PLEAS, SIR, MAY I HAVE AN ATTORNEY? WHY THE SIXTH AMENDMENT RIGHT TO COUNSEL SHOULD EXTEND TO PRE-INDICTMENT PLEA NEGOTIATIONS

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INTRODUCTION

The ratification of the Sixth Amendment in 1791 guaranteed the accused the right to counsel in a criminal prosecution.[1] More than two centuries later, the criminal justice system of trials has largely shifted to a system of pleas, raising the question of whether the right to counsel should extend to the crucial moment when a defendant decides, pre-indictment, to make a decision that will change his or her life forever.[2] Although the Supreme Court recognized this critical issue by extending the right to counsel to *post*-indictment plea negotiations in 2012,[3] it left unanswered whether the right should extend to pre-indictment pleas. If the Court grants cert in *Turner v. United States*,[4] it may definitively decide whether "the guiding hand of counsel"[5] guaranteed by the Sixth Amendment should apply in pre-indictment circumstances.

Sitting *en banc*, the Sixth Circuit in *Turner* relied on *United States v. Moody*, which held that the right to counsel attaches only "at or after the initiation of criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[6] This bright-line precedent may conclude the matter, however an original intent or value-driven policy approach might lead the Court to grant cert and ultimately extend the right to counsel to a setting which "present[s] the same dangers that gave birth initially to the right itself."[7]

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1. *See* U.S. CONST. amend. VI.

2. Though not discussed herein, this contribution sees the value in the plea-bargaining system as one that has the potential both to "conserve valuable prosecutorial resources" and also provide the opportunity to "defendants to admit their crimes and receive more favorable terms at sentencing." Missouri v. Frye, 566 U.S.134, 144 (2012).

3. *See id.* at 145.

4. 848 F.3d 767 (6th Cir. 2017), *aff'd en banc*, 885 F.3d 949 (6th Cir. 2018), *petition for cert. filed*, (U.S. Jul. 20, 2018) (No. 18-106).

5. Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

6. *Turner*, 885 F.3d at 956 (quoting United States v. Moody, 206 F.3d 609, 614 (6th Cir. 2000)).

7. United States v. Ash, 413 U.S. 300, 311 (1973).

The Sixth Amendment provides that "[i]n all criminal *prosecutions* . . . the *accused* shall . . . have the assistance of counsel for his defense."[8] In *Missouri v. Frye*, Justice Kennedy—joined by Justices Sotomayor, Kagan, Ginsburg, and Breyer—held that the Sixth Amendment "guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings."[9] Although the right to counsel was traditionally limited to the critical stages of *judicial* proceedings at trial, the Court concluded that counsel was required to communicate and accept formal plea offers on behalf of a post-indictment defendant, expanding the right's application to "arraignments, post-indictment interrogations, post-indictment lineups, and the entry of a guilty plea."[10]

The time has come for *Frye*'s policy-driven rationale and the Sixth Amendment to be extended to pre-indictment plea negotiations. In this "system of pleas,"[11] where "bargaining is a defining, if not *the* defining, feature of the criminal justice system,"[12] ninety-seven percent of federal convictions and ninety-four percent of state convictions are the products of guilty pleas at some stage of the process.[13] Of those convictions, approximately one-fifth stem from pre-indictment pleas.[14] In light of this stark reality, this piece first addresses the history of the Sixth Amendment. It then discusses why originalists and living constitutionalists alike may find safe harbor in both granting cert and extending the right to counsel in *Turner*. Finally, it details the prevalence of pre-indictment pleas and explains why, should the Court grant cert, it would be remiss to not extend the right in these narrow circumstances. Whether pre- or post-indictment, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system"—one in which defense counsel is vital.[15]

8. U.S. CONST. amend. VI (emphasis added).
9. 566 U.S. 134, 140 (2012) (quoting Montejo v. Louisiana, 556 U.S. 778, 786 (2009)).
10. *Id.* at 140, 145.
11. Lafler v. Cooper, 566 U.S. 156, 170 (2012).
12. BUREAU OF JUSTICE ASSISTANCE, U.S. DEPARTMENT OF JUSTICE PLEA AND CHARGE BARGAINING RESEARCH SUMMARY, https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf (Jan. 24, 2011) (internal citations omitted) (emphasis added).
13. *Id.*; *see also Frye*, 566 U.S. at 143.
14. *See* Brief for the National Association of Criminal Defense Lawyers as Amici Curiae Supporting Petitioner, Turner v. United States, No. 18-106 (U.S. filed Aug. 23, 2018) at 5 [hereinafter NACDL Amicus Brief].
15. *Frye*, 566 U.S. at 144 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

