No. 05-1512

In the Supreme Court of the United States

SAMUEL CONSTANZA ALVARADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's statements to federal law enforcement agents after the dismissal of state charges were taken in violation of his Sixth Amendment right to counsel.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rules: Page

In the Supreme Court of the United States

No. 05-1512

SAMUEL CONSTANZA ALVARADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 440 F.3d 191. The oral ruling of the district court (Pet. App. 15a-19a) and its written order (Pet. App. 20a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 2006. The petition for a writ of certiorari was filed on May 25, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiracy to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. 846; and distri-

bution of cocaine, in violation of 21 U.S.C. 841(a). He was sentenced to 121 months of imprisonment, to be followed by four years of supervised release.

1. On October 1, 2003, a task force composed of police officers from Prince William County, Virginia, an agent from the Drug Enforcement Administration (DEA), and two agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) were conducting surveillance of the Econo Lodge Motel in Dumfries, Virginia. The officers had received information that Francisco Lara-Hernandez was transporting cocaine from North Carolina to the motel. Around 11:30 p.m., the officers arrested Lara-Hernandez. He was questioned by ATF Agent Jordi Clop. Lara-Hernandez said that he had delivered one-half kilogram of cocaine to Room 333 of the Days Inn Hotel, which was located across the street. He also said that three men, one wearing a red shirt, were in Room 333 and that the men were using two vehicles, including a white truck. Pet. App. 2a-3a.

Shortly thereafter, around midnight, DEA Agent Justin May saw petitioner, who was wearing a red t-shirt, leave Room 333 and head towards the motel's back exit. When petitioner began to climb into a white truck, county police officers arrested him. Pet. App. 3a; Gov't C.A. Br. 6; 3/29/04 Tr. 7-8, 16, 24-25, 35-36.

Petitioner did not speak English. ATF Agent Clop read the *Miranda* warnings in Spanish to petitioner, who waived his rights and agreed to talk to the agent. Petitioner told the agent that he was staying in Room 338 and consented to a search of the room. In the meantime, officers had obtained a search warrant for Room 333. Around 3 a.m., the officers searched both rooms. A suitcase of marijuana and a handgun were found in Room 338, and 250 grams of cocaine, scales, and packag-

ing material were found in Room 333. Pet. App. 3a; Gov't C.A. Br. 6-7; 3/29/04 Tr. 9, 16-17, 42-44, 59-61, 92-93.

In the early morning hours of October 2, 2003, petitioner was transported to the county police station. After petitioner again received the *Miranda* warnings and waived his rights, ATF Agent Clop and a county police officer interrogated him. Pet. App. 3a; Gov't C.A. Br. 7; 3/29/04 Tr. 63-64.

Later that day, a county police officer obtained arrest warrants for petitioner. Pet. App. 3a; Gov't C.A. Br. 7. One warrant charged petitioner with conspiracy to manufacture, sell, give, or distribute a controlled substance on October 2, 2003, in violation of Va. Code Ann. §§ 18.2-22 and 18.2-248 (2004). C.A. App. 23. The other warrant charged petitioner with possession with intent to manufacture, sell, give, or distribute cocaine on October 2, 2003, in violation of Va. Code Ann. § 18.2-248 (2004). C.A. App. 24. At his arraignment on the state charges on October 10, 2003, petitioner requested counsel, and a lawyer was appointed to represent him. Pet. App. 3a; Gov't C.A. Br. 7; C.A. App. 25.

Petitioner remained in state custody in the county jail until his preliminary hearing on December 5, 2003. Pet. App. 3a; Gov't C.A. Br. 7. The day before the hearing, on December 4, ATF Agent Matthew Collins filed a federal criminal complaint that charged petitioner with conspiracy to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. 846. 3/29/04 Tr. 85; C.A. App. 26-33. A federal arrest warrant for petitioner was issued. Pet. App. 3a.

At the preliminary hearing on the state charges on December 5, 2003, the Commonwealth of Virginia dismissed the charges against petitioner. ATF Agent Clop

and DEA Agent May attended the hearing and immediately arrested petitioner on the federal charge. They transported petitioner to a nearby police station. Pet. App. 3a-4a; Gov't C.A. Br. 7-8; 3/29/04 Tr. 9-10, 12, 45-46, 64-65, 78-79.

