No. 18-106

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

BRIEF OF *AMICI CURIAE* FORMER JUDGES AND PROSECUTORS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are former judges and prosecutors with extensive experience in both the federal and state criminal justice systems. Collectively, they have negotiated countless plea bargains as prosecutors and have reviewed countless others from the bench. A list of *amici* appears in Appendix A to this brief.

Based on their experience and expertise, *amici* urge this Court to grant the petition and recognize a Sixth Amendment right to counsel in plea negotiations, regardless whether those negotiations occur before or after formal charging.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has repeatedly recognized that it must be alert to "changing patterns of criminal procedure and investigation." *United States v. Ash*, 413 U.S. 300, 310 (1973). Because criminal prosecution has become a "system of pleas," the Court has held that defendants are entitled to competent counsel throughout the plea bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see Missouri v. Frye*, 566 U.S. 134, 143-44 (2012); *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). But the Court has not yet directly addressed the fact that plea bargaining increasingly occurs before the filing of formal charges. It should do so now.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2, counsel for *amici* state that after timely notification, all parties consented to the filing of this brief.

Publicity concerns, discovery obligations, and speedy trial constraints create incentives for preindictment plea bargaining. These incentives are particularly strong in cases involving cooperating witnesses, complex crimes, and dual federal-state jurisdiction. Mandatory minimums and guidelines sentencing regimes further contribute to this phenomenon.

For the preindictment plea bargaining system to work properly, it is essential that defendants have representation in the plea negotiation process. The involvement of competent counsel enhances both the likelihood and finality of plea agreements. But rather than interpreting the Sixth Amendment in light of the "realities of modern criminal prosecution," *United States v. Wade*, 388 U.S. 218, 224 (1967), many lower courts have fastened on a phrase from *Kirby v. Illinois*, 406 U.S. 682 (1972)—a case involving lineups, and not plea negotiations—and have held that defendants have no right to counsel during plea negotiations unless there has already been a "formal charge, preliminary hearing, indictment, information, or arraignment," *id.* at 689 (plurality opinion). *See* Pet. App. 2a.

Those courts are wrong. The Sixth Amendment right to effective assistance of counsel does not depend on the "mere formalism" of a charging instrument. *United States v. Gouveia*, 467 U.S. 180, 189 (1984) (quoting *Kirby*, 406 U.S. at 689 (plurality opinion)). Rather, it attaches at "the point at which '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, and

immersed in the intricacies of substantive and procedural criminal law.'" *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008) (quoting *Kirby*, 406 U.S. at 689 (plurality opinion)).

In *amici*'s experience, this point occurs when a prosecutor enters into plea negotiations, because it is then that the government has truly evinced a commitment to prosecute. Because the vast majority of convictions are effectively finalized at the bargaining table rather than in the courtroom—and more and more of these negotiations occur before indictment—it is time for this Court to hold that the formality of a charging instrument should not divide those who have a constitutional right to counsel in plea negotiations from those who do not.

ARGUMENT

I. Preindictment plea bargaining is an important part of the contemporary criminal justice system.

Whatever may have been true at the time of this Court's foundational Sixth Amendment right-to-counsel cases, criminal prosecution today rarely involves full-scale public trials. Since the early 2000s, the proportion of convictions obtained through guilty pleas has remained level at roughly 97%. *See* U.S. Sentencing Comm'n, *Overview of Federal Criminal Cases: Fiscal Year 2016*, at 4 (2017).[2] Thus, plea bargaining is not an "adjunct" to a trial-based criminal justice system; "it *is* the criminal justice system." *Frye*, 566 U.S. at 144 (2012) (quoting Robert E. Scott

[2] Data available at https://tinyurl.com/ya92rzp8.

& William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)).

In addition to the shift from trials to plea bargains, the criminal justice system has also recently seen another important shift: Plea bargaining now often occurs prior to a defendant's indictment or first court appearance. Two sets of data involving federal prosecutions attest to this point.

