No. 18-106

In The

Morris Tyler Moot Court of Appeals at Yale

JOHN R. TURNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

In the nearly half a century since it decided *Kirby* v. *Illinois*, 406 U.S. 682 (1972), this Court has repeatedly reaffirmed that the Sixth Amendment right to counsel attaches only at the initiation of formal judicial proceedings. Moreover, when the Sixth Amendment attaches to a formally charged offense, it encompasses other offenses only if they are the "same," not merely "factually-related." Under the foundational paradigm of dual sovereignty, violations of separate sovereigns' laws are distinct "offenses"—even when they arise out of the same conduct.

The questions presented are:

1. Whether *Kirby* should be abrogated and the right to counsel should now attach during pre-charge plea negotiations.

2. Whether the Sixth Amendment right to counsel should attach during pre-charge federal plea negotiations whenever a state has filed charges for similar crimes.

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JURISDICTION

The Sixth Circuit entered judgment en banc on March 23, 2018. On May 22, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including July 23, 2018. The petition for writ of certiorari was filed on July 20, 2018. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Relevant provisions are reproduced in an appendix to this brief. *See* App., *infra*, 1a.

STATEMENT

A. The Aggravated Robberies

On October 3, 2007, John Turner committed a string of four armed robberies in the Memphis, Tennessee area. *Turner* v. *United States*, Nos. 2:12-cv-02266-SHM-dkv and 2:08-cr-20302-SHM, 2015 WL 13307594, at *6 (W.D. Tenn. Sept. 9, 2015). To investigate such violent crimes—as well as other serious federal and state crimes—state, local, and federal law enforcement officers work on a joint task force, the Safe Streets Task Force (SSTF). *Id.* at *5. On October 5, 2007, an SSTF agent signed an affidavit stating that Turner had committed multiple armed

robberies. *Id.* at *6. That day, a Shelby County judge signed an arrest warrant. *Ibid.* Turner was placed in custody and confessed to all four offenses. *Ibid.* He retained Mark McDaniel to represent him. *Ibid.*

Turner's first three victims positively identified him from a photo lineup as the man who robbed them. *Id.* at *1. A few months later, a Shelby County grand jury returned three indictments charging Turner with aggravated robbery, a Class B felony. *Ibid.*; Tenn. Code Ann. § 39-13-402(a). The fourth indictment for aggravated robbery issued a few months later. *Turner*, 2015 WL 13307594, at *6. During this time, McDaniel represented Turner in his prosecution by the State of Tennessee—which the State later resolved by *nolle prosequi*. *Ibid.*

McDaniel learned that the United States Attorney's Office for the Western District of Tennessee planned to bring federal charges against Turner for the armed robberies, under the Hobbs Act. *Id.*; *see* 18 U.S.C. 1951(a). If Turner had been convicted under 18 U.S.C. 924(c) for using a firearm during each of the robberies, he would have received a mandatory minimum sentence of eighty-two years, to run consecutive to the sentences for the robberies themselves. *Id.* at *6. Instead, during the summer of 2008, the United States Attorney's Office offered Turner a plea deal for fifteen years. *Ibid.* The offer expired if and when he was indicted, shortly after September 15, 2008. *Ibid.*

B. The Plea Offers

McDaniel conveyed the offer to Turner. *Id.* at *5. Although the adequacy of the representation is disputed, McDaniel and Turner spoke about the offer extensively. In the end, McDaniel was unable to convince Turner to accept the federal plea offer. On September 19, 2008, a federal grand jury returned an eight-count indictment against Turner. *Id.* at *1. And the plea offer expired.

Turner then discharged McDaniel or McDaniel declined to continue the representation. *Id.* at *7. Turner's mother hired a new attorney to represent him on his federal and state charges. *Ibid.* A new Assistant United States Attorney was assigned to Turner's case, and she gave him a plea offer of twenty-five years. He accepted it and pled guilty. *Ibid.*

C. The Ineffective Assistance Claim

On April 5, 2012, Turner filed a Petition to Vacate Sentence by a Person in Federal Custody pursuant to 28 U.S.C. 2255, alleging that McDaniel provided ineffective assistance of counsel during precharge plea negotiations with the United States Attorney's Office. *Id.* at *3. Specifically, Turner contends that he could not understand how both the state and federal governments could charge him, why he should plead guilty to federal charges that had not yet been brought, or that the plea offer was very favorable. *Id.* at *5. McDaniel provided an affidavit testifying that Turner insisted—despite McDaniel telling him otherwise—that the double jeopardy doctrine prohibited both the federal and

state government from prosecuting him for the same robberies. *Id.* at *9. Citing this Court's precedent, the District Court for the Western District of Tennessee denied the petition. Turner had no Sixth Amendment right to counsel to pre-charge plea negotiations, the court reasoned. Thus, he could not bring an ineffective assistance of counsel claim.

First, the court noted that "[t]he Sixth Amendment right to counsel 'attaches only at or after the initiation of adversary judicial proceedings against the defendant * * *—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Id.* at *9 (quoting *United States* v. *Gouveia*, 467 U.S. 180, 187-88 (1984)). "Applying these standards, the Sixth Circuit has held the Sixth Amendment right to the effective assistance of counsel does not attach in pre-indictment plea negotiations." *Id.* at *10 (citing *Kennedy* v. *United States*, 756 F.3d 492, 493 (6th Cir. 2014); *United States* v. *Moody*, 206 F.3d 609, 613-16 (6th Cir. 2000)).

The court also rejected Turner's second argument—that the precedent was "inapplicable to his case because he had been indicted in state court before the communication of the federal plea offer." *Ibid.* The court observed that "[t]he Sixth Amendment right [to counsel] * * * is offense specific." *Ibid.* (quoting *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991)). Because Turner's state and federal offenses were not the "same offense" under *Texas* v. *Cobb*, 532 U.S. 162, 172-73 (2001), "Turner's Sixth Amendment rights with respect to the Hobbs Act charges did not

attach when he was indicted in state court for aggravated robbery." *Id.* at *12.

Concluding that "reasonable jurists could [not] debate whether * * * the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to further proceed," the court denied a certificate of appealability. *Id.* at *18 (quoting *Miller-El* v. *Cockrell*, 537 U.S. 322, 366 (2003)).

The Sixth Circuit agreed. On February 15, 2017, a three-judge panel affirmed the district court's decision on the same grounds. *Turner* v. *United States*, 848 F.3d 767 (6th Cir. 2017). A year later, the Sixth Circuit—this time sitting en banc—once again affirmed. On March 23, 2018, the court held: "John Turner asks us to overrule nearly four decades of circuit precedent holding that the Sixth Amendment right to counsel does not extend to pre-indictment plea negotiations. * * * Our rule [was] copied word for word from the Supreme Court's rule. * * * The district court followed this rule, and we AFFIRM." *Turner* v. *United States*, 885 F.3d 949, 951 (6th Cir. 2018) (en banc).

SUMMARY OF ARGUMENT

I. The Sixth Amendment right to counsel has two dimensions: the attachment question and the critical stage question. Before individuals can rely on the Sixth Amendment's right to counsel, it must formally "attach." Only after attachment may a defendant invoke the right to counsel—and he may do so only when a proceeding is a "critical stage." Unlike what

qualifies as a critical stage, the Court has never expanded its understanding of the threshold point in time after which the Sixth Amendment becomes relevant: the initiation of "formal judicial proceedings." Attachment at that stage comports with the language of the Amendment, the purposes the right serves, and the need for an administrable bright line rule.

II. Over nearly half a century, the Court has reaffirmed repeatedly that the right to counsel attaches at the initiation of formal judicial proceedings—"whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972).

Pre-charge plea negotiations plainly do not meet this standard. As the Court recognized in *Missouri* v. *Frye*, 566 U.S. 134 (2012), plea negotiations are not a standardized process. They are also, by definition, non-judicial: no court or judge is involved in a case until formal charges are brought.

III. Holding that the right to counsel attaches at pre-charge plea negotiations would flout the original meaning of the Assistance of Counsel Clause. At the Founding, an accused in a criminal prosecution was someone against whom formal charges had been brought. Such a holding would also ignore the clear purpose of attachment—to help an individual navigate complex substantive and procedural law once the government's role has shifted from investigation to prosecution.

Attachment at the initiation of formal judicial proceedings has proved a workable bright line rule. Conversely, petitioner's rule would be unadministrable. Finding that the right to counsel attaches earlier than ever before would unsettle the laws of all fifty states and the federal government—none of which requires the appointment of counsel during pre-charge plea negotiations. This would disrupt indigent defense systems and government budgets across the country.

Additionally, because plea negotiations are neither a clear nor a distinct event, prosecutors would be forced to make difficult judgement calls about when an individual's right to counsel attaches. Courts will be burdened with adjudicating claims that these judgments were made incorrectly—a structural error requiring reversal of the conviction.

