No. 18-106

In the Supreme Court of the United States

JOHN R. TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment right to counsel, which applies in "criminal prosecutions," extends to plea discussions that take place before the formal initiation of criminal proceedings.

2. Whether the Sixth Amendment right to counsel extends to plea discussions that take place before the formal initiation of federal criminal proceedings but after the initiation of related state criminal proceedings.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 9
Conclusion 27

TABLE OF AUTHORITIES

Cases:

Blockburger v. *United States*, 284 U.S. 299 (1932) .. 6, 22, 26
Counselman v. *Hitchcock*, 142 U.S. 547 (1892), overruled in part on other grounds by *Kastigar* v. *United States*, 406 U.S. 441 (1972) ... 12, 13, 14
Currier v. *Virginia*, 138 S. Ct. 2144 (2018) 19
Davis v. *United States*, 512 U.S. 452 (1994) 11, 15
Fellers v. *United States*, 540 U.S. 519 (2004) 11
Heath v. *Alabama*, 474 U.S. 82 (1985) 7, 23
Johnson v. *Zerbst*, 304 U.S. 458 (1938) 11
Kansas v. *Carr*, 136 S. Ct. 633 (2016) 19
Kirby v. *Illinois*, 406 U.S. 682 (1972) 11
Lafler v. *Cooper*, 566 U.S. 156 (2012) 18
Martel v. *Clair*, 565 U.S. 648 (2012) 19
Matteo v. *Superintendent*, 171 F.3d 877 (3d Cir.), cert. denied, 528 U.S. 824 (1999) 21
McNeil v. *Wisconsin*, 501 U.S. 171 (1991) 11, 15, 22
Missouri v. *Frye*, 566 U.S. 134 (2012) 5, 16, 17
Moran v. *Burbine*, 475 U.S. 412 (1986) 11, 14, 16, 17
Powell v. *Alabama*, 287 U.S. 45 (1932) 11
Roberts v. *Maine*, 48 F.3d 1287 (1st Cir. 1995) 21
Rothgery v. *Gillespie Cnty.*, 554 U.S. 191 (2008) 8, 11, 12, 13, 14, 15

Cases—Continued: Page

Rutledge v. *United States*, 517 U.S. 292 (1996) 26
Texas v. *Cobb*, 532 U.S. 162 (2001) 6, 7, 22
United States v. *Ash*, 413 U.S. 300 (1973) 11
United States v. *Bird*, 287 F.3d 709 (8th Cir. 2002) 24
United States v. *Giamo*, 665 Fed. Appx. 154 (3d Cir. 2016), cert. denied, 137 S. Ct. 1357 (2017) 20
United States v. *Gouveia*, 467 U.S. 180 (1984) 5, 10, 11, 13, 16, 17
United States v. *Jansen*, 884 F.3d 649 (7th Cir. 2018) 20
United States v. *Larkin*, 978 F.2d 964 (7th Cir. 1992), cert. denied, 507 U.S. 935, and 510 U.S. 913 (1993) 21
United States v. *Mills*, 412 F.3d 325 (2d Cir. 2005) 23
United States v. *Moody*, 206 F.3d 609 (6th Cir.), cert. denied, 531 U.S. 295 (2000) 21, 22
United States v. *Worjloh*, 546 F.3d 104 (2d Cir. 2008), cert. denied, 560 U.S. 979 (2010) 24
Virginia v. *Paul*, 148 U.S. 107 (1893) 23

Constitution, statutes, and rules:

U.S. Const.:
Amend. V 12, 14
(Double Jeopardy Clause) 7, 23, 26
Amend. VI ..... *passim*
Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* 19
18 U.S.C. 924(c) 2, 3
18 U.S.C. 1951 ..... 2, 3
18 U.S.C. 1951(a) 25
18 U.S.C. 1951(b)(1) 25
18 U.S.C. 3559(a)(2) 19
28 U.S.C. 2255 3

Statutes and rules—Continued: Page

Tenn. Code Ann. (2006):
§ 39-13-401(a) 25
§ 39-13-402(a) 25
Fed. R. Crim. P.:
Rule 11(c)(1)(C) 3
Rule 11(d)(1) 18
Fed. R. Evid. 410(a)(4) 18

Miscellaneous:

Black's Law Dictionary (10th ed. 2014) 15
4 William Blackstone, *Commentaries on the Laws of England* (1769) 12
3 Wayne R. LaFave, *Criminal Procedure* (4th ed. 2015 & Supp. 2017) 19
U.S. Dep't of Justice, *Criminal Resource Manual*, https://www.justice.gov/jm/criminal-resource-manual-296-communications-represented-persons-issues (last visited Nov. 20, 2018) 18
1 Noah Webster, *An American Dictionary of the English Language* (1828) 12

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-71a) is reported at 885 F.3d 949. The opinion of the court of appeals panel (Pet. App. 72a-85a) is reported at 848 F.3d 767. The order of the district court (Pet. App. 86a-131a) is unreported but is available at 2015 WL 13307594.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2018. On May 22, 2018, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including July 23, 2018, and the petition was filed on July 20, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Tennessee, petitioner

was convicted on four counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951, and one count of carrying and using a firearm during or in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Pet. App. 76a. He was sentenced to 300 months of imprisonment, to be followed by three years of supervised release. *Id.* at 90a. A court of appeals panel affirmed. *Id.* at 72a-85a. The en banc court of appeals granted rehearing, vacated the panel opinion, and affirmed. *Id.* at 1a-71a.

