No. 18-

In the Supreme Court of the United States

JOHN R. TURNER,

Petitioner,

V.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Sixth Amendment right to counsel attaches when the prosecutor conducts plea negotiations before the filing of a formal charge.

II. Whether the Sixth Amendment right to counsel attaches when a federal prosecutor conducts plea negotiations before the filing of a formal charge in federal court, where the defendant has already been charged with the same offense in state court.

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John R. Turner respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit en banc opinion is published at 885 F.3d 949 (6th Cir. 2018) (en banc). App. 1a. The Sixth Circuit panel opinion is published at 848 F.3d 767 (6th Cir. 2017). App. 72a. The district court opinion is unpublished but is available at 2015 WL 13307594 (W.D. Tenn. 2015). App. 86a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit was entered on March 23, 2018. On May 22, 2018, Justice Kagan extended the time to file a certiorari petition until July 23, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall … have the assistance of counsel for his defence."

INTRODUCTION

When does the Sixth Amendment right to counsel attach? For a long time now, the Court has answered this question in two different ways.

Sometimes the Court has described the moment of attachment as the filing of formal charges. In this version, the right to counsel commences with "the initiation of adversary judicial criminal proceed-

ings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 198 (2008) (internal quotation marks omitted). *See also Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (right to counsel attaches "once the adversary judicial process has been initiated"); *McNeil v. Wisconsin*, 501 U.S. 171, 180-81 (1991) ("The Sixth Amendment right to counsel attaches at the first formal proceeding against an accused."); *United States v. Gouveia*, 467 U.S. 180, 187 (1984) ("[T]he right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant."); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion).

At other times—sometimes in the very same opinions—the Court has said the right to counsel attaches when the government turns from investigation to accusation. Under this description, the right to counsel commences when "the government has committed itself to prosecute, the adverse positions of government and defendant have solidified, and the accused finds himself faced with the prosecutorial forces of organized society." *Rothgery*, 554 U.S. at 198 (internal quotation marks omitted). *See also Moran v. Burbine*, 475 U.S. 412, 430 (1986) (right to counsel attaches "when the government's role shifts from investigation to accusation"); *Maine v. Moulton*, 474 U.S. 159, 170 (1985); *United States v. Ash*, 413 U.S. 300, 310 (1973) (right to counsel attaches where "the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or both"); *Kirby*, 406 U.S. at 689-90.

These were once two different ways of describing the same rule, because the filing of a formal charge

once marked the moment when the government's role shifted from investigation to accusation. As the Court explained in *Kirby*, the focus on the initiation of formal judicial proceedings was "far from a mere formalism." *Id.* at 689. When *Kirby* was decided, the filing of a formal charge was "the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified." *Id.* Back then, a defendant needed a lawyer only after a formal charge had been filed, because it was only "then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Id.*

That was nearly fifty years ago. Since then, practice in criminal cases has changed in two important ways.

First, plea bargaining has become even more ubiquitous. Ninety-seven percent of federal convictions are secured by guilty plea. *Missouri v. Frye*, 566 U.S. 134, 143 (2012). Plea negotiations, not trials, determine the fate of the overwhelming majority of criminal defendants. "The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires." *Id.*

Second, while plea bargaining was once conducted after indictment, now it frequently takes place before the filing of any formal charge. This change was

caused primarily by the adoption of mandatory minimum sentences and the Sentencing Guidelines, which "have created a particularly powerful incentive to engage in pre-charge bargaining." Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 Nw. U.L. Rev. 1635, 1664 (2003). *See also* 5 Wayne R. LaFave et al., *Criminal Procedure* § 21.3(a) (4th ed. Westlaw) (text at nn. 10-11) ("Because the federal Sentencing Guidelines provide an incentive to engage in pre-charge plea bargaining with a pre-initial appearance prospective defendant, it is not surprising that a considerable amount of such bargaining now occurs."). Pre-indictment plea bargaining now apparently takes place in at least 20% of federal criminal cases, and likely in an even higher percentage.[1]

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[1] The government does not publish data on the frequency of pre-indictment plea bargaining, so we have estimated this figure as follows. In 2014, the latest year for which data are available, 19.6% of federal criminal defendants were charged by felony information rather than indictment. Bureau of Justice Statistics, *FY 2014 Defendants Charged in Criminal Cases* (table generated at www.bjs.gov/fjsrc). Because all federal felony defendants have a constitutional right to be charged by a grand jury indictment, the defendants charged by information must have waived their right to an indictment, which typically occurs when a defendant enters a plea to charges that have not yet been filed. Metzger, *Beyond the Bright Line*, at 1663 ("[I]f pre-charge bargaining is successful, the parties agree that the defendant will waive her right to a grand jury indictment and the United States Attorney will file a criminal information alleging the violation of an agreed-upon statute."). This 19.6% figure does not include pre-indictment plea negotiations that terminated without an agreement, so the true incidence of such negotiations is likely higher. Whatever the precise figure, the government has never disputed that pre-indictment plea bargaining is very common.

Because of these changes in practice, the filing of formal charges no longer marks the point at which "the adverse positions of government and defendant have solidified." *Kirby*, 406 U.S. at 689. A court appearance is no longer the first time "a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Id.* Now that moment often comes before the accused is formally charged, when the prosecutor makes a plea offer to the defendant. For this reason, the ABA Standards governing defense counsel recognize that counsel has duties to the client during pre-indictment plea bargaining. *ABA Standards for Criminal Justice: Pleas of Guilty* standard 14-3.2(b) (commentary) (3d ed. 1999) (noting that counsel's "duty to seek crucial items of discovery before plea negotiations are completed" may permit a more limited investigation "where a highly favorable pre-indictment plea is offered, and the pleas offered after indictment are likely to carry significantly more severe sentences").

