No. 20-244

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

BRIEF IN OPPOSITION

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November 30, 2020

CAPITAL CASE

QUESTION PRESENTED

Whether statements petitioner made to a cellmate while in federal custody, after petitioner was indicted for a federal financial crime and before the State charged him with murdering his wife, were obtained in violation of his Sixth Amendment or due process rights and should have been excluded from his subsequent state criminal prosecution on that basis.

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

People v. Fayed, No. S198132, judgment entered April 2, 2020 (this case below).

In re Fayed on Habeas Corpus, No. 261155.

Los Angeles County Superior Court:

People v. Fayed, No. BA346352, judgment entered November 17, 2011 (this case below).

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CONSTITUTIONAL PROVISIONS

STATEMENT

1. Petitioner James Michael Fayed and his wife Pamela ran Goldfinger Coin and Bullion, a business that provided money and precious-metal transfer services. Pet. App. 3. In 2007, Fayed began divorce proceedings and banned Pamela from the Goldfinger offices. *Id.* In early 2008, the federal government began investigating Goldfinger for money laundering. *Id.* at 4. In February 2008, federal prosecutors charged Fayed and Goldfinger, in a sealed indictment, with operating an unlicensed money transmitting business in violation of 18 U.S.C. § 1960. *Id.*

Pamela learned about the federal investigation in June 2008. Pet. App. 4. She retained a criminal defense attorney, who contacted Assistant United States Attorney Mark Aveis and told him that "Pamela wants to come in." *Id.* Aveis believed that this meant Pamela wanted to cooperate in the investigation against Fayed and Goldfinger. *Id.*

On July 28, 2008, Fayed and Pamela met with their attorneys at a Century City office building. Pet. App. 5. After the meeting, as Pamela walked alone to her car in the adjacent parking structure, an assailant stabbed her repeatedly in the head, neck, and chest. *Id.* Pamela died from her injuries. *Id.*

Cell phone records showed that, close to the time of the attack, Fayed had exchanged text messages with his assistant, Joey Moya. Pet. App. 6. Records also showed that the cell phones of Moya's associates, Gabriel Marquez and Steven Simmons, were near the parking structure. *Id.* Surveillance cameras recorded a red sport utility vehicle in the structure near the time of the killing; the parking ticket that the occupants of that vehicle used to exit the structure bore Simmons's fingerprint. *Id.* The vehicle's license plate

matched that of a vehicle that Avis Rent-A-Car rented to Fayed and Goldfinger. *Id.* When the police took possession of the vehicle, they found blood inside of it; the blood was later identified as Pamela's. *Id.*; 9 Reporter's Transcript 1626-1628.

On August 1, 2008, the federal indictment of Goldfinger and Fayed was unsealed and federal agents arrested Fayed for the 18 U.S.C. § 1960 offense. Pet. App. 6. On August 6, the federal district court denied bail and ordered Fayed to be held in custody pending trial. *Id.* at 226. While holding Fayed in custody, federal authorities informed the Los Angeles Police Department—which was investigating Pamela's murder—that Fayed's cellmate, Shawn Smith, wanted to speak to police. *Id.* at 6-7. Smith met with an LAPD detective and agreed to wear a recording device when he returned to the cell with Fayed. *Id.* Smith then surreptitiously recorded Fayed admitting that he had paid Moya to kill Pamela. *Id.* Fayed also asked Smith to solicit a hitman—a fictional person named Tony that Smith had invented and mentioned to Fayed—to kill Moya before Moya could implicate Fayed in Pamela's murder. *Id.*

2. In September 2008, the State charged Fayed with the first-degree murder of Pamela and alleged, as special circumstances making the murder punishable by death, that the murder had been committed for financial gain and by means of lying in wait. Pet. App. 7; *see* Cal. Penal Code §§ 187(a), 190.2(a)(1), 190.2(a)(15). The State also charged Fayed with one count of conspiracy. Pet. App. 7; *see* Cal. Penal Code § 182(a)(1). The federal prosecutors moved to dismiss the federal indictment against Fayed on the same day. Pet. App. 7.

At the murder trial, Fayed challenged the admissibility of his surreptitiously recorded statement on the grounds that his federal constitutional rights had been violated in three principal ways. Pet. App. 12-29. First, he argued that his Sixth Amendment right to counsel had already attached as to the murder at the time of the recording because the ongoing federal financial case and the subsequent state murder prosecution were "inextricably intertwined." *Id*. at 13. Second, he argued that the federal case was a "sham," such that the federal and state prosecutions were bound together for purposes of triggering the right to counsel. *Id*. at 15-16. Third, he claimed that the recording violated his due process rights because federal authorities had engaged in subterfuge to assist the State's investigation into Pamela's murder. *Id*. at 17-18. The trial court rejected these challenges and admitted the recorded statement into evidence. *Id*. at 12.

