No. 18-106

IN THE
Supreme Court of the United States

JOHN R. TURNER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This case presents a question of great importance to NACDL, and the clients its attorneys represent, because the vast majority of criminal prosecutions end in guilty pleas. NACDL has a strong interest in protecting the fairness of plea bargains through rules of criminal procedure that level the playing field between prosecutors and defendants. NACDL therefore files this brief in support of petitioner.

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[1] The parties have granted consent to the filing of this brief. Under Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and its counsel made any monetary contribution intended to fund the preparation and submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court's decision in *Missouri* v. *Frye*, 566 U.S. 134 (2012), suggests the Sixth Amendment right to counsel should apply to pre-indictment plea negotiations no less than post-indictment negotiations. Plea-bargaining, whether before or after prosecutors decide to file formal charges, is central to our modern system of criminal justice. It is therefore imperative criminal defendants have the assistance of counsel while navigating that process, whenever it occurs.

Amicus curiae's independent research indicates there is a growing trend of pre-indictment plea negotiations, and it is accelerating: in the Western District of Tennessee alone, where petitioner's case arose, the frequency of pre-indictment pleas has increased four-fold from 2015 to 2017. On top of that, the U.S. Court of Appeals for the Sixth Circuit decided this case incorrectly. Placing form over substance, the court of appeals misapplied this Court's precedents.

This Court should grant the petition.

ARGUMENT

I. THE PRIMARY QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

A. Criminal defendants require assistance of counsel during plea negotiations.

Plea agreements are the defining feature of our modern criminal justice system. As of March 2012, "[n]inety-seven percent of federal convictions and

ninety-four percent of state convictions [were] the result of guilty pleas.[2] *Frye*, 566 U.S. at 143. Relying on that "simple reality," this Court held that the assistance of counsel during plea negotiations is an indispensable component of the Sixth Amendment right. *Id.* at 143–44. "Anything less . . . might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." *Id.* at 144.

Writing for the majority in *Frye*, 566 U.S. at 141–42, Justice Kennedy emphasized that the Court's decision did not concern "the advice pertaining to the plea that was accepted but rather to the course of legal representation that preceded it with respect to other potential pleas and plea offers." And when articulating the Counsel Clause's scope, this Court did not cabin its decision to any particular sequence of events or period of time. The Court instead recognized the nebulous nature of plea negotiations, which often occur with "no clear standards or timelines and with no judicial supervision of the discussions between prosecution and defense." *Id.* at 143. "[T]he negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Id.* at 144.

There are at least three specific concerns with preindictment plea-bargaining that make this case ripe

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[2] This Court has previously relied on data from the Bureau of Justice Statistics, a component of the Office of Justice Programs within the Department of Justice. *See Frye*, 566 U.S. at 143 (citing Bureau of Justice Statistics, U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics Online* tbl. 5.22.2009, https://bit.ly/2noP15i; Sean Rosenmerkel et al., Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony Sentences in State Courts, 2006–Statistical Tables* 1 (NCJ226846, rev. Nov. 2010), https://bit.ly/2oSOEC2).

for review: (1) the frequency of pre-indictment bargaining, (2) the ability to charge bargain, and (3) the far-reaching collateral consequences of plea deals.

1. The frequency of pre-indictment plea-bargaining is increasing.

Pre-indictment plea agreements are an ever-increasing phenomenon. Although published information about plea offers is not readily available from the federal or state governments,[3] data regarding guilty pleas entered after "waiver of indictment" can be a proxy for data about pre-indictment plea-bargaining in general. See Pet. 4 n.1 ("Because all federal felony defendants have a constitutional right to be charged by a grand jury indictment, the defendants charged by information must have waived their right to an indictment, which typically occurs when a defendant enters a plea to charges that have not yet been filed.").

Amicus curiae's independent research suggests that the frequency of pre-indictment negotiation is increasing. In 2017, pre-indictment guilty pleas in the Western District of Tennessee (where petitioner's case arose) accounted for about 12 percent of all pleas (44 of 365). That percentage increased twofold from 2016, and fourfold from 2015.[4] Other publicly available information about defendants who enter pleas by "felony

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[3] Specific data about plea offers is largely unavailable "[b]ecause plea negotiations are off the record and because most cases plead out." Nat'l Ass'n of Criminal Def. Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* 16 (2018), https://bit.ly/2M9qIr1.