In this case, a majority of the en banc Sixth Circuit, believing itself bound by the "formal charges" language in this Court's cases, held that defendants have no Sixth Amendment right to counsel during pre-charge plea negotiations. (Not just no right to free appointed counsel, but no right to counsel *at all*, so a defendant evaluating a pre-charge plea offer could be barred from consulting even retained counsel.) But several Sixth Circuit judges wrote separately to urge this Court to reconsider its "formal charges" language, because they found it contrary to any reasonable understanding of when a defendant needs a lawyer, given present-day plea bargaining

practices. This case is the perfect vehicle for doing so. That is our first Question Presented.

This case will alternatively allow the Court to take a smaller step in the same direction. When the federal prosecutor offered a pre-indictment plea agreement to John Turner on forthcoming charges of robbery, he had already been charged in state court with the same robberies. There is an acknowledged circuit split on whether an already-filed state charge gives rise to a Sixth Amendment right to counsel for a forthcoming federal charge for the same offense. The Court could also decide the case on this narrower ground. That is our second Question Presented.

STATEMENT

1. While addicted to drugs, petitioner John Turner robbed four Memphis-area businesses in less than 24 hours. App. 3a, 73a. No one was hurt. Dist. Ct. Record PageID 86. (Subsequent citations to the District Court Record will use the abbreviation "R.") The robberies were investigated by a joint task force managed by the FBI and composed of federal and state law enforcement officers. App. 73a-74a & n.1. Upon being apprehended, Turner readily admitted his guilt and fully cooperated. R. 22, 34.

Turner was indicted in state court for the four robberies. App. 3a. His family retained attorney Mark McDaniel to represent him. App. 74a. During a scheduled state court appearance, the state prosecutor told McDaniel that he needed to contact Assistant U.S. Attorney Tony Arvin, because Turner was to be prosecuted in federal court as well. App. 3a, 74a.

McDaniel met with Arvin, who advised that the U.S. Attorney's office would be charging Turner under 18 U.S.C. §§ 1951 and 924 for the same four robberies that were the subject of the pending state charges. R. 313. Arvin offered to resolve the forthcoming federal charges with a 15-year sentence. App. 3a. But Arvin told McDaniel that the offer had to be accepted prior to Turner's federal indictment. If Turner failed to accept the offer before the deadline, the offer would expire. App. 3a.

Although McDaniel met with Turner in a courtroom holding cell and briefly discussed this offer, McDaniel utterly failed to advise Turner competently. Specifically:

- McDaniel failed to inform Turner that the plea offer would be withdrawn upon federal indictment, which was soon to occur. As a result, Turner did not know he faced a deadline. R. 343-44, 346.

- McDaniel failed to inform Turner that he was facing a mandatory minimum sentence of 82 years on the federal charges if he didn't accept the plea—and that he was certain to be convicted if he went to trial, because of his confession. App. 96a-97a, R. 344, 346.

- McDaniel failed to explain how Turner could plead to federal charges that were not even pending, or how he could be charged for the same robberies in both state and federal court. App. 96a-97a, R. 23, 343.

- McDaniel then abruptly quit, without warning Turner of any impending deadline to accept the federal offer. Turner had no counsel when the offer expired. R. 346.

Because of these failures by McDaniel, the plea offer was not accepted by the U.S. Attorney's deadline, and it was withdrawn.

Turner was then indicted in federal court. App. 3a. He retained new counsel, who was only able to obtain a 25-year post-indictment plea offer to resolve the federal charges. App. 3a. Turner took this offer, pleading guilty to four counts of robbery affecting commerce, 18 U.S.C. § 1951, and one count of carrying a firearm in relation to a crime of violence, *id.* § 924(c). During the sentencing hearing, the district court expressed serious reservations about accepting the plea to the 25-year sentence. R. 87, 93. The court remarked that the sentence was "excessive" and "too much time" for what he viewed as "aberrational" conduct on Turner's part. R. 100, 101. Ultimately the district court approved the plea agreement and sentenced Turner to 25 years—ten years longer than the original offer. App. 3a.

Turner sought relief under 28 U.S.C. § 2255. App. 4a. He provided sworn declarations and other documentary evidence demonstrating that McDaniel had rendered ineffective assistance of counsel by failing to provide adequate advice regarding the first plea offer and its impending deadline. App. 107a-108a. Turner asserted that: (1) had he been properly advised, he would have timely accepted the 15-year offer, given that he was facing an 82-year mandatory minimum sentence, and as evidenced by the fact that he had pled to a 25-year sentence; and (2) the district court would have accepted the 15-year offer, in light of the concerns the court expressed at the sentencing hearing that a 25-year sentence was too

harsh. Turner requested an evidentiary hearing to establish his claim.

The government disputed that McDaniel's performance was deficient. The government also argued that Turner could not raise a claim of ineffective assistance of counsel that occurred before indictment, because his right to counsel had not yet attached.