The jury found Fayed guilty as charged. After a separate penalty trial, it returned a verdict of death. *See* Pet. App. 8; 14 Clerk's Transcript 3616, 3618-3620, 3631-3633, 3698, 3704-3706.

3. The California Supreme Court unanimously affirmed the judgment. Pet. App. 109. It rejected Fayed's claim that the admission of the tape-recorded statement violated his Sixth Amendment right to counsel because the federal and state cases were "intertwined." *Id*. at 13; *see id*. at 13-19. The court explained that the Sixth Amendment right to counsel is "offense specific" and attaches only to crimes for which the government has initiated adversary judicial criminal proceedings, "such as by formal charge or indictment," or to uncharged crimes that share all the elements of a charged crime. *Id*. at 14-15 (citing *Rothgery v. Gillespie County, Tex.,* 554 U.S. 191, 198 (2008),

Texas v. Cobb, 532 U.S. 162 (2001), and *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991)). Because Fayed had not been charged with murder when Smith recorded Fayed's statement, and the federal financial crime and the state murder did not share any of the same elements, these "bright-line" limitations on the Sixth Amendment right to counsel foreclosed Fayed's claim. *Id.* at 14-15, 19.

The court also rejected Fayed's argument that the federal case was a sham. It observed that his theory relied on principles underlying the dual sovereignty doctrine in the Fifth Amendment double-jeopardy context, which did not govern the analysis of his Sixth Amendment right-to-counsel claim. *See* Pet. App. 15-16. And even assuming that those principles were relevant to his Sixth Amendment claim, the court determined that they would not help Fayed. It explained that "the sham prosecution theory only applies to provide defendant relief if there were successive prosecutions by two sovereigns for the *same* offense." *Id.* at 17. It could not apply in Fayed's case, where the federal financial crime and the state murder offense were not the same. *Id.* at 16-17.

Finally, the court rejected Fayed's argument that federal officials engaged in improper subterfuge by detaining him on federal charges and then obtaining and sharing information with state authorities. *See* Pet. App. 17-18. The court explained that, with Fayed lawfully detained, state and federal authorities were free to cooperate, and "this level of cooperation and collaboration simply represents the 'conventional practice between the two sets of prosecutors throughout the country.'" *Id.* at 17 (quoting *Bartkus v. Illinois*, 359 U.S. 121, 123 (1959)).

ARGUMENT

Fayed contends that the state court should have suppressed incriminating statements that Fayed made after he was indicted for a federal financial crime but before he was charged by state prosecutors with his wife's murder. But this Court has repeatedly instructed that the Sixth Amendment right to counsel is "offense specific." When Fayed made the statements to his cellmate, while in custody for a federal financial offense, the right to counsel had not attached with respect to the future state murder charge. Fayed fails to identify any genuine conflict in the lower courts with respect to this claim. And his alternative constitutional theories were not properly raised below and are meritless in any event.

1. Fayed principally argues that his right to counsel with respect to the as-yet unfiled state charge had attached when Smith recorded his statements, and that their conversation therefore violated the Sixth Amendment. Pet. 21-22; *see Massiah v. United States,* 377 U.S. 201, 206 (1964). That argument is incorrect on the merits and does not implicate any lower-court conflict.

a. The Sixth Amendment right to counsel "does not attach until a prosecution is commenced." *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). This Court has "pegged commencement to 'the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Rothgery v. Gillespie County, Tex.,* 554 U.S. 191, 198 (2008) (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984)); *see also Kirby v. Illinois*, 406 U.S. 682, 689 (1972). That "rule is not 'mere formalism,' but a recognition of the point

at which 'the government has committed itself to prosecute,' 'the adverse positions of government and defendant have solidified,' and the accused 'finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Rothgery*, 554 U.S. at 198 (quoting *Kirby*, 406 U.S. at 689).

When the Sixth Amendment right to counsel attaches, it is "offense-specific" to the charged crime. *Texas v. Cobb,* 532 U.S. 162, 168 (2001) (citing *McNeil*, 501 U.S. at 175). The right attaches to an uncharged crime only if that crime shares all the same elements of proof as the charged offense. *Cobb*, 532 U.S. at 172-173. Unless that requirement is met, the right does not attach to another uncharged crime—even if it is "factually related" to or "interwoven" with the charged offense. *Id.* at 167-168.