First, an increasing share of federal felony convictions proceed from information rather than indictment. Typically, defendants waive their Fifth Amendment right to an indictment only if they have already struck a plea bargain with the prosecution. In 1998, 13% of felony convictions proceeded from information. By 2014, that percentage had increased to nearly 20%.[3]

Second, an increasing number of defendants have been pleading guilty at their first appearance in court on the same day that charges are filed. These three events—first appearance, filing of charges, and entry of a plea—occur simultaneously in a felony case only

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[3] For the data used in these calculations, see *Defendants Charged in Criminal Cases*, Bureau Just. Stat.: Fed. Crim. Case Processing Stat., https://tinyurl.com/yaqh78o7 (last visited June 18, 2018).

Admittedly, using convictions that proceed from information is an imperfect proxy, since some of these individuals have been arraigned and therefore are entitled to representation even in courts that take the Sixth Circuit's restrictive view of the right to counsel. It is impossible from the published data to identify precisely how many of the defendants who pleaded guilty to an information fall into this category.

when there has been pre-charge negotiation. In 1996, there were 851 defendants in this category. By contrast, in 2017, there were more than 3100. Indeed, this number if anything understates the total number of pre-charge plea negotiations because it does not capture cases where even a single day elapses between a defendant's initial appearance and the entry of a guilty plea.[4]

In *amici*'s experience, there are a number of factors supporting this trend.

A. Prosecutors have reason to delay indictment in cases they seek to resolve through plea agreements.

Even if a prosecutor has sufficient evidence to justify bringing charges, there are several advantages to negotiating with a potential defendant before indictment.

First, the process of securing an indictment can reveal information that prosecutors would prefer to keep confidential. Indictments require prosecutors to bring witnesses and evidence before a grand jury. While many of the participants in that process are bound to secrecy, *see, e.g.*, Fed. R. Crim. P. 6(e)(2)(B), others—including the witnesses themselves—are not. Additionally, indictments normally become public as soon as they are filed. This publicity can be problematic for prosecutors because it provides information to other potential defendants about the

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[4] For the data used to reach these figures, see *Criminal Defendants Filed, Terminated, and Pending from FY 1996 to Present*, Fed. Jud. Ctr., https://tinyurl.com/y7t7tggr (last visited June 18, 2018).

existence and scope of an ongoing investigation. It can also be problematic for the indicted defendant, who is exposed to public attention before the charges against him are resolved.

Second, indictments trigger prosecutorial obligations to provide discovery. *See* Fed. R. Crim. P. 16(a) (setting out federal prosecutors' discovery obligations); *see also, e.g.*, N.C. Gen. Stat. § 15A-903 (setting out North Carolina's open file discovery policy). Discovery obligations not only impose logistical burdens on prosecutors, but can also compromise ongoing investigations when they result in turning over sensitive information.

Third, speedy trial statutes create an incentive to negotiate pleas before indictment. For example, the federal Speedy Trial Act requires a prosecutor to bring a defendant to trial within seventy days of the filing of an information or indictment. 18 U.S.C. § 3161(c)(1). While the Act explicitly allows the exclusion of time during which a court is considering a "proposed plea agreement," *id.* § 3161(h)(1)(G), "plea bargaining [itself] is not an express ground for an excludable continuance," *United States v. Carlone*, 666 F.2d 1112, 1116 (7th Cir. 1981). As the clock runs down, the prospect of going to trial can affect the parties' bargaining positions. Moreover, uncertainty over whether certain days are excludable, and over whether a plea deal will be reached at all, forces prosecutors to choose between investing resources in preparation for a trial that might never occur or risking going to trial underprepared. And judges too must worry that days they exclude for plea negotiations will later be held nonexcludable, thereby requiring dismissal and reindictment.

Given these concerns, a prosecutor who believes that it might be possible to resolve a case without trial has good reason to negotiate prior to filing an indictment.

B. Preindictment plea bargaining is especially likely in cases involving cooperating witnesses, white-collar offenders, or individuals facing both federal and state charges.