1. In a single day in October 2007, petitioner robbed four Memphis-area businesses at gunpoint. Pet. App. 3a, 87a. At a dry cleaners, he "posed as a customer, approached the register, pulled out a silver handgun, and pointed it at [an employee] demanding the money from the register." *Id.* at 87a-88a. The victim acquiesced and petitioner "left the store with approximately $60." *Id.* at 88a. At a beauty shop, petitioner again "posed as a customer, approached the register, pulled out a silver handgun, and pointed it at [an employee] demanding the money from the register." *Ibid.* That victim also acquiesced and petitioner "left the store with approximately $197." *Ibid.* Petitioner carried out a similar robbery of a pizza parlor, leaving with approximately $340. *Id.* at 89a. Finally, at a convenience store, petitioner again "approached the register, pulled out a silver handgun, cocked it, and pointed it at [an employee] demanding the money from the register." *Ibid.* Petitioner then said to the employee, "give me all the money and put it in this cup or I'll kill you." *Ibid.* That victim likewise acquiesced and petitioner "left the store with an undetermined amount of money." *Ibid.*

Petitioner was arrested by a Memphis police officer working as part of a joint federal-state task force. Pet.

App. 3a. In February 2008, a Tennessee grand jury indicted petitioner on multiple counts of Tennessee aggravated robbery. *Id.* at 74a. Attorney Mark McDaniel represented petitioner in plea discussions with state prosecutors. *Ibid.*

In the summer of 2008, while the state proceedings were ongoing, an Assistant United States Attorney (AUSA) in the Western District of Tennessee told McDaniel that the United States Attorney's Office "planned to bring federal robbery and firearms charges" against petitioner "that could result in a mandatory minimum of eighty-two years' imprisonment for the firearms charges alone." Pet. App. 3a. The AUSA conveyed to McDaniel "a plea offer of fifteen years' imprisonment." *Ibid.* The offer would "expire if and when a federal grand jury indicted" petitioner. *Ibid.* A dispute exists about the ensuing communications between petitioner and McDaniel, but petitioner did not accept the plea offer before a federal grand jury indicted him in September 2008. *Ibid.*

Petitioner retained new counsel and entered into a plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C). Pet. App. 3a, 90a. Petitioner agreed to plead guilty to four counts of Hobbs Act robbery, in violation of 18 U.S.C. 1951, and one count of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). Pet. App. 3a, 75a. In return, the government agreed that a total sentence of 25 years of imprisonment was the appropriate disposition of the case. *Id.* at 3a. The district court approved the agreement and sentenced petitioner to 25 years of imprisonment. *Ibid.* Petitioner did not appeal.

2. In 2012, petitioner moved to vacate his sentence under 28 U.S.C. 2255. Pet. App. 76a. "The sole issue

presented was whether defense counsel McDaniel rendered ineffective assistance of counsel during the plea negotiations on the federal charges." *Ibid.* "The district court, following Sixth Circuit and Supreme Court precedent, found that [petitioner's] Sixth Amendment right to counsel had not yet attached during his preindictment federal plea negotiations and denied his motion." *Id.* at 4a; see *id.* at 86a-131a. The district court therefore "did not reach the factual question of whether McDaniel was ineffective." *Id.* at 76a.

A panel of the court of appeals affirmed. Pet. App. 72a-85a. The panel observed that although this Court "has not squarely addressed whether a defendant has the right to counsel during preindictment plea negotiations," the Court "has consistently drawn the line at the time of filing of formal charges, holding that the right to counsel attaches only after the formal initiation of judicial proceedings." *Id.* at 77a. In addition to that "purely chronological, bright-line test" adopted by this Court, the panel noted binding Sixth Circuit precedent "adher[ing] to the bright-line rule that the [Sixth Amendment right to counsel] attaches only after formal charges have been filed." *Id.* at 77a-79a. The panel rejected petitioner's ineffective-assistance claim "because it is undisputed that no formal charges had been filed against [him] when the plea negotiations occurred." *Id.* at 85a.

3. The court of appeals granted rehearing en banc, vacated the panel opinion, and affirmed. Pet. App. 1a-71a.

a. The en banc court of appeals explained that petitioner's challenge raised two issues: "(1) whether the Sixth Amendment right to counsel extends to preindictment plea negotiations; and (2) whether an indictment in a state prosecution triggers a criminal defendant's

Sixth Amendment right to counsel for the purposes of forthcoming federal charges based on the same underlying conduct." Pet. App. 4a. The court rejected petitioner's contentions on both issues.[1]

i. On the first issue, the en banc court of appeals explained that this Court's rule governing the time at which the Sixth Amendment right to counsel attaches is "crystal clear": the "right to counsel 'attaches only at or after the time that adversary judicial proceedings have been initiated.'" Pet. App. 6a-7a (quoting *United States* v. *Gouveia*, 467 U.S. 180, 187 (1984)). Accordingly, because petitioner's ineffective-assistance-of-counsel claim arose from plea discussions that took place before he was formally charged in federal court, the court of appeals determined that the right to counsel had not attached and that his claim failed as a matter of law. *Id.* at 10a-11a.

