No. 18-106

In the

# Morris Tyler Moot Court of Appeals at Yale

JOHN R. TURNER,

*Petitioner*,

v.

UNITED STATES,

*Respondent.*

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

## BRIEF FOR PETITIONER

THOMAS HOPSON
BRIAN MCGRAIL
127 Wall Street
New Haven, CT 06511
(203) 432-4992

*Counsel for Petitioner*

## QUESTIONS PRESENTED*

John Turner pleaded guilty to state charges. Federal prosecutors then offered him a plea bargain for charges arising out of the same conduct, which would have limited his prison sentence to fifteen years. Because his attorney failed to explain why he should accept the deal, Turner missed the offer's deadline. He later accepted a plea deal for twenty-five years. The lower courts held Turner's right to counsel had not attached during these plea negotiations, and so dismissed his claim that his attorney was constitutionally ineffective. The questions presented are:

1. Whether the Sixth Amendment's right to counsel attaches when prosecutors present the accused with a plea offer before they have filed formal charges.

2. Whether the Sixth Amendment's right to counsel attaches when a defendant has been indicted for the same offense by a different sovereign.

---

* All parties are named in the caption of the case.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes and constitutional provisions**



**Regulations**

**Other authorities**

## OPINIONS BELOW

The opinion of the district court denying Turner's petition to vacate his sentence is unpublished but is available at 2015 WL 13307594. The panel opinion of the court of appeals affirming the district court is reported at 848 F.3d 767. The opinion of the en banc court of appeals affirming the panel's decision is reported at 885 F.3d 949.

## STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 20, 2018. After timely filing, the petition for a writ of certiorari was granted. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense." U.S. Const. amend VI.

## INTRODUCTION

Plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri* v. *Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)). This Court has established that the Sixth Amendment secures a right to counsel in plea negotiations that follow the filing of formal charges. *Id.* at 143. This case concerns the treatment of plea offers that precede formal charges.

John Turner robbed four businesses, stole about $800, and was arrested shortly thereafter. After he pleaded guilty in state court, a federal prosecutor

planned to bring charges carrying a mandatory minimum sentence of eighty-two years. The prosecutor offered a plea deal for Turner to serve fifteen years, so long as he pleaded before a grand jury returned an indictment. But Turner missed the deadline. The prosecutor then submitted an offer for Turner to serve twenty-five years, which he accepted.

Turner filed a motion for post-conviction review of his sentence, alleging that he would have accepted the first plea offer but for his attorney's ineffective assistance. The Sixth Circuit dismissed Turner's ineffectiveness claim, reasoning that Turner's right to counsel had not attached when Turner missed the plea deadline. This Court should vacate the decision below and clarify that the right to counsel attaches when prosecutors make a formal offer in a plea negotiation. In the alternative, the Court should hold Turner's right to counsel attached when he was indicted for the same offense in state court.

## STATEMENT

### A. Legal Background

**1.** "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Frye*, 566 U.S. at 143 (citation omitted). This Court has embraced plea bargaining's "prevalence" because the "potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties." *Id.* at 144.

Yet because plea bargains can "benefit all concerned" only if they are "[p]roperly administered," this Court has long "recognize[d] the importance of counsel

during plea negotiations." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 362 (1978) (citation omitted). That is why this Court held that plea negotiations are a critical stage of a criminal proceeding, requiring effective assistance of counsel so long as that right has previously attached. See *Frye*, 566 U.S. at 144; *Lafler* v. *Cooper*, 566 U.S. 156, 165 (2012). "In order that [plea bargaining's] benefits can be realized" defendants "require effective counsel during plea negotiations." *Frye*, 566 U.S. at 144.

**2.** Charge bargaining, in which the bargaining takes place before formal charges are filed, is one of the most common forms of plea bargaining. See, *e.g.*, Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 Stan. L. Rev. 1409, 1410 (2003). Because "[j]udges can sentence defendants only for crimes to which they plead, and defendants can plead only to crimes with which they are charged," the "prosecutor's charging decision" can be the most important decision in a defendant's case. Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 Minn. L. Rev. 1, 11 (2012). And often, "there is a range of criminal charges that can fit a criminal transaction." *Id.* Accordingly, in the modern criminal justice system, "criminal cases are much more complex than binary judgments of guilt or innocence." Stephanos Bibas, *The Myth of the Fully Informed Rational Actor*, 31 St. Louis U. Pub. L. Rev. 79, 80 (2011).

The centrality of bargaining means that bargained-for "sentences are not in any meaningful sense 'discounts' from the system's intended outcomes: they *are* the intended outcomes." Gerard E. Lynch, Frye *and* Lafler: *No Big Deal*, 122 Yale L.J. Online 39, 40 (2012). This Court has noted that "longer sentences exist on the books largely for bargaining purposes."

*Frye*, 566 U.S. at 144 (quoting Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006)). Because "[t]he expected post-trial sentence is imposed in only a few percent of cases," it "is like the sticker price for cars: only an ignorant, ill-advised consumer would view the full price as the norm and anything less a bargain." *Lafler*, 566 U.S. at 168 (quoting Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L. Rev. 1117, 1138 (2011)).

The pressure to plead is so profound that even some innocent defendants succumb. For example, over ten percent of the defendants exonerated through DNA evidence by the Innocence Project pleaded guilty to crimes they did not commit. See *DNA Exonerations in the United States*, Innocence Project, http://www.innocenceproject.org/dna-exonerations-in-the-united-states. An even higher percentage of these cases involved errors—such as "false confessions" and "eyewitness misidentifications"—to which uncounseled defendants are especially vulnerable. *Id.*

In the modern system, "it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." *Frye*, 566 U.S. at 143-44. The system is designed so that "individuals who accept a plea bargain" often receive "shorter sentences than other individuals who . . . take a chance and go to trial." *Id.* at 144 (quoting Barkow, *supra*, at 1043). Our "administrative criminal justice system" is "so dominant" that today "trials take place in the shadow of guilty pleas." Wright & Miller, *supra*, at 1415.

**3.** Prosecutors use sentencing laws as leverage because they must: Prosecutors are "often as overburdened as public defenders and appointed counsel." Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 Nw. U.L. Rev. 261, 262 (2011). The pressure of "excessive caseloads" leads prosecutors to push for swift agreements. *Id.* at 265.

This dynamic exerts pressure long before trial. Prosecutors need accused individuals to plead quickly because even pretrial steps—like obtaining an indictment from a grand jury—require them to expend scarce resources. The longer an accused waits, the worse the deal is likely to get as the prosecutor invests resources in a case. The reason is simple: Prosecutors must maintain adequate incentives for the accused to strike quick bargains or "our system of pleas" will collapse. *Lafler*, 566 U.S. at 170.

It is for this reason that a defense "lawyer can make a big difference in the cooperation process." Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2485 (2004). "Experienced criminal defense attorneys understand the potential benefits of fast cooperation" for their clients. *Id.* That is why practitioner's guides advise defense counsel to "attempt to get involved in the process before formal charges are filed." Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 Clin. L. Rev. 73, 112 (1995); see also Am. Bar Ass'n, *Criminal Justice Standards for the Defense Function*, Standard 4-6.2(g) (4th ed. 2016) ("Defense counsel should be aware of possible benefits from early cooperation with the government.").

**4.** Defense counsel may be essential in plea negotiations for other reasons. Absent effective counsel, accused persons "do not know what legal claims they might have." Scott & Stuntz, *supra*, at 1951-52. They often will not know, for example, that they have "legally valid defenses or entitlements to suppress certain types of evidence." *Id.* at 1952. A foundational premise of the modern criminal justice system—"that plea bargaining does not raise serious duress or unconscionability concerns—depends, to a substantial degree, on the ability of defense counsel to prevent government overreaching." *Id.* This concern is amplified by "the complexity of modern sentencing law," which is "now governed by a thick manual of sentencing guidelines" that are interpreted through "[t]housands of cases." Bibas, *Shadow of Trial*, *supra*, at 2483.

Furthermore, plea negotiations often take the form of quasi-trials at which counsel is a virtual necessity. At least in some jurisdictions, negotiations are "primarily discussions of the merits of the case, in which defense attorneys point out legal, evidentiary, or practical weaknesses in the prosecutor's case, or mitigating circumstances that merit mercy." Gerard E. Lynch, *Screening Versus Bargaining: Exactly What Are We Trading Off?*, 55 Stan. L. Rev. 1399, 1403 (2003). Accordingly, for many defendants, "the real trial is the one, quite informal and necessarily based mostly on hearsay, at which the prosecutor decides what charges to file and what plea to accept." Barkow, *supra*, at 1047 (citation omitted).

**5.** Although many defendants' right to counsel will attach before their plea negotiations, current law leaves the remaining few to confront a sophisticated government adversary all on their own. See, *e.g.*,

*United States* v. *Moody*, 206 F.3d 609, 612-16 (6th Cir. 2000).

