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* CENTER ON WRONGFUL CONVICTIONS AND LEGAL AID SOCIETY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Center on Wrongful Convictions ("CWC") is part of Northwestern Pritzker School of Law's Bluhm Legal Clinic. Dedicated to identifying and rectifying wrongful convictions, the CWC's clinical faculty and students represent clients with claims of actual innocence. The CWC also studies systemic problems in the application of criminal constitutional law and the functioning of the criminal justice system, advocates for legal reform, and works to raise public awareness of the prevalence, causes, and social costs of wrongful convictions. Since its launch in 1999, the CWC has achieved the exoneration and/or release of at least 50 innocent clients, including several whose cases involved false guilty pleas.

The Legal Aid Society conducts indigent criminal defense representation for the State of New York. Like CWC, it represents clients who will be directly affected by this Court's decision to review this case. Both *amici* have an interest in ensuring that this Court clarifies the law in this area and extends the Sixth Amendment right to counsel to plea negotiations that occur before formal charging.

INTRODUCTION

The Sixth Circuit majority purported to find a bright-line rule against preindictment attachment of the Sixth

1. Pursuant to 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, after timely notification, all parties consented to the filing of this brief.

Amendment right to counsel, relying on this Court's decisions in *Kirby v. Illinois*, 406 U.S. 682, 689–90 (1972), and *United States v. Gouveia*, 467 U.S. 180, 192–93 (1984). But those opinions—which dealt with contacts between defendants and law enforcement, rather than plea bargain negotiations or any other substantive, post-investigation involvement by a prosecutor—explain generally that the right attaches where "the government has committed itself to prosecute," *Kirby*, 406 U.S. at 689, and when the defendant is confronted with the government's "expert adversary" in circumstances which "might well settle the accused's fate," *Gouveia*, 467 U.S. at 189 (citation omitted).

As this Court recently recognized, post-indictment plea negotiations meet these criteria and require the attachment of this right. But the Court has yet to consider whether this right can be extended to plea negotiations that occur preindictment. Because the same concerns are implicated whether the plea negotiations occur pre- or post-indictment, the answer should be the same, and this case is an ideal vehicle to resolve this important issue.

Preindictment negotiations are no less important than post-indictment negotiations. Indeed, preindictment plea negotiations have become more common in recent decades, as have joint federal-state task forces which negotiate plea agreements with defendants after they have been indicted on state charges but before indictment on federal charges. Because ill-equipped defendants can be induced to make unwarranted and even false guilty pleas preindictment, proper representation of defendants during preindictment plea bargaining is essential.

If this right does not attach preindictment, then Turner and all those like him who received ineffective assistance (or no assistance at all) cannot even try to prove they are entitled to relief. If it does, then Turner and similar defendants very likely can try to so prove. On this key issue, the Circuit Courts are in conflict. And, citing the obvious injustice of a bright-line rule against preindictment attachment, even lower court judges ruling against Turner in this case have called on this Court to revisit this question and clarify this important area of law.

ARGUMENT

I. This Question Is One Of Importance

Preindictment plea negotiations have become more prevalent and problematic in recent decades. *See United States v. Moody*, 206 F.3d 609, 617 (6th Cir. 2000) (Wiseman, J. concurring); David N. Yellen, *Two Cheers For a Tale of Three Cities*, 66 S. Cal. L. Rev. 567, 569-70 (1992). Both courts and commentators have noted the problems caused in our criminal justice system by preindictment negotiations without the benefit of competent counsel. *See* 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). Although precise figures are hard to come by, such negotiations seem to account for at least 20% of federal criminal cases. *See* Petition For Writ of Certiorari, 4 n.1.

If such preindictment negotiations lead to a plea agreement, prosecutors typically bypass the otherwise normal and constitutionally required indictment process by obtaining a waiver and proceeding instead under a

separate procedure using an information as the charging document. *See id*. This underscores the formal nature of such plea agreements, which are plainly part of the adjudicative rather than investigative process—as are the plea negotiations leading directly to this alternate formal procedure.