Attachment of the right to counsel before law enforcement has completed its investigation also forecloses the use of important investigatory tools, such as undercover officers and informants. And it will not necessarily be clear for which charges this is true, as no agreement will have been reached yet about what offenses would be covered by a potential plea deal.

IV. The Sixth Amendment right to counsel does not attach to uncharged *federal* offenses simply because a defendant has been charged by a *state* prosecutor. This follows from two indisputable premises.

First, when a sovereign criminalizes conduct, a violation of that law is a legal "offense" to that sovereign—and that sovereign alone. This flows from the

foundational paradigm of dual sovereignty, under which each sovereign has the inherent authority to define and prosecute offenses. Thus, longstanding Supreme Court precedent has held that the same conduct can "offend" multiple sovereigns at once. The federal government and the State of Tennessee—separate sovereigns—have both criminalized armed robbery. Therefore, petitioner committed "offenses" against two sovereigns.

Second, the Sixth Amendment right to counsel is "offense specific." It does not attach by implication, and this Court has soundly rejected every attempt to hold otherwise. Because federal prosecutors did not charge petitioner, there was no specific federal offense to which the Sixth Amendment could have attached. Moreover, even if there had been federal charges, federal and state offenses are *distinct*—even when they arise out of the same conduct. Therefore, the "offense specific" rule bars petitioner's claim.

Texas v. *Cobb* confirms that dual sovereignty applies in the Sixth Amendment context. 532 U.S. 162 (2001). The *Cobb* Court found "no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel." *Id.* at 173. The double jeopardy context requires a sovereign-specific understanding of "offense." So too, then, does the Sixth Amendment.

V. Dual sovereignty in the Sixth Amendment context is essential to our federal system of justice. Holding otherwise would severely undermine the

federal government's inherent authority—and society's desire—to bring criminals to justice.

Under petitioner's rule, once a state charges a defendant, the Sixth Amendment's exclusionary rule would apply at the federal level—barring federal prosecutors from employing the full suite of investigate tactics they could otherwise use. This would obstruct the most important federal cases. Federal prosecutors only prosecute individuals already facing state charges when substantial federal interests are at stake. Under petitioner's rule, federal law enforcement's efficacy in these important cases would turn on a separate sovereign's charging decision. This is plainly arbitrary.

Moreover, petitioner's rule is unworkable, costly, and unnecessary. It burdens federal prosecutors with researching whether a state has filed formal charges and, if so, whether they are the "same." It will backlog courts and indigent counsel with painstaking litigation. It will encourage rushed plea deals and hard bargaining. And it will do so without good reason: petitioner's rule only affects those who, by definition, are *already* entitled to counsel in a state prosecution. Finally, any risk of one sovereign using information illegally obtained by another is minute.

VI. This Court need not extend the right to counsel past its text and purpose to protect individuals during pre-charge plea negotiations. The right will always attach before any plea is entered, and at that time there must be an affirmative showing on the record that the plea is knowing and voluntary. Indi-

viduals are also protected, under the Due Process Clause, against unfair treatment by the government at all stages of a criminal case. Finally, even if the individual ultimately goes to trial, nothing said during plea negotiations is admissible against him.

ARGUMENT

I. The right to counsel only applies after it has formally attached

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to * * * have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. Before defendants can rely on that guarantee, a threshold event must occur: the right must formally "attach." *Rothgery* v. *Gillespie Cty.*, 554 U.S. 191, 212 (2008). After attachment, defendants are entitled to counsel during "critical stages" of the prosecution. *Ibid.* Therefore, courts analyzing Sixth Amendment right to counsel claims must engage in a two-step inquiry. First, they must determine whether the threshold event of "attachment" has occurred. Only then may they address whether a post-attachment proceeding qualifies as a critical stage. Crucially, these two inquiries are "distinct." *Id.* at 211.

In determining when the right to counsel attaches, the Court has always relied on the "literal language of the Amendment" and "the purposes which [it has] recognized that the right to counsel serves." *United States* v. *Gouveia*, 467 U.S. 180, 188 (1984). With the Amendment's text and purpose in mind, this Court has crafted a bright line attachment rule,

rejecting standards that are "wholly unworkable and impossible to administer." *Rothgery*, 554 U.S. at 206. That bright line is the initiation of "formal judicial proceedings." *Gouveia*, 467 U.S. at 185 (citing *Kirby* v. *Illinois*, 406 U.S. 682 (1972)). Only then may defendants rely on the Sixth Amendment's right to counsel.

Although the attachment question is answered by looking to history, the critical stage question is evolving. These are "proceedings between an individual and agents of the State (whether 'formal or informal, in court or out,') that amount to 'trial-like confrontations,' at which counsel would help the accused 'in coping with legal problems or * * * meeting his adversary.'" *Rothgery*, 554 U.S. at 212 n.16 (quoting *United States* v. *Ash*, 413 U.S. 300, 312-13 (1973); *United States* v. *Wade*, 388 U.S. 218, 226 (1967)). The "core purpose of the counsel guarantee was to assure 'Assistance' at trial." *Ash*, 413 U.S. at 309. Therefore, the Court has "expanded" the right to counsel by designating certain post-attachment, pre-trial "trial-like confrontations" that "present[] the same dangers that gave birth initially to the right itself" as critical stages. *Id.* at 311.

The Court concluded in *Missouri* v. *Frye*, 566 U.S. 134, 144 (2012), and *Lafler* v. *Cooper*, 566 U.S. 156, 162 (2012), that post-attachment plea negotiations presented such a danger because they are "central to the administration of the criminal justice system" and because they present "the only stage when legal aid and advice would help" many defendants.

Frye, 566 U.S. at 144 (quoting *Massiah* v. *United States*, 377 U.S. 201, 204 (1964)).

This Court has consistently held, however, that whether an event *after* attachment is a critical stage is irrelevant as to *when* the right to counsel first attaches—the two are entirely distinct questions. *Compar*e *Wade*, 388 U.S. at 236-37 (1967) (Sixth Amendment right to counsel in post-charge lineups) *and Massiah*, 377 U.S. at 205-06 (Sixth Amendment right to counsel in post-charge interrogations), *with Kirby*, 406 U.S. at 690 (no Sixth Amendment right to counsel in pre-charge lineups) *and Moran* v. *Burbine*, 475 U.S. 412, 431-32 (1986) (no Sixth Amendment right to counsel in pre-charge interrogations).

In urging the Court to extend the Sixth Amendment right to counsel to pre-charge plea negotiations, petitioner stresses the importance of such negotiations to case outcomes. In doing so, he makes the "mistake of merging the attachment question * * * with the distinct 'critical stage' question." *Rothgery*, 554 U.S. at 211.

II. The right to counsel does not attach at pre-charge plea negotiations

This Court has always held that the right to counsel attaches at the initiation of "formal judicial proceedings." *Gouveia*, 467 U.S. at 185 (citing *Kirby*, 406 U.S. 682). Pre-charge plea negotiations are not formal judicial proceedings in any sense of the term, and therefore do not mark the point of attachment under *Kirby*.

A. The right to counsel attaches at the initiation of formal judicial proceedings

The Court first considered the attachment question in *Kirby* v. *Illinois*, when it was asked to decide whether a defendant had the right to counsel during a pre-charge police lineup. Although the Court had twice held that counsel was guaranteed during a *post*-charge police lineup, it swiftly dismissed the idea that the same was true for a *pre*-charge lineup. 406 U.S. at 683. Instead, it found that the right to counsel is "historically and rationally applicable only after the onset of *formal* prosecutorial proceedings." *Id.* at 690 (emphasis added). Only formal proceedings "mark[] the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." *Ibid.* The Court listed examples of such proceedings: "a formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 688.

A decade later, the Court in *United States* v. *Gouveia* found the attachment question similarly straightforward. The Court was asked whether the right to counsel attaches before the initiation of formal proceedings if individuals are detained. 467 U.S. at 187. The Court said no, affirming *Kirby*'s "interpretation of the Sixth Amendment right to counsel" as "consistent not only with the literal language of the Amendment, * * * but also with the purposes which we have recognized that the right to counsel serves." *Ibid.*

When *Gouveia* was decided, this Court had already consistently "foreclose[d] the possibility that the right to counsel might under some circumstances attach prior to the formal initiation of judicial proceedings." *Id.* at 193 (Stevens, J., concurring). Nearly half a century later, the Court has repeatedly reaffirmed this meaning. *See, e.g.*, *Texas* v. *Cobb*, 532 U.S. 162, 167 (2001); *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991); *Michigan* v. *Harvey*, 494 U.S. 344, 353 (1990); *Michigan* v. *Jackson*, 475 U.S. 625, 629 & n.3 (1986); *Moran*, 475 U.S. at 430-31; *Maine* v. *Moulton*, 474 U.S. 159, 170 (1985); *Moore* v. *Illinois*, 434 U.S. 220, 226-27 (1977); *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977); *Ash*, 413 U.S. at 311.

