

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**

—◆—
**REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

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REPLY BRIEF FOR PETITIONER

In this case, federal and state officials worked together to send an agent into Petitioner's cell to question him outside the presence of his attorney. It is undisputed that, at the time of that questioning, Petitioner's Sixth Amendment right to counsel had attached, *at the very minimum*, on the federal licensing charge. Thus, the question presented herein is not whether the government violated Petitioner's constitutional rights, that is undeniable, the question is the scope of that constitutional violation.

Petitioner argues that his right to counsel had attached not only on the licensing violation but also as to the murder allegations. Although the murder count did not appear on the face of the federal Indictment, Petitioner was brought into court, twice, and confronted with the specific allegations that he committed the murder of Pamela Fayed. Petitioner had counsel appear in court on his behalf, cross-examine government witnesses, conduct an investigation, present evidence, and argue that there was insufficient evidence that he committed murder. Following those two court hearings, Petitioner was held without bail based on the murder allegations. After the government created a situation where Petitioner had to be represented in court by his attorney to defend himself against murder allegations, and after Petitioner had created the requisite relationship with his lawyer, the government sent in the agent to question Petitioner outside the presence of that counsel.

Respondent's Brief in Opposition glosses over these crucial facts and does not address how the actions of federal and state officials initiated trial-like confrontations with Petitioner which necessitated representation by counsel. Instead, Respondent asks this Court to impose an inflexible interpretation of the Sixth Amendment where the right to counsel *can never attach* before the formal filing of a charging document under any circumstance. In steadfastly sticking with its rigid position, Respondent does not address or contest the majority of Petitioner's assertions, instead returning to its formalistic theme that Sixth Amendment protection demands a written allegation.

Strictly tethering the right to counsel to the filing of a formal charging document not only misunderstands the scope and purpose of this fundamental right, it also provides an easy mechanism for the government to do what they did in the instant case, namely, purposefully circumvent a defendant's constitutional rights.

Thus, this Court should grant certiorari and reverse the California Supreme Court's decision. This is necessary to affirm that a defendant's right to counsel cannot so easily be sidestepped by a myopic adherence to formality at the expense of fairness.



ARGUMENT

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

In its recitation of facts, Respondent simply states that Petitioner was “denied bail” by the federal court and ordered held in custody, downplaying the import of the murder allegations on that detention.¹ Respondent argues that the “remarks” at the bail hearing—meaning the repeated allegation that Petitioner committed murder—were made “merely to decide” whether to grant bail. Opp’n at 12. This argument misunderstands the basis for attachment of a defendant’s right to counsel.

The Sixth Amendment right to counsel is intended “to ‘protec[t] the unaided layman at critical confrontations’ with his ‘expert adversary.’” *McNeil v. Wisconsin*,

¹ The evidence is plain that the lower court detained Petitioner based on the murder allegations. In denying bail, 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,” Pet. App. at 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.” Pet. App. at 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.* Respondent’s contention that the government merely “cited” the pending LAPD murder allegations ignores not only what happened at those two federal hearings but the specific findings of the district court. Opp’n at 12.

501 U.S. 171, 177 (1991) (citation omitted). Indeed, this Court has found that the right to counsel attaches not with the creation of a formal filing document but, instead, when the “defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.” *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

In fact, bringing a defendant in front of a court, making allegations that he committed a crime, making him answer those specific allegations, and setting bail based on those allegations are precisely the set of circumstances in which this Court found the right to counsel to have attached in *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 198 (2008). Thus, contrary to Respondent’s suggestion, this Court has never drawn an inflexible line dependent on a prosecutor’s filing decisions.

Respondent further contends that its proposed bright-line rule is beyond reproach, and that there is no discord with that interpretation in the lower courts. Opp’n at 8–9. In doing so, Respondent dismisses the cases where lower courts have disagreed with the bright-line attachment rule asserting that those cases are factually inapposite. Opp’n at 9. However, any discernible distinction between the facts of those cases and the instant case does not alter that those courts have rejected the notion that there is an exceptionless bright-line rule. *See, e.g., Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892 (3d Cir. 1999) (en banc) (citation omitted). Contrary to Respondent’s position, the discord in the lower courts’ positions on whether the

right to counsel can attach prior to the filing of formal charges not only exists but has been the subject of much discussion in courts and academia. *See, e.g., United States v. Rosen*, 487 F. Supp. 2d 721, 732–33 (E.D. Va. 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).

