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Turner-ing Over a New Leaf: Pre-Charge Plea Negotiations as a Critical Stage for the Purposes of the Sixth Amendment Right to Counsel

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TURNER-ING OVER A NEW LEAF: PRE-CHARGE PLEA NEGOTIATIONS AS A CRITICAL STAGE FOR THE PURPOSES OF THE SIXTH AMENDMENT RIGHT TO COUNSEL

Abstract: On February 15, 2017, the U.S. Court of Appeals for the Sixth Circuit affirmed that the Sixth Amendment right to counsel does not attach to pre-charge plea negotiations. In so doing, the Sixth Circuit upheld a bright-line rule that the right to counsel does not attach until formal charges have been filed. Two months later, on April 13, 2017, the Sixth Circuit vacated its opinion and granted a rehearing en banc. This Comment argues that pre-charge plea negotiations should be considered a critical stage for the purposes of the Sixth Amendment, and thus defendants should have a Sixth Amendment right to counsel at these points in the legal process.

INTRODUCTION

The Sixth Amendment to the U.S. Constitution guarantees the right of the accused to have the assistance of counsel in all criminal prosecutions.[1] The U.S. Supreme Court has interpreted this right to attach during all "critical stages" of criminal proceedings.[2] Critical stages are the points at which adversarial judicial proceedings have been initiated.[3] To determine whether a stage is critical for the purposes of the Sixth Amendment, courts in some circuits employ a bright-line rule, while others reject this approach.[4] In prac-

[1] *See* U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668, 684–85 (1984) (recognizing the Sixth Amendment right to counsel).

[2] Missouri v. Frye, 566 U.S. 134, 140 (2012) (the right to the effective assistance of counsel applies at all critical stages of criminal proceedings); *see* Kirby v. Illinois, 406 U.S. 682, 689 (1972) (finding that critical stages include formal charges, preliminary hearings, indictments, information, or arraignments). An information is when a defendant is charged without a grand jury indictment. *Information*, LAW.COM, http://dictionary.law.com/Default.aspx?selected=953 [https://perma.cc/U7F2-33M8].

[3] *See Kirby*, 406 U.S. at 688 (finding that the Sixth Amendment right to counsel attaches at or after the initiation of "adversary judicial proceedings").

[4] *See, e.g.*, United States v. Hayes, 231 F.3d 663, 675 (9th Cir. 2000) (holding that without being "the subject of a formal charge, preliminary hearing, indictment, information or arraignment," the Sixth Amendment does not apply, including when a defendant, who has not been formally accused, is a target of a grand jury investigation); Roberts v. Maine, 48 F.3d 1287, 1291 (1st Cir. 1995) (recognizing that the right to counsel could conceivably attach prior to formal charges, indictment, or arraignment in extremely limited circumstances when the government crosses the line from fact-finder to adversary); United States v. Heinz, 983 F.2d 609, 612 (5th Cir. 1993) (finding that "the Sixth Amendment right to counsel does not attach until or after the time formal

tice, this bright-line rule effectively means that the right to counsel does not attach until after formal charges have been filed.[5] In 2017, the U.S. Court of Appeals for the Sixth Circuit in *Turner v. United States* (*Turner I*) followed circuit precedent in applying this bright-line rule to conclude that the defendant lacked a valid claim for the ineffective assistance of counsel because he did not have the right to counsel during pre-charge plea negotiations.[6] Shortly after the Sixth Circuit decided *Turner I*, the court vacated its opinion and granted a rehearing *en banc*, indicating that the Sixth Circuit might reconsider the facts of *Turner I* and align its reasoning with the other Circuits that interpret Supreme Court precedent to allow for the pre-indictment attachment of the Sixth Amendment right to counsel.[7] This Comment argues that pre-charge plea negotiations analogous to those that occurred in *Turner I* are a critical stage where the Sixth Amendment right to counsel should attach.[8] Part I of this Comment provides the factual and procedural background for *Turner I*.[9] Part II considers the differing opinions about when the Sixth Amendment right to counsel attaches, with some circuits adhering to a bright-line rule and other circuits carving out exceptions.[10] Part III argues that the Sixth Amendment right to counsel should attach during pre-charge plea-bargaining because it is a critical stage for purposes of the Sixth Amendment.[11]

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adversary judicial proceedings have been initiated"); Chrisco v. Shafran, 507 F. Supp. 1312, 1319 (D. Del. 1981) (concluding that there are scenarios when the Sixth Amendment right to counsel can attach prior to the filing of formal charges). A bright-line rule is an objective test that produces predictable results. *Bright-Line Rule*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/bright-line_rule [https://perma.cc/GG3E-PV4K].

[5] *See* Moran v. Burbine, 475 U.S. 412, 431 (1986) (reasoning that the Sixth Amendment right to counsel does not attach until after the filing of formal charges); *Roberts*, 48 F.3d at 1291 (acknowledging extremely limited exceptions to the bright-line rule that the right to counsel does not attach until a defendant is formally charged). The right to counsel does not attach until after the government has committed itself to prosecution and established its adversarial position. *See Moran*, 475 U.S. at 432.

[6] Turner v. United States (*Turner I*), 848 F.3d 767, 773 (6th Cir. 2017). *Turner I* followed the precedent established in *United States v. Moody*, which held that the Sixth Amendment right to counsel does not attach until after the filing of formal charges. *Id.* at 770–71; *see* United States v. Moody, 206 F.3d 609, 614 (6th Cir. 2000).

[7] Turner v. United States (*Turner II*), 865 F.3d 338, 338 (6th Cir. 2017) (granting re-hearing *en banc*). There are indications that upon rehearing *Turner I* the Sixth Circuit will find that the right to counsel can attach pre-indictment. *See* United States v. Pina, No. 1:17-cr-08, 2017 U.S. Dist. LEXIS 135238, at *7 (W.D. Mich. Aug. 23, 2017).

[8] *See infra* notes 76–117 and accompanying text.

[9] *See infra* notes 12–30 and accompanying text.

[10] *See infra* notes 31–75 and accompanying text.

[11] *See infra* notes 76–117 and accompanying text.

I. FACTUAL AND PROCEDURAL HISTORY OF *TURNER V. UNITED STATES*

Section A of this Part will establish the relevant factual background of *Turner I*.[12] Section B of this Part will provide *Turner I*'s procedural history.[13]

A. Factual Background

On October 3, 2007, John Turner robbed four businesses at gunpoint in Memphis, Tennessee and was later arrested by a state officer working on a federal-state anticrime task force.[14] Turner retained attorney Mark McDaniel for the state proceedings and was indicted under Tennessee law for four counts of aggravated robbery.[15] These state charges were resolved through a plea agreement in March 2009.[16] At some point during the summer of 2008, while McDaniel was still representing Turner on the state charges, a district attorney informed McDaniel that the U.S. Attorney's Office intended to bring federal charges, arising from the same incidences, against Turner.[17] Assistant United States Attorney ("AUSA") Tony Arvin told McDaniel that he would offer Turner a plea deal of fifteen years on the federal charges, so long as Turner accepted the offer before the federal indictment was returned.[18] McDaniel contended that he presented the federal plea deal to Turner in a timely manner, but Turner rejected it.[19] Turner subsequently discharged McDaniel and hired new representation.[20] A new AUSA was also assigned to Turner's case.[21] The best plea deal Turner's new attorney could

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[12] *See infra* notes 14–24 and accompanying text.

