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

REPLY BRIEF FOR PETITIONER

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The government does not dispute that prosecutors frequently commence plea negotiations before they file formal charges. Indeed, the very thing being negotiated is often what those charges will be.

Nor does the government dispute that plea bargaining is the most important stage—often the *only* stage—in the vast majority of criminal prosecutions.

Nor does the government dispute that defendants without lawyers are utterly incapable of handling plea negotiations by themselves. Unrepresented defendants do not know the possible offenses with which they might be charged or the range of sentences they might receive. They have little sense of the strength of the evidence against them or how they might fare at trial. Pre-charge plea bargaining requires a lawyer's knowledge of these matters and many more, including the immigration consequences of a conviction and the possibility of assisting the government in exchange for a reduced charge. An uncounseled defendant who tries to negotiate with an experienced prosecutor is like a child sent into an NFL game.

The government does not contest any of this, because it cannot. Instead, the government offers the anachronistic argument that a "criminal prosecution" under the Sixth Amendment begins only with the filing of formal charges, because it is only then that a criminal case shifts from investigation to prosecution. But that ceased to be true many years ago, when prosecutors started making plea offers before, rather than after, the filing of formal charges. Now, when the negotiations precede the charge, it is the onset of negotiations that marks the transition

from investigation to prosecution. The right to counsel thus attaches when the prosecutor commences pre-charge plea negotiations. The Court should grant certiorari and reverse the Sixth Circuit's erroneous decision to the contrary.

ARGUMENT

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.

The government errs in defending the decision below and in denying the existence of a circuit split on this issue.

A. When plea bargaining took place only after the filing of a formal charge, the filing of the charge was "the starting point of our whole system of adversary criminal justice," because it marked the moment at which "the government has committed itself to prosecute." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion). The Court thus explained that the right to counsel attached upon the filing of a formal charge, 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. See also Rothgery v. Gillespie Cty.*, 554 U.S. 191, 198 (2008); *Moran v. Burbine*, 475 U.S. 412, 430 (1986); *Maine v. Moulton*, 474 U.S. 159, 170 (1985).

The government quotes (BIO 10-11) these cases quite selectively. It ignores the passages explaining that the *reason* for using the filing of a formal charge as the starting point for the right to counsel was that

the filing of a formal charge was, in that era, the moment at which "the government's role shifts from investigation to accusation." *Moran*, 475 U.S. at 430. Today, by contrast, the shift from investigation to accusation often takes place before the filing of a formal charge, when the prosecutor initiates plea negotiations. This is why eight of the sixteen judges below urged this Court to clarify that the right to counsel attaches when the prosecutor conducts pre-charge plea negotiations. Pet. App. 13a, 55a, 57a, 70a-71a. As they recognized, when a prosecutor offers a plea agreement to the defendant, the government has crossed the line from investigation to prosecution.

The government is equally selective in its discussion (BIO 11-12) of the Sixth Amendment's original meaning. The government ignores the array of Founding-era sources cited below in Judge Bush's opinion concurring *dubitante* (Pet. App. 11a-32a), as well as the additional Founding-era sources cited in our certiorari petition (Pet. 19-20) and in the amicus brief filed by the Due Process Institute and the Cato Institute. Instead, the government relies entirely on Blackstone and a single dictionary. When the early sources are considered as a whole, they plainly indicate that a "criminal prosecution," as understood by the Founders, began before indictment.

The government makes much (BIO 12-13) of the textual difference between the Sixth Amendment, which applies in "criminal prosecutions," and the Fifth Amendment, which applies in a "criminal case," but that difference supports our side of the argument, not the government's. A "criminal case" encompasses two broad phases—first, an *investigation*

to determine the person who committed the offense, and second, a *prosecution* to punish that person. The Fifth Amendment privilege against self-incrimination applies throughout the entire case, during both the investigation and the prosecution, while the Sixth Amendment applies only after the shift from investigation to prosecution. *See Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892), overruled in part on other grounds, *Kastigar v. United States*, 406 U.S. 441 (1972). Plea bargaining is not investigation; it is prosecution.

The government erroneously suggests (BIO 15) that plea negotiations are *not* part of a prosecution. When a prosecutor makes a plea offer, the government is no longer investigating. It is prosecuting. As amici Former Judges and Prosecutors observe (at p. 21 of their brief), "[p]rosecutors do not negotiate plea bargains with mere suspects." Moreover, where a plea agreement is reached before the filing of a formal charge, the filing of the charge often occurs simultaneously with the entry of the defendant's guilty plea. The government's view produces the absurd consequence that the prosecution ends at the same time it begins.

The government's view also requires reading the Sixth Amendment's text in an inconsistent manner. The several rights enumerated in the Sixth Amendment apply "[i]n all criminal prosecutions." It is clear that the right to a speedy trial applies before indictment. *United States v. MacDonald*, 456 U.S. 1, 7 (1982) ("In addition to the period after indictment, the period between arrest and indictment must be considered in evaluating a Speedy Trial Clause claim."). The right to compulsory process also applies

before indictment. *United States v. Burr*, 25 F. Cas. 30, 33 (C.C.D. Va. 1807) (Marshall, C.J.) (holding that the Compulsory Process Clause applies "before as well as after indictment"). As a textual matter, it would make no sense for the Assistance of Counsel Clause to be interpreted any differently.

