No. 18-_____

In The
Supreme Court of the United States

JAIME V. PINA, JR.,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Jaime V. Pina, Jr., and his younger brother Angel were charged in state court with possession with intent to deliver cocaine. An attorney hired by his family to represent both brothers, and acting under a direct conflict of interest when he did so, met with and learned confidential information from both young men. The attorney then advised Jaime to submit to a police interview with drug task force detectives. The detectives told the attorney that Jaime and Angel's case was going to be prosecuted federally and that federal agents wanted to interview them. The lawyer failed to obtain proffer protection or engage in any plea negotiations first with the federal prosecutor. When the lawyer took Jaime to make a statement, Jaime incriminated himself with a story that did not include Angel's involvement. Under these circumstances:

I. Does the Sixth Amendment right to counsel attach when federal authorities are actively pursuing an indictment but before the filing of a formal federal charge?

II. Does the Sixth Amendment right to counsel attach when federal authorities are actively pursuing an indictment but before the filing of a formal federal charge, where Defendant has been charged with the same crime in state court?

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PETITION FOR A WRIT OF CERTIORARI

Jaime V. Pina, Jr., respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit opinion is unpublished but is available at 2018 WL 3860517 (6th Cir. Aug. 14, 2018). App. 1. The district court opinion is similarly unpublished but is available at 2017 WL 3667661 (W.D. Mich. Aug. 23, 2017). App. 10.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit was entered on August 14, 2018. On November 5, 2018, Justice Sotomayor extended the time to file a certiorari petition until December 12, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

INTRODUCTION

This Petition presents a stark example of why it is critical that this Court resolve the circuit splits on the extent of a defendant's Sixth Amendment rights before a federal indictment is formally filed. This issue is already before the Court for consideration in the petition for certiorari in *Turner v. United States*, No. 18-106, and it should be taken up there and in this matter as well. With the prevalence of state-federal drug and other investigation task forces pursuing criminal charges, the "critical stages" of most cases occur long before formal charge in federal court. They certainly did for Petitioner Jaime V. Pina, Jr.

In November 2016, state law enforcement in Michigan received a tip about an individual named Benito Escamilla, and executed a search warrant at Mr. Escamilla's home looking for evidence of drug trafficking. When they executed the search warrant, Mr. Escamilla was not at home, but his teenage son was there smoking marijuana with Petitioner Jaime Pina ("Jaime"), then 23 years old, and his younger brother Angel Pina ("Angel"), then age 20. Substantial quantities of illegal drugs were found in the home, and both Pina brothers were arrested. Jaime had a small quantity of cocaine in his pocket. State authorities charged Jaime and Angel Pina with possession with intent to distribute cocaine in state court.

Family of the two brothers hired an attorney, Ed Anderson, to represent them. Despite the direct conflict, Mr. Anderson appeared to undertake the dual

representation. He spoke to both brothers and learned confidential information from both. While incarcerated pre-trial in the county jail, and at the direction of Mr. Anderson, Jaime Pina submitted to an unrecorded interview with drug task force law enforcement officers on November 16, 2016, without any proffer protection. During this interview, Jaime Pina allegedly made incriminating statements claiming to have acted as a go-between for drug deliveries between a well-known local dealer, Magdaleno Rodriguez, and Escamilla. Jaime, who had a petty criminal record, did not implicate his younger brother Angel, who at the time had no record or experience with the justice system. Law enforcement were aware that Mr. Anderson had been advising both brothers and even reminded him that he could not represent both.

At the time of Jaime Pina's statements to law enforcement, Mr. Anderson had done no investigation of the case. However, Mr. Anderson had learned from task force detectives that federal Homeland Security investigators wanted to interrogate both Pina brothers and that the case was going to be federally prosecuted. But he did not seek to speak to the federal prosecutor, learn more about the case, or ask for a proffer agreement for Jaime Pina.

