

No. 20-_____

**In The
Supreme Court of the United States**

—◆—

JAMES MICHAEL FAYED,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

—◆—

**On Petition For A Writ Of Certiorari
To The California Supreme Court**

—◆—

PETITION FOR A WRIT OF CERTIORARI

—◆—

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**CAPITAL CASE
QUESTIONS PRESENTED**

Whether the Sixth Amendment right to counsel attaches on uncharged murder allegations when a defendant is brought to court to defend himself against those murder allegations, has counsel appear at two hearings to defend against the murder allegations, and the defendant is held without bail based solely on those uncharged murder allegations.

Whether the Dual Sovereignty doctrine for “same offense” has been imported from Fifth Amendment double jeopardy jurisprudence to the Sixth Amendment right to counsel.

Whether in the interests of fundamental fairness, the prohibition against use of the “Silver Platter” doctrine applies when the federal government knowingly collects evidence in violation of a defendant’s federal Sixth Amendment right to counsel for use in a subsequent state court prosecution.

STATEMENT OF RELATED CASES

- *People v. Fayed*, No. BA346352, Los Angeles Superior Court, Judgment entered November 17, 2011.
- *People v. Fayed*, No. S198132, California Supreme Court, Judgment entered April 2, 2020.
- *United States v. Fayed*, CR 08-224, Central District of California, Dismissal entered September 15, 2008.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James Michael Fayed respectfully petitions for a writ of certiorari to review the judgment of the California Supreme Court, which affirmed his conviction and sentence of death.

**PARTIES TO THE PROCEEDINGS**

The caption contains the names of all parties in the lower court.

**OPINION BELOW**

The opinion of the California Supreme Court is reported as *People v. Fayed*, 9 Cal.5th 147 (2020), and is included as Appendix A to this petition. App. 1a.

**JURISDICTION**

The judgment of the California Supreme Court was entered on April 2, 2020. App. 1a. On March 19, 2020, this Court issued an order extending the deadline to file a petition for a writ of certiorari to 150 days from the date of the lower court's judgment. As a result, the request is timely in the instant case if filed on or before August 29, 2020.

This Court has jurisdiction under 28 U.S.C. § 1257(a) (1998).



CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”



INTRODUCTION

“[I]t is through counsel that all other rights of the accused are protected.” *Penson v. Ohio*, 488 U.S. 75, 84 (1988). “The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’” *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938)). The government has an “affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right.” *Maine v. Moulton*, 474 U.S. 159, 176 (1985).

In Petitioner’s case, the California Supreme Court found that there is no Sixth Amendment right to counsel, unless and until there is a formal filing document. The court found this rule applied, without exception and without considering the purpose of the Sixth Amendment right.

The Sixth Amendment right to counsel is specifically intended “to ‘protec[t] the unaided layman at critical confrontations’ with his ‘expert adversary.’” *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991) (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)). This Court has consistently taken a “pragmatic approach” in determining “the scope of the Sixth Amendment right to counsel,” “asking what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage.” *Patterson v. Illinois*, 487 U.S. 285, 298 (1988); see *Moulton*, 474 U.S. at 170 (“[T]he right to the assistance of counsel is shaped by the need for the assistance of counsel.”).

Petitioner was represented by counsel and had repeatedly invoked his constitutional right to remain silent and right to counsel when questioned by state law enforcement concerning the murder of his estranged wife Pamela Fayed. See App. 11a. After the State of California determined that there was insufficient evidence to arrest Petitioner for murder, it worked with the federal government to arrest Petitioner for a minor federal licensing violation. When Petitioner was brought to federal court for two bail hearings, the Indictment listed only the minor licensing violation. However, that charge was insufficient to deprive Petitioner of his liberty pending trial.¹ Nonetheless, the

¹ The Bail Reform Act sets forth the process for bail and detention. See 18 U.S.C. § 3142(f) (2008). “[T]he structure of [§ 3142(f)] and its legislative history make it clear that Congress did not intend to authorize preventive detention unless the

Assistant United States Attorney (AUSA) clearly and repeatedly argued that the two federal courts had to consider the federal licensing violation in conjunction with, and as if it had been filed alongside, either state or federal murder charges.

As a result, Petitioner was required to obtain counsel, and have that counsel defend him in federal court, twice, against specific allegations that he committed murder; have that same attorney, twice, cross-examine a government witness in court concerning the murder allegations; have his attorney conduct an investigation and present evidence concerning the murder allegations; and have his attorney argue that the murder allegation evidence was insufficient to hold Petitioner without bail. Ultimately, in denying Petitioner bail, the federal district court specifically stated that Petitioner was being held because of the murder allegations, not the licensing violation. App. 226c.

Following Petitioner's detention, the LAPD and the Federal Bureau of Investigations (FBI) worked together to wire up an informant and sent that informant into Petitioner's cell to question him. This fact pattern is particularly egregious in Petitioner's case since—even if it were arguable that Petitioner's right to counsel had not attached on either the federal or state murder case—Petitioner's right to counsel had attached, *at the very least*, on the federal licensing violation. Knowing this, the federal and state

judicial officer first finds that one of the § 3142(f) conditions" exists. *United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988).

governments nonetheless sent in the undercover informant to question Petitioner and made no effort to limit the questioning to the “uncharged” offense. Indeed, the informant asked questions about the federal white collar case.

In taking these actions, the federal and state agents were able to obtain what they had been unable to get in either the state or federal investigations: Petitioner’s statements without his lawyer. After the two jurisdictions had worked together to knowingly violate Petitioner’s rights in the federal case, they merely dismissed the federal case, and *that same day*, the state charges were filed. The statements that were knowingly obtained in violation of Petitioner’s rights in the federal case were then used as the centerpiece of the state court prosecution.