This Court has already considered and rejected an argument similar to the one advanced by Fayed here. The defendant in *Moran v. Burbine*, 475 U.S. 412, 428-429 (1986), claimed that "[a]t least in some situations . . . , the Sixth Amendment protects the integrity of the attorney-client relationship regardless of whether the prosecution has in fact commenced 'by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" He proposed that the right to counsel attaches, "at the very least, once the defendant is placed in custodial interrogation." *Id.* at 429. But this Court was "not persuaded." *Id.* It explained that "[t]he Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor." *Id.* at 430. The right "becomes applicable

only when the government's role shifts from investigation to accusation." *Id*.

Applying those principles, this Court has held that its "Sixth Amendment precedents are not applicable" when an informant surreptitiously elicits incriminating information from a detained suspect who has not yet "been charged with the crime" being investigated. *Illinois v. Perkins*, 496 U.S. 292, 299 (1990); *see also Moran*, 475 U.S. at 431 (citing *Maine v. Moulton*, 474 U.S. 159, 180 & n.16 (1985)).

Here, as the California Supreme Court recognized, the offense-specific nature of the right to counsel forecloses Fayed's claim. *See* Pet. App. 14. Contrary to Fayed's argument (Pet. 21), the bail hearings in the federal financial-crime case did not trigger Fayed's right to counsel with respect to the subsequent state murder charge. "[T]here is no exception to [the] offense-specific requirement for uncharged offenses that are 'closely related' to or 'inextricably intertwined' with the charged offense." Pet. App. 14 (quoting *Cobb*, 532 U.S. at 173). While the pending state murder investigation was a logical basis for denying bail on the federal licensing charge, *see* Pet. App. 17, the federal bail proceedings did not constitute a state murder charge. Fayed never faced punishment for murder in the federal case; nor was the federal government required to prove the same facts to prosecute Fayed under 18 U.S.C. § 1960 that a state prosecutor would need to prove to obtain a state conviction for murder. Instead, as the district court determined, the issue in the federal bail proceeding was limited to whether Fayed "will make his court appearances," which the court resolved in the negative by holding that "the possibility of flight is too grave." *See* Pet. App. 212, 226;

18 U.S.C. § 3142(f)(2)(A). Fayed did not have to "defend against" (Pet. 22) any murder allegations at that time. With respect to the murder, he did not yet find 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.

b. Fayed claims that the lower courts are conflicted over when the Sixth Amendment right to counsel attaches. Pet. 18-20. He argues that five federal circuits strictly tie attachment of the right to a formal charging while the other circuits do not. *Id.* But there is no conflict. The other seven federal circuits have similarly rejected claims that the Sixth Amendment right to counsel applies before charging. *See*, *e.g.*, *Roberts v. State of Maine*, 48 F.3d 1287, 1290 (1st Cir. 1995) (rejecting claim of pre-charging attachment of right to counsel); *United States v. Birbal*, 113 F.3d 342, 345 (2d Cir. 1997) (attachment of the right to counsel tied to indictment); *Alston v. Redman*, 34 F.3d 1237, 1251-1252 & n.16 (3d Cir. 1994) (attachment of right to counsel tied to indictment); *United States v. Alvarado*, 440 F.3d 191, 196 (4th Cir. 2006) (right to counsel "attaches only after the commencement of formal charges against a defendant"); *Turner v. United States*, 885 F.3d 949, 953 (6th Cir. 2018) (explaining that this Court's Sixth Amendment "attachment rule is crystal clear" and rejecting claim of pre-indictment right to counsel); *DeSilva v. Dileonardi*, 181 F.3d 865, 868 (7th Cir. 1999) ("a person arrested and held for questioning cannot assert a right to counsel under the Sixth Amendment [citation], even though the questioning may lead to a prosecution"); *United States v. Ingle*, 157 F.3d 1147, 1151 (8th Cir. 1998) (rejecting claim that the "right to counsel may attach before the filing of a formal charge").

As Fayed notes, Pet. 19-20, a few courts of appeals have "discussed the 'possibility'" of rare cases where the right to counsel might attach before charging. *Turner*, 885 F.3d at 954-955 (quoting *Roberts*, 48 F.3d at 1291). But his assertion that those courts "rejected a rigid rule that is singularly focused on the filing of a charging document" (Pet. 19) substantially overstates the cited cases. Fayed first invokes *United States v. Jansen*, 884 F.3d 649 (7th Cir. 2018), which concerned a claim of ineffective assistance of counsel. *See* Pet. 19 n.5. The question of when the right to counsel attaches is distinct from the question of whether the defendant was wrongly deprived of effective assistance at a critical stage of his trial after that right attached. *See, e.g.*, *Rothgery*, 554 U.S. at 211-212. The former question was not considered, discussed, or ruled on in *Jansen*.