Indeed, the federal government did soon formally prosecute the case. The United States filed a complaint against Jaime on December 15, 2016, and then obtained an Indictment from the Grand Jury on January 10, 2017, charging him with conspiracy to distribute and to possess with intent to distribute cocaine, and

possession with intent to distribute cocaine. Magdaleno Rodriguez and Angel were charged with the same crimes as co-conspirators, although Escamilla was not charged. The Government had been investigating Mr. Rodriguez since 2006 and had collected a great deal of evidence against him. Mr. Rodriguez cooperated and agreed to testify against his co-defendants. Angel also pleaded guilty, but Jaime Pina went to trial with appointed counsel in the federal court.

After a trial, a jury found Jaime Pina guilty of both counts. The district court denied motions both before and after trial challenging the use of Jaime Pina's statements on a claim that they were obtained in violation of Jaime Pina's Sixth Amendment rights. The district court also denied an evidentiary hearing.

At trial, the Government significantly relied upon Jaime's admissions in his November 16, 2016 police interview as both direct evidence of guilt on the two charges, but also to bolster the testimony of Rodriguez, who received significant benefits to testify. Mr. Rodriguez's testimony presented a vastly different theory than Jaime's statements to law enforcement. Mr. Rodriguez testified that both Jaime and Angel delivered cocaine to him from their father in Texas. There was a great deal of physical evidence that Angel had been significantly involved with Mr. Rodriguez in his drug sales, like mention of Angel in Mr. Roridguez's drug deal ledger and a great deal of phone and text communication between them. There was vastly less physical evidence implicating Jaime.

In *Turner*, the Sixth Circuit reheard the appeal en banc, and a majority felt it was bound by this Court's "formal charges" language in prior Sixth Amendment cases to hold that Turner's right to counsel had not attached pre-indictment. *Turner v. United States*, 885 F.3d 949 (6th Cir. 2018) (en banc). But several judges wrote separately to encourage this Court to reconsider this issue, noting (from a variety of perspectives) that a defendant needs the assistance of counsel long before the filing of a formal charge. Specifically, in *Turner*, the defendant's prior attorney was in active plea negotiations with the federal prosecutor, and half of the en banc court's judges wrote to urge that Sixth Amendment rights attach during pre-charge plea negotiations.

In this case, Jaime Pina was at an equally-critical pre-federal charge juncture: his former attorney, acting under a direct conflict, advised him to cooperate with drug task force detectives and make statements about his involvement. Jaime's former lawyer did not obtain proffer protection, nor did he engage the federal prosecutor in any discussions or plea negotiations. This was despite the drug detectives' urging that Jaime speak with them because they advised that the federal prosecutor was about to bring federal charges. We urge the Court to grant the petition to determine that the decision to proffer to authorities pre-federal charge is a "critical stage" where Sixth Amendment rights attach.

The *Turner* petition also presents the Court with the ability to take up this Sixth Amendment question on the narrower grounds of whether an existing state

charge gives rise to a right to counsel for a later federal charge for the same offense. Jaime Pina's case fits squarely within the narrower, same-state-charge grounds presented by *Turner*. On the first question presented, federal prosecutors had not yet entered formal plea negotiations with Jaime, as in *Turner*. However, they had certainly become Jaime's adversaries by the point when he made his statements. Although Jaime has been denied an evidentiary hearing, he at least knows that the fact that the federal prosecutor intended to bring a case was used as encouragement that Jaime needed to come forward early.

There could be almost no more critical time for a defendant to have assistance of counsel than when evaluating a case and determining whether to cooperate with the Government in the hope of receiving a better plea deal. This is doubly true when a defendant like Jaime is already in criminal jeopardy given the pendency of a state charge of the same offense. This Court should grant these petitions to give the lower courts and practitioners needed guidance and clarification on the scope of Sixth Amendment rights, given the prevalence of these questions during the progression of many criminal prosecutions. Without such guidance and clarification, Sixth Amendment rights will continue to be denied to defendants in a manner that is significantly troubling within the everyday, practical realities of the operation of the criminal justice system.