[13] *See infra* notes 25–30 and accompanying text.

[14] *Turner I*, 848 F.3d at 768. In federal-state joint taskforces, local and federal officers work in tandem to achieve a shared goal, and federal and local prosecutors will work together to bring charges against the individuals arrested by the taskforce. *See* John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1124–25 (1995) (noting that state prosecutors in organized crime investigations often work with federal prosecutors who have greater bargaining power as a result of the federal sentencing guidelines).

[15] *Turner I*, 848 F.3d at 768.

[16] *Id.* The plea deal offered to Turner on the state charges was a negotiated sentence of eight or nine years. *Id.*

[17] *Id.* at 769. McDaniel was informed that Arvin intended to charge Turner under the Hobbs Act for interference with commerce by threats or violence and for using a firearm during a violent crime for each of the four robberies. *Id.* The mandatory minimum sentence for the federal charges alone was eighty-two years. *Id.*

[18] *Id.* The charges against Turner were to be presented to a federal grand jury on September 15, 2008. *Id.*

[19] *Id.* Turner did not dispute that he did not timely accept the offer, but he did dispute the exact events that transpired between McDaniel and Turner regarding the initial plea offer. *Id.* McDaniel claims that Turner rejected the deal because Turner believed a sentence of fifteen years was too long for his actions. *Id.*

[20] *Id.*

[21] *Id.*

negotiate with the new AUSA was a twenty-five-year sentence for the federal charges.[22] Turner accepted the deal and pled guilty to the federal charges in the U.S. District Court for the Western District of Tennessee.[23] As a condition of the plea agreement, Turner waived his right to a direct appeal.[24]

B. Procedural History

In 2012, Turner filed a motion to vacate or set aside his conviction based on a claim that his attorney for the state proceedings, Mark McDaniel, provided ineffective assistance of counsel during the federal plea negotiations.[25] The government argued that counsel could not be ineffective because Turner had no right to counsel during the plea negotiations that occurred prior to the filing of formal charges.[26] The district court agreed and denied Turner's motion without ruling on the merits, holding that the right to counsel had not attached during the federal pre-charge plea negotiations.[27] The U.S. Court of Appeals for the Sixth Circuit upheld the district court's decision, as required by circuit precedent.[28] Two months later, the Sixth Circuit vacated the decision and granted a rehearing *en banc*.[29] *Turner I* has since been restored to the docket as a pending appeal.[30]

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[22] *Id.* Turner pled guilty to four counts of robbery affecting commerce in violation of the Hobbs Act and one count of using and carrying a firearm in furtherance of a violent crime. *Id.*

[23] *Id.*

[24] *Id.* A waiver of a right to appeal bars a defendant from being able to appeal part of his or her conviction, often including his or her sentence. Leanna C. Minix, *Examining Rule 11(b)(1)(n) Error: Guilty Pleas, Appellate Waiver, and Dominguez Benitez*, 74 WASH. & LEE L. REV. 551, 553 (2017). Although the use of appellate waivers in guilty pleas is increasingly more common, and all circuits have upheld waivers as constitutional, it is not without some hesitation. *See id.* at 566 (noting that debates over the use of appellate waivers in guilty pleas include balancing issues of efficiency and fairness). A former U.S. federal judge argued that a defendant should not be able to use their right to appeal as a bargaining chip, citing concerns about the unequal power balance between defendants and prosecutors. Nancy Gertner, *Having the Right to Appeal Is an Issue of Fairness*, N.Y. Times (Feb. 4, 2016, 6:36 PM), https://www.nytimes.com/roomfordebate/2012/08/19/do-prosecutors-have-too-much-power/having-the-right-to-appeal-is-an-issue-of-fairness [https://perma.cc/PP8Z-J2RM].

[25] *Turner I*, 848 F.3d 769. Turner's motion to vacate or set aside his conviction was filed pursuant to 28 U.S.C. § 2255. *Id.* at 768. Ineffective assistance of counsel claims are generally not raised on direct appeal but are properly raised on a motion to vacate under 28 U.S.C. § 2255. *See* United States v. Maddox, 69 F. App'x 663, 665–66 (6th Cir. 2003) (holding a defendant who waived his right to appeal properly asserted his ineffective assistance of counsel claim in a motion to vacate his sentence under 28 U.S.C. § 2255).

[26] *Turner I*, 848 F.3d at 768.

[27] *Id.*

[28] *Id.* at 773. The district court relied on *Moody* to draw its conclusion in *Turner I*. *Id.* The *Moody* court upheld the bright-line test, holding that the Sixth Amendment right to counsel does not attach until after the filing of formal charges. *Moody*, 206 F.3d at 614.

[29] *Turner II*, 865 F.3d at 338.

[30] *Id.* at 339.

II. LEGAL FRAMEWORK FOR WHEN THE SIXTH AMENDMENT RIGHT TO COUNSEL ATTACHES

The Sixth Amendment affords the accused the right to the assistance of counsel for his or her defense in all criminal prosecutions.[31] The assistance of counsel is a safeguard that the U.S. Supreme Court has deemed necessary to ensure the fundamental rights of life and liberty, and is so vital in the adversarial trial system that without it justice cannot be done.[32] Because the skills and knowledge of an attorney are necessary to ensure a fair trial and just results, the right to counsel is only satisfied when the assistance of counsel is effective.[33] The point at which a defendant is entitled to the effective assistance of counsel depends on whether the Sixth Amendment right to counsel has attached at a given stage of the criminal proceeding.[34] Section A of this Part details the bright-line rule, which has been used to determine whether a defendant's right to counsel has attached.[35] Section B of this Part discusses how circuit courts have interpreted and applied this bright-line rule.[36] Section C of this Part addresses the right to counsel specifically as it pertains to plea negotiations.[37]

A. The Bright-Line Rule for the Right to Counsel

The Supreme Court has held that the Sixth Amendment right to counsel only attaches at "critical" stages of criminal proceedings that occur "at or after the time that adversary judicial proceedings have been initiated."[38] A stage is considered critical when the government has committed itself to

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[31] Strickland v. Washington, 466 U.S. 668, 685 (1984). *See generally* Mary Fan, *Adversarial Justice's Casualties: Defending Victim-Witness Protection*, 55 B.C. L. REV. 775, 794 (2014) (indicating that the right to counsel arose as a response to the historical imbalances of power between defendant and state).

[32] Gideon v. Wainwright, 372 U.S. 335, 343 (1963). The role of counsel is so crucial that defendants accused of federal or state crimes have the right to appointed counsel if they are unable to afford to retain their own. *Strickland*, 466 U.S. at 685.

[33] *Strickland*, 466 U.S. at 685–86.

