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## Constitutional Law - Eighty-Six the Sixth Amendment: The Sixth Amendment Right to Counsel Applies to Pre-Indictment Plea Negotiations Too - Turner v. United States, 885 F.3D 949 (6th Cir. 2018)(En Banc)

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**CONSTITUTIONAL LAW—EIGHTY-SIX THE  
SIXTH AMENDMENT: THE SIXTH AMENDMENT  
RIGHT TO COUNSEL APPLIES TO PRE-  
INDICTMENT PLEA NEGOTIATIONS TOO—  
*TURNER V. UNITED STATES*, 885 F.3D 949  
(6TH CIR. 2018) (EN BANC).**

The Sixth Amendment to the Constitution guarantees certain protections to defendants during critical stages of criminal proceedings.<sup>1</sup> These protections, however, do not extend to the defendant until the prosecution has commenced.<sup>2</sup> In *Turner v. United States*,<sup>3</sup> the United States Court of Appeals for the Sixth Circuit, sitting *en banc*, considered whether the Sixth Amendment right to counsel extended to pre-indictment plea negotiations.<sup>4</sup> The court held that the Sixth Amendment right to counsel extends to a criminal defendant only once judicial proceedings have commenced, and thus, does not encompass pre-indictment plea negotiations.<sup>5</sup>

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<sup>1</sup> See U.S. CONST. amend. VI (assigning inalienable rights in criminal proceedings).

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic].

*Id.*

<sup>2</sup> See *Turner v. United States*, 885 F.3d 949, 951 (6th Cir. 2018) (en banc) (articulating circumstances under which Sixth Amendment protections attach).

<sup>3</sup> 885 F.3d 949 (6th Cir. 2018) (en banc).

<sup>4</sup> See *id.* at 952 (asserting one of two issues addressed in case). Unaddressed in this case comment, the court also decided “whether an indictment in a state prosecution triggers a criminal defendant’s Sixth Amendment right to counsel” with respect to “forthcoming federal charges based on the same underlying conduct.” *Id.* The court held that the state charge does not trigger the right to counsel in the impending federal charge because the right to counsel is “offense specific” and “cannot be invoked once for all future prosecutions.” *Id.* at 954 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991)).

<sup>5</sup> See *Turner*, 885 F.3d at 951 (announcing holding of case).

In 2007, John Turner robbed four Tennessee businesses at gunpoint.<sup>6</sup> He was arrested for these crimes by a Memphis police officer who also served as a member of a joint federal-state task force.<sup>7</sup> With respect to the state charges, Turner was indicted on multiple counts of aggravated robbery, and he hired an attorney to represent him on these charges, which included representation during the plea negotiations with the state prosecutors.<sup>8</sup> During the state proceedings, it became clear that the United States Attorney's Office planned to bring federal charges, including those related to robbery and firearm possession, against Turner as part of the federal-state task force.<sup>9</sup> The Assistant United States Attorney ("AUSA") offered Turner's attorney a plea of fifteen years.<sup>10</sup> The AUSA stipulated, however, that the offer "would expire if and when a federal grand jury indicted Turner."<sup>11</sup> It is disputed, but not of consequence to the issue at hand, whether Turner refused the plea deal once it was offered or if he was even presented with the deal at all.<sup>12</sup> The grand jury in the Western District of Tennessee

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<sup>6</sup> See *id.* (outlining underlying crimes Turner committed); see also Brief for the United States in Opposition at \*5–6, *Turner v. United States*, 885 F.3d 949 (6th Cir. 2018) (No. 18-106), 2018 Lexis 4602 (businesses included dry cleaner, beauty shop, pizza parlor, and convenience store).

<sup>7</sup> See *Turner*, 885 F.3d at 951 (iterating basis for federal and state cases); *Turner v. United States*, 848 F.3d 767, 768 (6th Cir. 2017), *aff'd en banc*, 885 F.3d 949 (6th Cir. 2018) (describing task force). The Safe Streets Task Force (SSTF) was "a joint federal-state task force created to target and prosecute individuals involved in serious crimes." *Turner*, 848 F.3d at 768 n.1. The task force was the result of a Memorandum of Understanding between the FBI and various Tennessee city and county police departments. *Id.* The memorandum articulated that "the criteria for determining whether to prosecute a particular violation in state or federal court will focus upon achieving the greatest overall benefit to law enforcement and the jurisdiction will be resolved through discussion among all investigative agencies and prosecutive [sic] entities having an interest in the matter." *Id.*

<sup>8</sup> See *Turner*, 885 F.3d at 951 (describing procedural history); *Turner*, 848 F.3d at 768 (discussing Turner's retention of private attorney). This case is not concerned with Turner's right to counsel as an indigent defendant as he could afford one and thus did not need the state to appoint him an attorney. *Turner*, 848 F.3d at 768. While not at issue in the case-in-chief, Turner was offered and then accepted a plea deal on the state charges that resulted in a sentence of eight or nine years. *Id.*

<sup>9</sup> See *Turner*, 885 F.3d at 951–52 (stating federal firearm charges alone carry mandatory minimum of eighty-two years' imprisonment).