STATEMENT OF THE CASE

A. Events leading to Jaime Pina's state charge

1. Drug task force officers investigate Jaime Pina's eventual co-defendant, Rodriguez

Detectives purchased approximately 190 grams of cocaine in total throughout 2016 from Magdaleno Rodriguez through an undercover officer posing as a street-level dealer. Dist. Ct. Record PageID 962-73, 979-81, 1544.[1] Following those purchases, police executed a search warrant at Mr. Rodriguez's house and found 14.2 grams of cocaine, 100 hydrocodone pills, just under $17,000 in cash, and a drug ledger. R. 982, 986-87, 992, 1001, 1006.

Prior to his arrest in this case on August 8, 2016, Mr. Rodriguez had previously been convicted of two other felony drug charges. R. 1010, 1130-31. Confronted with the evidence against him, Mr. Rodriguez agreed to cooperate with the Government in the form of making a proffer statement and testifying in front of the grand jury. R. 1131-35.

In exchange for his cooperation, the Government agreed to dismiss five counts against Mr. Rodriguez as part of his plea. R. 1140-41. The Government further agreed to forgo filing a notice which would have doubled his mandatory minimum sentence to 10 years based on his two prior felony convictions; not to prosecute him for his involvement in a large marijuana

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[1] Hereinafter, citations to the District Court Record PageID numbers will use the abbreviation "R."

growing operation or for any other substances besides cocaine, and to agree to a drug quantity; to forgo forfeiture, which could have totaled approximately $300,000; and to agree to a three-level reduction of Mr. Rodriguez's Sentencing Guideline offense level for acceptance of responsibility. R. 1141-42, 1182, 1184-85. Additionally, the Government agreed to potentially file a motion for a reduction of Mr. Rodriguez's sentencing, based on the level of assistance he provided in the case against any co-defendants, and it did file such a motion because of his testimony against Jaime Pina at trial. R. 1142-43.

2. Police search Benito Escamilla's home and arrest Jaime Pina

Unrelated to the arrest of Mr. Rodriguez, police received a tip in November 2016 that Benito Escamilla was dealing large amounts of cocaine out of his home. R. 1016-17, 1034. Law enforcement executed a search warrant at Mr. Escamilla's home on November 9, 2016. R. 1019. Jaime and Angel Pina were found smoking marijuana with Benito Escamilla's teenage son, Benancio, who testified that although he was familiar with Angel as an associate of Benito's, he had never seen Jaime before that morning. R. 1023, 1252-53, 1256. The evidence indicated that Jaime had arrived at Mr. Escamilla's home only that morning, having just traveled from Tennessee by bus, and that Angel had been living in the home. *Id.*

During the search, police found approximately 28 grams of cocaine in Jaime's pocket and a small amount of crystal methamphetamine in Angel's pocket. R. 1023. They also found drugs throughout Mr. Escamilla's home, including crystal methamphetamine and approximately 90 grams of cocaine. R. 1063, 1069-70.

3. The Pina family hires Mr. Anderson to represent or consult with Jaime and Angel

The State charged both Jaime and Angel Pina with crimes, and charged Jaime with possession with intent to distribute cocaine. Their family paid Attorney Edward Anderson to represent, or speak with, both brothers/co-defendants in state custody, which Mr. Anderson first did on or about November 12-14, 2016. R. 1267, 1270. At trial, Mr. Anderson admitted that he learned privileged information from both brothers – first from Angel, and then from Jaime – before deciding to represent Jaime in a police interview. R. 1268.

Mr. Anderson testified that he learned from drug task force detectives that Homeland Security investigators and the U.S. Attorney wanted to interrogate both Pina brothers, and that the case would be federally prosecuted. R. 1269, 1279. There was a discussion between the investigators and Mr. Anderson about law enforcement interviewing both Jaime and Angel Pina. R. 1269. At some point, one of the detectives said something to Mr. Anderson like, "You know you cannot represent both of them, right?" *Id.* In determining a course

of action, Mr. Anderson admitted he considered the impact for both brothers/co-defendants. R. 1279.