As a result, the question of whether and when attachment of the right to counsel can occur outside the specified instances listed by this Court in *Kirby* will continue to be an issue dividing the lower courts until this Court explicitly resolves it. *See Kirby*, 406 U.S. at 689 (noting adversarial relationships can start at “formal charge, preliminary hearing, indictment, information, or arraignment”). Thus, Petitioner requests that this Court grant certiorari to decide this important 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

Even if Petitioner’s right to counsel had not attached on the state murder charges, Petitioner asserts his right to counsel attached on federal murder charges. During Petitioner’s federal bail hearings, the Assistant United States Attorney (AUSA) argued that the facts of the murder case should be considered by the court as a state murder allegation, or alternately, *as a federal*

murder allegation. Pet. App. at 160b–161b. The government itself argued that the court should treat the case in front of the court as *both a licensing and murder case*, combining the charges in a way that could not later be parsed out for the purposes of the Sixth Amendment. Thus, if Petitioner’s right to counsel had attached in the federal murder case, it must be determined whether evidence obtained in violation of that right was properly used in the state murder case.

In response, Respondent again returns to its refrain of focusing on the formal charging document to the exclusion of all other facts. Opp’n at 7. Respondent argues that Petitioner was only formally charged with a federal licensing charge and that offense is clearly not the “same offense” as the murder charge. Opp’n at 12.

Yet, contrary to Respondent’s assertions, Petitioner does not ask the Court to consider whether the federal licensing case, itself, was the “same offense” as the state murder case. Instead, the question is whether the federal case—where the government combined allegations of federal murder and licensing violations in order to hold Petitioner without bail—was the “same offense” as the state murder charges.² This Court has

² Respondent’s contention that Petitioner forfeited this argument arises out of Respondent’s misunderstanding of Petitioner’s claims. Petitioner does not assert that he was formally charged with federal murder, but rather that Petitioner was put into an adversarial relationship with federal prosecutors when they argued he should be detained without bail on the basis of an uncharged murder offense intertwining the murder offense with the federal licensing charge. Pet. at 23. Petitioner repeatedly raised

found that in evaluating this question under the Sixth Amendment, a court should employ the *Blockburger* “same offense” analysis from Double Jeopardy jurisprudence. *Texas v. Cobb*, 532 U.S. 162, 172–73 (2001); see *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Petitioner contends that the state murder charge and the federal murder charge are the “same offense” under this test because they have the same elements. Pet. at 23–24.

1. There is Recognized Disagreement on This Question, and the Separate Sovereigns Exception Should Not Apply to the Sixth Amendment

If the federal murder allegations (for which Petitioner was held without bail) and the state murder allegations are, as Petitioner contends, the “same offense,” then the question becomes whether the separate sovereigns doctrine from the “offense specific” test in *Blockburger*, 284 U.S. 299 should apply in the Sixth Amendment context.

As set forth in the Petition, there is an extensive and notorious circuit split on this issue. Pet. at 25–27. Respondent fails to address the existence or significance of this split, or whether the separate sovereigns doctrine should apply in the context of the Sixth Amendment.

this issue below and has not forfeited this claim. See Appellant’s Opening Br. at 72–76.

Notwithstanding Respondent's failure to address this obvious discord, as set forth fully in the Petition, there are significant reasons why the separate sovereigns doctrine was applied in the Fifth Amendment context. Pet. at 28. Those same rationales, concerning the sanctity of a separate sovereign's ability to bring cases, have no bearing to the Sixth Amendment right to counsel. See *Gouveia*, 467 U.S. at 188–89 (addressing the “core purpose” of the right to counsel). As a result, Petitioner asks this Court to consider whether application of the separate sovereigns doctrine to the “same offense” analysis under the Sixth Amendment serves the goal of furthering that right. This remains an important question necessitating review.

2. Even if the Separate Sovereigns Doctrine Applies, There is an Exception for a Sham Prosecution

Additionally, even if this Court finds that the separate sovereigns doctrine applies in the Sixth Amendment context, Petitioner contends that the Court should consider whether the exception to that doctrine for sham prosecutions, noted in *Barthkus v. Illinois*, 359 U.S. 121, 121 (1959), should also apply. Under *Barthkus*, the separate sovereigns doctrine does not apply where one jurisdiction is acting as a sham or cover for another. *Id.*

In the Petition for Certiorari, Petitioner sets forth that in this case, the AUSA, by his own admission, only took action in pursuing a case against Petitioner at the

behest of the State of California. Pet. at 33. California used the federal government to do what it could not do itself: arrest, detain, and question Petitioner. The two jurisdictions worked together to violate Petitioner's rights, then blithely dismissed the federal case while using the tainted evidence as the centerpiece of the state murder trial.