<sup>10</sup> See *id.* at 952 (chronicling proceedings). The AUSA planned to bring federal charges under the Hobbs Act, which criminalizes interference with commerce by threats or violence, and for using a firearm during a crime of violence for each of the four robberies. *Turner*, 848 F.3d at 769.

<sup>11</sup> See *Turner*, 885 F.3d at 952 (setting scope of plea offer). The offer was extended at some point during the summer of 2008 and was to expire around September 15, 2008 when the charges were presented to the grand jury. *Turner*, 848 F.3d at 769. It is important to note that the low standard for federal indictment practically cementing Turner's indictment. FED. R. CRIM. P. 6.

<sup>12</sup> See *Turner*, 885 F.3d at 952 (highlighting sub-matter of case not at issue in case).

indicted Turner in 2008.<sup>13</sup> Turner subsequently hired a new attorney who helped him negotiate a plea deal of twenty-five years imprisonment.<sup>14</sup>

In 2012, Turner filed a “motion alleging that his original attorney rendered constitutionally ineffective assistance during [his] federal plea negotiations.”<sup>15</sup> The district court denied his motion, holding that Turner’s Sixth Amendment right to counsel had not yet attached during his pre-indictment federal plea negotiations; thus, he had no standing to bring a claim for ineffective assistance of counsel.<sup>16</sup> On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the lower court’s decision.<sup>17</sup> Turner filed a petition for rehearing *en banc*, which the court granted.<sup>18</sup> The court reaffirmed the ruling and held that the Sixth Amendment right to counsel attaches only at or after the initiation of judicial criminal proceedings.<sup>19</sup> The right does not attach at any point before the initiation of adversarial judicial criminal proceedings, and therefore the Sixth

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<sup>13</sup> See *id.* (describing federal indictment).

<sup>14</sup> See *id.* (explaining how Turner waived his right to file direct appeal as part of plea agreement). The ability to appeal is one of the differences between the original plea offer, which Turner would have preferred, and the one he received as a result of the expiration of the first plea offer. *Id.* Turner’s sentence will also be followed by three years of supervised release. Brief for the United States in Opposition, *supra* note 6, at \*5. Turner was ultimately convicted on four counts of Hobbs Act robbery and one count of carrying and using a firearm during or in relation to a crime of violence. *Id.* at \*4–5.

<sup>15</sup> See U.S. CONST. amend. VI (stating basis for claim). The Sixth Amendment which states, “in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic],” was the basis for Turner’s constitutional claim. *Id.*; see 28 U.S.C. § 2255(a) (2019) (declaring motion Turner filed); *Turner*, 885 F.3d at 952 (stating motion was filed because of ineffective assistance of counsel). The code states in pertinent part: “[a] prisoner in custody under sentence of a court . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.” 28 U.S.C. § 2255(a). This type of appeal was not forfeited in Turner’s plea acceptance. *Turner*, 885 F.3d at 952.

<sup>16</sup> See *Turner*, 885 F.3d at 952 (finding no constitutional issue); *Turner v. United States*, No. 2:12-cv-02266-SHM-dkv, 2015 U.S. Dist. LEXIS 190572, at \*4 (W.D. Tenn. June 8, 2015) (expressing basis for denying claim).

<sup>17</sup> See *Turner*, 885 F.3d at 952 (articulating procedural posture); *Turner v. United States*, 848 F.3d 767, 768 (6th Cir. 2017), *aff’d en banc*, 885 F.3d 949 (6th Cir. 2018) (affirming district court’s denial of evidentiary hearing). The same court decided both cases, one sitting *en banc*, the other as a panel. *Turner*, 885 F.3d at 952; *Turner*, 848 F.3d at 767.

<sup>18</sup> See *Turner*, 885 F.3d at 952 (noting all sixteen circuit judges sat on panel).

<sup>19</sup> See *id.* at 951 (refusing to overrule precedent). Judicial criminal proceedings commence by way of “formal charge, preliminary hearing, indictment, information, or arraignment.” *Id.* (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). Turner filed a petition for a writ of certiorari which was recently denied by the Supreme Court. *Turner v. United States*, 885 F.3d 949 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 2740 (2019).

Amendment right to counsel does not extend to pre-indictment plea negotiations.<sup>20</sup>

The Sixth Amendment, in the interest of protecting the most vulnerable peoples in the criminal justice system, broadly declares that “the accused” are entitled to “the Assistance of Counsel for his defence [sic]” in “all criminal prosecutions.”<sup>21</sup> These cases often come up through the courts under a claim of ineffective assistance of counsel, but there can be no ineffective assistance of counsel if the right to counsel has yet to attach to the proceedings.<sup>22</sup> In applying that right to various scenarios likely unimaginable by the Constitution’s drafters, the Supreme Court has sought to define key terms and form rules for when and in what instances the right to counsel does and does not attach.<sup>23</sup> This right has been afforded to the criminally accused going as far back as the eighteenth century.<sup>24</sup>

The Supreme Court’s attachment rule is guided mostly by the “plain language of the [Sixth] Amendment” and identifies the key phases in a proceeding when the right to counsel attaches.<sup>25</sup> This is “only at or after the

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<sup>20</sup> See *Turner*, 885 F.3d at 952–53 (highlighting that pre-indictment plea negotiations are not critical stage deserving of Sixth Amendment protection).