Despite the conflict of interest of working on behalf of both brothers/co-defendants and obtaining information from them both, Mr. Anderson advised Jaime to submit to a police interview. R. 1270, 1279. Mr. Anderson never had discussions with a federal prosecutor regarding proffer protection for this statement or whether a plea deal could make proffering so early worthwhile for Jaime. R. 1280-81. If an evidentiary hearing had been held where these issues could have been further explored, counsel believes that Mr. Anderson would have testified that he believed that by proffering to the drug detectives, Jaime could avoid federal prosecution by being treated as an "unindicted co-conspirator" in the federal case.

Moreover – just a few days after meeting Jaime and Angel for the first time – Mr. Anderson still knew very little about the case, including not knowing that Jaime had already spoken to law enforcement briefly on two prior occasions, much less knowing the content of those statements. R. 1280.

There is no recording of the police interview, R. 1281, and Mr. Anderson did not take notes. R. 1271, 1281. At trial, Mr. Anderson testified that Jaime told police that he distributed much smaller quantities of cocaine from Escamilla to Rodriguez than detectives testified that Jaime admitted. R. 1273-74 ("one ounce or two ounces" "once a week, sometimes twice a week"); R. 1096 ("three to four ounces of cocaine every four to

five days"). During the interview, Jaime repeatedly expressed his need to urinate and his discomfort at having to wait, and yet neither the police nor Mr. Anderson stopped questioning to take a bathroom break. R. 1275.

Prior to Jaime's statements on November 16, 2016, police had never made any connection between Mr. Rodriguez and either Pina brother. During Mr. Rodriguez's post-indictment proffer, he did not state that Mr. Escamilla was the source of any of his cocaine, although he talked about the street names of several other individuals who sourced him with cocaine.

B. District Court proceedings

The U.S. Attorney filed a criminal complaint against Jaime and Angel Pina on December 15, 2016, charging Jaime with possession with intent to distribute cocaine. Then the Grand Jury indicted Jaime on January 10, 2017, charging him with conspiracy to distribute and to possess with intent to distribute cocaine and possession with intent to distribute cocaine. Counsel was appointed to represent Jaime in federal court, and made a pre-trial motion to suppress evidence obtained in violation of his Sixth Amendment rights, which the Government opposed. The district court denied without prejudice the motion to exclude Jaime's November 16, 2016 statements, on the basis that Jaime had not yet suffered any prejudice. R. 321.

At trial, the Government significantly relied upon Jaime's admissions in the November 16, 2016 police interview as both direct evidence of guilt on the two

charges, but also to bolster the testimony of Mr. Rodriguez, whose story on Jaime's involvement was entirely different. R. 1096-97, 1124-26.

Mr. Rodriguez proffered and testified instead that both Jaime and Angel were a source of cocaine supply to Rodriguez that they brought from their father in Texas. R. 1146-49, 1152. There was a great deal of physical evidence that Angel was involved with Rodriguez in drug sales, like mention of Angel in Rodriguez's drug ledger (R. 1008-09) and significant phone and text communication between them (R. 1166-67), but much less evidence of Jaime's communication with Rodriguez.

The only evidence of a connection between Jaime and Mr. Rodriguez not reliant upon Rodriguez's testimony was a few vague texts between the two men, which the Government alleged were coded and could be explained by Rodriguez's testimony. R. 1173-76. But it was also undisputed that Rodriguez was dealing marijuana to Jaime for his personal use when he was in Michigan, so they had other explainable reasons for texting. See R. 1184. The Government relied on Jaime's statements to corroborate Rodriguez, even though the two accounts of Jaime's supposed involvement were so different.

After a trial, a jury found Jaime guilty of both counts. R. 646-47. The district court denied his motion for a new trial, which was based on the Sixth Amendment claim that his statements should not have been admitted. R. 657-58, 1575. The district court declined

to conduct an evidentiary hearing regarding the ineffective assistance of counsel claim either before or after trial.

