PROVIDING BROADER SIXTH AMENDMENT PROTECTIONS: WE CAN AFFORD TO GIVE INDIGENT DEFENDANTS MORE

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Though the Framers intended for the Sixth Amendment to secure criminal defendants' right to a fair trial by providing them with the right to effective assistance of counsel, the full right to effective assistance of counsel is not currently guaranteed. A recent Sixth Circuit case, Turner v. United States*, held that a defendant does not have the right to effective assistance of counsel until the right to counsel attaches. This is troubling given that in* Turner*, the defendant, John Turner, received a sentence ten years greater than the sentence he would have received but for his state counsel's ineffectiveness. The Sixth Circuit rejected Turner's ineffective assistance of counsel claim because under current jurisprudence, the right to counsel has a bright-line rule: it does not attach until an indictment is brought or the defendant is brought before a judge. Turner's attorney for his state case negotiated a plea deal with federal prosecutors before a federal indictment was brought, and therefore, the right to counsel did not attach in the federal case. Thus, Turner did not have the right to effective assistance of counsel.*

This tension between ineffective assistance of counsel and when the right to such counsel attaches is striking: it deprives criminal defendants of a Sixth Amendment right. Courts can resolve this tension, however, by recognizing that (1) effective assistance of counsel is an independent Sixth Amendment right; (2) the right to counsel raises different administrative and fairness concerns than effective assistance of counsel; and (3) courts apply the different strands of the Sixth Amendment independently, differently, and respective of the concerns the particular case raises. Furthermore, courts should promptly resolve this tension because the racial disparity in outcomes indicates that Turner *situations will fall unevenly along poor*

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and minority lines. The Sixth Amendment will not completely and effectively fulfill its purpose of guaranteeing criminal defendants the right to effective assistance of counsel unless it is properly interpreted to protect defendants like John Turner.

I. INTRODUCTION

> "*A justice system which tolerates injustice is doomed to collapse.*"[1]

A recent Sixth Circuit Case, *Turner v. United States*, shows how criminal procedure jurisprudence fails to provide adequate protections for those who need it most.[2] The Sixth

[1] THE SENTENCING PROJECT, REDUCING RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS iii (2d ed. 2008) (quoting Leonard Noisette, former director, Neighborhood Defender Service of Harlem, New York), https://www.sentencingproject.org/wp-content/uploads/2016/01/Reducing-Racial-Disparity-in-the-Criminal-Justice-System-A-Manual-for-Practitioners-and-Policymakers.pdf [https://perma.cc/SVS2-TNX6].

[2] Turner v. United States, 885 F.3d 949 (6th Cir. 2018).

Amendment guarantees a criminal defendant the right to counsel, but it also provides a defendant the right to effective assistance of counsel.[3] Right to counsel law, however, seems to preclude providing relief for ineffective assistance of counsel received during pre-indictment plea negotiations.[4] The Supreme Court has not directly ruled on the issue,[5] but circuit courts have held that the right to counsel must attach before a defendant has the right to effective assistance of counsel and therefore have not entertained the merits of whether counsel can be ineffective pre-indictment.[6] This is unjust. The technical application of *when* the right to counsel attaches is in tension with full protection against ineffective assistance of counsel. This tension may exacerbate the stark disparities between the wealthy and poor that exist in the criminal justice system.

The facts of *Turner* exemplify when this tension arises. John Turner was charged under Tennessee state law with four counts of armed robbery.[7] Turner's attorney represented him during plea negotiations with a state prosecutor. During the plea negotiations, the state prosecutor informed Turner's attorney that federal prosecutors also wanted to charge Turner with federal robbery and federal firearms charges.[8] Federal prosecutors then reached out to Turner's attorney and offered a plea deal that would result in a fifteen-year sentence—sixty-seven years below the maximum sentence Turner was facing.[9] The federal prosecutors offered this plea deal *before* bringing a federal indictment and told Turner's attorney that the offer expired upon such an indictment.[10] Turner avers that he was never told about the plea deal before it lapsed.[11] He hired a new attorney and pleaded to a twenty-five-year sentence in the federal case.[12] Turner brought an ineffective assistance of counsel claim, but

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[3] U.S. CONST. amend. VI.

[4] This was the outcome in *Turner*, 885 F.3d 949.

[5] Turner's lawyers filed a writ of certiorari with the Supreme Court on July 20, 2018. Turner v. United States, 885 F.3d 949 (6th Cir. 2018), *petition for cert. filed*, No. 18-106 (July 20, 2018).

[6] *Id.* at 955.

[7] *Id.* at 951.

[8] *Id.* at 952.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

the Sixth Circuit held that Turner could not be granted relief for ineffective assistance of counsel,[13] reasoning that he did not yet have the right to counsel in the federal case.[14]

Indigent defendants are significantly impacted by their inability to gain relief for ineffective assistance during pre-indictment plea negotiations. Consider Turner's situation, which arose because there were both state and federal charges. This is not an unusual situation due to the increasing federalization of crime.[15] In this type of situation, an indigent defendant must use a state-appointed attorney in the state case and a federally appointed attorney in the federal case.[16] But the defendant does not currently receive the right to a federal attorney until *after* a federal indictment.[17] As a result, the state attorney deals with any federal pre-indictment plea deals. The state attorney may fail to provide efficient representation in federal pre-indictment plea negotiations.[18] As *Turner* suggests, such a defendant may not only be deprived of an opportunistic plea deal, but also denied recourse for an attorney's inability to relay the opportunity.[19] At the very least, the tension between the right to counsel's attachment and ineffective assistance during pre-

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[13] *Id.* at 955.

[14] *Id.* ("But Turner's Sixth Amendment right to counsel had not yet attached during those preindictment plea negotiations. There can be no constitutionally ineffective assistance of counsel where there is no Sixth Amendment right to counsel in the first place.").

[15] *See generally* Dick Thornburgh et al., *The Growing Federalization of Criminal Law*, 31 N.M. L. REV. 135 (2001).

[16] A defendant will most likely need a different attorney for her federal prosecution and state prosecution because the state public attorney system is funded and operated differently than the federal public defense system. *See* CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES 3 (2000) (showing that the only types of counsel in federal district court criminal cases were private attorneys, federal defender organizations, or pro se, and never included any state public defenders).

[17] Rothgery v. Gillespie, 554 U.S. 191, 225 (2008).

[18] Public defenders are not inherently less competent than a private attorney, but a lapse in communicating a plea deal seems plausible given the often-massive case load of a public defender and limited resources. *See* BUREAU OF JUSTICE STATISTICS, NCJ 231175, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007, at 1 (2010), https://www.bjs.gov/content/pub/pdf/clpdo07.pdf [https://perma.cc/Q7FK-V8SM] (finding that seventy-three percent of county-based public defenders exceeded the maximum recommended limit of cases received per attorney).

[19] This was the outcome in *Turner*, 885 F.3d at 952.

indictment plea negotiations is more likely to arise for indigent defendants.

This tension should cause concern, particularly when considering that in 2012, "97 percent of federal cases and 94 percent of state cases"[20] and "90 to 95 percent of [public defenders'] clients plead[ed] guilty."[21] Because guilty pleas are ubiquitous, prosecutors have an incentive to begin the negotiations as early as possible, including pre-indictment.[22] This tension within Sixth Amendment jurisprudence should not be accepted, and a variety of realities plaguing the criminal justice system exacerbate the urgency for resolution of this injustice. First, Attorney General Eric Holder acknowledged that the criminal justice system fails to provide competent legal services to the poor.[23] Second, grave disparities exist in plea outcomes for African American defendants, who are more likely to rely on public defenders compared to White defendants.[24]

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[20] Erica Goode, *Stronger Hand for Judges in the "Bazaar" of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), https://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html [https://perma.cc/F5BH-5V8E].

[21] Jaeah Lee et al., *Charts: Why You're in Deep Trouble If You Can't Afford a Lawyer*, MOTHER JONES (May 6, 2013), http://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts/# [https://perma.cc/VP8E-428D].

[22] Teresa White Carns & John Kruse, *A Re-Evaluation of Alaska's Plea Bargaining Ban*, 8 ALASKA L. REV. 27, 38 (1991) ("By 1989, however, Anchorage prosecutors were describing the routine 'pre-indictment' hearings as opportunities for charge bargaining in most cases." (footnote omitted)); Steven J. Mulroy, *The Bright Line's Dark Side: Pre-Charge Attachment of the Sixth Amendment Right to Counsel*, 92 WASH. L. REV. 213, 217 (2017) ("[P]re-indictment plea negotiations are not uncommon."); David N. Yellen, *Two Cheers for a Tale of Three Cities*, 66 S. CAL. L. REV. 567, 569 (1992) ("[I]t is likely that [pre-indictment plea] bargaining has increased under the [federal sentencing] guidelines . . . .").

[23] Eric Holder, Attorney Gen., U.S. Dep't of Justice, Speech at the Justice Department's 50th Anniversary Celebration of the U.S. Supreme Court Decision in *Gideon v. Wainwright* (Mar. 15, 2013), https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-justice-departments-50th-anniversary-celebration-us [https://perma.cc/6PDK-2MXJ].

[24] *See generally* Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 B.C. L. REV. 1187 (2018); *see also* WOLF HARLOW, *supra* note 16, at 9 (finding that about seventy-seven and seventy-three percent of Black and Hispanic defendants, respectively, used a public defender in state cases, and about sixty-five and fifty-six percent of Black and Hispanic defendants used a public defender in federal cases, respectively).

Having an attorney during plea negotiations and eventually at the plea deal acceptance provides the most adequate protection for defendants. This is especially true for any poor or minority individuals who have been charged with a crime and have no knowledge of the law. The right to counsel poses larger problems that are beyond the scope of this Note. This Note argues that indigent defendants who have pre-indictment counsel in some capacity must also have the right to effective assistance of counsel relief under the Sixth Amendment for any pre-indictment plea bargaining that takes place.[25] Admittedly, pre-indictment plea negotiations are more likely to take place in the white-collar setting than for "street crimes." This Note, however, argues that the facts exemplified by *Turner* ("*Turner* situations") both happen and result in outcomes that have a profound impact on poor and minority defendants. The Court should consider this when analyzing Sixth Amendment relief for pre-indictment plea negotiations.[26]

This Note further argues that the supposed Sixth Amendment tension between ineffective assistance of counsel and the right to counsel can and should be resolved. In Part II, this Note details the law on when the right to counsel attaches. Significantly, it does not currently exist for pre-indictment plea deals, which presumably also precludes ineffective assistance of counsel relief for advice during pre-indictment plea negotiations. Next, Part III shows that providing ineffective assistance of counsel relief for pre-indictment plea negotiations is not an affront to Supreme Court precedent because the right to effective assistance of counsel is an independent Sixth Amendment right, and the Court applies the different strands of the Sixth Amendment in relation to the different administrative and fairness concerns each raise. The socioeconomic and racial disparities that exist in the criminal justice system, as well as the extent to which the inability to gain relief for ineffective assistance of counsel during pre-indictment plea negotiations exacerbates this disparity, are discussed in Part III. Part IV

[25] Turner v. United States, 885 F.3d 949, 955 (6th Cir. 2018) (holding that ineffective assistance of counsel cannot be raised unless the right to counsel attaches).