Despite the fact that counsel thoroughly represented Petitioner in court, twice, concerning the specific allegations that Petitioner committed the murder of Pamela Fayed, the California Supreme Court still determined that, based on this Court’s precedent, no right to counsel attached as to those murder allegations. In doing so, the court below joined the ever-growing judicial splits on 1) whether the Sixth Amendment right to counsel can ever attach prior to the formal filing of charges, and 2) whether the Fifth Amendment’s separate sovereign doctrine has been incorporated into Sixth Amendment jurisprudence for the determination of “same offense.” The national division and lack of clear guidance on these issues results in disparate treatment with some defendants receiving more

protection of their Sixth Amendment rights than others. This is an untenable position considering the import of the right to counsel enshrined in the Sixth Amendment. U.S. Const., amend. VI.

Additionally, the rule championed by the court below allows separate sovereigns working together to easily coordinate to interrogate a defendant about a charged offense outside the presence of his attorney—*deliberately* subverting that defendant’s Sixth Amendment rights, then simply hand that tainted evidence off for use in a “separate case.” Constitutional protections should not be so easy to work around, manipulate, and violate. Thus, the Court should grant the instant petition.

◆

STATEMENT OF THE CASE

On July 28, 2008, Petitioner James Fayed’s wife, Pamela Fayed, died after being stabbed in a parking garage in Century City, California. App. 5a. After learning of his wife’s death, Petitioner immediately became concerned about the well-being of his nine-year-old daughter, J.F., who resided with Pamela Fayed while the couple were separated. App. 51a. Petitioner contacted the Ventura County Sheriff’s Office to ask the police to conduct a welfare check on his daughter. *Id.* The officers requested that Petitioner come into the station. *Id.*

The Sheriffs contacted the Los Angeles Police Department (LAPD). *See* App. 51a. Although Petitioner

did not match the physical description of the suspected murderer, when Petitioner arrived at the Sheriff's station with his attorneys, the LAPD was there; they immediately handcuffed Petitioner, then seized, and later searched, his cell phone. *Id.* LAPD detectives then put Petitioner in a police car and transported him nearly fifty miles to the West Los Angeles Police Station for questioning. *Id.* Petitioner arrived at the West Los Angeles station at approximately 3:30 a.m. LAPD detectives attempted to interview Petitioner, but Petitioner repeatedly informed them that he would not answer questions and that he wanted his attorneys present. *Id.* Although Petitioner's attorneys arrived at the West Los Angeles station shortly after Petitioner, LAPD officers refused to allow them into the interrogation room. Eventually, Petitioner was released without charges being filed. App. 52a.

A. Federal Detention of Petitioner to Obtain Evidence in a State Murder Case

Shortly after Petitioner was released, the FBI informed the LAPD that several months earlier on February 26, 2008, the federal government had filed an Indictment against Petitioner and his business, Goldfinger, alleging a single violation of 18 U.S.C. § 1960 (2006), Operating an Unlicensed Money Transmitting Business. App. 65a. The Indictment was sealed while the government continued its investigation. *Id.* In the months following the Indictment, the government made no effort to obtain an arrest warrant for Petitioner or to seek his surrender or cooperation. App.

210c. In fact, at Petitioner’s state court trial, AUSA Mark Aveis testified that the federal government did not believe that Petitioner or Goldfinger were “directly involved” in illegality. App. 4a. Aveis stated that bringing the Indictment was not to pursue charges. Instead, it marked the beginning of an investigation, and the government hoped to get Goldfinger to cooperate against other persons who used money flowing through the business in Ponzi schemes. The district court also acknowledged that the federal government was not pursuing the federal case until they learned of Pamela Fayed’s murder and the “stakes [went] up.” App. 210c–211c.

On August 1, 2008, detectives from the LAPD met with AUSA Aveis to discuss the investigation into Petitioner. Later that same day, the FBI arrested Petitioner on the Operating an Unlicensed Money Transmitting Business charge. App. 11a. Following Petitioner’s arrest, the government filed a Notice of Request for Detention, asking that Petitioner be detained in federal custody without bail as a matter of law.

Despite the request for a no-bail hold, when Petitioner was brought to court, no additional charges were filed. *See* App. 171b. The Indictment still alleged only the single licensing violation, which could not justify detention without bail. *Id.*; *see* 18 U.S.C. § 3142(f).

1. First Federal Hearing Concerning The Murder Allegations

At the first federal detention hearing, the government immediately began by reciting a long list of specific reasons why the LAPD believed Petitioner killed Pamela Fayed. App. 118b–123b. The magistrate then specifically asked Petitioner’s counsel if he agreed with those allegations. App. 126b. When counsel refused to agree, the magistrate allowed the government to call FBI Agent Timothy Swec as a witness. App. 133b. During the cross-examination, Swec admitted that he had no knowledge of the case. App. 146b. He was merely reading from a document titled “detention script” prepared by the LAPD. The federal government used the information from the LAPD’s “detention script” to argue there was reason to believe that Petitioner had killed Pamela Fayed. App. 158b–163b. The government argued that based on the LAPD’s evidence that Petitioner committed murder, he should be held without bail. *Id.*

Petitioner’s counsel argued that Petitioner had to be released on the licensing violation, stating “[t]here may be a time and a place for these Los Angeles police detectives to bring a murder case . . . [but] you can’t detain him today on [the licensing violation] because tomorrow he may be prosecuted for murder,” and insisting that “this man deserves to be treated by this Court for what he’s charged with.” App. 181b. The AUSA argued that the formal charges did not matter because “what really drives the bus here, your honor” is the “murder-for-hire scheme.” App. 185b. The AUSA

further argued that even if the murder was not formally charged in state court, the court should consider the licensing case as combined with a federal murder count for purposes of bail. App. 182b–186b. Thus, the government repeatedly argued that the court could consider the murder allegations, as either state or federal charges. Either way, however, the murder allegations had to be considered with the licensing violations for purposes of bail.

The Magistrate Judge found that, under the law, Petitioner could not be detained without bail on the federal licensing charge. App. 186b–187b.

