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The Kirby Cop-Out: How Strict Adherence to Kirby's Bright-Line Attachment Rule Undermines Sixth Amendment Protections

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THE *KIRBY* COP-OUT: HOW STRICT ADHERENCE TO *KIRBY*'S BRIGHT-LINE ATTACHMENT RULE UNDERMINES SIXTH AMENDMENT PROTECTIONS

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I. INTRODUCTION

Imagine your family maintains the most prestigious art gallery in America for the sole purpose of collecting and preserving profound artwork. Although the gallery has received countless submissions from artists, the only submissions that were truly profound and worth memorializing happened to be oil paintings, with very few pastel paintings. Then one day, an artist arrived with a sketch that resembled a painting already in your collection, but nowhere near the quality of the painting it was modeled after. Although the artist's sketch would be excluded solely because it was not as profound as the rest, you politely inform the artist that your gallery only accepts oil paintings. Angrily, the sketch-artist points to the pastel painting on the wall to counter your claim, to which you respond, "That was an exception, but it is still a painting nonetheless." After realizing how easily you dismissed the disgruntled artist, you announce a new rule: in order to be memorialized in the gallery, the art must be an oil painting. From that day on, you continue to reject artists for submitting subpar works of art, but if it is a close call you rely on the bright-line rule announced to the sketch-artist many years ago. The only downside to your rule is that sometimes you have to turn away truly profound art, deserving to be memorialized, that is not an oil-painting because you have relied on the rule to reject so many others.

In Sixth-Amendment jurisprudence, the right to effective assistance of counsel at trial provides an indispensable safeguard in the American criminal justice system. Its rationale is straightforward: the average American does not possess the expertise to effectively defend against organized, well-funded prosecutorial forces that are designed to convict those accused of a crime. The courts have recognized that in order to preserve the right to counsel at trial, the right needs to be extended to certain pre-trial confrontations. Similar to the hypothetical gallery, all of the pre-trial confrontations happened to occur after formal judicial proceedings had been initiated, but the confrontations were never deemed a necessary condition to invoke the right to counsel. Then, in *Kirby v. Illinois*, the Supreme Court of the United States made a novel decision. The Court found that because case law showed that every extension of the right to counsel in pre-trial confrontations has been needed after formal

judicial proceedings were initiated, formal initiation of judicial proceedings is a necessary condition for the right to counsel to be implicated. [1]

Just as the hypothetical gallery owner could have rejected the sketch for not being worth memorializing, so too could the Court have rejected Kirby's claim by holding that the Sixth Amendment did not apply during criminal investigations.[2] However, neither the gallery owner nor the Court made this decision. Since the Court's decision in *Kirby*, bright-line attachment continues to be used as a way to dismiss claims that invoke core Sixth Amendment principles, and meritless claims, alike. *Turner v. United States*[3] is the judicial equivalent to the gallery owner turning away an artist's submission that was worthy of being memorialized among other profound artwork simply because of an arbitrary rule. The Sixth Circuit denied the defendant in *Turner* the right to counsel because the formalistic, bright-line attachment rule announced in *Kirby* continues to trump the underlying principles of the Sixth Amendment. Instead of determining whether pre-indictment plea negotiations implicate the rights the Sixth Amendment seeks to protect, the majority used *Kirby* and its progeny as a cop-out to quickly deny Turner the right to counsel instead of implicating an in-depth Sixth Amendment analysis.

This Article examines Sixth Amendment caselaw and concludes that the right to effective assistance of counsel should be extended to Turner, and other similarly situated defendants, during pre-indictment plea negotiations. Part II summarizes the Sixth Circuit's decision denying Turner's right to counsel, the introduction of the attachment rule, and how other Courts of Appeals have interpreted *Kirby*'s bright-line attachment rule. Part III first analyzes why *Kirby* is a constitutional outlier that undermines the spirit of the Sixth Amendment and has produced unsettled caselaw in this area. Part III next discusses how the right to counsel, properly understood, should extend to pre-indictment plea negotiations. Lastly, this comment will show that even under a bright-line rule, Turner's right to counsel attached when the government extended a formal plea offer. Finally, Part IV summarizes the main arguments discussed in this Article and offers insight into the implications of the Sixth Amendment attachment issue for pre-indictment plea negotiations.

II. BACKGROUND

This Part summarizes the Sixth Circuit's decision in *Turner*,

1. Kirby v. Illinois, 406 U.S. 682, 684 (1972) (plurality opinion).

2. *See id.* at 690-91.

3. Turner v. United States, 885 F.3d 949, 952 (6th Cir. 2018) (en banc), *cert, denied*, No. 18-106, 2019 U.S. LEXIS 4220 (June 24, 2019).

emphasizing the judges' different viewpoints. Then, this Part traces the development of Sixth Amendment jurisprudence by addressing the underlying principles of why the right to counsel is crucial to the American criminal justice system and highlighting the cases that have extended the right to counsel to certain "critical stages" of the adversarial process. Next, this Part discusses how the bright-line "attachment" component was introduced in *Kirby*. This Part concludes by presenting cases from circuits outside of the Sixth Circuit that deviate from *Kirby*'s bright-line rule.

A. Turner v. United States

In March 2018, the Sixth Circuit reheard *Turner*, *en banc*,[4] to decide whether the Sixth Amendment right to counsel extends to pre-indictment plea negotiations.[5] This case arose from Turner's motion to vacate his conviction based on ineffective assistance of counsel during plea negotiations for his federal charges.[6]

In October 2007, Turner robbed four Memphis-area businesses at gunpoint and was later apprehended by a state police officer working in a joint federal-state task force.[7] In February 2008, a grand jury indicted Turner on state aggravated robbery charges.[8] Turner retained counsel and the state charges were resolved through a plea agreement in March 2009.[9] During the summer of 2008, an Assistant United States District Attorney ("ADA") informed Turner's counsel that the United States planned to bring federal charges for each of the four robberies.[10] The ADA told Turner's attorney he would offer Turner a fifteen-year sentence for his federal charges, conditioned on Turner accepting the offer before a federal indictment was returned.[11] Turner did not accept the plea deal before the grand jury's indictment was returned and the ADA withdrew the offer.[12]

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5. The Supreme Court of the United States denied certiorari on Turner v. United States, 885 F.3d 949 (6th Cir. 2018), *en banc*, cert, denied, No. 18-106, 2019 U.S. LEXIS 4220 (June 24, 2019). This Article addresses the state of the Sixth Circuit's position on the right to counsel, and how the Sixth Circuit's approach should extend the right to counsel to pre-indictment plea negotiations.

6. Turner v. United States, 848 F.3d 767, 768 (6th Cir. 2017), *aff'd on reh'g*, Turner v. United States, 885 F.3d 949 (6th Cir. 2018), *en* banc, *cert, denied*, No. 18-106, 2019 U.S. LEXIS 4220 (June 24, 2019). Although not addressed in this Article, the court also held Turner's right to counsel was not triggered by the state indictment because he committed two separate offenses, even though the essential elements of the state and federal offenses were the same. *Id.* at 955.

7. *Id.*

8. *Id.*

9. *Id.* The state plea-deal is not addressed in this comment.

10. *Id.* at 769.