Most recently, in *Rothgery* v. *Gillespie County*, the Court confirmed its reading yet again, finding that "the attachment question" turns on "whether formal judicial proceedings have begun" and concluding that the right to counsel is "limited by its terms: 'it does not attach until a prosecution is commenced.'" 554 U.S. at 198, 211 (quoting *McNeil*, 501 U.S. at 175).

B. Pre-charge plea negotiations are not formal judicial proceedings

Pre-charge plea negotiations are not "formal judicial proceedings" under this Court's jurisprudence. And, in a literal sense, *any* plea negotiations are just the opposite: "plea-bargaining is informal, off-the-record, and occurs outside court." Anne R. Traum, *Using Outcomes to Reframe Guilty Plea Adjudication*, 66 Fla. L. Rev. 823, 849 (2014).

1. Pre-charge plea negotiations are not formal

This Court has already recognized that plea negotiating is anything *but* formal, characterizing it as "nuanced" and "by its nature, defined to a substantial degree by personal style." *Frye*, 566 U.S. at 144-45 (quoting *Premo* v. *Moore*, 562 U.S. 115, 125 (2011)). In fact, the *Frye* Court found plea negotiations so non-standardized that it would have been "neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process." *Ibid.* As a result, the only rule governing plea negotiations that the Court set forth in *Frye* is the "duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Ibid.*

Indeed, "formal" proceedings are those "[o]f, relating to, or involving established procedural rules, customs, and practices." *Black's Law Dictionary* 678 (10th ed. 2014). There are no widespread procedural rules governing plea negotiation. *See* Stephanie Stern, *Regulating the New Gold Standard of Criminal Justice: Confronting the Lack of Record-Keeping in the American Criminal Justice System*, 52 Harv. J. on Legis. 245, 257 (2015) (advocating for the creation of a Plea-Bargaining Commission that would "promulgat[e] rules and standards for plea-bargaining"). Even the American Bar Association's guidance on plea negotiations—adopted by many jurisdictions—does not suggest any standards for such informal dealings. *See Frye*, 566 U.S. at 145-46; American Bar

Association, *Standards for Criminal Justice: Pleas of Guilty* (3d ed. 1999).

Nor are there any governing customs: the practice "varies depending on the jurisdiction and on the context of its use." Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 Emory L.J. 753, 755 (1998). Even United States Attorneys' Offices in *adjacent* jurisdictions may have different plea negotiation policies for the same crime. *See United States* v. *Banuelos-Rodriguez*, 215 F.3d 969, 979 (9th Cir. 2000) (contrasting plea negotiation standards between the "contiguous Southern, Eastern, and Northern Districts of California" and "the neighboring Central District of California"). Nor do plea negotiations take a consistent form, ranging from elaborate proffer agreements to "quick conversation[s] in a prosecutor's office." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1911-12 (1992).

2. Pre-charge plea negotiations are not judicial

Pre-charge plea negotiations are also not "judicial." "Judicial" proceedings are those "[o]f, relating to, or by the court or a judge," or "[i]n court." *Black's Law Dictionary* 862. For example, every "formal judicial proceeding" the Court listed in *Kirby*—"a formal charge, preliminary hearing, indictment, information, or arraignment"—requires judicial involvement. 406 U.S. at 688. Not so for pre-charge plea negotiations. The fact that an individual has not yet

been charged necessarily means that no court or judge is yet involved in the matter. Moreover, not only do these negotiations take place outside of the courtroom, but, in federal court, judicial participation in plea negotiations at any stage is expressly prohibited. Fed. R. Crim. P. 11(c)(1).

The Sixth Circuit is the only federal appellate court to have considered whether the right to counsel attaches at pre-charge plea negotiations. Four times, it has held that clear Supreme Court precedent dictates that it does not. *See Turner* v. *United States*, 885 F.3d 949, 959 (6th Cir. 2018) (en banc); *Kennedy* v. *United States*, 756 F.3d 492, 493 (6th Cir. 2014); *United States* v. *Moody*, 206 F.3d 609, 614 (6th Cir. 2000); *United States* v. *Sikora*, 635 F.2d 1175, 1175 (6th Cir. 1980). Several federal district courts outside the Sixth Circuit have agreed. *See, e.g.*, *United States* v. *Montaner*, No. 10-20289-cr, 2012 WL 442985, at *5 (S.D. Fla. Jan. 23, 2012); *United States* v. *Gambone*, No. CRIM. 00-176-3, 2000 WL 1367603, at *3 (E.D. Pa. Sept. 21, 2000).

"There is * * * no circuit split on this issue." *Turner*, 885 F.3d at 954. Although some courts have found that the right to counsel could attach before the initiation of formal judicial proceedings, any reliance on their reasoning is misplaced. Several courts have relied on reasoning this Court has already rejected. For example, this Court has squarely rejected the claim that "the existence of an attorney-client relationship itself triggers the protections of the Sixth Amendment." *Moran*, 475 U.S. at 430; *contra United States v. Wilson*, 719 F. Supp. 2d 1260, 1268 (D. Or.

2010) (reasoning that the right to counsel had attached in pre-indictment plea negotiations because the prosecutor "facilitated the appointment of counsel for petitioner").

Others have assumed that the right attaches before the initiation of formal judicial proceedings although the question was not before them. *See, e.g.*, *United States* v. *Giamo*, 665 Fed. Appx. 154, 156-57 (3d. Cir. 2016). Still more have speculated that the right could conceivably attach before formal charges are brought but have never so held. *See, e.g.*, *Roberts* v. *Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995); *United States* v. *Larkin*, 978 F.2d 964, 969 (7th Cir.1992).

III. The right to counsel should not attach at pre-charge plea negotiations

The Sixth Amendment right to counsel should not attach at pre-charge negotiations for three reasons. Doing so would be incompatible with the right's original meaning, inconsistent with the right's purpose, and completely unworkable.

A. The original meaning of the Assistance of Counsel Clause dictates that it attaches at the initiation of formal judicial proceedings

The Assistance of Counsel Clause, by its own terms, is the right of an "accused" to have the assistance of counsel in his "criminal prosecution." At the Founding, an "accused" in a "criminal prosecution" meant someone formally charged with having com-

mitted a crime. Several sources confirm this meaning.

In his Commentaries, Blackstone described "prosecution" as a particular point in the criminal process: "the manner of [the offender's] *formal accusation*."[1] 4 William Blackstone, *Commentaries on the Laws of England* 301 (1769) (emphasis added). At the time of Blackstone's writing, there were three modes of prosecution: indictment, presentment, and information. An indictment was "a written accusation of one or more performs of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury." *Id.* at 302. A presentment was also a formal accusation made by a grand jury but based on the grand jurors' "own knowledge or observation, without any bill of indictment laid before them." *Id.* at 301. Finally, an information was a "proceeding at the suit of the king, without a previous indictment or presentment by a grand jury." *Id.* at 308. Therefore, a criminal prosecution was understood to require that formal charges had been brought.

The English meaning of these terms was consistent with the American one. Like in England, "prosecution" in the American context meant "[t]he institution or commencement and continuance of a criminal suit; the process of exhibiting formal charg-

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[1] Certainly, the term "accusation" alone can refer to an uncharged allegation. But the characterization of a prosecution as a "*formal* accusation" clarifies that a person accused in a criminal prosecution has been formally charged. *See Rothgery*, 554 U.S. at 220 (Thomas, J., dissenting).

es against an offender before a legal tribunal." 2 *An American Dictionary of the English Language* (1828). The notion that a criminal prosecution requires formal charges is consistent also with the early American understanding of who was "accused." *See* 1 *An American Dictionary of the English Language* (1828) (defining "accused" as "charged with a crime, by a legal process; charged with an offense"). And just as in England, early American courts understood that an "accused" was the subject of a "criminal prosecution" only after being formally charged. *See, e.g.*, *Virginia* v. *Paul*, 148 U.S. 107, 119-22 (1893) (holding that, where "no indictment was found, or other action taken, in the county court," there was no "criminal prosecution") (citing *Commonwealth* v. *Artman*, 5 Phila. 304 (1863) (same)).

Finally, the Sixth Amendment's reference to a "criminal prosecution" differs from the only other mention in the Constitution of criminal proceedings: the Fifth Amendment's right against self-incrimination in "criminal cases." U.S. Const. Amend. V. This distinction is constitutionally significant. In *Counselman* v. *Hitchcock*, the government argued that a witness could not invoke his right against self-incrimination in a grand jury proceeding because there was no "criminal case" at that time. 143 U.S. 547, 562-63 (1892). The Court analyzed the Fifth Amendment's text and purpose and rejected the government's argument, in part because a "criminal case" is broader than a "criminal prosecution." *Ibid.* Many scholars agree. *See, e.g.*, Leonard W. Levy, *Origins of the Fifth Amendment* 427 (1968) ("In

what was to be the Sixth Amendment the Senate clustered together the procedural rights of the criminally accused *after* indictment.") (emphasis added); Michael J. Zydney Mannheimer, *Ripeness of Self-Incrimination Clause Disputes*, 95 J. Crim. L. & Criminology 1261, 1322 (2005) ("It appears that the placement of the Self-Incrimination Clause in the Fifth Amendment rather than the Sixth signifies that a 'criminal case' can exist before a 'criminal prosecution[]' commences."); Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 Tenn. L. Rev. 987, 1013 (2003) ("[T]he Sixth Amendment plainly deals with rights that protect 'the accused' during the court phase of prosecutions, including trials.").