The en banc court of appeals recognized that the right to counsel applies during "critical stages" of a prosecution, which would include post-indictment plea negotiations. Pet. App. 5a (quoting *Missouri* v. *Frye*, 566 U.S. 134, 140 (2012)). But the court observed that the "critical stage" inquiry is "'distinct'" from the question when the Sixth Amendment right to counsel "attaches." *Id.* at 5a-7a (citation omitted). The court explained that the distinction between those inquiries "is why the Supreme Court has repeatedly rejected attempts by criminal defendants to extend the Sixth

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[1] The en banc court of appeals observed that petitioner "appear[ed] to have waived" the second argument, which the panel had not addressed, but that "the government ha[d] not argued waiver." Pet. App. 8a. The court accordingly exercised its "discretion to deviate from the general waiver rule" and resolved the issue. *Ibid.*

Amendment right to counsel to preindictment proceedings, even where the same proceedings are critical stages when they occur postindictment." *Id.* at 6a. And the court emphasized that this Court "has not extended the Sixth Amendment right to counsel to any point before the initiation of adversary judicial criminal proceedings." *Id.* at 7a.

The en banc court of appeals disagreed with petitioner's assertion that "other circuits extend the Sixth Amendment right to counsel to preindictment 'adversarial confrontations.'" Pet. App. 7a. The court explained that "no other circuit has definitively extended the Sixth Amendment right to counsel to preindictment plea negotiations." *Ibid.* Accordingly, it found "no circuit split on this issue." *Ibid.*

ii. On the second issue raised by petitioner, the en banc court of appeals rejected petitioner's contention that "even if the Sixth Amendment right to counsel does not ordinarily attach to preindictment plea negotiations, an indictment in a state prosecution triggers a criminal defendant's Sixth Amendment right to counsel for the purposes of forthcoming federal charges based on the same underlying conduct." Pet. App. 8a.

The en banc court of appeals explained that the Sixth Amendment right to counsel is "offense specific," such that the right that attached when the State filed charges against petitioner would also attach to federal plea negotiations only if the uncharged federal offense was the "same offense." Pet. App. 8a (citation omitted). In *Texas* v. *Cobb*, 532 U.S. 162 (2001), this Court assessed whether two state offenses were the "same" for purposes of determining when the right to counsel attaches by applying the test articulated in *Blockburger* v. *United States*, 284 U.S. 299 (1932), which concerned the

Double Jeopardy Clause. *Cobb*, 532 U.S. at 173. In adopting that approach, the Court in *Cobb* saw "no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel." *Ibid.*

The en banc court of appeals accordingly applied this Court's longstanding interpretation of the Double Jeopardy Clause to determine that petitioner's state and federal offenses were "two separate offenses," and that attachment of the right to counsel in the state proceedings did not lead to attachment of the right to counsel in the federal plea discussions. Pet. App. 10a. The court observed that under the Double Jeopardy Clause, a defendant who "in a single act violates" the laws of two separate sovereigns "has committed two distinct offences." *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985) (citation and internal quotation marks omitted). The court reasoned that applying that interpretation "to determine the meaning of the term 'offense' in the double-jeopardy context but not in the Sixth Amendment right-to-counsel context would create a constitutional difference where the Supreme Court saw none." Pet. App. 10a. The court did not address whether the state and federal offenses would be the "same offense" under *Blockburger*. *Id.* at 8a.

b. Judge Bush filed an opinion concurring dubitante. Pet. App. 11a-32a. He agreed that the court of appeals was "bound to affirm because of Supreme Court precedents holding that the Sixth Amendment right to counsel attaches only at or after the initiation of criminal proceedings." *Id.* at 12a (citation and internal quotation marks omitted). He proceeded to review historical sources regarding the meaning of the words "accused" and "criminal prosecution" at the time of the Framing.

See *id.* at 17a-30a. He observed that the authorities he cited "are not conclusive," and that he had not "explored all relevant sources," but that the "Founding generation quite possibly would have understood" petitioner "to be an 'accused'" and the "*prosecutor*'s presentation of" a plea offer to be part of a 'criminal prosecution.'" *Id.* at 30a-31a. He added that "it makes sense to look at sources like" those he cited "as a starting point in analyzing [petitioner's] right-to-counsel claim," and that this Court may wish to "reconsider its right-to-counsel jurisprudence." *Id.* at 32a.

c. Judge Clay concurred in the judgment. Pet. App. 33a-55a. He agreed with the majority that this Court's precedent foreclosed petitioner's Sixth Amendment claim. *Id.* at 33a. But he wrote separately to express his view that the rule the court was bound to apply "creates pernicious consequences, as persuasively articulated by the dissent." *Ibid.* Judge Clay also concluded, contrary to the en banc majority, that the dual sovereignty doctrine does not apply in the Sixth Amendment right-to-counsel context. *Id.* at 41a-50a. He nevertheless concluded that petitioner was not entitled to relief because his state and federal offenses were not the "same" under the *Blockburger* test. *Id.* at 41a-53a. He explained that the state and federal statutes each have "an element that the other does not," and that petitioner's contrary argument rested on a "tortured syllogism" that "essentially ignore[d]" the interstate-commerce element of the federal offense. *Id.* at 51a-53a.

d. Judge White also concurred in the judgment. Pet. App. 55a-57a. She wrote separately to reject the dissent's assertion that this Court's decision in *Rothgery* v. *Gillespie County*, 554 U.S. 191 (2008), authorizes lower courts to hold that the right to counsel attaches before

the formal initiation of adversarial criminal proceedings. Pet. App. 55a-57a. Judge White explained that *Rothgery* involved "an initial arraignment, a proceeding already recognized by [this Court] as triggering the right to counsel," and therefore "simply reaffirmed" the "bright-line rule" that this Court has long applied. *Id.* at 56a-57a. Judge White added that, were she "[u]nconstrained" by Supreme Court precedent, she would have found "the dissent, Judge Bush's concurrence, and Judge Clay's pertinent * * * observations persuasive on the merits." *Id.* at 57a.

e. Judge Stranch dissented. Pet. App. 57a-71a. In her view, the court of appeals was not bound by the precedents of this Court that the majority relied on, but could instead "apply a flexible, fact-specific analysis." *Id.* at 70a. And she viewed the circumstances and equities to support the conclusion that the plea discussions between the federal government and petitioner "qualifies as an adversary judicial proceeding and therefore triggers the accused's right to counsel." *Id.* at 58a.