<sup>21</sup> See U.S. CONST. amend. VI (declaring rights); *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938) (emphasizing rights of life and liberty that Sixth Amendment protects); *United States v. Moody*, 206 F.3d 609, 618 (6th Cir. 2000) (Wiseman, J., concurring) (aiming to “protect defendants in critical stages of their prosecution”). “[The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.” *Zerbst*, 304 U.S. at 462–63.

<sup>22</sup> See *Smith v. Ohio Dep’t of Rehab. & Corr.*, 463 F.3d 426, 433 (6th Cir. 2006) (“There can be a constitutional claim of ineffective assistance of counsel only at a stage of the proceedings when there is a right to counsel under the Sixth Amendment.”). In the inverse, the court specified that there can be no claim of constitutionally ineffective assistance of counsel where there is no right to counsel. *Id.* at 433 n.4.

<sup>23</sup> See Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U.L. REV. 1635, 1641 (2003) (articulating history and evolution of Sixth Amendment).

<sup>24</sup> See *Powell v. Alabama*, 287 U.S. 45, 60–65 (1932) (discussing historical evolution of right); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (examining necessity of counsel in criminal proceedings); Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245, 245–47 (2006) [<https://perma.cc/P57W-28DU>] (describing states’ gradual adoption and application of right to counsel). In the past, not all states permitted the right to all criminal prosecutions, sometimes it was limited to only the more serious crimes, and, further, sometimes only in capital cases. *Powell*, 287 U.S. at 73; *Abel*, *supra* note 24, at 245–47. The right now applies in federal and state cases alike for all criminal charges, save some misdemeanors, and even in some state civil matters, as well as family law and probate matters. *Abel*, *supra* note 24, at 245–47.

<sup>25</sup> See, e.g. *United States v. Gouveia*, 467 U.S. 180, 187–89 (1984) (“right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated”); *Kirby v. Illinois*, 406 U.S. 682, 690–91 (1972) (necessitating scrutiny of every pretrial confrontation); *Powell*, 287 U.S. at 57 (articulating when and in what instances right to counsel attaches).

time that adversary judicial proceedings have been initiated against” someone, which includes a “formal charge, preliminary hearing, indictment, information, or arraignment.”<sup>26</sup> In *Gouveia*, however, the Court warned that there may be some circumstances in which the right to counsel may attach prior to the formal initiation of judicial proceedings.<sup>27</sup> In response, the right to counsel has expanded from its initial limitation of only applying at trial to applying in certain pretrial “trial-like confrontation[s].”<sup>28</sup> This is because the dangers that initially gave birth to the right to counsel were found equally strong and deserving of protection in other critical stages such as post-indictment interrogations, post-indictment lineups, and the entry of guilty pleas.<sup>29</sup> Courts have speculated as to whether this list is inclusive or exhaustive.<sup>30</sup> In deciding whether to include pretrial proceedings under the Sixth Amendment’s umbrella, case law recommends an examination of any pretrial confrontation to determine whether the right to counsel is required in order to preserve the defendant’s rights.<sup>31</sup>

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<sup>26</sup> See *Kirby*, 406 U.S. at 688–89; *Powell*, 287 U.S. at 57 (providing specific examples of when right attaches). The Court in *Powell* further noted that failure to provide counsel at trial was also a violation of the Fourteenth Amendment’s Due Process Clause. 287 U.S. at 71. See *United States v. Sikora*, 635 F.2d 1175, 1181 n.4 (6th Cir. 1980) (suggesting plea bargaining is “judicial proceeding”). The Federal Rules of Criminal Procedure, which regulate plea bargains, grants judges ultimate supervision over plea bargains and it can be argued “that plea bargaining is itself a judicial proceeding in the sense contemplated by *Kirby*.” *Id.*

<sup>27</sup> See *Gouveia*, 467 U.S. at 193 (Stevens, J., concurring) (“the right to counsel might under some circumstances attach prior to the formal initiation of judicial proceedings”).