The original meaning of the Assistance of Counsel Clause clearly supports this Court's long-standing holding that the right to counsel attaches at the initiation of formal judicial proceedings. This Court should therefore reject petitioner's invitation to "wrench the Sixth Amendment from its proper context." *Gouveia*, 467 U.S. at 191 (quoting *United States* v. *Marion*, 404 U.S. 307, 322 (1971)).

B. The purpose of the Assistance of Counsel Clause dictates that it attaches at the initiation of formal judicial proceedings

This Court has consistently held that the right to counsel attaches only upon the initiation of formal judicial proceedings because:

> [1] It is only at that time "that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. [2] It is 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."

Gouveia, 467 U.S. at 189 (quoting *Kirby*, 406 U.S. at 689). Extending the right to counsel to pre-charge negotiations serves neither of these principles.

First, during pre-charge plea negotiations, the government has not committed itself to prosecute and therefore the parties' adverse positions have not solidified. These negotiations may result in a variety of outcomes. Sometimes prosecution is inevitable, and therefore negotiations are simply an opportunity to agree on charges, sentencing, or both. However, a prosecutor may also be willing to forego a prosecution under certain conditions. This could include, for example, an individual releasing any 42 U.S.C. 1983 claims he might have against the jurisdiction, agreeing to act as an informant or cooperating witness, or participating in a substance abuse program or alter-

native dispute resolution. *See Newton* v. *Rumery*, 480 U.S. 386, 390 (1987) (describing an agreement not to pursue prosecution in exchange for a release of claims against the town); Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. Rev. 1243, 1256, 1259 n.59 (2011) (describing the use of these types of agreements); Stephen J. Schulhofer & Irene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L. Rev. 231, 265 (1989) (observing that, in districts surveyed, pre-charge plea negotiations "often occurred through agreements not to file").

Indeed, agreements to be an informant or cooperating witness in exchange for pleading guilty to a minor charge or avoiding charges altogether are common in organized crime, drug trafficking, and white-collar crime cases. *See* Ellen C. Brotman & Erin C. Dougherty, *Blue Collar Tactics in White Collar Cases*, Champion, Sept. 2011, at 20.

In other cases, the government may decline to prosecute at all, regardless of agreement. In this case, for example, even *after* Turner was indicted, the state dismissed the aggravated robbery charges against him. *Turner*, 2015 WL 13307594, at *6. Before an individual has been charged, the parties' adverse positions had not solidified because "the government's role" has not "shift[ed] from investigation to accusation." *Moran*, 475 U.S. at 431; *see United States* v. *Hayes*, 231 F.3d 663, 673 (9th Cir. 2000) ("He was not thereby charged, indicted, or arraigned—and may never have been. Instead, the government remained an investigator rather than a

prosecutor and Hayes was a target, not 'the accused.'").

Second, an individual also does not find himself faced with the prosecutorial forces of organized society or with complex procedural and substantive law at this point. Certainly, an individual who approaches a prosecutor in hopes of becoming an informant in exchange for avoiding future charges cannot be said to face the prosecutorial forces of organized society.

And where an individual engages in plea negotiations before he is charged, he has not, and perhaps will never, face the intricacies of substantive and procedural criminal law. When deciding whether there is a right to counsel, the Court's concern has always been with "the recognition and awareness that an unaided layman had little skill in arguing the law or in coping with an intricate procedural system." *Ash*, 413 U.S. at 307*; see also Gerstein* v. *Pugh*, 420 U.S. 103, 121 (1975) (holding that defendants do not need counsel at probable cause hearings because they "do[] not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial."). Where an individual pleads guilty at his first opportunity, he encounters neither complex legal standards nor difficult credibility determinations. The only procedural or substantive criminal law he will face at all is his arraignment—when he *will* have the right to counsel. *See Frye*, 566 U.S. at 140.

C. Attachment at the initiation of formal judicial proceedings is workable

This Court's consistent holding that the right to counsel attaches at formal judicial proceedings is not only supported by the Sixth Amendment's text and purpose—it is "a clean and clear rule that is easy * * * to follow." *Hayes*, 231 F.3d at 675. Because of the clear need for an administrable rule governing the attachment of the right to counsel, this Court has rejected proposals, like petitioner's, that are "wholly unworkable and impossible to administer." *Rothgery*, 554 U.S. at 206; *see also Montejo* v. *Louisiana*, 556 U.S. 778, 792 (2009) (rejecting extension of a Sixth Amendment rule that "would be unworkable in more than half the States of the Union.").

This Court should be "loath to engraft some new, pre-indictment proceeding onto the rule, thereby making it no longer clean and clear—and outside the clear boundaries [it] has established." *Hayes*, 231 F.3d at 675.

1. Petitioner's rule would upset considerable reliance interests in every jurisdiction

This Court has stressed the importance of establishing an attachment doctrine that is not only clear but "[]workable." *Rothgery*, 554 U.S. at 206. For more than forty-five years, the point at which counsel must be appointed has been clear and consistent—across both time and cases. Abrogating *Kirby* would disrupt all those reliance interests. This includes the rules and laws of all fifty states and the federal

courts, not *one* of which provides a right to counsel during pre-charge plea negotiations. *See* Fed. R. Crim. P. 5 (requiring the appointment of counsel at a defendant's initial appearance); *Rothgery*, 204-05 & n.14 (listing the mechanisms by which states provide for the appointment of counsel, some of which provide counsel soon after arrest, but none of which provides counsel during pre-charge plea negotiations).

The right to counsel is not self-executing: it requires courts and legislatures to enact rules and laws to ensure that counsel is available and appointed at the constitutionally required time. *See* 3B Charles Alan Wright et al., *Federal Practice and Procedure* Rule 44 (4th ed. 2018) ("Federal law and local court rules govern the procedure for implementing the right to counsel."). It also impacts budgetary decisions regarding the funding of indigent counsel systems. *See* Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 Minn. L. Rev. 1197, 1198 (2013) (listing the consequences of "inadequate funding of indigent defense systems across the country," including "excessive public defender caseloads and understaffing of public defender offices" and "inadequate or nonexistent expert and investigative resources for defense counsel").

Requiring counsel earlier than ever before would disrupt federal and state indigent defense systems across the country. Indeed, it would be "wholly unworkable and impossible to administer." *Rothgery*, 554 U.S. at 206. Because this Court's attachment jurisprudence has been exact, consistent, and well-reasoned since its inception, courts have had no diffi-

culty applying it. *See Hayes*, 231 F.3d at 675 ("[T]he Supreme Court, this court, and every other circuit to consider a similar issue has adhered to the rule that adversary judicial proceedings are initiated 'by way of formal charge, preliminary hearing, indictment, information, or arraignment.' This is a clean and clear rule that is easy [] to follow.") (quoting *Kirby*, 406 U.S. at 690).

Petitioner's rule would leave state and lower federal courts struggling, unguided, with the question of when the right to counsel attaches generally and in individual cases. Were the Court to "wrench the Sixth Amendment from its proper context," courts would be left to reason without guidance about what other pre-charge events newly constitute attachment. *Gouveia*, 467 U.S. at 191 (quoting *Marion*, 404 U.S. at 322). Police lineups? Probable cause hearings? Arrest? They will not know where the Court's attachment jurisprudence is going next.

2. Petitioner's rule would require prosecutors to make difficult and high-stakes judgment calls

Unlike formal proceedings, "plea negotiations" are neither a clear nor a discrete event. They take various forms, "ranging from routine, perfunctory ones, to extended negotiations over the character of the [person], what the person did, who the witnesses and victims were, and so forth." Douglas W. Maynard, *Inside Plea Bargaining: The Language of Negotiation* 84 (1984). Even "among practitioners" there exists "[n]o standard definition of plea bargain-

ing." Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 Emory L.J. 753, 755 (1998); *cf. Frye*, 566 U.S. at 144 (declining to "define the duty and responsibilities of defense counsel in the plea bargain process," given its varied forms).

And defining plea negotiations narrowly—such as the offer of a written plea agreement—would also leave petitioner's rule virtually useless. Because prosecutors may choose when to offer such an agreement, they may choose to do so only once negotiations are completed—just before charging and arraignment, when the right to counsel would already attach.