11. *Id.*

12. *Id.*

Turner later fired his attorney, and the best deal Turner's new attorney could negotiate was a twenty-five-year sentence, which Turner accepted.[13]

On rehearing *en banc*, the Sixth Circuit reaffirmed its holding that the right to counsel does not attach to pre-indictment negotiations.[14] Turner argued that based on the Supreme Court's 2012 holdings in *Missouri v. Frye*[15] and *Lafler v. Cooper,*[16] which recognized the Sixth Amendment right to counsel in post-indictment plea negotiations, the right to counsel should also apply to plea negotiations that occur before a defendant is indicted.[17] The court rejected this argument, stating it is "firmly established" that the right to counsel attaches only at or after formal judicial proceedings are initiated.[18] The Sixth Circuit refused Turner's argument because the "Supreme Court has repeatedly rejected attempts by criminal defendants to extend the Sixth Amendment right to counsel to pre-indictment proceedings, even where the same proceedings are *critical stages* when they occur post-indictment."[19] The "critical stages" the court referenced were police lineups[20] and interrogations:[21] a right to counsel exists in these stages only after formal charges are brought against the defendant.[22]

The court also rejected Turner's argument that other circuits extend the right to counsel in pre-indictment adversarial confrontations.[23] According to the majority, only one circuit has implied the right to counsel extends to pre-indictment plea negotiations, but that opinion was "non-precedential and the issue of when the Sixth Amendment right to counsel attaches was not before the court in that case."[24] The court noted that a minority of circuits have discussed the possibility of extending the right to counsel in pre-indictment proceedings, but since no circuit has unequivocally extended the right to pre-indictment plea negotiations, the court rejected the notion of a circuit split.[25]

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13. *Id.*

14. Turner v. United States*,* 885 F.3d 949, 952 (6th Cir. 2018), *en banc*, *cert, denied*, No. 18-106, 2019 U.S. LEXIS 4220 (June 24, 2019)

15. Missouri v. Frye*,* 566 U.S. 134 (2012).

16. Lafler v. Cooper, 566 U.S. 156 (2012).

17. *Turner*, 885 F.3d at 952.

18. *Id.* at 953.

19. *Id.* (emphasis added).

20. *See infra* pp. 8-9,12-13.

21. *See* Moran v. Burbine, 475 U.S. 412 (1986) (holding the right to counsel did not attach to an interrogation that took place the night the defendant was arrested for burglary and subsequently confessed to a murder that occurred a year earlier).

22. *Turner*, 885 F.3d at 953 (internal citations omitted).

23. *Id.*

24. *Id.* at 953-54 (citing United States v. Giamo, 665 F. App'x 154, 156-57 (3d. Cir 2016)).

25. *Id.* at 953 (citing Roberts v. Maine, 48 F.3d 1287, 1291 (1st Cir. 1995); *see* Perry v. Kemna,

Judge Clay wrote separately to express his reluctance in following the bright-line rule that denies Turner the right to counsel.[26] Quoting his opinion in *United States v. Moody*,[27] Judge Clay stated:

"We do not favor this bright line approach because it requires that we disregard the cold reality that faces a suspect in pre-indictment plea negotiation. 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."[28]

While acknowledging the logic in Turner's argument, the court noted that *Frye* and *Lafler* did not expressly extend the right to pre-indictment plea deals since the right to counsel had already attached.[29]

Judge Stranch's dissenting opinion in *Turner* argued that the court failed to perform its function while sitting *en banc* and that precedent did not require the result reached by the majority.[30] According to the dissent, this case presented an issue that the Supreme Court has not yet addressed.[31] Instead of engaging in a fact-specific inquiry, the majority followed an inapplicable bright-line approach and undermined existing Sixth Amendment caselaw.[32] For Turner, a pre-indictment plea deal would be the only adversarial confrontation, yet the majority was not willing to extend him the right to counsel.[33] Lastly, the dissent points out, the pre-indictment plea process was completely insulated from constitutional review.[34] Even a defendant such as Turner, who retained private counsel, cannot bring claims of ineffective assistance of counsel.[35]

B. The Sixth Amendment

The Sixth Amendment guarantees the right of an accused to receive assistance of counsel in all criminal prosecutions for his or her defense.[36] The Sixth Amendment protects the fundamental notion that "if the constitutional safeguards it provides be lost, justice will not 'still be

356 F.3d 880, 895-96 (8th Cir. 2004) (Bye, J., concurring) (collecting cases)).

26. *Turner*, 885 F.3d at 968 (Clay, J., concurring).

27. United States v. Moody, 206 F.3d 609 (6th Cir. 2000) (preceding Sixth Circuit decision declining to extend the right to counsel in preindictment plea negotiations).

28. *Id.* at 615.

29. *Turner*, 885 F.3d at 969 (Clay, J., concurring).

30. *Id.* at 977 (Stranch, J., dissenting).

31. *Id.*

32. *Id.* at 978.

33. *Id.* at 983.

34. *Id.*

35. *Id.* at 983.

36. U.S. CONST. amend. VI.

done.'"[37] Until 1963, the right to be appointed counsel was only available in federal criminal prosecutions.[38] In *Gideon v. Wainwright*, the Supreme Court incorporated the Sixth Amendment, through the Fourteenth Amendment, to require that all state courts provide counsel for indigent citizens accused of a crime.[39] The Court's decision in *Gideon* extended the reasoning of existing precedent and was based on the notion that in the American adversarial system, any person who cannot afford to hire an attorney cannot be given a fair trial unless an attorney is provided for the accused.[40] Further, the state's spending of "vast sums of money to establish machinery to try defendants accused of a crime" requires the state to provide funding to protect indigent defendants' constitutional rights.[41]

In order to ensure Sixth Amendment protections, the Court in *Gideon* applied a practical approach to "scrutinize *any* pretrial confrontation of the accused" and determine whether presence of counsel is "necessary to preserve the defendant's basic right to a fair trial."[42] In doing so, the Court recognized that the spirit of the Sixth Amendment is that the average defendant does not possess the legal skills to effectively defend against the organized forces of the state and skilled prosecutors and therefore, in order for justice to prevail, every American has the fundamental right to be represented by counsel.[43]

1. Critical Stages that Require the Right to Counsel

The historical background of the Sixth Amendment suggests that the core purpose was to assure assistance at trial.[44] In a line of cases starting with *Powell v. Alabama*, the right to counsel has been extended to critical, pre-trial confrontations that "require[] the guiding hand of counsel" to ensure the guarantee is not merely an empty promise.[45] Further, the right to counsel being extended to pre-trial confrontations resulted from "changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered parts of the trial itself."[46]

The first prong required to trigger the Sixth Amendment right to

37. Johnson v. Zerbst, 304 U.S. 458, 462 (1938) (footnote omitted).
38. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
39. *Id.*
40. *Id.*
41. *Id.*
42. United States v. Wade, 388 U.S. 218, 227 (1967) (emphasis added).
43. United States v. Ash, 413 U.S. 300, 309 (1973).
44. *Id.*
45. Powell v. Alabama, 287 U.S. 45, 69 (1932).
46. *Ash*, 413 U.S. at 310.

counsel is that the proceeding must be a critical stage.[47] Determining whether a hearing is a critical stage depends on "whether potential substantial prejudice to defendant's rights inheres . . . in the confrontation and the ability of counsel to help avoid that prejudice."[48] The critical stage has been extended from the right to counsel only at trial based on pragmatic considerations that "the right to use counsel at the formal trial (would be) a very hollow thing (if), for all practical purposes, the conviction is already assured by pretrial examination."[49]

To determine whether a pre-trial proceeding is a critical stage, the Court weighs the "usefulness of counsel" and the "dangers to the accused of proceeding without counsel."[50] Early Supreme Court decisions in *United States v. Wade*[51] and *United States v. Ash*[52] illustrate how the Court distinguishes between critical and noncritical proceedings. In *Wade*, the defendant was arrested, appointed counsel, and subjected to an identification lineup without notice to Wade's attorney.[53] The Court found that during police lineups, there was a well-known risk of law enforcement engaging in suggestive practices that influenced how the witness identified the accused, which could not be corrected at trial.[54] The Court further found that once witnesses identified suspects in a lineup, they rarely second-guessed themselves, so the identification issue was often settled before trial.[55] Since an attorney's presence would have likely prevented the use of suggestive practices that carry significant implications at trial, the Court deemed police lineups to be a critical stage in Sixth Amendment right to counsel analysis.[56]

Conversely, in *Ash*, the Court held that photo identifications were not a critical stage because there were "substantially fewer possibilities of impermissible suggestion."[57] Since photo identifications can be reconstructed at trial and defense counsel can effectively cross-examine witnesses to expose suggestive practices, the Court did not deem them to

47. *Cf.* United States v. Wade, 388 U.S. 218, 227 (1967).