2. Second Federal Hearing Concerning The Murder Allegations

On August 6, 2008, the government filed an Application for Review, and a hearing was held the same day before Judge Otis D. Wright II. App. 198c; 202c. The court began that hearing by stating it was “inclined to accept the government’s position.” App. 200c. The court noted the papers filed by the government, which detailed the LAPD’s allegations that Petitioner killed Pamela Fayed, and a new allegation that Pamela Fayed had agreed to cooperate in the federal investigation. App. 202c–203c. The court then recited facts it believed substantiated the murder allegations. App. 203c–204c. When Petitioner’s counsel attempted to address the findings of the magistrate, the district court ordered him to “stop” and directly respond to the

specific facts of the LAPD's allegations that Petitioner committed the murder of Pamela Fayed. App. 204b.

Throughout this second hearing, the government again presented evidence of the state murder case, including calling its witness who testified to what he had been told by the LAPD and FBI about the murder allegations. App. 219c. Petitioner's counsel had to, again, make arguments responding to the LAPD's specific allegations about the murder case, and, again, examine the FBI agent concerning the allegations that Petitioner killed Pamela Fayed. By the time of this second hearing, Petitioner's counsel was aware that the allegations at the detention hearing would concern the murder allegations. Thus, to counter the specific allegations made in the first hearing, Petitioner's counsel conducted an investigation and interviewed witnesses in advance of the second hearing. Petitioner's counsel then used that information to successfully examine Swec concerning some specific allegations. App. 220c–222c. Therefore, for a second time, Petitioner, through his retained counsel, was made to stand in court in front of a judge, defend himself against the LAPD's murder accusations, and explain why he should not be detained without bail because of those murder allegations.

At this second hearing, the district court concluded that Petitioner should be detained without bail. App. 226c. The District Court was clear in its reasoning that the murder case justified detention, repeatedly stating that the licensing case was not the focus: "All right, now you know our focus is not on this case and

the licensing,” App. 207c, and “I’m not focusing on the license. I could care less about the fact that he was operating a business without a license.” App. 210c. The court specifically recognized that if the issue in front of the court were the licensing charge alone, Petitioner would already “be home now.” *Id.*

Thus, during these two federal court hearings, Petitioner was, repeatedly, confronted by the weight of the LAPD’s accusations and, through his counsel, made to defend against the specific allegation that he murdered Pamela Fayed.

3. Using The Detention For Murder to Obtain The Challenged Statements

On September 9, 2008, while Petitioner was being detained without bail on the murder allegation and licensing violation, LAPD Detectives met with Petitioner’s cell mate Shawn Smith. App. 6a–7a. The next day, the LAPD and FBI put a wire on Smith, instructed him on the best way to extract information from Petitioner, and then sent him back to the cell he shared with Petitioner. App. 11a–12a. In directing Smith, state and federal law enforcement never told him not to discuss the licensing case. *See* App. 12a. Smith returned to the cell and began questioning Petitioner about both the murder and licensing case and tried to convince Petitioner to hire a hitman to murder Petitioner’s co-defendants. *See, e.g.,* App. 6a–7a; 11a–12a; 21a; 69a. Once statements from Petitioner had been elicited, the FBI and LAPD removed the wire. Despite

Smith's extensive criminal history and the fact that he was facing a substantial prison term on federal drug and weapons charges, Smith was released on an unsecured bond shortly after the FBI and LAPD obtained his recorded conversation with Petitioner. App. 11a–12a. Smith was never sent back to prison on that case. *Id.*

A few days after the recorded conversation was obtained, a Felony Complaint for Arrest Warrant was issued by the State of California against Petitioner for murder and conspiracy. App. 7a. *That same day*, AUSA Mark Aveis dismissed the federal indictment against Petitioner, and Petitioner was released directly into the custody of the LAPD. *Id.*

B. Introduction of Petitioner's Recorded Statements at Trial

Throughout the proceedings in state court, Petitioner made several requests to suppress the statements made to Smith. App. 24a. Prior to the preliminary hearing in the state case, Petitioner filed a motion to suppress his statements. The court denied the Motion without issuing a written order. Petitioner orally renewed the motion at the preliminary hearing, which was denied. Petitioner again tried to suppress the statements in his Motion to Dismiss pursuant to California Penal Code section 995, which was denied without a written order. Prior to trial, Petitioner filed a Motion in Limine renewing his objection to admission of the statement. The trial court ruled that the

statement was admissible without issuing a written order. Ultimately, the state introduced the entire recording of Petitioner's conversation with Smith at trial, without calling Smith as a witness. App. 23a–25a.

Following his conviction, Petitioner filed a Motion for a New Trial objecting to the use of the recorded statement at trial. App. 12a. The trial court heard argument and denied the motion without written opinion. *Id.*

On direct appeal to the California Supreme Court, Petitioner argued that the admission of his conversation with the informant was in violation of his Sixth Amendment right to counsel, his Fifth Amendment right to counsel and privilege against self-incrimination, his Fourth Amendment right to be free from unreasonable detention, and his rights under the Sixth Amendment's confrontation clause. App. 10a.



REASONS FOR GRANTING THE WRIT

The Sixth Amendment “embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.” *Johnson*, 304 U.S. at 462–63. “The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or

liberty unless he has or waives the assistance of counsel.” *Id.* at 463 (footnote omitted).²

Once a defendant’s right to counsel has attached, any statement “deliberately elicited” may not be used as evidence. *Massiah v. United States*, 377 U.S. 201, 206 (1964). Additionally, fundamental fairness is the essence of due process and requires that government conduct conform to a sense of justice, decency, and fair play. U.S. Const., amend. XIV, § 1.