Under petitioner's rule, the increased likelihood of prosecutors mistaking when the right to counsel attaches carries dire consequences: more overturned convictions. This is because a denial of the assistance of counsel at a critical stage—which pre-charge plea negotiations presumably would be under *Frye*—is a structural error that invalidates a conviction. *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993). These extreme consequences seriously undermine society's finality interests. *See United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) ("Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and * * * inevitably delays and impairs the orderly administration of justice. The impact is greatest when * * * setting aside guilty pleas.") (quotations omitted).

Simply erring on the side of appointing counsel any time a prosecutor speaks to an individual is not viable. First, the undersupply of indigent counsel will delay plea negotiations. *See* Britta Palmer Stamps, *The Wait for Counsel*, 67 Ark. L. Rev. 1055, 1076 (2014) (noting that requiring appointment soon after arrest "presents logistical hurdles in rural areas where judges' dockets consist of cases from multiple counties, complicating the timing of * * * appointment of public defenders"). Moreover, even once counsel is appointed, many defense attorneys have such high caseloads that they cannot represent a client in plea negotiations on a flexible schedule. *See* Lauren Sudeall Lucas, *Public Defense Litigation: An Overview*, 51 Ind. L. Rev. 89, 89 (2018) (noting "excessive public defender caseloads and understaffing of public defender offices").

Not only would prosecutors face the risk of overturned convictions for misjudging when pre-charge plea negotiations begin, but courts would be bogged down reviewing these claims. Reviewing collateral attacks on guilty pleas is already extremely challenging because of "the lack of any record of plea bargain discussions." Stephanie Stern, *Regulating the New Gold Standard of Criminal Justice: Confronting the Lack of Record-Keeping in the American Criminal Justice System*, 52 Harv. J. on Legis. 245, 250-51 (2015). This is complicated further by the difficulty of discerning exactly when plea negotiations are taking place. *See supra* Section III.C.1 for a discussion of the undefined nature of plea negotiations. Courts are already required to adjudicate these difficult and

fact-intensive claims under *Frye*. Petitioner would have them do so even more often.

3. Petitioner's rule would undermine law enforcement investigations

Expanding the right to counsel would also "unnecessarily frustrate the public's interest in the investigation of criminal activities." *Moulton*, 474 U.S. at 180. The Sixth Amendment's exclusionary rule bars certain statements taken outside the presence of counsel once the right has attached. *Massiah*, 377 U.S. at 207. If petitioner's regime were adopted, this exclusionary rule would pose serious investigatory problems for the government.

First and foremost, those engaged in criminal activity would effectively be able to control the government's investigatory process. A prosecutor may be in the middle of an investigation when an individual approaches her and engages her in plea negotiations. *See United States* v. *Moody*, 206 F.3d 609, 617 (6th Cir. 2000) ("In practical terms, drug conspiracy cases have become a race to the courthouse. When a conspiracy is exposed by an arrest or execution of search warrants, soon-to-be defendants [want] * * * to bargain and bargain early, even if an indictment has not been filed."). Suddenly, law enforcement is unable to use investigative tools like undercover officers and informants. *See Moulton*, 474 U.S. at 176.

Second, particularly when the individual initiates negotiations, it will be difficult for the prosecutor to evaluate which charges she is foreclosing from certain methods of additional investigation. As a re-

sult, she cannot adequately determine which charges she can discuss, and which she cannot. Although this difficulty will be limited by the fact that the Sixth Amendment is offense-specific, *McNeil*, 501 U.S. at 175, even the "offense-specific" boundary will be difficult to discern because no charges will have been filed. Nor can the prosecutor use the fact that offenses are "factually related" as a guide, as this Court has expressly rejected that interpretation of attachment. *Cobb*, 532 U.S. at 168.

Even if it were clear which offenses were on the negotiating table, however, the prosecutor may not necessarily know where law enforcement is in its investigation and therefore whether, if no agreement is reached, she needs further evidence to prove an individual's guilt at a possible trial. Regardless of who initiates pre-charge plea negotiations, the government's investigation will often be incomplete. *See Patterson* v. *Illinois*, 487 U.S. 285, 306 (1988) (Stevens, J., dissenting) ("[T]he return of an indictment also presumably signals the government's conclusion that it has sufficient evidence to establish a prima facie case.").

By frustrating lawful investigations, petitioner's rule would undermine "society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran*, 475 U.S. at 426. This Court has recognized that "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good." *McNeil*, 501 U.S. at 181. Petitioner's rule, however, would prohibit law enforcement from taking these statements and prosecutors from using

them at trial. And "society would be the loser." *Id.* at 181.

IV. Dual sovereignty applies in the Sixth Amendment right to counsel context

Petitioner next seeks to bootstrap a right to counsel for possible *federal* offenses—which had not attached—from his right to counsel for his *state* offenses—which had attached. In doing so, petitioner asks this Court to ignore a fact "too plain to need more than a statement"—the United States and the State of Tennessee are separate sovereigns. *Westfall* v. *United States*, 274 U.S. 256, 258 (1927) (Holmes, J.). As such, petitioner's legal defenses—and the Sixth Amendment rights animating them—must be analyzed *within* each sovereign separately.

A. Petitioner's federal and state robberies were "offenses" to separate sovereigns

Dual sovereignty is "the basic structure of our federal system." *United States* v. *Wheeler*, 435 U.S. 313, 320 (1978). "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). And they embedded this idea in the Constitution itself: "the founding document 'specifically recognizes the States as sovereign entities.'" *Alden* v. *Maine*, 527 U.S. 706, 713 (1999) (quoting *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 71 n.15 (1996)); *see* U.S. Const. Amend. X ("The powers not delegated to the United States by

the Constitution, nor prohibited by it to the States, are reserved to the States respectively.").

Our country's "very foundation" is that "the people of the *United States* * * * have a political identity * * * independent of, though consistent with, their identity as citizens of the *State* of their residence." *U.S. Term Limits, Inc.*, 514 at 840 (Kennedy, J., concurring) (emphasis added). This twin system is the heart of our law, responsible for doctrines ranging from sovereign immunity to incorporation. *See* U.S. Const. Amend. XI (sovereign immunity); Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. Contemp. Legal Issues 409 (2009) (squaring Bill of Rights incorporation with the Constitution's original meaning).

Two hundred years later, it is still axiomatic that "[i]n America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

This Court "has uniformly held that the States are separate sovereigns with respect to the Federal Government." *Heath* v. *Alabama*, 474 U.S. 82, 89 (1985). Indeed, ours is a federalist system in which the federal government and the fifty states retain "certain exclusive and very important portions of sovereign power." The Federalist No. 9, at 55 (Alex-

ander Hamilton) (Cooke ed. 1961). This is critically important in criminal prosecutions for two reasons.

First, "inherent in any sovereign" is the power "independently to determine what shall be an offense against its authority." *Heath*, 474 U.S. at 89 (quoting *Wheeler*, 435 U.S. at 320 n.14). Second, also due to "inherent sovereignty," each government has the "power to prosecute." *Ibid.* And for good reason. "Just as the Federal Government has the right to decide that a state prosecution has not vindicated a violation of the 'peace and dignity' of the Federal Government, a State must be entitled to decide that a prosecution by another State has not satisfied its legitimate sovereign interest." *Heath*, 474 U.S. at 93; *see infra* Part V for a public policy discussion of dual sovereignty.

Because of dual sovereignty, "when [an individual's] same act transgresses the laws of two sovereigns, * * * 'he has committed two offences, for each of which he is justly punishable.'" *Heath*, 474 U.S. at 88 (quoting *Moore* v. *Illinois*, 55 U.S. (14 How.) 13, 20 (1852)). Indeed, "this Court has long held" that two prosecutions "are not for the same offense if brought by different sovereigns—even when those actions target the identical criminal conduct through equivalent criminal laws." *Puerto Rico* v. *Sanchez-Valle*, 136 S. Ct. 1863, 1870 (2016). The Court first blessed this concept nearly two centuries years ago, and has repeatedly reaffirmed it since. *See ibid.*; *Heath*, 474 U.S. at 88 ("When a defendant in a single act violates the peace and dignity of two sovereigns by breaking the laws of each, he has committed two

distinct offences."); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *United States* v. *Lanza*, 260 U.S. 377 (1922); *Fox* v. *Ohio*, 46 U.S. (5 How.) 410 (1847); *Houston* v. *Moore*, 18 U.S. (5 Wheat.) 1, 33 (1820) (Johnson, J., concurring) ("Why may not the same offence be made punishable under the laws of the states, and of the United States? Every citizen of a state owes a double allegiance[]; he enjoys the protection and participates in the government of both the state and the United States.").

Tennessee's Constitution recognizes that crimes are committed against the State in its official capacity as sovereign. Tenn. Const. Art. VI § 12 ("Indictments shall conclude, 'against the peace and dignity of the State.'"); *see also* Tenn. Code Ann. § 40-13-201 ("An indictment * * * must conclude 'against the peace and dignity of the state of Tennessee.'"). The Founders, this Court, and the state of Tennessee are clear: because petitioner's conduct was unlawful under both state and federal law, he separately committed "offenses against the peace and dignity of both" the United States and the State of Tennessee. *Lanza*, 260 U.S. at 382; *see* 18 U.S.C. 1951(b)(1) ("Hobbs Act" robbery); Tenn. Code Ann. § 39-13-402(a) (aggravated robbery).