1. In many kinds of cases, successful prosecution depends on the government getting information or testimony from individuals who were in some way involved in the underlying criminal activity. Plea bargaining is a vital tool for securing this kind of cooperation. Sometimes, a prosecutor will have an incentive to indict a potential cooperating witness on every potential charge to create leverage that will induce the witness to cooperate. But that tactic comes at a cost: When the prosecutor then reaches a plea agreement that dismisses some of the charges, that dismissal provides impeachment evidence in the form of a comparison between the initially filed charges the cooperator faced and the charges to which he ultimately pleaded guilty. That comparison can undermine the credibility of the cooperating witness and limit the value of his testimony.

By contrast, a prosecutor who negotiates before indictment does not face this dilemma: She need turn over only the cooperator's actual plea agreement. Additionally, negotiating the agreement before indictment allows the prosecutor more time before finalizing the agreement to develop her evaluation of the cooperator's information, credibility, and ability to

testify. And it allows the cooperator the opportunity to minimize publicity related to his cooperation agreement with the government, particularly in cases where he does not ultimately appear as a witness in court.

2. Preindictment plea negotiations are especially likely in cases involving white-collar offenses. Indictment in these cases is often preceded by actions that notify potential defendants of their exposure. These individuals may have received a target letter informing them they are under investigation. They may be aware of subpoenas or search warrants seeking documents potentially tying them to some criminal offense. Or they may be employees of an entity under investigation. Rather than waiting for an actual indictment, these individuals will often approach prosecutors' offices to see whether the prosecutors are willing to offer an acceptable deal.

In addition, white-collar cases often involve complex transactions or activities that require lengthy investigations. Accordingly, there will be situations where a prosecutor is ready to charge a particular individual with a given offense even as investigation into additional charges or defendants continues. A prosecutor may conclude that justice would best be served by reaching a deal that resolves some or all of the potential charges against some or all of the potential defendants prior to completing the entire investigation.

3. There are many situations in which a particular action can be prosecuted under both federal and state law. *See* John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 Temp. L. Rev. 673, 678 (1999) ("Federal criminal law, which once was

exceptional . . . , now largely duplicates the coverage of state criminal law."). Formal federal-state coordination has increased in recent years, resulting in situations where individuals are being investigated by joint federal-state task forces. *See, e.g.*, *Anti-Human Trafficking Task Force Initiative*, Bureau Just. Assistance, https://tinyurl.com/q8tpq2l (last visited June 18, 2018); *DEA Programs: State & Local Task Forces*, U.S. Drug Enforcement Admin., https://tinyurl.com/ycqxzd37 (last visited June 18, 2018); *Joint Terrorism Task Forces*, FBI, https://tinyurl.com/y7nb8r8f (last visited June 18, 2018). These situations often produce preindictment plea negotiations in one of the two jurisdictions. The bargain is often negotiated after one jurisdiction has brought formal charges but before the other has done so.

Once one jurisdiction has indicted a defendant, the other jurisdiction is relieved of many of the concerns that would otherwise impel it to indict. The defendant will be in custody or under some other form of judicial supervision. And the initial indictment places pressure on the defendant to resolve his potential exposure. So the second jurisdiction may be able to obtain an agreement to plead guilty without having to indict first. The petition now before the Court provides an example of how this dynamic can play out.

C. Preindictment plea negotiations have recently become even more common.

The features just identified have existed in one form or another for some time. But recent developments that limit prosecutors' ability to reduce

a defendant's sentence once formal charges are filed have accelerated the move towards preindictment plea bargaining. Two factors—the proliferation of mandatory minimums and the emergence of guideline sentencing regimes—have played a major part. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, 98 Stat. 1837, 1976-2194 (introducing mandatory minimums for drug, firearm, and sex offenses, as well as for repeat offenders); Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1837, 1987-2040 (creating the U.S. Sentencing Commission along with its guideline sentencing regime).

1. Mandatory minimums prohibit judges from imposing sentences below a given threshold, even if both parties and the judge agree that a lower sentence would best serve the interests of justice. The minimums restrict judicial discretion and override even the Federal Sentencing Guidelines where they conflict. By binding judges to minimum sentences for particular charged offenses, the minimums can limit the range of sentences a prosecutor can offer once she has brought an indictment.