A. The Sixth Amendment Right to Counsel Attaches When a Defendant is Forced to Defend Himself in Court Against an Uncharged Offense And is Detained Without Bail Based on That Charge

When, precisely, the Sixth Amendment right to counsel attaches has been the subject of copious debate in courts throughout the nation. In the plurality opinion of *Kirby v. Illinois*, 406 U.S. 682, 689 (1972), Justice Stewart wrote the often referenced quote that the right to counsel attaches “at or after the initiation of adversary judicial criminal proceedings—*whether by way of formal charge, preliminary hearing, indictment, information, or arraignment*” (emphasis added). Although the Court set forth this list of times when “adversarial proceedings” commence, the Court did not create a

² The Sixth Amendment right to counsel is made obligatory upon the States through the Due Process Clause of the Fourteenth Amendment. *Gideon*, 372 U.S. at 340, 342.

rigid, inflexible, and hardhearted rule that was untethered to the purpose of the Sixth Amendment.

Instead, the *Kirby* Court considered whether the defendant had the right to counsel during a post-arrest, but pre-filing, police station identification. In finding no violation, the Court noted its holding was intended to incorporate the purpose of the Sixth Amendment that the start of the right to counsel is when “the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.” *Kirby*, 406 U.S. at 689. The *Kirby* Court made the distinction between the defendant’s pre-filing interactions with investigators, which does not start the Sixth Amendment right, and when adversarial proceedings against the government actually begin. *Id.* This was reaffirmed by the Court in *Gouveia*, 467 U.S. at 184, where the defendant was questioned while confined to administrative segregation in prison before being arrested or accused on new charges. Again, during that time, the defendant was only dealing with investigators, and adversarial proceedings with the government on the new charges had not yet begun. *Id.* The Court reiterated that the “core purpose” of the Sixth Amendment right to counsel is assuring aid “when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor[,]” not during law enforcement investigation. *Id.* at 188–89.

Instead of relying exclusively on the formal filing of a charging document, this Court again focused on determining when a defendant “finds himself faced with the prosecutorial forces of organized society” in *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 198 (2008) (quoting *Kirby*, 406 U.S. at 689). In that case, the question was whether a defendant, brought to court, informed of the allegations against him, and made subject to restrictions on his liberty, had a right to counsel even though the prosecutor was not involved in the initial hearing and there was no formal filing by the prosecutor.³ *Id.* at 194. This Court found that the appellate court’s focus on the participation of the prosecutor was misplaced: “[T]he court effectively focused not on the start of adversarial judicial proceedings, but on the activities and knowledge of a particular state official who was presumably otherwise occupied. This was error.” *Id.* at 198–99. *Rothgery* made clear that the initial court appearance where, inter alia, bail was set, attached the right to counsel without a fixed reliance on the presence of a formal charging document filed by the prosecutor. *Id.* at 203. This Court found it sufficient that the proceedings in court “accused Rothgery of committing a particular crime and prompted the judicial officer to take legal action in response (here, to set

³ The particular type of hearing at issue in *Rothgery*, 554 U.S. at 195, was one in which an officer submits a document detailing probable cause to the court, the magistrate determines if there is probable cause, and bail is set. The officer who submitted the document did not have the “power to commit the state to prosecute without a prosecutor’s knowledge or involvement.” *Id.* at 198 (citation omitted).

the terms of bail and order the defendant locked up).” *Id.* at 199 n.9; see *United States v. Ash*, 413 U.S. 300, 310 (1973) (right to counsel attaches where “the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or both”).

Despite instruction from this Court that the approach to determining whether the right to counsel has attached should mirror the reason for the Sixth Amendment right to counsel, many courts across the country remain fixated on Justice Stewart’s list in *Kirby*, 406 U.S. at 682. Thus, some courts demand strict, absolute compliance with that list—meaning that in the absence of a formal charging document that is filed with the court, there is no Sixth Amendment right to counsel. The Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits have drawn this bright-line and strictly enforced it.⁴ These courts find that the bright-line

⁴ *United States v. Calhoun*, 796 F.3d 1251, 1254–55 (10th Cir. 2015) (no denial of right to counsel for conflict of interest because representation was in the grand jury pre-indictment); *United States v. Ayala*, 601 F.3d 256, 272 (4th Cir. 2010) (no violation of right to counsel where defendant was subpoenaed to appear before grand jury pre-indictment); *United States v. Morriss*, 531 F.3d 591, 593–94 (8th Cir. 2008) (no violation of right to counsel where defendant, who the police knew had retained counsel, was questioned pre-indictment); *United States v. Waldon*, 363 F.3d 1103, 1112 n.3 (11th Cir. 2004) (“reject[ing] . . . out of hand” ineffective-assistance claim by defendant who was subpoenaed to testify before grand jury prior to indictment); *United States v. Hayes*, 231 F.3d 663, 675 (9th Cir. 2000) (en banc) (holding that the right to counsel did not apply pre-indictment to the target of a grand jury investigation, even though counsel had been appointed); *United States v. Lin Lyn Trading, Ltd.*, 149 F.3d 1112, 1117 (10th Cir. 1998) (finding no violation of right to counsel

requirement of a filing document applies “subject to no exceptions and no blurring.” *Perry v. Kemna*, 356 F.3d 880, 895 (8th Cir. 2004) (Bye, J., concurring). However, even some courts that feel compelled by this Court’s precedent to consider only whether a formal charging document was filed, have felt reluctant to comply. At least one court has noted that being (seemingly) forced to employ the bright-line test left them “somewhat queasy.” *Hayes*, 231 F.3d at 666.

Conversely, other jurisdictions have rejected a rigid rule that is singularly focused on the filing of a charging document.⁵

where government seized a notepad containing confidential attorney-client communications because the indictment had not yet been filed); *United States v. Heinz*, 983 F.2d 609, 612 (5th Cir. 1993) (government’s pre-indictment recording of a conversation between defendant and his attorney did not violate the Sixth Amendment); *United States v. Sutton*, 801 F.2d 1346, 1365–66 (D.C. Cir. 1986) (finding that recording of defendant who had counsel was not a violation of his right to counsel because the indictment had not yet been filed).