[26] *Id.* at 952 (deciding to review whether the right to counsel had attached instead of ruling on ineffective assistance of counsel for a defendant charged with aggravated robbery).

concludes by arguing that courts can apply the ineffective assistance of counsel standard to pre-indictment plea negotiations whenever an attorney represents a defendant in some capacity.

II. COURTS HAVE DETERMINED WHEN AND WHERE THE SIXTH AMENDMENT RIGHT TO COUNSEL ATTACHES EXCEPT FOR PRE-INDICTMENT PLEA NEGOTIATIONS

It is important to understand both where ineffective assistance of counsel and right to counsel attachment law currently stand and why there is ostensible tension between the two. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[27] Early on, the Sixth Amendment was understood to protect all criminal defendants in federal cases.[28] In 1963, the Supreme Court recognized the fundamental unfairness of a state justice regime that limits access to counsel for defendants without resources. The Court then interpreted the Sixth Amendment to require states to provide counsel for all indigent defendants in a felony criminal case[29] or for any crime that will result in imprisonment for six or more months.[30] Over time, courts have highlighted the pivotal role lawyers play in ensuring defendants are guaranteed a fair trial and defending against the potential deprivation of one's liberty. Still, the Supreme Court needed answers to two questions: (1) when exactly does the Sixth Amendment right to counsel attach, thus requiring that a lawyer be provided, and (2) are there any implied rights regarding the right to counsel?

The Supreme Court made clear in *Rothgery v. Gillespie* that a bright-line rule determines when the right to counsel attaches and a lawyer is needed.[31] As most bright-line rules function, the rule draws a visible, clear line—criminal defendants must stand in front of a judge or be formally charged before they have the right to an attorney.[32] Some lower courts have

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[27] U.S. CONST. amend. VI.

[28] Mulroy, *supra* note 22, at 219 (citing Luis v. United States, 136 S. Ct. 1083, 1089 (2016)); *see also* Johnson v. Zerbst, 304 U.S. 458 (1938).

[29] Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

[30] Argersinger v. Hamlin, 407 U.S. 25, 30–31 (1971).

[31] *See* Rothgery v. Gillespie, 554 U.S. 191 (2008).

[32] *Id.* at 198.

bent the line at times and instead apply a standard approach.[33] The standard approach implies that there are times before an individual stands before a judge or is indicted when the state is extremely adversarial. The standard approach supports an understanding of the right to counsel as commencing protection for a defendant whenever the state begins to use the law as a sword. The Supreme Court is, however, clear that a bright-line rule must apply at that point.[34]

In *Strickland v. Washington*, the Supreme Court held that the Sixth Amendment affords a criminal defendant the right to effective assistance of counsel.[35] The Court found that the Due Process Clause requires a fair trial and the Sixth Amendment defines what a fair trial is.[36] The *Strickland* court then held that a fair trial includes effective assistance of counsel.[37] In a system that emphasizes the role of counsel to ensure fair outcomes, the right to counsel is meaningless absent protection against inadequate counsel. Unlike with a right to counsel claim, courts apply a standard to determine whether there is ineffective assistance of counsel at a critical point in the proceedings.[38] Ineffectiveness can only be proven by showing that counsel was inadequate and that the inadequate performance also prejudiced the defense in such a way that the defendant was "deprive[d] . . . of a fair trial."[39]

As *Turner* highlights, right to counsel law currently denies relief for ineffective assistance of counsel received pre-indictment when staggered charges are brought by a state prosecutor and a federal prosecutor.[40] This Part offers a succinct analysis of the ineffective assistance of counsel and the right to counsel Sixth

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[33] Mulroy, *supra* note 22, at 217.

[34] *See Rothgery*, 554 U.S. at 198.

[35] Strickland v. Washington, 466 U.S. 668 (1984). The standard for ineffective assistance of counsel is discussed in Section II.A.

[36] *Id.* at 685.

[37] *Id.*

[38] *See Rothgery*, 554 U.S. at 198 (showing that the right to counsel has a bright-line rule).

[39] *Strickland*, 466 U.S. at 687.

[40] Turner v. United States, 885 F.3d 949, 955 (6th Cir. 2018).

Amendment strands.[41] The analysis concludes with contrasting the two stands in hopes of highlighting the problem with the current friction.

A. Current Ineffective Assistance of Counsel Law

The Supreme Court has held that the Sixth Amendment protects criminal defendants from ineffective assistance of counsel.[42] The watershed case, *Strickland v. Washington*, is a case in which the Court found that there was no ineffective assistance of counsel in the face of substantial defense counsel shortcomings.[43] In *Strickland*, a criminal defendant pleaded guilty to three murders and received the death penalty.[44] The defendant then raised an ineffective assistance of counsel claim for his attorney's decision not to seek a psychiatric evaluation and present other meaningful arguments to the sentencing judge. The Court found that the attorney's conduct did not amount to ineffective assistance of counsel.[45]

The *Strickland* court established the standard for evaluating ineffective assistance of counsel claims: a defendant must prove that his legal counsel was not reasonably effective and that the ineffectiveness had a prejudicial effect.[46] Far from a bright-line rule, a judge must make an individual judgement to determine whether counsel's actions were objectively impermissible. Determining whether there was ineffective assistance of counsel is intensely dependent on the facts of the case. This stands in stark contrast to the right to counsel, where the judge merely inquires whether a defendant has seen a judge or been indicted.[47]

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[41] For further analysis, see Brandon K. Breslow, *Signs of Life in the Supreme Court's Uncharted Territory: Why the Right to Effective Assistance of Counsel Should Attach to Pre-Indictment Plea Bargaining*, 62 FED. L. 35, 35 (2015) (arguing that the dicta in these cases can help extend the Sixth Amendment to pre-indictment plea bargaining).

[42] *Strickland*, 466 U.S. at 668.

[43] *Id.* at 669.

[44] *Id.* at 672–75.

[45] *Id.* at 698.

[46] *Id.* at 687.

[47] *See* Rothgery v. Gillespie, 554 U.S. 191, 198 (2008) (summarizing the Court's precedent regarding the right to counsel as having "pegged commencement" of a criminal prosecution to "'the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment'").

The Supreme Court has, in a line of cases, found a cognizable ineffective assistance of counsel claim specifically for advice given during post-indictment plea negotiations.[48] This type of claim is available for both possible outcomes of the negotiations: plea deals that are accepted and plea deals that lapse or are denied.[49] The difference is in measuring prejudice. When the ineffective assistance of counsel claim stems from an accepted plea deal, the defendant must "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[50]

Significantly, in *Lafler* and *Frye*, the Supreme Court not only extended its ineffective assistance of counsel analysis to lapsed or denied plea deals, but also noted that a plausible remedy for ineffective counsel during plea deals would be to simply sentence the defendant according to the original plea deal.[51] That is, the remedy may be that the defendant is sentenced consistent with the plea deal that defense counsel's deficient assistance precluded the defendant from accepting. In *Lafler*, the defendant was counseled to reject a plea deal with a recommendation for a fifty-one to eighty-five-month sentence for murder.[52] Lafler's attorney wrongly believed that because the victim of the crime was shot below the waist, the state could not prove Lafler's intent to murder.[53] The defendant was ultimately found guilty based on defense counsel's wrong assumption and was sentenced to 185 to 360 months.[54] He successfully claimed ineffective assistance of counsel and was offered the original plea deal as a remedy.[55]

Succinctly, ineffective assistance of counsel applies a standard approach to determining whether a defendant should be granted relief based on counsel conduct at trial or during plea deals. In contrast, the Sixth Amendment right to counsel line of cases does not apply a standard approach.

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[48] *See* Lafler v. Cooper, 566 U.S. 156 (2012); Missouri v. Frye, 566 U.S. 134 (2012); Hill v. Lockhart, 474 U.S. 52 (1985).

[49] *See Lafler*, 566 U.S. 156 (plea denied); *Frye*, 566 U.S. 134 (plea lapsed); *Hill*, 474 U.S. 52 (plea accepted).

[50] *Hill*, 474 U.S. at 59.

[51] *See generally Lafler*, 566 U.S. 156; *Frye*, 566 U.S. 134.

[52] *Lafler*, 566 U.S. at 161.

[53] *Id.* at 166.

[54] *Id.* at 160, 166.

[55] *Id.* at 174.

B. Right to Counsel for Pre-Indictment Interrogations Has a Bright-Line Rule

In *United States v. Gouveia*, the Court held that there is no Sixth Amendment right to counsel during pre-indictment interrogations.[56] Originally, in *Escobedo v. Illinois*, the Court seemed to create advantageous rules for resourceful defendants.[57] In *Escobedo*, the Supreme Court held that when an "investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect," the Sixth Amendment right attaches and a defendant can have a lawyer present if demanded during police interrogations before the filing of any charges.[58] However, because this case dealt with police conduct and not prosecutors' conduct, *Escobedo* is interpreted as a Fifth Amendment case and has diverged from relevant precedent analyzing Sixth Amendment protections.[59]

Gouveia held that a blanket rule applies to both indigent and wealthy criminal defendants: the right to counsel "attaches only at or after the initiation of adversary judicial proceedings."[60] In *Gouveia*, two prisoners were accused of killing another inmate.[61] Prison officials removed the accused men from general population, placed them in administrative segregation, and conducted interrogations without counsel present.[62] The defendants were held in segregation for nineteen months while the prison investigated the incident, which included additional interrogations of the defendants. Finally, a grand jury indicted

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[56] United States v. Gouveia, 467 U.S. 180, 187 (1984).

[57] 378 U.S. 478, 490 (1964).