ARGUMENT

Petitioner contends (Pet. 14-31) that this Court should grant certiorari to decide (1) whether the Sixth Amendment right to counsel applies to pre-indictment plea discussions, or, more narrowly, (2) whether the right applies to pre-indictment federal plea discussions where the defendant has been charged with a related offense in state court. Neither question warrants this Court's review.

On the first question, the en banc court of appeals correctly applied this Court's well-established rule that the Sixth Amendment right to counsel, which applies to an "accused" in a "criminal prosecution[]," attaches only after judicial criminal proceedings have been initiated.

U.S. Const. Amend. VI. That rule follows from the text and purpose of the Sixth Amendment, as well as decades of precedents of this Court that petitioner does not ask the Court to overrule. The court of appeals correctly explained that no circuit conflict exists on the issue. And the policy arguments advanced by petitioner and his amici in support of a different rule are properly directed to legislative officials, not the judiciary.

On the second question, the en banc court of appeals correctly applied this Court's precedents indicating that his state and federal charges are distinct, such that the filing of state charges did not create a right to counsel with respect to federal charges that had not yet been filed. The court of appeals' decision does not implicate any conflict among the courts of appeals; the decisions cited by petitioner involved specific forms of collaboration between state and federal officials that are not present here. And even if the decision below did implicate a circuit conflict, this case would be a poor vehicle for resolving it, because the decision below can be affirmed on the alternative ground that petitioner's state and federal crimes were not the same even under the test that he proposes. See Pet. App. 50a-53a (Clay, J., concurring in the judgment).

1. a. The en banc court of appeals correctly rejected petitioner's claim that the Sixth Amendment applies to plea discussions that occur before the initiation of formal criminal charges. The Sixth Amendment guarantees an "accused" the right to the assistance of counsel in "all criminal prosecutions." U.S. Const. Amend. VI. In keeping with the "plain language of the Amendment and its purpose," *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984), this Court has repeatedly held that the right to counsel "does not attach until a *prosecution is*

commenced"—"that is, 'at or after the initiation of adversary judicial criminal proceedings,'" whether "'by way of formal charge, preliminary hearing, indictment, information, or arraignment,'" *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991) (citation omitted; emphasis added); see, *e.g.*, *Rothgery* v. *Gillespie Cnty.*, 554 U.S. 191, 198 (2008); *Fellers* v. *United States*, 540 U.S. 519, 523 (2004); *Davis* v. *United States*, 512 U.S. 452, 457 (1994); *Moran* v. *Burbine*, 475 U.S. 412, 432 (1986); *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972) (plurality opinion) (citing additional cases dating back to *Powell* v. *Alabama*, 287 U.S. 45 (1932)).

This Court's longstanding interpretation of the Sixth Amendment is correct. The rule that the right to counsel attaches only upon the formal initiation of criminal proceedings follows directly from the text of the Sixth Amendment, "which requires the existence of both a 'criminal prosecution' and an 'accused.'" *Gouveia*, 467 U.S. at 188 (brackets and citation omitted). "It is only" once criminal proceedings are formally initiated "'that the government has committed itself to prosecute,'" and it is "'only then that the adverse positions of government and defendant have solidified.'" *Id.* at 189 (citation omitted). The right to counsel protects a defendant "brought before a tribunal with power to take his life or liberty," *ibid.* (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463 (1938)), not one against whom no judicial proceeding has commenced.

This Court's rule also reflects the original meaning of the Sixth Amendment and the "rich historical heritage" of "[t]he right to counsel in Anglo-American law." *United States* v. *Ash*, 413 U.S. 300, 306 (1973). Blackstone equated the term "prosecution" with "formal accusation," which typically corresponded to "indictment,

the most usual and effectual means of prosecution." 4 William Blackstone, *Commentaries on the Laws of England* 298-299 (1769) (Blackstone); see *Rothgery*, 554 U.S. at 219 (Thomas, J., dissenting) (stating that, in examining "what a 'criminal prosecution' would have been understood to entail by those who adopted the Sixth Amendment," there "is no better place to begin than with Blackstone") (brackets omitted). Blackstone elsewhere used the term "prosecution" to refer to "instituting a criminal suit." Blackstone 305. "And, significantly, Blackstone's usage appears to have accorded with the ordinary meaning of the term" in early America. *Rothgery*, 554 U.S. at 221 (Thomas, J., dissenting). Noah Webster's dictionary, for example, defined "prosecution" as "[t]he institution or commencement and continuance of a criminal suit" or "the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment." 1 Noah Webster, *An American Dictionary of the English Language* (1828). Webster added that "*[p]rosecutions* may be by presentment, information or indictment." *Ibid.*