[34] *See* Missouri v. Frye, 566 U.S. 134, 138 (2012) (finding that the right to counsel and the right to the effective assistance of counsel are intertwined); *Strickland*, 466 U.S. at 686 (finding that "the right to counsel is the right to the effective assistance of counsel" (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)); *Turner I*, 848 F.3d 767, 773 (6th Cir. 2017) (holding that a defendant who did not have a Sixth Amendment right to counsel was not entitled to an evidentiary hearing for his ineffective assistance of counsel claim).

[35] *See infra* notes 38–49 and accompanying text.

[36] *See infra* notes 50–63 and accompanying text.

[37] *See infra* notes 64–75 and accompanying text.

[38] Montejo v. Louisiana, 556 U.S. 778, 786 (2009); Kirby v. Illinois, 406 U.S. 682, 688 (1972). Critical stages can exist beyond the trial itself, and some may occur pre-trial. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25, 34 (1972) (holding that counsel is needed for guilty pleas); Hamilton v. Alabama, 368 U.S. 52, 54–55 (1961) (holding that an arraignment is a critical stage in state criminal proceedings, and the accused is entitled to counsel during arraignment).

prosecute, thereby establishing its adverse position against the defendant, and the defendant is faced with the "intricacies of criminal law."[39] The Supreme Court has interpreted the Sixth Amendment right to counsel to not attach until after formal charges have been filed.[40] This method for determining when the right to counsel attaches is often referred to by courts and scholars as a bright-line rule.[41] Supreme Court justices, circuit courts, and scholars have failed, however, to reach a consensus regarding at what stages the Sixth Amendment right to counsel attaches.[42]

It is currently ambiguous whether the right to counsel *can* attach prior to the filing of formal charges.[43] Although the Supreme Court has consistently held that the right to counsel does not attach until the initiation of adversarial judicial proceedings, the Court in 1964 in *Escobedo v. Illinois* recognized the right to counsel for defendants pre-indictment but post-arrest.[44]

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[39] *Kirby*, 406 U.S. at 689–90; *see* Moran v. Burbine, 475 U.S. 412, 432 (1986) (finding that only when the government establishes an accusatory and adversarial position against the defendant does the defendant need assistance from someone with knowledge of the complexities of the law).

[40] *See Moran*, 475 U.S. at 431 (interpreting Supreme Court case law to affirm that the Sixth Amendment right to counsel does not attach until after the filing of formal charges).

[41] *See Turner I*, 848 F.3d at 770–71; Steven J. Mulroy, *The Bright Line's Dark Side: Pre-Charge Attachment of the Sixth Amendment Right to Counsel*, 92 WASH. L. REV. 213, 215 (2017) (noting that the bright-line rule for the Sixth Amendment right to counsel is traceable to *United States v. Gouveia*, 467 U.S. 180 (1984), and compels either a formal charge or an appearance before a judge to trigger the right).

[42] *Compare* United States v. Hayes, 231 F.3d 663, 676 (9th Cir. 2000) (holding that the defendant did not have a Sixth Amendment right to counsel during a pre-indictment deposition becuase he was not formally charged at the time), *with* Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 892–93 (3d Cir. 1999) (holding that the defendant had a Sixth Amendment right to counsel during pre-charge conversations, reasoning that the right to counsel is not necessarily predicated on a formal charge but rather on when the defendant is confronted by a judicial adversary). *See* Mulroy, *supra* note 41, at 216–17 (noting that currently five circuit courts, including the D.C. Circuit, abide by the bright-line rule and four circuits have rejected the rule in some form). The court in *Brewer v. Williams* stated, "[w]hatever 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—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" 430 U.S. 387, 398 (1977) (quoting *Kirby*, 406 U.S. at 689) (emphasis added). According to Justice Stevens in his *Gouveia* concurrence, this statement does not foreclose the possibility that the right to counsel may under certain circumstances attach prior to the initiation of judicial proceedings. 467 U.S. at 193 (Stevens, J., concurring). Justice Stevens was convinced that the *Gouveia* majority adopted a broader rule than was obligated by precedent in finding that the right to counsel attaches *only* at or after the initiation of criminal proceedings. *Id.* Justice Stevens did not join the opinion of the Court in part because he did not believe that this broad interpretation was justified by prior cases. *Id.*

[43] *See Turner I*, 848 F.3d at 770–71.

[44] *See* Escobedo v. Illinois, 378 U.S. 478, 490–91 (1964). *But see Moran*, 475 U.S. at 429–30 (reasoning that *Escobedo*'s Sixth Amendment analysis was not only dictum, but it also supported an understanding that the *Moran* court considered it to be in conflict with the U.S. Supreme Court). In *Escobedo*, the Court held that the Sixth Amendment right to counsel attaches pre-indictment, but post-arrest, during interrogations. *See* 378 U.S. at 490–91. The Court determined

Lower courts have also raised concerns about the implications of the bright-line rule, including instances when the accused must navigate the adversarial judicial system before formal charges are filed.[45] In fact, circuit courts are split as to whether the right to counsel can attach pre-indictment.[46] Some circuits, including the U.S. Court of Appeals for the Sixth Circuit, follow the bright-line rule.[47] Other circuits have moved away from upholding this rigid test.[48] How courts approach this issue can have serious consequences, considering a defendant's right to trial can be at stake during pre-charge stages, and absent counsel the average defendant is not readily able to navigate the process on his or her own.[49]

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that this point in time was a critical stage where the assistance of counsel is vital, as evidenced by the many confessions that are obtained by law enforcement during this period. *See id.* at 488. Considering the interrogation stage is one that law enforcement uses to obtain confessions, it is critical that the accused is provided counsel. *See id. Escobedo* has since been interpreted by the U.S. Supreme Court to be a Fifth Amendment case, despite its multiple references to the Sixth Amendment. *See Moran*, 475 U.S. at 429–30; Mulroy, *supra* note 41, at 225. Its criticism of the rigidity of the pre-or post-formal charge distinction, however, is nonetheless relevant. *See* Mulroy, *supra* note 41, at 225–26. Numerous cases have since reaffirmed that the Sixth Amendment right to counsel does not attach until after the initiation of judicial proceedings. *See Gouveia*, 467 U.S. at 188; Estelle v. Smith, 451 U.S. 454, 469–470 (1981); Moore v. Illinois, 434 U.S. 220, 226–27 (1977); *Brewer*, 430 U.S. at 398–99.

[45] *See Turner I*, 848 F.3d at 773 (the bright-line rule does not allow for the "realities of present-day prosecutions and their heavy reliance on plea bargaining"); United States v. Moody, 206 F.3d 609, 614 (6th Cir. 2000) (upholding the bright-line rule even though "the facts so clearly demonstrate that the rights protected by the Sixth Amendment are endangered" when a suspect was denied counsel during pre-indictment plea negotiations).

[46] *Turner I*, 848 F.3d at 771. *Compare* Kennedy v. United States, 756 F.3d 492, 493 (6th Cir. 2014) (holding that the defendant did not have a right to counsel during pre-indictment plea negotiations, thereby affirming that the Sixth Amendment right to counsel does not attach until formal charges have been filed), *with* Roberts v. Maine, 48 F.3d 1287, 1290–91 (1st Cir. 1995) (interpreting Supreme Court jurisprudence to allow for limited exceptions to the bright-line rule, such as when the government has shifted from investigator to accuser).