Fayed also relies on *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 893 (3d Cir. 1999), which held that the defendant's right to counsel attached when he underwent a "preliminary arraignment" after he was arrested pursuant to a warrant "charging him with the murder . . . ." But *Matteo* does not conflict with the ruling in this case because Fayed was not under arrest for Pamela's murder when he made the incriminating statements to Smith. *See* Pet. App. 6.

Nor does the ruling below conflict with the First Circuit's decision in *Roberts*, which *rejected* the defendant's claim that the Sixth Amendment right to counsel attached when he took a blood alcohol test after an arrest for driving without a license. *See Roberts*, 48 F.3d at 1291. In the course of reaching that decision, the appellate panel speculated that there might be very rare exceptions where the government crosses "the constitutionally significant divide from

fact-finder to adversary" without yet charging a suspect. *Id.* Such dicta does not establish a conflict warranting this Court's review. Similarly, in *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992), the court reserved the possibility that there might be some way for a suspect to "rebut" the "axiomatic" presumption that the right attaches only at the time of charging—but then rejected the defendants' claims that their right to counsel had attached during a pre-indictment lineup.[1]

2. Fayed also asks the Court to review the question "whether the separate sovereign doctrine from Fifth Amendment jurisprudence applies in the context of the Sixth Amendment right to counsel." Pet. 23. He reasons that, by the time of the recorded statements, his right to counsel had attached on "federal murder charges" that comprised the "same offense" as the one later charged by the state. *Id.* at 23, 28. He urges the Court to grant review and hold either that the Fifth Amendment's separate sovereign doctrine does not apply in the context of a Sixth Amendment right-to-counsel claim, *see id.* at 25-30, or that the circumstances

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[1] The district court cases cited by Fayed (Pet. 20 n.5), all pertain to a defendant's right to counsel (or to effective assistance of counsel) when he is confronted by prosecutors during pre-charging plea negotiations. None concluded that the right to counsel had attached with respect to an uncharged state offense when the suspect had been charged only in a federal case and then spoke to a cellmate whom he believed to be a confederate. *See United States v. Wilson*, 719 F. Supp. 2d 1260, 1267 (D. Or. 2010), *United States v. Busse*, 814 F. Supp. 760, 763-764 (E.D. Wis. 1993), *Chrisco v. Shafran*, 507 F. Supp. 1312, 1319-1320 (D. Del. 1981), and *United States v. Fernandez*, 2000 WL 534449, *2 (S.D.N.Y May 3, 2000),

here qualify for the "sham prosecution" exception to the separate sovereign doctrine, *see id.* at 31-34.[2]

As a threshold matter, Fayed did not properly present this argument below. His opening brief on direct appeal never argued that he had been charged with a federal murder offense. *See* Appellant's Opening Brief 67-78. Instead, Fayed alluded to "federal murder allegations" for the first time in his reply brief. *See* Appellant's Reply Brief 18. The California Supreme Court generally deems claims forfeited if they are raised for the first time in a reply brief, *see, e.g.*, *People v. Rangel*, 62 Cal. 4th 1192, 1218 (2016), and it did not address this federal-murder-prosecution argument in its decision below, *see* Pet. App. 13-19.

In any event, the argument lacks merit because Fayed was never charged with murder in federal court. The federal indictment alleged a single count of operating an unlicensed money transmitting business under 18 U.S.C. § 1960. Pet. App. 117-118; 2 Clerk's Transcript 313-314.

The only context in which dual-sovereignty and sham-prosecution principles were addressed by the

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[2] To the extent Fayed argues that the federal charges or detention were improper, that argument is unsupported. After a close review of the record, the California Supreme Court "reject[ed] defendant's assertion that federal authorities acted improperly in detaining" him and concluded that Fayed's "concerns of 'subterfuge and evasion with respect to federal-state cooperation in criminal investigation' are not realized in this case." Pet. App. 18-19. Moreover, any suggestion that the federal charges were a "sham prosecution" (*e.g.*, Pet. 31) intended to facilitate investigation of Pamela's murder is difficult to square with the fact that Fayed was charged with violating 18 U.S.C. § 1960 "[o]n February 26, 2007, five months before Pamela's murder." Pet. App. 4.