[58] *Id.*

[59] Eve Brensike Primus, *Disentangling* Miranda *and* Massiah*: How to Revive the Sixth Amendment Right to Counsel as a Tool for Regulating Confessions*, 97 B.U. L. REV. 1085, 1101 (2017) ("In *Miranda*, the Court . . . . reinterpreted *Escobedo* as a Fifth Amendment case (thus destroying *Escobedo*'s precedential value for Sixth Amendment purposes) . . . ." (footnote omitted)); *see also* Mulroy, *supra* note 22, at 225 ("In *Kirby*, the Court explained that 'the Court in retrospect perceived that the "prime purpose" of *Escobedo* was not to vindicate the . . . right to counsel as such, but, like *Miranda*, "to guarantee the full effectuation of the privilege against self-incrimination."' (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

[60] *Gouveia*, 467 U.S. at 187.

[61] *Id.* at 182.

[62] *Id.*

the two suspects.[63] The men argued that their Sixth Amendment right to counsel had been violated when they were held for nineteen months in segregation while interrogations were being conducted without being appointed counsel.[64]

The Supreme Court relied on a sweeping, bright-line rule: before any formal charges are brought, an individual is not afforded the Sixth Amendment's right to counsel.[65] Therefore, the defendants in *Gouveia* did not have their Sixth Amendment right violated. The implications of the holding in *Gouveia* are that if a defendant cannot pay for a lawyer to be available at the start of a criminal investigation, the defendant ultimately is not afforded the ability to have one.[66] Indigent defendants during pre-indictment interrogations are not afforded the right to counsel during those interrogations.

C. Right to Counsel for Pre-Indictment Lineups Has a Bright-Line Rule

In *Kirby v. Illinois*, the Supreme Court was also clear that an individual is not afforded the Sixth Amendment's right to counsel in pre-indictment lineups.[67] There, a plurality of the Court agreed that the right to counsel has a clear, distinct line; the right attaches only when "adversary judicial proceedings have been initiated against [a defendant]."[68]

The facts of *Kirby* illustrate the problems that can arise from a bright-line rule, especially for those who cannot demand that a lawyer be present. In that case, someone had robbed the victim and that victim reported the theft to the police.[69] The following day, police stopped Kirby because the officers misidentified him as someone with an arrest warrant for an

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[63] *Id.*

[64] *Id.*

[65] *Id.* at 187.

[66] Though a wealthy defendant may not have the right to have his counsel present, a poor defendant receives no counsel at all. A wealthy defendant can summarize the interrogation to his retained attorney and be counseled on how to proceed and the implications of his interrogation. A poor defendant does not receive this benefit because of this ruling. This can be used to force indigent defendants to accept plea deals.

[67] 406 U.S. 682, 687 (1972).

[68] *Id.* at 688 (denying the right to counsel to a defendant who was placed in a pre-indictment witness lineup and identified by the victim).

[69] *Id.* at 684.

unrelated crime.[70] When Kirby produced his identification, he also displayed a wallet that had the complaining witness's identification inside.[71] This made the officers suspicious, so they brought him to the police station.[72] The officers did not know about the reported robbery until they brought him to the station.[73] Without Kirby's knowledge, and before he was advised of his right to counsel, the robbery victim was called to the station and subsequently identified Kirby as the robber.[74] Kirby was indicted for the robbery six weeks later, and the victim's identification of him during the pre-indictment lineup was used at trial.[75]

The Supreme Court declined Kirby's motion to suppress the pre-indictment lineup evidence.[76] It found that while the exclusionary rule applies to post-indictment lineups, the same cannot be said about pre-indictment lineups because the right to counsel had not attached.[77] The Court found that the police were conducting a routine investigation and declined to hold that it was adversarial before the state had "committed itself to prosecute."[78] This is evidence that there is no Sixth Amendment right to counsel for pre-indictment lineups.

D. Right to Counsel Bright-Line Rule Excludes the Role of the Prosecutor in Determining When the Right to Counsel Attaches

The bright-line rule applies as stated: an indictment must be filed or the defendant must have come before a judge.[79] This is true regardless of prosecutorial knowledge of whether

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[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 684–85.

[75] *Id.* at 685.

[76] *Id.* at 690.

[77] *Id.* at 688; *see also* Wayne H. Carlton, Jr. & Carol A. Tootle, Note, *Constitutional Law—Criminal Procedure—Counsel Required at Lineup Only If Formal Judicial Proceedings Have Been Initiated*, 47 TUL. L. REV. 899 (1973) (arguing that while *Kirby* implemented a bright-line rule, the Court ignored fairness and justice in doing so).

[78] *Kirby*, 406 U.S. at 689.

[79] Rothgery v. Gillespie, 554 U.S. 191, 206 (2008).

the judicial proceedings took place.[80] In *Rothgery v. Gillespie*, the Supreme Court reversed the Fifth Circuit and held what is arguably the Supreme Court's clearest application of a bright-line rule determining when the right to counsel attaches.[81] *Rothgery* invokes a strong principle—a judicial proceeding *or* an indictment will invoke a defendant's Sixth Amendment right to counsel, and prosecutorial knowledge of the judicial proceeding is irrelevant.[82] This is a strong indication that the bright-line rule leaves no room for discretion and excludes the right to counsel for any pre-indictment context.

In that case, Rothgery was wrongly arrested for "felon in possession of a firearm" after a background check erroneously reported that he had been previously convicted of a felony.[83] Following Texas' criminal procedure, he went before a magistrate judge who was to determine whether there was probable cause for his arrest and to set bail.[84] Rothgery was indigent and at various times requested counsel, but the local court declined his request.[85] However, the state prosecutor never knew that Rothgery was arrested and had appeared before a judge.[86] Eventually, a Texas grand jury indicted Rothgery, but a state prosecutor dismissed the indictment once Rothgery finally obtained a lawyer who showed that the criminal record was erroneous.[87] Rothgery sued for violation of his Sixth Amendment rights, but the Fifth Circuit denied relief because the state prosecutor did not have knowledge of the case.[88] The Supreme Court rejected this argument.[89] The Court held that "the first formal proceeding is the point of attachment."[90] This new bright-line rule seems to indicate that the first formal proceeding is

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[80] *Id.* at 210.

[81] Rebecca Yoder, Rothgery v. Gillespie County*: Applying the Supreme Court's Latest Sixth Amendment Jurisprudence to North Carolina Criminal Procedure*, 33 CAMPBELL L. REV. 477, 481 (2011) ("The Court's language strongly suggests an attempt to create a bright-line rule applicable in every state criminal court.").

[82] *Rothgery*, 554 U.S. at 210.

[83] *Id.* at 195.

[84] *Id.* at 195–96.

[85] *Id.* at 196.

[86] *Id.* at 197–98.

[87] *Id.* at 197.

[88] *Id.* at 198.

[89] *Id.* at 199.

[90] *Id.* at 203.

either a defendant's first judicial appearance *or* an indictment. Prosecutorial knowledge is not necessary for the right to attach. The *Rothgery* court's interpretation of the law was not new, however.[91] Instead, it reinforced its stance on taking a bright-line approach to when the right to counsel attaches and that the bright-line rule articulated in *Gouveia* and *Kirby* includes appearance before a judge to know whether there is probable cause and for a bail determination.[92]

The disparity in outcomes under the status quo for those who can pay for an attorney and those who cannot must be considered. If Rothgery could have afforded to retain an attorney who would have shown that the record was erroneous, his charges could have been dismissed before even appearing before a judge. A lawyer could have entered into pre-indictment negotiations and resolved the issue or sought a disposition. Consider, in addition, the *Turner* scenario: Rothgery could have also been charged with a federal firearm crime and entered into plea negotiations with a federal prosecutor before an indictment. In this hypothetical situation, Rothgery's state attorney could have misadvised him during the pre-indictment negotiations in his federal case, impacting the outcome of his federal case. Yet, according to *Turner*, he would be unable to bring an ineffective assistance of counsel claim.[93]

E. The Supreme Court Has Not Directly Ruled on the Right to Counsel in Pre-Indictment Plea Negotiations

The Supreme Court has not ruled on whether the right to counsel attaches to pre-indictment plea negotiations.[94] However, the bright-line rule applied in *Gouveia*, *Kirby*, and *Rothgery* implies that the right to counsel does not attach during pre-indictment plea negotiations because pre-indictment plea

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[91] Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 342 (2011) ("*Rothgery*'s specific holding of when the right to counsel attaches affirmed prior right to counsel rulings . . . ." (footnote omitted)).

[92] *Kirby* stated that "adversary judicial [criminal] proceedings" invoke the Sixth Amendment. Kirby v. Illinois, 406 U.S. 682, 688 (1972).

[93] *See* Turner v. United States, 885 F.3d 949, 955 (6th Cir. 2018).

[94] *See* Mulroy, *supra* note 22.

negotiations happen before there is an indictment or a judicial proceeding.[95]

For example, in *United States v. Moody*, the Sixth Circuit held that pre-indictment plea deals do not trigger the right to counsel.[96] In *Moody*, Mark Moody voluntarily approached the FBI in order to cooperate on potential charges pertaining to a conspiracy to deal cocaine.[97] At that point, an indictment had not been brought.[98] The prosecution appreciated his cooperation and offered Moody a five-year-sentence plea offer.[99] Moody hired an attorney who then declined the prosecution's offer before realizing that the defendant made various self-incriminating statements during plea bargaining.[100] The prosecutor used these statements and eventually forced the defendant to plead guilty, but at that point, the five-year sentence was off the table. Instead, the defendant pleaded guilty to a ten-year sentence.[101] Moody brought an ineffective assistance of counsel claim, but the Sixth Circuit denied his claim.[102] The Sixth Circuit understood that it was a mere formality that the government had not filed an indictment before the plea offer, but declined to set aside, vacate, or correct the defendant's sentence for ineffective assistance of counsel.[103] Under the bright-line rule, the right to counsel did not attach and therefore, Moody did not have a right to an ineffective assistance of counsel claim. The right to counsel can only attach "at or after the initiation of judicial

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[95] *C.f. Turner*, 885 F.3d 949.

[96] 206 F.3d 609 (6th Cir. 2000) (holding that pre-indictment plea deals do not trigger the right to counsel).

[97] *Id.* at 611.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* at 612 ("The district court granted the motion for downward departure, and imposed a sentence of 120 months of imprisonment . . . .").

[102] *Id.* at 615 ("But for the delay of the prosecution in filing charges, Moody clearly would have been entitled to the effective assistance of counsel. Under the Supreme Court's and our Circuit's approach, he is not—even though the point at which the actions of Moody's counsel fell below an objective standard of reasonableness was no less a 'critical stage' of the proceedings against him.").