B. The right to counsel attaches to specific offenses within a sovereign

The fact that Turner offended separate sovereigns ends the inquiry. This is because the "Sixth Amendment right [to counsel] * * * is offense specific." *McNeil*, 501 U.S. at 175. The "Sixth Amendment

right to counsel is personal to the defendant and specific to the offense." *Cobb*, 532 U.S. at 171 n.2; *see also id.* at 173 n.3 ("[W]e could just as easily describe the Sixth Amendment as 'prosecution specific.'"). Because the right to counsel is "offense specific," its attachment to one offense cannot imply attachment to another. *Cobb*, 532 U.S. at 168 ("[D]efendant's statements regarding offenses for which he had not been charged were admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses."). This forecloses petitioner's argument for two reasons.

First, because petitioner was not charged at the federal level, there was no charge to which the Sixth Amendment could attach in the first place. The right "cannot be invoked once for all prosecutions," *McNeil*, 501 U.S. at 175, and does not attach to "offenses for which [individuals are not] charged." *Cobb*, 532 U.S. at 168.

Second, *McNeil*'s "same offense" requirement does not turn on *why* a crime is distinct. It applies to crimes that are distinct *because* they offend separate sovereigns, just as it applies to crimes that are distinct *because* they have different elements. *See United States* v. *Waters*, No. cr-11-100, 2013 WL 3949092 (E.D. Pa. July 31, 2013) (holding that, despite the Sixth Amendment attaching to defendant's state charges, the right had not attached to the defendant's federal charges until his federal indictment. Thus, he could not challenge the ineffective assistance of his state counsel in a 2255 motion). Therefore, even if the right *could* attach to an uncharged

federal offense, whether the right attached to a state offense is irrelevant. They would be *different* offenses.

This Court has already rejected the idea that the right to counsel can attach by implication—even to "crimes that are 'factually related' to a charged offense"—*within* a sovereign. *Cobb*, 532 U.S. at 168 (refusing to approve "[s]ome state courts and Federal Courts of Appeals[']" decisions to "read into *McNeil*'s offense-specific definition an exception for crimes that are 'factually related' to a charged offense"); *cf. Blockburger* v. *United States*, 284 U.S. 299, 304 (1932) (establishing test for when offenses are considered the "same").

Instead, this Court has issued a clear rule, consistent with the right's purpose. The right to counsel is designed to help individuals "after 'the adverse positions of government and defendant have solidified' with respect to a *particular* alleged crime." *McNeil*, 501 U.S. at 177-78 (quoting *Gouveia*, 467 U.S. at 189)) (emphasis added). Without tethering the right to particular offenses, the Sixth Amendment becomes a general right to counsel, with no principled metes and bounds. Such a rule would depart from the particularity with which this Court has shaped its attachment jurisprudence. This Court should not upend that doctrine now.

C. *Cobb* confirms that dual sovereignty applies in the Sixth Amendment context

Dual sovereignty is a paradigm so fundamental to our nation's past and present that its applicability

to the Sixth Amendment is obvious. "Any other conclusion would be an affront to both state and federal sovereignty." *United States* v. *Alvarado*, 440 F.3d 191, 197 (4th Cir. 2006). But dual sovereignty's applicability to the Sixth Amendment is not just obvious. The *Cobb* Court confirmed it—twice.

First, the Court saw "no *constitutional* difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel." *Cobb*, 532 U.S. at 173 (emphasis added). The *constitutional* meaning of "offense" in the double jeopardy context is sovereign specific. "This Court has plainly and repeatedly stated that two identical offenses are not the 'same offence' within the meaning of the Double Jeopardy Clause if they are prosecuted by different sovereigns." *Heath*, 474 U.S. at 92.

Cobb thus requires a sovereign-specific understanding of "offense" in the right to counsel context. If it did not, "there *would* be a difference in the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel. * * * [Crimes] would not constitute the 'same offense' for double jeopardy purposes, while they would constitute the 'same offense' for right to counsel purposes." *United States* v. *Coker*, 433 F.3d 39, 44 & n.8 (1st Cir. 2005) (emphasis added). Five Circuits have upheld this reasoning. *See Turner*, 885 F.3d at 955; *Alvarado*, 440 F.3d at 196; *United States* v. *Burgest*, 519 F.3d 1307, 1310 (11th Cir. 2008); *Coker*, 433 F.3d at 50; *United States* v. *Avants*, 278 F.3d 510, 517 (5th Cir. 2002).

Second, *Cobb* describes the right to counsel as "prosecution specific." 532 U.S. at 173 n.3. Federal and state prosecutions—even for the same conduct—are distinct prosecutions. This is because "each government's "power to prosecute" is derived from its own "inherent sovereignty." *Heath*, 474 U.S. at 89 (quoting *Wheeler*, 435 U.S. at 320 n.14). Under *Cobb*'s "prosecution specific" framework, a state prosecution is not the "same" as the federal offense. The First and Fourth Circuits have agreed. *See Alvarado*, 440 F.3d at 196-97; *Coker*, 433 F.3d at 44.

Any argument that *Cobb* did not expressly "incorporate" dual sovereignty misses the point. "Incorporating" dual sovereignty is conceptually impossible. *See United States* v. *Angleton*, 314 F.3d 767, 771 (5th Cir. 2002) ("The dual sovereignty doctrine is best understood, * * * not as an exception to double jeopardy, but rather as a manifestation of the maxim that where a defendant violates the laws of two sovereigns, he commits separate offenses."). By arguing otherwise, petitioner mistakenly frames dual sovereignty as an exception—a unique departure instead of structural concept.

V. Dual sovereignty is essential to our federal system of justice

Holding that dual sovereignty does not apply in the Sixth Amendment context would not simply ignore sovereign authority—it would severely undermine it. The "power to prosecute" is "'inherent in any sovereign.'" *Heath*, 474 U.S. at 89 (quoting *Wheeler*, 435 U.S. at 320, n.14). Petitioner's rule threatens the

principle's very heart. It would make federal prosecutions more difficult (stymying federal investigations), because of an arbitrary act (state prosecutors charging defendants first), at tremendous time and expense, for no good reason.

A. Petitioner's rule would obstruct the most important cases

Unnecessarily attaching the right to counsel to pre-charge plea negotiations obstructs law enforcement investigations. *See supra* Section III.C.3. Petitioner's proposal that the right to counsel attaches to uncharged federal offenses simply because a state has charged a defendant with similar offenses is just as obstructive.

In short, petitioner's rule would permit the federal government to *prosecute* someone charged by the state but prohibit it from fully *investigating* that person. Simply because state prosecutors beat them to the courthouse, federal prosecutors would be barred from collecting uncoerced confessions or statements from individuals outside of the presence of counsel. *McNeil*, 501 U.S. 171; *Moulton*, 474 U.S. 159. Petitioner's rule thus "negate[s] society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses." *Cobb*, 532 U.S. at 171-72.

The very fact that the federal government considers prosecuting an individual who is already being prosecuted at the state level indicates that the case is especially important. Official policy supports this intuitive fact. When states press charges, federal

prosecutors only press similar charges when the case "involve(s) a substantial federal interest" that the state has left "demonstrably unvindicated." U.S. Dep't of Justice, *United States Attorneys' Manual* § 9-2.031(A). Otherwise, the Department of Justice generally "preclude[es] the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s)." *Ibid.*

Of course, the fact that the state is prosecuting an individual does not prohibit the federal government from doing the same. *See Heath*, 474 U.S. at 82 (holding the Double Jeopardy Clause inapplicable to different sovereigns bringing same charges). But under petitioner's rule, much of the evidence a federal prosecutor may have—though strong—may be inadmissible "simply because other charges were pending at that time." *Moulton*, 474 U.S. at 180.

Whether federal prosecutors can bring a case after a state prosecution leaves a "substantial federal interest * * * demonstrably unvindicated" would turn on the arbitrary fact of whether the state beat them to the courthouse. *United States Attorneys' Manual* at § 9-2.031(A). Because this "strip[s] both sovereigns of a central attribute of sovereignty in derogation of our federal design," this Court should not adopt it. *Alvarado*, 440 at 197 (citing *Heath*, 474 U.S. at 93).

Creating an inherently competitive dynamic between state and federal prosecutors will have yet another troubling effect: fewer cooperative state-federal task forces. Joint task-forces—such as the Safe

Streets Task Force that investigated petitioner—are efficient because they "bring together federal, state and local law enforcement officers with the goal of sharing resources and information to combat a particular crime problem." U.S. Dep't of Justice, *Justice Manual* cmt. § 3-7.000D. By making it harder for agencies participating in joint efforts to bring cases, petitioner's rule discourages efficient collaboration.