⁵ See *United States v. Jansen*, 884 F.3d 649, 656–59, 659 n.4 (7th Cir. 2018) (evaluating sufficiency of counsel’s assistance in pre-filing plea); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892–93 (3d Cir. 1999) (en banc) (noting right to counsel may attach before filing where “the accused is confronted, just as at trial, by the procedural system, or by his expert adversary, or by both[.]” (quoting *Gouveia*, 467 U.S. at 189)); *Roberts v. Maine*, 48 F.3d 1287, 1290 (1st Cir. 1995) (finding that right to counsel did not attach under the facts of the case but noting “the right to counsel might conceivably attach before any formal charges are made, or before an indictment or arraignment, in circumstances where the “government had crossed the constitutionally significant divide from fact-finder to adversary”” (quoting *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992))); *Larkin*, 978 F.2d at 969 (finding list in *Kirby* creates a “rebuttable presumption” and

Some circuits appear to have internal discord.⁶

The fact that this inter- and intra-circuit discord exists has been a consistent point of discussion for

a “defendant may rebut this presumption by demonstrating that, despite the absence of formal adversary judicial proceedings,” the government had become the adversary); *United States v. Wilson*, 719 F. Supp. 2d 1260, 1266 (D. Or. 2010) (Sixth Amendment right to counsel attached at pre-indictment plea negotiation, because the right “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”); *United States v. Busse*, 814 F. Supp. 760, 763 (E.D. Wis. 1993) (Sixth Amendment right to counsel had attached when, during “pre-charge negotiation[s],” the government had “committed itself to prosecut[ion]” (citation omitted)); *Chrisco v. Shafran*, 507 F. Supp. 1312, 1319–20 (D. Del. 1981) (the right to counsel attached when defendant was represented by counsel during pre-indictment plea negotiations); *United States v. Fernandez*, No. 98 CR. 961 JSM, 2000 WL 534449 at *2 (S.D.N.Y. May 3, 2000) (the right to counsel attached pre-indictment when the defendant was represented and his attorney failed to inform him prior to the filing of formal charges about the possibility of a cooperation agreement with the prosecution).

⁶ *Compare Perry*, 356 F.3d at 896 (Bye, J., concurring) (“[T]he Eighth Circuit has used language suggesting it would adopt the bright-line approach” but had not directly addressed the issue), and *United States v. Ingle*, 157 F.3d 1147, 1151 (8th Cir. 1998) (quoting *Moran v. Burbine*, 475 U.S. 412, 431 (1986)) (employing bright-line test), with *United States v. Red Bird*, 287 F.3d 709, 715–16 (8th Cir. 2002) (right to counsel attached prior to federal indictment where defendant had been arraigned in separate Indian tribal court proceeding on the same charge); compare *United States v. Mills*, 412 F.3d 325, 329 (2d Cir. 2005) (right attached prior to federal indictment where challenged police interrogation occurred after state court prosecution on the same charge), with *United States v. Mapp*, 170 F.3d 328, 334 (2d Cir. 1999) (no attachment of right to counsel where government placed informant in cell to ask about uncharged murder case).

courts and commentators. *See Perry*, 356 F.3d at 895–96 (Bye, J., concurring); *United States v. Rosen*, 487 F. Supp. 2d 721, 732–33 (E.D. Va. 2007); 3 LaFave et al., *Criminal Procedure* § 11.2(b) nn. 81.10–81.90 (3d ed. 2007); Steven J. Mulroy, *The Bright Line’s Dark Side: Pre-Charge Attachment of the Sixth Amendment Right to Counsel*, 92 Wash. L. Rev. 213, 228–33 (2017); Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 Nw. U. L. Rev. 1635, 1635 (2003).

In this case, the California Supreme Court interpreted this Court’s precedent as requiring that the right to counsel would *only* have attached if there was a formally filed document alleging murder—without any other consideration. App. 14a, citing *Rothgery*, 554 U.S. at 198. However, at the time when Petitioner was forced to have his attorney twice represent him in court on the murder allegations, cross-examine witnesses about the murder allegations, put on evidence concerning those murder allegations, and argue against detention without bail based solely on those murder allegations,⁷ he undeniably found “himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law,” concerning those murder allegations. *Kirby*, 406 U.S. at 689.

⁷ This Court has held that compliance to the right to counsel is “an essential jurisdictional prerequisite to a federal [or state] court’s authority to deprive an accused of his life or liberty.” *Johnson*, 304 U.S. at 467.

The actions of the government—accusing Petitioner in open court of committing murder and seeking to detain him without bail because of those allegations—required that Petitioner retain, work with, develop a relationship with, and ultimately be represented in court by his attorney to defend against those murder allegations.

Despite the trial-like confrontations concerning the murder allegations, the relationship with counsel to defend against those allegations, and being denied bail solely based on those allegations, the California Supreme Court determined that—because the murder allegation was not *written* on the Indictment—there was no right to counsel. It is incomprehensible that Petitioner—who was actually represented in court, twice, specifically to defend against those murder allegations—did not have a right to that same counsel because no government agency had written that allegation down on a piece of paper.

The import of the list in *Kirby* on the right to counsel will continue to be an issue until this Court explicitly resolves it. Thus, Petitioner requests that this Court grant certiorari to decide this issue.

B. This Court Should Consider Whether The Separate Sovereigns Doctrine From Fifth Amendment Jurisprudence Applies in The Context Of The Sixth Amendment Right to Counsel

Additionally, even if Petitioner’s right to counsel had not attached on the state murder charges, Petitioner contends his right to counsel attached on federal murder charges.⁸ Indeed, when the magistrate court asked the AUSA if the court could properly consider the state murder case, it was the government itself that proposed an alternative: consider the case with a federal murder allegation.

The AUSA stated that even if the uncharged state murder allegations could not be considered by the federal court because they were not filed “right now,” there was evidence that the murder was cognizable in federal court; thus, the court should *consider it as a federal murder case*. App. 160b–161b. Therefore, it was the federal government who argued that, at a minimum, the court had to consider the case to be a licensing violation *and* a federal murder charge.⁹ As a result,

⁸ Contrary to the California Supreme Court’s statement, the question was not whether the federal licensing case, itself, was the “same offense” as the state murder case. App. 17a. Instead, the question is whether the federal case—where the government combined allegations of murder and licensing violations—was the “same offense” as the state murder charges.