[103] *Id.* ("We believe it to be a mere formality that the government had not indicted Moody at the time that it offered him a deal and invited him to seek the assistance of counsel.").

criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[104] It ruled against Moody despite also stating that during pre-indictment plea deals "the adverse positions of the government and the suspect have solidified" and the bright-line rule "raises the specter of the unwary defendant agreeing to surrender his right to a trial in exchange for an unfair sentence without the assurance of legal assistance to protect him."[105]

The *Moody* holding applied to the holding in *Turner v. United States*.[106] The Sixth Circuit felt bound by *Moody* when it denied Turner relief.[107] The court could not vacate or set aside the federal sentence because the state counsel's ineffective performance happened before any indictment or judicial proceeding in the federal case.[108]

An Oregon district court, however, saw the issue differently in *United States v. Wilson*—it not only held that the right to counsel attached, but also awarded the defendant ineffective assistance of counsel relief for advice during pre-indictment plea negotiations.[109] The defendant, Jay Wilson, was found with a large quantity of illegal drugs and a gun.[110] Before an indictment was filed, Wilson decided to cooperate with the authorities, confessed his role in a drug smuggling operation, and provided critical intelligence that led to more drug busts.[111] He wanted to enter into pre-indictment plea negotiations, but the federal prosecutor insisted on an attorney

[104] *Id.* at 614 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

[105] *Id.* at 615–16.

[106] Turner v. United States, 885 F.3d 949 (6th Cir. 2018).

[107] *Id.* at 951–52.

[108] *Id.* at 955 ("There can be no constitutionally ineffective assistance of counsel where there is no Sixth Amendment right to counsel in the first place.").

[109] 719 F. Supp. 2d 1260, 1266 (D. Or. 2010). For a list of the split between courts on this issue, see Mulroy, *supra* note 22, at 216. The circuit split Mulroy focuses on is not specific to pre-indictment plea deal negotiations, however, but rather examines whether the Supreme Court has implemented a bright-line rule or standard for any pre-indictment conduct.

[110] *Wilson*, 719 F. Supp. 2d at 1264.

[111] *Id.*

being present.[112] After the state provided Wilson an attorney, the prosecutor offered him a six-year plea deal.[113] The public defender refused to accept the plea deal and instead countered that a deal be made after discovery.[114] The prosecutor declined this offer and then filed an indictment. At trial, Mr. Wilson was sentenced to twenty years in prison.[115]

The defendant filed a motion to set aside or vacate his sentence for ineffective assistance of counsel based on his public defender's advice pre-indictment,[116] but the district court insisted that it legally needed to address whether the Sixth Amendment right to counsel attached.[117] The district court first reiterated that the Supreme Court has not held whether the Sixth Amendment applies to "formal pre-indictment plea negotiation."[118] The court then took a more legal realist view of the issue: instead of drawing a bright line, the district court held that "the right to the effective assistance of counsel rests on the nature of the confrontation between the suspect-defendant and the government, rather than a 'mechanical' inquiry into whether the government has formally obtained an indictment."[119] It then found that the right to counsel had attached in this case. The district court went on to review whether Wilson's counsel was ineffective and had led to the twenty-year sentence.[120]

The different outcomes in *Wilson* and *Turner* are significant.[121] Though both defendants had a lawyer pre-indictment, only one defendant received relief for ineffective assistance of counsel—a corrected sentence of six years. The

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[112] *Id.* ("Petitioner insisted on speaking to the prosecutor about obtaining a 'deal' in exchange for his cooperation. Assistant United States Attorney ('AUSA') Charles Stuckey informed him that [sic] would not discuss plea negotiations unless petitioner obtained an attorney.").

[113] *Id.*

[114] *Id.*

[115] *Id.* at 1265.

[116] *Id.*

[117] *Id.* at 1266.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 1269.

[121] *Wilson*, unlike *Turner*, did not deal with a state crime and then a subsequent federal charge. This Note's proposed solution, discussed in Part IV, does not make this distinction. However, that difference is critical to understanding how indigent and minority defendants are more likely affected by the outcome, which is discussed in Part III.

other was denied a chance to argue that his counsel was ineffective because the Sixth Circuit held that the bright-line rule about when the right to counsel attaches precludes relief for ineffective assistance of counsel during pre-indictment plea negotiations, even when a lawyer was present during pre-indictment proceedings.

The issue is especially grave for indigent individuals who rely on appointed counsel and will most likely have different counsel if both state and federal prosecutors bring charges. Until the Supreme Court rules on whether a criminal defendant can have relief for ineffective assistance of counsel during pre-indictment plea negotiations, an indigent defendant who has state-appointed counsel will be left without constitutional protections against a situation in which the state attorney gives advice that adversely affects the defendant's federal case.

III. TENSION BETWEEN THE CURRENT BRIGHT-LINE RULE FOR RIGHT TO COUNSEL AND PROVIDING RELIEF FOR INEFFECTIVE ASSISTANCE OF COUNSEL DURING PRE-INDICTMENT PLEA NEGOTIATIONS MUST BE REMEDIED TO ADDRESS RACE AND CLASS ISSUES IN THE STATUS QUO

The issue described does not need to exist; courts can provide ineffective assistance of counsel relief for advice received during pre-indictment plea negotiations without it being an affront to precedent or the text of the Constitution. This becomes clearer if the right to effective assistance of counsel is analyzed as its own independent strand of the Sixth Amendment. The Court stated in *McMann v. Richardson* that "if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."[122] This implies that courts must hold lawyers to their obligation to provide effective assistance of counsel, and no criminal defendant can be deprived of the ability to have effective assistance of counsel. This makes sense given that the Sixth Amendment provides for "*Assistance* of

[122] 397 U.S. 759, 771 (1970).

Counsel."[123] *Strickland* relied on *McMann* to hold that a defendant has the right to effective assistance of counsel and then elaborated on what the standard is for measuring ineffectiveness.[124] Therefore, instead of depriving a criminal defendant of a constitutional right, courts must resolve the apparent tension between its Sixth Amendment jurisprudence on right to counsel and ineffective assistance of counsel.

Courts can do this by considering the administrative and fairness concerns the Supreme Court considers in the different Sixth Amendment strands and realizing that courts apply each strand independently based on the concerns the immediate case raises. This tension must be resolved. The criminal justice system relies on plea negotiations, and these negotiations can and do happen pre-indictment.[125] Additionally, the facts of cases in which this issue is more likely to arise strongly influence how poor individuals and minorities are treated in the criminal justice system. In these cases, a state brings charges, a state public attorney is assigned, and then federal prosecutors negotiate a plea with the state-appointed attorney before a federal indictment is brought.[126] Instead of viewing the negative impacts of pre-indictment plea negotiations as an innate, perennial issue, courts can provide relief that assists in remedying the pitfalls of the current system. This Part analyzes how the courts can resolve the apparent tension between right to counsel attachment analysis and providing ineffective assistance of counsel relief for defendants who have a deficient attorney during pre-indictment plea negotiations.

While the Supreme Court is preoccupied with ex ante clarity for right to counsel cases, that concern ought not to apply in the ineffective assistance of counsel context, as those claims are invariably assessed post-conviction. Ineffective assistance

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[123] U.S. CONST. amend. VI (emphasis added).

[124] Strickland v. Washington, 466 U.S. 668, 686 (1984) ("The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases—that is, those presenting claims of 'actual ineffectiveness.' . . . [But] [t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

[125] Mulroy, *supra* note 22, at 217.

[126] These were the facts in *Turner*, expect that there was not a state appointed attorney. Turner v. United States, 885 F.3d 949 (6th Cir. 2018).

of counsel issues cannot raise the same concerns as right to counsel issues because of the context in which they are raised, and because they guard against different injustices. The differences between ineffective assistance of counsel and right to counsel create tension and should be viewed as legal fiction. Courts should provide relief for harmful legal advice obtained during pre-indictment plea negotiations.

Additionally, this Part analyzes why this tension must be resolved. Given the way poor and minority defendants interact with the criminal justice system, this tension denies relief to many and perpetuates the disparities that plague the criminal justice system. The courts should consider this impact and understand the policy concerns the current supposed tension raises.

A. The Necessity of Ex Ante Clarification of Current Sixth Amendment Right to Counsel Cases

A bright-line rule is a meaningful way to address the fairness and administrative concerns the Supreme Court has when reviewing when the right to counsel constitutionally attaches. The Sixth Amendment's right to counsel precedent developed out of a need to protect the lay defendant, and this necessity underpins all of the Court's right to counsel opinions.[127] For instance, *Gideon* compelled states to provide counsel for all criminal defendants, not just in capital cases. This is because an attorney can help provide a fair criminal procedure in the adversarial system and a fair criminal system goes beyond capital crimes.[128] The Court emphasized the importance of having the right to an attorney when it stated that "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law."[129] Lay defendants need protection,

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[127] Some scholars believe the right to counsel developed not just to protect lay defendants, but specifically because of the courts' paternalistic nature and desire to protect African Americans, who were seen as inherently lay defendants. *See generally* Kristen Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649 (2017). Others directly relate the concern to protect the lay defendant with the history of the right pre-Constitution. *See* Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-To-Counsel Doctrine*, 93 NW. L. REV. 1635, 1637–57 (2003).

[128] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[129] *Id.* at 345.

and the Court believed that this is the pivotal role attorneys play within the adversarial system.

Requiring counsel to be provided is not enough to protect the lay defendant. Courts must decide *when* in the proceedings an attorney must be provided. In *Gouveia*, the Court articulated that the purpose of the Sixth Amendment was to "protect[] the unaided layman at critical confrontations with his adversary."[130] The Court wants the criminal process to be perceived as fair. A process that allows a prosecutor who is well-versed in the law to begin prosecuting someone without an attorney does not have a perception of fairness.

These fairness concerns galvanized the Court to apply a bright-line rule for determining when the right to counsel attaches. In order to protect lay defendants in adversarial criminal proceedings, ex ante clarity is necessary. This clarity is precisely what a bright-line rule provides. Looking retrospectively is not good enough because it leaves defendants on their own to answer complex legal questions that can impact their outcomes.[131] There can be remedies after the fact, but sometimes remedies are hard to provide—it is difficult to know what would have been different if a lawyer was present. Instead of conjecturing about this, the Court unequivocally states when in the process the defendant must have an attorney.

Right to counsel cases also have administrative concerns that support the need for ex ante clarity and therefore, a need for a bright-line rule. First, generally, if a state has an obligation to provide counsel in a far-ranging number of cases after *Gideon* and *Argersinger*, then the Court must be clear about when the state must provide this benefit. The Court cannot reasonably expect a state to determine when to provide counsel on a case-by-case standard with fair results.[132] Secondly, and similarly, right to counsel law should not be allowed to impede a state's routine investigation techniques that help ensure the correct defendant

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[130] United States v. Gouveia, 467 U.S. 180, 189 (1984); *see also* Rothgery v. Gillespie, 554 U.S. 191, 198 (2008) (discussing when the right to counsel attaches and why it does).