Few believe that is a desirable outcome. The Advisory Committee on the Federal Rules of Criminal Procedure noted, "[d]iscussions without benefit of counsel increase the likelihood that such discussions may be unfair." Fed. R. Crim. P. 11 advisory committee's note (1974). And this Court's observation that only "[d]efendants advised by competent counsel" are "presumptively capable of intelligent choice in response to prosecutorial persuasion" suggests the same conclusion. *Bordenkircher*, 434 U.S. at 363.

If the accused lacks counsel, the government may respond by refusing to enter plea negotiations altogether. Indeed, the Advisory Committee on the Federal Rules of Criminal Procedure counseled that "[i]t may be desirable that an attorney for the government not enter plea discussions with a defendant personally." Fed. R. Crim. P. 11 advisory committee's note (1974). The imperative to strike bargains quickly increases the risk that unrepresented individuals may miss the chance to negotiate altogether.

**6.** Throughout the plea-bargaining process, lawyers are expected to provide defendants with "clear information about the substantive outcomes they will face and how good a deal they are receiving." Bibas, *Rational Actor*, *supra*, at 82. The "mutuality of advantage," *Brady* v. *United States*, 397 U.S. 742, 752 (1970), assumed by this Court to flow from plea bargaining depends on defendants' ability to predict "the costs and benefits of pleading guilty and do so only if plea bargaining serves their interests." Bibas, *Rational Actor*, *supra*, at 79. If defendants receive professionally unreasonable advice, they cannot make the

intelligent choices upon which plea bargaining depends.

In *Lafler* and *Frye*, this Court held that defendants can challenge the effectiveness of their counsel's performance during plea negotiations. See *Lafler*, 566 U.S. at 162-70; *Frye*, 566 U.S. at 140-49. That result follows from this Court's conclusion that "[i]n today's criminal justice system" the "negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Frye*, 566 U.S. at 144.

### B. Factual Background

On October 3, 2007, John Turner robbed four businesses at gun-point. *Turner* v. *United States*, No. 2:12-cv-02266-SHM, 2015 WL 13307594, at *6 (W.D. Tenn. Sept. 9, 2015). He was arrested shortly thereafter by members of the Safe Streets Task Force (SSTF).

The SSTF is "a joint federal-local task force" that includes the Federal Bureau of Investigation and three local police departments. *Id.* at *5. Because the "day to day operation and administrative control of the SSTF" was the "responsibility" of an FBI agent, the "local and state law enforcement personnel" serving as a part of the SSTF were "federally deputized." *Id.*

Turner retained Mark McDaniel as counsel. *Id.* at *6. Turner was indicted by a Tennessee grand jury on four counts of aggravated robbery. *Id.* He then agreed to a plea bargain and the "state charges were resolved by *nolle prosequi*" for a prison term of between nine and twelve years. *Id.*

While McDaniel was bargaining with state officials, he "learned that the United States Attorney

planned to bring federal charges" against Turner as well. *Id.* These charges—brought under the Hobbs Act, 18 U.S.C. § 1951, and for using a firearm in the commission of a crime of violence under 18 U.S.C. § 924(c)—would arise out of the same robberies. *Id.* If convicted, Turner "would face a mandatory minimum sentence of eighty-two years." *Id.* at *6 & n.14.

An AUSA "made McDaniel a plea offer of fifteen years on the condition that Turner accept the offer before a federal indictment had been returned." *Id.* at *6. Turner missed the deadline and subsequently hired a new lawyer. *Id.* at *7. The best offer Turner's new lawyer "was able to obtain" on the federal charges was twenty-five years. *Id.*

Turner filed a petition to vacate his sentence pursuant to 28 U.S.C. § 2255, alleging ineffective assistance of counsel. *Id.* at *3. In the petition, Turner alleged that, despite his repeated expressions of confusion as to why he should plead to federal charges that had not yet been filed, McDaniel did not explain to him that the alternative was an eighty-two-year mandatory-minimum sentence. *Id.* Had Turner understood the relevant tradeoffs, he would have accepted the offer and "received a 15-year sentence." *Id.*[1] McDaniel disputes Turner's account. *Id.* at *8-9.

### C. Prior Proceedings

**1.** The district court rejected Turner's § 2255 petition. Relying on circuit precedent, it concluded that because "the Sixth Amendment right to the effective

[1] The state authorities agreed that the state and federal sentences should "run concurrently," so that Turner's prison time would have been limited to fifteen years. *Id.* at *17 n.29.

assistance of counsel does not attach in pre-indictment plea negotiations," Turner's ineffectiveness claim was barred. *Id.* at *10. The district court also concluded that the right to effective assistance did not attach upon the filing of state charges because the "dual sovereignty doctrine" applied *Id.* at *12 (citing *Texas* v. *Cobb*, 532 U.S. 162, 173 (2001)).

**2.** A panel of the Sixth Circuit affirmed "with regret," lamenting that the "bright-line test" for attachment adopted by this Court led to a "triumph of the letter over the spirit of the law." *Turner* v. *United States*, 848 F.3d 767, 771 (6th Cir. 2017) (quoting *Moody*, 206 F.3d at 616). The panel expressed concern that a "prosecutor's preindictment plea negotiations 'raised the specter of the unwary defendant agreeing to surrender his right to a trial in exchange for an unfair sentence without the assurance of legal assistance to protect him.'" *Id.* (quoting *Moody*, 206 F.3d at 615). The panel also emphasized that, "by offering a plea deal, the prosecutor had committed himself to prosecute" Turner. *Id.*

**3.** The en banc Sixth Circuit likewise affirmed, reasoning that this Court's precedents foreclosed Turner's arguments. *Turner* v. *United States*, 885 F.3d 949, 951-55 (6th Cir. 2018) (en banc). Judge Bush concurred dubitante. He argued that "the original understanding of the Sixth Amendment gave larger meaning to the words 'accused' and 'criminal prosecution' than do [this Court's] precedents." *Id.* at 956 (Bush, J., concurring).

Judges Clay and White concurred in the judgment. Judge Clay observed that "during pre-indictment plea negotiations where a specific sentence is offered to a suspect for a specific offense, 'the adverse

positions of the government and the suspect have solidified.'" *Id.* at 969 (Clay, J., concurring in the judgment) (quoting *Moody*, 206 F.3d at 615-16). Judge White noted that were she "[u]nconstrained by" this Court's precedents she likely would have decided differently. *Id.* at 977 (White, J., concurring in the judgment).

Judge Stranch, joined by Judges Cole, Moore, and Donald, dissented. She criticized the majority for ignoring this Court's "practical recognition of the changing criminal justice system and its responsive jurisprudence extending the right to counsel to events before trial." *Id.* at 978 (Stranch, J., dissenting). She argued that "a formal plea offer on specific forthcoming charges contains all of the trappings of an adversary judicial proceeding." *Id.*

In this respect, Judge Stranch observed that "an individual who receives a formal plea offer has become an accused." *Id.* "Prosecutors do not make plea offers to all suspects, only those who face impending charges." *Id.* at 980-81 (citations omitted). Hence, "when a prosecutor extends a formal plea offer for specific charges, she has cemented her position as a defendant's adversary and she has committed herself to prosecute." *Id.* at 981. Judge Stranch concluded that "[t]his is precisely the sort of confrontation at which an inexperienced defendant who lacks legal skill risks signing away his liberty to a savvy and learned prosecutor." *Id.* Thus, "[d]enying an accused the right to counsel during preindictment plea negotiations . . . all but ensures that his window of exposure to the criminal justice system will open with the prosecutor and close in the prison system." *Id.*

## SUMMARY OF ARGUMENT

**I.** Turner's right to counsel attached when he received a plea offer from a federal prosecutor. This offer demonstrated that the government had "committed itself to prosecute" and that the "adverse positions of government and defendant [had] solidified." *Kirby* v. *Illinois*, 406 U.S. 683, 689 (1972) (plurality opinion). The offer also immersed Turner in the machinery of modern criminal justice, which Turner, absent effective counsel, "lack[ed] both the skill and [the] knowledge" to navigate. *Powell* v. *Alabama*, 287 U.S. 45, 68 (1932). Under this Court's precedents, these circumstances clearly warrant attachment.

The text, history, and guiding principles of the Sixth Amendment confirm this conclusion. Turner was both "accused" and subject to "criminal prosecution" within the original meaning of the Amendment's text. His response to the plea offer was also the "only stage [of his prosecution] when legal aid and advice would [have] help[ed]" him. *Frye*, 566 U.S. at 144 (quoting *Massiah* v. *United States*, 377 U.S. 201, 204 (1964)). Because the Sixth Amendment tracks "changing patterns of criminal procedure," *United States* v. *Ash*, 413 U.S. 300, 310 (1973), it rightly covered Turner during this high-stakes process.

Recognizing a right to counsel in charge bargaining would facilitate the administration of justice, helping prosecutors and defendants reach equitable deals that benefit both sides. Tying attachment to the receipt of a formal offer also creates an administrable standard, rooted in well-established principles of contract law.