Part of the reason for this rise in preindictment plea negotiations is the increased use of joint federal-state task forces, leading to situations where, as here, federal prosecutors will negotiate a plea after state indictment but prior to federal indictment for the same offense, investigated by the same law enforcement officers.[2] This post-*Kirby,* post-*Gouveia* development has increased the

2. *See, e.g.*, *United States v. Morris*, 470 F.3d 596, 598–99 (6th Cir. 2007) (federal prosecutors indicted defendant for the same charges in federal court that state had charged him with when he rejected state's plea offer, even though he had been unable to fully communicate or plan a defense strategy with appointed counsel in crowded, un-private courthouse "bull pen" cell); *United States v. Mills*, 412 F.3d 326, 326–27 (2d Cir. 2005) (after defendant was charged by state authorities, federal prosecutors indicted defendant for the same firearms charge based on statements obtained from defendant without presence of counsel in investigation of state law charge); *United States v. Red Bird*, 287 F.3d 709, 711–12 (8th Cir. 2002) (after defendant was charged with rape in Rosebud Sioux Tribal Court, federal prosecutors indicted defendant for the same alleged offense based on statements and DNA evidence obtained without defendant's counsel present); *United States v. Mapp*, 170 F.3d 328, 332–34 (2d Cir. 1999) (defendant indicted on federal charges after related state law charges were dismissed "due to evidentiary and speedy trial problems"); *United States v. Martinez*, 972 F.2d 1100, 1101–02 (9th Cir. 1992) (defendant indicted on federal firearm charges after being arrested on state law firearm charges that were later dropped).

frequency in which prosecutors have directly engaged in plea negotiations prior to formal indictment on the second charge. It has also created increasingly frequent situations where some lower courts have declined to recognize a Sixth Amendment right, even though a "criminal prosecution" under the Sixth Amendment has clearly begun and plea negotiations have occurred on the charge in question.

At the same time, we know that "wrongful guilty pleas" exist. Experience has shown that criminal defendants can be pressured, tricked, or otherwise persuaded to agree improvidently to plead guilty; to plead guilty to inappropriately serious charges; to accept inappropriately severe sentences; or even to plead guilty when they are innocent. According to data compiled by the University of California Irvine, University of Michigan Law School, and Michigan State University College of Law, guilty plea exonerations have been on the rise in recent years and represent a significant fraction of all exonerations. [3] In 2015 alone, 65 different defendants who had pled guilty were later exonerated, a record number for a given year, representing 43% of that year's exonerations.[4] The next year, 2016, saw that record broken, with 74 different

3. "Exonerated" defendants are those who had "all legal consequences" of their conviction relieved "through a decision by a prosecutor, a governor or a court, after new evidence of his or her innocence was discovered." National Registry of Exonerations, *Exonerations in the United States, 1989–2012,* http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf, at 6.

4. *Id.*, *Exonerations in 2015*, http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf.

guilty plea exonerations, representing over 44% of 2016 exonerations.[5] While 2017 saw a decline in all exonerations and guilty plea exonerations, there were still 38 wrongful guilty pleas, representing 27% of that year's exonerations.[6] This is not a rare occurrence.

The majority of these recent wrongful guilty pleas stemmed from drug cases, although some cases involved crimes as serious as child sex abuse and homicide. *See id.* These data suggest that defendants often decide to plead guilty out of fear of lengthy pretrial detention or the risk of a long sentence if convicted. In some drug cases, incorrect field drug tests yielding false positives played a significant role.[7]

These data comport with academic reviews of exoneration cases which find three main reasons why innocent suspects nonetheless plead guilty: (1) in minor cases, to obtain quick release from pretrial detention because of pressing demands of job or family; (2) in cases on remand after appeal, to obtain quick release with a "time served" or similar deal; and (3) in serious cases, to avoid the risk of severe sentences and to gain the benefit of a sharply reduced sentence. John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants*

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5. *Id.*, Exonerations in 2016, *http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf.*

6. *Id.*, *Exonerations In 2017*, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7bFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7d&FilterField1=Exonerated&FilterValue1=8_2017.

7. *Drug Cases,* http://www.law.umich.edu/special/exoneration/Documents/Drug_Cases_2016.pdf, at 1–2.