48. *Wade*, 388 U.S. at 227.

49. Escobedo v. Illinois, 378 U.S. 478, 487 (1964) (alterations in original) (internal citations omitted); *see also* Patterson v. Illinois, 487 U.S. 285, 298 (1988) ("we have defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel").

50. *Patterson*, 487 U.S. at 298.

51. *See also* Gilbert v. California, 388 U.S. 263 (1967) (*Gilbert* was the companion case to *Wade* that also addressed police identification lineups and was decided on the same day).

52. *Ash*, 413 U.S. at 300.

53. *Wade*, 388 U.S. at 219.

54. *Id.* at 229. ("[T]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor[.]") (citation omitted).

55. *Id.*

56. *Id.* at 237.

57. *Ash*, 413 U.S. at 324.

be a critical stage.[58]

In *Coleman v. Alabama*, the Supreme Court held that a pre-indictment hearing was a critical stage triggering the right to counsel.[59] In that case, the state of Alabama created a preliminary hearing to determine whether sufficient evidence existed to warrant the state trying the case to a grand jury and to set bail.[60] The hearing was not required to indict an accused and included procedural safeguards that barred testimony from hearings in which the accused was not represented by counsel.[61] The Court did not address whether Alabama's unnecessary and effectively nonconsequential hearing was considered a formal initiation of the criminal process.[62] However, the accused did not have the ability to "realize the[] advantages of a lawyer's assistance" before he was indicted, which "compell[ed] the conclusion that the Alabama preliminary hearing is a 'critical stage.'"[63] Specifically, during the hearing a defense attorney could (1) cross examine witnesses to expose errors in the state's case; (2) impeach the state's witnesses; (3) discover the case the state has against his client; and (4) make influential arguments regarding early psychiatric examinations or bail.[64]

In the companion cases *Frye* and *Lafler,*[65] the Supreme Court found that the defendants' Sixth Amendment right to effective assistance of counsel was violated during the plea-bargaining process. In *Frye,* the prosecutor sent two plea offers to Frye's attorney, but the attorney did not advise Frye that the offers had been made and both offers expired without the defendants knowledge that the offers existed.[66] Frye eventually entered a guilty plea and was sentenced to three years in prison, which was greater than the plea deal Frye would have accepted but-for his attorney's failure to communicate the previous offer.[67] In *Lafler,* the prosecution offered to dismiss several of the defendant's charges and recommend a sentence of fifty-one to eighty-five months in exchange for

58. *Id.* at 324-25.

59. Coleman v. Alabama, 399 U.S. 1, 9-10 (1970).

60. *Id.* at 8.

61. *Id.* at 8, 9.

62. *See id.* at 9. ("[I]n cases where the accused has no lawyer at the hearing the Alabama courts prohibit the State's use at trial of anything that occurred at the hearing, it does not follow that the Alabama preliminary hearing is not a "critical stage" of the State's criminal process.").

63. *Id.* at 9-10.

64. *See id.*

65. The main difference between the Court's decision in *Frye* and *Lafler* is that the latter addresses "proper remedies" for violations, while the former does not. *See* Missouri v. Frye*,* 566 U.S. 134, 138 (2012). Because remedies are outside the scope of this note, it will refer to the opinions collectively.

66. *Frye*, 566 U.S. at 138-39.

67. *Id.* at 139-40. ("Frye testified he would have entered a guilty plea to the misdemeanor [90-day sentence] had he known about the offer.").

a guilty plea.[68] The defendant's attorney convinced him that the prosecution would not be able to prove a material element of the crime.[69] The defendant lost at trial and received a mandatory minimum sentence of 185 to 360 months.[70]

In sum, *Frye* and *Lafler* extended the scope of the right to counsel "critical stage" to the plea-bargaining process.[71] After these cases, the Sixth Amendment extends to "pretrial critical stages" that are part of a criminal proceeding where "defendants [could not] be presumed to make critical decisions without counsel's advice."[72] In *Lafler*, The Court determined plea-negotiations were critical stages based on pragmatic considerations.[73] Specifically, "[t]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences."[74] Today's criminal justice system is largely one of pleas, which made protecting rights during plea negotiations more critical than at trial.[75]

Once the Court established the right to counsel for plea-bargaining, both defendants successfully demonstrated prejudice resulting from counsels' actions during the negotiation process.[76] When an offer to plea-bargain is made, "a defendant has the right to effective assistance of counsel in considering whether to accept it."[77] If that right is denied, a defendant must show prejudice to be entitled to relief.[78] In order to show prejudice, a defendant must demonstrate a "reasonable probability" that (1) "they would have accepted the earlier plea offer had they been afforded effective assistance of counsel;" (2) the plea would not have been cancelled by the prosecution or rejected by the trial court; and (3) "the end result of the criminal process would have been more favorable" by pleading to a lesser charge or receiving less prison time.[79] With respect to the third factor, "any amount of [additional] jail time has *Sixth*

68. Lafler v. Cooper, 566 U.S. 156, 161 (2012).

69. *Id.*

70. *Id.*

71. *Id.* at 165; *Frye*, 566 U.S. at 144.

72. *Lafler*, 566 U.S. at 165; *see also Frye*, 566 U.S. at 144-45 ("The art of negotiation is at least as nuanced as the art of trial advocacy and it presents questions further removed from immediate judicial supervision.") (citations omitted).

73. *See Lafler*, 566 U.S. at 170.

74. *Id.*

75. *Frye*, 566 U.S. at 144; *see also Lafler*, 566 U.S. at 170 ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

76. *Lafler*, 566 U.S. at 174; *Frye*, 566 U.S. at 150.

77. *Lafler*, 566 U.S. at 168.

78. *Id.*

79. *Frye*, 566 U.S. 147.

Amendment significance."[80]

2. The Introduction of the "Attachment" Requirement

In *Kirby*, a plurality opinion denied the right to counsel for the defendant during a police lineup that occurred before formal, adversary proceedings had been initiated.[81] The Court previously determined in *Wade*[82] that post-indictment lineups were critical stages where the right to counsel was required by the Constitution.[83] The defendant in *Kirby* was arrested based on what was deemed a credible complaint from a victim of a robbery, and evidence corroborating the complaint was found on the defendant's person when he was arrested.[84] On the same day of the arrest, police summoned the victim to the police station where he identified the defendant as the man who robbed the victim two days earlier.[85]

The plurality briefly traced the history of the Sixth Amendment and prior decisions to reach the conclusion that the right to counsel "attaches" only at or after adversary proceedings had been initiated against the accused.[86] After noting the difference of opinion among members of the Court in this area, the plurality stated that all of the cases involving the right to counsel occurred during the arraignment or after formal charges had been brought.[87] The often-quoted language in Sixth Amendment jurisprudence comes from the *Kirby* plurality, in which the Court stated the significance of a bright-line attachment rule:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point for our whole system of adversary criminal justice system. For it is only then that the government has committed itself to prosecute and only then that the adverse positions of the government and defendant have solidified.[88]

The Court also rejected the defendant's argument that the right to an attorney had attached because it did not want to interfere with "routine police investigation[s]."[89] Lastly, the Court noted the Due Process Clause of the Fourteenth Amendment would protect the defendant's

80. *Id.* (quoting Glover v. United States, 531 U.S. 198, 203 (2000)).