During the drive to the station, petitioner asked ATF Agent Clop what was happening, and the agent responded that he would explain when they reached the station. When they arrived, petitioner told Clop that he was glad to see the agents and wanted to tell them his side of the story. Clop interrupted petitioner to give him *Miranda* warnings. After petitioner waived his rights, he provided incriminating statements about his involvement in the drug conspiracy. Petitioner described the events of October 1 and 2, 2003, and he also disclosed a previous trip to obtain cocaine from a source in North Carolina. In addition, petitioner admitted that he had been involved with other co-conspirators in drug distribution since at least August 2003. After approximately 45 minutes of questioning, petitioner was taken before a magistrate judge for his initial appearance. Pet. App. 4a; Gov't C.A. Br. 8; 3/29/04 Tr. 10-11, 65-67, 79-81, 83-84.

2. On February 5, 2004, a federal grand jury sitting in the Eastern District of Virginia returned an indictment charging petitioner with conspiracy to distribute 500 grams or more of cocaine between August 2003 and October 2003, in violation of 21 U.S.C. 846, and distribution of cocaine on September 27, 2003, in violation of 21 U.S.C. 841(a)(1). Pet. App. 4a. Petitioner moved to suppress the incriminating statements that he had made to federal agents on December 5, 2003, on the ground, *inter alia*, that they were taken in violation of his Sixth Amendment right to counsel. C.A. App. 19-22.

After an evidentiary hearing, the district court denied the motion. Pet. App. 15a-20a. The court ruled that petitioner's Sixth Amendment right to counsel on the federal charges did not attach until the federal indictment was returned. *Id.* at 17a-19a. The court rejected petitioner's claim that the Sixth Amendment right attached with respect to the federal charges when the federal complaint was filed. *Id.* at 16a-17a. The court likewise rejected petitioner's claim that the state charges and federal charges were the same offense and therefore his Sixth Amendment right attached with respect to the federal charges when the state charges were brought. *Id.* at 18a-19a. The court explained that the offenses were "not the same" because they were brought by "two different sovereigns," each of which "can prosecute concurrently or even one after the other." *Id.* at 18a. The court accordingly concluded that "the right to counsel did not attach here at the time [petitioner] was taken into [federal] custody" on December 5, 2003. *Id.* at 19a.

At trial, ATF Agent Clop recounted the incriminating statements made by petitioner during the conversation with the agents on December 5, 2003, following his arrest on the federal complaint. C.A. App. 172-187. The jury found petitioner guilty on both counts. Pet. App. 21a.

3. The court of appeals affirmed. Pet. App. 1a-14a. The court rejected petitioner's claim that his Sixth Amendment right to counsel attached with respect to the federal charges when the state charges were brought because the state and federal charges constituted the "same offense." *Id.* at 5a-12a. The court noted that *Texas* v. *Cobb*, 532 U.S. 162 (2001), applied the Double Jeopardy Clause's "same offense" test set forth in

Blockburger v. *United States*, 284 U.S. 299 (1932), to determine whether two state offenses were the same for purposes of the Sixth Amendment right to counsel. Pet. App. 6a. "Because *Cobb* clearly indicates that the definition of offense is the same in the right to counsel and double jeopardy contexts," the court reasoned that "the dual sovereignty doctrine has equal application in both." *Ibid.* The court noted that "[t]his fundamental structural precept is deeply-ingrained, and is surely most salient in the realm most central to sovereignty itself, to wit, the ability to protect citizens and punish wrongdoers." *Id.* at 7a. The court held that "[s]ince [petitioner's] state and federal offenses were inherently distinct under the dual sovereignty doctrine, they cannot be the same offense for purposes of the Sixth Amendment right to counsel." *Id.* at 9a.