Who Plead Guilty, 100 Cornell L. Rev. 157, 173–181 (2014) (recounting examples); *see also* Andrew D. Leipold, *How The Pretrial Process Contributes To Wrongful Convictions,* 42 Am. Crim. L. Rev. 1123, 1153–54 (2005) (discussing how the prosecution's offer of a "deep discount" to a severe proposed sentence can induce innocent but risk-averse defendants to plead guilty).

This third reason becomes particularly important once one considers just how severe the penalty can be for a defendant who risks going to trial on federal felony charges, especially in light of mandatory minimum sentences and the otherwise lengthy sentences provided for under the U.S. Sentencing Guidelines. One recent study drawing on U. S. Sentencing Commission data concluded that for the offense of drug trafficking, the average sentence after trial was more than two-and-a-half times longer than the sentence imposed after a plea. *See The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It, National Association of Criminal Defense Lawyers*, www.nacdl.org/trialpenaltyreport ("NACDL, Trial Penalty"), at 20. A similar study concluded that for all felonies, the average sentence for federal defendants who go to trial is three times higher than those who plead to similar charges. *See* Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. Mich. J.L. Reform 345, 347–48 (2005).

These dramatically higher penalties exacerbate the potential for wrongful guilty pleas, which can occur with disturbing frequency. This is particularly true for those cases in which the evidence against an innocent defendant may nonetheless appear so damning that conviction at trial

is a strong possibility—such as false confession cases.[8] Indeed, scholars have estimated that anywhere from 1.6% to 27% of defendants who plead guilty may be factually innocent—and the National Registry of Exonerations confirms that a full 25% of exonerees who falsely confessed also entered false guilty pleas.[9]

Given these realities, it is beyond question that counsel is needed to provide defendants with vital assistance during plea negotiations—regardless of whether those negotiations occur pre- or post-indictment. Defense counsel can advise their clients during plea negotiations about the prospects for release pending trial; the strength of both the government's case and their defense; the odds of conviction; the possibility of securing a more favorable plea offer; the range of possible sentencing outcomes after trial; and the availability and nature of any mitigation case that the client might present following conviction. Indeed, counsel's specialized ability to help clients navigate these sometimes complex legal considerations—*e.g.*, calculating the possible sentencing guidelines range—is crucial to avoid the risk of significant injustice. Without the aid of counsel to explore the degree of actual risk that trial would pose, an uncounseled defendant may simply throw

8. *See Corley v. United States.*, 556 U.S. 303, 320-21 (2009) (internal citations omitted) (research shows that the pressures of custodial interrogation "can induce a frighteningly high percentage" of defendants to falsely confess to crimes they did not commit).

9. NACDL, Trial Penalty at 17; *see also* Nat'l Registry of Exonerations, *http://www.law.umich.edu/special/exoneraDion/Pages/detaillist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Group&FilterValue1=P*; Donald A. Dripps, *Guilt, Innocence, & Due Process of Plea Bargaining*, 57 Wm. & Mary L. Rev. 1343, 1360–63 (2016).

up his or her hands and agree to plead guilty—even if factually innocent—to avoid the perceived greater risk of going to trial.

Crucially, these complex legal considerations are just as acutely present when plea negotiations occur prior to indictment. Once the government extends a plea offer, a pre-indictment defendant—even a factually innocent one—may well feel the same pressures and perceive the same risks as a post-indictment defendant. In turn, they will undertake the same decision-making process as a defendant who is made a plea offer post-indictment, weighing the strength of the State's case, the risk of pre-trial detention, the availability of a more favorable plea offer, and the availability of mitigation evidence. The same legal advice is needed to weigh these factors effectively. Without such advice, an intolerable risk of false guilty pleas will persist.

II. This Important Question Has Deeply Split Lower Courts

Below, the *en banc* court reluctantly interpreted as exhaustive the language in *Kirby* and *Gouveia* listing "formal charge, preliminary hearing, indictment, information, or arraignment" as potential triggers of the Sixth Amendment right to counsel. *See Turner v. United* States, 855 F.3d 949, 952–53 (6th Cir. 2018). If that is the rule, then preindictment plea negotiations *can never* trigger attachment of the right, and defendants like Turner cannot even attempt to establish the elements of ineffective assistance of counsel. If that is not the rule, then such negotiations *could* trigger attachment—and, given the more general language from *Kirby* and *Gouveia*

relied on by the dissent below, very likely *would* do so. Defendants like Turner would then be allowed to attempt to establish the ineffective assistance elements. The answer to this important question, however, varies from circuit to circuit.