[47] *See, e.g.*, *Moody*, 206 F.3d at 614 (holding that the Sixth Amendment right to counsel does not attach until after the filing of formal charges). Similarly, the U.S. Court of Appeals for the Fifth Circuit held that "the Sixth Amendment right to counsel does not attach until or after the time formal adversary judicial proceedings have been initiated." United States v. Heinz, 983 F.2d 609, 612 (5th Cir. 1993). Further, the United States Court of Appeals for the Ninth Circuit held that a defendant was not protected by the Sixth Amendment when he was a target of a grand jury investigation, without having been arrested, because he was not "the subject of a formal charge, preliminary hearing, indictment, information or arraignment." *Hayes*, 231 F.3d at 675. *See generally* Mulroy, *supra* note 41.

[48] *See Roberts*, 48 F.3d at 1291 (recognizing that the right to counsel could conceivably attach prior to formal charges, indictment, or arraignment in extremely limited circumstances when the government crosses the line from fact-finder to adversary); Chrisco v. Shafran, 507 F. Supp. 1312, 1319 (D. Del. 1981) (concluding that there are scenarios when the Sixth Amendment right to counsel can attach prior to the filing of formal charges, including plea negotiations that demonstrate the government is committed to prosecution, establishing the government's adversary position).

[49] *See Turner I*, 848 F.3d at 773 (finding that the average defendant is ill-equipped to navigate the complexities of the plea process and sentencing guidelines on his or her own); Pamela R.

B. Circuit Court Support for the Attachment of the Sixth Amendment Right to Counsel Prior to Formal Charges

Four circuit courts, as well as multiple district courts, break from the bright-line rule and suggest that the Sixth Amendment right to counsel may exist prior to the filing of formal charges.[50] The U.S. Court of Appeals for the Seventh Circuit has acknowledged the opportunity for the Sixth Amendment right to counsel to attach pre-charge.[51] In 1992, in *United States v. Larkin*, the Seventh Circuit addressed the question of whether a defendant has a right to counsel during a pre-indictment lineup.[52] The *Larkin* court determined that in light of U.S. Supreme Court precedent there was a presumption that the right to counsel does not attach at pre-indictment line-ups; that presumption, however, could be rebutted if the government had crossed the line from fact-finder to adversary.[53]

Similarly, in 1995 the U.S. Court of Appeals for the First Circuit in *Roberts v. Maine* recognized that the right to counsel could conceivably attach prior to formal charges when the government crosses the line from fact-finder to adversary.[54] The First Circuit acknowledged that there are very limited circumstances where this line is crossed, but the mere fact that the court left open the possibility is an indicator that although a bright-line rule has traditionally been used, exceptions exist.[55] Therefore, if the government has taken an adversarial position, the Sixth Amendment right to counsel could conceivably attach prior to formal charges.[56]

Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1666 (2003) (arguing that it is unlikely that individuals who enter into pre-charge negotiations without counsel understand the risks of providing certain information during conversations nor are uncounseled individuals likely to understand the federal sentencing system or what protections to ask for); Minix, *supra* note 24, at 556 (noting that when defendants enter a guilty plea, they surrender their constitutional right to trial by jury); James S. Montana & John A. Galotto, *Right to Counsel: Courts Adhere to Bright-Line Limits*, 16 CRIM. JUST., Summer 2011, at 4, 12 (arguing that the federal sentencing guidelines incentivize pre-indictment plea bargaining).

[50] *See infra* notes 51–63 and accompanying text; *see also* Mulroy, *supra* note 41 (providing a general overview of case law that supports attaching the Sixth Amendment right to counsel prior to the filing of formal charges).

[51] United States v. Larkin, 978 F.2d 964, 969 (7th Cir. 1992).

[52] *Id.*

[53] *Id.* The right to counsel only attaches when the government is seeking to gain incriminating evidence, and not when information is being gathered in a "nonadversarial atmosphere." *See* United States *ex rel.* Hall v. Lane, 804 F.2d 79, 82–83 (7th Cir. 1986) (quoting DeAngelo v. Wainwright, 781 F.2d 1516, 1520 (11th Cir. 1986)).

[54] *See Roberts*, 48 F.3d at 1290–91 (holding that a defendant who was not allowed to call his attorney before a pre-charge blood/alcohol test did not have a Sixth Amendment right to counsel because the government was not committed to prosecuting him at that time).

[55] *See id.*

[56] *See id.* (recognizing the possibility that a defendant could have a pre-charge right to counsel if the government has shifted from investigator to accuser); *Larkin*, 978 F.2d at 969 (reasoning that a defendant who was denied counsel during a pre-indictment lineup could rebut the presump-

The U.S. Court of Appeals for the Fourth Circuit also interprets Supreme Court precedent to not necessarily require a formal charge before the Sixth Amendment right to counsel attaches.[57] Rather, in 1998 in *United States v. Burgess*, the Fourth Circuit interpreted the Supreme Court's 1977 decision in *Moore v. Illinois* not to require an indictment to indicate the initiation of criminal proceedings, but rather held that the right to counsel attaches at the point that the government is committed to prosecution.[58]

Comparably, the U.S. Court of Appeals for the Third Circuit held that the right to counsel may attach at stages that occur prior to the filing of formal charges.[59] In the Third Circuit, the critical triggering point for the Sixth Amendment right to counsel is the moment that a defendant is "faced with the prosecutorial forces of organized society, and [is] immersed in the intricacies of substantive and procedural criminal law."[60] In 1999, in *Matteo v. Superintendent, SCI Albion*, the defendant was brought into custody without a formal indictment or the filing of an information.[61] The *Matteo* court found that in this scenario the right to counsel had attached when the defendant was arrested because he was confronted by the "organized resources of an ongoing police investigation," even though he had not yet been formally charged.[62]

Collectively, the reasoning of these four Circuits establishes support for the Sixth Amendment right to counsel prior to formal charges at points when the accused is faced with the intricacies of criminal law, when the government has taken up an adversarial position, and/or when the government has committed itself to prosecution.[63]

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tion of no right to counsel by showing that the government took on an adversarial position at that point).

[57] *See* United States v. Burgess, No. 96-4505, 1998 U.S. App. LEXIS 6515, at *3–4 (4th Cir. Mar. 30, 1998) (holding that a defendant was not entitled to counsel during a post-arrest but pre-indictment lineup where he was identified as a bank robbery suspect).

[58] *See id.* (reasoning that Supreme Court precedent does not require an indictment to indicate when criminal proceedings have been initiated but rather the right to counsel attaches when the government has solidified its adversarial position); *see also Moore*, 434 U.S. at 228 (reasoning that it is an incorrect interpretation of *Kirby* to find that the right to counsel only attaches after a defendant is indicted).

[59] *See Matteo*, 171 F.3d at 892–93.