But although mandatory minimum statutes dictate that a particular sentence be imposed if the defendant is charged with and convicted of a particular offense, they do not dictate whether a particular offense must be charged in the first place. Thus, prosecutors who believe that a lower sentence best serves the interests of justice can offer defendants that sentence only by bargaining for a charge for which the desired sentence could be imposed. The result is that effective negotiation is relocated to the preindictment phase.

2. Similarly, guideline sentencing regimes have had a dramatic impact on the incentive to negotiate pleas before indictment. For example, the Federal Sentencing Guidelines provide sentencing ranges for each federal crime, allowing for departures only in limited circumstances. Even after the Guidelines were formally rendered "advisory" by this Court in *United States v. Booker*, 543 U.S. 220, 245-46 (2005), they still exert substantial pull on the sentences defendants actually receive. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016). As one *amicus* has written, despite *Booker*, "most courts have followed the Guidelines anyway." John Gleeson, *The Sentencing Commission and Prosecutorial Discretion: The Role of the Courts in Policing Sentence Bargains*, 36 Hofstra L. Rev. 639, 660 (2008). Guidelines therefore induce preindictment bargaining over which offenses will ultimately be charged, rather than postindictment bargaining as to what sentence will be recommended. *See* 5 Wayne R. LaFave et al., Criminal Procedure § 21.3(a) (4th ed. 2017) ("[T]he federal Sentencing Guidelines provide an incentive to engage in pre-charge plea bargaining with a pre-initial appearance prospective defendant . . . .").

In short, if the Sixth Amendment must be interpreted in light of the "realities of modern criminal prosecution," *United States v. Wade*, 388 U.S. 218, 224 (1967), this Court should be aware that one of those realities is that not only are most cases resolved through plea bargaining, but that a significant and growing number of those pleas are being negotiated and finalized prior to the filing of formal criminal charges.

II. Defense counsel are just as critical to reaching plea agreements in preindictment negotiations as they are in negotiations that occur after indictment.

Whether plea negotiations occur before or after indictment, the presence of counsel is essential. Plea negotiations can involve legal complexities beyond the capability of almost all uncounseled defendants, and providing counsel is in the best interest of all involved parties. It is also eminently feasible to ensure that defendants receive representation.

A. Preindictment plea negotiations are more efficient when prosecutors bargain with represented defendants.

An outside observer might assume that prosecutors would rather negotiate with uncounseled defendants, free from the objections or demands of defense counsel. But in plea negotiations, unlike in interrogations, law enforcement does not benefit from a defendant's waiver of his right to have counsel present. On the contrary, the system works far better when prosecutors negotiate with represented defendants. They are more likely to reach reasonable agreements and to have those agreements stick.

1. Agreements occur only when both parties have an overlapping assessment of the plausible potential outcomes. In the context of plea bargaining, such an assessment requires legal expertise.

Prosecutors, of course, have that expertise. They are "repeat players" with a wealth of skill and experience in negotiating criminal sentences, judging the likely outcomes of trials, and navigating the complexities of sentencing guidelines. *See* Stephanos

Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2532-34 (2004).

By contrast, an unrepresented layperson virtually always lacks expertise in the "intricacies of substantive and procedural criminal law," *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)). A defendant thus "requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

An unrepresented individual often has unrealistic expectations about his prospects at trial. In addition to overestimating his chances of acquittal, he may underestimate some of the burdens of going to trial—for example, substantial time in pretrial detention, the emotional toll of public trial on him and his family, and continued uncertainty about his future. Defense counsel can provide her client with the information necessary to make an intelligent choice between accepting and rejecting a particular plea offer. And she is better positioned than the prosecutor to provide this information because a defendant is more likely to trust a lawyer who is professionally obligated to zealously represent his interests.