Five circuits have held that the right can never attach preindictment; and two circuits have held that it can attach preindictment, with another two circuits noting in *dicta* that the right can attach preindictment. Further, several district court decisions have recognized preindictment attachment, specifically in the context of preindictment plea negotiations.[10]

First, five Circuits have expressly read *Kirby* and *Gouveia* as announcing a bright-line rule preventing the Sixth Amendment from attaching prior to indictment. *United States v. Hayes*, 231 F.3d 663, 669–71 (9th Cir. 2000) (*en banc*) (right did not attach for preindictment interrogation by police); *Mapp*, 170 F.3d at 334 (right did not attach when jail plant extracted admissions from suspect prior to indictment on federal charges); *United States v. Lin Lyn Trading*, 149 F.3d 1112, 1117 (10th Cir. 1998) (right did not attach preindictment for improper seizure of record of communications between defendant and his attorney because it occurred preindictment); *United States v. Heinz*, 983 F.2d 609, 611–12 (5th Cir. 1993) (right did not attach preindictment for taping of

10. The *en banc* majority's assertion, 885 F.3d at 954, that there is no circuit split in this case is incorrect for this reason. The split between those holding that the right can never attach preindictment (thus foreclosing relief for Turner) and the circuits holding that the right can attach preindictment (thus making relief available) requires this Court to resolve this divide.

conversation between one defendant represented by counsel and a co-defendant); *United States v. Sutton*, 801 F.2d 1346, 1365–66 n.14 (D.C. Cir. 1986) (right did not attach preindictment for taping of interview with represented defendant).

Meanwhile, other Circuits have adopted a more flexible approach. The Third Circuit has held *en banc* that the defendant's Sixth Amendment right to counsel attached after he was arrested and held in jail for more than a week, but *prior* to the filing of an information by the district attorney, and prior to arraignment. *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892–93 (3d Cir. 1999) (*en banc*). Like the five circuits cited above enforcing the bright-line rule, the Third Circuit looked to this Court's decisions in *Kirby* and *Gouveia*. But, in stark contrast to those circuits, the Third Circuit relied on the more general language in those opinions about the underlying purposes of the right to counsel to hold squarely that the right could attach prior to the filing of formal charges or a judicial hearing. *Id.* at 892. Specifically, the *en banc* court ruled that the right "also may attach at earlier stages," when "the accused is confronted … by the procedural system, or by his expert adversary … where the results of the confrontation might well settle the accused's fate." *Id.* (quotation omitted).

As a result, when a Third Circuit case arose later raising the precise factual scenario here—*i.e.*, adequacy of defense counsel during a preindictment plea negotiation—neither the government nor the Third Circuit questioned the applicability of the Sixth Amendment right to counsel. Instead, the case was decided on the merits of the *Strickland* ineffective assistance of counsel claim. *See*

United States v. Giamo, 665 F. App'x 154, 157 (3d Cir. 2016) ("Here, the *only issue* before the Court" is whether defendant met his *Strickland* burden) (emphasis added).[11]

The Seventh Circuit has also held that the right may attach preindictment, in what is arguably a third variation of the rule. It held that prior to a formal charge, there is simply a *rebuttable presumption* against attachment of the right, which may be rebutted by showing that the government had crossed the line from "fact-finder to adversary." *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992). Unlike the Sixth, Second, Fifth, Ninth, Tenth, and D.C. Circuits, and like the Third Circuit, the Seventh Circuit concluded that the language in *Kirby* and *Gouveia* about "formal charge, preliminary hearing, indictment, information, or arraignment" was an illustrative but not necessarily exhaustive list. It pointed to this Court's decision in *Maine v. Moulton*, where the majority wrote, "*Whatever else it may mean,* the right… means *at least* that [the right attaches]… at or after the time that judicial proceedings are initiated." *United States ex. rel. Hall v. Lane*, 804 F.2d 79, 82 (7th Cir. 1986) (citation omitted).