<sup>28</sup> See *United States v. Ash*, 413 U.S. 300, 338 (1973) (Brennan, J., dissenting) (holding Sixth Amendment right to counsel does not extend to photographic identifications). “[I]n order to be deemed ‘critical,’ the particular ‘stage of the prosecution’ under consideration must, at the very least, involve the physical ‘presence of the accused,’ at a ‘trial-like confrontation’ with the Government, at which the accused requires the ‘guiding hand of counsel.’” *Id.*

<sup>29</sup> See *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892 (3d Cir. 1999) (entertaining idea of expanding attachment issue in Third Circuit). “The right also may attach at earlier stages, when ‘the accused is confronted, just as at trial, by the procedural system . . . in a situation where the results of the confrontation might well settle the accused’s fate and reduce the trial itself to a mere formality.’” *Id.* (quoting *Gouveia*, 467 U.S. at 189). See *Wade v. State*, No. E2017-02177-CCA-R3-PC, 2018 Tenn. Crim. App. LEXIS 690, at \*34 (Tenn. Crim. App. Sept. 12, 2018) (recognizing plea-bargaining process as critical stage in Tennessee). “[A] precise definition for what constitutes a critical stage does not exist in Tennessee,” which shows flexibility and uncertainty in the rule. *Id.*

<sup>30</sup> See *Kennedy v. United States*, 756 F.3d 492, 493–94 (6th Cir. 2014) (postulating that both pre- and post-indictment plea negotiations deserve Sixth Amendment protection). “Had the Supreme Court erased the line between preindictment and postindictment proceedings for plea negotiations, it surely would have said so given its careful attention to the distinction for interrogations and lineups.” *Id.* at 494.

<sup>31</sup> See *United States v. Wade*, 388 U.S. 218, 262 (1967) (Fortas, J., concurring) (suggesting defendants have Sixth Amendment protection at post-indictment lineups); *but see* Dr. John Olsson, *Who Amended the Amendment?*, 5 AKRON J. CONSTITUTIONAL L. & POL’Y 15, 22 (2014) (suggesting *Kirby* overruled *Wade*); *see also* *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 208 (2008)

Recently, the Supreme Court again extended the Sixth Amendment to encompass another critical stage of the prosecution: plea negotiations.<sup>32</sup> But, in *Kirby v. Illinois*, the Supreme Court held that the Sixth Amendment did not extend to pre-indictment identification even though the same post-indictment lineup is treated as a critical stage requiring such protections.<sup>33</sup> The Sixth Circuit follows the bright-line rule defined in *Kirby* and holds that the Sixth Amendment right to counsel does not attach until the “initiation of judicial criminal proceedings” and so the pre-indictment plea offer is not

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(describing how Sixth Amendment attachment is determined); *United States v. Ash*, 413 U.S. 300, 313 (1973) (noting Court called for “examination” of event to determine defendant had Sixth Amendment protection); *Kirby v. Illinois*, 406 U.S. 682, 689–91 (1972) (determining right to counsel was result of careful evaluation of facts and circumstances). When determining whether there has been attachment, the critical question is “whether the machinery of prosecution was turned on,” and not by whom. *Rothgery*, 554 U.S. at 208. *Rothgery* implied that a prosecutorial action, such as filing information with the court, while not a critical stage, may still constitute attachment of the right to counsel. *Id.* at 212. See David C. Dearborn, “*You Have the Right to an Attorney, but Not Right Now: Combating Miranda’s Failure by Advancing the Point of Attachment Under Article XII of the Massachusetts Declaration of Rights*,” 44 SUFFOLK U. L. REV. 359, 363 (2011) (suggesting Sixth Amendment right to counsel attaches moment *Miranda* warnings are required).

<sup>32</sup> See *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (requiring right to counsel during plea negotiations to criminal defendants); *Lafler v. Cooper*, 566 U.S. 156, 162 (2012) (designating plea negotiations as critical stages deserving right to counsel). In these cases, though, the defendants were already indicted when they were offered their plea deal. *Frye*, 566 U.S. at 138; *Lafler*, 566 U.S. at 156. The Court in *Frye* highlighted that a significant amount of convictions end as a result of a plea entry which makes them a central part of the criminal justice system. 566 U.S. at 143. For many defendants, this makes the negotiation of a plea, and not the trial, the critical stage of the prosecution. *Id.* at 144. For those who accept a plea offer, the negotiation and acceptance of that plea is the only time at which assistance of counsel can be beneficial to them. *Id.* Additionally, post-indictment plea negotiations are protected by the right to counsel even if the negotiations have no effect on the fairness of the conviction. *Kennedy v. United States*, 756 F.3d 492, 493 (6th Cir. 2014) (stipulating neither *Lafler* nor *Frye* answered whether right to counsel attached in pre-indictment plea negotiations).

<sup>33</sup> See *Kirby*, 406 U.S. at 690–91 (limiting scope of Sixth Amendment). When a suspect has yet to be “formally charged with a criminal offense, . . . the appropriate constitutional balance” is struck when “the right of a suspect to be protected from prejudicial procedures” is balanced against “the interest of society in the prompt and purposeful investigation of an unsolved crime.” *Id.* at 691. But see *United States v. Sikora*, 635 F.2d 1175, 1181 (6th Cir. 1980) (Wiseman, J., dissenting) (“right to counsel should begin with the commencement of plea bargaining in those rather unusual cases where plea bargaining precedes formal charges”).

deserving of constitutional protection.<sup>34</sup> Many courts at all levels have hinted and urged for an expansion of the right to counsel.<sup>35</sup>

In *Turner v. United States*, the Sixth Circuit applied the precedent and upheld the Supreme Court's established bright-line rule that the Sixth Amendment right to counsel does not extend to pre-indictment plea negotiations.<sup>36</sup> The court reasoned that while plea negotiations are critical

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<sup>34</sup> See *United States v. Moody*, 206 F.3d 609, 615–16 (6th Cir. 2000) (following precedent, begrudgingly). The court writes extensively on its desire to stray from the precedent and urges the Supreme Court to revise the bright-line rule. *Id.* The court suggests that when a formal plea has been offered for a specific offense and a specific sentence, the “adverse positions of the government and suspect have solidified.” *Id.* “[I]t seems a triumph of the letter over the spirit of the law to hold that [the accused] had no right to counsel in his decision to accept or deny the offered plea bargain only because the government had not yet filed formal charges.” *Id.* at 616.