The distinction between "criminal prosecutions" in the Sixth Amendment and "criminal case[s]" in the Fifth Amendment reinforces the Court's longstanding interpretation of the former term. U.S. Const. Amends. V, VI. As this Court explained more than a century ago, "[a] criminal prosecution under article 6 of the amendments is much narrower than a 'criminal case,' under article 5 of the amendments." *Counselman* v. *Hitchcock*, 142 U.S. 547, 563 (1892), overruled in part on other grounds by *Kastigar* v. *United States*, 406 U.S. 441 (1972). The Court made that observation in rejecting the contention that a criminal "case" for purposes of the Fifth Amendment "could arise only when an indictment

should be returned"—an explanation that underscores the significance of an indictment in commencing a "criminal prosecution" for purposes of the Sixth Amendment. *Ibid.* Similarly, in construing an early federal statute using the term "'criminal prosecution,'" this Court linked the concept of a prosecution to an "indictment," noting that it made little sense to speak of a "prosecution" where nothing had been filed in court. *Virginia* v. *Paul*, 148 U.S. 107, 119 (1893) (citation omitted). In short, history provides "strong evidence that the term 'criminal prosecution' in the Sixth Amendment refers to the commencement of a criminal suit by filing formal charges" in court. *Rothgery*, 554 U.S. at 223 (Thomas, J., dissenting) (brackets omitted).

The en banc majority correctly explained—and the concurring judges all acknowledged—that this Court's longstanding and "crystal clear" interpretation of the Sixth Amendment controls the result here. Pet. App. 6a; see *id.* at 12a (Bush, J., concurring dubitante); *id.* at 33a (Clay, J., concurring in the judgment); *id.* at 56a (White, J., concurring in the judgment). Petitioner does not dispute that the alleged ineffective assistance of counsel came before "the initiation of adversary judicial criminal proceedings" in federal court. *Gouveia*, 467 U.S. at 189. Thus, under this Court's "firmly established" precedent, the right to counsel accordingly did not attach, and the court of appeals correctly rejected his claim. *Id.* at 187 (citation omitted).

b. Petitioner does not meaningfully contest this Court's longstanding interpretation of the Sixth Amendment's text or ask this Court to overrule any of its precedents. Petitioner recites (Pet. 19-20) Judge Bush's discussion of "the original public meaning of the Sixth Amendment text," but Judge Bush acknowledged that

the historical sources he cited are "not conclusive," Pet. App. 30a. The broad view suggested by petitioner is inconsistent with the holdings of this Court, directly contravenes Justice Thomas's historical analysis in *Rothgery*, which concluded that "the term 'criminal prosecution' in the Sixth Amendment refers to the commencement of a criminal suit by filing formal charges" in court, 554 U.S. at 223 (Thomas, J., dissenting) (brackets omitted), and would collapse the distinction between the Sixth Amendment's reference to "criminal prosecutions" and the Fifth Amendment's reference to a "criminal case," see *Counselman*, 142 U.S. at 563. Petitioner does not call on this Court to "reconsider its right-to-counsel jurisprudence," as Judge Bush acknowledged would be necessary to adopt his reading of the Sixth Amendment, Pet. App. 13a, nor does he identify any special factors that might support overruling this Court's decades-old precedents in this area.

Petitioner attempts (Pet. 17) to distinguish this Court's "prior cases finding no right to counsel before the commencement of judicial proceedings" on the ground that those cases "involved actions undertaken by law enforcement officials, not prosecutors." But petitioner cites nothing in those decisions suggesting that the identity of the government actor is relevant to the scope of the right to counsel, and this Court has never drawn such a distinction. The Court's decisions do not, for example, suggest that a prosecutor could trigger the right to counsel by accompanying a police officer to interview a suspect. See, *e.g.*, *Moran*, 475 U.S. at 428-432. To the contrary, the Court has made clear that the relevant line is a matter of formal judicial procedure: "The Sixth Amendment right to counsel attaches only at the

initiation of adversary criminal proceedings." *Davis*, 512 U.S. at 456.

Petitioner suggests (Pet. 18) that pre-indictment plea discussions should be treated differently than other pre-indictment interactions that do not trigger the right to counsel because, in petitioner's view, "when the government initiates pre-charge plea bargaining, the government is unambiguously prosecuting *before* the filing of a formal charge." But petitioner cites no support, let alone clear support, for the assertion that the government is "prosecuting" an individual when no charges have been filed. *Ibid.* That suggestion contradicts the original understanding of a criminal prosecution, see *Rothgery*, 554 U.S. at 219-223 (Thomas, J., dissenting); the ordinary meaning of "prosecute" today: "[t]o institute and pursue a criminal action," *Black's Law Dictionary* 1416 (10th ed. 2014); and this Court's long-held understanding that "a prosecution is commenced" for purposes of the right to counsel "'at or after the initiation of adversary judicial criminal proceedings,'" *McNeil*, 501 U.S. at 175 (citation omitted).

It is undisputed that the pre-indictment discussions here occurred before initiation of "judicial criminal proceedings." *McNeil*, 501 U.S. at 175 (citation omitted). Petitioner's contrary position is irreconcilable with the relevant text, history, and binding precedents that he does not ask the Court to overrule.

c. Petitioner and his amici rely heavily on policy arguments, contending that "plea negotiations" are "the point when defendants most desperately need the assistance of counsel." Pet. 18; see National Ass'n of Criminal Defense Lawyers (NACDL) Amicus Br. 2-8; For-

mer Judges and Professors Amicus Br. 3-19. To the extent that those contentions are relevant, they do not support a reinterpretation of the Sixth Amendment.