[4] To collect the underlying data, *amicus curiae* first identified the number of defendants convicted by guilty plea in the Sentencing Commission's annual report for the Western District of Tennessee, then compared those figures to the number of "waivers of

information" confirms that pre-indictment bargaining is prevalent. Bureau of Justice Statistics' data from 2014 about the frequency of charging defendants by information, for instance, suggest that pre-indictment plea negotiations take place in roughly one-fifth of all federal felony cases (19.6 percent). Pet. 4 n.1.[5]

Even this approximation may understate the prevalence of pre-indictment negotiations because, when pre-indictment negotiations fail, an indictment usually follows. See Pet. 8 ("[T]he plea offer was not accepted by the U.S. Attorney's deadline, and it was withdrawn. . . . Turner was then indicted in federal court."); Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 Nw. U. L. Rev. 1635, 1663 (2003) ("[W]hen pre-charge bargaining is unsuccessful, the negotiations may lead to the prosecutor filing charges that are more serious than those she had previously contemplated.").

Jurists and commentators have corroborated the ubiquity and growth of pre-indictment plea negotiations. See, *e.g.*, *United States* v. *Moody*, 206 F.3d 609, 617 (6th Cir. 2000) (Wiseman, J., concurring) ("What is material, however, is the Guidelines' role in pressuring prosecutors and defendants to engage in plea bargaining ever earlier in the criminal process."); *United States* v. *Wilson*, 719 F. Supp. 2d 1260, 1268 (D. Or. 2010) ("Most federal criminal cases are resolved through plea negotiations and a suspect-defendant's

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indictment" entered on the district court's criminal docket during the same period.

[5] To generate the relevant data, *amicus curiae* visited the Bureau of Justice Statistics' website (www.bjs.gov/fjsrc), selected "Defendants Charged in Criminal Cases" for 2014, picked "type of initial proceeding" as the primary variable, and displayed "all values." Under "display options," *amicus curiae* selected "frequencies" and "percent[]," then displayed the data in "HTML" format.

best chance of obtaining a reduced sentence occurs prior to indictment."); David N. Yellen, *Two Cheers for a Tale of Three Cities*, 66 S. Cal. L. Rev. 567, 569–70 (1992) (arguing the Sentencing Guidelines created an incentive to engage in pre-indictment negotiations).

2. Charge-bargaining is a unique feature of pre-indictment negotiations.

Much is at stake during a post-indictment plea negotiation. But defendants often have *more* at stake *before* an indictment because prosecutors may "charge bargain," *i.e.*, negotiate about particular charging decisions that affect sentencing. Because many criminal statutes overlap, "the same conduct is often punishable by a range of different statutes carrying different maximum—and sometimes minimum—penalties." David A. Sklansky, *The Problem With Prosecutors*, 1 Ann. Rev. Criminology 451, 456 (2018). Prosecutors can therefore bargain with defendants over "what to charge, how to charge, and what aggravating factors to present or withhold." Metzger, *supra*, at 1664 (citation omitted). The power to bargain over such matters necessarily wanes once prosecutors file formal charges.

Pre-indictment charge-bargaining is particularly troublesome: the average defendant lacks the legal acumen necessary to negotiate against a sophisticated prosecutor, let alone to do so regarding complex charging decisions involving criminal statutes and sentencing laws. Metzger, *supra*, at 1663–64; see also *Frye*, 566 U.S. at 144 ("[A] plea agreement can benefit both parties," but, "[i]n order that these benefits can be realized, . . . criminal defendants require effective counsel during plea negotiations."). Without the assistance of counsel during such pre-indictment negotiations, defendants lack meaningful bargaining power when their liberty depends on it the most.

3. Pre-indictment plea bargains carry severe collateral consequences.

Pre-indictment plea negotiations, no less than post-indictment negotiations, entail serious collateral consequences—from immigration status to waivers of constitutional and statutory rights.

"Deportation is always a particularly severe penalty" and "preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *Lee* v. *United States*, 137 S. Ct. 1958, 1968 (2017) (internal quotation marks and citations omitted). Similarly, *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), described deportation as "an integral part—indeed, sometimes the most important part—of a penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id.* at 364 (footnote omitted). For good reason, then, defense counsel "must inform her client whether his plea carries a risk of deportation." *Id.* at 374. And that requirement should apply equally to pre-indictment negotiations, where non-citizens undoubtedly face challenges "anticipat[ing] the immigration consequences of guilty pleas." *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1987 (2015).