The court of appeals also ruled that the state and federal offenses were "distinct," "even applying the traditional test" for determining whether two conspiracies brought by the same sovereign were the same offense for double jeopardy purposes. Pet. App. 5a. The court reasoned that the federal indictment charged a conspiracy that was "much more extended and pervasive," *id.* at 10a, and "broader in scope," *id.* at 11a, than the one charged in the state arrest warrant, which "encompassed only distinct events on or about a single day," *ibid.* The court also explained that only the federal indictment charged a specific drug amount. *Ibid.*

The court further rejected petitioner's claim that his Sixth Amendment right to counsel attached when the federal complaint was filed on December 4, 2003. Pet. App. 12a-13a. The court held that "[t]he filing of a federal criminal complaint does not commence a formal prosecution" but rather primarily serves "to establish

probable cause for an arrest warrant" under Federal Rules of Criminal Procedure 3 and 4(a). Pet. App. 12a. Finally, the court of appeals vacated petitioner's sentence under *United States* v. *Booker*, 543 U.S. 220 (2005), and remanded for resentencing. Pet. App. 13a-14a.

ARGUMENT

Petitioner contends (Pet. 7-22) that his incriminating statements to the federal agents following the dismissal of the state charges violated the Sixth Amendment. He maintains that his right to counsel had attached with respect to the state charges, and that the state charges constitute the "same offense," for Sixth Amendment purposes, as the federal offenses of which he stands convicted. The court of appeals correctly rejected that contention. Although there is a conflict among the circuits on the issue whether the dual sovereignty doctrine applies in the Sixth Amendment right-to-counsel context, this case is not an appropriate vehicle for resolving the issue. Even assuming that the dual sovereignty doctrine has no application under the Sixth Amendment, petitioner's federal charges were distinct from the state charges. In addition, petitioner's Sixth Amendment right to counsel with respect to the state charges terminated when the state charges were dismissed. And petitioner waived any Sixth Amendment right to counsel after he initiated the conversation with the federal agents about the case. Further review is therefore unwarranted.

1. The Sixth Amendment right to counsel "is triggered at or after the time that judicial proceedings have been initiated . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraign-

ment." *Fellers* v. *United States*, 540 U.S. 519, 523 (2004) (internal quotation marks omitted); *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977). The Court has explained that it is only at that point "that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified." *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (opinion of Stewart, J.); accord *Moran* v. *Burbine*, 475 U.S. 412, 432 (1986); *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984).

Once the right to counsel attaches with respect to an offense, the Sixth Amendment renders inadmissible in the prosecution's case in chief statements deliberately elicited from the defendant unless the defendant validly waives his right to counsel before making the statements. *Fellers*, 540 U.S. at 523-524; *Michigan* v. *Harvey*, 494 U.S. 344, 348-349 (1990); *Massiah* v. *United States*, 377 U.S. 201, 206 (1964). Moreover, in *Michigan* v. *Jackson*, 475 U.S. 625, 636 (1986), this Court adopted a prophylactic rule under the Sixth Amendment that, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." See *Harvey*, 494 U.S. at 349.

In the courts below, petitioner contended that the statements he made to the federal agents on December 5, 2003, should be suppressed under the rule established in *Michigan* v. *Jackson* because his right to counsel had earlier attached with respect to the state charges and the state and federal charges were the "same offense." Pet. C.A. Br. 13; Pet. C.A. Reply Br. 13-14. The court of appeals correctly held that the state and federal charges

were not the same for purposes of the Sixth Amendment.

In *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991), the Court held that the Sixth Amendment right to counsel, and the rule under *Michigan* v. *Jackson* that invalidates subsequent waivers after the right is invoked, are "offense specific." In *Texas* v. *Cobb*, 532 U.S. 162, 173 (2001), the Court clarified that the test for differentiating one offense from another under the Sixth Amendment right to counsel is identical to the test for identifying whether two offenses are the same under the Double Jeopardy Clause. The Court in *Cobb* explained that it saw "no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel." *Ibid.* The Court thus adopted the elements test of *Blockburger* v. *United States*, 284 U.S. 299 (1932), to decide whether the Sixth Amendment had been invoked on an uncharged state offense based on its prior invocation on a charged state offense. The Court squarely rejected an exception to the Sixth Amendment's offense-specific rule for crimes "factually related" to the charged offense. *Cobb*, 532 U.S. at 168.