81. Kirby v. Illinois, 406 U.S. 682, 684 (1972) (plurality opinion).

82. United States v. Wade, 388 U.S. 218 (1967).

83. *Kirby*, 406 U.S. at 683.

84. *Id.* at 684.

85. *Id.* at 684-85.

86. *Id.* at 688.

87. *Id.* at 689; *but see id.* at 696 (Brennan, J., dissenting) (Expressing serious reservations about the plurality reducing prior cases' holdings, that protect the right to counsel, to support its formulation of the bright-line attachment rule).

88. *Id.* at 689 (plurality opinion).

89. *See id.* at 690.

constitutional rights during the police investigation.[90]

Five years after *Kirby,* the Supreme Court addressed the attachment issue in *Brewer v. Williams.*[91] In *Brewer*, an arrest warrant was issued for the defendant based on his suspected involvement in a fourteen-year-old girl's disappearance.[92] The defendant hired an attorney, turned himself in, and agreed to be transported 160 miles to the county where the arrest warrant originated.[93] An agreement was made between law enforcement officers, the defendant, and his attorney that no questioning would take place while he was being transported.[94] However, the officers violated this agreement and elicited incriminating statements, which violated the defendant's right to counsel.[95] The Court determined there was "no doubt" adversarial proceedings had been initiated and the defendant's right to counsel was violated during the transport-interrogation.[96] After noting the difference of opinions on the scope of the Sixth Amendment, the Court concluded the right had attached but did not make reference to the bright-line attachment rule announced in *Kirby*.[97]

Although not referenced in *Brewer*, *Kirby*'s formalistic approach was adopted by a majority of the Court in *United States v. Gouveia*.[98] In *Gouveia*, the defendants were already serving a prison sentence when they became suspects in the murder of a fellow inmate.[99] The defendants were placed in administrative segregation for nineteen months until a federal grand jury indicted them.[100] At the arraignment proceeding, counsel was appointed.[101] The *Gouveia* defendants alleged, among other claims, that their right to counsel was violated during the administrative segregation.[102] The Court held that no violation occurred because the Sixth Amendment right had not attached yet.[103] After highlighting the rationale underlying the right to counsel, the Court relied on *Kirby* and subsequent cases to reach its conclusion.[104] Primarily, the Court focused on the need for counsel when an accused is confronted by a professional,

90. *See id.* at 691.
91. Brewer v. Williams, 430 U.S. 387 (1977).
92. *Id.*
93. *Id.* at 391.
94. *Id.*
95. *Id.* at 393, 399.
96. *Id.* at 399.
97. *See id.*
98. United States v. Gouveia, 467 U.S. 180 (1984).
99. *Id.* at 183.
100. *Id.*
101. *Id.*
102. *Id.* at 183-84.
103. *Id.* at 188.
104. *Id.*

organized adversary.[105] Since appointing an attorney while the defendants were in administrative segregation would not further the Sixth Amendment's purpose, the bright-line attachment rule was properly invoked to deny the defendants the protections of the Sixth Amendment.[106]

C. Circuits Deviating from the Bright-Line Attachment Rule

Several circuits have followed a more pragmatic approach – one that does not exclusively rely on the formal initiation of judicial proceedings – to determine whether the Sixth Amendment right to counsel has "attached" to a defendant in a particular case. Yet, the majority in *Turner* denied the existence of a circuit split on this issue and dismissed the value and reasoning of this alternative approach.[107]

In *Roberts v. Maine*, the First Circuit demonstrated this pragmatic approach when it supported the proposition that a right to counsel may attach before the formal charges are brought.[108] In *Roberts*, the defendant was stopped by the police for driving with a suspended license. He was later arrested because the arresting officer suspected the defendant was driving while intoxicated.[109] Under the relevant Maine statute, the defendant had the option to submit to or refuse chemical testing to determine intoxication level. The defendant's refusal, however, could be used against him in subsequent judicial proceedings.[110] The defendant refused to submit to testing, was convicted at trial, and appealed his sentence. He alleged the state's refusal to allow him to consult with his attorney to discuss whether to submit to testing violated his Sixth Amendment right to counsel.[111]

The First Circuit in *Roberts* ultimately concluded no Sixth Amendment violation occurred, but not before discussing the Circuit's position on the "attachment" issue. Specifically, the court recognized that the right to counsel might attach before any formal charges are made, before an indictment or arraignment, if the government were to "cross[] the constitutionally significant divide from fact-finder to adversary."[112] The court noted the right would only attach in particular circumstances, but it was not present here because the police were still performing their

105. *See id.* at 189.

106. *See id.* at 191.

107. Turner v. United States, 885 F.3d 949, 952 (6th Cir. 2018) (en banc), *cert, denied*, No. 18-106, 2019 U.S. LEXIS 4220 (June 24, 2019).

108. Roberts v. Maine, 48 F.3d 1287, 1291 (1995).

109. *Id.* at 1290.

110. *Id.*

111. *Id.*

112. *Id.* at 1291 (internal quotes and citations omitted).

investigatory function and the state had not crossed the "constitutionally significant divide."[113]

In *United States v. Larkin*, the Seventh Circuit reached a conclusion similar to the First Circuit's position in *Roberts*. There, the defendant was incarcerated in a state penitentiary for his involvement in an armed robbery.[114] While incarcerated, and three months before he was indicted by a federal grand jury, the government mistakenly compelled Larkin to appear in a police lineup, prior to the grand jury compelling him to do so.[115] During the lineup, witnesses identified Larkin as the person involved in the bank robbery.[116] The government refused to grant Larkin's request for counsel to be present during the lineup, and the witnesses' identification of the defendant in a pre-indictment lineup was almost exclusively the basis for conviction at trial.[117]

On appeal, Larkin argued that the state denied him the right to counsel.[118] The lineup in question occurred three months prior to Larkin's indictment.[119] The court began its analysis by finding that the right to counsel "presumptively does not attach to pre-indictment lineups."[120] The court further stated a "defendant may rebut this presumption by demonstrating that, despite the absence of formal adversary judicial proceedings, the government had crossed the constitutionally significant divide from fact-finder to adversary."[121] The defendant made no such showing the government changed its position and therefore did not rebut the presumption.[122] The court took special notice of the fact there was no valid reason to deny Larkin's request for counsel.[123]

Lastly, the Third Circuit has also applied a pragmatic interpretation of Supreme Court precedent.[124] In *Matteo v. SCI Albion*, the defendant was convicted of first-degree murder, robbery, and several other charges.[125] While Matteo was in jail, police taped two conversations between the defendant and a friend who lent him a rifle used in the murder; Matteo gave the friend explicit instructions about where to find the murder

113. *Id.*

114. United States. v. Larkin, 978 F.2d 964, 967 (7th Cir. 1992).

115. *Id.* at 968.

116. *Id.* at 967.

117. *Id.*

118. *Id.* at 969.

119. *Id.*

120. *Id.*

121. *Id.* (internal citations and quotations omitted).

122. *Id.*

123. *Id*. at 970 ("It bears repeating that 'counsel can hardly impede legitimate law enforcement; on the contrary ... law enforcement may be assisted by preventing the infiltration of taint[.]'" (quoting United States v. Wade, 388 U.S. 218, 238 (1967))).

124. Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 892-3 (3d Cir. 1999).