⁹ If Petitioner was held in custody only on the federal licensing charge—as the government has argued—then depriving Petitioner of his liberty on a minor licensing violation rendered his detention unlawful. U.S. Const., amend. IV; *see* 18 U.S.C.

the government combined the licensing and federal murder charge in a way that could not later be parsed out for purposes of the Sixth Amendment right to counsel.

If, as Petitioner contends, his right to counsel attached to federal murder allegations, then the question becomes whether evidence obtained in violation of that right was properly used in the state murder case.

This Court has held that the Sixth Amendment right to counsel is “offense specific.”¹⁰ *McNeil*, 501 U.S. at 175. In *Texas v. Cobb*, 532 U.S. 162, 172–73 (2001), this Court held that “offense specific” means that when a defendant’s right to counsel attaches with respect to one offense, it attaches to any other that is the “same offense” under the *Blockburger* analysis from Double Jeopardy jurisprudence.¹¹ There, the issue before the

§ 3142(f). When the government elicits incriminating statements from a suspect by exploiting an unlawful search, seizure, detention, or arrest, it violates the Fourth Amendment. *Wong Sun v. United States*, 371 U.S. 471, 485 (1963); see U.S. Const., amends. IV, XIV, § 1.

¹⁰ Under federal law, “Murder is the unlawful killing of a human being with malice aforethought.” 18 U.S.C. § 1111(a) (2003). Under California law, “Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.” Cal. Penal Code § 187(a) (1996).

¹¹ Under the *Blockburger* “same offense” test, “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Blockburger v. United States*, 284 U.S. 299, 304 (1932). However, two offenses are not considered the “same offense” if they violate the laws of two separate sovereigns. *Puerto Rico v. Sanchez Valle*, 136 S.Ct. 1863, 1867 (2016).

Court was two state offenses, and no offenses in a separate sovereign. Thus, this Court did not consider or address whether the separate sovereign doctrine, routinely applied to the *Blockburger* test in the Fifth Amendment Double Jeopardy context, would apply in the context of the Sixth Amendment right to counsel.

1. There is a Recognized Disagreement on This Question

The First, Fourth, Fifth, and Sixth Circuits have held that *Cobb* requires that the dual sovereignty doctrine applies to the “same offense” determination under the Sixth Amendment. In those circuits, even if two offenses would otherwise be the same under *Blockburger*, they are separate offenses for purposes of the right to counsel when prosecuted by separate sovereigns.¹² Thus, charges filed in federal court can never give rise to a right to counsel in a state prosecution for the same offense. These circuits rely heavily on this Court’s singular sentence in *Cobb* that there is “no constitutional difference between the meaning of the term ‘offense’ in the contexts of double jeopardy and of the right to counsel.” *Cobb*, 532 U.S. at 173.

Conversely, the Second and Eighth Circuits hold that the Sixth Amendment does apply to the same

¹² See *Turner v. United States*, 885 F.3d 949, 954–55 (6th Cir. 2018); *United States v. Burgest*, 519 F.3d 1307, 1310 (11th Cir. 2008); *United States v. Alvarado*, 440 F.3d 191, 196–97 (4th Cir. 2006); *United States v. Coker*, 433 F.3d 39, 47 (1st Cir. 2005); *United States v. Avants*, 278 F.3d 510, 517 (5th Cir. 2002).

offense charged by one sovereign and later charged by another. *See Mills*, 412 F.3d at 329–30; *Red Bird*, 287 F.3d at 714–15. Additionally, the Seventh Circuit has indicated it will follow the Second and Eighth Circuit’s lead and find that the dual sovereignty doctrine is not incorporated into Sixth Amendment jurisprudence. *See United States v. Krueger*, 415 F.3d 766, 775–78 (7th Cir. 2005). These circuits have recognized that even though the *Cobb* Court used the *Blockburger* test for determining “same offense,” that “does not demonstrate that *Cobb* incorporates the dual sovereignty doctrine.” *Mills*, 412 F.3d at 330. As one court noted, the considerations informing the Double Jeopardy Clause are so different from those informing the Sixth Amendment that “[w]e do not believe that it is appropriate to fully rely on double jeopardy analysis here.” *Red Bird*, 287 F.3d at 715.

This circuit split has been widely and repeatedly acknowledged.¹³ Most recently, the Sixth Circuit noted

¹³ *See United States v. King*, 903 F. Supp. 2d 500, 504–05 (E.D. Mich. 2015) (addressing the existence of the split between circuits); *Burgest*, 519 F.3d at 1310 (acknowledging and rejecting the opposing views of the Second and Eighth Circuits); *Alvarado*, 440 F.3d at 198 (openly disagreeing with the Second and Seventh Circuits); *Coker*, 433 F.3d at 43–44 (First Circuit openly disagreeing with the Second Circuit’s opinion in *Mills*, 412 F.3d at 327); *Krueger*, 415 F.3d at 776–77 (addressing the existence of the split between circuits); *Mills*, 412 F.3d at 330 n.2 (openly disagreeing with the Fifth Circuit); *see also* Brian J. Litwak, *Constitutional Conflation: The Incorrect Incorporation of Dual Sovereignty Into Sixth Amendment Jurisprudence*, 41 New Eng. J. on Crim. & Civ. Confinement 85, 103–07 (2015); Ryan M. Yanovich, Comment, *Answering Justice Scalia’s Question: Dual Sovereignty and the Sixth Amendment Right to Counsel After Texas v. Cobb and*

that “[t]he circuit courts are split on whether the Supreme Court in *Cobb* ‘incorporated all of its double jeopardy jurisprudence (including the dual sovereignty doctrine)’ into its Sixth Amendment right-to-counsel jurisprudence ‘or [incorporated] merely the *Blockburger* test.’” *Turner*, 885 F.3d at 954 (quoting *Coker*, 433 F.3d at 43); see *Krueger*, 415 F.3d at 776 (noting the conflict between the Fifth Circuit on one side and the Second and Eighth Circuits on the other).