Under the "dual sovereignty" principle applied in double jeopardy law, "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985); see *United States* v. *Lara*, 541 U.S. 193, 210 (2004); *Abbate* v. *United States*, 359 U.S. 187, 194-196 (1959); *United States* v. *Lanza*, 260 U.S. 377, 382 (1922). In this case, accordingly, even if petitioner's Sixth Amendment right to counsel attached with respect to the state charges at his arraignment on October 10, 2003, the

right attached only with respect to the specific *state* offenses of conspiracy to distribute a controlled substance and possession with intent to manufacture, sell, give, or distribute cocaine on October 2, 2003. Petitioner's Sixth Amendment right to counsel with respect to the *federal* offenses of conspiracy to distribute 500 grams or more of cocaine between August 2003 and October 2003 and distribution of cocaine on September 27, 2003, did not attach until he was indicted by a federal grand jury on February 5, 2004, well after he made the statements to the federal agents on December 5, 2003. Because petitioner's Sixth Amendment right to counsel had not yet attached with respect to the federal offense at the time he was questioned by the agents, *Michigan* v. *Jackson* did not require suppression of petitioner's statements to the agents at the federal trial in this case.[1]

2. a. As petitioner notes (Pet. 9-14), and as the court of appeals acknowledged (Pet. App. 9a), there is a conflict among the circuits on the issue whether the dual sovereignty doctrine applies in the context of the Sixth Amendment right to counsel. Like the court of appeals in this case, the First and Fifth Circuits have held that *Texas* v. *Cobb*, *supra*, requires application of the dual sovereignty doctrine in determining whether state and federal charges constitute the same offense for purposes of the Sixth Amendment right to counsel. *United States* v. *Coker*, 433 F.3d 39, 42-47 (1st Cir. 2005); *United States* v. *Avants*, 278 F.3d 510, 515-518 (5th Cir.), cert. denied, 536 U.S. 968 (2002). In contrast, the Second

[1] Petitioner argued below that his right to counsel attached with respect to the federal charges when the federal criminal complaint was filed on December 4, 2003. The court of appeals rejected that claim, Pet. App. 12a-13a, and petitioner does not challenge that ruling in this Court.

Circuit has declined to apply the dual sovereignty doctrine in the Sixth Amendment context, reasoning that *Cobb* incorporated only the *Blockburger* "same elements" test for determining whether two offenses are the same, even when the offenses are charged by different sovereigns. *United States* v. *Mills*, 412 F.3d 325, 329-330 (2d Cir. 2005).[2]

As the First Circuit noted in *Coker*, the disagreement among the circuits essentially turns on whether "*Cobb* incorporated all of [this Court's] double jeopardy jurisprudence (including the dual sovereignty doctrine) or merely the *Blockburger* test into its Sixth Amendment right to counsel jurisprudence." 433 F.3d at 43. The majority view is correct. In *Cobb*, this Court plainly stated that it saw "no constitutional difference between the meaning of the term 'offense' in the contexts of dou-

---

[2] Although petitioner contends (Pet. 13-14) that the Eighth Circuit also rejected the dual sovereignty doctrine in the Sixth Amendment context in *United States* v. *Red Bird*, 287 F.3d 709 (2002), the Eighth Circuit held in that case that federal and tribal complaints charged the same offense for Sixth Amendment purposes because "the tribe and the U.S. worked in tandem to investigate" the offense and tribal sovereignty is "'unique and limited' in character." *Id.* at 715 (quoting *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978)). Accordingly, the First Circuit has noted that "[t]he basis for the court's decision in *Red Bird* is not entirely clear," and that "the limited and unique nature of tribal sovereignty" appeared to cause the Eighth Circuit's concern. *Coker*, 433 F.3d at 46, 47; see note 4, *infra*, (further distinguishing *Red Bird* from this case).

As petitioner also notes (Pet. 14 n.6), the Seventh Circuit in *United States* v. *Krueger*, 415 F.3d 766, 775-780 (2005), expressed doubts over whether the dual sovereignty doctrine should be applied on the facts of that case, *id.* at 775-778, but the court ultimately found it "unnecessary to decide the Sixth Amendment question," *id.* at 778, because the statements at issue were in any event admissible for sentencing purposes. *Id.* at 779-780.

ble jeopardy and of the right to counsel." 532 U.S. at 173. Under petitioner's approach (and that of the Second Circuit in *Mills*), federal and state offenses that are distinct offenses in the double jeopardy context would be considered the same offense in the right-to-counsel context when the charges satisfy the *Blockburger* test. See *Coker*, 433 F.3d at 44 & n.8.

b. Despite the conflict among the circuits on the dual sovereignty issue, this Court's review is not warranted here.