125. *Id.* at 880.

weapon.[126] The defendant argued the taped conversation and subsequent discovery of the murder weapon violated his Sixth Amendment right to counsel.[127]

At the time of Matteo's telephone conversations, he had already been arrested, incarcerated for more than a week, undergone preliminary arraignment, and retained an attorney.[128] After enumerating the standard formal proceedings found in *Kirby,* the court stated that the right may also attach at earlier stages.[129] Specifically, the "crucial point is that the defendant is guaranteed the protection of counsel" when he is faced with the prosecutorial forces of organized society.[130] The Third Circuit determined that Matteo was confronted with organized resources of an ongoing police investigation, and the officers were aware he was represented; therefore, the court found that the right to counsel had attached.[131] Instead of using the bright-line test, the court conducted a fact-specific inquiry to hold the right to counsel attached for Matteo.[132]

III. DISCUSSION

Cases involving the right to counsel have consistently produced tension among Supreme Court Justices. In the decades following the Court's decision in *Kirby*, lower courts have been forced to decide whether the spirit of the Sixth Amendment or the letter of the law should guide their analyses. This Part first argues that the rigid attachment approach used by the *Turner* majority is not as "crystal clear" as it suggested. Second, this Part shows how other circuits' Sixth Amendment analyses rebut the *Turner* majority's assertion that no circuit split exists on this issue. And lastly, this Part argues that Turner's right to counsel attached during pre-indictment plea negotiations through a proper understanding and analysis of *Kirby* and its progeny.

A. The Caselaw is not as "firmly established" as the Turner Majority Claimed

The dissent in *Turner* correctly noted the flaw in the majority's certainty in dismissing Turner's ineffective assistance of counsel claim.

126. *Id.* at 883.

127. *Id.* at 892.

128. *Id.*

129. *Id.* at 892.

130. *Id.*

131. *Id.* at 893.

132. *See id.*; *see also* United States v. Giamo, 665 F. App'x 154 (3d Cir. 2016) (applying the *Frye-Lafler* analysis to pre-indictment plea negotiations).

Contrary to the *Turner* majority's assertion that caselaw is "firmly established" in favor of a bright-line formal attachment rule, the court was "wrong both about the clarity of [prior cases] and the substance [the Supreme Court] find[s] clear."[133] Indeed, the formalistic approach announced in *Kirby* could not garner support from a majority of Justices and has continued to divide the Court in the four-decades since its plurality opinion.

1. *Kirby's* Foundation and Rationale

Kirby could not receive support from a majority of justices because the plurality opinion exceeded the scope of the precedent it relied on. The plurality in *Kirby* precluded a claim of ineffective assistance of counsel during a pre-indictment lineup, despite the right being extended to post-indictment lineups in *Wade* and *Gilbert*, decided just five years earlier.[134] However, the two cases cited by the plurality do not hold formal judicial proceedings are a necessary condition.[135] Rather, *Wade* and *Gilbert* "happened to involve postindictment confrontations" and "nothing at all turned upon that particular circumstance."[136] Perhaps even more indicative of how *Kirby*'s "attachment" rule deviated from previous caselaw is how lower courts interpreted *Wade* and *Gilbert*. Since they were decided, every United States Court of Appeals that was faced with the issue had applied *Wade* and *Gilbert* to pre-indictment confrontations.[137]

Kirby also undermined Supreme Court precedent by failing to engage in a historical and factual analysis to reach its conclusion. In *Wade,* the Court summarized how Sixth Amendment jurisprudence evolved since it first extended the right to counsel for a pre-trial proceeding in *Powell*. [138] *Wade* concluded that *Powell* and its succeeding cases required the Court to "scrutinize any pretrial confrontation of the accused" and determine whether "substantial prejudice to the defendant's rights" would follow

133. Turner v. United States, 885 F.3d 949, 980 (6th Cir. 2018) (Stranch, J., dissenting) (quoting Rothgery v. Gillepsie County 554 U.S. 191, 211 (2008)), *en banc*, *cert, denied*, No. 18-106, 2019 U.S. LEXIS 4220 (June 24, 2019).

134. Kirby v. Illinois, 406 U.S. 682, 683 (1972) (plurality opinion).

135. *See id.* at 703 (Brennan, J., dissenting).

136. *Id.; see also* United States v. Gouveia, 467 U.S. 180, 195 (Stevens, J., concurring) ("[*Wade*] illustrates how Sixth Amendment jurisprudence has turned not on the formal initiation of judicial proceedings, but rather on the nature of the confrontation between the authorities and the citizen").

137. *Kirby*, 406 U.S. at 704, n.14 (Brennan, J., dissenting) (collecting cases); *see also* Wilson v. Gaffney, 454 F.2d 142, 144 (10th Cir. 1972) ("[S]urely the assistance of counsel, now established as an absolute post-indictment right does not arise or attach because of the return of an indictment. The confrontation of a lineup . . . cannot have a constitutional distinction based upon the lodging of a formal charge.").

138. United States v. Wade, 388 U.S. 218, 227 (1967).

without access to counsel.[139] *Kirby*, decided only five years later, concluded that *Powell* and its progeny stand only for the notion a person's right to counsel "attaches only at or after" judicial proceedings are initiated.[140] Any prior decisions that deviated from this narrow interpretation were dismissed as being inapplicable or limited to its own facts.[141]

Prior to *Kirby*, every "critical stage" occurred after formal judicial proceedings began, which was not relevant until *Kirby* added the "attachment" prong as a necessary condition that must be satisfied to invoke the Sixth Amendment. In *Stovall*, decided the same day as *Wade* and *Gilbert*, the Court summarized those cases to stand for the proposition "that the confrontation is a 'critical stage,' and that counsel is required at all confrontations."[142] Similarly, in *Coleman*, the Court found a "critical stage" was sufficient to trigger the right to counsel.[143] *Coleman* was decided based on the spirit of the law: its reasoning flowed logically from *Powell* through the Court's decision in *Wade*.[144] Specifically, the right to counsel was extended to the defendant in *Coleman* because the "guiding hand of counsel" was "essential to protect[ing] the indigent accused against an erroneous or improper prosecution."[145] The Court never premised its decision on whether the defendant had been indicted.

When *Kirby* was decided, it undermined the principled foundation of Sixth Amendment jurisprudence and reversed the logic of how claims invoking the right to counsel are analyzed. The plurality reduced decades of precedent centered around protecting the accused from the state in criminal prosecutions with a single, conclusory statement.[146] *Powell* and its subsequent cases did not stand for the proposition that the right to counsel attaches "only at or after the time" formal proceedings began.[147] Rather, the caselaw "firmly establish[ed]" that if the accused is faced with an organized prosecution and the right to counsel would help protect the spirit of the Sixth Amendment, the Constitution exists to prevent against injustice.[148] The right to counsel in prior decisions was not conditioned

139. *Id.*; *see also id*. at 226 ("It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.").

140. *Kirby*, 406 U.S. at 688.

141. *Id.* at 689 (citing Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966)).

142. Stovall v. Denno, 388 U.S. 293, 298 (1967).

143. Coleman v. Alabama, 399 U.S. 1, 9-10. (1970).

144. *See id.* at 7-9.

145. *Id.* at 14.

146. *Kirby*, 406 U.S. at 688.

147. *Id.*

148. *See* United States v. Gouveia, 467 U.S. 180, 189 (1984).

on an arbitrary formality. Instead, the right was extended when the defendant could show the state had shifted from investigator to an accuser, because that is the sole purpose of the right to counsel.[149] The fact that these "critical stages" occurred at or after a formal proceeding is wholly irrelevant. Moreover, *Kirby* was not cited by the majority when the same issue was decided a year later because its reasoning was such an egregious constitutional outlier.[150]

2. *Kirby's* Application in Subsequent Cases

One year after *Kirby*, a majority of Supreme Court Justices in *Ash* returned to the *Powell-Wade* Sixth Amendment analysis.[151] In *Ash*, the majority undertook an extensive historical analysis and traced the developments in Sixth Amendment caselaw. First, it noted how changing patterns of criminal procedure and investigation required extending the right to events before trial.[152] The right to counsel expanded "when new contexts appear presenting the same dangers that gave birth initially to the right itself."[153] A notable absence from the *Ash* majority is the holding in *Kirby*.[154] Indeed, Justice Stewart's separate concurring opinion was the only mention of the supposed "firmly established" rule in the Supreme Court's comprehensive analysis of Sixth Amendment caselaw.[155]

Gouveia finally incorporated *Kirby*'s holding into its majority opinion in 1984.[156] The "narrow issue" in this case was whether the Sixth Amendment requires appointment of counsel to prisoners in administrative detention for alleged criminal involvement while under detention.[157] Again, the Court exaggerated *Kirby*'s weight in Sixth Amendment jurisprudence and applied *Kirby* to a fact pattern that does not implicate the right to counsel.