[131] *Gideon*, 372 U.S. at 345 (stating that a lay defendant needs help in the "*science* of law") (emphasis added).

[132] Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15, 19 (2016) (arguing that *Gideon* has been a failed promise and is consistently undermined by underfunding and overworking public defender offices and by "legislators, taxpayers, and lower-level judges nationwide").

is arrested.[133] A standard-based approach to the attachment analysis would essentially cause prosecutors to have minitrials while investigating a matter before an indictment is brought to show that their actions were not "adversarial" in nature.[134] A bright-line rule eliminates this concern.

The Court has historically been concerned about these administrative problems when reviewing pre-indictment lineups.[135] In *United States v. Kirby*, the Court saw that the defendant was asking the Court "to import into a routine police investigation an absolute constitutional guarantee historically and rationally applicable only after the onset of formal prosecutorial proceedings."[136] The Court stated that it enforces a different doctrine to ensure there is no abuse during investigations, but the Sixth Amendment right to counsel is not suitable.[137] Ex ante clarity ensures that the state knows how it can conduct routine lineups, and the same can be said for pre-indictment investigations. The current bright-line rule is manageable and allows courts to guard against their administrative concerns. The Court, therefore, relies on other doctrines and promulgated rules by the American Bar Association to ensure investigations are conducted in a fair manner. However, it denies that the Sixth Amendment provides doctrinal use.[138]

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[133] In fact, there are clear ethical rules showing that courts desire to protect routine investigation techniques while ethically regulating adversarial prosecutor contact. For further examples of the Court's concern with impeding investigations outside the context of this Note, see Lisa F. Salvatore, United States v. Hammad*: Encouraging Ethical Conduct of Prosecutors During Pre-Indictment Investigations*, 56 BROOK. L. REV. 577 (discussing Disciplinary Rule 7-104(A)(1) and how the Court became wary about applying it to pre-indictment investigations).

[134] The adversarial language is used here as a standard to mirror the law stated in lower courts, which apply a standard-like approach. *See, e.g.*, United States v. Wilson, 719 F. Supp. 2d 1260, 1266 (D. Or. 2010).

[135] Kirby v. Illinois, 406 U.S. 682, 690 (1972).

[136] *Id.*

[137] *Id.* at 691 ("The Due Process Clause of the Fifth and Fourteenth Amendments forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification.").

[138] *Id.* (holding that the Sixth Amendment did not apply to routine police investigations but that this does "not . . . suggest that there may not be occasions during the course of a criminal investigation when the police do abuse identification procedures[;] [s]uch abuses are not beyond the reach of the Constitution").

B. Courts Do Not Need Ex Ante Clarity When Giving Defendants Relief Under the Sixth Amendment Right to Effective Assistance of Counsel

A bright-line rule is unnecessary because the Sixth Amendment's guarantee of effective assistance of counsel is not a ground rule establishing fair parameters at the start of legal proceedings. Instead, this guarantee is supposed to correct mishaps that happen during the pursuit of justice. Ineffective assistance of counsel claims innately present a different problem than the right to counsel attachment analysis. Courts should, therefore, deal with an ineffective assistance of counsel claim differently than, and separately from, the attachment analysis.

Ineffective assistance of counsel is retrospective—no ex ante clarity is necessary. This is because ineffective assistance of counsel does not become a problem until conviction. This would be true for pre-indictment ineffective assistance of counsel claims as well. It is not about setting rules beforehand, but more like bringing a gun to a gun fight when the gun's trigger malfunctions, causing a fatal ending for the defendant. So, though courts are concerned with ex ante clarity for right to counsel cases, courts cannot and do not need to have the same concerns when providing relief for ineffective assistance of counsel.

To claim that one's right to effective assistance of counsel was violated, a defendant is required to show that (1) there is a deficient performance by counsel and (2) the deficiency prejudiced the defendant.[139] The standard implies that the right can only be reviewed retrospectively and is factually dependent. The reviewing court is not permitted to conjecture whether counsel will be defective and prejudice the defendant. The fact that there needs to be retrospective review is simply a byproduct of what the claim is supposed to protect and rectify.

Significant consideration must be paid to the different contexts in which the right to counsel and ineffective assistance of counsel strands of the Sixth Amendment arise in order to understand the different administrative concerns. Most right to counsel claims are brought to suppress evidence and so are

[139] Strickland v. Washington, 466 U.S. 668 (1984).

raised before conviction and sometimes before trial.[140] For example, a lineup that happens post-indictment without a lawyer present cannot be introduced at trial.[141]

Ineffective assistance of counsel claims, instead, are usually brought only after the defendant loses his or her case. First, defendants cannot raise the claim in most state proceedings until collateral review or in federal habeas claims.[142] Second, if the defendant is not convicted, then the deficient performance becomes moot. Proving prejudice becomes insurmountable when a defendant is acquitted. The prejudice prong is easier to review when a defendant is convicted because a court is reviewing specific action taken by counsel already present and its impact on the adverse outcome. Moreover, no matter what concerns a court may have about the effectiveness of counsel, the concerns are inconsequential if the defendant is not convicted. In fact, the sole concern the Court addresses in *Strickland* is that courts can only review whether counsel was deficient with the benefit of hindsight, and the Court clearly stated that performance must be viewed from the lens of counsel's perspective at the time.[143]

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[140] *See* Beth G. Hungate-Noland, Texas v. Cobb*: A Narrow Road Ahead for the Sixth Amendment*, 35 U. RICH. L. REV. 1191 (discussing the Supreme Court's exclusionary rule for evidence obtained in violation of the right to counsel).

[141] *See* United States v. Wade, 388 U.S. 218 (1967) (holding that the use of a post-indictment lineup violated the defendant's Sixth Amendment right and could not be used at trial, but remanding for review the issue of the admissibility of an in-court identification by the same witness).

[142] *See generally* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007) (arguing that only allowing a defendant to raise an ineffective assistance of counsel claim in a collateral review hearing is inadequate); *see also* Eve Brensike Primus, *Effective Trial Counsel After* Martinez v. Ryan*: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604 (2013) (reviewing the effect of a Supreme Court case that allowed for ineffective assistance of counsel in state court to be raised in federal habeas claims).

[143] *Strickland*, 466 U.S. at 689.

1. The Supreme Court Has Adopted Retrospective Review in Ineffective Assistance of Counsel Claims Under the Sixth Amendment Within the Plea Negotiation Context, Illustrating the Necessity of Applying This Approach to Plea Negotiations

The court needs to adopt retrospective review of ineffective assistance of counsel during plea bargaining for similar reasons. The problem of ineffective assistance of counsel is not an issue until a plea deal is reached and entered. Furthermore, and significantly, there are no ex post concerns because the remedy afforded for deficient plea negotiation advice does its best to rectify the prejudice the defendant received.

The Supreme Court has accepted ineffective assistance of counsel claims pertaining to advice given during post-indictment plea negotiations.[144] *Hill v. Lockhart* is the first example of this. The *Hill* court was forced to apply an inherently retrospective standard. Hill's court-appointed attorney negotiated a plea deal in which the prosecutor would recommend a thirty-five-year sentence to be served concurrently and the judge accepted both the plea and the sentence recommendation.[145] This negotiation appeared seamless until Hill was informed that because he was a formerly convicted felon, he must serve one-half of his sentence to become eligible for parole compared to the one-third he was told he would need to serve by his attorney.[146] Hill's counsel wrongly advised Hill about this issue, and Hill then claimed

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[144] This was done in a string of cases. *See* Lafler v. Cooper, 566 U.S. 156 (2012) (holding that Cooper was prejudiced by counsel's deficient performance after rejecting a guilty plea); Missouri v. Frye, 566 U.S. 134, 145 (2012) (holding that "defense counsel has the duty to communicate formal offers from the prosecution" and that as a result, counsel was deficient in failing to communicate to defendant prosecutor's written plea before it expired); Hill v. Lockhart, 474 U.S. 52 (1985) (holding in part that the *Strickland v. Washington* test for evaluating claims of ineffective assistance of counsel applies to guilty plea challenges based on ineffective assistance of counsel).

[145] *Hill*, 474 U.S. at 54 ("The trial judge accepted the guilty plea and sentenced petitioner in accordance with the State's recommendations.").

[146] *Id.*

ineffective assistance of counsel.[147] The *Hill* court held that the standard was not just proving counsel was deficient, but that a defendant would need to show he would have foregone accepting the plea and gone to trial but for the deficient performance[148]—a standard that requires review only post-plea deal.[149] The Supreme Court's acceptance of retrospective review within the plea context is true for plea deals that are not accepted as well. Indeed, this was the case in *Lafler v. Cooper* and *Missouri v. Frye*.[150] The Court can, therefore, readily apply retrospective review to pre-indictment plea negotiations.

The Court applies the same *Strickland* analysis when reviewing ineffective assistance of counsel claims when a defendant pleads that his counsel's deficient performance led to a lapse or denial of a plea deal.[151] As previously noted, what is particularly interesting about the precedent within this specific context is the remedy courts may impose. That is, courts can essentially compel the state to reoffer the plea deal.[152] This remedy is extraordinary. It fixes any issues with the defective counsel by providing what would have been the outcome if not for defense counsel's prejudicial performance. Remedies for right to counsel do not provide this fix. Instead, they simply remand for a new trial without knowing what the outcome would have been. This available remedy cannot adequately address the issue of a lay defendant facing a prosecutor alone, no matter how responsible and ethical the prosecutor. Instead of clarifying when a lawyer must be present, a court reviewing ineffective assistance of counsel can use a case-by-case basis to look for

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[147] *Id.* at 55 ("According to petitioner, his attorney had told him that if he pleaded guilty he would become eligible for parole after serving one-third of his prison sentence. In fact, because petitioner previously had been convicted of a felony in Florida, he was classified under Arkansas law as a 'second offender' and was required to serve one-half of his sentence before becoming eligible for parole.").

[148] *Id.* at 59–60.

[149] This Note is not discussing conflict of interest claims, which are brought under the Sixth Amendment effective assistance of counsel strand.

[150] Lafler v. Cooper, 566 U.S. 156 (2012) (holding that Cooper was prejudiced by counsel's deficient performance after rejecting a guilty plea); Missouri v. Frye, 566 U.S. 134, 145 (2012) (holding that "defense counsel has the duty to communicate formal offers from the prosecution" and that as a result, counsel was deficient in failing to communicate to defendant prosecutor's written plea before it expired).

[151] Strickland v. Washington, 466 U.S. 668, 687 (1984).