I. THE SIXTH AMENDMENT AND ITS MEANING

A. *History of the Amendment*

At the time of the Sixth Amendment's ratification in 1791, the common law rule was to "severely limit[] the right of a person accused of a felony to consult with counsel at trial."[16] The "core purpose" of the Sixth Amendment guarantee of counsel was to invert this rule by assuring that the accused, when "confronted with both the intricacies of the law and the advocacy of the . . . prosecutor" would be given assistance.[17] The Amendment's drafters were motivated by a "desire to minimize imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official."[18] Taking into account the Amendment's underpinnings, the Court has recognized time and again that the "assistance" provided by the right to counsel would be "less than meaningful if it were limited to the formal trial itself."[19] In fact, the *Ash* Court took care to explain that pre-trial extension is and was necessary as a response to developing norms in criminal procedure where "the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both."[20] Although precedent is ambiguous as to whether the right extends to pre-indictment plea negotiations, the original intent and underlying values of the Sixth Amendment are squarely in accordance with such an extension.

Those employing an original public meaning approach may be loath to extend the right to counsel, however, because the drafters of the Sixth Amendment did not even contemplate plea bargaining—a practice that only began in earnest after the Civil War.[21] Indeed, "the idea that the jury right could become the subject of an agreement between the prosecutor and the defendant was abhorrent to nineteenth-century judges."[22] It was not until 1930 that the Supreme Court held that a jury trial could be waived in the first place,[23] let alone pursuant to a plea agreement. It was only forty

16. United States v. Ash, 413 U.S. 300, 306 (1973) (citing Powell v. Alabama, 287 U.S. 45, 60–66 (1932)).
17. *See id.* at 309.
18. *Id.*
19. *Id.* at 310.
20. *See id.* ("This extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself.").
21. Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 853 (2003).
22. *Id.* (citing Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113 (1999)).
23. Patton v. United States, 281 U.S. 276 (1930).

years later, in *Brady*, that the Court formalized its current approach to plea bargaining.[24]

In its opposition to Turner's cert petition, the Government relies on an original public meaning approach, citing primarily to *McNeil v. Wisconsin* to suggest that the original and long-held understanding of both the public and the courts is that "a prosecution is commenced" for purposes of the right to counsel "at or after the initiation of adversary *judicial* criminal proceedings."[25] Turner's contrary position, they argue, is "irreconcilable with the relevant text, history, and binding precedents that he does not ask the Court to overrule."[26]

The Court's analysis in extending the right in *Frye*, however, shows the benefits of an original intent approach over an original public meaning approach in addressing current systemic realities. As the petitioner asserts in *Turner*, "when the government initiates pre-charge plea bargaining, the government is unambiguously prosecuting *before* the filing of a formal charge."[27] Accordingly, this is no case for an original public meaning interpretation, but rather an original intent or value-based interpretation that preserves the very purpose of the Amendment—to ensure that defendants have access to counsel at all critical stages of criminal proceedings.[28]

In her dissent in *Turner*, Judge Stranch of the Sixth Circuit stressed the critical nature of pre-indictment proceedings, arguing that "an individual who receives a formal plea offer has become an accused," and therefore the right to counsel is directly in accordance with the purpose and intent behind the amendment.[29] The Supreme Court's analysis in *United States v. Wade* substantiates this argument:

> When the Bill of Rights was adopted, . . . the accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial

24. Brady v. United States, 397 U.S. 742, 750 (1970) ("[P]leas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction.").
25. Brief in Opposition at 11, Turner v. United States, (U.S. filed Nov. 23, 2018) (No. 18-106) (quoting McNeil v. Wisconsin, 501 U.S. 171, 175 (1991)) (emphasis added).
26. *Id.* at 15.
27. Petition for Writ of Certiorari at 18, Turner v. United States, (U.S. filed Jul. 20, 2018) (No. 18-106).
28. *See* Montejo v. Louisiana, 556 U.S. 778, 786 (2009) (quotation marks and citations omitted).
29. Turner v. United States, 885 F.3d 949, 980 (en banc) (Stranch, J., dissenting).

> itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings.[30]

In light of the history, precedent, and realities of this system of pleas, originalists need not pause before extending the right to counsel in this context—in fact, an original intent approach leaves the Court with no reasonable alternative.

B. *Policy Concerns*

This is not to ignore the significant line-drawing issues that a broad application of the Sixth Amendment would cause if applied to *all* pre-indictment proceedings. This piece stresses the unique circumstances of the pre-indictment plea negotiation and, accordingly, suggests a narrow application to these circumstances alone. Pre-indictment plea negotiations are not simply an investigative step along the way to a judicial proceeding—a defendant who has taken a plea deal in a pre-indictment context will likely walk out being definitively deemed guilty. After he makes the choice to take a plea, the defendant inevitably will appear in court.[31] As the Court has recognized since 1932, "[p]rosecutors do not make plea offers to all suspects, only those who face impending charges."[32] Accordingly, the pre-indictment plea negotiations in *Turner* and post-indictment negotiations in *Frye* are identical. To deny that reality is to elevate form over substance—a practice which has no place when the stakes are this high.

In a proceeding between the unskilled and uninformed defendant and trained prosecutor,[33] the denial of counsel at the pre-charge bargaining stage "all but ensures that [the defendant's] window of exposure to the criminal justice system will open with the prosecutor and close in the prison system."[34] The pre-indictment plea is so inextricably linked—so uniquely tethered—to a judicial proceeding as to render it the same as a judicial proceeding under the Sixth Amendment. Unlike a suspect who confesses to law enforcement officials during a knock-and-talk, the government official involved is also their direct adversary—that is, the individual they would otherwise face at trial. Given the possibility for a

30. United States v. Wade, 388 U.S. 218, 224 (1967).
31. *See* Fed. R. Crim. P. 11(b)(1) ("Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court.").
32. *Turner*, 885 F.3d at 980–81.
33. *See* Powell v. Alabama, 287 U.S. 45, 68 (1932).
34. *Turner*, 885 F.3d at 982.

definitive determination of guilt and the adversarial position of the prosecutor involved in the pre-indictment plea context, a narrow extension of the right to counsel has clearly defined parameters which will not prove problematic.

II. PREVALENCE OF PRE-INDICTMENT PLEAS AND THEIR CONSEQUENCES

In light of the rapid growth of pre-indictment plea negotiations, it is "insufficient," as the *Frye* Court held, "simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process."[35] This very "horse trading between prosecutor and defense counsel determines who goes to jail and for how long."[36] As mentioned above, ninety-seven percent of federal convictions and ninety-four percent of state convictions are the product of guilty pleas at some stage of the process.[37] Of those convictions, approximately one-fifth stem from pre-indictment pleas,[38] and the numbers are only growing. In 2017 alone, the number of pre-indictment pleas in Turner's jurisdiction, the Western District of Tennessee, increased "twofold from 2016, and fourfold from 2015."[39] This increase is understandable given the heightened prosecutorial and judicial efficiency associated with such pleas. Further, the benefits possible in a plea negotiation "are even more important pre-indictment when the prospective defendant can offer to spare the government the burden of obtaining an indictment,"[40] and spare themselves a greater charge.

The Government in *Turner* partially relies on a legal process theory that the legislature, not the Court, should be responding to policy arguments.[41] Its argument is founded on the notion that the Court has "'decline[d] to depart from [its] traditional interpretation of the Sixth

35. Missouri v. Frye, 566 U.S. 134, 144 (2012).
36. *Id.* (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1952 (1992)).
37. BUREAU OF JUSTICE ASSISTANCE, U.S. DEPARTMENT OF JUSTICE PLEA AND CHARGE BARGAINING RESEARCH SUMMARY, https://www.bja.gov/Publications/PleaBargaining-ResearchSummary.pdf (Jan. 24, 2011); see also *Frye*, 566 U.S. at 143.
38. *See* NACDL Amicus Brief, *supra* note 14, at 5.
39. *Id.* at 4.
40. Brandon K. Breslow, *Signs of Life in the Supreme Court's Unchartered Territory: Why the Right to Effective Assistance of Counsel Should Attach to Pre-Indictment Plea Bargaining*, 62-NOV FED. LAW. 34, 39 (2015) (citing United States v. Moody, 206 F.3d 609, 615–16 (6th Cir. 2000) ("There is no question in our minds that at formal plea negotiations, where a specific sentence is offered to an offender for a specific offense, the adverse positions of the government and the suspect have solidified.")).
41. Brief in Opposition at 16, Turner v. United States, (U.S. filed Nov. 23, 2018) (No. 18-106).