Moreover, defense counsel are better positioned than prosecutors to elicit information from their clients that may be critical to reaching an acceptable deal. For example, many defendants may consider immigration consequences to be more important than any other aspect of their conviction. *Cf. Lee v. United States*, 137 S. Ct 1958, 1967-68 (2017). And a defendant with children may care more about where or when he serves his sentence, or avoiding having his spouse indicted as well, than about the precise number

of months he will serve. *See, e.g.*, *Former Enron Chief Financial Officer Andrew Fastow Pleads Guilty to Conspiracy to Commit Securities and Wire Fraud, Agrees to Cooperate with Enron Investigation*, Fed. Bureau Investigation (Jan. 14, 2004), https://tinyurl.com/ycnobmmh; *see also* Dan Markel et al., *Criminal Justice and the Challenge of Family Ties*, 2007 U. Ill. L. Rev. 1147, 1166-67. In *amici*'s experience, defense counsel are instrumental in identifying, prioritizing, and effectively communicating their client's particular interests.

2. The introduction since the 1980s of federal and state sentencing guideline regimes has made the involvement of counsel in plea negotiations even more critical. *See generally* George Fisher, Plea Bargaining's Triumph: A History of Plea Bargaining in America 210-29 (2003) (discussing how the Federal Sentencing Guidelines have altered the plea bargaining landscape). In the federal system, for example, it can be near impossible for an individual facing criminal prosecution to evaluate—absent professional assistance—how the sentence under a particular plea offer compares to his potential exposure were he to forgo the deal and ultimately be convicted. Navigating the Guidelines is a task that has often perplexed *amici* even after years of experience; an inexperienced layperson trying to understand the nuances of the Guidelines stands little chance—and a wrong step might result in a failure to reach a plea

agreement and, consequently, an unduly long period of incarceration.[5]

One example of why defendants need to understand the Federal Sentencing Guidelines is the possibility of a section 5K1.1 motion. One of the few ways out from under the presumptive Guidelines sentence, and even from mandatory minimum sentences, is for the prosecutor to file a motion on behalf of a defendant who has offered "substantial assistance." *See* U.S. Sentencing Comm'n, *Guidelines Manual* § 5K1.1 (2016). An uncounseled defendant may be unaware of this opportunity, and therefore either fail to offer assistance—because he does not know the unique benefits of doing so—or not demand such a motion in return for the assistance he does offer. And he is unlikely to know that the substantial assistance motion must make specific reference to 18 U.S.C. § 3553(e) in order to authorize the sentencing court to depart downward from the guidelines sentence. *See Melendez v. United States*, 518 U.S. 120, 125-26 (1996). Lower courts have found inadequate counseling on section 5K1.1 motions as potential grounds for a *Strickland* claim. *See, e.g.*, *United States v. Leonti,* 326 F.3d 1111, 1120 (9th Cir. 2003).

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[5] *Amici*'s experience is mostly with the Federal Sentencing Guidelines, but at least seventeen states and the District of Columbia also have a system of sentencing guidelines, and seven other states have sentencing commissions. *See Sentencing Guidelines Resource Center: Key Elements*, U. Minn. Robina Inst. Crim. L. & Crim. Just., https://tinyurl.com/y7k6cz5f (last visited June 18, 2018). Navigating the complexity of the state guideline sentencing regimes similarly demands expert assistance.

B. Representation during the preindictment plea negotiation process best serves the systemic interest in the finality of convictions.

For obvious reasons, prosecutors have a strong interest in the finality of the plea deals they reach. So too, of course, do the judges who accept those guilty pleas. But there is significantly more risk that plea deals negotiated without competent counsel will not stand up.

1. Judges may be less likely to accept a defendant's guilty plea in the first place when the plea was reached with an unrepresented defendant. Because a guilty plea waives a suite of constitutional protections under the Fifth and Sixth Amendments, judges may accept a plea only if they are convinced that the defendant has knowingly and intelligently chosen to plead guilty. *See* Fed. R. Crim. P. 11(b). In *amici*'s experience, reaching this conclusion can be significantly more difficult when the defendant did not receive competent advice in negotiations.