<sup>35</sup> See *United States v. Giamo*, 665 F. App'x 154, 156–57 (3d Cir. 2016) (hinting right to counsel extends to pre-indictment negotiation of plea). While this case was ultimately decided under another question, the court held that the defendant could not prove he would have accepted the plea agreement as offered and overlooked the question of whether defendant's attorney's assistance at this stage, a pre-indictment plea negotiation, was required by the Sixth Amendment. *Id.* at 157; see *Perry v. Kemna*, 356 F.3d 880, 895–96 (8th Cir. 2004) (explaining that right to counsel may attach before government files charges); *Roberts v. Maine*, 48 F.3d 1287, 1290–91 (1st Cir. 1995) (determining when right to counsel attaches); *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992) (suggesting right attaches prior to formal commencement if government's focus switched from investigatory to accusatory). “By its very terms, [the Amendment] becomes applicable only when the government's role shifts from investigation to accusation. For it is only then that the assistance of one versed in the ‘intricacies . . . of law,’ is needed . . .” *Moran v. Burbine*, 475 U.S. 412, 430 (1986) (quoting *United States v. Cronin*, 466 U.S. 648, 656 (1984)). See *Ex parte Burford*, 7 U.S. 448, 453 (Cir. Ct., D. Penn 1806) (holding Sixth Amendment rights applied even though accused had not yet been formally charged); *United States v. Moore*, 26 F. Cas. 1308, 1309 (D. Pa. 1801) (“[A] ‘public prosecution,’ . . . is instituted and commenced when the party, by process, or otherways, is brought before a court or magistrate, and on information or proof is held to answer. The subsequent indictment is but a continuation of the prosecution so begun.”); *Allen v. State*, 10 Ga. 85, 90–91 (1851) (highlighting when rights attach to defendants' pre-indictment); Alexis Berglund, Comment: *Turner-ing over a New Leaf: Precharge Plea Negotiations as a Critical Stage for the Purpose of the Sixth Amendment Right to Counsel*, 59 B.C. L. REV. E. SUPP. 188, 199 (2018) (“plea negotiation process is adversarial!”).

[S]o soon as a party is charged with a crime and bound to answer, or committed for it, that it becomes then, a public prosecution, and that the indictment is but a continuation of it; and that from that stage of it he is entitled to compulsory process for his witnesses.

*Allen*, 10 Ga. at 91.

<sup>36</sup> See *Turner v. United States*, 885 F.3d 949, 951 (6th Cir. 2017) (affirming precedent). *But 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, 241–42 (2017) (disregarding bright-line rule for broader, more workable rule). Mulroy proposed that the right attaches whenever a “prosecutor is involved in substantive communications with a defendant” including “pre-charge plea and other negotiations; subpoenaed grand jury testimony; pretrial depositions; . . . and similar situations.” *Id.* at 213.

stages of prosecution, they are still subject to the attachment rule.<sup>37</sup> The court rejected attempts to soften the line between the “critical stage question” and the “attachment question” concluding that these inquiries must be kept distinct.<sup>38</sup> These separate questions, while both important in determining whether an accused is entitled to counsel, are the reason that some post-indictment proceedings deserve protection and that same proceeding, occurring pre-indictment, is not entitled to protection.<sup>39</sup>

The court held steadfast in their application that the Sixth Amendment “attaches only at or after . . . adversary judicial proceedings

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<sup>37</sup> See *Turner*, 885 F.3d at 953 (differentiating facts in *Turner* from those in *Frye* and *Lafler*). A defendant has no constitutional right to a plea offer and no guarantee that a judge will accept a plea offer. See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1916 (1992) (“[T]here is a choice between (1) a right (that may be bought and sold) to an elaborate trial, and (2) an inalienable right to a more casual trial process.”); see also Mulroy, *supra* note 36, at 217–18 (highlighting commonality of facts giving rise to *Turner*). Instances in which there is a simultaneous or preceding pre-indictment plea offer will become more common, making it harder to justify not extending the right to counsel to those instances. Mulroy, *supra* note 36, at 217–18. Mandatory sentencing and sentencing guidelines are another evolving area of the law which has and will continue to influence the importance and application of the Sixth Amendment right to counsel. Metzger, *supra* note 23, at 1658. Laws in these areas place a unique importance on the charges presented by the prosecutor, and an unrepresented defendant in these pre-indictment proceedings could be seriously disadvantaged. *Id.* at 1663–64. Similarly, a lawyer’s assistance in seeking a reduced sentence for cooperating with the government is equally important in the pre-sentencing and post-sentencing phases. *Id.* at 1668. Recently in *Maslonka v. Hoffner*, the Sixth Circuit faced a similar, yet distinct, issue also unimaginable prior to the ratification of the Sixth Amendment. 900 F.3d 269, 278–79 (6th Cir. 2018). That is, “whether or not cooperation with federal authorities is considered part of the critical stage of state plea negotiations where . . . a state plea offer hinges on that federal cooperation.” *Id.*