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11. The Sixth Circuit *en banc* majority below, 885 F.3d at 953–54, stated that *Giamo* merely "implied" (rather than squarely held) that the Sixth Amendment applied to the preindictment plea negotiations in that case. But the *en banc* majority failed to cite the Third Circuit's prior ruling in *Matteo*, which squarely *held* that the right to counsel can attach preindictment. Such a holding is clearly a sharp contrast to those other circuits, whose rulings, as explained above, would clearly preclude relief for Turner. And *Matteo* specifically included any situation where the "expert adversary," the prosecutor, confronted the accused in a way that could "settle the accused's fate." This would clearly apply to preindictment plea bargaining, and it explains why neither the prosecutor nor the court in *Giaimo* raised any objection to Sixth Amendment attachment and the need for a full *Strickland* analysis.

Further underscoring the differences among the circuits are two other circuits which have rejected, *in dicta,* any bright-line rule. The First Circuit recognized the "possibility" that the right could attach before formal charges, indictment, or arraignment, where the "government had crossed the constitutionally significant divide from fact-finder to adversary." *Roberts v. Maine*, 48 F.3d 1287, 1290–91 (1st Cir. 1995). And the Fourth Circuit has also questioned the existence of a bright-line rule. *United States v. Burgess*, No. 96-4505, 1998 WL 141157, at *1 (4th Cir. Mar. 30, 1998) (per curiam) ("the Supreme Court has refused to draw a line at indictment to indicate the onset of criminal proceedings").

Finally, several district courts have squarely held—specifically in the context of preindictment plea negotiations—that the government's offer of a plea bargain is proof enough of a commitment to prosecute, equivalent to a formal charge for Sixth Amendment purposes. *United States v. Busse*, 814 F. Supp. 760, 763 (E.D. Wis. 1993); *Chrisco v. Sharan*, 507 F. Supp. 1312, 1319 (D. Del. 1981).

III. Lower Courts Have Expressed Widespread Discomfort With A Bright-Line Rule And Have Urged This Court To Take Up This Question

Even some of the courts adopting the bright-line rule have done so under protest, raising concerns about the unfairness of such a rule. The Ninth Circuit *en banc* majority opinion admitted it was "somewhat queasy" about this result, inasmuch as it allowed the prosecution "to have its cake and eat it too" by doing some things (*e.g.*, take a deposition) that normally do not occur until after formal charge, while doing other things (interrogation outside the

presence of counsel) which can only occur before charges are filed. *Hayes*, 231 F.3d at 675–76. A four-judge dissent went further, rejecting the bright-line rule, and correctly distinguishing *Kirby* and *Gouveia*, which involved *police* interrogations, from *Hayes*, which involved the *prosecutor* "taking and preserving actual trial testimony" through a deposition. *Id.* at 678–81 (Reinhardt, J., dissenting); *see also* Mulroy, *supra*, 92 Wash. L. Rev. at 235–36 (drawing precisely this distinction and proposing a rule setting attachment at the involvement of the prosecutor).

Similarly, the Sixth Circuit judges have repeatedly expressed discomfort with a perceived, rigid, unfair rule, and have expressly called upon this Court to revisit this question. In *Moody*, a Sixth Circuit panel complained that while the prosecutor was "committing himself to proceed with prosecution" by offering a specific plea deal, the court nonetheless felt constrained to enforce a rule that was "a mere formality," a "triumph of the letter over the spirit of the law" that "exalt[ed] form over substance" and "requires that we disregard the cold reality that faces a suspect in preindictment plea negotiations." *United States v. Moody*, 206 F.3d 609, 615–16 (6th Cir. 2000); *see also id.* at 618 (Wiseman, J., concurring) ("I would urge the Supreme Court to reconsider its bright line test"). The rule, it cautioned, "raises the specter of the unwary defendant agreeing to surrender his right to trial in exchange for an unfair sentence without the assurance of legal assistance to protect him." *Id.* at 615.