[60] *See id.* (quoting *Kirby*, 406 U.S. at 689). In *Matteo*, the court held that the defendant was faced with adversarial prosecutorial forces, and his Sixth Amendment right to counsel attached, when his phone conversations were recorded while he was in prison as a result of an arrest warrant, even though an information had not yet been filed, nor did he have a preliminary hearing or arraignment. *Id.* at 893–94.

[61] *Id.* at 893–94.

[62] *See id.* at 893.

[63] *See supra* notes 50–62 and accompanying text.

C. The Sixth Amendment Right to Counsel and Plea Negotiations

Whereas circuit courts differ as to whether there is a Sixth Amendment right to counsel during pre-charge plea negotiations, the U.S. Supreme Court has held that the right to counsel extends to plea negotiations generally.[64] For the purposes of the Sixth Amendment, the negotiation and acceptance of a plea deal is considered a critical stage.[65] Plea negotiations are central to the criminal justice system, and the accused has a right to counsel during these critical stages.[66] In fact, about ninety-five percent of all criminal convictions are the result of plea deals.[67] Also, the criticality of plea negotiations is not entirely dependent on whether the negotiation takes place before or after a formal charge.[68] For example, in the Sixth Circuit, if the acceptance or rejection of a plea offer would affect whether a defendant would be prosecuted in federal court in addition to state court, then the defendant has the right to the effective assistance of counsel during those negotiations, even if they occur prior to the filing of federal charges.[69]

Multiple district courts across the country have also held that the attachment of the Sixth Amendment right to counsel during plea negotiations can occur pre-charge.[70] In *Chrisco v. Shafran*, the U.S. District Court for the

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[64] Lafler v. Cooper, 566 U.S. 156, 162 (2012) (reasoning that the accused has a Sixth Amendment right to counsel during critical pretrial stages, including plea-bargaining); Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (stating that "the negotiation of a plea bargain is a critical phase . . . for purposes of the Sixth Amendment").

[65] *See Lafler*, 566 U.S. at 162; *Padilla*, 559 U.S. at 373.

[66] *See Frye*, 566 U.S. at 143; *Moody*, 206 F.3d at 616 (Wiseman, J., concurring) ("plea bargaining is central to federal criminal law"). The *Frye* Court noted that defendants whose cases go to trial often receive longer sentences than those who enter into a plea bargain because the longer sentences exist for the purpose of facilitating plea-bargains. 566 U.S. at 144. The *Frye* Court also reaffirmed the sentiment that the American criminal justice system is a "system of pleas, not a system of trials," supporting the argument that the negotiation of a plea bargain is a critical stage for a defendant. *See id.* at 143.

[67] DEP'T OF JUSTICE, NCJ226846, FELONY SENTENCES IN STATE COURTS, 2006–STATISTICAL TABLES 1 (2010) (finding that 94% of defendants sentenced in state courts pled guilty); Dep't of Justice, *Criminal Defendants Disposed of in U.S. District Courts*, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE (May 22, 2009) [hereinafter DOJ SOURCEBOOK], https://www.albany.edu/sourcebook/pdf/t5222009.pdf [https://perma.cc/S5PP-CMVQ] (finding that 97% of sentenced federal defendants pled guilty).

[68] *See* United States v. Morris, 470 F.3d 596, 602–03 (6th Cir. 2006) (holding that an ineffective assistance of counsel claim is valid when a defendant was offered a plea deal in state court that included the dropping of federal charges, prior to the defendant having been formally charged with federal charges).

[69] *See id.* (holding that the defendant was denied the effective assistance of counsel when he was required to make an immediate decision on a state plea deal, without his attorney present, the rejection of which would cause him to be referred to federal court pursuant to a joint state-federal taskforce).

[70] *See* United States v. Wilson, 719 F. Supp. 2d 1260, 1267–68 (D. Or. 2010) (holding that a defendant has the right to counsel when he is offered a specific plea deal that would require him to forfeit his right to a trial pre-indictment); United States v. Busse, 814 F. Supp. 760, 764 (E.D. Wis.

District of Delaware relied on Judge Wiseman's often-cited *United States v. Sikora* dissent to support this position.[71] Judge Wiseman, and subsequently the district court, reasoned that plea negotiations are evidence, in and of themselves, that the government is committed to prosecution, and that adversarial position can be established whether or not the accused is formally charged.[72] The district court also cited the American Bar Association's position that plea negotiations should be engaged in through defense counsel in order to support the court's finding that counsel should be present during plea negotiations, including those that are entered into prior to the filing of formal charges.[73]

The U.S. District Court for the Eastern District of Wisconsin also recognized the ability for the right to counsel to attach during instances when pre-charge plea negotiations are entered into by retained counsel.[74] Further, the U.S. District Court for the District of Oregon recognized a Sixth Amendment right to counsel during pre-charge plea negotiations when the government has established an adversarial position and shown that it is committed to prosecution.[75]

III. THE SIXTH AMENDMENT RIGHT TO COUNSEL SHOULD ATTACH DURING PRE-CHARGE PLEA NEGOTIATIONS

The bright-line rule, as it is currently interpreted and applied, effectively disenfranchises defendants who are confronted by adversarial proceedings prior to formal charges, such as during pre-charge plea negotiations.[76] Scenarios like these often arise during joint federal-state taskforce prosecu-

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1993) (finding that the defendant successfully asserted an ineffective assistance of counsel claim when the prosecutor engaged in pre-charge plea negotiations with his attorney); *Chrisco*, 507 F. Supp. at 1319 (reasoning that the Sixth Amendment right to counsel can attach prior to the filing of formal charges, including to "plea negotiations which occur prior to the commencement of adversary judicial proceedings").

[71] *Chrisco*, 507 F. Supp. at 1319 (citing United States v. Sikora, 635 F.2d 1175, 1180 (6th Cir. 1980) (Wiseman, J., dissenting)).

[72] *Id.*

[73] *Id. See* ABA STANDARDS FOR CRIMINAL JUSTICE PLEAS OF GUILTY Standards 14-1.3(a), 14-3.1(a) (3d ed. 1999) (arguing that defendants should be given an opportunity to retain counsel before entering into a guilty plea and prosecuting attorneys are generally expected to engage in plea negotiations with defendant's counsel).

[74] *See Busse*, 814 F. Supp. at 763–64 (holding that the defendant had a Sixth Amendment right to counsel during pre-charge plea negotiations that were entered into with his attorney).