<sup>38</sup> See *Turner*, 885 F.3d at 953 (rejecting argument that preindictment and postindictment plea negotiation stages should be treated equally); *Rothgery*, 554 U.S. at 211–12 (explaining difference between questions). “Once attachment occurs, the accused . . . is entitled to the presence of appointed counsel during any ‘critical stage’ of the postattachment proceedings . . .” *Rothgery*, 554 U.S. at 212. Thus, even post attachment, there will still be instances in which counsel’s presence is not required at certain proceedings. *Id.*

<sup>39</sup> See *Kirby v. Illinois*, 406 U.S. 682, 689–90 (1972) (refusing to offer assistance of counsel during pre-indictment lineup); *Massiah v. United States*, 377 U.S. 201, 205–06 (1964) (declining to impose per se rule regarding critical stage question); *Turner*, 885 F.3d at 953 (enumerating pretrial “trial-like confrontations” that are just as perilous as post-indictment confrontation). “The initiation of judicial criminal proceedings is far from a mere formalism.” *Kirby*, 406 U.S. at 689. See also Brandon K. Breslow, *Signs of Life in the Supreme Court’s Uncharted Territory: Why the Right to Effective Assistance of Counsel Should Attach to Pre-Indictment Plea Bargaining*, 62 FED. LAW. 34, 38–39 (2015) (proposing right to counsel should attach to all plea negotiations, pre or post-indictment alike); James S. Montana & John A. Galotto, *Right to Counsel: Courts Adhere to Bright-Line Limits*, 16 CRIM. JUST. 4, 12 (2001) (postulating right to counsel should attach at critical pre-indictment stages, such as plea bargaining).

have been initiated.”<sup>40</sup> The court refused to expand the scope of the right to counsel as some lower courts and other circuits have suggested.<sup>41</sup>

There are a number of alternative rule formulations that would better serve those accused in pre-indictment scenarios that are similar to the rule formulations that give defendants protection in post-indictment proceedings.<sup>42</sup> Additionally, there are valid concerns that the current bright-line rule lends itself to “prosecutorial manipulation.”<sup>43</sup> Prosecutors may be tempted to delay issuing a formal indictment with the intent that the unprotected, unadvised accused will quickly accept a plea deal.<sup>44</sup> To remedy this, when determining a critical stage, the court should consider whether: (1) the government made its intent to prosecute known “either formally or through informal means, such as grand jury investigation, plea bargaining, or pre-charge discussions with the suspect or with defense counsel,” (2) formal charges would have followed if discussions broke down between the parties, and (3) “it is a temporal fortuity that the case falls outside the traditional . . . critical stage.”<sup>45</sup> In *Turner*, the prosecution intended to move forward with formal charges as evidenced by the plea offer and the

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<sup>40</sup> See *United States v. Gouveia*, 467 U.S. 180, 187 (1984) (failing to broaden applicability of Sixth Amendment right to counsel); *Turner*, 885 F.3d at 953 (articulating when Sixth Amendment protections initiate). The dubitably concurring Judge Bush suggested the question of attachment turns on the definitions of “accused” and “criminal prosecution,” as used in the text of the Sixth Amendment, and embarked on a thorough historical analysis of the terms to determine their meaning at the time the Sixth Amendment was ratified. *Turner*, 885 F.3d at 956 (Bush, J., concurring). Attachment is triggered in two instances: “a formal charge from the prosecutor, either in the form of an indictment or information; or . . . an appearance before a judge, as in arraignment or first appearance.” Mulroy, *supra* note 36, at 215.

<sup>41</sup> See *Turner*, 885 F.3d at 953–54 (denying existence of circuit split); *but see* Mulroy, *supra* note 36, at 230–33 (indicating First, Third, and Seventh Circuits and some state courts proposed bright-line rule alternatives).

<sup>42</sup> See *Turner*, 885 F.3d at 983–84 (Stranch, J., dissenting) (insisting on “flexible, fact-specific analysis” of criminal confrontations to determine Sixth Amendment applicability); Mulroy, *supra* note 36, at 241–42 (suggesting alternative application of rule would fairly benefit accused); *see also Kirby*, 406 U.S. at 690–91 (articulating current rule).

<sup>43</sup> See *Turner*, 885 F.3d at 983 (Stranch, J., dissenting) (“[P]rosecutors can simply delay indicting people to extract unfavorable and uncounseled plea agreements.”); Mulroy, *supra* note 36, at 233 (noting but for prosecutor’s delay in filing charges, defendants entitled to effective assistance).