Indeed, given the strict requirement that the prosecution prove that such waivers represent the "intentional relinquishment … of a known right or privilege," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), this scenario seems more than a specter. By the time a

plea hearing judge inquires as to this during allocution, concessions and admissions will have been made, and the bell cannot be unrung.

And, of course, multiple judges of the *en banc* court below repeatedly echoed these concerns. Judge Bush "express[ed] doubts about the precedents that bind us," and recounted what he considered "significant evidence" that an original understanding of the Sixth Amendment would have included a right to counsel in Turner's case. *Turner*, 855 F.3d at 965–66. Judge Clay wrote, "the right to counsel *should* attach during preindictment plea negotiations." Doing otherwise would let prosecutors exploit uncounseled defendants and leave counseled defendants without an ineffective assistance of counsel claim. *Id.* at 976 (citing Mulroy, *supra*, 92 WASH. L. REV. at 213). Judge White wrote that she would find the above two concurring opinions and the dissent "persuasive on the merits" if she felt "unconstrained" by this Court's precedent. *Id.* at 977. And the dissent explained at length why the majority's interpretation of this Court's language in *Kirby* and *Gouveia* would not only lead to unfair results, but was simply incorrect as a matter of case law interpretation. *Id.* at 977–84.

IV. Developments Since *Kirby* And Its Progeny Underscore The Need For This Court To Address This Issue

A. New Situations Raised By This Case Not Addressed In Prior Decisions

The majority below relied on the oft-quoted language about formal charge or appearance before a judge from *Kirby*, *Gouveia*, and *Moran v. Burbine* to deny Turner

relief. But all those cases involved interactions between *law enforcement* and defendants in various interrogation settings. They reflected this Court's natural reluctance to interfere in the law enforcement investigative process. *See Kirby*, 406 U.S. at 684; *Gouveia*, 467 U.S. at 189; *McNeil v. Wisconsin*, 501 U.S. 171, 173 (1991); *Maine v. Moulton*, 474 U.S. 159, 163–65 (1985); *Moran v. Burbine*, 475 U.S. 412, 424 (1986). Devoid of any involvement by the prosecutor, these interactions are harder to classify as an initiation of a "criminal prosecution" against an "accused" under the Sixth Amendment.

At the time of those cases, this Court had no occasion to consider situations in which a *prosecutor* would be communicating with the defendant about the substance of the charges, which more appropriately comes within the language of the Amendment. *See* Mulroy, *supra*, 92 Wash. L. Rev. at 241–42 (proposing a rule providing for attachment when the prosecutor has contact with the defendant about the substance of the case, directly or through counsel). This case presents such a first instance.

Similarly, in the decades since *Kirby*, there had been no occasion to examine Sixth Amendment attachment during plea negotiations, including ineffective assistance of counsel during such negotiations, for the simple reason that it was not until 2012 that this Court held that an ineffective assistance theory could even apply to plea negotiations (albeit, post-indictment). *Missouri v. Frye*, 566 U.S. 134, 144 (2012); *Lafler v. Cooper*, 566 U.S. 156, 174 (2012). Indeed, the Court's rulings were based on the "simple reality" that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Frye*, 566 U.S. at 144 (citation omitted); *see also Lafler*, 566 U.S. at 170 (calling the modern criminal justice

system "for the most part a system of pleas, not a system of trials.").

Such a pragmatic approach supports extending this same right to effective counsel to preindictment plea negotiations. The reasoning behind *Frye* and *Lafler* applies with equal force whether these negotiations take place the day before or the day after the indictment. In either circumstance, receiving "[a]nything less [than effective counsel]… might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." *Frye*, 566 U.S. at 1408 (internal quotations and citations omitted).[12]

B. Discovery Of "Original Public Meaning" Evidence

Because this Court's opinions containing the "formal charge" language did not deal with preindictment plea