The district court held that there is no Sixth Amendment right to counsel prior to indictment, and thus that Turner could not raise a claim of ineffective assistance of counsel. App. 86a-131a. The district court accordingly denied § 2255 relief without holding an evidentiary hearing, and without ever determining whether McDaniel's performance was deficient. App. 76a, 108a.

2. A three-judge panel of the Sixth Circuit affirmed. App. 72a-85a. The panel held that it was bound by circuit precedent to find that there is no Sixth Amendment right to counsel, and thus no right to the effective assistance of counsel, before the filing of formal charges. App. 85a. The panel nevertheless lamented the injustice of this result: "Whether [plea negotiations] occur before or after the filing of formal charges, it is undisputed that the plea negotiation process is adversarial by nature and the average defendant is ill equipped to navigate the process on his own." App. 83a-84a.

The Sixth Circuit granted rehearing en banc. 865 F.3d 338 (6th Cir. 2017).

3. The Sixth Circuit, sitting en banc, affirmed. App. 1a-71a. Ten of the court's sixteen judges joined the majority opinion. App. 1a-11a. Two of these ten

judges also joined a separate opinion concurring *dubitante*. App. 11a-32a. Two judges concurred in the judgment only. App. 33a-55a, 55a-57a. Four judges dissented. App. 57a-71a.

The en banc majority held: "The Supreme Court's attachment rule is crystal clear. It is 'firmly established' that a person's Sixth Amendment right to counsel 'attaches only at or after the time that adversary judicial proceedings have been initiated against him.'" App. 6a-7a (quoting *Gouveia*, 467 U.S. at 187). The majority concluded: "Because the Supreme Court has not extended the Sixth Amendment right to counsel to any point before the initiation of adversary judicial criminal proceedings, we may not do so." App. 7a.

The en banc majority also rejected the argument that the already-filed state robbery charge triggered Turner's Sixth Amendment right to counsel for the forthcoming federal robbery charge. App. 10a. The majority observed that because the "Sixth Amendment right to counsel is 'offense specific,'" App. 8a (quoting *McNeil*, 501 U.S. at 175), Turner had a right to counsel only if state robbery and federal robbery are the "same offense." App. 8a (citing *Texas v. Cobb*, 532 U.S. 162, 173 (2001)). The majority noted that "[t]he circuit courts are split on whether the Supreme Court in *Cobb*" incorporated the dual sovereignty doctrine used in double jeopardy cases, under which federal and state charges can never be the same offense because they are prosecuted by different sovereigns. App. 9a. The majority held that the dual sovereignty doctrine applies in Sixth Amendment cases just as it does in double jeopardy cases, so that a pending state charge can never trigger the

right to counsel for a forthcoming federal charge, even if the state and federal offenses have the same elements. App. 10a.

Judge Bush, joined by Judge Kethledge, concurred *dubitante*. App. 11a-32a. Judge Bush reasoned that "we are bound to affirm because of Supreme Court precedents holding that the Sixth Amendment right to counsel attaches only at or after the initiation of criminal proceedings." App. 12a (internal quotation marks omitted). But he argued that the original public meaning of the Sixth Amendment pointed to the opposite result. App. 12a-13a. Judge Bush surveyed a wide range of Founding-era sources, including dictionaries, the Crimes Act of 1790, the trial of Aaron Burr, and other federal court decisions. App. 17a-29a. He concluded that lawyers at the Founding would have understood Turner to be an "accused" in a "criminal prosecution," as those terms are used in the Sixth Amendment. App. 30a-31a.

Judge Clay, joined in part by Judge White, concurred in the judgment. App. 33a-55a. "The rule that we affirm today has pernicious consequences," he declared. "Nevertheless, I believe our hands as a Court are tied and that Supreme Court precedent prevents me from joining the dissent." App. 33a. He concluded that "the right to counsel *should* attach during pre-indictment plea negotiations. The current rule leads to unduly harsh consequences for criminal defendants. It allows prosecutors to exploit uncounseled criminal defendants, and leaves counseled defendants, like Turner, without a claim for ineffective assistance of counsel when their attorneys render deficient performance." App. 54a.

Judge Clay also disagreed with the majority's conclusion that the dual sovereignty doctrine used in double jeopardy cases is applicable to the right to counsel. App. 50a. He determined, however, that Turner's state and federal robbery charges were not the same offenses. App. 53a.

Judge White concurred in the judgment. App. 55a-57a. She explained: "Unconstrained by the Supreme Court's consistent application of *Kirby*'s bright-line rule, I would find the dissent, Judge Bush's concurrence, and Judge Clay's pertinent concluding observations persuasive on the merits." App. 57a.

Judge Stranch, joined by Chief Judge Cole and Judges Moore and Donald, dissented. App. 57a-71a. She stated: "The Supreme Court has never applied a mechanical, indictment-based rule in its attachment cases. It has instead repeatedly scrutinized the confrontation [between the government and the accused], evaluating both the relationship of the state to the accused and the potential consequences for the accused." App. 63a-64a. Applying this standard, she determined that Turner's Sixth Amendment right to counsel attached when the federal prosecutor made a formal plea offer. App. 64a. "[W]hen a prosecutor extends a formal plea offer for specific charges, she has cemented her position as the defendant's adversary and she has committed herself to prosecute," Judge Stranch explained. App. 64a. "This is precisely the sort of confrontation at which an inexperienced defendant who lacks legal skills risks signing away his liberty to a savvy and learned prosecutor." App. 65a.