[75] *See Wilson*, 719 F. Supp. 2d at 1267. The court found that the government sufficiently established its adversarial position and commitment to prosecution when it told the defendant he was going to be indicted and then presented him with a specific plea bargain that would have resulted in a prison sentence and surrendering his constitutional right to a trial. *Id.*

[76] *See Turner I*, 848 F.3d 767, 773 (6th Cir. 2017) (finding that plea negotiations are a substantial component of the criminal justice system and defendants are generally ill-equipped to handle the plea negotiation process on their own).

tions, where plea negotiations can result in deals that involve both state and federal charges even though a defendant has only been charged at either the state or federal level.[77] This is the scenario that played out in *Turner v. United States* (*Turner I*).[78] The criminal justice system relies heavily on plea negotiations, and U.S. Supreme Court precedent does not preclude the inclusion of pre-charge plea negotiations as critical stages for the purposes of the Sixth Amendment right to counsel. [79] This Part will argue that the right to counsel extends to pre-charge plea negotiations, and therefore, upon rehearing *Turner I en banc*, the U.S. Court of Appeals for the Sixth Circuit should find that the defendant's right to counsel had attached during the federal plea negotiations that occurred prior to the defendant being formally charged in federal court.[80]

The plea negotiation process is adversarial, and regardless of whether it occurs before or after a defendant is charged, the accused generally does not have the legal skill to handle the process on his or her own without the assistance of counsel.[81] As such, many courts have recognized the bright-line rule for a defendant's right to counsel is not in touch with the current realities of the criminal justice system's heavy reliance on plea-bargaining.[82] This rings especially true as pre-indictment plea-bargaining becomes more common with the increased use of joint federal-state task forces, which can result in initial prosecution in either the state or federal court system prior to charges being brought in the other.[83] The bright-line rule effectively disenfranchises defendants who have not been formally charged, but who are nonetheless faced with what some district and circuit

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[77] *See* Mulroy, *supra* note 41, at 217 & n.28 (noting that the rise in joint federal-state taskforces has made pre-indictment plea negotiations common in scenarios when a defendant is charged in one court system but has not been prosecuted in the other); *see, e.g.*, *Turner I*, 848 F.3d at 768–69 (noting that the defendant was charged in state court as a result of a joint federal-state anticrime taskforce and was later offered a plea deal for the federal charges prior to the filing of formal federal charges).

[78] *See Turner I*, 848 F.3d at 768.

[79] *See* United States v. Gouveia, 467 U.S. 180, 193 (1984) (Stevens, J., concurring). *See generally* Mulroy, *supra* note 41, at 219–28 (arguing that the proper understanding of Supreme Court precedent does not preclude the recognition of the attachment of the right to counsel prior to formal charges).

[80] *See infra* notes 81–117 and accompanying text.

[81] *Turner I*, 848 F.3d at 773 (finding that defendants cannot be expected to navigate the plea bargaining process on their own when the complexity of the federal sentencing guidelines can even confound attorneys).

[82] *See id.* In *Moody*, the court concluded that it is obligated to follow precedent, which required the application of the bright-line rule. United States v. Moody, 206 F.3d 609, 614–15 (6th Cir. 2000). However, the court stated in dictum that it does not favor the bright-line rule in part because the very existence of a plea deal (the government offering a specific sentence for a specific offense) in and of itself establishes the adverse position of the government, regardless of whether a formal charge has been filed. *See id.* at 615–16.

[83] *See* Mulroy, *supra* note 41, at 217 & n.28.

courts have appropriately described as adversarial prosecutorial forces.[84] In scenarios such as the one encountered by the defendant in *Turner I*, it is an injustice to deny an individual counsel when the government enters into plea negotiations before filing formal charges.[85]

In response to this lack of a right to counsel at a stage considered by many in the legal field to be critical, the Sixth Circuit has urged the Supreme Court to reconsider the bright-line test for the right to the assistance of counsel several times over the past thirty-five years.[86] It would not be far-fetched for the Supreme Court to do so either.[87] The Supreme Court has previously held that the assistance of counsel is a guaranteed right when adversarial proceedings have begun against the accused; proceedings that will ultimately seal their fate.[88] Plea negotiations often lead to a plea deal,

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[84] *See Turner I*, 848 F.3d at 773; *Moody*, 206 F.3d at 615–16; Chrisco v. Shafran, 507 F. Supp. 1312, 1319 (D. Del. 1981) (observing that plea bargaining indicates the government's commitment to prosecution, which combined with the importance of counsel during those negotiations can trigger the right to counsel because the negotiations indicate the adverse position of the government comparable to that of when formal charges are filed). In *United States v. Wilson*, the prosecutor engaged in pre-indictment negotiations with the defendant's attorney and later testified that it would have been "unfair" to meet with the defendant without counsel. 719 F. Supp. 2d 1260, 1267 (D. Or. 2010). The court held that the defendant's Sixth Amendment right to counsel had attached during the pre-indictment plea negotiation because it would be unjust for the government to later claim the defendant had no right to counsel after conducting plea negotiations that solidified the government's adverse position. *See id.*

[85] *See Turner I*, 848 F.3d at 773; *Moody*, 206 F.3d at 615–16; *Wilson*, 719 F. Supp. 2d at 1268 (finding that a determination that a defendant does not have the right to counsel during pre-indictment plea negotiations "may be more damaging than a denial of effective assistance at trial itself"). In *United States v. Busse*, the government claimed the defendant had no right to counsel when the prosecutor entered into pre-charge plea negotiations with defendant's attorney. 814 F. Supp. 760, 763–64 (E.D. Wis. 1993). The court held that the defendant's Sixth Amendment right to counsel did attach at the time of those negotiations, reasoning that because the government and defendant relied on the prosecutor's representations it would be unjust to later allow the government claim that the negotiations were not adversarial judicial proceedings. *See id.*; Metzger, *supra* note 49, at 1699 n.228 (acknowledging that finding no right to counsel during pre-charge plea bargaining seems unjust).

[86] *See Turner I*, 848 F.3d at 773 (quoting United States v. Sikora, 635 F.2d 1175, 1182 (6th Cir. 1980) (Wiseman, J., dissenting) (reiterating that "those persons who enter the plea bargaining process before formal charges have been filed should have the protection of the Sixth Amendment" because they are "just as surely faced with the 'prosecutorial forces of organized society' as the defendant who has been formally introduced to the system"); *Moody*, 206 F.3d at 618 (Wiseman, J., concurring) (urging the Supreme Court to reconsider the bright-line rule).

[87] *See* Lafler v. Cooper, 566 U.S. 156, 177 (2012) (Scalia, J., dissenting) (acknowledging the right to counsel extends to any point where a defendant's ability to access a fair trial is hindered, regardless of whether it is a formal or informal stage); Mulroy, *supra* note 41, at 219–28 (arguing that Supreme Court precedent does not preclude the attachment of the right to counsel prior to the filing of a formal charge in certain circumstances).

[88] *See Gouveia*, 467 U.S. at 187 (finding that defendants only have a right to counsel "at or after the initiation of adversary judicial proceedings"); United States v. Wade, 388 U.S. 218, 224 (1967) (finding that proceedings that "may well settle the accused's fate and reduce the trial itself to a mere formality" are critical stages for the purposes of the Sixth Amendment). The historical

the result of which will also seal the accused's fate.[89] The Supreme Court has held that the Sixth Amendment right to counsel attaches at points that a defendant is faced with an adversarial confrontation that can ultimately strip him of his liberties.[90] Thus, the Sixth Amendment right to counsel should attach during pre-charge plea negotiations, where a defendant is faced with an adversarial confrontation that can deprive him of his right to a trial.[91]

Courts have observed that adopting a position that deviates from the bright-line rule would be a move away from certainty and clarity by blurring the lines of an otherwise steadfast rule.[92] Nonetheless, when a rule consistently has implications antagonistic to justice and fairness, it is an appropriate time to reconsider whether that rule continues to be workable.[93] Scholars have recently considered expanding the bright-line rule in response to the unjust implications of its rigidity, arguing for included protec-

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purpose of the Sixth Amendment was to assure assistance at trial, which has been expanded to include certain critical pre-trial prosecutorial proceedings as the criminal justice system evolves. United States v. Ash, 413 U.S. 300, 309–10 (1973). The expansion of the historical interpretation of the right to counsel is thus possible when new contexts that could seal the accused's fate arise. *See id.* at 317 (considering whether to expand the right to counsel to include witness photo identification).