[152] *Lafler*, 566 U.S. at 166.

the lapse or denial of a plea offer and offer a just remedy. This is an appropriate remedy even when the defendant had a full trial.[153]

Understanding the significance of plea deals in the criminal justice system, the Court decided to extend ineffective assistance of counsel protections to post-indictment plea negotiations.[154] The nature of these claims force retrospective review, making any right to counsel attachment analysis irrelevant, and the remedies provided make any ex ante concerns moot. This analysis can be extended to pre-indictment negotiations. Post-indictment negotiations are not different than pre-indictment negotiations, except for the mere formality of an indictment. Ineffective assistance of counsel claims for post-indictment are analyzed retrospectively. This analysis can be easily applied to pre-indictment plea deal negotiations. Courts would still be asked to review pre-indictment plea negotiations post-conviction—the ill-advice provided pre-indictment would still drive post-indictment outcomes. There is nothing inherent to pre-indictment plea negotiations that make their review for deficient counsel different than that of negotiations detached from right to counsel in the post-indictment context.

C. The Significance of Retrospective Review in Ineffective Assistance of Counsel Claims: Different Strands and Applications of the Sixth Amendment

The fact that the Court applies a retrospective analysis detached from a right to counsel analysis is significant because it indicates that the Court applies the strands of the Sixth Amendment differently according to the concerns each raises. The Sixth Amendment provides that in "all criminal prosecutions" a defendant will "have the Assistance of Counsel for his defense."[155] The Supreme Court has articulated three different rights that are inherent in the right to have "Assistance of Counsel": (1) the right to an attorney, including the right to publicly appointed counsel; (2) the right to effective assistance

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[153] *Id.* at 174.

[154] *Frye*, 566 U.S. at 143 ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

[155] U.S. CONST. amend. VI.

of counsel; and (3) the right to counsel of one's choice.[156] Thus, ineffective assistance of counsel is analyzed as an independent strand of the Sixth Amendment.

The Supreme Court created a distinction between different strands of the Sixth Amendment in *United States v. Gonzalez-Lopez*.[157] *Gonzalez-Lopez* concerned the Sixth Amendment's promise that a criminal defendant has not just the right to counsel, but a right to counsel of one's choice.[158] Gonzalez-Lopez was charged with conspiracy to distribute marijuana and tried to replace the attorney his family hired with an attorney of his own.[159] This attorney applied for admission *pro hac vice* three times, but the district court denied him the ability to represent Gonzalez-Lopez each time.[160] The Eighth Circuit found that the district court erroneously deprived Gonzalez-Lopez of the counsel of his choice and vacated the conviction.[161]

The Supreme Court upheld the Eighth Circuit's order, but Justice Scalia, writing for a majority of the Court, took pains to explain that the right to counsel and the right to counsel of one's choice are different strands of the Sixth Amendment that are distinct from the right to effective assistance of counsel.[162] The government argued that a defendant who claims he was deprived of the right to counsel of his choice should not obtain a remedy unless he can show that his actual attorney was ineffective.[163] The Court, however, stated that erroneous deprivation of counsel bears directly on the framework within

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[156] *See* United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (holding that the right to counsel includes the right to counsel of one's choice); *Strickland*, 466 U.S. 668 (discussing the right to effective assistance of counsel); Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (discussing the right to counsel in criminal proceedings).

[157] *Gonzalez-Lopez*, 548 U.S. 140 (holding that the defendant not only had the right to counsel but also a right to counsel of his choosing).

[158] *Id.* at 144; *see also* U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.").

[159] *Gonzalez-Lopez*, 548 U.S. at 142.

[160] *Id.* at 142–43 (finding that the district court not only denied Low the ability to represent the defendant, but issued sanctions against him).

[161] *Id.* at 143.

[162] *Id.* at 147 ("The right to select counsel of one's choice, by contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trial.").

[163] *Id.* at 144.

which trial proceeds.[164] It is impossible to know how the trial would have proceeded if conducted by entirely different counsel, similar to ineffective assistance of counsel. The Court then highlighted that the right to counsel of one's choice raises different concerns than effective assistance of counsel.[165] With these concerns in mind, the right to counsel of one's choice does not require a "prejudice inquiry."[166] The Court granted the defendant a new trial without deciding if the defendant was prejudiced by not being represented by his counsel of choice.[167] The facts of this case show the different administrative and justice concerns the Court has in dividing the different kinds of relief under the Sixth Amendment.[168]

Lower courts have also divided the right to counsel from the right to effective assistance of counsel.[169] In a class action case brought by previously convicted defendants against the State of New York, for example, defendants claimed that their Sixth Amendment rights were violated and sought to overhaul the state's public defense system.[170] At the time of their arraignment, the class members had not been appointed an attorney, nor did they have an attorney at "subsequent proceedings."[171] Some went unrepresented for five or more months.[172] Additionally, some defendants could never contact their attorney and had various motions and waivers filed on their behalf without being informed or consenting.[173] The claim was filed post-conviction, so the trial court found the claim to be a violation of their right to effective assistance of counsel. The court found the systemic relief sought inapplicable and denied the claim.[174]

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[164] *Id.* at 148.

[165] *Id.* at 144.

[166] *Id.* at 148.

[167] *Id.*

[168] *Id.* at 144.

[169] *See, e.g.*, Hurrell-Harring v. State, 930 N.E.2d 217 (N.Y. 2010).

[170] *Id.* at 219.

[171] *Id.* at 222.

[172] *Id.* (finding that this general issue was true for ten out of the twenty plaintiffs).

[173] *Id.*

[174] *Id.* at 220.

The New York Court of Appeals construed the complaint as claiming that New York violated plaintiffs' right to counsel.[175] First, the court summarized the different strands of the Sixth Amendment and how each raised different concerns to provide different relief.[176] The court then found this claim wholly different from effective assistance of counsel, both in the nature and the type of relief that can be granted.[177] The court stated that "[g]iven the simplicity and autonomy of a claim for non-representation, as opposed to one truly involving the adequacy of an attorney's performance, there is no reason . . . why such a claim cannot or should not be brought without the context of a completed prosecution."[178] The court then construed the claim as one for a violation of a right to counsel rather than one for ineffective assistance of counsel.[179] This may have been motivated by the clarity of applying the bright-line rule under the right to counsel law.[180]

Hurrell-Harring and *Gonzalez-Lopez* illustrate the legal fiction that the Sixth Circuit relies on in *Turner v. United States*. Courts can separate the different strands of the Sixth Amendment and provide relief depending on which strand is violated. While dicta in *Gonzalez-Lopez* supports this claim, *Hurrell-Harring* is an example of a court providing relief under the Sixth Amendment based on the facts of the case and the different concerns under the different Sixth Amendment strands. The New York Court of Appeals separated strands of the Sixth Amendment according to different concerns. The variance of concerns with regard to ineffective assistance of counsel attachment highlight why the Sixth Amendment tension in reviewing pre-indictment plea deals should be eradicated. The Court should not deprive a defendant of the effective assistance of counsel strand of the Sixth Amendment when the concerns it wants to guard against are present. By understanding that the concerns regarding ineffective representation

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[175] *Id.* at 222 ("The above summarized allegations, in our view, state cognizable Sixth Amendment claims.").

[176] *Id.* at 221–22.

[177] *Id.* at 225–26.

[178] *Id.*

[179] *Id.* at 222–24. ("These allegations state a claim, not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*.").

[180] *See id.* at 225 (noting that analysis of the right to counsel is not a fact-intensive inquiry).

in pre-indictment plea negotiations are the same as for post-indictment plea negotiations, courts can afford to give ineffective assistance of counsel relief within this context.

D. The Court Should Be Wary of the Impact of the Current Tension Between the Attachment of the Right to Counsel and Ineffective Assistance of Counsel Pre-Indictment on Poor People and Minorities

In addition to recognizing that it can justify applying a strand of the Sixth Amendment and extend Sixth Amendment relief to pre-indictment plea negotiations based on different administrative concerns, the Supreme Court should also consider the impact the current lack of protection has on poor and minority communities.[181] The facts of *Turner* indicate the circumstances under which this problem is more likely to arise.

Consider a scenario expanding on the facts in *Turner*: an indigent defendant is investigated and indicted on a state aggravated robbery charge. She is appointed a state public defense attorney who begins to create a defense for her trial. The state eventually passes the case on to federal prosecutors, and so additional federal charges based on the same conduct may potentially be filed, but no indictment is filed yet. The federal prosecutor decides to reach out to the state-appointed attorney to discuss plea negotiations pre-indictment. Meanwhile, the state attorney is working hard on the defendant's case, but the attorney is overworked, as is often the case, with a caseload straining the attorney's means and resources. The state-appointed attorney fails to communicate the plea negotiations—which resulted in a fifteen-year plea deal offer—to the defendant. This deficient counsel effectively seals the defendant's fate in the federal charges. After she gets indicted on the federal crime, the defendant is appointed a federal

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[181] For additional arguments for extending the Sixth Amendment to the pre-indictment context, see Mulroy, *supra* note 22 (arguing that the Court's language in its opinions offer up an ability to extend the Sixth Amendment to pre-indictment situations, and that fairness requires extending the Sixth Amendment). *See generally* Breslow, *supra* note 41 (arguing that the Court's dicta gives way for extending the Sixth Amendment specifically to pre-indictment plea bargaining).

defense attorney.[182] The federal prosecutor decides to take the original, more lenient pre-indictment plea deal off the table. The new, and perhaps better, attorney cannot fix what the previous attorney did. The defendant eventually accepts a plea deal of twenty-five years.[183] The advice from the first attorney prejudiced her outcome, but the defendant probably does not have a claim; she did not have a right to counsel in her federal case and therefore had no right to effective assistance of counsel pre-indictment.

This situation—an indigent defendant undergoing state proceedings and a state-appointed public defender and then subsequent federal charges with a change of representation—is not merely hypothetical.[184] Though it affects a limited class of people (and the right to counsel is a more widespread issue), the injustice in pre-indictment proceedings still exists and will continue to exist unless addressed. It is well-documented that federal law has criminalized many acts that used to be solely

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[182] Because the state public attorney system is funded and operated differently than the federal public defense system, the defendant most likely will need a different attorney for each case. *See* WOLF HARLOW, *supra* note 16, at 3.

[183] This was the case in Turner v. United States, 848 F.3d 767 (6th Cir. 2018).

[184] *See, e.g.*, Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239, 240 (2005) (recounting a criminal defendant who could have been prosecuted in state court but was instead prosecuted in federal court and arguing that this scenario is an outgrowth from state-federal prosecutor cooperation); Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721 (2002) (recounting that two criminal defendants were charged with the same crime, but federal prosecutors dropped the charges on one because of state court proceedings yet continued prosecuting the other, which led to the former defendant receiving probation and the latter receiving thirteen months in prison).

state crimes.[185] There is a large (and growing) amount of criminal conduct that can expose a defendant to two different criminal trials—state and federal. This over-federalization also increases the likelihood of *Turner* outcomes.