12. Although this brief focuses on the issue of preindictment attachment of the right to counsel, a similarly practical approach counsels against the application of the "dual sovereign" rule to the right to counsel. The Sixth Circuit adopted below a rule barring attachment of the Sixth Amendment right to counsel to a federal prosecution prior to federal indictment, even when the arrest and investigation were by a joint federal-state task force and the defendant had already been indicted on the related state charge. Such a rule would allow a state prosecutor to deliberately violate a defendant's Sixth Amendment rights post-state indictment (*e.g.*, by deliberately eliciting incriminating information from the defendant outside the presence of defense counsel), only to pass on any ill-gotten information to cooperating federal law enforcement, which would then be empowered to use the illicit information at trial. This kind of "silver platter" abuse is already deemed unconstitutional in the Fourth Amendment context. *See Elkins v. United States*, 364 U.S. 206, 223 (1960).

bargains, the Court lacked any opportunity to consider the original public meaning of the terms "criminal prosecutions" and "accused." This Court should grant *certiorari* to do so now, for such an analysis would point away from a bright-line rule drawn at indictment. As Judge Bush noted in his concurrence below, the wording of the Crimes Act of 1790 suggests that at the time of the Founding, one could be "accused" without being "indicted." *Turner*, 885 F.3d at 961. The Crimes Act was drafted by the First Congress, whose membership overlapped significantly with the Framers and whose legislation is often given authoritative weight by this Court. *See*, *e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).

For some purposes, such as the right to subpoena witnesses, the Act applied to those who had been "accused *or* indicted." Crimes Act of 1790, 1st Cong. § 29 (2d Sess. 1790) (emphasis added). The disjunctive here suggests that not all "accused" persons were indicted. For other purposes, such as the right to have a list of jurors and witnesses, the Act applied to those who had been "accused *and* indicted." *Id.* (emphasis added). This alternate phrasing likewise points to the ability of a person to be "accused" without being indicted. If the two terms were coextensive, the use of both in this conjunctive context would be superfluous. This Court has "cautioned against reading a text in a way that makes part of it redundant." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 669 (2007).

One might speculate that the First Congress, unfamiliar with the substantial preindictment proceedings common today, was simply using the words loosely, without much thought as to any possible distinction between the

two terms. But Chief Justice Marshall himself, sitting as a circuit judge in the treason trial of Aaron Burr, expressly considered and rejected this interpretation; gave decisive weight to the difference between the two phrasings; and interpreted this language to distinguish between "accused" and "indicted." In Burr's trial, the prosecutor resisted Burr's attempt to subpoena President Jefferson, arguing that this right attached only after indictment. *United States v. Burr*, 25 F. Cas. 30, 32–33 (C.C. Va. 1807). Citing the above-quoted Crimes Act language, Justice Marshall rejected this argument, holding that the right to subpoena, but not the rights to obtain jury and witness lists, applied to someone not yet indicted. *Id.* In doing so, he explicitly noted that the terms "accused" and "indicted" could "apply to different stages of the prosecution." *Id.*

Moreover, Justice Marshall concluded that this right to a subpoena even before indictment was not only statutory but constitutional, stemming from what is now the Sixth Amendment. *Id.* Since the Sixth Amendment right to "compulsory process for obtaining witnesses" also applies only to an "accused" in "criminal prosecutions," this ruling supports the conclusion that these terms also can apply preindictment for purposes of the Sixth Amendment right to counsel.

V. The Sixth Circuit's Rule Will Lead To Unjust Consequences

If the ruling below is left to stand, prosecutors could engage in hard bargaining directly with uncounseled defendants, taking advantage of the imbalance in training and experience to extract unduly harsh plea deals. *See Moody*, 206 F.3d at 615 (raising precisely this concern).

Nothing currently stops prosecutors from strategically delaying the filing of formal charges so that they could achieve this result. *See id.* Indeed, prosecutors can, fully consistent with the Sixth Circuit's view of the Sixth Amendment, deliberately time an "exploding offer" to expire upon indictment (exactly as they did in this case), thus ensuring that the defendant has no protection against ineffective assistance—indeed, no right to counsel at all. The assistance of counsel thereafter would be superfluous, if not meaningless, under such a regime.

Defense lawyers would also have less incentive to be diligent during preindictment plea negotiations. They may have an ethical obligation to zealously defend their client's interests, which is rarely enforced, but little attention would be paid to negligent counseling during plea negotiations if no court will ever review it. And district court judges would not be able to appoint counsel for preindictment plea negotiations even if they thought it warranted, because district courts can do so only when the defendant has a right to counsel under the Sixth Amendment or another provision of law. *See* 18 U.S.C. § 3006A(a)(1) (2012).