state court below was in its consideration of Fayed's effort to link the federal licensing charge to the subsequent state murder charge. *See* Pet. App. 14-16. As discussed above, Fayed asserted that his right to counsel had attached with respect to the subsequently charged state murder offense while he was in custody for the federal licensing offense because the two crimes were "inextricably intertwined." Pet. App 13; *supra* p. 3.[3] The California Supreme Court correctly rejected that argument based on *Texas v. Cobb*. *See* Pet. App. 14-16 (discussing *Cobb,* 532 U.S. at 173). It explained that, even if the dual-sovereignty and sham-prosecution principles were imported into a Sixth Amendment right-to-counsel context, they would provide Fayed with relief only "if there were successive prosecutions by two sovereigns for the *same* offense." Pet. App. 17. Here, however, the federal licensing charge and the state murder charge were "clearly not the same." *Id*.

Fayed now suggests that he was effectively charged with murder in the federal proceeding because the federal prosecutor argued at a bail hearing that the court "should *consider it as a federal murder case*." Pet. 23 (citing Pet. App. 160-161) (emphasis in petition). But the remarks at the bail hearing were not a grand-jury indictment—which is the only method specified by the Fifth Amendment for bringing felony charges. Under 18 U.S.C. § 3142(f)(2)(A), the purpose of the hearing was merely to decide whether to grant bail to Fayed or to detain him without bail. *See* Pet. App. 113, 117-118 (initial bail hearing before the magistrate). In opposing bail, the prosecutor naturally cited the pending LAPD murder investigation

[3] He did not contend that he had also been charged with a federal murder offense. *See* Appellant's Opening Brief 72-76.

(*see* Pet. App. 118-123) and Fayed's access to millions of dollars in potentially ill-gotten funds (*see id*. at 123). Notwithstanding the remarks highlighted by Fayed, the prosecutor otherwise acknowledged that the only issue before the court was whether Fayed would flee if released on bail. *See id*. at 182-186. The magistrate made it clear that "[t]his is not a murder case in this court" (*id*. at 160) and that the hearing was limited to adjudicating "the government's request for detention" without bail (*id*. at 117). And, after the magistrate had granted bail to Fayed, the district judge in reversing that decision emphasized that the hearing was solely concerned with Fayed's suitability for bail—"[t]hat's all we're concerned about here"—not Fayed's guilt with respect to Pamela's murder. *Id*. at 212.[4]

3. Finally, Fayed argues that, even if his Sixth Amendment right to counsel was not violated with respect to the state murder prosecution, it nonetheless was violated as to the federal licensing charge because Smith "asked a variety of questions concerning the federal business investigation." Pet. 35. Fayed claims that his due process rights were violated when state authorities used the recording in the murder case, analogizing his theory to a Fourth Amendment search-and-seizure violation under *Elkins v. United States*, 364 U.S. 206 (1960). *See* Pet. 34-36.

Again, however, Fayed did not present this precise *Elkins* claim to the California Supreme Court in his opening brief on appeal, but did so only belatedly in his reply brief. Appellant's Reply Brief 26. In Fayed's

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[4] Because Fayed was not charged with the "same offense" in federal and state courts, this case does not present any opportunity to resolve the conflict over whether the separate sovereigns doctrine applies to defendants who *were* charged with the same offense in federal and state court. *See* Pet. 25-27.

opening brief, his *Elkins* claim was based on the theory that federal officials were not genuinely interested in the licensing crime but were focused only on the uncharged murder, and that his due process rights were violated when the state murder prosecution later relied on this so-called subterfuge. *See* Appellant's Opening Brief 76-78. Here, Fayed posits that the federal officials *were* interested in investigating the financial crimes, and intentionally violated his rights in the licensing case by eliciting information from him about Goldfinger. Pet. 35. He now contends that it was this conduct that made it improper for the state murder prosecution to rely on that recording for the state's own purposes. *Id.* But the state supreme court did not address the latter, untimely theory.

Even if this argument had been properly presented below, it would not merit review by this Court. Importing the Fourth Amendment *Elkins* principle into the Sixth Amendment context, as Fayed invites this Court to do, would upend the well-established principle that the right to counsel is offense-specific. *See, e.g.*, *Cobb*, 532 U.S. at 167-168. It could extend the right to counsel to any questioning or surveillance by law enforcement that touches upon an uncharged crime, so long as the suspect could later demonstrate a Sixth Amendment violation as to a charged crime at that time. There is no basis in precedent for any such extension. And, as the court below recognized, there was nothing improper about the federal and state authorities cooperating in their legitimate investigations of separate federal and state crimes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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