No. 18-762

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Petitioner raises two critical constitutional questions concerning the Sixth Amendment: (1) whether the right to counsel attaches when federal authorities are actively pursuing indictment but have not yet filed a formal federal charge; and (2) whether the right to counsel applies in a pre-charge federal investigation when a defendant has been charged with the same crime in state court. Pet. i. The first question is also pending before this Court in the petition seeking review of a divided *en banc* opinion in *Turner v. United States*. No. 18-106. Respondent's arguments simply seek to sidestep the recurring, troubling legal questions arising under the Sixth Amendment presented here and in *Turner*. This Court should grant this petition and prevent lower courts from continuing to apply a bright-line test of when the right to counsel attaches. That test is contrary to a plain language reading of the text of the Sixth Amendment, ignores modern realities of federal prosecutions, and renders the right to counsel illusory in cases like that of Petitioner.

First, Respondent's brief entirely ignores the direct, stark conflict that Mr. Pina's attorney in state court was under when he advised Mr. Pina to submit to police questioning without a proffer or cooperation agreement. He did this while providing confidential advice to Mr. Pina's co-defendant and brother. Multiple representation presenting a direct conflict is never harmless error. *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980).

Respondent also erroneously claims that Petitioner does not ask this Court to overrule any of its precedents. Opp'n 6-7. Petitioner has taken the position that this Court must reject the bright-line test requiring filing of a formal charge for the right to counsel to attach under the Sixth Amendment. E.g., Pet. 15-18. To the extent that overruling prior precedents is necessary, this Court should do that. But prior precedents of this Court have also suggested that the question of "when the government has committed itself to prosecute[]" may necessarily occur at a time other than indictment or charge. Cf. *Moran v. Burbine*, 475 U.S. 412, 430-32 (1986); *Escobedo v. Illinois*, 378 U.S. 478, 484-86 (1964). This history has been glossed over by Respondent, just as it has sidestepped the troubling notion that an unrepresented defendant should be left to make critical decisions without effective counsel merely because the government has yet to file its federal charges.

Finally, Respondent argues that this matter should not be held for remand after the forthcoming decision in *Gamble* No. 17-646, because the Sixth Circuit took the position that Petitioner forfeited the argument that the exact same state charges had been filed, and thus a right to counsel had attached. Petitioner did not forfeit that argument below and adequately addressed the simple facts of this issue. The state here filed a state charge of possession with intent to distribute cocaine that was eventually pursued in its identical federal form by the federal government. The name of the charge and its elements are the same. The

Sixth Circuit addressed it and held that *Turner* foreclosed the issue, which also made any discussion by Petitioner necessarily abbreviated. Moreover, the fact that the federal authorities also included a conspiracy charge does not change the analysis, nor make the possibility of relief impossible for Mr. Pina, as Respondent claimed. Any finding on remand that his statements were admitted in violation of the Sixth Amendment would support a new trial on both charges.

Accordingly, this Court should grant Mr. Pina's petition on either or both grounds. The question of the appropriate modern contours of the Sixth Amendment right to counsel should not be sidestepped any longer.

REPLY 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 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).

Respondent is correct that this Court generally has favored a bright-line rule that indictment or

charge spells the "critical stage." However, Respondent's discussion avoids this Court's acknowledgement that it is possible that there are exceptions to this bright-line rule, where this Court has noted that the actual question for Sixth Amendment attachment is "when the government has committed itself to prosecute." *Moran v. Burbine*, 475 U.S. 412, 430-32 (1986), *cited in Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995). *Moran* 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. *Moran*, 475 U.S. at 431-32 (internal citations and quotations omitted). See also *Escobedo*, 378 U.S. at 484-86 (finding Sixth Amendment right to counsel attached and violated before indictment and during police interrogation). To the extent that this Court has made other, more definitive statements requiring a bright-line rule of only the time of formal charge, it is time for this Court to clarify the matter.

Such a clarification should provide a test that reflects modern realities of federal prosecution. Certainly, plea negotiations, as presented by the *Turner* petition, fall under the time when "adverse positions of government and defendant have solidified" and the right to counsel has attached under the Constitution. But, respectfully, so do the circumstances here. The decision to proffer, with direct or background involvement of the federal 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, 224-238 (2017).

If Mr. Pina's petition is not granted, this Court should at least hold it for consideration of the *Turner* petition. To the extent that this Court clarifies the Sixth Amendment landscape, the district court is the appropriate place for determining whether, and how, that change would apply to Mr. Pina.

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.

Given that Petitioner was in custody at the time that we argue that his Sixth Amendment rights attached, facing the mirror-image state charge of possession with intent to distribute cocaine, Respondent relies on an argument of waiver below to avoid this issue. The Sixth Circuit erred when it held that Petitioner forfeited this claim. Petitioner sufficiently raised it below, and the Sixth Circuit addressed it. In light of the *Turner* decision, and the obvious similarity between the pending state charge and the eventual federal corollary count, there simply was not much to say about it. Even if the holding of waiver was not in error, this Court has discretion to decide the issue and

should. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 488 (2008).

The fact that Petitioner was facing the same state charge, see Mich. Comp. Laws § 333.7401(2)(a)(iii), is particularly disturbing here. Ineffective counsel advised Petitioner – while in custody – to provide statements to law enforcement while that attorney acted under a direct conflict because he also represented Petitioner's co-defendant and brother. Jaime Pina was particularly in need of effective assistance of counsel to make critical decisions about his defense over the several days that he was in pre-trial custody.

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. But that fact does not, as Respondent suggests, mean that Petitioner would be unable to obtain relief below in the event that his statements were deemed unconstitutionally admitted. Opp'n 12. A new trial would be the appropriate remedy, since it would be impossible to separate the unlawful damage done to Petitioner's defense as to either charge by admitting the confession.

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.[1]

III. This case, like *Turner*, warrants review.

The Government argues that this case is not a good vehicle for these issues. Gov't Opp'n 11-12. That

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[1] If the Court does not grant certiorari on Mr. 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, Mr. 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, Mr. 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*.

is not true. This case presents a stark example of ineffective assistance – advice rendered on a direct conflict to provide statements while under threat of federal prosecution – which was able to be discovered despite denial of an evidentiary hearing below. This petition presents an opportunity to further define what the "critical stage" is that triggers the Sixth Amendment's fundamental protections.

Moreover, Respondent's reliance on supposed forfeiture of the "same" offense question is simply an attempt to gloss over how starkly this case presents it. It was sufficiently presented below, and this Court has the ability to address it in any event. Nor is the Government correct that remand could not possibly benefit Petitioner. To the extent that the district court erroneously permitted admission of Mr. Pina's statements against him, such a holding necessarily implicates his convictions for both possession with intent to distribute and conspiracy.

At bottom, the issues presented in Mr. Pina's petition are recurring because of the prevalence of federal-state drug investigation task forces. It renders the Sixth Amendment right to counsel a farce if the law permits authorities to continue to proceed as they did here. This will continue to happen when defendants like Mr. Pina have inadequate counsel – or frequently no lawyer – during what is now the "critical stage" of a federal prosecution, i.e., the pre-charge decision to cooperate by submitting to a police interrogation. It is rendered worse, as here, when a defendant like Mr. Pina had to make those critical decisions while in

custody for the same state drug charges that federal authorities are investigating by use of state law enforcement.

Certiorari should be granted. But at the very least, Mr. Pina's petition should be held for remand for further proceedings based on *Gamble*'s outcome and/or a grant of certiorari in the *Turner* petition.

CONCLUSION

For these reasons and those stated in the petition for certiorari, this Court should grant the petition.

Respectfully submitted,

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