In the federal system, for example, the plea colloquy required under Rule 11(b) requires the judge to determine that the defendant understands a long list of factors ranging from the rights being waived, to the possible penalties, to certain collateral consequences of conviction. A judge relies on defense counsel to assist defendants in determining whether to make those waivers and expose themselves to those penalties and consequences. In cases where the defendant lacked counsel during the process of making those decisions*, amici* judges have felt duty bound to postpone consideration of the plea until the defendant receives competent advice.

2. The presence of defense counsel at the plea allocution itself is no substitute for receiving adequate assistance when deciding whether to accept the plea offer. Indeed, it has long been recognized that defense counsel brought in after a plea deal has been reached are very reluctant to "upset the bargains that the defendants had entered without professional assistance." *See* Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L.J. 1179, 1273 (1975). Even when the newly appointed counsel concludes that the client has negotiated a bad deal, persuading the client to back out of the existing deal in the hope of negotiating a better one creates a risk that the prosecutor will instead go to trial and be subject to "either a conviction on more serious counts or the imposition of a more severe sentence." *Lafler v. Cooper*, 566 U.S. 156, 166 (2012).

3. The upshot is that failing to provide defendants with counsel during the plea negotiation process runs the risk of providing defendants with a basis for later attacking their convictions on appeal or in postconviction proceedings. Some of those attacks will succeed, resulting in either a full-scale trial or an additional round of plea negotiations, either of which could have been avoided had defendants been properly counseled in the first place. But even when the attacks ultimately do not succeed, they will consume judicial resources along the way.

To avoid these problems, it was the general practice of *amici* who served as prosecutors to insist that defendants with whom they wished to negotiate first obtain counsel. For indigent individuals, *amici* often assisted them in doing so.

C. Providing counsel in the preindictment plea negotiation process is entirely feasible.

1. Precisely because defense counsel are so essential to plea negotiations, prosecutors already have found ways to ensure that defendants have counsel for preindictment plea negotiations. In cases involving nonindigent defendants, they can refuse to bargain with defendants who do not retain, and negotiate through, counsel.

For indigent defendants, several federal districts already provide counsel prior to indictment in certain circumstances, including during some preindictment plea negotiations. Indeed, some district courts have already recognized that a right to counsel during preindictment negotiations exists under the Sixth Amendment. *See United States v. Wilson*, 719 F. Supp. 2d 1260, 1268 (D. Or. 2010); *cf. Chrisco v. Shafran*, 507 F. Supp. 1312, 1319 (D. Del. 1981) (citing *United States v. Sikora*, 635 F.2d 1175, 1180 (6th Cir. 1980) (Wiseman, J., concurring in part and dissenting in part)).

In particular, many districts follow the Model Criminal Justice Act to provide counsel in circumstances that lead to preindictment plea negotiations. *See* Model Plan for Implementation and Administration of the Criminal Justice Act § IV(A) (2016), https://tinyurl.com/y74jzd6x. These districts provide counsel to witnesses called to testify before a grand jury, for example, or to individuals who have received a target letter. *See, e.g.*, Judicial Council of the Second Circuit, Revised Plan for Furnishing Representation Pursuant to the Criminal Justice Act 5 (2017), https://tinyurl.com/y9bnhn8o (Southern District of New York); Judicial Council of the Ninth

Circuit, General Order No 2: Amended Criminal Justice Act Plan 4 (2015), https://tinyurl.com/yc6waqq3 (Northern District of California). In the District of Idaho, it was the practice of the court to appoint the federal defender upon request of an eligible person who receives a target letter. The District's form target letters directed recipients to contact the federal defender's office if they could not hire an attorney

In *amici*'s experience, all of these districts—and most others across the country—already ensure counsel is present during plea negotiations, even when the negotiations occur preindictment.

2. Nor would providing counsel in preindictment plea negotiations place a significant burden on the states. With regard to the street crimes that form the bulk of state criminal prosecutions, most defendants' first contact with the system comes either after the charges have been filed or when they are arrested and soon thereafter receive a preliminary hearing or arraignment. In all these cases, the Sixth Amendment right to counsel indisputably attaches. *See Rothgery*, 554 U.S. at 198-99. And defendants thus must already receive representation in any plea negotiations. The marginal cost of providing counsel to indigent defendants in more complex state cases where a prosecutor seeks to negotiate a plea before filing charges is outweighed by the benefits of reaching plea agreements that stick.