REASONS FOR GRANTING THE WRIT

The en banc Sixth Circuit held that there is no Sixth Amendment right to counsel during plea negotiations that occur prior to the commencement of judicial proceedings. The court erred for two reasons.

First, there *is* a Sixth Amendment right to counsel during pre-charge plea negotiations. Plea bargaining, whether before or after the commencement of judicial proceedings, is the most important stage of most criminal cases. It is when defendants most need counsel. When the prosecutor offers a formal plea agreement to the defendant, "the government has committed itself to prosecute, the adverse positions of government and defendant have solidified, and the accused finds himself faced with the prosecutorial forces of organized society." *Rothgery*, 554 U.S. at 198 (internal quotation marks omitted). An uncounseled defendant is utterly incapable of engaging in plea negotiations with the prosecutor.

Second, once the right to counsel attaches for a state offense, it also attaches for a federal offense with the same elements. Double jeopardy's dual sovereignty doctrine has no place in determining when the right to counsel attaches. The doctrine rests on considerations that have no relevance to the Sixth Amendment. Transposing dual sovereignty to the right to counsel yields absurd results, without serving any purpose.

There are lower court conflicts on both of these questions. Both questions recur frequently—the first can arise any time the prosecutor conducts pre-charge plea negotiations, while the second arises whenever the state and federal governments prosecute a defendant for the same incident. This case

will allow the Court to resolve either or both questions.

I. The Court should decide whether the Sixth Amendment right to counsel attaches when the prosecutor conducts plea negotiations before the filing of a formal charge.

Below, eight of the sixteen Sixth Circuit judges joined separate opinions urging this Court to clarify that the right to counsel attaches when the prosecutor conducts plea negotiations before the commencement of judicial proceedings. App. 13a, 55a, 57a, 70a-71a. They recognized that the outcome below is contrary to common sense and to the original meaning of the Sixth Amendment.

A. The decision below denies defendants the right to counsel when they need it most.

There can be no doubt that "criminal defendants require effective counsel during plea negotiations." *Frye*, 566 U.S. at 144. An uncounseled defendant will normally have no idea whether he should accept the prosecutor's plea offer. He will lack any sense of the strength of the evidence against him, or of the offenses with which he could be charged, or of the sentence he might receive if found guilty at trial. Nor will an uncounseled defendant have any conception of how to go about negotiating with the prosecutor. As one commentator explains, when defense counsel is involved,

> [t]hese pre-charge negotiations may include complex defense presentations to prosecutors, at which defense attorneys argue for lesser

> charges or no charges at all. Defense attorneys present evidence that might otherwise be unobtainable by the prosecution; they proffer facts about the case or offer statements by the defendant who might otherwise have claimed Fifth Amendment protection against self-incrimination. Moreover, defense counsel do so under standard "proffer" agreements that limit the government's future use of any statement a defendant makes during a negotiation session. Negotiations also address the production of documents, the timing or limitation of subpoena compliance, restitution, or cooperation in the prosecution of others.

Metzger, *Beyond the Bright Line*, at 1665-66. An uncounseled defendant will be utterly unequipped to perform any of these standard tasks.

For most defendants, plea negotiations are by far the most important stage of a criminal prosecution. They are what determine the offenses with which the defendant will be charged and the sentence he will receive. In plea agreements, defendants give up virtually all the rights to which they would otherwise be entitled. "In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Frye*, 566 U.S. at 144.

Plea negotiations are equally critical whether they take place before or after the commencement of judicial proceedings. An uncounseled defendant presented with a plea offer from the prosecutor is just as helpless before his first court appearance as after. When the prosecutor makes a plea offer, "defendants cannot be presumed to make critical decisions with-

out counsel's advice." *Lafler v. Cooper*, 566 U.S. 156, 165 (2012). The decision below denies defendants the right to counsel precisely when they need it most. This outcome is impossible to square with any sensible understanding of the Sixth Amendment.

The decision below has other troubling consequences as well. As Judge Bush observed, the decision below allows a court to deny a defendant the right even to *retain* counsel to conduct pre-charge plea negotiations. App. 32a; *cf. Luis v. United States*, 136 S. Ct. 1083, 1089 (2016) ("The Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire.") (brackets and internal quotation marks omitted). Under the decision below, district courts appear to lack the authority to appoint counsel for indigent defendants when the prosecutor presents a pre-charge plea offer, because district courts are authorized to appoint counsel before a formal charge only where the defendant has a right to counsel under the Sixth Amendment or another provision of federal law. *See* 18 U.S.C. § 3006A(a)(1). Moreover, even where prosecutors know that defendants are represented before the commencement of judicial proceedings, the decision below allows prosecutors to bypass defense counsel and negotiate directly with defendants. *Cf. Moulton*, 474 U.S. at 171 ("[T]he prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.").

These absurd consequences might perhaps be palatable if denying a right to counsel served some purpose, but it serves none. The government has no in-

terest in denying counsel to defendants during plea negotiations. In this respect, pre-charge plea bargaining is very different from the other pre-charge settings the Court has considered. Each of the Court's prior cases finding no right to counsel before the commencement of judicial proceedings involved actions undertaken by law enforcement officials, not prosecutors. *See McNeil*, 501 U.S. at 173 (police officer); *Gouveia*, 467 U.S. at 184 (FBI agents); *Ash*, 413 U.S. at 302 (FBI agent); *Kirby*, 406 U.S. at 684-85 (police officers). In each of these cases, the government had not yet transitioned from investigation to prosecution, so recognizing a pre-indictment right to counsel might have "seriously impede[d] effective law enforcement." *McNeil*, 501 U.S. at 180; *see also Gouveia*, 467 U.S. at 189-90 (rejecting the argument that the right to counsel attaches at arrest); *Ash*, 413 U.S. at 321 (rejecting the argument that the right to counsel attaches at photographic displays for the purpose of allowing a witness to attempt an identification of the offender); *Kirby*, 406 U.S. at 690 (rejecting the argument that the right to counsel attaches at a pre-indictment stationhouse identification).