First, the Court said *Kirby* was "confirmed" in subsequent cases, which is a mischaracterization.[158] Moreover, the *Goveia* majority

149. The plurality's final word in *Kirby* specifically noted that petitioner's rights would be better protected by the fifth amendment because it prevents police from suggestive police lineups. *See Kirby*, 406 U.S. at 691.

150. United States v. Ash, 413 U.S. 300, 306-13 (Analyzing the history of the Sixth Amendment, citing twelve different Supreme Court cases and three commentators, but did not mention *Kirby* or the 'formal initiation of criminal proceedings' once).

151. *See id.*

152. *Id.* at 310.

153. *Id.* at 311.

154. *Id.* at 306-13.

155. *Id.* at 321. (Stewart, J., concurring); Kirby v. Illinois, 406 U.S. 682, 688 (1972) (plurality opinion).

156. United States v. Gouveia, 467 U.S. 180 (1984).

157. *Id.* at 185, n.1.

158. *Id.* at 188.

extended, without justification, the Court's decision in *Brewer*.[159] *Brewer* first noted the conflict regarding various precedents on the attachment issue.[160] Then, because there was no reasonable argument to contradict that the right had attached, the Court simply conceded that "[w]hatever else it may mean, the right to counsel . . . means *at least* that a person is entitled to the help of a lawyer at or sometime after judicial proceedings have been initiated."[161] The second case cited by the majority was another plurality opinion[162]; the other two citations offered applied *Kirby* but did not decide whether the right could attach at an earlier point.[163]

Second, the *Gouveia* majority invoked *Kirby* in a case where the facts did not warrant the sweeping conclusion that the right to counsel can only be invoked after formal proceedings were initiated. In *Gouveia*, the defendants were held for nineteen months in administrative detention before being indicted.[164] The defendants' chief argument was a Fifth Amendment due-process violation, their secondary argument was a Sixth Amendment speedy trial violation, and their final argument was that they argued a violation of the right to counsel.[165] Yet the Court invoked *Kirby's* formalistic attachment rule when the rationale for the right to counsel was not implicated by the case. Indeed, the majority rebuked the Court of Appeals for even suggesting counsel could be useful:

> [T]he Court of Appeals must have concluded, quite illogically we believe, . . . that the inmate or his counsel could begin an effective investigation of the crime within the restricted prison walls before even being able to discover the nature of the Government's case.[166]

Overall, the case law and application of the formal attachment method used by the Court contradicts the underlying principles of the Sixth Amendment, and bright-line attachment is found to be a necessary condition only when dismissing superfluous attempts by defendants to invoke the right to counsel.

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159. *Id.* at 193 (Stevens, J., concurring in judgement).

160. Brewer v. Williams, 430 U.S. 387, 398 (1977) ("There has occasionally been a difference of opinion within the court as to the peripheral scope of this constitutional right.").

161. *Gouviea,* 467 U.S. at 193 (emphasis in original) (citing [*Brewer*, 430 U.S. at 398]) (Stevens, J., concurring in judgement).

162. United States v. Mandujano, 425 U.S. 564, 581 (1976) (plurality opinion).

163. *Gouveia*, 467 U.S. at 193, n.3 (citing Estelle v. Smith, 451 U.S. 454, 469-70 (satisfying *Kirby*'s formal language where defendant was indicted and already had an appointed attorney); Moore v. Illinois, 434 U.S. 220, 226-27 (satisfying *Kirby's* formal language where state conceded a preliminary hearing was initiation of adverse criminal proceedings)).

164. *Gouveia*, 467 U.S. at 183.

165. *Id.*

166. *Id.* at 191.

B. Courts of Appeal Look Beyond the Bright-Line Attachment Rule

In *Turner*, the majority opinion unequivocally denied the existence of a circuit split by mischaracterizing the decisions reached in other circuits.[167] In opinions cited in *Turner*, as well as others overlooked by the majority, other circuits decline to extend the right to counsel to earlier stages because the government had not yet solidified its position as an adversary, not based on adherence to a bright-line rule.[168] More specifically, the reason other circuits have not adopted the bright-line rule is because of their adherence to Sixth Amendment jurisprudence – not in spite of it.

For example, the First Circuit's decision in *Roberts*, which was cited in *Turner*, did not rely on the bright-line attachment rule to deny Sixth Amendment protections.[169] The defendant claimed he was denied the right to counsel when police refused to let him speak to his attorney before submitting to a field-sobriety test.[170] The defendant pursued a frivolous argument that since refusing to take a sobriety test carried a mandatory sentence, the right to counsel had attached, but the court concluded this was not sufficient to change a normal investigatory procedure into an adversarial proceeding.[171]

The court disposed the claim because the police had not yet crossed the "constitutionally significant divide from fact-finder to adversary."[172] Indeed, the decision to bring formal charges depended on the outcome of the sobriety test.[173] Instead of rejecting Roberts's strained attempt to invoke Sixth Amendment protections under the bright-line attachment rule, the First Circuit engaged in a principled analysis to determine whether he was subject to intricacies of the adversarial system.[174] More importantly, the First Circuit found the investigation violated the Due Process Clause without an unwarranted mischaracterization of the Sixth

167. *Compare* Turner v. United States, 885 F.3d 949, 953 (6th Cir. 2018), *en banc, cert, denied*, No. 18-106, 2019 U.S. LEXIS 4220 (June 24, 2019).("Because the Supreme Court has not extended the Sixth Amendment right to counsel to any point before the initiation of adversary judicial criminal proceedings, we may not do so"); *with* Roberts v. Maine, 48 F.3d 1287, 1291 (1st Cir. 1995) ("Overall, Supreme Court jurisprudence on the Sixth Amendment appears to allow for few exceptions to the bright-line rule that the right to counsel does not attach until the government initiates official proceedings by making a formal charge.").

168. *See* Roberts v. Maine, 48 F.3d 1287, 1290 (1st Cir. 1995); United States v. Larkin, 978 F.2d 964, 969 (7th Cir. 1992).

169. *Roberts*, 48 F.3d at 1291.

170. *Id.* at 1290.

171. *Id.*

172. *Id.* at 1291 ("Overall, Supreme Court jurisprudence on the Sixth Amendment appears to allow for few exceptions to the bright-line rule.").

173. *Id.*

174. *Id.* at 1290 (citing Moran v. Burbine, 475 U.S. 412, 431 (1986)).

Amendment's attachment question.[175]

The Seventh Circuit followed a similar analysis in *Larkin* and rejected the defendant's Sixth Amendment claim. There, the government mistakenly compelled Larkin to participate in a lineup prior to compelling him to simply appear before the grand jury.[176] Similar to the defendant in *Kirby*, Larkin was subjected to a lineup before an indictment on his federal charges were returned by the grand jury.[177] Unlike *Kirby*, the Seventh Circuit did not dispose of Larkin's claim with a bright-line attachment rule. Instead, the court concluded Larkin had a chance to rebut the presumption that the right to counsel does not attach for pre-indictment police lineups.[178] Since the defendant did not show that the government "crossed the constitutionally significant divide," the right to counsel had not yet attached for him.[179] The Seventh Circuit's decision in *Larkin* is a strong indication that circuits are divided the attachment issue. The court expressly stated that if the defendant can demonstrate that the government had changed its position from fact-finder to accuser, the right to counsel exists "*despite* the absence of formal adversary judicial proceedings."[180]

Further, the Third Circuit found that the "crucial point is that the defendant is guaranteed the protection of counsel from the moment he 'finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'"[181] In *Giamo*, the Third Circuit realized pre-indictment plea negotiations were sufficient to trigger the right to counsel and applied a *Frye-Lafler* analysis to determine whether the defendant's rights were violated.[182] Similar to *Turner*, the defendant in *Giamo* was offered a pre-indictment plea deal that would dismiss charges carrying mandatory minimum sentences, and he alleged his counsel was deficient in relaying

175. *Id.* at 1291.