This circuit split will likely only grow without further guidance, allowing courts across the country to apply differing interpretations of the Sixth Amendment right to counsel to defendants in the same position. Additionally, the increasing cooperation between federal and state authorities is apt to cause the question of the dual sovereignty doctrine’s application in the Sixth Amendment context to arise more frequently. Thus, instances leading to confusion about, or even outright manipulation of, a defendant’s Sixth Amendment right to counsel can be expected to exponentially increase.

Montejo v. Louisiana, 78 Fordham L. Rev. 1029, 1051-65 (2009); Charles Morrison, Comment, *The Supreme Court May Have Meant What It Said, but It Needs to Say More: A Comment on the Circuit Split Regarding the Application of the Dual Sovereignty Doctrine to the Sixth Amendment Right to Counsel*, 39 U. Tol. L. Rev. 153, 153 (2007); David J. D’Addio, *Dual Sovereignty and the Sixth Amendment Right to Counsel*, 113 Yale L.J. 1991, 1991–92 (2004).

2. The Separate Sovereign Doctrine Should Not Determine Whether a Defendant's Sixth Amendment Right to Counsel Attaches

Importing the dual sovereignty doctrine from Fifth Amendment double jeopardy jurisprudence into the Sixth Amendment right to counsel context ignores the core purposes of those rights.

The Fifth Amendment enshrines the “universal maxim” that no man be twice put in jeopardy for the same offense. *Green v. United States*, 335 U.S. 184, 187 & n.4 (1957) (citing 4 Blackstone’s Commentaries 335). The determination of when a person can be tried twice is necessarily tempered by the fact that our nation is made of separate sovereigns: “As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.” *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The dual sovereignty doctrine reflects the basic principle that “an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.” *United States v. Lanza*, 260 U.S. 377, 382 (1922). This Court has recognized that double jeopardy law is “complex” but shows as “fidelity” to honoring the rights of separate sovereigns. *Gamble v. United States*, 139 S.Ct. 1960, 1966 (2019).

Those same concerns of sovereignty, so central to the discussion of Double Jeopardy, are just not the relevant feature of the Sixth Amendment right to counsel.

Instead, the “core purpose” of the right to counsel is “assur[ing aid] . . . ‘when the accused [is] confronted with the intricacies of the law and the advocacy of the public prosecutor.’” *Gouveia*, 467 U.S. at 189 (citing *Ash*, 413 U.S. at 309).

If the core purpose of the right to counsel is to ensure that a defendant is receiving constitutionally sufficient aid, and there is a determination that the defendant has not received that aid, the core purpose of the right to counsel is in no way furthered by allowing the tainted evidence to be received in a separate court. Additionally, respecting the Sixth Amendment right to counsel in no way prevents any sovereign from prosecuting violations of its laws. It merely requires that, in doing so, those sovereigns not use evidence that has been tainted by the illegality of a constitutional violation.¹⁴

Indeed, many of the dangers in allowing application of the separate sovereign doctrine to the right to counsel are evident. By applying the separate sovereign doctrine in the Sixth Amendment context, there is

¹⁴ This Court has consistently been distrustful of assertions that constitutional rights should give way simply because one sovereign has handed its case off to another. To that end, this Court has held that evidence seized by state officers in violation of the Fourth Amendment is inadmissible in a federal criminal trial. *Elkins v. United States*, 364 U.S. 206, 223 (1960) (“If the government becomes a lawbreaker, it breeds contempt for law[.]”). The Fifth Amendment privilege against self-incrimination also prohibits a sovereign from using testimony immunized in another sovereign’s courts. *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 77–79 (1964).

“nothing to prevent the federal authorities from turning incriminating statements over to the state for use in state prosecution.” Morrison, *supra*, at 169 (noting D’Addio, *supra*, at 1998).

As one commentator noted, application of

dual sovereignty principles would permit cooperation between sovereigns that could easily frustrate the purpose of the right to counsel. Dual sovereignty would enable one sovereign to question the defendant without a lawyer present while the defendant awaited trial before another sovereign. Should that questioning yield fruit, the prosecution could be handed off to whichever sovereign is in the best position to make use of the incriminating evidence.

See D’Addio, *supra*, at 1998.

This hypothetical fact pattern foretold above is precisely what happened in Petitioner’s case, except that here, the sovereigns did not act separately, and one merely benefited from the violation of the other. Instead, even though Petitioner’s rights had unquestionably attached on *at least some charges*, the two sovereigns worked together to *knowingly violate* Petitioner’s Sixth Amendment rights in the hopes of obtaining incriminating information and walking it across the street to state court to use freely.

3. Even if The Separate Sovereign Doctrine Applies, There is an Exception For a Sham Prosecution

Assuming, for the purpose of argument, that this Court finds that the separate sovereign doctrine applies in the Sixth Amendment context, the next question is whether the exception to that doctrine, noted in *Bartkus v. Illinois*, 359 U.S. 121, 121 (1959), should also apply.

In *Bartkus*, 359 U.S. at 123–24, the Court considered the separate sovereign doctrine within the context of Double Jeopardy. Justice Frankfurter observed that the facts of that case

do[] not support the claim that the State of Illinois in bringing its prosecution was merely a tool of the federal authorities, who thereby avoided the prohibition of the Fifth Amendment against a retrial of a federal prosecution after an acquittal. It does not sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution.