This Court has repeatedly "decline[d] to depart from [its] traditional interpretation of the Sixth Amendment right to counsel" in response to policy arguments. *Gouveia*, 467 U.S. at 192; see, *e.g.*, *Moran*, 475 U.S. at 431 (rejecting proposed extension of right to counsel even though "a lawyer's presence could be of value to the suspect"). One of the central policy arguments advanced by petitioners and his amici is that defendants' need for counsel is equally weighty in pre-indictment plea discussions as in post-indictment plea discussions—where the right undeniably applies, see *Missouri* v. *Frye*, 566 U.S. 134, 141 (2012)—and that the right should apply equally regardless of whether any adversary judicial proceedings have commenced. Pet. 14-15; Former Judges and Professors Amicus Br. 12-19.[2] But that is precisely the kind of argument this Court rejected in *Moran*.

In *Moran*, a criminal defendant argued that the Sixth Amendment required exclusion of his confessions in police interrogations that occurred before he was formally charged. 475 U.S. at 428. The Court observed that it was "clear, of course, that, absent a valid waiver, the defendant has the right to the presence of an attorney during any interrogation occurring *after* the first

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[2] As petitioner and his amici appear to recognize, *Frye* does not extend the right to counsel to pre-indictment plea discussions by its own terms. The plea offer in *Frye* was extended after indictment, see 566 U.S. at 138, and the Court noted that other critical stages included "arraignments, *postindictment* interrogations, *postindictment* lineups, and the entry of a guilty plea," *id.* at 140 (emphases added).

formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches." *Ibid.* (emphasis added). But the Court declined to adopt the same rule for inculpatory statements at interrogation sessions that "took place *before* the initiation of 'adversary judicial proceedings.'" *Ibid.* (quoting *Gouveia*, 467 U.S. at 192). The Court explained that the constitutional text, purpose, and precedent "foreclose[d]" the defendant's position and emphasized that "looking to the initiation of adversary judicial proceedings, far from being mere formalism, is fundamental to the proper application of the Sixth Amendment right to counsel." *Id.* at 431. That same logic, which is reflected in this Court's overall jurisprudence in this area, applies with full force here. See Pet. App. 6a (providing other examples in which this Court has held that the right to counsel applies to an interaction that occurs after indictment but not before).

In addition, the consequences of the decision below are more limited than petitioner and his amici suggest. Petitioner and his amici extrapolate from data regarding the number of federal criminal defendants charged by information rather than indictment that some 20% of federal felony cases involve pre-indictment plea bargaining. Pet. 4 & n.1; NACDL Amicus Br. 4-5. No basis exists to assume that all federal criminal defendants charged with felonies by information rather than indictment engaged in pre-indictment plea discussions. But even if that assumption were correct, every defendant who *accepts* a pre-indictment plea offer will necessarily have the benefit of counsel before entering that plea, because the right to counsel plainly applies at the entry of a guilty plea. See *Frye*, 566 U.S. at 140. A defendant who unwisely accepted a plea offer, moreover, can

"withdraw" that plea "before the court accepts the plea, for any reason or no reason." Fed. R. Crim. P. 11(d)(1). And statements made during plea discussions that do not result in a guilty plea, or result in one that is later withdrawn, are generally not admissible into evidence. Fed. R. Evid. 410(a)(4). It is thus only defendants who regret having *rejected* a pre-indictment plea offer that will be affected by the decision below, and even then only when the pre-indictment plea offer is no longer available after the indictment. Those defendants, however, will enjoy the right to counsel if the government proceeds to charge them after the rejected plea offer. And in some cases, they may be able to secure better plea bargains, lesser sentences, or even acquittals at trial. Cf. *Lafler* v. *Cooper*, 566 U.S. 156, 186 (2012) (Scalia, J., dissenting).

Petitioner suggests (Pet. 16) that the decision below will imperil a criminal suspect's right to retain counsel and allow the government "to bypass defense counsel and negotiate directly with" individuals who may face federal charges. Those concerns are overstated. As petitioner himself recognizes (Pet. 16-17), the government "has no interest in denying counsel to defendants during plea negotiations," and the government does not seek to prevent criminal suspects from retaining or consulting with counsel during plea discussions. Moreover, ethical rules and professional responsibilities that exist independent of the Constitution restrict the ability of government attorneys to negotiate directly with individuals represented by counsel. See U.S. Dep't of Justice, *Criminal Resource Manual* § 296, https://www.justice.gov/jm/criminal-resource-manual-296-communications-represented-persons-issues; see also Center on Wrongful Convictions and Legal Aid Society

Amicus Br. 21 (discussing this ethical requirement). The decision below will not affect those duties.

In any event, petitioner's policy arguments are properly directed to policy makers, not to the courts. The right to counsel, like other provisions in the Bill of Rights, sets a floor rather than a ceiling, and legislatures are free to provide by statute the rights that petitioner seeks to find in the Sixth Amendment. See, *e.g.*, *Currier* v. *Virginia*, 138 S. Ct. 2144, 2156 (2018) (plurality opinion) ("The proper authorities, the States and Congress, are empowered to adopt new laws or rules" beyond the constitutional minimum "in criminal cases if they wish."); *Kansas* v. *Carr*, 136 S. Ct. 633, 648 (2016) (Sotomayor, J., dissenting) ("The Federal Constitution guarantees only a minimum slate of protections; States can and do provide individual rights above that constitutional floor."). Indeed, Congress has legislated beyond the constitutional minimum in several criminal procedure contexts, such as by enacting the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, and creating a limited statutory right to counsel in postconviction proceedings, see 18 U.S.C. 3599(a)(2); *Martel* v. *Clair*, 565 U.S. 648, 661-662 (2012). Many States likewise provide a right to counsel in circumstances where the Sixth Amendment would not require it. See 3 Wayne R. LaFave, *Criminal Procedure* § 11.2(b) (4th ed. 2015 & Supp. 2017). "On these matters, the Constitution dictates no answers but entrusts them to a self-governing people to resolve." *Currier*, 138 S. Ct. at 2156 (plurality opinion).

d. Contrary to petitioner's contention (Pet. 20-23), the decision below does not conflict with the decision of any other court of appeals.