First, it is not clear that refusal to apply the dual sovereignty doctrine would change the outcome of this case. Petitioner has not disputed that the substantive federal and state drug offenses in this case are distinct offenses, *i.e.*, that the state offense of possession with intent to manufacture, sell, give, or distribute cocaine on October 2, 2003, is not the same offense as the federal offense of distribution of cocaine on September 27, 2003. Nor has petitioner disputed that the state conspiracy charge is distinct from the federal substantive drug charge. See, *e.g.*, *United States* v. *Felix*, 503 U.S. 378, 388 (1992) ("[A] substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes."). For that reason alone, the admission of petitioner's incriminating statements to federal agents on December 5, 2003, with respect to the substantive federal count did not violate the Sixth Amendment. Thus, whether or not the dual sovereignty doctrine applies in the Sixth Amendment context, at the time petitioner made incriminating statements to federal officials on December 5, 2003, petitioner had no right to counsel with respect to the uncharged federal substantive drug charges, for which the court imposed a sentence of 121 months to run concurrently with the

same sentence imposed on the conspiracy count. Pet. App. 5a.

Similarly, contrary to petitioner's assertion (Pet. 7 n.3), the court of appeals concluded that the differences between the state and federal conspiracy charges with respect to the time periods, scope, and amounts of drugs "provide[d] ample support for the conclusion that the conspiracies were not the same offense." Pet. App. 11a. Thus, under the court of appeals' alternative rationale, the admission of petitioner's incriminating statements to federal agents on December 5, 2003, with respect to the conspiracy count likewise did not violate the Sixth Amendment. Although petitioner argues (Pet. 7 n.3) that the state conspiracy was a "subset" of the federal conspiracy, there is no reason for this Court to review the court of appeals' fact-bound contrary conclusion that the two conspiracies were distinct offenses.

Second, even were petitioner correct that the state and federal charges would have constituted the same offense for Sixth Amendment purposes if the state charges had remained pending, the state charges in fact were dismissed before petitioner made incriminating statements to federal agents on December 5, 2003. Petitioner's right to counsel with respect to the state charges terminated with the dismissal of the state charges, because petitioner "was no longer facing a state apparatus that ha[d] been geared up to prosecute him." *United States* v. *Montgomery*, 262 F.3d 233, 247 (4th Cir.) (internal quotation marks omitted), cert. denied, 534 U.S. 1034 (2001). The federal indictment was not returned until February 5, 2004. Because petitioner was not facing any pending prosecution—state or federal—when he was interrogated on December 5, 2003, he had no Sixth Amendment right to counsel at that

time. See *McNeil*, 501 U.S. at 175 (Sixth Amendment right "does not attach until a prosecution is commenced, that is, 'at or after the initiation of adversary judicial criminal proceedings'") (quoting *United States* v. *Gouveia*, 467 U.S. 180, 188 (1984)).[3]

These circumstances also distinguish the Second Circuit's decision in *United States* v. *Mills*, *supra*, on which petitioner relies (Pet. 12-13) for his assertion of a circuit conflict. In *Mills*, the defendant was questioned by local officials while state charges were pending, and therefore at a time when the right to counsel had attached. A fed-

---

[3] Some courts have suggested that the Sixth Amendment would be violated if federal and state authorities collude to manipulate the timing of charges to deprive a defendant of his right to counsel. See *United States* v. *Mapp*, 170 F.3d 328, 334 (2d Cir.), cert. denied, 528 U.S. 901 (1999); *United States* v. *Bartelho*, 129 F.3d 663, 675 (1st Cir. 1997), cert. denied, 525 U.S. 905 (1998); *United States* v. *Martinez*, 972 F.2d 1100, 1103-1105 (9th Cir. 1992). It is unclear whether the reasoning of those cases survives *Cobb*'s rejection of an exception to the Sixth Amendment's offense-specific rule for crimes "factually related" to the charged offense. 532 U.S. at 168; see *Montgomery*, 262 F.3d at 247. In any event, a defendant has the burden to prove the existence of actual collusion, which includes proof of a deliberate intent to deprive a defendant of his right to counsel, in order to establish the collusion exception. Cf. *United States* v. *Michaud*, 268 F.3d 728, 734-735 (9th Cir. 2001), cert. denied, 537 U.S. 867 (2002); *United States* v. *Doe*, 155 F.3d 1070, 1078 (9th Cir. 1998) (en banc). Although petitioner repeatedly notes (Pet. 17, 19, 21) that the officers and agents in this case cooperated in their respective investigations, petitioner has not argued (either below or in this Court) that there was improper collusion or bad faith. This Court noted in *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), that cooperation between federal and state authorities is not unusual but rather is "the conventional practice." *Id.* at 123. Petitioner appears to concede (Pet. 21) that he cannot show that the cooperation between the county officers and the federal agents in this case amounted to "a sham and a cover for a federal prosecution" under *Bartkus*. 359 U.S. at 123-124.