Some courts have used this language to find that *Bartkus* established an exception to the dual sovereignty doctrine. See *United States v. Guzman*, 85 F.3d 823, 826 (1st Cir. 1996) (finding “most courts have treated the *Bartkus* intimation as good law. [Citations.]”); see also *In re Kunstler*, 914 F.2d 505, 517 (4th Cir. 1990) (noting that the “tool of the same authorities” exception is available in “some circumstances”

(citing *Bartkus*, 359 U.S. at 121)); *United States v. Liddy*, 542 F.2d 76, 79–80 (D.C. Cir. 1976) (noting the *Bartkus* exception but finding it inapplicable in that case). Conversely, other courts have declined to recognize the language as precedential. See, e.g., *United States v. Brocksmith*, 991 F.2d 1363, 1366 (7th Cir. 1993) (“We have questioned whether *Bartkus* truly meant to create such an exception, and we have uniformly rejected such claims.”); *United States v. Patterson*, 809 F.2d 244, 247 n.2 (5th Cir. 1987) (finding this Court’s case law “unclear” on whether “a ‘sham’ situation would constitute an exception to the dual sovereignty doctrine.”). Yet, even those courts that recognize the exception struggle with its application,¹⁵ and there is little agreement or uniformity in its application.¹⁶

¹⁵ Indeed, courts have construed this Court’s holding so narrowly that it is impossible to meet the threshold. Litwak, *supra*, at 90–91; see David L. Lane, Comment, *Twice Bitten: Denial of the Right to Counsel in Successive Prosecutions by Separate Sovereigns*, 45 Hous. L. Rev. 1869, 1907 (2009) (“[T]he Court should clearly hold that the *Bartkus* ‘sham prosecution’ exception does, in fact, exist and will be enforced[.]”); Morrison, *supra*, at 179–80 (arguing that the Court should clearly recognize the sham prosecution exception and craft an application in the Sixth Amendment context).

¹⁶ Compare *United States v. Bowlson*, 240 F. Supp. 2d 678, 684–85 (E.D. Mich. 2003) (finding a sham prosecution where state officers functioned as part of a joint state-federal taskforce and there was explicit direction of one sovereign by the other) and *United States v. Knight*, No. 05-81155, 2006 WL 1722199, at *2–3 (E.D. Mich. June 22, 2006) (finding a sham prosecution where a state officer was part of a federal taskforce in the other prosecution) with *United States v. Peña*, 910 F. Supp. 535, 540 (D. Kan. 1995) (finding no sham prosecution even where the state attorney

Petitioner’s case raises the issue of the fundamental existence of a *Bartkus* exception, the bounds of such an exception, and whether that exception applies within the Sixth Amendment context.¹⁷

In this case, the AUSA admitted at trial that he had no intention of pursuing the federal case. However, the State of California, which did not have the evidence to charge or even arrest Petitioner, wanted Petitioner arrested. The AUSA only took action on the licensing case as a cover for the LAPD to detain Petitioner for murder—even using LAPD’s “detention script” as a guide to getting the detention order. In doing so, California was getting the federal government to “accomplish that which they [could not] constitutionally do themselves,” namely, arrest and detain Petitioner without bail. *Liddy*, 542 F.2d at 79. Once the State of California completed that goal, they then used the “cover” of the federal case to do another thing they could not do: question Petitioner without his attorney. Once the State of California, working hand in glove with the FBI, used its agent to question Petitioner and extract his statement, it filed charges against Petitioner relying, almost exclusively, on that statement. That *very same day*, the federal government dismissed their case.

who prosecuted the state action was later designated a federal prosecutor in the second case).

¹⁷ At least one court has recognized that this exception applies to the “same offense” requirement of the Sixth Amendment where one case is used as a cover for gaining advantage in another case. *Coker*, 433 F.3d at 39.

Accordingly, even if the separate sovereign doctrine applies to the “same offense” determination under the Sixth Amendment, Petitioner asks this Court to confirm the *Bartkus* exception to that doctrine, and to extend that exception to the Sixth Amendment right to counsel.

C. This Court Should Apply Due Process Protections for Illegally Obtained Evidence to the Sixth Amendment Right to Counsel

Fundamental fairness is the essence of due process and requires that the government’s conduct conform to a sense of justice, decency, and fair play. U.S. Const., amend. XIV, § 1. Under these principles, this Court has already determined that evidence obtained in violation of the Fourth Amendment does not become constitutionally compliant because it is brought to another jurisdiction. In disallowing the “silver platter doctrine,” the Court sought to eliminate the “inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards [would] be promoted and fostered.” *Elkins*, 364 U.S. at 222.

This Court has further noted that, generally, courts should refrain from assisting others in disregarding constitutional mandates and has criticized courts for playing a role in the “willful disobedience of a Constitution they are sworn to uphold.” *Elkins*, 364 U.S. at 223. This Court has observed that “free and

open cooperation” between state and federal officers is “hardly promoted by a rule that implicitly invites federal officers . . . at least tacitly to encourage state officers in the disregard of constitutionally protected freedom.” *Id.* at 221–22.

Even if the actions of the government in this case did not violate any of the above-noted Sixth Amendment rights on murder charges, one thing is indisputable: Petitioner had a Sixth Amendment right to counsel concerning the licensing violation. While Petitioner was held in federal custody without bail, and after this right to counsel had attached, the FBI and LAPD sent an informant into Petitioner’s cell to question him. At no time did they instruct that informant not to violate Petitioner’s Sixth Amendment right concerning the licensing case. In fact, the informant asked a variety of questions concerning the federal business investigation.

When they did that, the FBI and LAPD knew they were violating *at least some of Petitioner’s constitutional rights*. At the absolute minimum, they were knowingly violating Petitioner’s right to counsel in the filed federal case. Yet, they did it anyway because they wanted to get information for the murder case. After intentionally and purposefully violating Petitioner’s constitutional rights, the federal government simply dismissed its case and then delivered Petitioner’s statements on a “silver platter” to the State of California. The State of California then made the evidence the centerpiece in its trial against Petitioner.

As a result, this Court should explicitly adapt existing principles of fundamental fairness disavowing the “silver platter doctrine” to the Sixth Amendment right to counsel. *See* U.S. Const., amend. XIV, § 1.



CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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