B. Petitioner's rule is unworkable, costly, and unnecessary

Because it would mean that the admissibility of a federal prosecutor's evidence—and thus the viability of her case—turns on the existence of a state prosecution, petitioner's rule is wildly unworkable.

"Needless to say, it would be highly impractical for the federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses." *Abbate* v. *United States*, 359 U.S. 187, 195 (1959). There are over 2,400 federal and state prosecutor offices in the United States. United States Bureau of Justice Statistics, *Prosecutors in State Courts, 2007 – Statistical Tables*, U.S. Dep't of Just. (2011), https://www.bjs.gov/content/pub/pdf/psc07st.pdf; *U.S. Attorneys Listing*, U.S. Dep't of Justice, https://www.justice.gov/usao/us-attorneys-listing. Under petitioner's rule, federal prosecutors in one office would have to ensure none of the roughly 2,300 state prosecutors have filed charges against an individual they are investigating, lest they risk a Sixth Amendment violation.

Presumably, prosecutors can narrow many of these offices down by region, but this by no means cures the problem. Often, for example, interstate impact is the only reason Congress could have criminalized conduct in the first place. *See, e.g.*, *Turner*, 885 F.3d at 975 n.1 (Clay, J., concurring) (noting that absent affecting interstate commerce, Hobbs Act robbery "would not be a valid exercise of Congress's Commerce Clause powers under Article I of the Constitution"). How diligent an effort must a federal prosecutor conduct? Must she check the court docket in the county with which she shares concurrent jurisdiction? In every county the crime passed through? Where the crime could have impacted?

Petitioner's rule is costly. For all of the reasons that Turner's rule is unworkable, it is expensive. Answering "yes" to any of the questions above comes at a price. A prosecutor would have to spend time searching county court dockets to determine whether charges have already been filed against an individual she is investigating. And once she determines that a state has brought charges, she must conduct a *Blockburger* analysis to see whether the state crime is the "same" as the federal one—and thus relevant. *See generally* 284 U.S. at 304 ("[T]he test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

Not only will these questions take up prosecutors' time, but they will backlog courts with litigation and further stretch indigent defense counsel. Counsel will now litigate whether the state and federal of-

fenses are considered the "same" under *Blockburger*, a test that is "extraordinarily difficult to administer in practice." *Cobb*, 532 U.S. at 185 (Steven, J., dissenting). Judges and defense counsel will spend tremendous time and resources on pre-trial motions practice. Petitioner's own case evidences this difficulty. *Turner*, 885 F.3d at 974-75 (Clay, J., concurring) (addressing petitioner's claim that his state and federal crimes were the same "offense" under *Blockburger*).

Even though attorneys would frequently litigate the issue, petitioner's rule would rarely change a case's outcome. Federal crimes are often distinct from state crimes due to jurisdictional elements—conduct must have a federal hook for Congress to have lawfully criminalized it. For example, though saturated in the federal criminal code, an effect on interstate commerce is unnecessary—and thus missing—from many state codes. This is important, because crimes with different jurisdictional elements are not the "same offense" under *Blockburger*.[2] Petitioner's case illustrates this point: "Hobbs Act robbery requires that the robbery have affected interstate commerce, while Tennessee aggravated robbery

[2] Several courts have agreed, reasoning that "overlooking the jurisdictional requirement would thwart Congress's express intent to create jurisdiction to combat crimes of this type." *United States* v. *Rashed*, 83 F. Supp. 2d 96, 104 n.6 (D.D.C. 1999), aff'd, 234 F.3d 1280 (D.C. Cir. 2000). For similar reasoning, see *United States* v. *Hairston*, 64 F.3d 491, 496 (9th Cir. 1995); *United States* v. *Sablan*, 976 F. Supp. 2d 1190, 1196 (E.D. Cal. 2013).

has no such element." *Turner*, 885 F.3d at 975 (Clay, J., concurring). Therefore, this increased litigation will rarely be of any use.

Petitioner's rule is unnecessary. Petitioner's scenario presupposes that the state has already brought charges. In other words, the only individuals who petitioner's rule helps are those who by definition *are entitled* to counsel in their state cases. *Kirby*, 406 U.S. at 688. They are unlikely to negotiate alone, even if they are not yet "immersed in the intricacies of substantive and procedural criminal law." *Id.* at 689.

C. Petitioner's rule would cause rushed plea deals

Petitioner's rule will force federal prosecutors to approach defendants with plea deals early and aggressively in order to vindicate the federal interests they are charged with protecting. This has two obvious implications.

First, prosecutors will rush to make deals without the ability to devote the careful attention needed to ensure their plea offers are in the interest of justice. *See Berger* v. *United States*, 295 U.S. 78, 88 (1935) (noting that a sovereign's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done"). Prosecutors will also be strongly incentivized to threaten individuals with more charges and enhancements if they cannot reach an agreement—and quickly. Under petitioner's rule, prosecutors would be incentivized to engage in such hard bargaining in order to get pleas settled before

another sovereign's charging decision makes it more difficult. The public policy concerns with such hard bargaining is plain. *See* Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line?*, 17 Nev. L.J. 401 (2017) (listing policy concerns with overcharging).

Second, prosecutors will shorten the window defendants have to accept plea offers. Of course, prosecutors are within their discretion to make exploding offers. *See Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file * * * generally rests entirely in his discretion."); Wayne R. LaFave et al., *Criminal Procedure* § 13.2(g) (4th ed. 2015) (discussing wide prosecutorial discretion). Although permissible, short-dated exploding offers increase pressure on individuals. Petitioner's rule encourages prosecutors to make exactly such offers.

Instead, this Court should continue to allow prosecutors to think critically about when, how, and what kind of plea deal to offer individuals. This ensures that plea bargaining benefits all parties. *See* Scott & Stuntz, *supra*, at 1909 & n.2-3 ("Defendants who bargain for a plea serve lower sentences than those who do not. * * * [A] substantial minority of those who go to trial are acquitted."); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. Legal Stud. 289, 289 (1983) (describing plea bargaining as a part of a "well-functioning market system").

D. Any risk of one sovereign using information illegally obtained by another is minute

This Court has looked past dual sovereignty only twice, both times to bar one sovereign's use of evidence illegally obtained by another. In *Elkins* v. *United States*, the Court held that the Fourth Amendment bars from *federal* prosecutions evidence illegally seized by *state* officers. 364 U.S. 206 (1960). Four years later, the Court extended this cross-sovereign exclusionary rule to the Fifth Amendment right against self-incrimination. *Murphy* v. *Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964). In each case, the Court was motivated by the fear of "one sovereign obtaining evidence in violation of defendants' constitutional rights, then passing the evidence on a 'silver platter' to the other sovereign, which would then be free to utilize the tainted evidence in its own prosecution with no risk of suppression." *Coker*, 433 F.3d at 50 (Cyr, J., concurring) (quoting *Elkins*, 364 U.S. at 208).[3]

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[3] Cross-sovereign exclusionary rules make sense in the Fourth and Fifth Amendment contexts, because information obtained in violation of those rights offend their very core. The Fourth Amendment guards "against all unreasonable searches and seizures under the guise of law." *Weeks* v. *United States*, 232 U.S. 383, 391-92 (1914); *see* U.S. Const. Amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."). The Fifth Amendment right against self-incrimination reflects "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where

A cross-sovereign exclusionary rule is unrelated to the Sixth Amendment's purpose. Being "immersed in the intricacies of substantive and procedural criminal law" without counsel—the effect of a Sixth Amendment violation—is not something that can be transferred on a "silver platter" between sovereigns. *Gouveia*, 467 U.S. at 189 (quoting *Kirby*, 406 U.S. at 689). The Sixth Amendment right to counsel is about *assistance at trial*. Exclusionary rules are about *information*. The Sixth Amendment's right to counsel "'protec[ts] the unaided layman at critical confrontations' with his 'expert adversary,' the government, after 'the adverse positions of government and defendant have solidified' with respect to a particular alleged crime." *McNeil*, 501 U.S. at 177-78 (quoting *Gouveia*, 467 U.S. at 189). As Justice Sutherland articulated nearly a century ago, this ensures laymen the assistance of those with "both the skill and knowledge adequately to prepare his defense." *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932).

Even assuming state prosecutors violated this right, they could not conspire with federal prosecutors "to do together what each could not constitutionally do on its own." *Heath*, 474 U.S. 102 (Mar-

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he may lead a private life.'" *Murphy*, 378 U.S. at 55 (quoting *United States* v. *Grunewald*, 233 F.2d 556, 581-82 (2d Cir. 1956) (Frank, J., dissenting), *rev'd on unrelated grounds* 363 U.S. 391 (1956)); *see* U.S. Const. Amend. V ("No person * * * shall be compelled in any criminal case to be a witness against himself.").

shall, J., dissenting). In short, the "silver platter" does not just lack luster—there is nothing on it.