C. Sixth Circuit proceedings

The Sixth Circuit affirmed on the heels of the en banc decision in *Turner*, and held that *Turner* foreclosed all of Jaime's arguments. App. 4-5. In addition, the panel held that Jaime could not obtain relief even under Turner's conception of the Sixth Amendment because federal prosecutors had yet to engage Jaime in plea negotiation when they first charged him. App. 5. The panel noted that "[p]erhaps Jaime's attorney should not have allowed him to be interviewed a third time, but the Sixth Amendment offers no remedy when the prospect of criminal charges is merely hypothetical." App. 6.

REASONS FOR GRANTING THE PETITION

Certiorari here is warranted for multiple reasons. Although divided, the en banc Sixth Circuit in *Turner*, and the panel here, held there is no right under the Sixth Amendment to counsel prior to commencement of judicial proceedings. This is in error.

First, the Sixth Amendment right to counsel should not be read as narrowly as it has been by the lower courts. Such a reading is incompatible with original intent, as well as with any current conception of

what the "critical stages" of a prosecution are. While the critical stages certainly include actual plea negotiations pre-indictment, as argued in the *Turner* petition for certiorari, so too they encompass other times of crucial decisions before a formal charge. One of those times is the "critical stage" of being advised to make pre-indictment statements to authorities in the hopes of receiving more lenient treatment. A defendant without counsel is completely unable to navigate the complex decisions surrounding potential defenses and evaluation of Government discovery, proffering to authorities as part of early cooperation as part of a strategy to entice a plea deal from the Government, and plea negotiations in earnest. The practical reality is that the "critical stages" of a criminal case frequently occur in advance of a formal charge *and* before a firm plea offer. This Court should weigh in on a better method to determine when the right to counsel attaches than using any bright line that is way too late on the spectrum.

Second, the *Turner* petition is correct that dual sovereignty concepts have no place in Sixth Amendment jurisprudence. The Sixth Amendment rights surely attach when a state has, as here, charged the same offense as a later federal indictment.

These are issues which both present splits of authority and recur frequently. They are critical to giving practitioners and lower courts guidance, and to protecting Constitutional rights of defendants at the time when it is, indeed, "critical." Accordingly, this Petition should be granted as a supplemental vehicle to *Turner*

for this Court to take up these questions. In the alternative, if the Court grants the *Turner* petition, the Court should grant this Petition to vacate the judgment and remand for further consideration in light of *Turner*.

ARGUMENT

I. This Court should take up whether the Sixth Circuit right to counsel attaches before the filing of a formal criminal charge, and if so, the contours of the appropriate test. Such a test should hold that it attaches during advice to proffer before indictment, regardless of plea negotiation status.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The law is clear that adequate assistance of counsel is necessary for a fair trial, whose result is reliable, as guaranteed by the Constitution. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "The 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." *Id.* at 686. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. See *id.* at 687.

Deficiencies in counsel's performance which are prejudicial to the defense constitute ineffective assistance under the Constitution. *Id.* at 691-92.

A lawyer acting under an actual conflict of interest renders ineffective assistance of counsel. *Glasser v. United States*, 315 U.S. 60, 70 (1942) (recognized as superseded by rule on other grounds in *Bourjaily v. United States*, 483 U.S. 171, 181 (1987)). Unconstitutional multiple representation is never harmless error. *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980) (*citing Glasser*, 315 U.S. at 76).

The Sixth Amendment secures to a defendant who faces incarceration the right to counsel at all "critical stages" of the criminal process. *United States v. Wade*, 388 U.S. 218, 224 (1967).

The Sixth Circuit was wrong when it said that "the prospect of criminal charges [was] merely hypothetical" for Jaime in the federal court when his former lawyer advised him to make statements to drug task force detectives. See App. 6. Indeed, police encouraged his attorney to submit him to an interview because of the involvement of federal investigators and because they said the U.S. attorney intended to bring federal charges, which he did a month later. That indicates that the prosecutor was involved in the background, and puts Jaime's federal prosecution at that point beyond the realm of "merely hypothetical."