When a prosecutor makes a plea offer, by contrast, the government is no longer investigating. It is prosecuting. Recognizing a right to counsel will not impede effective law enforcement. Nor will it hamper the government's ability to prosecute. The government has nothing to gain by denying defendants the right to counsel during plea negotiations—except the ability to exploit defendants' ignorance.

Nor are these absurd consequences compelled by this Court's prior decisions. Each time the Court has stated that the right to counsel attaches upon the

filing of a formal charge, it has always been because, in those cases, the formal charge actually signaled the government's shift from investigation to prosecution. *See Rothgery*, 554 U.S. at 198; *Gouveia*, 467 U.S. at 189; *Kirby*, 406 U.S. at 689-90. By contrast, when the government initiates pre-charge plea bargaining, the government is unambiguously prosecuting *before* the filing of a formal charge. Prosecutors only make plea offers to individuals against whom the prosecutors intend to file charges if the offer is not accepted. As Judge Stranch observed below, "when a prosecutor extends a formal plea offer for specific charges, she has cemented her position as a defendant's adversary and she has committed herself to prosecute." App. 64a.

The Court has taken a "pragmatic approach" in determining "the scope of the Sixth Amendment right to counsel," "asking what purposes a lawyer can serve at the particular stage of the proceedings in question and what assistance he could provide to an accused at that stage." *Patterson v. Illinois*, 487 U.S. 285, 298 (1988). *See also Moulton*, 474 U.S. at 170 ("[T]he right to the assistance of counsel is shaped by the need for the assistance of counsel."). Here, these considerations point as strongly as they possibly could in favor of recognizing a right to counsel during plea negotiations—even if they occur prior to the start of judicial proceedings. This is the most important stage of a criminal prosecution, the point when defendants most desperately need the assistance of counsel.

B. The decision below is contrary to the original public meaning of the Sixth Amendment.

As Judge Bush demonstrated in his thorough concurring opinion, App. 11a-32a, the decision below is also contrary to the original public meaning of the Sixth Amendment. The Sixth Amendment protects an "accused" in "all criminal prosecutions." U.S. Const. amend. VI. Of course, there was no plea bargaining at the Founding, so our specific issue could not have arisen. But the Founding-era sources gathered by Judge Bush indicate that "accused" was understood to mean something broader than "indicted," and that a "criminal prosecution" encompassed more than merely the post-indictment stages of a criminal case. When a prosecutor, in effect, says to a defendant "The government believes you are guilty of this charge and I will indict you for it unless you plead guilty," the defendant is an "accused" in a "criminal prosecution" according to the original meaning of these terms.

In the trial of Aaron Burr, for example, Chief Justice Marshall considered whether Burr was entitled to compulsory process under the Sixth Amendment before being indicted. The Compulsory Process Clause, like the Assistance of Counsel Clause, applies to an "accused" during a "criminal prosecution." Chief Justice Marshall held that the Sixth Amendment guarantees "a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses." *United States v. Burr*, 25 F. Cas. 30, 33 (C.C.D. Va. 1807). *See also Ex parte Burford*, 7 U.S. 448, 452 (1806) (Marshall, C.J.) (holding that the Sixth Amendment right "to be in-

formed of the nature and cause of the accusation" also applies before indictment).[2]

Indeed, when one of the leading early American legal treatises listed the 37 sequential "[p]arts in a criminal prosecution," indictment was number 15, preceded by stages of the prosecution such as the filing of a complaint, the issuance of an arrest warrant, and the arrest of the defendant. 6 Nathan Dane, *A General Abridgment and Digest of American Law* 527 (1824). A "criminal prosecution," as understood by Founding-era lawyers, began before indictment.

C. The courts of appeals are divided over whether the Sixth Amendment right to counsel can attach before the initiation of formal judicial proceedings.

This Court's review is also needed to resolve a conflict among the courts of appeals as to whether the Sixth Amendment right to counsel can attach before the initiation of formal judicial proceedings. The courts of appeals have split along the same fissure that divided the majority and dissent below.

Some circuits, like the majority below, have treated the initiation of judicial proceedings as a hard-and-fast line, before which the right to counsel can never attach. *See United States v. Ayala*, 601 F.3d

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[2] In *Rothgery*, 554 U.S. at 219-22 (Thomas, J, dissenting), Justice Thomas relied primarily on Blackstone's *Commentaries* to conclude that the original meaning of "prosecution" required the filing of a formal charge. As Judge Bush suggested, however, in ascertaining the original meaning of the Assistance of Counsel Clause, Founding-era American sources are preferable to English sources, because in England there was no right to counsel analogous to the right established by the Sixth Amendment. App. 30a n.24.