[89] *See* Mulroy, *supra* note 41, at 222–23.

[90] *See* Coleman v. Alabama, 399 U.S. 1, 7 (1970) (finding that the right to counsel is guaranteed when the absence of such counsel could inhibit the accused's right to a fair trial); *Wade*, 388 U.S. at 225 (finding that the Sixth Amendment right to counsel applies at points "where certain rights might be sacrificed or lost"); *Sikora*, 635 F.2d at 1181 (Wiseman, J., dissenting) (reasoning that plea bargains are critical stages because the fundamental right to a trial is at stake); *Wilson*, 719 F. Supp. 2d at 1267.

[91] *See Coleman*, 399 U.S. at 7 (finding that the determination of whether the right to counsel has attached requires an analysis of whether the defendant's rights would be substantially prejudiced and if counsel would "help avoid that prejudice"); *Wade*, 388 U.S. at 226 (finding that if the accused's right to a fair trial is at stake he or she has the right to counsel regardless of whether the prosecutorial stage is formal or informal); *Sikora*, 635 F.2d at 1181 (Wiseman, J., dissenting); *Wilson*, 719 F. Supp. 2d at 1267; Mulroy, *supra* note 41, at 222–23 (noting that plea negotiations, whether pre or post indictment, may lead to a plea that would result in the accused's forfeiture of his or her right to trial).

[92] *See* United States v. Hayes, 231 F.3d 663, 675 (9th Cir. 2000) (reasoning against adding pre-indictment proceedings to the bright-line rule, claiming it would no longer make the rule "clean and clear"). Steadfast rules enable the Supreme Court to promote uniformity and predictability among lower courts despite risks associated with inflexibility and potentially arbitrary outcomes. Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 646 (2014).

[93] *See Ash*, 413 U.S. at 310–11, 317 (finding that when the criminal justice system evolves the Sixth Amendment right to counsel can expand with it); *Moody*, 206 F.3d at 618 (Wiseman, J., concurring) (urging the Supreme Court to reconsider when the Sixth Amendment right to counsel attaches, arguing defendants should be entitled to counsel when faced with "a complicated procedural system and a more knowledgeable adversary" during pre-indictment plea bargaining); *see, e.g.*, Montana & Galotto *supra*, note 49, at 11–12 (arguing that the bright-line rule for the right to counsel inadequately protects the accused in pre-indictment stages and thus the Supreme Court should consider "freeing" lower courts from its constraints).

tions during certain pre-indictment stages.[94] The inclusion of pre-charge plea negotiations would fit neatly into this category, upholding the valued ability for a defendant to retain counsel when faced with a judicial adversary.[95]

Many circuit and district courts have interpreted Supreme Court precedent to allow for the attachment of the right to counsel in certain instances prior to the filing of formal charges, including pre-indictment plea negotiations.[96] Of the courts that have upheld a bright-line rule for the right to counsel, some have nevertheless acknowledged the pitfalls of doing so.[97] Justice Stevens in his *Gouveia* concurrence argued that interpreting precedent as supporting a steadfast bright-line rule would be an unnecessarily broad interpretation.[98] Justice Stevens argued that it was possible for the Sixth Amendment right to counsel to attach before the filing of formal charges.[99] Additionally, Judge Wiseman of the Sixth Circuit argued in his *United States v. Sikora* dissent for an acknowledgement of pre-charge Sixth Amendment rights, arguing that stages such as plea negotiations are critical because of what is at stake: the possibility of surrendering constitutional rights or liberties.[100] The circuit court in *Turner I* has previously stated that the plea process is adversarial in nature and found fault in the circuit precedent that it was obliged to follow.[101] *Turner I* echoed *United States v. Moody*'s sentiments that the bright-line test in these instances is a "triumph of the letter over the spirit of the law," because offering a plea deal is evidence of the government's commitment to prosecution.[102]

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[94] *See* Mulroy, *supra* note 41, at 241 (arguing the right to counsel should attach when a prosecutor interacts with the accused directly or via counsel about the substance of his or her case); 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*, FED. LAW., Oct./Nov. 2015, at 34, 38–39 (arguing that the right to the effective assistance of counsel should attach to all plea negotiations, whether they occur pre or post indictment); Montana & Galotto *supra*, note 49, at 12 (arguing the right to counsel should attach at critical pre-indictment stages such as during federal plea bargaining).

[95] *See* Mulroy, *supra* note 41, at 227–28, 241. Mulroy argued for an expansion of the bright-line rule to "include those instances in which a prosecutor has contact with a suspect about the substance of the case (other than as a witness), either directly or through counsel." *Id.* at 241. Mulroy articulates that plea-bargaining clearly falls within this proposed rule. *Id.*

[96] *See supra* notes 50–63, 69–75.

[97] *See Turner I*, 848 F.3d at 773 (refusing to overrule circuit precedent despite acknowledging that doing so would mean the accused may have to navigate the pre-indictment plea negotiation process on their own); *Moody* 206 F.3d at 615–16 (raising concerns about the court's precedential obligation to follow the bright-line approach to the right to counsel because plea negotiations establish the adverse position of the government, regardless of whether they occur pre-indictment).

[98] *Gouveia*, 467 U.S. at 193 (Stevens, J., concurring).

[99] *Id.*

[100] *Sikora*, 635 F.2d at 1181 (Wiseman, J., dissenting).

[101] *See Turner I*, 848 F.3d at 773 (following circuit precedence despite recognizing the consequences of and inflexibility of a bright-line rule for when the right to counsel attaches).

[102] *Id.* at 771.

As a result of a plea bargain, the accused may surrender their constitutional right to a trial, and the deciding factor for whether he or she has the assistance of competent counsel should not be whether plea negotiations occur before or after a formal charge.[103] Relying on the presence or absence of formal charges as the deciding factor unfairly allows, and perhaps even incentivizes, the government to take the opportunity to circumvent constitutional protections.[104] Adversarial plea negotiations that occur at times the government has shown its commitment to prosecution should be considered critical stages for the purposes of the Sixth Amendment, and as such, the right to counsel should attach, even if it is pre-charge.[105]

In *Turner I*, the court acknowledged the potential injustice of not recognizing a pre-charge right to counsel during plea negotiations.[106] There, the defendant was already facing conviction on state charges when he was offered a federal plea deal, prior to federal charges having been formally filed.[107] Two different attorneys represented Turner during the negotiation process, and the fact that these two skilled professionals negotiated very different deals shows that the skillset of the negotiator plays an important role in the plea-bargain process.[108] If the defendant had no right to counsel at this stage, he could have faced those negotiations on his own.[109] The sentencing guidelines are complicated enough for a professional to navigate; it is unreasonable to expect a person without legal training to navigate them alone.[110]

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[103] *See Lafler*, 566 U.S. at 177 (Scalia, J., dissenting); *Gouveia*, 467 U.S. at 189; *Moody*, 206 F.3d at 618; *Chrisco*, 507 F. Supp. at 1319.