**II.** Turner's right to counsel also attached after he was indicted by a Tennessee grand jury for the robberies that were the subject of his federal plea negotiation. When the right to counsel attaches, it does so for any offense that "would be considered the same offense" under the *Blockburger* test developed in this Court's double jeopardy jurisprudence. *Cobb*, 532 U.S. at 173. Because Hobbs Act robbery is a lesser included offense of Tennessee aggravated robbery, Turner's right to counsel had attached at the time of his plea offer.

The Sixth Circuit held to the contrary because it interpreted *Cobb* as applying the dual sovereignty doctrine to the right to counsel. But the dual sovereignty doctrine did not apply on the facts of *Cobb* and it does not apply to the Sixth Amendment. Later this term, the Court will consider whether to overrule the dual sovereignty doctrine in the double jeopardy context. See *Gamble* v. *United States*, 138 S. Ct. 2707 (2018). But even if it survives, this Court should not now expand the dual sovereignty doctrine into the Sixth Amendment.

Applying the dual sovereignty doctrine to the right to counsel is inconsistent with this Court's holding that attachment does not depend on precisely how the "the machinery of prosecution" has been "turned on." *Rothgery* v. *Gillespie Cty.*, 554 U.S. 191, 208 (2008). To the contrary, *Rothgery* is clear that what matters is only *that* this machinery has been turned on because once it has been, defendants are "faced with the prosecutorial forces of organized society." *Id.* at 207. Moreover, this Court has rejected the dual sovereignty rationale outside the narrow confines of the double jeopardy clause because they incentivize intersovereign collusion to violate constitutional rights.

Bedrock principles of federalism—including that individual liberty "is enhanced by two governments, not one" because federal and state governments serve as a check on one another, *Alden* v. *Maine*, 527 U.S. 706, 758 (1999)—further support declining to apply the dual sovereignty doctrine in this case.

Even if this Court applies the dual sovereignty doctrine, it should enlarge the collusive prosecution exception established in *Bartkus* v. *Illinois*, 359 U.S. 121 (1959). Increasing inter-sovereign cooperation and the federalization of criminal law threaten to erode core individual liberties protected by the Bill of Rights. When two sovereigns act as one entity, it contravenes the purposes of the Double Jeopardy and the Assistance of Counsel clauses to treat them as separate. And the justifications for applying the dual sovereignty doctrine in the double jeopardy context—for instance, that a state might immunize a defendant from federal prosecution in a civil rights case—do not apply where two sovereigns have formalized a cooperative arrangement.

## ARGUMENT

The Sixth Amendment guarantees that persons "accused" in a "criminal prosecution[]" shall "have the assistance of counsel" for their defense. U.S. Const. amend. VI. This Court has long recognized that "the right to counsel is the right to effective assistance of counsel." *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14 (1970) (citations omitted). The converse is also true: A defendant "cannot claim constitutionally ineffective counsel" where "there is no constitutional right to an attorney." *Coleman* v. *Thompson*, 501 U.S. 722, 752 (1991) (citation omitted). Thus, a threshold question for Turner's ineffectiveness claim is whether his

right to counsel had "attached" during his plea negotiations. *Rothgery*, 554 U.S. at 211. The Sixth Circuit erred in finding that it did not. *Turner*, 885 F.3d at 952 (majority opinion). This Court should vacate the judgment below and remand the case for an evidentiary hearing on Turner's ineffectiveness claim.

## I. The Sixth Amendment right to counsel attaches when a prosecutor makes a formal offer in a plea negotiation.

The right to counsel attaches when the accused "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby*, 406 U.S. at 689. The modern practice of plea bargaining, both before and after indictment, creates these conditions.

This right should attach when prosecutors offer a formal plea bargain to the accused. Facing a concrete offer, issued by an adverse prosecutor within the complex of modern criminal procedure, the accused "requires the guiding hand of counsel." *Gideon* v. *Wainwright*, 372 U.S. 335, 345 (1963) (quoting *Powell*, 287 U.S. at 68-69). Contract principles provide apt tools for determining when a formal offer is issued. And setting attachment to the time of offer would facilitate the administration of justice.

### A. The Court's precedents support treating plea offers as attachment events for the right to counsel.

"[T]he Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of [his] criminal proceedings." *Montejo* v. *Louisiana*, 556 U.S. 778, 786 (2009) (citation omitted). The right

extends "to certain steps before trial" because those "critical stages" may be the "only stage[s] when legal aid and advice would help" the accused. *Frye*, 566 U.S. at 140, 143, 144 (quoting *Massiah*, 377 U.S. at 204). Critical stages include the negotiation of a plea bargain, the entry of a guilty plea, arraignments, interrogations, and lineups. See *id.* at 140, 145. However, before the right to counsel applies at a critical stage, it must first "attach." *Rothgery*, 554 U.S. at 211. Under this Court's precedents, the right to counsel attaches when prosecutors make a formal plea offer to the accused.

### 1. This Court has tied attachment to three principal conditions: a commitment to prosecute, an adversity of positions, and a complexity of procedure.

The right to counsel attaches at the "initiation of adversary judicial proceedings." *United States* v. *Gouveia*, 467 U.S. 180, 188 (1984). The "adversary judicial proceedings" test seeks to identify the point at which (1) "the government has committed itself to prosecute," (2) the "adverse positions of government and defendant have solidified," and (3) the accused faces the "prosecutorial forces of organized society [while] immersed in the intricacies of substantive and procedural criminal law." *Rothgery*, 554 U.S. at 198 (quoting *Kirby*, 406 U.S. at 689). These three conditions—a commitment to prosecute, an adversity of positions, and a complexity of procedure—have long played the decisive role in this Court's attachment jurisprudence. The right to counsel attaches when they are present; it does not when they are absent. These criteria should guide this Court's approach to plea bargaining.

**a.** The commitment condition captures the transition in the government's role "from investigation to accusation." *Moran* v. *Burbine*, 475 U.S. 412, 430 (1984). "[I]t is only then that the assistance of [counsel] is needed to assure that the prosecution's case encounters 'the crucible of meaningful adversarial testing.'" *Id.* (quoting *United States* v. *Cronic*, 466 U.S. 648, 656 (1984)). The commitment condition is a matter of substance, not form. In *Rothgery*, this Court held that the right to counsel attaches at a state's preliminary hearing, even when (1) the state's prosecutors are not aware of the hearing and (2) the police officer at the hearing cannot "commit the state to prosecute without the . . . involvement of a prosecutor." 554 U.S. at 197-98 (citation omitted). For attachment purposes, the question is thus not whether the government has made a formal commitment to prosecute. It is instead whether the "machinery of prosecution [has been] turned on" and directed towards the accused, implicating "his actual ability to defend himself." *Id.* at 207-08.

**b.** The adversity condition is similarly oriented to practical concerns. The drafters of the Sixth Amendment understood "that if a defendant were forced to stand alone against the state, his case [would be] foredoomed." *United States* v. *Wade*, 388 U.S. 218, 224 (1967). As such, when the government becomes adverse to the accused, the Amendment "requires that the accused [receive] counsel acting in the role of an advocate." *Cronic*, 466 U.S. at 656. Adversity, for this purpose, does not require the presence of a prosecutor or the imminence of an indictment. See *Rothgery*, 554 U.S. at 207. Indeed, a routine preliminary hearing is enough to clear the bar. *Id.*

**c.** The third requirement for an "adversary judicial proceeding" is complexity. The right to counsel reflects the "obvious truth that the average defendant does not have the professional legal skill to protect himself . . . [when a] prosecution is presented by experienced and learned counsel." *Gouveia*, 467 U.S. at 188 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 462-63 (1938)). "That which is simple, orderly, and necessary to the lawyer—to the untrained layman may appear intricate, complex and mysterious." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 236 (1973). For this reason, "[t]he function of counsel as a guide through complex legal technicalities long has been recognized by this Court." *Ash*, 413 U.S. at 307. The complexity condition applies whenever the liberty of the accused depends on navigating such "legal technicalities." *Id.*

**d.** The presence of a judge can be a helpful proxy for assessing attachment. When a judicial officer is present, it is likely that the above conditions will be satisfied. However, like all proxies, judicial presence is imperfect. When this Court has declined to find an attachment event, it has consistently emphasized the absence of commitment, adversity, and complexity—not the absence of a judge. See, *e.g.*, *Gouveia*, 467 U.S. at 188-90. As such, so long as plea offers satisfy these conditions, they should trigger the right to counsel.

### 2. Pre-indictment plea bargaining presents the accused with the required commitment, adversity, and complexity.

In the modern criminal justice system, "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Frye*, 566 U.S. at 144. Because the offer of a pre-

indictment plea bargain meets the conditions of commitment, adversity, and complexity, it is an attachment event for the right to counsel.