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

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id*. (citing United States v. Rosen, 487 F.Supp.2d 721, 733 (E.D. Vir. 2007) ("In addition to these cases, several district courts have concluded that a right to counsel existed in pre-indictment plea negotiations. United States v. Fernandez, 2000 WL 534449 (S.D.N.Y.2000); Chrisco v. Shafran, 507 F.Supp. 1312, 1319-20 (D. Del.1981); United States v. Busse, 814 F.Supp. 760, 763 (E.D.Wis.1993)); ("These cases were not followed, however, in United States v. Moody, 206 F.3d 609 (6th Cir.2000), where the Sixth Circuit *reluctantly* (and *unpersuasively*) concluded that the right to counsel does not attach in pre-indictment plea negotiations, despite the fact that in the circumstances there presented, the adversarial posture of the parties had clearly solidified because the defendant had been offered a specific plea bargain.'") (emphasis added)).

181. Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 892 (3d Cir. 1999) (citing Kirby v. United States, 406 U.S. 682, 689 (1972)).

182. United States v. Giamo, 665 F. App'x 154, 156 (3d Cir. 2016).

the prosecution's offer.[183] Unlike *Turner*, Giamo's claim failed because he could not show that he would have accepted the government's offer: not because his right to counsel had not attached yet.[184]

C. Applying a Reasoned Sixth Amendment Analysis to Turner's Claim

The crux of the Supreme Court's attachment rule is that the Constitution does not require a defendant be appointed counsel until the government formally initiates a criminal prosecution. However, the formal initiation of judicial proceedings is not a workable standard in cases involving pre-indictment plea negotiations. First, this subpart argues that, in *Turner*, the government shifted from its role as a fact-finder to the Turner's adversary. It applies the reasoning from Supreme Court cases applying the bright-line attachment rule to show that the government can shift to a defendant's adversary without formal charges being filed. Second, this subpart argues that formal attachment denies the right to counsel at a stage in which the defendant's rights are substantially prejudiced. During pre-indictment plea negotiations, a defendant needs assistance of counsel to navigate complex substantive and procedural components of criminal law.

1. The Government Shifted from Fact-Finder to Adversary

In support of the court's decision on the attachment issue in *Turner*, the court improperly distinguished between critical stages that occur before and after the right to counsel attaches. Specifically, the court cited precedent that held no right to counsel exists during pre-indictment lineups and interrogations, whereas the right is extended when those events occur post-indictment.[185]

In *Kirby* and *Moran,* the Supreme Court held that the right to counsel does not attach for pre-indictment lineups and interrogations.[186] The underlying facts and timeline of the events in both cases are fundamentally distinguishable from those in *Turner*. In *Kirby*, the police arrested the defendant for a robbery he committed the day before and brought the victim to the police station to identify the assailant.[187] In *Moran*, on the night the defendant was arrested, he admitted to

183. *Id.* at 157.

184. *Id.*

185. Turner v. United States*,* 885 F.3d 949, 953 (6th Cir. 2018), *cert, denied*, No. 18-106, 2019 U.S. LEXIS 4220 (June 24, 2019).

186. Kirby v. Illinois, 406 U.S. 682 (1972); Moran v. Burbine, 475 U.S. 412 (1986).

187. *Kirby*, 406 U.S. at 684-85.

committing the murder and unsuccessfully attempted to suppress his confession because no right to counsel attached.[188] Clearly, the government had not yet "committed itself to prosecute" in these cases.[189] The pre-indictment lineup and interrogation both took place on the same day of the arrest, and the police were deeply engaged in the fact-finding, investigatory stage.

In *Kirby,* the Supreme Court expressly rejected interpreting the Sixth Amendment in a way that interfered with a "routine police investigation."[190] In *Turner*, when the ADA engaged in plea negotiations with Turner prior to his federal indictment, there was no ongoing police investigation and the government had already committed itself to prosecuting.[191] Turner's arrest was the result of a joint state-federal task force and had already been indicted on state charges resulting from the same conduct.[192] Within two days, the police obtained a typed, signed confession from Turner, a positive identification by a witness in a lineup, and video surveillance showing Turner committing these armed robberies.[193] Turner was incarcerated from the time he was arrested on the state aggravated robbery charges until the subsequent plea deal with the ADA was executed.[194] In sum, when the ADA offered a plea deal before Turner's indictment, law enforcement's investigation had concluded and "the adverse positions of government and defendant ha[d] solidified."[195]

The ADA made Turner a formal offer of fifteen years' imprisonment for charges that resulted from the same conduct as his state charges, which supports the claim that the government had shifted from its fact-finding function to Turner's adversary.[196] As argued in the *Turner* dissent, prosecutors may only offer a plea deal if they plan to bring charges or have a factual or legal basis to do so.[197] The record did not indicate that

188. Moran v. Burbine, 475, U.S. 412, 431-32.

189. *Kirby*, 406 U.S. at 689.

190. *Id.* at 698.

191. Turner v. United States*,* 848 F.3d 767, 768 (6th Cir. 2017), *aff'd on reh'g*, Turner v. United States, 885 F.3d 949 (6th Cir. 2018), *en banc, cert, denied*, No. 18-106, 2019 U.S. LEXIS 4220 (June 24, 2019).

192. *Id.*

193. Turner Compl. No. 07136332 (Oct. 5, 2007).

194. Turner had four separate case numbers in Shelby County, Tennessee state court: Tennessee v. Turner, No. 08 03612-08620401 (June 3, 2008) ($150,000); Tennessee v. Turner, No 08 01145-08606637 (Feb. 19, 2008) ($100,000); Tennessee v. Turner, No. 08 01146 07136332 (Feb. 19, 2008) ($200,000); Tennessee v. Turner, No. 08 01147-07136332 (Feb. 19, 2008) ($200,000). His combined bond was $650,000 and Shelby County public records do not indicate it was posted in the financial section, though it has a record of Turner paying other court costs.

195. *Kirby*, 406 U.S. at 698.

196. *Turner*, 885 F.3d at 952; *see Turner* 885 F.3d at 954-55.

197. *Turner*, 885 F.3d at 981 (Stranch, J., dissenting) (citing *Cf.* Am. Bar Ass'n, *Criminal Justice Standards for the Prosecution Function*, Standard 2-5.6(g) (4th ed. 2015; U.S. Dep't of Justice, *U.S. Attorneys' Manual* § 9-27. 430 (2017)).

police undertook any additional efforts to investigate Turner's crimes, but even if police continued to investigate, extending a formal plea offer "signals an individual has transitioned from a mere suspect to an accused."[198] Indeed, had Turner promptly accepted the pre-indictment plea deal, his conviction would have been based solely on facts already possessed by the police and presented to the ADA.

The logical conclusion is that the right to counsel attached when the ADA presented a formal plea offer to Turner. If Turner's case was presented to the Courts of Appeals mentioned above, it is likely that *Turner's* facts would be sufficient to cross the "constitutionally significant divide" that triggers the right to counsel.[199] The First and Seventh Circuits cast doubt on the strict adherence to a bright-line attachment rule by interpreting Supreme Court decisions to allow the right to attach before initiating official proceedings.[200] The reason for rejecting the defendants' claims that their right to counsel had attached was that the police were still heavily involved in their respective investigations. In these cases, the facts controlled the analysis—not strict adherence to bright-line rules.