[104] *See Busse*, 814 F. Supp. at 764; *Wilson*, 719 F. Supp. 2d at 1267 (holding that the government cannot claim that the defendant had no right to counsel even though the prosecutor did not think it would be fair to meet with the defendant without counsel). If there is no right to counsel during pre-charge plea negotiations then hypothetically the prosecutor could hold off on charging the accused to prolong the period that he or she could legally be without counsel. *See* Gouveia, 467 U.S. at 191 (acknowledging that it is a legitimate concern that the government may delay formal charges, and therefore the appointment of counsel, to develop its case against the accused, but asserting that such an incident would not implicate the right counsel).

[105] *See Sikora*, 635 F.2d at 1180 (Wiseman, J. dissenting); *Wilson*, 719 F. Supp. 2d at 1267; *Busse*, 814 F. Supp. at 764; *supra* notes 76–104 and accompanying text.

[106] *See Turner I*, 848 F.3d at 773.

[107] *Id.* at 768–69.

[108] *See id.* at 769. A variety of factors can influence the outcome of a plea negotiation, including the defense attorney's personal motivations, their ability to use a negotiation style that is compatible with their personality, the amount of effort the attorney is willing to expend, and even the defendant's attitude towards the charge. *See generally* Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73 (1995).

[109] *See Turner I*, 848 F.3d at 769.

[110] *See id.* at 773; *Moody* 206 F.3d at 616 (Wiseman, J., concurring) (observing the complexity of the sentencing guidelines). The defendant in *Turner I* cited *United States v. Morris* to argue that there is an exception to the bright-line rule for defendants who enter into plea negotiations when faced with both state and federal charges prior to formally being charged in federal court. *Turner I*, 848 F.3d at 772. In *Morris*, the court found the right to counsel attached when a defendant was offered a plea deal in state court that included dropping federal charges, prior to the de-

Additionally, the Sixth Circuit has continued to maintain for decades that finding no right to counsel in scenarios comparable to *Turner I* is unjust.[111] The *Turner I* court even referred to plea negotiations as critical stages of the criminal process, regardless of whether formal charges have been filed.[112] The court further articulated that the plea negotiation process is adversarial in nature, and the bright-line rule does not take into consideration the reality that the criminal justice system heavily relies on plea-bargaining.[113] Without a right to counsel at these stages the burden is effectively placed on ill-equipped defendants to fend for themselves against prosecutors.[114] Considering that ninety-seven percent of federal convictions are the result of a plea deal, it would be unjust to not afford counsel at a time that, in and of itself, reflects the government's commitment to prosecution.[115] Thus, the Sixth Circuit correctly vacated their opinion in *Turner I*, and the court *en banc* should rule that the Sixth Amendment right to counsel had attached during the plea negotiations that occurred prior to Turner being formally federally charged.[116] The U.S. Supreme Court should also consider accepting certiorari on this particular matter, if applied for, to clarify that the right to counsel attaches during pre-charge plea negotiations.[117]

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fendant being formally federally charged. United States v. Morris, 470 F.3d 596, 603 (6th Cir. 2006). The *Turner I* court distinguished itself from *Morris* because the plea offered to the defendant in *Morris* was to determine which court the defendant would be prosecuted in, state or federal, compared to *Turner I* where the defendant was being prosecuted on state and federal charges independent from one another. *Turner I*, 848 F.3d at 772. The *Turner I* court nonetheless recognized that this line of reasoning negatively impacts defendants who are facing charges in both federal and state courts, because without the assistance of counsel a defendant is forced to navigate the complex federal sentencing guidelines on his or her own. *Id.* at 773. Also, federal-state prosecutions are increasingly more abundant making it more difficult to identify exactly when charges are formally filed for the purposes of the Sixth Amendment. *Id.*

[111] *See Turner I*, 848 F.3d at 773; Mulroy, *supra* note 41, at 217 (noting that the Sixth Circuit has criticized the bright-line rule it is obliged to uphold).

[112] *Turner I*, 848 F.3d at 773.

[113] *Id.*; *see* Mulroy, *supra* note 41, at 234 (citing *Turner I*'s position that the bright-line rule is out of touch with the realities of the modern criminal justice system as an explanation for why many circuits have departed from the rule).

[114] *See Turner I*, 848 F.3d at 773; Metzger, *supra* note 49, at 1666–68 (arguing that the bright-line rule cannot guarantee fairness for individuals who engage in pre-charge plea negotiations, and that those who do so without counsel may unwittingly harm their case going forward when faced with a prosecutor who holds significantly more legal knowledge).

[115] *See* Missouri v. Frye, 566 U.S. 134, 143 (2012); *Moody*, 206 F.3d at 615–16; *Sikora*, 635 F.2d at 1181 (Wiseman, J., dissenting); DOJ SOURCEBOOK, *supra* note 67.

[116] *See supra* notes 76–115 and accompanying text.

[117] *See Moody*, 206 F.3d at 618 (Wiseman J., concurring). *See supra* notes 76–113 and accompanying text.

CONCLUSION

The decision of the U.S. Court of Appeals for the Sixth Circuit to rehear *Turner v. United States* could result in the overruling of the Circuit's precedential adherence to the bright-line rule and allow for the recognition that the Sixth Amendment right to counsel attaches to pre-charge plea negotiations. If so, it would be an example of a circuit court expressly recognizing a Sixth Amendment right to pre-charge counsel, and not just the possibility of that right. Regardless of *Turner*'s final outcome, this is an issue that would be ripe for the U.S. Supreme Court to consider. It is in the interest of fairness and justice for both the Sixth Circuit and the Supreme Court to recognize the right to counsel during pre-charge plea negotiations. During these negotiations, a defendant is faced with the adversarial forces of the judicial system and, without counsel, would be left to navigate sentencing guidelines and adversarial confrontations without any prior relevant knowledge or skills. When an individual is faced with an adversarial foe (the government) looking to exchange a particular sentence for a certain offense, there is sufficient evidence to support the proposition that the government is committed to prosecution. To assert otherwise would be to say that the government spends its time and resources engaging in plea-bargain conversations with individuals whom it is not seriously considering prosecuting. Considering that ninety-seven percent of federal convictions are the result of plea negotiations, it is likely that the government engages in plea-bargaining because it is the most efficient method of obtaining convictions; and the accused should have the right to counsel during the process through which the significant majority of defendants are convicted and ultimately forgo their constitutional right to a trial.

ALEXIS BERGLUND

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