<sup>44</sup> See Mulroy, *supra* note 36, at 247–48 (describing prosecutor’s incentives in delaying indictment); *see also Metzger*, *supra* note 23, at 1690 (recognizing demerits of current application of right to counsel). “[T]he absence of counsel will give the government an unfair advantage or . . . determine the outcome of the proceeding. . . . [T]he government may well commit itself to prosecuting but delay filing a formal charge.” Metzger, *supra* note 23, at 1690.

<sup>45</sup> See Metzger, *supra* note 23, at 1690 (highlighting potential prosecutorial manipulation proposed rule would protect against). This formulation of the rule would not harshly exclude pre-indictment situations, post-sentence cases, and situations where there was “inadvertent or deliberate manipulation of the process in order to circumvent the defendant’s right to appointed counsel.” *Id.*

associated expiration date.<sup>46</sup> Suggesting the case may not go forward because the grand jury had not indicted the accused—as was the case in *Turner*—merely because the grand jury was not yet presented with the case offers the defendant a warped sense of security, exemplifying why counsel is necessary in complicated proceedings such as these.<sup>47</sup> There is blatant prosecutorial manipulation present when these tactics are used to coerce an accused into accepting a plea offer.<sup>48</sup>

Another proposed rule suggests the right to counsel pivots either on the involvement of law enforcement or on the defendant's direct interaction with prosecutors regarding substantive aspects of his or her case.<sup>49</sup> Undeniably, the plea offer was a substantive aspect of *Turner's* case; in fact, it was his *whole* case.<sup>50</sup> Additionally, the court presumes the right to counsel applies where a “proceeding carries a risk of substantial potential prejudice.”<sup>51</sup> Plea offers are a powerful tool of the justice system and their

<sup>46</sup> See *Turner*, 885 F.3d at 952 (commenting AUSA planned to bring charges and offered plea with pending expiration date).

<sup>47</sup> See *Scott*, *supra* note 37, at 1909–10 (describing popularity of plea bargaining process).

<sup>48</sup> See *Metzger*, *supra* note 23, at 1690 (highlighting courts can find either inadvertent or deliberate prosecutorial manipulation).

<sup>49</sup> See *Mulroy*, *supra* note 36, at 233–34 (suggesting another application of rule that Sixth Amendment right attaches when defendant interacts with prosecutor). Law enforcement's interactions with suspects, are often just that—interactions—because law enforcement cannot initiate proceedings in the same way a prosecutor can. *Id.* at 235–36. As such, a suspect is arguably not yet an “accused” as the Sixth Amendment intended. *Id.* Furthermore, once a prosecutor becomes involved, it is evident that the inquiry has turned from fact-finding police work to adversarial, prosecutorial work. *Id.* at 231–32. This proposed rule is open-ended and, in application, would extend to the following situations and more:

[N]egotiations on cooperating with the investigation in exchange for immunity; negotiations on the surrender of a wanted person; negotiations on the turning over of potentially incriminating evidence; and negotiations on the terms under which someone will take the police to point out something (like the location of a body) . . . .  
[C]ommunications concerning the grand jury testimony of the suspect, or depositions taken in preparation for trial . . . .

*Id.* at 241; see also *Metzger*, *supra* note 23, at 1690–91 (describing how interactions with police can present collateral consequences unknown to layperson). *Metzger* suggests defendants are entitled to protection when confronted with “intricacies of the criminal procedure system that may be ‘mysterious, intricate and complex,’” such as interactions with pretrial service officers or probation officers, in situations like a lineup, for example. *Metzger*, *supra* note 23, at 1690–91.

<sup>50</sup> See *Turner*, 885 F.3d at 955; *Scott*, *supra* note 37, at 1912 (“[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system.”).

<sup>51</sup> See *Metzger*, *supra* note 23, at 1691 (suggesting right to counsel should attach when effects of proceeding are irrevocable).

use should still be encouraged but in a manner the Constitution envisioned, which is what these proposed rules seek to achieve.<sup>52</sup>

A workable solution would allow the attachment question and is the critical stage question to be asked in an interchangeable order.<sup>53</sup> As it operates now, the question of whether an aspect of the prosecution is a critical stage follows, somewhat naturally, after the determination that the Sixth Amendment attached to the prosecution.<sup>54</sup> But, this order advanced the improper notion that a defendant would not face a critical stage of the prosecution prior to traditional attachment.<sup>55</sup> If courts instead adopt the idea that there may be instances when a critical stage can occur before a “formal charge, preliminary hearing, indictment, information, or arraignment,” defendants will be given a chance at a just and equitable proceeding.<sup>56</sup> This allows the law to evolve as the courts consider new questions and issues that were unimaginable when the Sixth Amendment was ratified, or even when the controlling precedent was decided nearly forty years ago.<sup>57</sup> Ultimately,

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<sup>52</sup> See *Turner*, 885 F.3d at 965 (Bush, J., concurring) (summarizing what constitutional framers intended by enacting Sixth Amendment); see also *United States v. Sikora*, 635 F.2d 1175, 1182 (6th Cir. 1980) (“It should be emphasized again that this is not a major or even a particularly significant extension of Sixth Amendment protection, because in most cases formal proceedings would have begun before plea bargaining commences.”).