The decision to proffer, with direct or background involvement of the prosecutor, is a "critical stage" of the process where Sixth Amendment rights to counsel

should attach, regardless of whether it is pre- or post-charge. See Steven J. Mulroy, *The Bright Line's Dark Side: Pre-Charge Attachment of the Sixth Amendment Right to Counsel*, 92 Wash. L. Rev. 213, 224-38 (2017). As Professor Mulroy noted, a more expansive rule would capture this Court's prior statements that the Sixth Amendment attaches at the time of the shift from investigation to prosecution, focusing "on whether 'the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified[.]" *Id.* at 224 (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality op.)). See also *Escobedo v. Illinois*, 378 U.S. 478, 484-86 (1964) (finding Sixth Amendment right to counsel attached and violated before indictment and during police interrogation).

Other circuits have held that the right to counsel may attach earlier than a formal charge, without assigning any other type of bright-line test to the question. See *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892-93 (3d Cir. 1999) (en banc) (holding that Sixth Amendment right attached when defendant in custody on arrest warrant and informant elicited statements in jail calls); *Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995) (dicta); *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992) (dicta). The question is "when the government has committed itself to prosecute." *Moran v. Burbine*, 475 U.S. 412, 430-32 (1986), *cited in Roberts*, 48 F.3d at 1291. While this Court in *Burbine* declined to hold that the Sixth Amendment

right attaches as a rule in all custodial interrogations, and assumed that it attached at initial of formal charges, it left open the possibility that it attaches at other times "when the government has committed itself to prosecute and the adverse positions of government and defendant have solidified." Cf. *Burbine*, 475 U.S. at 431-32 (internal citations and quotations omitted). The Seventh Circuit has said that the presumption is that the Sixth Amendment right does not attach prior to a formal charge, but that it is a rebuttable presumption if the defendant can demonstrate that "the government had crossed the constitutionally significant divide from fact-finder to adversary." *Larkin*, 978 F.2d at 969.

Like in *Turner*, if the district court had properly recognized Jaime's Sixth Amendment rights at the time of a pre-indictment decision to proffer to police, it would have been required to hold an evidentiary hearing to fully determine the facts of Jaime's claim regarding the legal representation he received under a direct conflict of interest. At such a hearing, Jaime would have been able to show that the Government had "committed itself to prosecute" as of November 16, 2016, *Moran*, 475 U.S. at 430-32, when he made statements to police, and that he would have made different decisions if he had been given competent legal advice. Resolution of this question presented would be outcome-determinative for Jaime.

II. This Court should decide whether the Sixth Amendment right to counsel attaches in a federal prosecution where, as here, the defendant has already been charged with the same offense in state court.

This case, like *Turner*, also presents the question whether the Sixth Amendment right to counsel attaches prior to federal indictment where the defendant was charged with the same offense in state court. This is an alternate, narrower ground for decision in this matter.[2]

If the right to counsel attaches with respect to a charged offense, it attaches to another charge that is the "same offense" under the test used to determine the application of the Double Jeopardy clause in *Blockburger v. United States*, 284 U.S. 299 (1932). *Texas v. Cobb*, 532 U.S. 162, 172-73 (2001). Charges are different offenses, and thus the Sixth Amendment does not attach for one after indictment of the other, if each

[2] The Sixth Circuit concluded below that Petitioner waived the argument that his Sixth Amendment rights attached once the state charged him with the same, possession-with-intent-to-distribute offense, by failing to sufficiently develop it. App. 6. However, the panel still held that *Turner* had foreclosed the issue by siding with the circuits who apply the dual sovereignty concept to attachment of Sixth Amendment rights. See App. 5-6. Petitioner submits that this issue was sufficiently argued below, both in briefs and at oral argument. Under the circumstances, where the Sixth Circuit still held that *Turner* foreclosed the argument, see *id.*, it has been more than sufficiently developed below. In any event, this Court has discretion to decide the issue and should. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 488 (2008).

requires proof of a fact which the other does not. *Id.* at 173.