**a.** As Judge Stranch noted below, "where a specific sentence is offered to an offender for a specific offense, the adverse positions of the government and the suspect have solidified." 885 F.3d at 968 (Stranch, J., dissenting). This offer cements the prosecutor's position as the adversary of the accused, expressing a clear commitment to obtaining a criminal conviction. After all, the very proposal of a plea bargain requires a prosecutor to believe that there is a "factual basis" for conviction. See U.S. Dep't of Justice, *Justice Manual* § 9-27.430 (2018). As the Department of Justice cautions, "it obviously is improper for the prosecutor to attempt to dispose of a case by means of a plea agreement if he/she is not satisfied that the legal standards for guilt are met." *Id.* § 9-27.420. Thus, by making a specific offer, the prosecutor has committed herself as the accused's adversary.

It is insufficient to respond that prosecutors in pre-indictment bargaining retain flexibility over which charges to file. Our system "is for the most part a system of pleas, not a system of trials." *Lafler*, 556 U.S. at 170. Prosecutors often weigh a "range of criminal charges that can fit a criminal transaction," and bargaining is essential for whittling these charges down. Bibas, *Rational Actor*, *supra*, at 80. During the course of this bargaining, even if prosecutors are not committed to bringing a particular charge, they *are* committed to prosecuting a "criminal transaction." *Id.* Under *Rothgery*'s prioritization of substance over form, this transaction-level commitment is sufficient for attaching the right to counsel.

**b.** Negotiating a plea offer is itself an adversarial process. Plea bargaining occurs through "give-and-take negotiation" between parties that "arguably possess relatively equal bargaining power." *Bordenkircher*, 434 U.S. at 362. Each will try to extract as much as they can from the other in exchange for their bargaining chips. In the commercial sphere, there would be little doubt that counter-parties in this setting were "adverse" to one another. The same is true here.

**c.** Finally, pre-indictment plea bargaining presents the accused with the raw complexity of modern criminal procedure. No less in plea bargaining than at trial, the uncounseled accused "lacks both the skill and knowledge" to assess the strength of the prosecution's case against him. *Powell*, 287 U.S. at 69. This difficulty is only compounded by the intricacies of modern sentencing law, its "thick manual of sentencing guidelines," and its "[t]housands of relevant cases." Bibas, *Shadow of Trial*, *supra*, at 2483. Taken together, the accused's ignorance of sentencing, evidence, and professional culture leave him adrift in the face of determined prosecution. The handicap prevents him from striking a fair bargain. See *Bordenkircher*, 434 U.S. at 363 (observing that only "[d]efendants advised by competent counsel" are "presumptively capable of intelligent choice in response to prosecutorial persuasion").

**d.** In sum, pre-indictment plea bargaining shares the key characteristics of an attachment event. It expresses the government's commitment to prosecute, involves adverse negotiations with one's accusers, and embodies the full complexity of modern criminal pro-

cedure. For this reason, the formal offer of a plea bargain attaches the right to counsel under this Court's precedents.

### 3. Plea bargaining is sufficiently judicial to warrant attachment.

The attachment of the right to counsel does not require the physical presence of an Article III judge. See Section I.A.1, *supra*. Nonetheless, pre-indictment plea bargaining can be reasonably classified as a "judicial proceeding." At the very least, it is sufficiently intertwined with the judiciary to warrant attachment.

Federal Rule of Criminal Procedure 11 requires judicial supervision of plea bargains. Although judges may not participate in the bargaining itself, see Fed. R. Crim. P. 11 (c)(1), they retain the final authority to "accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report." *Id.* 11(c)(3)(A); see also *U.S. Sentencing Guidelines Manual* § 6B1.2 (U.S. Sentencing Comm'n 2011) (providing standards for the acceptance of plea bargains). This authority accompanies a responsibility to ensure that there is a "factual basis" for all guilty pleas. Fed. R. Crim. P. 11(b)(3). Against this backdrop, the prosecution and the accused must bargain with an eye to eventual judicial approval. See *Justice Manual* § 9-27.430 (advising federal prosecutors to account for Rule 11(b)(3) during plea negotiations).

This judicial presence in plea bargaining is a matter of design. Before the amendments to Rule 11 in 1975, plea bargaining occurred "in an informal and largely invisible manner." Fed. R. Crim. P. 11 advisory committee's note (1974). Breaking from that norm, the revised standards sought to "(1) ensur[e] that the defendant has made an informed plea; and

(2) ensur[e] that plea agreements are brought out in open court." *Id.* at advisory committee's note (1983). Today, before a judge can accept a guilty plea, she must confirm on the record that the accused understands fifteen distinct elements of his plea, including his "right to a jury trial." Fed. R. Crim. P. 11 (b)(1)(C). Rule 11 thus "gives the district judge ultimate supervision over plea bargains." *United States* v. *Sikora*, 635 F.2d 1175, 1181 n.4 (6th Cir. 1980) (Wiseman, J., concurring in part and dissenting in part).

Ultimately, this Court has tied attachment of the right to counsel to three key conditions: a commitment to prosecute, an adversity of positions, and a complexity of procedures. The significance of the word "judicial" in *Kirby*'s "adversary judicial proceedings" test has been left open. However, to the extent that attachment does require some judicial involvement, pre-indictment plea bargaining more than clears that bar.

### B. Guaranteeing a right to counsel in pre-indictment plea bargaining coheres with the text, history, and guiding principles of the Sixth Amendment.

The "literal language" of the Sixth Amendment ties attachment to the "existence of both a 'criminal prosecution' and an 'accused.'" See *Gouveia*, 467 U.S. at 188. It is accordingly of great significance that these terms, understood in their historical context, could reasonably encompass the realities of modern plea bargaining. In assessing "extension[s] of the right to counsel," this Court has also considered "changing patterns of criminal procedure and investigation." *Ash*, 413 U.S. at 310. These patterns confirm that the Sixth Amendment should attach when prosecutors present a specific offer during a plea negotiation.

### 1. The offer of a plea bargain is rightly understood as an "accusation" within a "criminal prosecution."

The right to counsel in the United States reflects a dramatic break from the English tradition. For centuries, the common law rule had "severely limited the right of a person accused of a felony to consult with counsel at trial." *Id.* at 306. By contrast, at the time of ratification, twelve of the thirteen colonies had "fully recognized" the right to counsel "in all criminal prosecutions." *Id.* The Sixth Amendment also reflects changes in prosecution. In the early eighteenth century, the colonists adopted the Continental institution of the "public prosecutor," who was, by nature, "incomparably more familiar than the accused with the problems of procedure." *Id.* at 308 (citing Mark H. Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 Law & Soc'y Rev. 273, 273 (1979)). "Thus, an additional motivation for the American [right to counsel] was a desire to minimize imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official." *Id.* at 309.

This history colors the Sixth Amendment's use of "accused" and "criminal prosecution." It is true that the terms are amenable to narrow interpretations, and that legal authorities sometimes used them narrowly to refer to an indictment. See, *e.g.*, 4 William Blackstone, *Commentaries* *289-90. But the Founding generation also used the terms to express broader concepts: an accusation could be an allegation of wrongdoing, and a criminal prosecution could be the effort to right that wrongdoing through the criminal justice system. Because reading "accused" and "criminal prosecution" broadly best coheres with the Sixth

Amendment's history and guiding principles, the Court should adopt the broader reading here.

**a.** Respondents' narrow reading of "accuse" is incompatible with Founding-era usage. The established maxim, "No man shall be bound to accuse himself," clearly uses "accuse" to cover far more than indictment. See 1 Blackstone, *supra*, *68. So too did the Virginia Declaration of Rights, which secured the right to confront one's "accusers and witnesses." *Va. Declaration of Rights* § 8 (1776). William Blackstone frequently used 'accuse' to mean 'allege wrongdoing.' See, *e.g.*, 4 Blackstone, *supra*, *13, *47, *137, *215, *230, *447. And the critical mass of Founding-era dictionaries confirms that the public vernacular included a broad usage of the term. See *Turner*, 885 F.3d at 958 (Bush, J., concurring) (finding that eight of the nine major dictionaries in the Founding era "define 'accuse' as some version of 'to charge with a crime; to blame or censure'").

The Founding generation also employed "prosecute" to capture a wide range of conduct. Participants in the state ratifying conventions used the term to mean "pursue" or "attempt to effect a design." See, *e.g.*, Edmund Randolph, in 3 *The Debates in the Convention of the Commonwealth of Virginia* 128 (Jonathan Elliot, ed., 1827) (1787) (referring to the "prosecution of the war and its other exigencies"). James Wilson must have had this meaning in mind when he remarked that, in ancient Athens, impeachments "were not referred to any court of justice, but were prosecuted before the popular assembly." James Wilson, *Lectures on Law*, in 2 *Collected Works of James Wilson* 861 (Liberty Fund, ed., 2007) (1790). Of course, 'prosecute' could, in some contexts, refer narrowly to the conduct following an indictment. See, *e.g.*, *id.* at

1108. But a review of the appropriate dictionaries again confirms that the broader meaning was in common usage, and so was readily available to the Constitution's drafters. See *Turner*, 885 F.3d at 960 (Bush, J., concurring).