256, 272 (4th Cir. 2010); *United States v. Heinz*, 983 F.2d 609, 612 (5th Cir. 1993); *United States v. Morriss*, 531 F.3d 591, 593-94 (8th Cir. 2008); *United States v. Hayes*, 231 F.3d 663, 673 (9th Cir. 2000) (en banc); *United States v. Calhoun*, 796 F.3d 1251, 1254-55 (10th Cir. 2015); *United States v. Waldon*, 363 F.3d 1103, 1112 n.3 (11th Cir. 2004); *United States v. Sutton*, 801 F.2d 1346, 1365-66 (D.C. Cir. 1986).

Other circuits, like the dissent below, have recognized that the right to counsel can attach before the filing of formal charges, where the government's role has shifted from investigation to prosecution, and where the prosecutor has clearly become the defendant's adversary. *See Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892-93 (3d Cir. 1999) (en banc); *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992).

The Third and Seventh Circuits, applying this rule, have assumed without discussion that the Sixth Amendment guarantees the right to the effective assistance of counsel during pre-indictment plea bargaining. *See United States v. Giamo*, 665 F. App'x 154, 156-57 (3d Cir. 2016) (unpublished opinion) (concluding that the defendant suffered no prejudice from counsel's incompetence during pre-indictment plea bargaining); *United States v. Jansen*, 884 F.3d 649, 656-59, 659 n.4 (7th Cir. 2018) (evaluating counsel's performance during pre-indictment plea bargaining and finding it adequate).

District courts, taking the same view, have explicitly held that the Sixth Amendment guarantees the right to the effective assistance of counsel during

pre-indictment plea bargaining. *See United States v. Wilson*, 719 F. Supp. 2d 1260, 1266-68 (D. Or. 2010); *United States v. Busse*, 814 F. Supp. 760, 763-64 (E.D. Wis. 1993). Other district courts have so assumed. *See Chrisco v. Shafran*, 507 F. Supp. 1312, 1319 (D. Del. 1981). These courts have recognized that "[t]o conclude that petitioner had no right to counsel in evaluating the government's plea offer simply because the government had not yet obtained a formal indictment would elevate form over substance, and undermine the reliability of the pre-indictment plea negotiation process." *Wilson*, 719 F. Supp. 2d at 1268.

Courts and commentators have often noted the existence of this conflict. *See Perry v. Kemna*, 356 F.3d 890, 895-96 (8th Cir. 2004) (Bye, J., concurring); *United States v. Rosen*, 487 F. Supp. 2d 721, 732-33 (E.D. Va. 2007); 3 LaFave et al., *Criminal Procedure* § 11.2(b) (text at nn. 81.10-81.90); Steven J. Mulroy, *The Bright Line's Dark Side: Pre-Charge Attachment of the Sixth Amendment Right to Counsel*, 92 Wash. L. Rev. 213, 228-33 (2017); Brandon K. Breslow, *Signs of Life in the Supreme Court's Uncharted Territory: Why the Right to Effective Assistance of Counsel Should Attach to Pre-Indictment Plea Bargaining*, Federal Lawyer, Oct./Nov. 2015, at 36; Metzger, *Beyond the Bright Line*, at 1651-52 & n.105.

Had the district court properly recognized John Turner's Sixth Amendment right to counsel during pre-charge plea negotiations, it would have been compelled, at the very least, to conduct an evidentiary hearing on his claim. *See Fontaine v. United States*, 411 U.S. 213, 215 (1973) (per curiam). At that hearing, Turner would have been able to show that

he would have accepted the plea offer had he been competently advised, and that the district court would have approved the agreement. *Cf. Frye*, 566 U.S. at 148; *Lafler*, 566 U.S. at 174. Resolution of the Question Presented will thus determine the outcome of this case.

II. The Court should decide whether the Sixth Amendment right to counsel attaches when a federal prosecutor conducts plea negotiations before the filing of a formal charge in federal court, where the defendant has already been charged with the same offense in state court.

This case also raises the question whether the Sixth Amendment right to counsel attaches before indictment in a federal prosecution where the defendant has already been charged with the same offense in state court. The Court could alternatively decide the case on this narrower ground.

The Sixth Amendment right to counsel is "offense specific." *McNeil*, 501 U.S. at 175. When a defendant's right to counsel attaches with respect to one offense, it attaches to any other that is the "same offense" under the *Blockburger* test. *Texas v. Cobb*, 532 U.S. 172-73 (2001) (referring to *Blockburger v. United States*, 284 U.S. 299 (1932)). Under that test, there are two separate offenses, not just one, where "each provision requires proof of a fact which the other does not." *Cobb*, 532 U.S. at 173 (citation and internal quotation marks omitted).

When the federal prosecutor offered a plea agreement to forthcoming charges of robbery, Turner had already been charged in state court with the same

robberies. The state and federal robbery charges were the same offenses under *Blockburger*. In state court, Turner was charged with aggravated robbery, which Tennessee law defines as simple robbery plus either (1) use of a deadly weapon or (2) serious bodily injury to the victim. Tenn. Code § 39-13-402(a). Under Tennessee law, the trial court must instruct the jury on lesser included offenses, Tenn. Code § 40-18-110(a), and simple robbery is a lesser included offense of aggravated robbery. *State v. Richmond*, 90 S.W.3d 648, 660 (Tenn. 2002); *State v. Allen*, 69 S.W.3d 181, 187 (Tenn. 2002). Under state law, an indictment for aggravated robbery thus necessarily includes the lesser included offense of simple robbery, because jurors have the right to "ignore the State's evidence establishing the use of a deadly weapon" and convict of simple robbery instead. *Richmond*, 90 S.W.3d at 660. (In practice, Tennessee prosecutors do not charge aggravated robbery and simple robbery for the same incident. They only charge aggravated robbery, which is understood to include an implicit charge of simple robbery, because everyone knows that the court will also instruct the jury on simple robbery.) When Turner was charged in state court with aggravated robbery, therefore, his right to counsel attached with respect to simple robbery as well as aggravated robbery.