Other potential consequences of pre-indictment plea deals include waivers of the right to appeal, or mount a collateral attack on, a given sentence. See *United States* v. *Lee*, 888 F.3d 503, 505 (D.C. Cir. 2018); Susan R. Klein et al., W*aiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 Am. Crim. L. Rev. 73, 87 (2015) (finding that 67.5 percent of federal plea agreements included collateral attack waivers). If an uncounseled defendant does not know what sort of protections and limitations for which to negotiate in exchange for waiving appellate and collateral attack rights—or when refusal might be advantageous—she may be without recourse

for sentencing errors. Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 238–40 (2005). And where such errors occur, the defendant's inability to appeal or collaterally attack her sentence stymies the evolution of corrective measures in the judicial process. See *Evitts* v. *Lucey*, 469 U.S. 387, 396 (1985) (observing that an appeal is a criminal defendant's attempt to "demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful").

Likewise, advance waivers of ineffective assistance of counsel claims may preclude another potential corrective measure. See *Williams* v. *United States*, 396 F.3d 1340, 1342 (11th Cir. 2005); King & O'Neill, *supra*, at 246–47. The same is true of waivers of the right to request information from the government under the Freedom of Information Act ("FOIA"). See *Price* v. *U.S. Dep't of Justice Attorney Office*, 865 F.3d 676, 682–83 (D.C. Cir. 2017) (recognizing that FOIA "provides an important vehicle" for "uncovering undisclosed *Brady* material and evidence of ineffective assistance of counsel"); Klein, *supra*, at 85 (finding that 27 percent of robbery pleas and 23 percent of arson pleas contained FOIA waivers).[6]

B. The Sixth Circuit's rule raises practical concerns apart from plea deals.

The Sixth Circuit, relying on a perceived "bright-line" rule, held that the Sixth Amendment right to counsel never attaches before "the initiation of judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information,

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[6] Uncounseled defendants may also unwittingly waive their right to bear arms, serve on a jury, or receive public housing, among other things. *See* 18 U.S.C. § 922(g); 28 U.S.C. § 1865(b)(5); 42 U.S.C. § 13661(c).

or arraignment." Pet. App. 2a (quoting *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)). The Sixth Circuit's decision raises additional practical concerns apart from the plea-bargaining process itself.

Chief among these is the incentive for prosecutors to delay formal charges.[7] See Steven J. Mulroy, *The Bright Line's Dark Side: Pre-Charge Attachment of the Sixth Amendment Right to Counsel*, 92 Wash. L. Rev. 213, 247–49 (2017). Although pre-indictment negotiations may "conserve valuable prosecutorial resources," *Frye*, 566 U.S. at 144, they also dispense with important pretrial criminal procedures—for example, "proffer" agreements limiting the government's use of a defendant's statements, or logistical issues like document production and subpoena compliance. Instead, an uncounseled defendant's fate depends "entirely upon the integrity of his adversary." Metzger, *supra*, at 1666–67 (describing potential pitfalls for uncounseled defendants in pre-charge plea negotiations).

The Sixth Circuit's rule also undermines important protections under *Brady* v. *Maryland*, 373 U.S. 83 (1963). A prosecutor's *Brady* obligations are both substantive and logistical: corral all relevant evidence from those acting on the government's behalf, see *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995), and identify what evidence is material to guilt or punishment, see *United States* v. *Bagley*, 473 U.S. 667, 674 (1985). Neither task is easy. See *Connick* v. *Thompson*, 563 U.S. 51, 71 (2011) ("*Brady* has gray areas and some *Brady*

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[7] While the Federal Rules and the Due Process Clause may require dismissal if the government unnecessarily delays bringing formal charges, *see* Fed. R. Crim. P. 48(b); *United States* v. *Gouveia*, 467 U.S. 180, 192 (1984), the standard for dismissal is high and does not relieve prosecutors of the incentives discussed here.

decisions are difficult"). And if either is done incorrectly, the prosecutor's work could be all for naught. See *Wearry* v. *Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam) (vacating conviction because of *Brady* violation, "irrespective of the good faith or bad faith of the prosecution"). Worse still, professional sanctions loom large.[8] See Model Rules of Prof'l Conduct r. 3.8(d) (Am. Bar Ass'n 1983). Accordingly, prosecutors may be naturally inclined to decrease the risk of *Brady* violations however they can. See *Strickler* v. *Greene*, 527 U.S. 263, 283 nn.22 & 23 (1999) (prosecutor opened his entire file to the defense).