In fact, cases similar to *Turner*—state trial and subsequent federal charges—are not difficult to find.[186] What is more concerning is that there is an increasing amount of cooperation between federal and state prosecutors, especially because federal sentences are harsher.[187] This will only create more cases with facts like *Turner* and leave indigent defendants without Sixth Amendment relief when there is a possibility they will need it. In fact, "90 to 95 percent of [public defenders'] clients plead guilty."[188] Further, this plea negotiating is not limited to post-indictment negotiations.[189] The current climate is ripe for indigent defendants to face *Turner* situations. Unfortunately, the unfairness in the current system also falls unevenly along racial lines.

1. Racial Implications

The racial fabric of the criminal justice tapestry is profound, and excluding Sixth Amendment relief from pre-indictment plea negotiations serves to perpetuate this systemic

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[185] Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 980 (1995) (proposing a principle for how to limit federalization); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 647 (1997) ("As a result of the growth of federal criminal law, much criminal conduct is now subject to federal as well as state prosecution."); Michael A. Simmons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 897 (2000) ("There is no doubt that many federal criminal statutes cover conduct that is usually (and has traditionally been) prosecuted by state and local authorities.").

[186] *See* Miller & Eisenstein, *supra* note 184.

[187] *Id.* (arguing that federal-state prosecution cooperation is growing considerably).

[188] Lee et al., *supra* note 21.

[189] *See, e.g.*, Turner v. United States, 885 F.3d 949 (6th Cir. 2018).

issue.[190] Scholarship on the significant racial disparities is plentiful.[191] For instance, one study found that "African Americans are incarcerated in state prisons at a rate that is 5.1 times the imprisonment of [W]hites."[192] Another study found that

> [i]n 2014, African Americans constituted 2.3 million (34 percent) of the total 6.8 million prison population in the U.S. . . . and although African Americans and Hispanics made up approximately 32 percent of the U.S. population, they comprised 56 percent of all incarcerated people in the U.S. in 2015.[193]

This disparity exists in a world where plea deals are the usual disposition of a case, pre-indictment plea deals included.

Studies demonstrate that African American defendants are not only forced into more plea bargains, but they receive harsher plea deals. One study, for example, examined racial disparities in the plea-bargaining process in Wisconsin and found startling results:

> White defendants are twenty-five percent more likely than [B]lack defendants to have their most serious initial charge dropped or reduced to a less severe charge . . . . As a result, [W]hite defendants who face initial felony charges are approximately fifteen percent more likely than [B]lack defendants to end up being convicted of

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[190] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 13 (2010) ("[M]ass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race.").

[191] *See, e.g.*, JESSICA EAGLIN & DANYELLE SOLOMON, REDUCING RACIAL AND ETHNIC DISPARITIES IN JAILS: RECOMMENDATIONS FOR LOCAL PRACTICE 13 (2015) ("[Nationally,] African Americans and Hispanics are significantly overrepresented in jails.").

[192] ASHLEY NELLIS, THE SENTENCING PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 3 (2016), https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [https://perma.cc/WD6D-6QQN] (citing statistics from the Bureau of Justice).

[193] Michael Kiehne, *Why Diversity Still Matters*, 96 MICH. BAR J. 22, 24 (2017) (footnote omitted).

> a misdemeanor instead. In addition, [W]hite defendants initially charged with misdemeanors are approximately seventy-five percent more likely than [B[lack defendants to be convicted for crimes carrying no possible incarceration, or not to be convicted at all.[194]

Wisconsin is not an outlier. In New York City, African American defendants are nineteen percent more likely to be offered a plea deal that includes jail or prison time; the disparity is even more significant for misdemeanor drug offenses.[195] Furthermore, the racial disparities in outcomes exist in a context in which African Americans are more likely to rely on a public defender in felony cases than White defendants.[196]

These statistics have grave implications. First, African Americans are more prone to *Turner* situations. With the increased federalization of crime, *Turner* situations are not only made more likely, but there is also a reasonable assumption that these situations will likely fall along the current racial lines in the criminal justice system. The federalization of crimes is not implemented in a way that will stop the current systemic racial injustice. Second, *Turner* situations can be seen as exacerbating the racial disparities in plea outcomes. Given that African Americans face harsher plea deals, there is no reason to think that the harsher plea deals happen only post-indictment.[197] Therefore, it is likely that these disparities will happen pre-indictment and could be the result of ineffective assistance of counsel—Turner received a sentence that was ten years longer

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[194] Berdejó, *supra* note 24, at 1191 (footnotes omitted).

[195] BESIKI KUTATELADZE ET AL., VERA INST. OF JUSTICE, RACE AND PROSECUTION IN MANHATTAN 7 (2014), http://archive.vera.org/sites/default/files/resources/downloads/race-and-prosecution-manhattan-research-summary-v2.pdf [https://perma.cc/HRR2-ZZWE].

[196] CHRISTOPHER HARTNEY & LINH VUONG, NAT'L COUNCIL ON CRIME & DELINQUENCY, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE US CRIMINAL JUSTICE SYSTEM 14 (2009). In 2009, for example, it was found to be 4.7 times more likely. *Id.*

[197] There is very little data on the nature of plea deals and what offers were rejected or when in the criminal proceeding the plea was offered. *See* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 16 (2018), https://bit.ly/2M9qIr1 [https://perma.cc/L29B-QZK6] (finding that data about plea offers is largely unavailable "[b]ecause plea negotiations are off the record and because most cases plead out").

than what he would have received with effective counsel. Currently, when poor African American defendants are placed in a *Turner* situation, they are not afforded a remedy after their attorney gives bad advice that leads to a high likelihood of a harsher plea deal. Affording relief for ineffective assistance of counsel during pre-indictment plea negotiations is a way for courts to begin to rectify this racial injustice, allowing African American defendants to at least gain some sort of relief when their counsel's ineffective advice leads to a disproportionate plea deal.

IV. EXTENDING THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

The Court should give a defendant the right to effective assistance of counsel whenever a prosecutor enters into pre-indictment plea negotiations and a defendant is represented in some capacity.[198] This proposed rule provides an ineffective assistance of counsel claim for all defendants who need it; if a defendant has an attorney in any capacity (for example, she has a state attorney pre-indictment for any potential charges), she has the right to effective assistance of counsel. The solution resolves the current Sixth Amendment tension based on the above administrative concerns with an eye toward the current injustice forced upon the indigent and racial minorities.

Any of the existing remedies already offered for ineffective assistance of counsel within the plea context could be the remedy provided for ineffective assistance pre-indictment. Indeed, when deficient counsel results in a defendant accepting a less desirable plea, a court can control the remedy by vacating the plea and ordering the parties to renegotiate or go to trial.[199] If the ineffective counsel fails to inform the defendant or leads the defendant to reject a favorable plea, lower courts have more discretion, depending on whether the plea led to a harsher sentence or a harsher charge. If it is the former, then a court can simply impose a new sentence reflecting the original plea;

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[198] A similar rule was proposed before but was broader in scope, focused on the right to counsel, and included interrogations by a prosecutor as well. *See* Mulroy, *supra* note 22, at 241–42 (proposing extending the right to counsel when considering the potential arbitrariness in courts' opinions when implementing the current bright-line rule).

[199] *See* Lee v. United States, 137 U.S. 1958, 1969 (2017) (vacating the plea deal and therefore requiring prosecutors to renegotiate).

if it is the latter, then a court can require the prosecutor to reoffer the original plea with the lesser charge.[200] The remedies for these claims already exist and should be applied to the pre-indictment plea negotiation context as well.

A. The Proposed Rule Is Not an Affront to the Concerns Raised for Right to Counsel in Pre-Indictment Contexts

The rule is not an affront to ex ante clarity concerns raised in right to counsel cases. First, ex ante concerns are not relevant when analyzing an ineffective assistance of counsel claim. They pose different problems than the right to counsel, and so the current friction ought not to exist and a remedy should be afforded. Second, there is still a clear, bright-line rule for when the relief should be available. Prosecutors and courts will know beforehand whether a defendant can seek relief based on an accepted plea deal or a plea deal that lapsed. There is no ambiguity in the specificity of the proposed extension of the Sixth Amendment.

Significantly, the proposed rule is also workable for states. The rule does "*not* require that the state actually furnish counsel any earlier in the process than it currently does."[201] Instead, the rule allows prosecutors and defense counsel to face the same consequences they would face for their actions within a specific context without regard to whether a charge has been brought or not. It also eliminates any incentive for prosecutors to use their leverage when a defendant is most vulnerable and eliminates incentives to delay a formal charge.[202]

Furthermore, the Court would not be interfering with ubiquitous investigation tactics. To be clear, this Note is not concerned with police conduct; it instead focuses on the injustice that prosecutors may engage in pre-indictment plea negotiations with defense attorneys who may fail to give effective counsel, while affected defendants are not provided constitutional

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[200] Lafler v. Cooper, 566 U.S. 156, 170–71 (2012).

[201] Mulroy, *supra* note 22, at 242 (citing Colbert, *supra* note 91, at 334 (finding that states continue to delay when they appoint counsel despite the Court's ruling in *Rothgery*)).

[202] *See* Mulroy, *supra* note 22, at 247.

protection and thus are not provided relief.[203] Once a prosecutor enters the picture and begins plea negotiations, one might assume that there is already damning evidence against the defendant. Defense counsel must not be able to escape her ineffectiveness and leave a defendant ill-informed of her options and chances at trial. As shown, the Court considers how it will interfere with daily investigation tactics when reviewing pre-indictment Sixth Amendment right to counsel cases. Yet, once a prosecutor enters plea negotiations, this concern should be moot because ideally, if a prosecutor is offering a plea, the investigation should have already produced convincing evidence.

Pre-indictment plea negotiations are no different, administratively, from when courts review whether counsel was ineffective or not during post-indictment plea negotiations. The Court must, and does, look retroactively at whether counsel was deficient within the latter context, and so it should not be concerned in doing so for pre-indictment plea negotiations. Essentially, no new law is being created. Courts already know how to analyze the claim.[204]

B. The Proposed Rule Is Not an Affront to Sixth Amendment Precedent

The previous discussion shows that courts consistently separate the different strands of the Sixth Amendment and consider the different administrative issues each strand poses. More importantly, courts will apply the Sixth Amendment strands differently based on these divergent administrative concerns and the particular administrative issues a case raises. Courts have even gone as far as construing a complaint to fit within this framework and therefore finding a complaint judicially cognizable.[205]

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[203] Relief depends only on whether the plea was done voluntarily, knowingly, and with a factual basis. *See* FED. R. CRIM. P. 11(b). It can be argued that pre-indictment plea deals violate this rule, but that argument most likely fails.