III. The Sixth Amendment guarantees a right to counsel during preindictment plea negotiations.

1. Defendants undoubtedly have a right to effective assistance of counsel in *post*-indictment plea negotiations. This Court has found violations of the Sixth Amendment when lawyers fail to convey a plea offer to their client, *see Missouri v. Frye*, 566 U.S. 134, 138-39, 145 (2012); give a client faulty advice that causes him to accept a plea offer he would otherwise have rejected, *see Lee v. United States,* 137 S. Ct 1958, 1963-64, 1967-69 (2017); *Padilla v. Kentucky*, 559 U.S. 356, 359, 374 (2010); *Hill v. Lockhart*, 474 U.S. 52, 54-55, 58-59 (1985); or give a client faulty advice that causes the client to reject an advantageous plea offer, *see Lafler v. Cooper*, 566 U.S. 156, 161, 174 (2012). Each of those cases involved an already-indicted defendant, so there was no question that the right to counsel had attached. *See Lee*, 137 S. Ct at 1963; *Lafler*, 566 U.S. at 161; *Frye*, 566 U.S. at 138-39; *Padilla*, 559 U.S. at 359; *Hill*, 474 U.S. at 54.

Nothing in the Court's reasoning regarding the fundamental constitutional problem with convictions obtained based on defective legal advice justifies treating plea negotiations differently when they occur before indictment rather than after. The stakes are identical in both situations, and in both, the defendant faces the same information and experience gap that makes counsel essential. The absence of a formal charge is a distinction without a difference.

This Court's Sixth Amendment jurisprudence has long rejected the idea that "mere formalism" should determine when individuals are entitled to the assistance of counsel. The Court should grant review

here to clarify that the Sixth Amendment right to counsel in a "criminal prosecution" attaches when prosecutors engage a defendant in plea negotiations, regardless when those negotiations occur.

2. This Court should hold that a prosecutor's initiation of plea negotiations marks the beginning of a "criminal prosecution" for purposes of the Sixth Amendment.

Counsel becomes essential at "the point at which '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, and immersed in the intricacies of substantive and procedural criminal law.'" *Rothgery v. Gillespie County*, 554 U.S. 191, 198 (2008) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)). In *amici*'s experience, a prosecutor's decision to enter into plea negotiations is such a point.

Prosecutors do not negotiate plea bargains with mere suspects. A plea offer commits a prosecutor to a final disposition: Acceptance of the offer by the defendant binds the prosecutor to the deal once accepted by a judge. *See* Fed. R. Crim. P. 11(e). The prosecutor speaks with the authority of the government and proposes to "settle the accused's fate," *United States v. Ash*, 413 U.S. 300, 310 (1973) (quoting *United States v. Wade*, 388 U.S. 218, 224 (1967)). And far from being a phase of the criminal investigation, the plea offer is premised on a prosecutor's firm belief that the defendant is guilty—it is unquestionably a phase of the prosecution.

Thus, there can be no doubt that the adversarial posture between government and individual has solidified by the time a prosecutor offers a plea bargain. Indeed, under standard rules of professional conduct, she can do so only if she reasonably believes there is enough evidence to support a conviction at trial. *See* Criminal Justice Standards for the Prosecution Function § 3-5.6(g) (Am. Bar Ass'n 4th ed. 2015); *cf.* U.S. Dep't of Justice, U.S. Attorneys' Manual §§ 9-27.330, .430 (2018); Model Rules of Prof'l Conduct r. 3.8(a) (Am. Bar Ass'n 2018). By the time a prosecutor is willing to offer a defendant a plea deal, the government has long since "crossed the constitutionally-significant divide from fact-finder to adversary." *United States ex rel. Hall v. Lane*, 804 F.2d 79, 82 (7th Cir. 1986); *see also United States v. Gouveia*, 467 U.S. 180, 187-88 (1984); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892 (3d Cir. 1999) (en banc).