<sup>53</sup> See *Turner*, 885 F.3d at 968 (Clay, J., concurring) (suggesting critical stage question is just as important as attachment question). This idea is presumptively foreclosed by *Gouveia*, but the Court never considered the question of whether the right attaches in pre-indictment plea negotiations. *United States v. Gouveia*, 467 U.S. 180, 187–92 (1984); see *Kennedy v. United States*, 756 F.3d 492, 493 (6th Cir. 2014) (admitting issue would be one of first impression for Supreme Court). In *Turner*, the dissent advocates that the court ought to “scrutinize [the] formal federal plea offer to determine whether it marked the initiation of adversary judicial proceedings.” 885 F.3d at 980 (Stranch, J., dissenting). In other words, the court should consider whether the critical plea offer stage triggered the attachment of the right to counsel. *Id.*

<sup>54</sup> See *Turner*, 885 F.3d at 956–63 (Bush, J., concurring) (embarking on thorough historical analysis of terms “accused” and “criminal prosecution”).

<sup>55</sup> See *id.* at 981 (Stranch, J., dissenting) (suggesting pre-indictment plea negotiations contain underpinnings of adversarial judicial proceedings). “But while criticality and attachment are distinct concepts, there is overlap between the factors used to analyze them, such as adversity.” *Id.* (citation omitted).

<sup>56</sup> See *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (suggesting Sixth Amendment is invoked when adversarial positions solidify and defendant finds he needs counsel); see also *Metzger*, *supra* note 23, at 1689 (suggesting softened approach to critical stage question). A court could find a critical stage by evaluating the following procedural stages identified by the Supreme Court: “(1) adversariness-in-fact between the individual and the prosecution (‘adversariness-in-fact’); (2) complexity in the procedural stage in question (‘complexity’); and (3) potential prejudice to the individual, which prejudice can be countered by providing counsel (‘prejudice/benefit’).” *Metzger*, *supra* note 23, at 1689.

<sup>57</sup> See *Turner*, 885 F.3d at 965 (Bush, J., concurring) (reminding that Supreme Court routinely applies founding-era precepts to then-unknowable modern-day scenarios); *Mulroy*, *supra* note 36, at 217–18 (exemplifying how changed rule benefits accused via new procedural methods). In his concurrence, Judge Bush also noted that the framers had “no understanding of modern-day charge

the dissent as well as many of the concurring judges, who begrudgingly agreed with the majority because they felt as though they must follow the Supreme Court precedent, call for a case-by-case, practical evaluation of the facts and circumstances to properly determine when the Sixth Amendment right to counsel attaches.<sup>58</sup>

In *Turner v. United States*, the Sixth Circuit addressed the issue of whether the Sixth Amendment right to counsel extended to a plea negotiation that occurred prior to an indictment. The court blindly applied what it believed to be the relevant Supreme Court precedent in finding that, because the plea negotiation took place before a “formal charge, preliminary hearing, indictment, information, or arraignment,” the right to counsel did not attach to the proceedings. This outcome left the defendant, who deserved counsel at that critical stage of his criminal proceedings, at a disadvantage that violates what the Sixth Amendment broadly sought to protect. There are many viable options to resolve this issue that would better serve the interests of both prosecutors and defendants. Courts should reevaluate the manner in which a defendant’s right to counsel at the pre-indictment stage is determined and rework the existing framework to best serve the criminal justice system as a whole.

*Sierra Lovely*

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bargaining,” suggesting another method of entering verdicts in the current criminal justice system that was unimaginable when the Amendment was passed. *Turner*, 885 F.3d at 965 (Bush, J., concurring). In *Moody*, the court highlighted the changing system saying, “[t]he Sixth Amendment right to counsel historically has evolved to meet the challenges presented by a changing legal paradigm. The criminal justice system has and is changing so that defendants now face critical stages of their prosecutions prior to indictment.” 206 F.3d at 618 (Wiseman, J., concurring). Examples include cases involving mandatory sentencing, sentencing guidelines, and joint federal-state task forces. Metzger, *supra* note 23, at 1636; Mulroy, *supra* note 36, at 217–18.

<sup>58</sup> See *Turner*, 885 F.3d at 979–80 (Stranch, J., dissenting) (dulling attachment doctrine from harsh, bright-line rule used by majority); see also *United States v. Olson*, No. 2:12-cr-00327-APG, 2019 U.S. Dist. LEXIS 129320, at \*11 (D. Nev. Aug. 1, 2019) (granting appeal as to whether right to effective counsel attaches to pre-indictment formal plea offer). In light of *Turner* and the Supreme Court’s denial of certiorari, the court found “that reasonable jurists could debate whether a person can be denied effective counsel during a pre-indictment plea negotiation.” *Olsen*, 2019 U.S. Dist. LEXIS 129320, at \*11.