The federal robbery charges were for Hobbs Act robbery, the elements of which are simple robbery plus the obstruction of interstate commerce. 18 U.S.C. § 1951. If the government proved all the elements of Hobbs Act robbery, it would necessarily prove all the elements of simple robbery under state law. State law simple robbery is thus the "same offense" as Hobbs Act robbery under *Blockburger*.

When Turner's right to counsel attached with respect to the state prosecution for simple robbery, therefore, his right to counsel also attached with respect to the federal prosecution for Hobbs Act robbery.[3]

The *Blockburger* test was used in double jeopardy cases before it was used in right to counsel cases. In double jeopardy cases, because of the dual sovereignty doctrine, even if two offenses are the same under *Blockburger*, they are different offenses if they violate the laws of different sovereigns. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1867 (2016). The circuits are sharply divided on whether the dual sovereignty doctrine also applies in right to counsel cases. This Court has never addressed the question.

A. There is an acknowledged circuit conflict on this question.

The courts of appeals disagree as to whether the dual sovereignty doctrine applies to the Sixth Amendment as well as to the Double Jeopardy Clause, so as to bar the right to counsel from attaching in a federal prosecution where the defendant has already been charged with the same offense in state court.

In the Second and Eighth Circuits, the dual sovereignty doctrine does not apply to the Sixth Amendment. *United States v. Mills*, 412 F.3d 325, 329-30 (2d Cir. 2005); *United States v. Red Bird*, 287

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[3] Below, Judge Clay erroneously reached the opposite conclusion, App. 51a-53a, because he misapprehended Tennessee law by overlooking the fact that Turner's right to counsel had attached in the state prosecution for simple robbery as well as for aggravated robbery.

F.3d 709, 714-15 (8th Cir. 2002). The Seventh Circuit has strongly suggested, at length, that it would agree in an appropriate case. *United States v. Krueger*, 415 F.3d 766, 775-78 (7th Cir. 2005). In these circuits, charges filed in state court give rise to a right to counsel in a federal prosecution for the same offense.

These circuits have recognized that "[t]he fact that *Cobb* appropriates the *Blockburger* test, applied initially in the double jeopardy context, does not demonstrate that *Cobb* incorporates the dual sovereignty doctrine." *Mills*, 412 F.3d at 330. They have concluded that the considerations informing the Double Jeopardy Clause are so different from those informing the Sixth Amendment that "[w]e do not believe it is appropriate to fully rely on double jeopardy analysis here." *Red Bird*, 287 F.3d 715.

On the other side of the split are several circuits that, like the Sixth Circuit below, have applied the dual sovereignty doctrine in Sixth Amendment cases. *See United States v. Coker*, 433 F.3d 39, 47 (1st Cir. 2005); *United States v. Alvarado*, 440 F.3d 191, 196 (4th Cir. 2006); *United States v. Avants*, 278 F.3d 510, 517 (5th Cir. 2002); *United States v. Burgest*, 519 F.3d 1307, 1310 (11th Cir. 2008). In these circuits, charges filed in state court can never give rise to a right to counsel in a federal prosecution.

These circuits have placed heavy reliance on a single sentence in *Cobb*, 532 U.S. at 173, in which the Court stated: "We see no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel." These circuits have interpreted this sentence to mean that the dual sovereignty doctrine should be

used in Sixth Amendment cases in just the same way it is used in double jeopardy cases. *See Coker*, 433 F.3d at 43 (finding this sentence "of significant importance"); *Alvarado*, 440 F.3d at 196 (describing this sentence as the "[m]ost important[]" part of *Cobb*); *Avants*, 278 F.3d at 517 (finding this sentence "[p]articularly relevant"); *Burgest*, 519 F.3d at 1310.

This split has been frequently discussed, including in several of the cases on both sides. *See* App. 9a (noting that "[t]he circuit courts are split" on this issue); App. 44a ("[t]his Court's sister circuits are divided"); *Coker*, 433 F.3d at 44 ("we reject the reasoning of the Second Circuit in *Mills*"); *Alvarado*, 440 F.3d at 198 (disagreeing with the Second and Seventh Circuits); *Burgest*, 519 F.3d at 1310 (using a "*But see*" citation for *Mills* and *Red Bird*); *Mills*, 412 F.3d at 330 n.2 (disagreeing with the Fifth Circuit's decision in *Avants*); *Krueger*, 415 F.3d at 776 (noting the conflict between the Fifth Circuit on one side and the Second and Eighth Circuits on the other); *United States v. King*, 903 F. Supp. 2d 500, 505 (E.D. Mich. 2012) ("[F]ederal circuits are split over whether conduct that violates laws of separate sovereigns establishes that the offenses are distinct for purposes of the Sixth Amendment right to counsel."); Brian J. Litwak, *Constitutional Conflation: The Incorrect Incorporation of Dual Sovereignty Into Sixth Amendment Jurisprudence*, 41 New Eng. J. on Crim. & Civ. Confinement 85, 103-07 (2015); Ryan M. Yanovich, *Answering Justice Scalia's Question: Dual Sovereignty and the Sixth Amendment Right to Counsel After* Texas v. Cobb *and* Montejo v. Louisiana, 78 Fordham L. Rev. 1029, 1051-65 (2009); Charles Morrison, *The Supreme Court May Have Meant What It Said, But It Needs to Say More: A Comment on the*