3. The failure of lower courts to recognize the applicability of the Sixth Amendment to preindictment plea negotiations demands this Court's intervention.

Despite this Court's rejection of "mere formalism" in analyzing the Sixth Amendment right to counsel, lower courts—including the Sixth Circuit here—have misread *Kirby* to create a "bright line test" under which "the Sixth Amendment right to counsel does not attach until after the initiation of formal charges." Pet. App. 36a (Clay, J., concurring in the judgment only) (quoting *United States v. Moody*, 206 F.3d 609, 614 (6th Cir. 2000)); *see also* Pet. 20 (collecting cases from seven circuits who similarly have "treated the initiation of judicial proceedings as a hard-and-fast

line, before which the right to counsel can never attach").[6]

This interpretation is not just wrong; it is illogical. What the lower courts are saying is that, for constitutional purposes, "criminal prosecutions" cannot begin until there has been a formal charge. But as this Court has recognized, plea bargaining increasingly is the primary locus in which prosecutors and defendants interact to determine both the offense of conviction and the punishment. In cases where the plea negotiation concludes before a formal charge has been filed, the lower courts are in effect holding that the "criminal prosecution" is over before it has begun. That cannot be right.

When this Court pointed to "formal charge, preliminary hearing, indictment, information, or arraignment" as beginnings to "criminal prosecutions" for Sixth Amendment purposes, it was simply describing the conventional way prosecutions then began. *See Kirby*, 406 U.S. at 689-90 (plurality opinion). But today, as *amici* have described, many criminal prosecutions begin, and are effectively resolved, prior to those events. Thus, the *Kirby* list, if it were ever exhaustive, is now badly anachronistic.

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[6] While many of the courts of appeals err on this issue, the mistake is by no means universal. Three circuits have split with the majority of their sister circuits and suggested that the filing of formal charges is not the *sine qua non* for the right to counsel. *See* Pet. 21 (collecting cases). Several district courts have also taken this view. *See id.* at 21-22.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX A

LIST OF *AMICI CURIAE*

U.W. Clemon served as a Judge on the U.S. District Court for the Northern District of Alabama from 1980 to 2009, serving as Chief Judge from 1999 to 2006.

W.J. Michael Cody served as United States Attorney for the Western District of Tennessee from 1977 to 1981 and as the Attorney General of Tennessee from 1984 to 1988.

Nancy Gertner served as a Judge on the U.S. District Court for the District of Massachusetts from 1994 to 2011.

John Gleeson served as an Assistant U.S. Attorney in the Eastern District of New York from 1985-1994. During that time he served variously as Chief of Appeals, Chief of Special Prosecutions, Chief of Organized Crime, and Chief of the Criminal Division. He served as a Judge on the U.S. District Court for the Eastern District of New York from 1994 to 2016. From 1999 to 2008, he was a member (and from 2005 to 2008 he was the Chair) of the Defender Services Committee of the Judicial Conference of the United States.

Alex Little served as an Assistant U.S. Attorney in Washington, D.C. and the Middle District of Tennessee from 2007 to 2013.

Wendy J. Olson served as a Trial Attorney in the Criminal Section of the Civil Rights Division of the United States Department of Justice from 1992 to 1997. From 1997 to 2010, she served as an Assistant U.S. Attorney for the District of Idaho. From 2010 to

2017, she served as United States Attorney for the District of Idaho.

Kevin Sharp served as a Judge on the U.S District Court for the Middle District of Tennessee from 2011 to 2017, serving as Chief Judge from 2014 to 2017.

Joyce Vance served as an Assistant U.S. Attorney for the Northern District of Alabama from 1991 to 2009. During that time, she served variously as a Criminal Assistant, an Appellate Assistant, and as Appellate Chief. From 2009 to 2017, she served as United States Attorney for the Northern District of Alabama.

Edward M. Yarbrough served as an Assistant District Attorney General for Davidson County, Tennessee in 1976 and as United States Attorney for the Middle District of Tennessee from 2007 to 2010.