Amendment right to counsel' in response to policy arguments."[42] This position, however, should not carry the day given the Court's long line of precedent[43] extending what the Government refers to as the "floor" of the Sixth Amendment.[44]

A separate yet more significant process argument for the Court to consider stems from the perceived injustices wrought by the absence of counsel, and the public distrust of the criminal justice system that those injustices create.[45] The Court in *Ash* and again in *Frye* recognized the need for an extension of the Sixth Amendment, because for plea bargaining to not "raise serious duress or unconscionability concerns—depends, to a substantial degree, on the ability of defense counsel to prevent government overreaching."[46] Not only are pre-indictment plea negotiations a pivotal time for the defendant's Fifth and Sixth Amendment rights, but the stark collateral consequences—such as potential waiver of right to appeal and collateral attack,[47] loss of immigration status,[48] and loss of the right to vote—are overlooked by the uninformed criminal defendant.[49]

CONCLUSION

As the Court has long acknowledged, "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for the defendant."[50] Should the Court deny the extension of the right

42. *Id.* at 16 (quoting United States v. Gouveia, 467 U.S. 180, 192 (1984)) (citing Moran v. Burbine, 475 U.S. 412, 431 (1986)) (rejecting the extension of a right to counsel despite the fact that "a lawyer's presence could be of value to the suspect").

43. *See*, *e.g.*, Missouri v. Frye, 566 U.S. 134 (2012) (extending the right to counsel to post-indictment plea negotiations); Lafler v. Cooper, 566 U.S. 156 (2012) (holding that a defendant is entitled to relief where his lawyer's ineffective assistance negatively impacts his decision to accept or reject a plea offer).

44. Brief in Opposition at 19, Turner v. United States, (U.S. filed Nov. 23, 2018) (No. 18-106).

45. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571–72 (1980) ("To work effectively, it is important that society's criminal process satisfy the appearance of justice.").

46. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1952 (1992).

47. *See* U.S. DEPARTMENT OF JUSTICE CRIMINAL RESOURCE MANUAL: PLEA AGREEMENTS AND SENTENCING APPEAL WAIVERS—DISCUSSION OF THE LAW, https://www.justice.gov/jm/criminal-resource-manual-626-plea-agreements-and-sentencing-appeal-waivers-discussion-law (accessed Apr. 29, 2019).

48. *See* Padilla v. Commonwealth of Kentucky, 559 U.S. 356 (2010) (holding that criminal defense attorneys must advise noncitizen clients about the risks of potential deportation associated with entering a guilty plea).

49. *See* NACDL Amicus Brief, *supra* note 14, at 7 (citing United States v. Lee, 888 F.3d 503, 505 (D.C. Cir. 2018); Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 87 (2015).

50. Missouri v. Frye, 566 U.S. 134, 144 (2012).

to counsel to the unique and narrow circumstances of the pre-indictment plea negotiation, it would be perpetuating an inherent unfairness that is neither necessary nor warranted under the Sixth Amendment.

The purpose and intent behind the Sixth Amendment are to ensure that defendants are amply protected and advised when they come head-to-head with a seasoned and well-informed prosecutor. To relegate Sixth Amendment protections in *Frye* but not in *Turner* would create an arbitrary distinction that has no place in this "system of pleas."[51] Should the Court grant cert, it would not only be following the original intent of the Framers in protecting defendants at critical stages of the process, but would also extend the right to an area where "new contexts . . . present[] the same dangers that gave birth initially to the right itself."[52] For this system of pleas to be a *fair* system, twenty percent of defendants[53] should not be left without a guarantee of true justice.

51. Lafler v. Cooper, 566 U.S. 156, 170 (2012).
52. United States v. Ash, 413 U.S. 300, 311 (1973).
53. *See* NACDL Amicus Brief, *supra* note 14, at 5.