Circuit Split Regarding the Application of the Dual Sovereignty Doctrine to the Sixth Amendment Right to Counsel, 39 U. Tol. L. Rev. 153, 155 (2007); Aaron J. Rogers, *"The Cost of Dual Citizenship": The Sixth Amendment Right to Counsel, Dual Sovereignty, and the (Reasonable) Price of Federalism*, 82 Notre Dame L. Rev. 2095, 2120-21 (2007); David J. D'Addio, *Dual Sovereignty and the Sixth Amendment Right to Counsel*, 113 Yale L.J. 1991, 1991-92 (2004).

B. The dual sovereignty doctrine has no bearing on the right to counsel.

The dual sovereignty doctrine has no place in determining when the right to counsel attaches.

The Court has never suggested that it does. *Cobb* involved two Texas offenses, but no federal offenses, so the Court had no occasion in *Cobb* to consider whether dual sovereignty has any bearing on the right to counsel. The majority below, like the other courts taking the same view, wrenched out of context the passage in *Cobb* stating that "[w]e see no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel." *Cobb*, 532 U.S. at 173. In this passage, the Court was merely explaining why the *Blockburger* test applies in both contexts. This passage has nothing to do with dual sovereignty.

Dual sovereignty rests on considerations that are relevant to the Double Jeopardy Clause but not to the Assistance of Counsel Clause. Dual sovereignty is rooted in respect for the equal sovereign power of states and the federal government, which has long been understood to imply that a prosecution by one cannot bar a subsequent prosecution by the other.

See, e.g., *Sanchez Valle*, 136 S. Ct. at 1871; *Heath v. Alabama*, 474 U.S. 82, 89 (1985). There is no comparable basis for applying dual sovereignty to the right to counsel. The sovereignty of neither Tennessee nor the United States would be infringed if the filing of state robbery charges gave federal defendants a right to counsel with respect to forthcoming federal charges for the same robberies.

Dual sovereignty's unique relevance to the Double Jeopardy Clause explains why the Court has consistently refused to apply dual sovereignty to other constitutional protections. In *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 77-78 (1964), the Court declined to apply dual sovereignty to the Fifth Amendment's Self-Incrimination Clause, and thus held that the Clause protects a witness in state court against incrimination under federal law, and vice versa. Likewise, in *Elkins v. United States*, 364 U.S. 206, 223-24 (1960), the Court refused to apply dual sovereignty to the Fourth Amendment, and thus held that evidence unlawfully obtained by state officers may not be introduced in a federal trial. So far as we are aware, the Assistance of Counsel Clause is the only part of the Constitution, apart from the Double Jeopardy Clause, to which any of the lower courts apply dual sovereignty. They only began doing so after *Cobb*.

As Judge Clay pointed out below, App. 49a, applying the dual sovereignty doctrine to the Sixth Amendment yields "illogical and perverse results." Where a defendant has been charged in state court but not yet in federal court, the decision below allows federal prosecutors to bypass defense counsel and speak directly with the defendant, and then use the

defendant's statements against him in court. Indeed, federal prosecutors could provide the information to their state counterparts, who could use it in the state prosecution as well.

This issue arises often, because state and federal authorities frequently cooperate in the investigation and prosecution of offenses, as they did here. In 2016 alone the DEA managed 271 federal-state task forces. Drug Enforcement Administration, *State & Local Task Forces*, https://www.dea.gov/ops/taskforces.shtml. The FBI administers 160 Violent Gang Safe Streets Task Forces composed of federal and state officers. Federal Bureau of Investigation, *What We Investigate: Gangs*, https://www.fbi.gov/investigate/violent-crime/gangs. Federal and state prosecutors often work together to bring charges against the same defendants. Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643, 710-11 (1997). This high level of cooperation is possible because federal criminal law has expanded so rapidly that it now covers much of the same ground as state criminal law. Paul D. Carrington, *Federal Use of State Institutions in the Administration of Criminal Justice*, 49 SMU L. Rev. 557, 558 (1996).

In light of this close cooperation between federal and state authorities, it makes little sense to say that a defendant charged in state court has no right to counsel with respect to an impending federal charge for the same offense, when the state and federal prosecutors are likely to be working together and sharing evidence, and when the same defense attorney is likely to be representing the defendant on both charges. At best, the decision below creates a

pointless obstacle for defendants seeking to obtain the advice of counsel. At worst, it allows prosecutors to manipulate the timing of charges to bypass counsel and interact with defendants directly.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] If the Court does not wish to grant certiorari on our first Question Presented, the Court should hold this petition pending a decision in *Gamble v. United States*, No. 17-646 (cert. granted June 28, 2018). If the Court overrules its dual sovereignty precedents in *Gamble*, it would be appropriate to grant this petition, vacate the judgment below, and remand the case to the Court of Appeals for reconsideration in light of *Gamble*. If the Court reaffirms its dual sovereignty precedents in *Gamble*, this petition should be granted.