Petitioner errs in suggesting (Pet. 21) that decisions from the Third and Seventh Circuits conflict with the decision below because those courts, in his view, "assumed without discussion that the Sixth Amendment guarantees the right to the effective assistance of counsel during pre-indictment plea bargaining." Decisions that only "assume[]" a legal conclusion "without discussion," *ibid.*, generally do not bind courts or constitute precedential authority, and neither decision cited by petitioner actually grants relief on a pre-indictment right-to-counsel claim. The Third Circuit in *United States* v. *Giamo*, 665 Fed. Appx. 154 (2016), cert. denied, 137 S. Ct. 1357 (2017), affirmed the denial of an ineffective-assistance-of-counsel claim involving a "pre-indictment plea offer" on the ground that the defendant failed to show prejudice. *Id.* at 155. The issue of when (if ever) the Sixth Amendment right to counsel attached was not raised or discussed, and the court's unpublished decision is not precedential in any event. Similarly, the Seventh Circuit in *United States* v. *Jansen*, 884 F.3d 649 (2018), affirmed the denial of an ineffective assistance of counsel claim alleging, among other things, that counsel failed to investigate the government's case during plea discussions. *Id.* at 656. The Seventh Circuit did not address the question of when the Sixth Amendment right to counsel attached, and at least part of the attorney's conduct took place after the filing of an information. *Id.* at 652-655.

Petitioner also asserts (Pet. 21) that the First, Third, and Seventh Circuits "have recognized that the right to counsel can attach before the filing of formal charges, where the government's role has shifted from investigation to prosecution, and where the prosecutor has

clearly become the defendant's adversary." But petitioner provides no description of those cases, and none of them involved pre-indictment plea discussions, let alone held that the right to counsel attached during such discussions. The First Circuit in *Roberts* v. *Maine*, 48 F.3d 1287 (1995), noted "the possibility that the right to counsel might conceivably attach before any formal charges are made," but cautioned that such "circumstances, however, must be extremely limited." *Id.* at 1291. The en banc Third Circuit in *Matteo* v. *Superintendent*, 171 F.3d 877, cert. denied, 528 U.S. 824 (1999), concluded only that a defendant's Sixth Amendment right to counsel "had attached" after he "had undergone preliminary arraignment." *Id.* at 892-893. And the Seventh Circuit in *United States* v. *Larkin*, 978 F.2d 964 (1992), cert. denied, 507 U.S. 935, and 510 U.S. 913 (1993), concluded that the defendant had no Sixth Amendment right to counsel at a pre-indictment lineup. Its suggestion in dicta that a hypothetical future defendant might be able to demonstrate "that, despite the absence of formal adversary judicial proceedings, the government had crossed the constitutionally significant divide from fact-finder to adversary," *id.* at 969, does not suggest that it would have found a Sixth Amendment right to counsel in the circumstances of this case.

Accordingly, as the court of appeals recognized, "[t]here is * * * no circuit split on this issue." Pet. App. 7a. Indeed, petitioner has not identified another circuit decision that even squarely addresses whether the Sixth Amendment applies to pre-indictment plea discussions. And this Court has previously declined to review the Sixth Circuit's position on the question presented, *United States* v. *Moody*, 206 F.3d 609, cert. de-

nied, 531 U.S. 295 (2000), despite many of the same arguments advanced here, see *id.* at 615; *id.* at 618 (Wiseman, J., concurring). This Court's review remains unwarranted.

2. As an alternative to his primary claim, petitioner contends (Pet. 23-31) that certiorari is warranted to consider the "narrower" question whether the Sixth Amendment right to counsel that attached when he was indicted on state charges also created a right to effective assistance of counsel with respect to plea discussions on related federal charges that had not yet been filed. That issue likewise does not warrant review.

a. The court of appeals correctly determined that the filing of state aggravated robbery charges against petitioner did not give rise to a right to counsel for unfiled federal Hobbs Act robbery charges. Pet. App. 8a-10a.

As this Court explained in *McNeil*, the Sixth Amendment right to counsel is "offense specific." 501 U.S. at 175. Thus, the right to counsel attaches only with respect to the particular offense that is the subject of the "adversary judicial criminal proceedings" that have been initiated. *Ibid.* (citation omitted). In *Texas* v. *Cobb*, 532 U.S. 162 (2001), the Court clarified that the right to counsel also attaches to other, as-yet-uncharged offenses only if they would be considered "the same offense" under the test described in *Blockburger* v. *United States*, 284 U.S. 299 (1932), which addressed a double-jeopardy claim. *Cobb*, 532 U.S. at 173. The Court explained that it saw "no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel." *Ibid.*