The Founding generation used the broader meanings of 'accused' and 'prosecution' in both federal statutes and judicial decisions. For instance, the Federal Crimes Act of 1790 applied in some cases to persons who were "accused *and* indicted," and applied in others to persons who were "accused *or* indicted." § 29, 1 Stat. 112, 118-19 (emphasis added). Interpreting this language, Chief Justice Marshall confirmed that "accused" and "indicted" were distinct, if often overlapping, descriptions. *United States* v. *Burr*, 25 F. Cas. 30, 33 (C.C. Va. 1807) (holding that the statute applied to "an accused person both before and after indictment"). The Chief Justice applied a similar construction to language in the Virginia Constitution, holding that the right "to be informed of the nature and cause of the accusation" attached upon the issuance of a warrant and prior to any formal charges. *Ex parte Burford*, 3 Cranch (7 U.S.) 448, 452 (1806).

The Chief Justice's clearest statement on this subject occurred during the trial of Aaron Burr. Although Burr had yet to be charged with a crime, prosecutors for the United States sought to commit him for treason. Chief Justice Marshall responded that the "fair and impartial administration of justice, especially *in criminal prosecutions*," forbid such a trial "by public feelings." *United States* v. *Burr*, 25 F. Cas. 25, 27 (C.C. Va. 1807) (emphasis added). In doing so, the Chief Justice confirmed that 'criminal prosecution' could refer to substance, not form. Burr faced 'prosecution'

simply because the government sought to convict him of a crime.

**b.** This brings us to plea bargaining. Historical studies "agree that plea bargaining was probably nonexistent before 1800." Haller, *supra*, at 273. Nonetheless, the modern practice of plea bargaining falls within the semantic meaning of a "criminal prosecution;" it presents the "accused" with concrete allegation of criminal wrongdoing. Reading the Sixth Amendment to cover plea bargaining also coheres with the guiding concerns of the Founding generation.

During the state ratifying conventions, many delegates worried that "criminal prosecutions" could become a "great instrument of arbitrary power," comparable in their reach and discretion to the power of the English kings. See, *e.g.*, James Iredell, in 4 *The Debates in the Convention of the State of North Carolina* 171 (Jonathan Elliot, ed., 1827) (1787). The Sixth Amendment responded to these concerns, with notable implications for plea bargaining. Without competent counsel, the accused stands against the "prosecutorial forces of organized society," operating in a legal language that he barely comprehends. *Rothgery*, 554 U.S. at 198; see Section I.A.2, *supra*. Plea bargaining in the absence of counsel thus raises the specter of arbitrary power, the very evil that the Sixth Amendment was designed to prevent.

It is also an affront to symmetry. Leading up to the Founding, several state constitutions provided that "all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors." Charter of Delaware, art. V (1701); accord Charter of Pennsylvania, art. V (1701) (using the same language); Constitution of New Jersey, art. XVI (1776) (providing

that "criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to"). The Federal Crimes Act also emphasized the value of symmetry. See 1 Stat. at 118-19 (providing that prosecutors and the accused shall have "like process" in the compulsion of witnesses). The Sixth Amendment can be understood as an attempt to codify this symmetry principle for criminal cases. See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 116 (1998). And under this principle, it would be anomalous for the accused to confront the adversity and complexity of plea bargaining without the aid of competent counsel.

In sum, the relevant language in the Sixth Amendment is open to a broad interpretation, encompassing the formal offer of a plea bargain. Moreover, this broad interpretation furthers the Amendment's anti-arbitrariness and pro-symmetry values. Attaching the right to counsel at the formal offer of a plea bargain thus coheres with the text and history of the Sixth Amendment.

**2. Recognizing a right to counsel in these circumstances bridges the core values of the Sixth Amendment and the realities of modern criminal procedure.**

The exigencies of the present similarly favor guaranteeing the right to counsel during pre-indictment plea bargaining. This Court has "expanded the constitutional right to counsel . . . when new contexts appear presenting the same dangers that gave birth initially to the right itself." *Ash*, 413 U.S. at 311. The development of modern plea bargaining is such a context.

Our criminal justice system "is for the most part a system of pleas, not a system of trials." *Lafler*, 566 U.S. at 170. Today, ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. *Frye*, 566 U.S. at 143. "[P]lea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process." *Id.* For most defendants, a plea bargain thus amounts to their "real trial." Barkow, *supra*, at 1047.

Although the proper administration of plea bargaining "can benefit all concerned," *Bordenkircher*, 434 U.S. at 362, there are dangers with the modern process as well. The innocent can confess. The ignorant can take bad deals or reject good ones. These dangers are amplified, and dramatically so, when the accused lack the guidance of counsel. And the "backstop" of a fair trial cannot "inoculate[ against] errors in [this] pretrial process." *Frye*, 566 U.S. at 144.

The Sixth Amendment's protections have grown in tandem with the rise of plea bargaining. *Hamilton* v. *Alabama* held that a defendant requires the presence of counsel to plead intelligently. 368 U.S. 52, 55 (1961). *Hill* v. *Lockhart* indicated that a defendant had the right to effective assistance of counsel during the plea process. 474 U.S. 52, 57 (1985). Most recently, *Lafler* clarified that the right to counsel extends to the negotiation of plea deals that lapse or are rejected, even when the accused ultimately proceeds to trial. 566 U.S. at 164.

Extending the right to counsel to pre-indictment plea bargaining is a natural extension of these cases. *Frye* and *Lafler* recognize that "the negotiation of a plea bargain, rather than the unfolding of a trial, is

almost always the critical point for a defendant." *Frye*, 566 U.S. at 144. Indeed, for many defendants, it is the "only stage when legal aid and advice would help [them]." *Id.* (quoting *Massiah*, 377 U.S. at 204). Taken together, *Frye* and *Lafler* confirm that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Id.* (quoting Scott & Stuntz, *supra*, at 1912). As such, if the right to counsel is to track "changing patterns of criminal procedure," *Ash*, 413 U.S. at 310, it must extend to the growing world of charge bargaining.

### C. The right to counsel should attach when prosecutors present a formal offer.

The prevalence of plea bargaining flows from its "mutuality of advantage to defendants and prosecutors." *Bordenkircher*, 434 U.S. at 363 (citation omitted). Recognizing a right to counsel during charge bargaining need not disrupt these advantages. Tying attachment to the formal offer of a plea bargain provides an administrable standard to the lower courts. Moreover, providing for effective counsel during charge bargaining increases the party's chances of reaching a speedy and equitable arrangement.

#### 1. Contract principles provide an administrable standard for attachment.

The right to counsel should attach when prosecutors make a formal offer of a plea bargain to the accused. At the point the prosecutor is willing to make this offer, the prosecution will be committed to its case, the parties will be adverse, and the accused will be immersed in the complexity of criminal procedure. See Section I.A, *supra*. An offer is sufficiently formal if it meets the standards for acceptance in open court.

Cf. Fed. R. Crim. P. 11(c)(1). This rule accords with the language of *Frye*, in which this Court emphasized that counsel had a duty to communicate a "formal offer" to her client. 566 U.S. at 145-47.

In many cases, as in this case, it will be obvious when a prosecutor has made an offer to an accused. Yet any disputes about whether a prosecutor made a sufficiently concrete offer can be adjudicated according to principles of contract law. These principles are both well-defined and widely familiar. Especially relevant principles include that offers can be conveyed verbally or in writing; that offers are not valid until receipt; and that the existence of an offer is determined from the objective lens of a reasonable person. See generally Restatement (Second) of Contracts § 24 (1981) (defining "offer" as "the manifestation of willingness to enter a bargain").

Courts already use the doctrines of contract law in construing plea bargains. See, *e.g.*, *Santobello* v. *New York*, 404 U.S. 257, 262 (1971) (applying standard of detrimental reliance to breach of plea bargain); *United States* v. *Lara-Ruiz*, 681 F.3d 914, 919 (8th Cir. 2012) (applying "general contract principles" to "discern the intent of the parties as expressed in the plain language of the agreement"). Moreover, this Court's insistence that defendants enter plea bargains only "voluntarily and knowingly" tracks the baseline requirements for a valid contract. See *Boykin* v. *Alabama*, 395 U.S. 238, 241 (1969).

Lower courts have already begun to apply *Frye*'s "formal offer" test. See Sabrina Mirza, *Formalizing the Plea Bargaining Process After* Lafler *and* Frye, 39 Seton Hall Legis. J. 487, 501 n.95 (2015) (collecting

cases). These precedents can be used to guide the identification of formal offers that precede indictment.

Jurisdictions can take several additional steps to enhance the test's workability. For example, as this Court has suggested, jurisdictions could mandate that all formal offers be in writing. *Frye*, 566 U.S. at 146 (citing N.J. Ct. Rule 3:9-1(b) (2012) ("Any plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant's attorney.")); see also, *e.g.*, D. Alaska R. 11.2; Ariz. R. Crim. P. 17.4(b); Ind. Code Ann. § 35-35-3-3; D. Neb. R. 12-4; D. N.M. R. 6-502; Tenn. R. 20; D. Tex. R. 5.28 (all mandating written offers). Alternatively, this Court suggested that the "terms" and "processing [of a formal offer] [could] be documented so that what took place in the negotiation process" can be preserved for subsequent review. *Frye*, 566 U.S. at 146. Finally, "formal offers [could] be made part of the record at any subsequent plea proceeding or before a trial on the merits." *Id.* Each of these steps would move the "formal offer" test closer to a bright-line rule.