But the Sixth Circuit's rule gives prosecutors an opportunity to delay (or altogether avoid) these difficult questions. By resolving cases pre-charge, prosecutors are safe knowing that *Brady* obligations do not yet apply. That is especially true where, as in many districts, local rules tie disclosure to specific events in the post-charge criminal process. See Daniel S. McConkie, *The Local Rules Revolution in Criminal Discovery*, 39 Cardozo L. Rev. 59, 85–86 (2017) (surveying local rules and concluding that "[t]here is a fairly broad range of timing requirements among the districts, ranging from at the arraignment to thirty days after the arraignment."). Because an information or indictment often triggers that process, see 18 U.S.C. § 3161; Fed. R. Crim. P. 5, and uncounseled defendants are otherwise unlikely to request exculpatory material on their own, prosecutors may forestall their *Brady* obligations through pre-indictment negotiations.

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[8] Some states even impose felony criminal liability. *See, e.g.*, Cal. Penal Code § 141(c).

Compounding these various problems is a lack of judicial oversight.[9] See Metzger, *supra*, at 1665 ("[P]recharge bargaining is an entirely extra-judicial and unregulated process."); Yellen, *supra*, at 569–70 ("This type of bargaining is almost completely shielded from view and leaves [prosecutors] enormous discretion."). Like both *Brady* and the right to counsel itself, oversight is integral to fairness in the criminal process. See *Wheat* v. *United States*, 486 U.S. 153, 158–59 (1988); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1049 (2006) (discussing the Framers' belief in a "strong judicial role in criminal cases"). Denying putative defendants these protections, even though they face the same consequences as actual defendants by pleading guilty, is inconsistent with fairness. And it leads to absurd results: a defendant receives the benefit of counsel only when there is already oversight, but not when there is none.

More absurd results emerge from the practical disconnect created by the Sixth Circuit's rule. Pre-indictment plea negotiations increase the likelihood of eliciting incriminating evidence, which prosecutors may attempt to use if negotiations turn sour. See Metzger, *supra*, at 1666–67 ("[S]tatements and evidence that [defendants] provide in the course of negotiations frequently become the weapons the prosecution uses to convict them."). Yet the Fifth Amendment guarantees the right to counsel during custodial interrogation to alert the individual "that he is faced with a phase of

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[9] To be sure, even those who strike pre-charge plea deals are entitled to some judicial review through the plea colloquy. Fed. R. Crim. P. 11(b). But review is generally limited to whether the plea is intelligently and voluntarily made. *See* William F. McDonald, U.S. Dep't of Justice, *Plea Bargaining: Critical Issues and Common Practices* 135 (1985) (judges reject only 2 percent of guilty pleas).

the adversary system—that he is not in the presence of persons acting solely in his interest." *Miranda* v. *Arizona*, 384 U.S. 436, 469 (1966). After the Sixth Circuit's decision in this case, custodial interrogation may be the only pre-charge event where defendants are entitled to counsel. That is so even though plea negotiations present equal, if not greater, fairness concerns. See *Boykin* v. *Alabama*, 395 U.S. 238, 242 n.4 (1969) ("A plea of guilty is more than a voluntary confession made in open court. It also serves as a stipulation that no proof by the prosecution need b[e] advanced. It supplies both evidence and verdict, ending controversy." (citation omitted)).

At its core, plea-bargaining is largely justified by its efficiency. *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977) ("[T]he chief virtues of the plea system [are] speed, economy, and finality."). But undue emphasis on efficiency at the expense of fairness undermines society's perception of the legitimacy of the criminal system.[10] See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 571–72 (1980) ("To work effectively, it is important that society's criminal process satisfy the appearance of justice."); Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. Rev. 79, 161 (2012) ("Allowing people to continue to serve years of extra prison time despite a plain error in their sentence undermines the legitimacy of the criminal justice system"). And a defendant who perceives his deal as unfair is more likely

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[10] Plea bargains are in a sense analogous to commercial contracts. *See Ricketts* v. *Adamson*, 483 U.S. 1, 16 (1987) ("[T]he law of commercial contract may in some cases prove useful as an analogy or point of departure in construing a plea agreement."). Even in contract law, however, fairness concerns can override efficiency interests. *See, e.g.*, Restatement (Second) of Contracts § 208 cmt. d (Am. Law Inst. 1981) (unconscionability).

to renege on it later, either by withdrawing or collaterally challenging it—ultimately rendering the process more costly, less speedy, and undermining society's interest in finality and comity. See *McQuiggin* v. *Perkins*, 569 U.S. 383, 393 (2013).

II. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S SIXTH AMENDMENT JURISPRUDENCE.

Aside from these severe, negative practical consequences, the Sixth Circuit's bright-line rule is also inconsistent with this Court's precedents. Indeed, the Sixth Circuit ignored major developments in this Court's Sixth Amendment case law and applied an overly formalistic attachment test.

This Court's jurisprudence calls for a practical attachment test—one that "is far from a mere formalism," *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984) (citation omitted), focusing on when the government has shifted "from investigation to accusation" and "has committed itself to prosecute." *Moran* v. *Burbine*, 475 U.S. 412, 430, 432 (1986). Indeed, even the cases relied upon by the Sixth Circuit recognize as much. See *Gouveia*, 467 U.S. at 189; *Kirby*, 406 U.S. at 689. Were a bright-line rule sufficient, the Court would not have belabored a practical evaluation of each event at issue in those cases. See Pet. App. 58a–63a (Stranch, J., dissenting).

United States v. *Ash*, 413 U.S. 300, 313 (1973), illustrates the "traditional test." The Court engaged in a thorough "examination of the event" at issue—a pretrial photo identification—to determine "whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *Id.* The Court ultimately declined to extend the right to counsel be-

cause the accused was not present for the photo identification, foreclosing the possibility that he "might be misled by his lack of familiarity with the law or overpowered by his professional adversary." *Id.* at 317. The Court nevertheless recognized that "changing patterns of criminal procedure and investigation" may "present[] the same dangers that gave birth initially to the right itself." *Id.* at 310–11.

Some circuits have recognized the practical attachment test as framed above. See *Matteo* v. *Superintendent, SCI Albion*, 171 F.3d 877, 892 (3d Cir. 1999) (en banc); *Roberts* v. *Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995). Another circuit has taken a nominally different approach, presuming that the right to counsel does not apply to pre-indictment events unless the defendant shows the government shifted "from fact-finder to adversary." See *United States* v. *Larkin*, 978 F.2d 964, 969 (7th Cir. 1992). That presumption-based approach is also consistent with this Court's decisions, unlike the effectively "irrebuttable" presumption embraced by the Sixth Circuit below.

However framed, the point remains the same: the right to counsel may extend to certain pre-indictment events. To be sure, in practice, the "traditional test" will ordinarily be satisfied after indictment or formal charge—a practical reality that may explain this Court's previous use of "bright-line" language. But that does not necessarily mean attachment occurs only after indictment. See *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977) ("Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him."); *Escobedo* v. *Illinois*, 378 U.S. 478, 486 (1964) ("It would exalt form over substance to make the right to counsel,

under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment. Petitioner had, for all practical purposes, already been charged with murder.").

The Sixth Circuit's analysis of pre- and post-indictment cases does not show otherwise.[11] See Pet. App. 6a. None of the decisions marshalled by the court of appeals turned on the arbitrary timing of an indictment. In fact, *Kirby*, 406 U.S. at 690, noted that pre-indictment lineups are part of "routine police investigation[s]" for which there is no "rationally applicable" basis to have constitutionally guaranteed counsel. On the other hand, a post-indictment lineup is no longer routinely investigatory, designed instead to "determine the accused's fate." *United States* v. *Wade*, 388 U.S. 218, 235 (1967). Similarly, post-indictment interrogations may be "the only stage when legal aid and advice would help" the accused, *Massiah* v. *United States*, 377 U.S. 201, 204 (1964), while pre-indictment interrogations do not signal the shift "from investigation to accusation" that requires counsel to assure the "prosecution's case encounters the crucible of meaningful adversarial testing," *Moran*, 475 U.S. at 430 (internal quotations omitted). The Sixth Circuit's own examples, then, demonstrate the practical analysis required by this Court's precedents.[12]

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[11] Pet. App. 6a (citing *Moran*, 475 U.S. at 431–32 (no right in pre-indictment interrogations); *Kirby*, 406 U.S. at 690 (no right in pre-indictment lineups); *United States* v. *Wade*, 388 U.S. 218, 236–37 (1967) (right to counsel in post-indictment lineups); *Massiah* v. *United States*, 377 U.S. 201, 205–06 (right to counsel in post-indictment interrogations)).