Most troublingly, if no right to counsel exists preindictment, nothing would stop a prosecutor dealing with a defendant represented by counsel from bypassing defense counsel deliberately so as to be able to pressure the defendant one-on-one in plea negotiations. To be sure, such a prosecutor might risk discipline from the local bar for ethical violations due to the "no contact rule." *See Heinz*, 983 F.2d at 615–18. But a defendant so victimized would lack any redress under the constitution.[13]

13. At any rate, such local bar discipline is by no means frequent or certain and normally would involve nothing more than

Indeed, the "no-contact" ethical rule serves as a useful analogy in deciding when the right to counsel attaches. This Court has drawn such analogies in the past when deciding constitutional issues. In *Frye*, this Court sought guidance from ABA recommendations and state bar professional standards for attorneys when it decided how to apply the Sixth Amendment to the factual context of plea negotiations. *Frye*, 566 U.S. at 145–46.

Prosecutors from nearly all states[14] and the federal government[15] are bound by some version of the ABA's Model Rule 4.2, which mandates that "a lawyer shall not communicate the subject of representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law." Model Rules Of Prof'l Conduct Rule 4.2 (Am. Bar Ass'n 2014). The purpose of the rule is similar to the purpose behind the Sixth Amendment right to counsel, which includes to "protect[] a person … against possible overreaching by other lawyers." *Id.* Comment 1.

Allowing a prosecutor to deliberately bypass defense counsel and contact the defendant directly prior to indictment, as the Sixth Circuit's rule does, runs counter

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a reprimand. *See* Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward A Revised 4.2 "No-Contact" Rule*¸ 60 Hast. L. J. 797, 799 (2009). It is hardly a substitute for Sixth Amendment protection and would be of no utility at all where the defendant was represented by ineffective counsel.

14. *See Montejo v. Louisiana*, 556 U.S. 778, 790 (2009).

15. *See* Offices of the U.S. Attorneys, United States Attorneys' Manual § 296, https://www.justice.gov/usam/criminal-resource-manual-296-communications-represented-person-issues .

to this basic rule of legal ethics. Indeed, the Second Circuit reasoned similarly in a case involving a prosecutor who personally interrogated a defendant represented by counsel outside the presence of defense counsel. The court construed the "no-contact" rule to apply preindictment. Otherwise, the court reasoned, the prosecutor "could manipulate grand jury proceedings to avoid [the rule's] encumbrances." *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988); *see also United States v. Talao*, 222 F.3d 1133, 1139 (9th Cir. 2000) (explaining that the prosecutor's ethical duties begin "at the latest" at indictment, and may begin beforehand). An analogous concern argues for attachment of the right during plea negotiations regardless of whether they are pre- or post-indictment. Such a rule would harmonize the prosecutor's ethical and constitutional duties.

Significantly, the no-contact rule allows a prosecutor to contact a party under some circumstances prior to "the commencement of criminal or civil proceedings," but only for "investigative activities." Model Rules Of Prof'l Conduct Rule 4.2m, Comment 5. The ethics standards here draw the same line between "investigative" acts (no protection) and "adversarial" acts (full protection) as drawn by this Court regarding the Sixth Amendment right to counsel. *Compare id. with Burbine*, 475 U.S. at 430 (the right attaches "when the government's role shifts from investigation to accusation"). Among the factors weighing in favor of applying the rule preindictment are the presence of custodial interrogation, the initiation of administrative proceedings, and the presence of a grand jury investigation of the suspect. *See Hammad*, 858 F.2d at 839; *Talao*, 222 F.3d at 1139. These factors similarly would weigh toward attachment of the right to

counsel. *See* Mulroy, *supra*, 92 Wash. L. Rev. at 241–42 (discussing such factors as weighing toward attachment). Plea negotiations, before or after indictment, are of a piece with these situations and should similarly trigger attachment of the right.

CONCLUSION

For the reasons stated above, *amicus* respectfully urges this Court to grant *certiorari* review.

Respectfully submitted,

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