To be sure, Sixth Amendment doctrine includes an exclusionary rule against unlawfully-obtained information. *Massiah*, 377 U.S. at 206. But there are three reasons why sovereigns are unlikely to share that information.

First, the Fifth Amendment already protects most scenarios in which individuals are likely to reveal incriminating information—like interrogations. Indeed, "there can be no doubt that a suspect must be apprised of his rights against compulsory self-incrimination and to consult with an attorney before [federal] authorities may conduct custodial interrogation." *Cobb*, 532 U.S. at 169. *Murphy* already bars *all* sovereigns from using such statements.[4]

Second, post-attachment, defendants are unlikely to make incriminating statements in the first place. After all, the Sixth Amendment only attaches once formal judicial proceedings have begun. *Gouveia*, 467 U.S. at 189. By then, an "accused speaking to a known Government agent is typically aware that his statements may be used against him." *United States* v. *Henry*, 447 U.S. 264, 273 (1980). When such statements are made during plea negotiations, they are barred from trial by the Federal Rules of Evidence and state analogues. *See* Fed. R.

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[4] That *Murphy* was "designed to protect the Fifth Amendment, not Sixth Amendment[] rights * * * is irrelevant." *Montejo*, 556 U.S. at 795.

Evid. 410(a)(4); David P. Leonard, *The New Wigmore: A Treatise on Evidence: Selected Rules of Limited Admissibility* § 5.9.3 (rev. ed. 2018). Thus, the narrow set of scenarios when the Sixth Amendment right to counsel attaches but the Fifth Amendment right does not raises limited evidentiary concerns.

Finally, many jurisdictions already exclude evidence obtained through improper inter-sovereign collusion under *Bartkus* v. *Illinois*, 359 U.S. 121 (1959). *Bartkus* prohibits prosecutors from invoking dual sovereignty—including in the Sixth Amendment context—where one sovereign's prosecution is simply a "tool" for the other. This rule "stands for the proposition that federal authorities are proscribed from manipulating state processes to accomplish that which they cannot constitutionally do themselves" and is consistent with "the dual sovereignty concept that underlies our system of criminal justice." *United States* v. *Liddy*, 542 F.2d 76, 79 (D.C. Cir. 1976). *Bartkus* mitigates "any concerns [this Court should] have about potential 'end runs' around the Sixth Amendment's protections." *Coker*, 433 F.3d at 45; *see United States* v. *Willson*, 712 Fed. Appx. 115, 117 (2d Cir. 2018); *United States* v. *Lucas*, 841 F.3d 796, 803 (9th Cir. 2016); *United States* v. *Guzman*, 85 F.3d 823, 826 (1st Cir. 1996); *United States* v. *Louisville Edible Oil Prod., Inc.*, 926 F.2d 584, 588 (6th Cir. 1991); *United States* v. *Raymer*, 941 F.2d 1031, 1037 (10th Cir.1991); *In re Kunstler*, 914 F.2d 505, 517 (4th Cir.1990).

This Court should not adopt petitioner's broad rule because of these narrow evidentiary concerns.[5] Instead, if it believes these concerns counsel action, it should make a narrow ruling creating a prophylactic cross-sovereign exclusionary rule as in *Elkins* and *Murphy*. It should not fundamentally alter our federalist structure because of a narrow evidentiary concern.

VI. The Constitution, rules of criminal procedure, and rules of evidence adequately protect individuals during pre-charge plea negotiations

This Court need not extend the right to counsel past "the literal language of the Amendment" to protect against the harms petitioner warns of. *Gouveia*, 467 U.S. at 188. Constitutional and statutory safeguards ensure that plea negotiations are fair—and provide recourse when they are not.

The greatest protection against the concerns petitioner raises is that a defendant's right to counsel *will* attach before he enters his plea. Both arraignment and the entry of a guilty plea are critical stag-

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[5] The only two Circuits that have adopted petitioner's position did exactly that. *See United States* v. *Krueger*, 415 F.3d 766, 777 (7th Cir. 2005); *United States* v. *Mills*, 412 F.3d 325, 330 (2d Cir. 2005). In a case involving federal and tribal charges, the Eighth Circuit declined to "fully rely on double jeopardy analysis" because "the tribe and the U.S. worked in tandem to investigate the" crime and "tribal sovereignty is 'unique and limited' in character." *United States* v. *Bird*, 287 F.3d 709, 715 (8th Cir. 2002) (quoting *Wheeler*, 435 U.S. at 323)).

es. *Frye*, 566 U.S. at 140. At that point, he cannot be forced to formally enter a guilty plea simply because he has previously agreed to do so. Such a plea would be involuntary, and thus unenforceable. *See Mabry* v. *Johnson*, 467 U.S. 504, 510 (1984) (acceptance of a plea deal does not make it specifically enforceable). Therefore, every defendant will have an opportunity to speak with counsel before entering a plea if he so wishes.

Additionally, this Court has long recognized that the Due Process Clauses of the Fifth and Fourteenth Amendments protect individuals against fundamentally unfair treatment by the government in criminal cases, including before the right to counsel attaches. *See Gouveia*, 467 U.S. at 191 ("declin[ing] to depart from [the Court's] traditional interpretation of the Sixth Amendment right to counsel in order to provide additional protections for respondents" where due process "protections apply").

The Due Process Clause also requires an *affirmative showing* on the record that the defendant entered the plea knowingly and voluntarily. *Boykin* v. *Alabama*, 395 U.S. 238 (1969). A plea does not meet these criteria if the individual is not "fully aware of [its] direct consequences, including the actual value of any commitments made to him by the * * * prosecutor." *Brady* v. *United States*, 397 U.S. 742, 756 (1970) (quoting *Shelton* v. *United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc)). Nor could it have been induced by "misrepresentation." *Ibid.* To ensure that a plea meets these criteria, judges must advise defendants of several rights they are giving

up, as well as make certain inquiries. *See, e.g.*, *Boykin*, 395 U.S. at 243 (requiring judges to inform defendants at the time of a plea that they are waiving certain constitutional rights).

In federal and many state courts, judges must inform defendants of the minimum and maximum sentences they face if they plead guilty. *See, e.g.*, Fed. R. Crim. P. 11(b)(1)(H)-(I); *Hannah* v. *State*, 943 So.2d 20, 25 (Miss. 2006); Ga. Unif. Super. Ct. R. 33.8(D)(3)-(4); Ill. Sup. Ct. R. 402(a)(2). They generally must also find a factual basis for the plea to ensure that innocent defendants are not pleading guilty. *See* Fed. R. Crim. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."); *Higgason* v. *Clark*, 984 F.2d 203, 208 (7th Cir. 1993) ("Putting a factual basis for the plea on the record has become familiar as a result of statutes and rules.").

Where a defendant was not apprised of the consequences of his plea agreement, he can challenge his plea under the Due Process Clause because "a valid plea presupposes fairness in securing agreement between an accused and a prosecutor." *Mabry*, 467 U.S. at 509 (quoting *Santobello* v. *New York*, 404 U.S. 257, 261 (1971)).

Next, any statements made by an individual to a prosecutor during pre-charge plea negotiations may not be used against him at trial if no agreement is reached. *See* Fed. R. Evid. 410(a)(4) (barring "a statement made during plea discussions with an attorney for the prosecuting authority if the discus-

sions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea"); Leonard, *supra*, at § 5.9.3 (noting that only "[a] few states maintain rules that do not deal explicitly with plea bargaining statements, but it is likely that at least some plea bargaining statements would be excluded in these jurisdictions, as well as in jurisdictions that have not yet codified a rule regarding the use of plea evidence"). Thus, an uncounseled individual does not risk handing a prosecutor incriminating evidence she can use to try him later.

Because of these safeguards, the Court simply does not *need* to disregard the Sixth Amendment's text and purpose—contradicting decades of precedent—to protect individuals during pre-charge negotiations.

If petitioner is unsatisfied with these protections, his concerns would be better addressed to state legislatures and Congress. It is those bodies, not this Court, that can enact laws and pass constitutional amendments to provide a right to counsel during pre-charge plea negotiations. *See Moran*, 475 U.S. at 428 ("Nothing we say today disables the States from adopting different requirements for the conduct of its employees and officials as a matter of state law."). Indeed, were the Court to expand the Sixth Amendment right to counsel, it would *prevent* legislation or constitutional amendments that could address petitioner's concerns "in a more precise and targeted fashion." *Padilla* v. *Kentucky*, 559 U.S. 356, 392 (2010) (Scalia, J., dissenting). As Justice Scalia recognized, "[t]he Constitution . . . is not an all-purpose

tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed." *Id.* at 388.

CONCLUSION

The judgment of the Sixth Circuit should be affirmed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. V provides, in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, * * * nor shall a person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself * * *.

2. U.S. Const. Amend. VI provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to * * * have the Assistance of Counsel for his defence.