The court of appeals correctly applied those principles in the decision below. In response to petitioner's claim that the filing of state robbery charges meant that the right to counsel attached to unfiled federal Hobbs Act robbery charges, the court looked to this Court's double jeopardy law to determine whether those charges were for the "same offense." Pet. App. 8a (citation omitted). The court relied on this Court's longstanding interpretation of the term "same offence" in the Double Jeopardy Clause, under which federal and state offenses are not the same. *Id.* at 8a-9a; see *Heath* v. *Alabama*, 474 U.S. 82, 88-89 (1985). Rather, when a defendant "in a single act" violates the laws of those two different sovereigns, "he has committed two distinct 'offences.'" *Heath*, 474 U.S. at 88 (citation omitted). The court of appeals thus correctly recognized that petitioner's state aggravated robbery offense and federal Hobbs Act offense were "distinct," *ibid.*, and that the attachment of the right to counsel for charges filed by the State did not create a right to counsel for charges not filed by the federal government, Pet. App. 10a.

b. Petitioner contends (Pet. 25-28) that the court of appeals' decision on this issue conflicts with decisions of the Second and Eighth Circuits. No such conflict exists. And even if one did, this case would be a poor vehicle for this Court to resolve it, because the decision below is correct even on petitioner's own proposed approach.

i. The Second Circuit in *United States* v. *Mills*, 412 F.3d 325 (2005), concluded that the federal government, in prosecuting a defendant for federal gun possession charges, could not use statements that state officials had obtained in violation of the right to counsel while pursuing state gun possession charges. *Id.* at 326-327. But the Second Circuit subsequently clarified that

Mills applies only "to situations in which federal prosecutors seek to admit *evidence* obtained by state and local prosecutors in violation of the Sixth Amendment." *United States* v. *Worjloh*, 546 F.3d 104, 109 (2008) (per curiam) (emphasis added), cert. denied, 560 U.S. 979 (2010). The Second Circuit's position thus does not conflict with the position of the court below. Indeed, the Second Circuit has explained that, in the absence of any question of evidence obtained in violation of the right to counsel, "the Supreme Court has incorporated double jeopardy analysis, including the dual sovereignty doctrine, into its Sixth Amendment jurisprudence." *Ibid.* (citation omitted).

The Eighth Circuit in *United States* v. *Bird*, 287 F.3d 709 (2002), concluded that statements made by a defendant in response to questioning by federal and tribal authorities could not be used at a subsequent federal rape trial because the federal investigator "worked in tandem with the tribal criminal investigator to deliberately elicit information from [the defendant], knowing that [he] had been indicted in an adversarial proceeding for the same charge and that [he] was represented by an attorney on that charge." *Id.* at 714. Like the Second Circuit's decision in *Mills*, the Eighth Circuit's decision in *Bird* does not conflict with the decision below, where nothing suggests that federal and state prosecutors worked together to circumvent petitioner's Sixth Amendment right to counsel.

ii. In any event, even if petitioner's asserted conflict existed, this Court's review would be unwarranted because the court of appeals' decision can readily be affirmed on an alternative ground. As Judge Clay explained in his concurrence, petitioner's state aggravated robbery offense is not the "same" as his federal

Hobbs Act offense under the *Blockburger* test, so his claim fails even under the approach that he proposes. Pet. App. 51a-53a.

Under Tennessee law, simple robbery "is the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn. Code Ann. § 39-13-401(a) (2006). Aggravated robbery is simple robbery "[a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon," or "[w]here the victim suffers serious bodily injury." *Id.* § 39-13-402(a). The federal Hobbs Act, on the other hand, makes it a crime to "obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery or extortion." 18 U.S.C. 1951(a). "[R]obbery" is defined in relevant part as "unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property." 18 U.S.C. 1951(b)(1).

As Judge Clay correctly explained in his concurring opinion, Tennessee aggravated robbery and Hobbs Act robbery are not the "same offense" under *Blockburger* because each offense requires proof of an element that the other does not. See Pet. App. 52a-53a. Specifically, "Tennessee aggravated robbery requires either the use of a weapon or resulting great bodily harm, while Hobbs Act robbery requires neither of those things, and Hobbs Act robbery requires that the robbery have affected interstate commerce, while Tennessee aggravated robbery has no such element." *Ibid.* (footnote omitted). Petitioner contends (Pet. 23-24) that Hobbs Act robbery is a lesser included offense of Tennessee aggravated

robbery, and therefore the "same offense" under *Blockburger*, because "the elements of his conviction for Hobbs Act robbery are identical to the elements for simple robbery under Tennessee law" and "simple robbery is a lesser included offense of aggravated robbery." Pet. App. 51a; see *Rutledge* v. *United States*, 517 U.S. 292, 297 (1996) (explaining that two offenses are the "same" under *Blockburger* if "one is a lesser included offense of the other"). But he cites no authority for the proposition that two offenses that each require "proof of a fact which the other does not" and are thus distinct offenses under *Blockburger*, 284 U.S. at 304, are nevertheless the "same" because one has a lesser included offense that might be considered a lesser included offense of the other. Because petitioner's claim fails even on his own test, the second question presented would not be outcome-determinative here.[3]

[3] Petitioner suggests (Pet. 31 n.4) that, if the Court declines to grant certiorari on his first question presented, it should hold this petition for a writ of certiorari pending a decision in *Gamble* v. *United States*, No. 17-646 (oral argument scheduled for Dec. 5, 2018), which presents the question whether to overrule the Court's longstanding sovereign-specific interpretation of the term "same offence" in the Double Jeopardy Clause. Because the court of appeals' decision would be correct even if the United States and Tennessee do not in fact define distinct offenses by virtue of their status as separate sovereigns, see Pet. App. 51a-53a (Clay, J., concurring in the judgment), no need exists to hold this petition for *Gamble*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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