But again, the need is no less compel-

Jackson v. Virginia, 443 U.S. 307, 319 (1979). Compare this to the standard of review afforded the motion for new trial, and the analogy is more than apt. See *Menefield v. Borg*, 881 F.2d 696, 699 (9th Cir. 1989) (finding that a "trial judge hearing a motion for a new trial reviews the evidence de novo and examines the record independently").

155. 389 U.S. 128, 134 (1967).

156. *United States v. Ash*, 413 U.S. 300, 313 (1973).

157. See *supra* Part II.A.

158. As the Supreme Court in *United States v. Cronin* reasoned, "the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." 466 U.S. 648, 654 (1984) (internal citations omitted).

159. Specifically, the direct appeal, discretionary appeal, and writ of habeas corpus.

160. In other words, gauging whether a defendant requires, or deserves, the services of an attorney based on the likely success, or lack thereof, of the specific proceeding at hand is a pointless exercise. The proper analysis focuses on the remedy or proceeding in the abstract—not the particulars of each individual proceeding or motion.

161. *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

ling in those instances where the likelihood of success is less than certain. Unquestionably, the prospect of freedom versus incarceration presents issues of substantial importance to the accused. Moreover, it can be no answer that such grievances are best left addressed to the first right of appeal stage.¹⁶² The unavoidable fact is that when states grant the accused the right to file a motion for new trial, they also grant the accused a right to follow through *with counsel*—regardless of whether he is indigent.¹⁶³ Given that substantial rights inevitably are implicated in any court proceeding in which liberty and incarceration are at stake, the very nature of the adversarial process—as the Supreme Court outlined and described on numerous occasions¹⁶⁴—demands that an accused be represented at such a “critical stage.” To borrow, and update, the Court’s language in *Powell v. Alabama*, the right to a motion for a new trial “would be ... of little avail if it did not comprehend the right to be heard by counsel.”¹⁶⁵ Surely, the rights and remedies, not to mention the complexities, involved in a motion for new trial are, at the very minimum, equal to those involved in other stages the Supreme Court found to be “critical stages” of the prosecution.¹⁶⁶

D. If a Motion for New Trial Is a Right, Then a Motion for New Trial with Counsel Is Also a Right

Even if the argument that a motion for new trial is a “critical stage” of the prosecution fails and, consequently, the right to counsel does not attach, the right still may derive from the Equal Protection or Due Process Clauses of the Fourteenth Amendment.

162. This is because, as the Ninth Circuit noted in *Menefield*, and which bears repeating again here: “the motion for a new trial is the defendant’s last opportunity for an unconstrained review on the merits of the evidence against him.” *Menefield v. Borg*, 881 F.2d 696, 699 (9th Cir. 1989). Once the defendant gets to the appeal stages (both direct and discretionary), “both [the] jury conclusions and the factual decisions of the trial court are either immune from review or treated under a highly deferential standard.” *Id.* (internal citations omitted).

163. *See supra* Part III. When a state grants a right, the state may not qualify that right in a way that violates the Equal Protection or Due Process Clauses of the Fourteenth Amendment.

164. *See supra* Part III.B.

165. 287 U.S. 45, 69 (1932).

166. For example, sentencing, preliminary hearings, and pretrial lineup. *See supra* notes 124-28 and accompanying text.

It is indeed true that the Constitution nowhere guarantees or requires states to grant criminal defendants the right to file a motion for new trial. Furthermore, the Supreme Court has not found such a right to exist during its course of adjudicating and interpreting the Constitution. Nevertheless, that dearth of a finding does not end the inquiry.

The reason for this is illuminated in the Supreme Court's analysis of *Evitts v. Lucey*.¹⁶⁷ In finding that the right to effective counsel attaches to the first appeal of right,¹⁶⁸ the Court compared the mechanisms and procedures involved in both the appeal and trial stages. Specifically, the Court noted, "[t]o prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake."¹⁶⁹ This same reasoning logically should apply to a motion for new trial. In short, if a state grants the right to a motion for new trial, then due process and equal protection mandate that the indigent defendant, facing the complexities and intricacies of the motion for new trial procedure, be afforded the right to effective counsel in order to successfully utilize his rights.¹⁷⁰ Though it may seem rote at this point, an unrepresented indigent convict simply cannot make adequate use of the right to file a motion for new trial without the services of an attorney.¹⁷¹ The argument is even more cogent when one considers that in some

167. 469 U.S. 387 (1985).

168. *Id.* at 394 (finding that the right stemmed from the Due Process Clause).

169. *Id.* at 396.

170. This point finds helpful support in *Griffin v. Illinois*, where the Supreme Court noted that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money." 351 U.S. 12, 19 (1956). The same kind of reasoning should apply equally, if not more so, to motions for new trial.

171. Consider the argument the majority in *Menefield* put forth:

Not only are substantive rights involved but counsel can enable the defendant to protect these rights. An effective motion for a new trial ordinarily requires a lawyer's understanding of legal rules and his experience in presenting claims before a court. The presence of trained counsel at this stage insures that the most favorable arguments will be presented and "that the accused's interests will be protected consistently with our theory of criminal prosecution."

Menefield v. Borg, 881 F.2d 696, 699 (9th Cir. 1989) (quoting *United States v. Wade*, 388 U.S. 218, 227 (1967)).

instances raising issues on a motion for new trial is required in order to bring them up later in an appeal.

CONCLUSION

Ultimately, the extension of the right to counsel to the motion for new trial stage is entirely consistent not only with the Sixth Amendment jurisprudence developed by the Supreme Court but also the protections afforded by the Fourteenth Amendment. Both the text of the Sixth Amendment and its underlying policy and rationale compel extension of the right to counsel in this area. In addition, Supreme Court precedent identifying “critical stages” of the prosecution in other areas similar to the motion for new trial device (at least in terms of importance) provides fertile soil for augmenting the constitutional protection of assistance of counsel by extending it to this area.

To be sure, the timing of the motion remains an important and, for the courts that have confronted it, a divisive issue. Given the underlying unique nature of the motion for new trial, and its similarity (and proximity) to the post-trial devices and stages (as contrasted with the postconviction devices and stages), any concerns over the motion being tantamount to a collateral attack should be assuaged.

Granted, extending this right may present some practical problems, the most notable being the potential increase in new trial motions and ineffective assistance of counsel claims. This objection may be countered best by the fact that once indigent defendants are afforded representation for their new trial motion (presumably by the same attorney who represented them at trial), courts may see a decrease in the number of subsequent ineffective assistance of counsel claims in the appellate and writ of habeas corpus filings.

Regardless, the costs to the system—in terms of financial and judicial resources—are assuredly real and not to be taken lightly. Where constitutional guarantees and individual liberties are at stake, however, resource concerns are, at a minimum, muted. When looking at this problem, one may be served best by thinking of the entire trial and post-trial (rather than postconviction) stages as points along the same continuum—such that not having the services of a lawyer at one point negates the notion of having

effective assistance of counsel at any point prior.¹⁷² In other words, trial and post-trial periods essentially work in conjunction. Not having a lawyer for one period can present grave problems for the accused and can severely impact not only his liberty interests, but also the effectiveness of the adversarial system itself. Understanding this effect and its corresponding solution can only help to enhance the public's confidence and faith in the criminal justice system, which, under any formulation, is no trivial matter.

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172. Leaving aside the notion of harmless error.