[204] The courts have decided to entertain ineffective assistance of counsel claims during plea bargaining, and this Note does not argue that ineffective assistance of counsel during pre-indictment plea bargaining is different than the claims courts review now. *See, e.g.*, *Lafler*, 566 U.S. at 162–63.

[205] Hurrell-Harring v. State, 930 N.E.2d 217, 222 (N.Y. 2010).

Therefore, applying Sixth Amendment ineffective assistance of counsel relief to pre-indictment plea negotiations does not undercut precedent in other pre-indictment contexts. Providing this constitutional relief instead would help address the Court's overall fairness concern in most Sixth Amendment cases—protecting the lay defendant. Lay defendants, who are often poor and African American, with deficient counsel should not have to wait until a formal charge is brought to have relief for the unfairness they faced, especially when plea bargaining dominates the criminal justice system.[206] In fact, if the Court does not extend Sixth Amendment relief, the concerns the Court addresses with a bright-line rule in right to counsel cases become arbitrary.

C. Extending Ineffective Assistance of Counsel Protects Indigent Individuals and Racial Minorities and Creates a More Fair and Just Criminal Justice System

Current law threatens the legitimacy of the criminal justice system because it leaves poor, African American defendants without constitutional protections in a context where they most need them. Extending the Sixth Amendment to pre-indictment plea negotiations can be another tool in improving the criminal justice system in order to ensure that the system is not taking advantage of indigent, African American defendants. Though the rule would also benefit wealthy defendants, it would not allow wealthy defendants to guard against routine investigation tactics; lineups and interrogations can still be conducted as they always have been. Yet, when a federal prosecutor begins to alter the availability of the best outcome for rich and poor defendants with pending state charges, poor, African American defendants will now not have to wait to have the right to counsel and appointed counsel in the federal charge to gain relief if later advice leads to a harsher plea deal or they are left without a plea deal at all. The Court will not just be protecting indigent defendants, but can judicially help address an issue that plagues society today—racial discrimination in the criminal justice system. There are positive policy implications when the right to counsel is extended to pre-indictment plea deals.

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[206] Lee et al., *supra* note 21.

D. Limitations to the Proposed Rule

The proposed rule does have limits. Its first limit is how much it could help poor, minority defendants. The proposed rule still leaves poor, minority defendants without relief if there is no defense attorney involved. This is a weaker part of the proposal and limits the number of people impacted by the rule. However, this would require a change to when the right to counsel attaches, and this Note does not present that argument. The proposed rule still makes an impact and begins to afford constitutional remedies to people who need it.[207]

It could also be argued that the rule does very little in terms of any real impact because it could be circumvented by the Supreme Court's Fifth Amendment precedent; the police might easily skirt the rule and still disadvantage poor and minority defendants. A police officer, while perhaps unable to officially enter plea negotiations, can interrogate a defendant and persuade the defendant to plead with the prosecutor. The proposed change in the law does not address the police officer conduct that can negatively influence a defendant before any attorney becomes involved in the case. This conduct is regulated by the Fifth Amendment and thus outside of the scope of this Note. There may be Fifth Amendment arguments that suffice for addressing the limited reach of the rule. Given the considerable advantages of the proposed rule, however, it should be adopted.

E. Opposition to Extending Sixth Amendment Relief

This proposed rule could raise serious opposition. The most significant concern is that this proposed change requires the case to be heard by the Supreme Court, which must in turn rule in a way that provides for the proposed relief. However, it should be noted that the modification does not depend on judicial action. Instead, the prosecutorial ethics rules could be modified to effectively ban plea bargaining pre-indictment.[208]

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[207] For example, it would have provided relief for John Turner in *Turner v. United States*, 885 F.3d 949 (6th Cir. 2018).

[208] Current ethics rules within the pre-indictment context only deal with right to counsel issues and not when a lawyer is present and defending his client. MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR ASS'N 2014).

This is similar to the "no-contact" rule in federal and most state ethics rules, which requires that "a lawyer shall not communicate about the subject of [a] representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."[209] Some courts have interpreted this rule to mean that prosecutors cannot contact a represented defendant pre-indictment without having the defendant's lawyer present.[210] These ethical rules impact right to counsel issues because they still protect the ex ante concerns the Court considers in its attachment analysis.[211]

A blanket rule forbidding pre-indictment negotiations all together does not adequately address the issues raised by *Turner* situations. This proposed ethics rule change is not practical because pre-indictment plea negotiations should not be banned.[212] While arguing for plea bargaining is not central to this Note, the efficiency of plea bargaining at any stage is exemplified by Alaska's experiment banning plea bargaining post-indictment: the ban simply pushed plea deals to the pre-indictment charging stage through a loophole in the law.[213] Prosecutors were not willing to give up a tool that made it more efficient to do their jobs. Courts have also respected the efficiency of plea bargaining.[214] It is hard to conceive that prosecutors would forego plea bargaining at any stage of the process, and banning efficient tools should not be supported. In fact, sophisticated defendants with more resources find it

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[209] *Id.*

[210] *See* Salvatore, *supra* note 133, at 579.

[211] These ethical rules are right to counsel issues because they still protect the ex ante concerns the Court has in attachment issues. *See id.*; United States. v. Hammad, 846 F.2d 854, 859 (2d Cir. 1988) (holding that the rule does not preclude routine investigation tactics).

[212] *See* White Carns & Kruse, *supra* note 22, at 30.

[213] *Id.*

[214] Instead of courts banning plea bargaining, they have simply extended rights to post-indictment plea bargaining. *See, e.g.*, Lafler v. Cooper, 566 U.S. 156 (2012).

very useful to bargain pre-indictment.[215] Indigent defendants may not have this opportunity as often, but this should not inhibit their ability to negotiate pre-indictment when the opportunity presents itself. When the less fortunate have the possibility to negotiate pre-indictment with counsel present, they should have the right for that counsel to be effective.

Additionally, there is the critique that the text of the Sixth Amendment is why a bright-line rule exists, and therefore no Sixth Amendment relief can be sought until a formal charge or a hearing in front of a judge.[216] At first glance, this makes sense. The word "prosecution" in the Sixth Amendment seems to delimit when the Sixth Amendment can be applied to certain formal actions. Not only does the text of the Sixth Amendment intuitively imply some formal case being brought before any of its right attach, but the history of the Sixth Amendment also leads courts to this interpretation.[217] The colonists were focused on conducting fair trials, and the "Continental Congress asserted each citizen's right to assistance of counsel in criminal trials."[218] This is because trials were taken for granted—criminal cases would usually have a trial.[219] Therefore, it seems fair for there to be a formal charge before any Sixth Amendment rights attach because defendants could always protect themselves at trial. In fact, some argue that the right to counsel is simply a Sixth Amendment clause used to "breathe life into" the other promises the Sixth Amendment

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[215] A *New York Times* article discussed the benefits of pre-indictment plea negotiating when discussing the Paul Manafort indictment: "Prosecutors bypassed the common Justice Department practice of inviting lawyers to meet and discuss potential indictments beforehand, often an opportunity for the defense to argue for leniency and for prosecutors to identify potential holes in their case." Matt Flegenheimer, *Andrew Weissmann, Mueller's Legal Pit Bull*, N.Y. TIMES (Oct. 31, 2017), https://www.nytimes.com/2017/10/31/us/politics/andrew-weissmann-mueller.html [https://perma.cc/L7E8-XTFJ].

[216] United States v. Gouveia, 467 U.S. 180, 188 (1984) ("That interpretation of the Sixth Amendment right to counsel is consistent . . . with the literal language of the Amendment, which requires the existence of . . . a 'criminal prosecutio[n]' . . . .").

[217] *See* Metzger, *supra* note 127, at 1637 (reviewing the development of the Supreme Court's right to counsel precedent and highlighting the Court's desire to protect lay defendants).

[218] *Id.* at 1640.

[219] *Id.* at 1639–40 (stating that the colonists were always concerned with putting up a legitimate and fair defense at trial).

guarantees—all except one, notice of charges, deal with rights during trial.[220]

History suggests that the text of the Sixth Amendment was concerned with the adversarial process seen on television—lawyers arguing in court in front of a jury or judge. This is not the current context, however, and the Court has also understood the changes in the modern criminal justice system.[221] The Court has extended the right to effective assistance of counsel to plea deals, despite the opportunity to have a fair trial, because "[t]he reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process."[222] The current criminal justice system is very different from the system that existed when the Framers drafted the Sixth Amendment. So, the textual concerns the Court expresses when drawing the bright-line rule in the pre-indictment context is unwarranted for ineffective counsel during pre-indictment plea negotiations. If the Supreme Court is going to condone plea bargaining and include it in its interpretation of a "criminal prosecution," then extending the ineffective assistance of counsel strand of the Sixth Amendment to pre-indictment plea deals is no affront to the Sixth Amendment's text.

V. CONCLUSION

Sixth Amendment right to counsel law appears at odds with providing any meaningful relief for defendants who enter into pre-indictment plea negotiations. A bright-line rule exists that may preclude Sixth Amendment relief for any pre-indictment conduct. Yet, Sixth Amendment law has various strands that all raise different administrative concerns. Whereas right to counsel apparently requires *ex ante* clarity, courts review whether counsel was ineffective *ex post*. This is because of the various administrative concerns the different rights raise. However, these administrative concerns have also forced courts to pull apart the Sixth Amendment, applying it differently in different contexts, and even construing complaints in a manner that fits these varied concerns.

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[220] *Id.* at 1640 (citing AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 139 (1997)).

[221] *See* Missouri v. Frye, 566 U.S. 134, 143 (2012).

[222] *Id.*

Fairness and justice require the Supreme Court to resolve the tension between current Sixth Amendment right to counsel doctrine and pre-indictment plea deal practices. Plea bargaining is a daily aspect of the criminal justice system and can happen pre-indictment. Yet, the criminal justice system must not support outcomes that are more likely to affect indigent defendants. The criminal justice system must not support a system in which African American defendants receive disproportionately harsher plea deals, any of which could happen pre-indictment and have no relief. Therefore, there should be Sixth Amendment ineffective assistance of counsel relief from pre-indictment plea deals. Other proposals fail to adequately address the policy implications of the current state of the law, and the proposal in this Note is administratively feasible without disrupting precedent.