**2. Tying attachment to the extension of a formal offer would facilitate the administration of justice.**

"The potential to conserve valuable prosecutorial resources and for defendants to . . . receive more favorable terms at sentencing means that a plea agreement can benefit both parties." *Id.* at 144. These benefits, however, depend on the accused receiving "effective counsel during plea negotiations." *Id.* Tying attachment to the extension of a formal offer would increase access to effective counsel and thus facilitate the administration of justice.

Prosecutors have every reason to favor an expanded right to counsel. Given the size of their dockets, prosecutors will prefer to work with "[e]xperienced criminal defense attorneys [who] understand the potential benefits of fast cooperation." Bibas, *Shadow of Trial*, *supra*, at 2485. Prosecutors will also prefer to work with counsel who share their understanding of both criminal procedure and "the costs and benefits of pleading guilty." Bibas, *Rational Actor*, *supra*, at 82. These shared understandings between prosecutors and appointed counsel are likely to promote speedier and more productive negotiations.

Increasing access to counsel may also increase prosecutors' opportunity to plea bargain in the first place. The Advisory Committee on the Federal Rules of Criminal Procedure cautions that "[i]t may be desirable that an attorney for the government not enter plea discussions with a defendant personally." Fed. R. Crim. P. 11 advisory committee's note (1974). Allowing attachment at the time of offer would remove this ethical concern, affirming that all guilty pleas "represent[] a voluntary and intelligent choice." *North Carolina* v. *Alford*, 400 U.S. 25, 31 (1970).

Defendants receive several benefits from an extended right to counsel. Like prosecutors, they benefit from the increased availability of plea bargaining. They also benefit from an advocate who can "assure that [their] interests will be protected consistently with our adversary theory of criminal prosecution." *Wade*, 388 U.S. at 227. Finally, they receive a remedy against gross ineffectiveness of counsel, which would otherwise "undermine" their opportunity for a "just result." *Strickland* v. *Washington*, 466 U.S. 668, 686 (1984).

The administrative costs of extending attachment to pre-indictment plea bargains are low. Lower courts have already begun to define the contours of a "formal offer." See Mirza, *supra*, at 501 n.95. Moreover, it is unlikely that expanding the right to counsel will generate burdensome or frivolous litigation. This is because the majority of plea bargaining is already covered by the combination of *Frye* and *Rothgery*. See *Frye*, 566 U.S. at 143 (guaranteeing a right to counsel at the post-attachment offer of a plea bargain); *Rothgery*, 554 U.S. at 198 (holding that the right to counsel attaches at a routine preliminary hearing); see also *Cty. of Riverside* v. *McLaughlin*, 500 U.S. 44, 56-58 (1991) (holding that defendants arrested without a warrant must receive a routine preliminary hearing within forty-eight hours). The primary beneficiaries of expanding the right to counsel will be individuals who fall outside the above pattern: defendants who voluntarily approach law enforcement, see, *e.g.*, *Moody*, 206 F.3d at 612-16 and defendants—like Turner—who face prosecution from both federal and state officials. The volume of these claims is unlikely to burden federal or state administration.

* * *

In sum, the formal offer of a plea bargain confronts the accused with a committed prosecutor, an adversarial environment, and a full complexity of modern criminal procedure. Recognizing the right to counsel in these circumstances coheres with the text, history, and guiding principles of the Sixth Amendment. This recognition is also practicable, both as a doctrinal and as an administrative matter. For these reasons, the Court should reverse the decision below and hold that the right to counsel attaches when

prosecutors make a formal offer to the accused in a plea negotiation.

## II. The Sixth Amendment right to counsel attaches when a defendant has been indicted for the same offense by a different sovereign.

Even if this Court concludes that Turner's right to counsel did not attach when prosecutors offered to allow Turner to plead guilty, it had already attached when he was indicted for aggravated robbery by a Tennessee grand jury.

The Sixth Amendment right to counsel is "offense specific." *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991). In *Texas* v. *Cobb*, this Court clarified that "when the Sixth Amendment right to counsel attaches, it . . . encompass[es] offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test." 532 U.S. 162, 173 (2001). Under *Blockburger*, two offenses are the same if each "requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). Applying the *Blockburger* test, this Court has concluded that "two different statutes define the same offense" when "one is a lesser included offense of the other." *Rutledge* v. *United States*, 517 U.S. 292, 297 (1996).

Hobbs Act robbery is a lesser included offense of aggravated robbery under Tennessee law. Below, Judge Clay summarized the elements of Tennessee aggravated robbery as "(1) simple robbery plus (2[]) the use of [a] deadly weapon" and Hobbs Act robbery as "(1) simple robbery that (2) obstructs interstate commerce." *Turner*, 885 F.3d at 975 (Clay, J., concurring in the judgment) (citing Tenn. Code Ann. § 39-13-401; 18 U.S.C. § 1951(b)(1)). Judge Clay concluded

that because "Hobbs Act robbery requires that the robbery have affected interstate commerce," it is not a "lesser included offense" of Tennessee aggravated robbery. *Id.*

That was erroneous. The better view, as explained by the Fifth Circuit, is that "jurisdictional elements do not count" under *Blockburger*. *United States* v. *Agofsky*, 458 F.3d 369, 372 (5th Cir. 2006) (citing *United States* v. *Gibson*, 820 F.2d 692 (5th Cir. 1987)). In any event, because this Court is "a court of review, not of first view," it should remand the case to the district court to decide whether Hobbs Act robbery is a lesser included offense of aggravated robbery under Tennessee law. *Byrd* v. *United States*, 138 S. Ct. 1518, 1527 (2018).

The Sixth Circuit did not reach this question because it interpreted the *Cobb* Court's statement that there is "no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel" to import the "dual sovereignty doctrine" wholesale into the Sixth Amendment. *Turner*, 885 F.3d at 954 (majority opinion) (quoting 532 U.S. at 173). The dual sovereignty doctrine, developed in this Court's double jeopardy jurisprudence, holds that "a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each," thereby "commit[ing] two distinct 'offences.'" *Heath* v. *Alabama*, 474 U.S. 82, 88-89 (1985) (quoting *United States* v. *Lanza*, 260 U.S. 377, 382 (1922)).

The Sixth Circuit is wrong. Even if the dual sovereignty doctrine survives in the double jeopardy context, see *Gamble* v. *United States*, 138 S. Ct. 2707 (2018) (granting certiorari on the question of

"[w]hether the Supreme Court should overrule the 'separate sovereigns' exception to the double jeopardy clause"), this Court has not and should not apply it to the Sixth Amendment.

Because the dual sovereignty doctrine does not apply to the right to counsel, and Hobbs Act robbery is a lesser included offense of aggravated robbery under Tennessee law, Turner's right to counsel had attached when his counsel began negotiating with federal prosecutors. As plea negotiations are a "critical stage," Turner had the right to the effective assistance of counsel during those negotiations. See *Frye*, 566 U.S. at 144. Because the Sixth Circuit concluded otherwise, this Court should vacate the judgment below and remand the case for further proceedings.

### A. *Texas* v. *Cobb* did not incorporate the dual sovereignty doctrine into the Sixth Amendment.

The single line in *Cobb* relied on by the Sixth Circuit to deny Turner his Sixth Amendment right to counsel—that there is "no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel"—must be read in context. 532 U.S. at 173. In *Cobb*, "the federal government was *not* involved." *United States* v. *Coker*, 433 F.3d 39, 50 (1st Cir. 2005) (Cyr, J., concurring in the judgment). Rather, Cobb faced charges of robbery and murder under state law, and this Court confronted the question of whether, upon indictment for robbery, Cobb's right to counsel attached as to the murder charge. As the Sixth Amendment's right to counsel is "offense specific," this Court imported the *Blockburger* test for whether two offenses are the "same." *Cobb*, 532 U.S. at 167, 173; see *id.* at 177

(Breyer, J., dissenting) ("[The words 'offense specific'] appear in this Court's Sixth Amendment case law, not in the Sixth Amendment's text."). Compare U.S. Const. amend. V ("No person shall . . . be subject to the same *offence* to be twice put in jeopardy.") with *McNeil*, 501 U.S. at 175 ("The Sixth Amendment right . . . is *offense* specific.") (emphasis added).

Because this Court does not "pass on questions of constitutionality unless such adjudication is unavoidable" *Matal* v. *Tam*, 137 S. Ct. 1744, 1755 (2017) (citation omitted), this Court did not have occasion to consider whether the dual sovereignty doctrine applies to the Sixth Amendment. The Sixth Circuit's interpretation of *Cobb* is especially dubious because *Cobb* itself held that "[c]onstitutional rights are not defined by inferences from opinions which did not address the question at issue." 532 U.S. at 169 (majority opinion). Yet the Sixth Circuit has drawn precisely such an inference here.