2. The Consequences of Pre-Indictment Plea Negotiations Require Effective Assistance of Counsel

Even in Supreme Court cases relying on the bright-line attachment rule, whether the government's adverse position is solidified and the accused is "immersed in the intricacies of substantive and procedural criminal law" is still relevant in the analysis.[201] When the Court finds that the right to counsel has not yet attached in pre-indictment proceedings, the reason is largely because the two previously stated factors were not satisfied.[202] However, pre-indictment plea negotiations are fundamentally distinguishable from other pre-indictment proceedings because of their exposure to the intricacies of the legal system and their ability to definitively resolve criminal charges against an accused.

For a criminal defendant to meaningfully evaluate a pre-indictment

198. *Id.*

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

200. *Id.*; Roberts v. Maine, 48 F.3d 1287, 1290 (1st Cir. 1995).

201. Rothgery v. Gillespie County, 554 U.S. 191, 198 (2008) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

202. Kirby v. Illinois, 406 U.S. 682, 684 (holding a pre-indictment lineup, that occurred the same day as the defendant's arrest was insufficient for right to counsel to attach); Moran v. Burbine, 475 U.S. 412 (1986) (holding the right to counsel did not attach to an interrogation that took place the night the defendant was arrested for burglary and subsequently confessed to a murder that occurred a year earlier); United States v. Gouveia, 467 U.S. 180 (1984) (holding no right attached during 19 month administrative detention).

plea deal, he or she would have to understand the charges, potential punishment, potential defenses, the strength of the government's case, and the risks of proceeding to trial.[203] In Turner's case, "[e]valuating the offer also required fluency in the complexities of the United States Sentencing Guidelines, a task that is challenging even to experienced attorneys."[204] When plea-negotiations take place before a formal indictment, the accused is not invoking the Sixth Amendment to provide a pre-indictment private investigator,[205] interfere with the police's investigatory function,[206] or even prevent *illegitimate* law enforcement practices before an indictment.[207] Rather, the accused is seeking effective assistance of counsel to navigate the complex legal system that "is for the most part a system of pleas."[208]

Denying the right to counsel during pre-indictment plea negotiations preclude effective assistance during the "accused's *only* adversarial confrontation."[209] Pre-indictment plea negotiations take place in at least twenty-percent of federal criminal prosecutions.[210] In federal court, one of every five criminal defendants' "exposure to the criminal justice system" starts with the prosecutor and "close[s] in the prison system."[211] And although pre-indictment plea deals are becoming increasingly more common, the majority in *Turner* "insulates those confrontations" from constitutional protections and review.[212] This is not meant to discount the desirability of these plea bargains; rather, it is to ensure that the government cannot streamline its criminal prosecutions by taking advantage of those who are unaware of their rights.

The Supreme Court should have granted certiorari on *Turner* to correct the Sixth Circuit's outdated interpretation of the right to counsel. The right to counsel should attach when a prosecutor extends a formal plea

203. Turner v. United States, 885 F.3d 949, 981 (6th Cir. 2018) *en banc, cert, denied*, No. 18-106, 2019 U.S. LEXIS 4220 (June 24, 2019). (Stranch, J., dissenting).

204. *Id.*

205. *Gouveia*, 467 U.S. at 191 ("[O]ur cases have never suggested that the purpose of the right to counsel is to provide a defendant with a preindictment private investigator[.]") (Emphasis added).

206. Maine v. Moulton, 474 U.S. 159, 179-80 (1985) ("[T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities.").

207. *Kirby*, 406 U.S. at 691 ("When a person has not been formally charged with a criminal offense, [the Due Process Clause of the Fifth and Fourteenth Amendments] strike[] the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures . . . and purposeful investigation of unsolved crime.").

208. Lafler v. Cooper, 566 U.S. 156, 170 (2012).

209. *Turner*, 885 F.3d at 982 (Stranch, J., dissenting).

210. Petition for Writ of Certiorari, at *4, n.1, Turner v. United States, 885 F.3d 949 (6th Cir. 2018) *en banc*, No. 18-106 (July 20, 2018).

211. *Turner*, 885 F.3d at 982 (Stranch, J., dissenting).

212. *Id.* at 983.

offer to an accused, even if he has not been formally indicted. Upon a finding that the right to counsel attaches after the government extends a formal plea offer, the *Frye-Lafler* analysis used for post-indictment plea deals would be readily transferrable.

Under the *Frye-Lafler* test, the Sixth Circuit, on remand, would likely have found that Turner received ineffective assistance of counsel. First, he would be able to show that he would have accepted the pre-indictment plea offer but-for the deficient assistance of his counsel. Turner accepted his state plea deal.[213] And he promptly accepted the post-indictment plea offer negotiated by his new attorney, despite receiving a longer prison sentence. [214] The prejudice prong of the *Frye-Lafler* anaylsis would have also been satisfied because Turner received ten additional years' incarceration as a result of not accepting the ADA's initial plea. [215]

IV. CONCLUSION

In conclusion, the Sixth Circuit's *en banc* decision in *Turner* improperly deferred to *Kirby*'s bright-line attachment rule and precluded Turner from bringing a claim for ineffective assistance of counsel during pre-indictment plea negotiations. Contrary to the *Turner* majority's assertion that *Kirby* requires the conclusion reached by the court, substantial caselaw exists to demonstrate the existence of a circuit split and reluctance among the lower courts to use the bright-line rule as a cop-out when deciding close cases of whether the right to counsel attached. The Sixth Amendment, properly understood and applied, should extend to prevent the accused from having to accept a pre-indictment plea deal without the protection of counsel in order to avoid a harsher prison sentence from a post-indictment plea with counsel.

Pre-indictment plea negotiations operate in a constitutional "blind-spot" between the Fifth and Sixth Amendment. The negotiations take place after the Fifth Amendment's protections end and before the Sixth Amendment's protections begin. Since the Court refuses to act in the interest of the accused, the accused is not afforded any protection from the constitution against the organized forces of the government. When the accused is presented with a formal plea offer – a fixed sentence for pleading guilty to specific charges – the interest served by providing

213. Turner v. United States, 848 F.3d 767, 768 (6th Cir. 2017), *aff'd on reh'g,* Turner v. United States, 885 F.3d 949, 952 (6th Cir. 2018) (en banc), *cert, denied*, No. 18-106, 2019 U.S. LEXIS 4220 (June 24, 2019).

214. Turner v. United States, 885 F.3d 949, 952 (6th Cir. 2018) (en banc), *cert, denied*, No. 18-106, 2019 U.S. LEXIS 4220 (June 24, 2019).

215. Missouri v. Frye, 566 U.S. 134, 157 (2012) (quoting Glover v. United States, 531 U.S. 198, 203 (2000)) (any amount of [additional] jail time has Sixth Amendment significance.

counsel to the accused is substantial, and a countervailing governmental interest has yet to be presented to the Court. Instead, the government relies on the Court's deference to a bright-line attachment rule as a cop-out, a bright-line rule that should be overturned.

As a result of the Supreme Court denying certiorari on *Turner*'s attachment question, lower courts will continue to deprive the accused of the right to counsel during this critical stage. As prosecutors utilize new means to secure guilty pleas prior to formal indictment, the bright-line attachment approach is inapplicable and will deny the right to effective assistance of counsel at the only adversarial stage of the criminal process. By continuing to rely on this cop-out, the Court leaves the accused without the resources necessary to face the government in our adversarial system, and the accused is tasked with representing him or herself against the United States government without the slightest chance of prevailing.