[12] Pre-indictment lineups and interrogations typically feature law enforcement, not prosecutors. *See* Mulroy, *supra*, at 243 ("[I]t is normally law enforcement agents, rather than the prosecutor,

Properly framed, it is difficult to imagine a pre-indictment event more worthy of Sixth Amendment protection than a plea negotiation. No investigative purpose could justify denying would-be defendants counsel in these circumstances. Moreover, pre-indictment negotiations are an objective initiation of a "critical confrontation[] . . . where the results might well settle the accused's fate." *Wade*, 388 U.S. at 224; see also *Gouveia*, 467 U.S. at 189; *Hamilton* v. *Alabama*, 368 U.S. 52, 55 (1961) ("Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently."). Not only does plea-bargaining raise the same risks pre- and post-indictment, but the former is even more expansive than the latter: pre-indictment plea-bargaining includes the opportunity to negotiate particular charging decisions.[13] See *supra* Part I.A.2; Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 Am. Crim. L. Rev. 231, 243 (1989) ("In a guidelines system, whoever controls the relevant facts

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who conduct witness interviews."); Richard A. Leo, *Police Interrogation and American Justice* 33–34 (2008) (interrogation "is carried out by police detectives"); Nat'l Inst. of Justice, U.S. Dep't of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999), https://bit.ly/1Eun4se. Without prosecutors present, it is unlikely that "the government's role [has] shift[ed] from investigation to accusation." *Moran*, 475 U.S. at 430. This distinction further undermines the Sixth Circuit's reliance on pre-indictment lineups and interrogations as examples of the bright-line rule.

[13] In fact, "empirical evidence indicates that after prosecutors indict, only two percent of defendants successfully bargain for a plea to an offense that carries a lesser mandatory minimum sentence than those required by the offenses charged in the indictment. Prosecutors also charge defendants under the highest mandatory minimum sentence warranted by the alleged offense in approximately three quarters of all cases." Metzger, *supra*, at 1664 n.177 (citations omitted).

and charges controls the sentence."). If plea-bargaining "*is* the criminal justice system," *Frye*, 566 U.S. at 144, such that the accused "might be misled by his lack of familiarity with the law or overpowered by his professional adversary," *Ash*, 413 U.S. at 317, then pre-indictment negotiations "present[s] the same dangers that gave birth initially to the [Sixth Amendment] right itself," *id.* at 311.

The Sixth Circuit also ignored recent decisions eroding the factual and legal underpinnings for its supposed "bright-line" rule. Until relatively recently, no "critical stage" presented the same concerns pre- and post-indictment. See, *e.g.*, *Kirby*, 406 U.S. at 690 (no right to counsel in pre-indictment lineups, even though there is in post-indictment lineups); *Moran*, 475 U.S. at 431–32 (no right in pre-indictment interrogations, even though there is in post-indictment interrogations). And this Court understandably did not consider pre-indictment plea-bargaining when deciding cases like *Kirby* and *Moran*, as the right to counsel did not extend to *any* plea negotiations at the time.

But *Frye* was a sea change. It was the first decision to recognize the centrality of plea negotiation in the modern-day criminal justice system. See *Frye*, 566 U.S. at 144 ("In 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."). And it marked the first time this Court extended the right to counsel to plea-bargaining. *Kirby* and its progeny—all decided before *Frye* and the recent proliferation of pre-indictment negotiation—therefore had no occasion to consider "the possibility that the right to counsel might under some circumstances attach prior to the formal initiation of judicial proceedings," *Gouveia*, 467 U.S. at 193 (Stevens, J., concurring in the judgment), and in particular

whether plea-bargaining might qualify, see *Moody*, 206 F.3d at 618 (Wiseman, J., concurring) ("The criminal justice system has and is changing so that defendants now face critical stages of their prosecutions prior to indictment.").

Similarly, before *Frye* there was little risk that a bright-line rule would produce arbitrary results. In this case, for instance, it would have been wholly irrelevant whether petitioner were indicted before or after plea negotiations—either way, he would have no right to counsel. But now timing makes all the difference. Two otherwise similarly situated defendants may face different outcomes for purely fortuitous reasons—*e.g.*, one busy prosecutor took longer to file charging paperwork, or one grand jury took longer than expected to return an indictment. See *Moody*, 206 F.3d at 615 ("We believe it to be a mere formality that the government had not indicted Moody at the time that it offered him a deal."). "That sort of hollow formalism is out of place in a doctrine that purports to serve as a practical safeguard for defendants' rights." *Montejo* v. *Louisiana*, 556 U.S. 778, 785 (2009).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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