Currently, there is a split of authority as to whether the *Cobb* doctrine applies when one charge is in state court and the latter charge is in federal court. *Infra*. But the state charge against Jaime is clearly the same offense with which the federal government later charged him.

At the time when drug task force officers told Mr. Anderson that the federal prosecutor had decided to bring federal charges against the Pina brothers, the state had already charged Jaime with possession with intent to distribute cocaine under Mich. Comp. Laws § 333.7401(2)(a)(iii). Indeed, Jaime was incarcerated in state pre-trial custody when his family hired Mr. Anderson to represent both him and his brother Angel, and when Mr. Anderson advised Jaime to provide statements to police while acting under a direct conflict of interest.

The federal prosecutor first brought a complaint, and then secured an indictment, containing the exact same federal charge against Jaime as the state charge, possession with intent to distribute cocaine, 21 U.S.C. § 841(a)(1). The federal indictment added the conspiracy count. Besides having exactly the same name, the state charge and the federal charge of possession with intent to distribute cocaine are the "same offense" for purposes of this Court's *Blockburger* test, *i.e.*, neither requires proof of a fact that the other does not. They

have the same elements. Compare Mich. Comp. Laws § 333.7401(2)(a)(iii) with 21 U.S.C. § 841(a)(1).

The Second and Eighth Circuits disagree with the position taken by the Sixth Circuit in *Turner* and in this case, and hold that the Sixth Amendment would apply to the same offense later charged federally. *United States v. Mills*, 412 F.3d 325, 329-30 (2d Cir. 2005); *United States v. Red Bird*, 287 F.3d 709, 714-15 (8th Cir. 2002); but see contra at *Turner*, 885 F.3d at 955; *United States v. Coker*, 433 F.3d 39, 47 (1st Cir. 2005); *United States v. Alvarado*, 440 F.3d 191, 196 (4th Cir. 2006); *United States v. Avants*, 278 F.3d 510, 517 (5th Cir. 2002); *United States v. Burgest*, 519 F.3d 1307, 1310 (11th Cir. 2008).

This Court should resolve this question by holding that dual sovereignty doctrine does not apply to bar attachment of Sixth Amendment rights in a later federal prosecution. The doctrine is not properly applied to the question of when the Sixth Amendment right to counsel attaches. *Cobb* did not decide that question, since it was looking at two state charges. 532 U.S. 162. As explained in great detail in the *Turner* petition, this issue arises frequently, where, as in Jaime's case, there is federal-state cooperation in drug prosecution task forces. See Petition, No. 18-106, at 30. Applying dual sovereignty doctrine in this context would permit perverse results of allowing a federal prosecutor to seek uncounseled statements from a defendant under state charges, and even in custody, and then share useful information with state prosecutors. This cannot be the extent of the Sixth Amendment right to counsel, or else

the right will be rendered illusory. The Court should grant petitions on this issue – if not both questions presented – and order relief for Jaime Pina.[3]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[3] If the Court does not grant certiorari on Jaime Pina's petition, he respectfully asks that the Court hold his petition pending a decision in the pending certiorari petition in *Turner v. United States*, No. 18-106. If the Court grants the *Turner* petition and reverses the Sixth Circuit, it would be appropriate to grant this petition, vacate the judgment below, and remand the case to the Court of Appeals for reconsideration in light of *Turner*.

Similarly, Jaime Pina's certiorari petition should also be held pending a decision in *Gamble v. United States*, No. 17-646 (argument held December 6, 2018). If this Court overrules its dual sovereignty precedents in that case, Jaime Pina asks that his petition be granted, that the judgment below be vacated, and that his case be remanded to the Court of Appeals for reconsideration in light of *Gamble*.