In any case, "it is a substantial overreading" to attribute to the *Cobb* Court an intent to import the dual sovereignty doctrine. Cf. *Marvin M. Brandt Revocable Tr.* v. *United States*, 572 U.S. 93, 107 (2014). The better view is that *Cobb* was silent on the issue because it was unnecessary to the disposition of that case.

### B. This Court should not extend the dual sovereignty doctrine.

*Cobb* did not apply the dual sovereignty doctrine to the Sixth Amendment. This Court should not do so now.

The principles animating this Court's attachment jurisprudence do not support applying the dual sover-

eignty doctrine. See Section I.A, *supra*. At the commencement of adversary proceedings, a defendant is "faced with the prosecutorial forces of organized society." *Rothgery*, 554 U.S. 207 (quoting *Kirby*, 406 U.S. at 689). Because he is pitted against an "experienced and learned" adversary, *Ash*, 413 U.S. at 309 (quoting *Zerbst*, 304 U.S. at 463), defense counsel "is indispensable to the fair administration of our adversarial system of criminal justice." *Maine* v. *Moulton*, 474 U.S. 159, 168 (1985).

As the *Rothgery* Court noted, "[a]ll of this is equally true whether the machinery of prosecution was turned on by the local police or the state attorney general." 554 U.S. at 208. And the same is true whether that machinery was turned on by the federal or state government.

The Sixth Circuit did not consider the import of *Rothgery* on the question presented; its decision rested exclusively on a crabbed reading of *Cobb*. See *Turner*, 885 F.3d at 954-55. But even if *Cobb* was ambiguous when it was decided, *Rothgery* settles the matter: Attachment depends on *what* circumstances the defendant faces, not on *who* brought about those circumstances. See 554 U.S. at 205-08.

The logic of *Rothgery* decides this case. But further considerations only strengthen the conclusion. The rationale undergirding the dual sovereignty doctrine does not support its extension, and extension would have perverse consequences. Properly understood, federalism also cautions against extending the dual sovereignty doctrine. And pragmatic concerns do not undermine that conclusion. For those reasons, this Court should clarify that the dual sovereignty doctrine does not apply to the Sixth Amendment.

### 1. The rationale for the dual sovereignty doctrine does not support its extension to the Sixth Amendment.

When this Court applies the dual sovereignty doctrine in its Fifth Amendment jurisprudence, it "asks a narrow, historically focused question." *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1867 (2016). The "historical, not functional" inquiry asks "only whether the prosecutorial powers of the two jurisdictions have independent origins." *Id.* at 1867, 1871. Because the states "rely on 'authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment,'" the "ultimate source" of their authority is distinct from that of the federal government. *Id.* at 1871 (quoting *Heath*, 474 U.S. at 89).

This sui generis historical inquiry is irrelevant outside the narrow confines of the Double Jeopardy clause. It provides no normative basis for applying the dual sovereignty doctrine to the Sixth Amendment.

Furthermore, even in the double jeopardy context, members of this Court have questioned the dual sovereignty doctrine's justification. See *Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg & Thomas, JJ., concurring). This Court has granted certiorari to consider overruling it entirely. See *Gamble*, 138 S. Ct. at 2707. Even if the Court decides that stare decisis requires its retention in the double jeopardy context, this grant of certiorari reveals appropriate discomfort with the application of the dual sovereignty doctrine. At a minimum, the Court should not now *expand* the doctrine's reach.

### 2. Application of the dual sovereignty doctrine to the Sixth Amendment invites constitutional violations.

Extension of the dual sovereignty doctrine outside the narrow confines of the Double Jeopardy Clause undermines defendants' constitutional rights. That is why this Court has twice overturned precedent applying a "separate sovereigns" rationale outside of the double jeopardy context.

In *Elkins* v. *United States*, this Court overruled the "silver platter doctrine," under which evidence obtained by state officials in violation of the Fourth Amendment could be introduced into a federal criminal trial. 364 U.S. 206 (1960), overruling *Lustig* v. *United States*, 338 U.S. 74 (1949). This Court reasoned that "[t]o the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Id.* at 215. Because the existing rule "implicitly invit[ed]" the "disregard of a constitutionally protected freedom," this Court held that the exclusionary rule prevented introduction of illegally obtained evidence, regardless of which sovereign violated a defendant's constitutional rights. *Id.* at 221-22.

This Court relied on similar logic in *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964). Overruling multiple prior decisions, *Murphy* held that "the constitutional privilege against self-incrimination protects" a witness from having compelled testimony introduced at trial by either sovereign. *Id.* at 77-78. *Murphy* abolished the then-existing "'separate sovereignty' theory of self-incrimination," *id.* at 89 (Harlan, J., concurring in the judgment) because otherwise a defendant could "be whipsawed into incriminating

himself under both state and federal law even though the constitutional privilege against self-incrimination is applicable to each." *Id.* at 56 (majority opinion). This Court noted especially the threat to individual rights of a dual sovereignty approach "where the Federal and State Governments are waging a united front against many types of criminal activity." *Id.* at 55-56.

*Elkins* and *Murphy* "stand for the proposition[]" that "federal and state governments should not be allowed to do in tandem what neither could do alone." Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1, 16 (1995). The principle animating those decisions is that the Constitution does not permit "collusive end-runs around" its guarantees of individual rights. *Coker*, 433 F.3d at 51.

The Sixth Circuit's holding in this case is irreconcilable with that sound principle. Attaching the right to counsel only as to the sovereign that charges an offense raises the specter of collusion to violate individuals' Sixth Amendment rights. This Court refused to countenance that result in *Elkins* and *Murphy*. It should do so again.

### 3. Federalism does not support extension of the dual sovereignty doctrine.

*Elkins* and *Murphy* defeat the argument that "abstract notions of federalism" support allowing sovereigns to collude to deprive individuals of constitutional rights. Amar & Marcus, *supra*, at 16.

But more fundamentally, the federalist defense of the dual sovereignty doctrine has things backwards. Our federal system "rests on what might at first seem

a counter-intuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond* v. *United States*, 564 U.S. 211, 220-21 (2011) (quoting *Alden*, 527 U.S. at 758). Federalism is valuable because it "protects the liberty of the individual from arbitrary power." *Bond* v. *United States*, 134 S. Ct. 2077, 2091 (2014). To champion the dual sovereignty doctrine in the name of federalism is thus to mistake means and ends: Federalism is a means to protect individual liberty, not "an end unto itself." *Id.* And the Sixth Amendment right to counsel is one of the very individual liberties that federalism is designed to protect.

A proper appreciation of federalism demands that this Court reject the dual sovereignty doctrine's application to the Sixth Amendment. One reason that "federalism secures to citizens the liberties that derive from the diffusion of sovereign power," *Bond*, 564 U.S. at 221 (citation omitted), is that sometimes the preservation of liberty requires "letting ambition counteract ambition." *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010) (cleaned up) (quoting The Federalist No. 51, at 349 (J. Cooke ed. 1961) (J. Madison)). But whereas competition between the federal government and the states is a necessary safeguard of individual liberty, employing the dual sovereignty doctrine in this context would encourage federal-state collaboration to the diminution of liberty. The dual sovereignty doctrine thus disrupts federalism. It is antithetical to the liberty-enhancing purpose that federalism is designed to serve.

**4. Prudential concerns do not support extension of the dual sovereignty doctrine.**

Pragmatic considerations do not undermine this conclusion. Preliminarily, there is no evidence that jurisdictions that have refused to read *Cobb* as importing the dual sovereignty doctrine, see *United States* v. *Mills*, 412 F.3d 325, 330 (2d Cir. 2005); *United States* v. *Red Bird*, 287 F.3d 709, 715 (8th Cir. 2002), have experienced any adverse consequences from doing so. In addition, this case is a reminder that it does not always "frustrate the public's interest in the investigation of criminal activities" to afford the accused the assistance of counsel. *Cobb*, 532 U.S. at 171. To the contrary, affording counsel to the accused can aid in the efficient administration of justice. See Section I.C.2, *supra*.

There is little merit to the concern that agents of one sovereign might not be aware of the actions of their counterparts. *Rothgery* specifically rejected a "prosecutorial awareness" standard because "knowledge" is irrelevant to attachment. 554 U.S. at 199, 206. And because there is often extensive cooperation between federal and state authorities, it is unlikely that both would investigate the same criminal offense while remaining oblivious to the other's investigation. See Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. Rev. 1159, 1180-92 (1995) (describing cooperation between federal and state law enforcement). Even if there is a rare contrary case, "[t]here is a cost to yielding to the desire to correct the extreme case, rather than adhering to the legal principle." *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 899 (2009) (Roberts, C.J., dissenting). "That

cost has been demonstrated so often that it is captured in a legal aphorism: 'Hard cases make bad law.'" *Id.*

Nor is the rule likely to impose additional burdens on prosecutors because it is an ethical violation to speak "with a person known to be represented by counsel about the subject of the representation" in "all 50 states." *Cobb*, 532 U.S. at 178 (Breyer, J., dissenting) (quotation marks and citation omitted); see also U.S. Dep't of Justice, *Justice Manual* § 296 (2018) (applying this rule to federal prosecutors). Applying the dual sovereignty doctrine would thus be unlikely to change law enforcement behavior.