eral prosecution was then brought, and the defendant moved to suppress the statement that he had made to the local police. The government conceded for purposes of the appeal that the interview by local police violated the defendant's right to counsel with respect to the state charges, and the Second Circuit held that the statements could not be used in the federal prosecution either. 412 F.3d at 327-328, 330 & n.2. In this case, unlike in *Mills*, the statements in question were not made while state charges were pending.[4]

Third, even assuming petitioner had a Sixth Amendment right to counsel when he was questioned on December 5, 2003, the questioning did not violate the rule in *Michigan* v. *Jackson*, *supra*, because petitioner initiated the communication with federal officials and petitioner waived his right to counsel. The Court made clear in *Michigan* v. *Jackson* that, notwithstanding an accused's invocation of his Sixth Amendment right to counsel, questioning by law enforcement officers may proceed when "the accused himself initiates further communication, exchanges, or conversations with the police." 475 U.S. at 626 (quoting *Edwards* v. *Arizona*, 451 U.S. 477, 485 (1981)); see *Harvey*, 494 U.S. at 352 ("[N]othing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney."). Even after an accused has invoked his right to counsel, once he has reinitiated dialogue with the police, he can execute a valid waiver of his

---

[4] Similarly, in *United States* v. *Red Bird*, on which petitioner also relies for his assertion of a circuit conflict (Pet. 13-14), charges were pending against the defendant in tribal court and counsel had been appointed for him in those proceedings when the federal agents questioned him. See 287 F.3d at 711-712.

right to counsel without first speaking to his attorney, and *Miranda* warnings are generally sufficient to make an accused aware of his right to have counsel present during the questioning and of the consequences of a decision to waive his Sixth Amendment rights. *Patterson* v. *Illinois*, 487 U.S. 285, 292-294 (1988); see *Harvey*, 494 U.S. at 352-353.

In this case, petitioner waived his Sixth Amendment right to counsel by initiating the conversation with the federal agents and speaking to them after receiving *Miranda* warnings. After being arrested on federal charges, petitioner asked Agent Clop "what was happening" during the drive to the police station, and the agent responded that he would explain when they arrived at the station. 3/29/04 Tr. 65, 83-84; see *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1045-1046 (1983) (defendant initiated conversation by asking, "Well, what is going to happen to me now?"). Once they arrived at the police station, petitioner said "something to the effect of I'm glad you guys are here. I want to talk to you guys. I've been wanting to talk to you guys. I want to give you guys my side of the story." 3/29/04 Tr. 66; accord *id.* at 84. Agent Clop, in the presence of Agent May, then interrupted petitioner and read the *Miranda* warnings from a card. After acknowledging those rights, petitioner again stated that he wished to speak to the agents and described his role in the cocaine conspiracy. *Id.* at 10-11, 66-67.[5] Thus, even assuming petitioner had a

[5] Petitioner testified at the suppression hearing that he did not receive the complete set of *Miranda* warnings. 3/29/04 Tr. 118-119. The district court ruled that petitioner was not questioned in violation of *Miranda*, finding that he was given the *Miranda* warnings. *Id*. at 174-178. In making that ruling, the court stated that petitioner "may have been confused about whether or not he had a right to have an

Sixth Amendment right to counsel when he was questioned on December 5, 2003, he waived that right.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

AUGUST 2006

---

attorney during the questioning." *Id.* at 177. The court, however, did not expressly address the validity of petitioner's waiver of his *Miranda* rights.