In addressing this argument, Respondent again skips over the government's knowing and intentional violation of Petitioner's constitutional rights. Instead, Respondent returns to its repeated refrain that the only question this Court can consider is whether Petitioner was formally charged with murder in federal court. Opp'n at 12. Under Respondent's position, the acts of the State of California in co-opting the federal government to prosecute its case, arrest Petitioner, detain him (based on the state's murder allegations), and question him after he repeatedly invoked his Fifth and Sixth Amendment rights, are wholly irrelevant because the AUSA—while arguing orally in court that Petitioner had committed murder in violation of federal and state law—did not write that allegation down on paper. Again, this hyper-focus on the formal charging document asks this Court to turn a blind eye to the plain facts of what occurred. The reason and rationale for the *Barthkus* exception, meant to dissuade authorities from colluding to circumvent a defendant's constitutional rights by acting through another entity, is no less applicable in this Sixth Amendment context.

As a result, this Court should grant certiorari to consider the existence and scope of the *Bartkus* exception.

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. In accordance with these ideals, this Court previously disallowed the "silver platter doctrine" within the Fourth Amendment context, finding that evidence obtained in violation of constitutional protections does not become constitutionally compliant when transferred to another jurisdiction. *Elkins v. United States*, 364 U.S. 206, 223–24 (1960). The issue posed in the Petition for Certiorari is whether this Court should uphold these principles of fundamental fairness within the Sixth Amendment context.

Even setting aside any constitutional violations concerning the murder allegations, discussed above, one fact is indisputable: Petitioner had a Sixth Amendment right to counsel concerning the federal 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 without limiting the questioning to the murder investigation or instructing

the informant not to gather information regarding the licensing case. In doing so, the FBI and LAPD *knew* they were violating Petitioner’s right to counsel in the federal case. After working with the State of California to violate 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.

Respondent does not dispute that Petitioner’s right to counsel had attached in the licensing case. Instead, Respondent asks this Court to focus on the federal official’s “intent.” Opp’n at 14. Respondent asserts that Petitioner’s claim of a rights violation under *Elkins* is somehow based on whether the government ever actually intended to use the information it illegally gathered in the federal licensing case. Thus, Respondent argues that it matters whether the government “was genuinely interested” in using the illegal evidence it obtained for the federal case. *Id.* It does not.

The relevant question is not whether the government knowingly and intentionally violated Petitioner’s rights for the purpose of using that evidence in the federal licensing case.³ The relevant question is whether

³ Respondent uses its self-made distinction about whether the government ever “intended” to use the tainted evidence in federal court to argue that Petitioner waived this argument. Respondent asserts that Petitioner initially argued that the government was not genuinely interested in the federal licensing case when it sent in an agent to violate Petitioner’s Sixth Amendment rights. Opp’n at 14. Respondent contends that Petitioner later argued that the government was interested in the federal licensing case whilst violating Petitioner’s Sixth Amendment rights. *Id.*

the federal government, hand in glove with the State of California, intentionally violated Petitioner's Sixth Amendment right to counsel, then delivered that evidence on a "silver platter" to the State of California to serve as the centerpiece of the state's murder case against Petitioner.

Despite the knowing and intentional violation of Petitioner's rights, Respondent asserts that applying the rationale disavowing the "silver platter doctrine" to the Sixth Amendment context would overturn this Court's findings that the right to counsel is offense specific. Opp'n at 14. Respondent is wrong. In disallowing the transfer of tainted evidence gathered in violation of defendants' rights between jurisdictions, this Court would uphold the fundamental principle of fairness and due process underlying the criminal justice system. Doing so does not untether the "offense specific" boundary from the attachment of the right to counsel. Rather, it prevents the use of evidence gathered in

This change, Respondent asserts, constitutes waiver. *Id.* Respondent's position is factually incorrect and legally insignificant. Petitioner has consistently maintained that his due process rights were violated by the use of the evidence obtained in violation of his Sixth Amendment right to counsel in the federal licensing case. Appellant's Opening Br. at 76–78. Certainly, Petitioner cannot know for sure what lurked in the minds of the investigators when they knowingly violated his rights. Yet, nothing about this claim is dependent upon whether the government ever intended to use the tainted evidence in federal court. What is relevant is that the government used an agent to knowingly and intentionally violate Petitioner's right to counsel by asking him questions about the federal licensing case. Petitioner has repeatedly and thoroughly made this argument, and any assertion of waiver is without merit.

violation of a defendant's constitutional right to counsel in one case from being used in another jurisdiction. It would eliminate an ongoing practice that invites federal officers "to encourage state officers in the disregard of constitutionally protected freedom." *Elkins*, 356 U.S. at 221–22.

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CONCLUSION

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

Respectfully submitted,

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