*Elkins* refutes the concern that refusing to apply the dual sovereignty doctrine will deter law enforcement cooperation. In *Elkins*, dissenting members of this Court raised this concern, see 364 U.S. at 243 (Frankfurter, J., dissenting) (warning that the "practical consequences" of the Court's holding would create "new" and "great[] difficulties"), but the majority reasoned that the application of the exclusionary rule to state courts would promote "forthright cooperation under constitutional standards." 364 U.S. at 222 (majority opinion). The recent history of steadily increasing law enforcement cooperation between federal and state governments has vindicated the *Elkins* Court's approach. See Guerra, *supra*, at 1180-92.

It is possible that in a small set of cases an expanded Sixth Amendment right would make convicting some defendants more difficult. But that is the point of constitutional guarantees in the criminal process. Constitutional rights, this Court has observed, "come[] at a cost." *Riley* v. *California*, 134 S. Ct. 2473, 2493 (2014). Declining to apply the Sixth Amendment's guarantee of the effective assistance of counsel

when an accused has been indicted for the same offense in a different sovereign's court is to defeat the Amendment's purpose through a test that is "all form, no substance." *BNSF Railway Co.* v. *Tyrrell*, 137 S. Ct. 1549, 1562 (2017) (Sotomayor, J., concurring in part).

It would also be contrary to this Court's Sixth Amendment precedents. It would further "society's interest in the ability of police to talk to witnesses and suspects" to restrict the Sixth Amendment's application only to formal trial proceedings. *Cobb*, 532 U.S. at 172 (majority opinion). Yet this Court has rejected that path. See, *e.g.*, *Wade*, 388 U.S. at 236-37; *Massiah*, 377 U.S. at 205-06. And with good reason: "The presence of counsel at . . . critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution." *Wade*, 388 U.S. at 227. The same is true no matter which sovereign has initiated adversary proceedings.

### C. If the dual sovereignty doctrine applies, this Court should expand the *Bartkus* exception for joint investigations.

*Cobb* did not apply the dual sovereignty doctrine to the Sixth Amendment, and this Court should not do so now. But even if the Court now decides to apply the dual sovereignty doctrine, it should enlarge the exception established in *Bartkus* v. *Illinois* for collusive prosecutions. 359 U.S. 121 (1959). Although the *Bartkus* exception was established to apply only to "sham" prosecutions, *id.* at 123, the principle animating the exception also applies "when state and federal officials participating in the investigation or prosecution of criminal conduct have acted more like representatives of one government than of two." Daniel A.

Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1, 73 (1992) (arguing for a similar exception).

**1.** The SSTF meets the two-acting-as-one requirement. The participating governments formalized their commitment to act as one unit through a Memorandum of Understanding (MOU). *Turner*, 2015 WL 13307594, at *5. The MOU provided that the "day to day operation and administrative control of the SSTF will be the responsibility of" an FBI agent. *Id.* And the local officers assigned to the SSTF—including one of the prosecutors listed on Turner's state indictment—were "federally deputized" pursuant to the MOU. *Id.*

Joint federal-state taskforces like the SSTF stretch the fiction behind the dual sovereignty doctrine past its breaking point. Where sovereigns have formally committed to act as one entity, it denies reality to insist that they are distinct for double jeopardy and Sixth Amendment purposes. The *Bartkus* exception could expand to accommodate such cases.

**2.** The need for an expanded *Bartkus* exception is pressing because recent decades have witnessed "the creation of a consolidated, multijurisdictional and federally-directed law enforcement establishment." Guerra, *supra*, at 1180 (capitalization altered). That has coincided with an increasing "federalization of criminal law." *Id.* at 1169. Indeed, "the Hobbs Act"—under which Turner was indicted and pleaded guilty—"federalizes any convenience store holdup," as it did in this case. Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debat*e, 46 Hastings L.J. 967, 973 (1995).

Together, the cooperation between federal and state law enforcement and the federalization of criminal law undermine Fifth and Sixth Amendment freedoms. This Court long ago noted the special danger that the "policies and purposes" of the Bill of Rights might be "defeated" where two governments are "waging a united front against many types of criminal activity." *Murphy*, 378 U.S. at 55-56. As it did in *Murphy*, this Court should shift its criminal procedure doctrines to confront the new reality. Cf. Section I.B.2, *supra*.

**3.** Practical considerations do not weigh heavily against expanding the *Bartkus* exception. Most prominently, the concern that federal and state investigators will engage in a "race to the courthouse" is inapplicable in a joint taskforce context. *Heath*, 474 U.S. at 93. Where sovereigns are cooperating closely, it does not make sense that they would race one another to the courthouse. Instead, "the normal and healthy situation consists of state and federal officers cooperating to apprehend lawbreakers and present the strongest case against them at a single trial, be it state or federal." *Bartkus*, 359 U.S. at 169 (Brennan, J., dissenting). Relatedly, the concern that one sovereign will prosecute an offender to insulate him from further prosecution does not apply where sovereigns are prosecuting together in a task force.

These counter-arguments also fail to account for "our system of pleas." *Lafler*, 556 U.S. at 170. The ability of prosecutors to "stack[] multiple charges" dictates that the prison time many defendants will serve is determined by the prosecutor. Bibas, *Rational Actor*, *supra*, at 80. This case is an apt example: Turner faced an eighty-two-year mandatory-minimum sentence on the federal charges alone. *Turner*, 2015 WL

13307594, at *6. Tennessee authorities apparently wanted the federal and state sentences to run concurrently so Turner would not face additional prison time because of the dual prosecutions. *Id.* at *17 n.29. Had it been desirable, the federal and state authorities could have cooperated to offer Turner a plea deal for whatever amount of prison time they thought he deserved.

Against this backdrop, the sole benefit of recognizing the dual sovereignty doctrine is to give taskforce prosecutors two bites of the apple in the small fraction of cases that go to trial. But that is the precise outcome the Double Jeopardy clause is supposed to prohibit. Its purpose is to prevent the government "with all its resources and power" from "mak[ing] repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green* v. *United States*, 355 U.S. 184, 187 (1957). This Court should expand the *Bartkus* exception to ensure that the Double Jeopardy clause can serve this important purpose in joint taskforce cases like this one.

### D. If it reaches the question, this Court should overrule the dual sovereignty doctrine.

If this Court concludes that the dual sovereignty doctrine applies and declines to expand the *Barktus* exception, it should overrule the dual sovereignty doctrine. It is "an affront to human dignity, [and] inconsistent with the spirit of our Bill of Rights." *Sanchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring) (citations omitted).

This Court will consider whether to overrule the dual sovereignty doctrine in a different case this term. See *Gamble*, 138 S. Ct. at 2707. That case will provide an opportunity for full briefing and argument on the continued viability of the dual sovereignty doctrine. Accordingly, we limit our discussion to one issue that bears heavily on whether and how the dual sovereignty doctrine may extend to the Sixth Amendment. See Sections II.B & C, *supra*.

The federalist defender of the dual sovereignty doctrine is caught on the horns of a dilemma. Adopting a primarily "competitive" view of federalism straightforwardly supports overturning the dual sovereignty doctrine. See Section II.B.3, *supra*. But if this Court instead adopts a view of "cooperative federalism," then the justification for treating the sovereigns as separate collapses. *Murphy*, 378 U.S. at 56; see Section II.C, *supra*. Both conceptions lead inexorably to the same conclusion: Federalism is incompatible with the dual sovereignty doctrine.

We leave consideration of the dual sovereignty doctrine's other issues to *Gamble*.

* * *

The Court need not address broader questions about the dual sovereignty doctrine in this case because it has never applied that doctrine to the Sixth Amendment. This Court should hold that the dual sovereignty doctrine does not so apply because a contrary holding would be inconsistent with the principles animating this Court's attachment jurisprudence, other constitutional criminal procedure doctrines, and sound principles of federalism.

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated and the case remanded for further proceedings. If the Court holds that the right to counsel attaches upon the receipt of a formal plea offer, the district court should apply *Strickland* to determine whether Turner received ineffective assistance of counsel. If the Court holds that the right attaches when a defendant is charged with the same offense by a different sovereign, the district court should apply *Blockburger* to determine if Hobbs Act robbery is the same offense as aggravated robbery under Tennessee law.

Respectfully submitted,

THOMAS HOPSON
BRIAN MCGRAIL
127 Wall Street
New Haven, CT 06511
(203) 432-4992
*Counsel for Petitioner*

October 27, 2018