The government suggests (BIO 17-18) that defendants do not really need the assistance of counsel during plea negotiations, because counsel will be present when the defendant enters his guilty plea. But the presence of counsel at the plea allocution is no substitute for the assistance of counsel during the negotiations. A defendant needs the guidance of a lawyer in bargaining with the government and in deciding whether to accept the prosecutor's offer. By the time the defendant appears in court to enter his formal plea, it is normally too late to reach a more favorable plea agreement.

Moreover, the government's suggestion is of no use to defendants who, because they lack competent counsel, fail to accept a favorable offer from the prosecutor. John Turner, for example, was offered a 15-year sentence, for charges that would have resulted in a mandatory minimum sentence of 82 years had he gone to trial. He had confessed to having committed the offenses, so at a trial he was certain to be convicted. Because of his lawyer's incompetence, Turner missed the deadline to accept this offer. Pet. 7. This kind of error cannot be corrected by the presence of defense counsel at the entry of a guilty plea.

B. Several courts and commentators have observed that "[t]he federal courts of appeals have interpreted the attachment rule in two distinct ways."

Perry v. Kemna, 356 F.3d 880, 895 (8th Cir. 2004) (Bye, J., concurring); *see also* sources cited at Pet. 22. The government misperceives (BIO 20-21) the nature of this conflict.

On one side of the split, the First, Third, and Seventh Circuits agree with us that the right to counsel can attach before the filing of formal charges. *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). Applying this rule, the Third and Seventh Circuits have evaluated claims of ineffective assistance during pre-charge plea negotiations. *United States v. Giamo*, 665 F. App'x 154, 156-57 (3d Cir. 2016); *United States v. Jansen*, 884 F.3d 649, 656-59, 659 n.4 (7th Cir. 2018).

On the other side of the split, six circuits agree with the government and with the majority below that the right to counsel can never attach before the filing of formal charges. *United States v. Ayala*, 601 F.3d 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).

The resolution of this conflict will determine the outcome of this case. If there are *any* circumstances in which the right to counsel can attach before the filing of a formal charge, those circumstances must

include plea negotiations initiated by the prosecutor. When the prosecutor makes a pre-charge plea offer, "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*, 554 U.S. at 198 (internal quotation marks omitted).

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.

On the second question presented, the government again errs in defending the decision below and in denying the existence of a circuit split.

A. The government relies on *Texas v. Cobb*, 532 U.S. 162 (2001), to argue (BIO 22-23) that the dual sovereignty exception to the Double Jeopardy Clause is also an exception to the Sixth Amendment right to counsel. But *Cobb* did not address this issue, and indeed it could not have, because *Cobb* involved two offenses against a single sovereign. All *Cobb* held was that for Sixth Amendment purposes, as for double jeopardy purposes, two offenses are different where each requires proof of a fact which the other does not. *Id.* at 173. The Court has never considered whether dual sovereignty has any bearing on when the right to counsel attaches.

The government fails to respond to our arguments (Pet. 28-30) that dual sovereignty has no place in determining when the right to counsel attaches. Dual sovereignty rests on respect for the equal sovereignty of the state and federal governments. But a right to counsel in a federal prosecution could not possibly intrude on state sovereignty. Dual sovereignty cannot be mechanically transposed from the Double Jeopardy Clause to other parts of the Constitution.

B. The Court of Appeals below recognized that "[t]he circuit courts are split" on this question. Pet. App. 9a; *see also* Pet. App. 44a. The conflict has been discussed by many courts and commentators. *See* sources cited at Pet. 27-28.

The government labors in vain (BIO 24) to explain away *United States v. Red Bird*, 287 F.3d 709, 714-15 (8th Cir. 2002), which squarely conflicts with the decision below. In *Red Bird*, the Eighth Circuit held that a defendant's right to counsel attached before the filing of a formal charge with respect to a federal rape offense, where the defendant had already been charged in tribal court with the same rape. The Eighth Circuit rejected the use of the dual sovereignty doctrine. *Id.* at 715. Rather, the court held that "the federal and tribal complaints charge the same offense for Sixth Amendment purposes." *Id.* Below, the Sixth Circuit took precisely the opposite view, and indeed the Sixth Circuit explicitly disagreed with *Red Bird*. Pet. App. 10a.

The government is mistaken in suggesting (BIO 24-26) that this case is a poor vehicle for addressing the issue. As we explained in the certiorari petition (Pet. 23-25), and as amici C. Ferguson et al. explain in further detail, when the federal prosecutor initi-

ated plea negotiations, Turner's right to counsel had already attached in state proceedings with respect to simple robbery as well as aggravated robbery. Simple robbery is a lesser included offense of Hobbs Act robbery, so it is the same offense for Sixth Amendment purposes. Below, Judge Clay misunderstood this point in his concurring opinion (Pet. App. 51a-53a), and the government simply repeats Judge Clay's error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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