No. 18-762

In the Supreme Court of the United States

JAIME VALENTE PINA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment right to counsel, which applies in "criminal prosecutions," applies to a defendant's interview with law enforcement that takes place before the initiation of federal criminal proceedings.

2. Whether the Sixth Amendment right to counsel applies before the initiation of federal criminal proceedings when the federal proceedings follow the initiation of related state criminal proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is not published in the Federal Reporter but is reprinted in 746 Fed. Appx. 440. The opinion of the district court (Pet. App. 10-24) is not published in the Federal Supplement but is available at 2017 WL 3667661.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2018. On November 5, 2018, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including December 12, 2018, and the petition was filed on that date. 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 Western District of Michigan, petitioner

was convicted of conspiracy to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(C) and 846, and possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). 8/30/17 Judgment 1. He was sentenced to 87 months of imprisonment, to be followed by three years of supervised release. *Id.* at 2-3. The court of appeals affirmed. Pet. App. 1-9.

1. During a search of a suspected drug trafficker's residence, Michigan police officers found petitioner with approximately 28 grams of cocaine in his pocket, along with a cell phone and $540. Pet. App. 10-11. After the officers arrested petitioner and administered his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), he told police investigators that he was not a cocaine user but that they would find drug-related text messages on his phone. Pet. App. 2, 11. The next day, he told investigators that the cocaine in his pocket was for "personal use," but he denied being a drug dealer. *Ibid.* State authorities then charged petitioner with possession with intent to deliver drugs, and he was arraigned in state court. *Id.* at 2.

After learning that federal authorities were also investigating petitioner, petitioner's counsel advised him to speak with state authorities a third time. Pet. App. 2. His counsel "did not secure an immunity agreement for that testimony." *Ibid.* In that third meeting, which his counsel attended, petitioner made incriminating statements "about distributing drugs and operating as a supplier to a couple of local drug dealers." *Ibid.*

A federal grand jury indicted petitioner on one count of conspiracy to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(C) and 846, and one count of possession with

intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. 2; 8/30/17 Judgment 1. Petitioner proceeded to trial on those charges. The government introduced petitioner's inculpatory statements at the third meeting with investigators, along with "physical evidence, text messages, and the testimony of another co-defendant" implicating him in the charged offenses. Pet. App. 2-3; see *id.* at 17 (describing the "ample evidence of [petitioner's] guilt"). The jury found petitioner guilty on both counts. *Id.* at 3.

2. Petitioner moved for a new trial. As relevant here, he argued that his counsel provided constitutionally ineffective assistance by allowing him to give the third interview to investigators. Pet. App. 13. The government contended that petitioner's claim lacked merit because his Sixth Amendment right to counsel in a "criminal prosecution[]," U.S. Const. Amend VI, attached only at the time of his federal indictment, which had not occurred when he made the inculpatory statements at the third interview, Pet. App. 15. The district court observed that the en banc Sixth Circuit was considering a similar question in *Turner* v. *United States*, 885 F.3d 949 (2018), petition for cert. pending, No. 18-106 (filed July 20, 2018), but that the en banc court had not yet issued a decision in that case. See Pet. App. 15.

The district court concluded that it did not need to address the threshold question whether the Sixth Amendment right to counsel had attached because, even assuming it had, petitioner could not show ineffective assistance of counsel under the standard outlined in *Strickland* v. *Washington*, 466 U.S. 668 (1984). Pet. App. 10-24. Specifically, the court determined that petitioner's counsel did not render deficient performance by allowing him to participate in the interview, *id.* at 16-

17, and that any allegedly deficient performance did not prejudice petitioner given "the ample evidence of his guilt presented at trial," *id.* at 17.

3. The court of appeals affirmed. Pet. App. 1-9. The court observed that the en banc court had issued its decision in *Turner*, *supra*, while petitioner's appeal was pending, and that *Turner* "forecloses [petitioner's] arguments." Pet. App. 4. In *Turner*, the en banc court had determined "that the Sixth Amendment right to counsel does not attach pre-indictment." *Ibid.* (citing *Turner*, 885 F.3d at 953). The court in petitioner's case accordingly reasoned that, because petitioner "gave his third interview before his federal indictment, the Sixth Amendment did not attach to [his] statements." *Ibid.*

The court of appeals noted that the defendant in *Turner* had petitioned for a writ of certiorari, but the court found it unnecessary to hold petitioner's case pending this Court's resolution of that petition. Pet. App. 4-5. The court explained that "even under the *Turner* dissent's more expansive view of Sixth Amendment protections," under which the right to counsel "attaches when the government offers a preindictment plea deal," the right had not attached with respect to petitioner's federal charges at the time of his third interview because petitioner "had not received a plea offer when he made the incriminating statements." *Id.* at 5; see *Turner*, 885 F.3d at 980 (Stranch, J., dissenting).

The court of appeals rejected petitioner's argument that "because the *state* had already filed drug charges against him when he spoke to state investigators, the Sixth Amendment protects his statements." Pet. App. 5. The court explained that "the right to counsel is offense-specific," *ibid.* (citing *Texas* v. *Cobb*, 532 U.S. 162, 167-

168 (2001)), and that "federal and state charges are distinct for purposes of the Sixth Amendment because the federal and state governments are separate sovereigns," *ibid.* (citing *Turner*, 885 F.3d at 954-955). The court added that, even if the separate-sovereigns doctrine did not apply to this context, petitioner had "failed to argue that his state and federal offenses share the same elements," so he had forfeited the argument that the state offenses for which he had been charged were the "same" offenses for which he was ultimately indicted in federal court. *Id.* at 6.

In light of its determination that petitioner's Sixth Amendment right to counsel had not attached at the time of the third interview, the court of appeals did not "decide whether [petitioner's] attorney provided ineffective assistance." Pet. App. 6.

ARGUMENT

Petitioner contends (Pet. 15-22) that this Court should grant review to decide (1) whether the Sixth Amendment right to counsel applies to pre-indictment interviews with law enforcement officers, or, more narrowly, (2) whether the right to counsel applies to pre-indictment interviews with law enforcement officers after a defendant has been charged with a related offense in state court. The court of appeals' decision on both questions is correct and does not conflict with any decision of this Court or another court of appeals. And no need exists to hold this petition for the Court's resolution of the petition in *Turner* v. *United States*, 885 F.3d 949 (6th Cir. 2018), petition for cert. pending, No. 18-106 (filed July 20, 2018), or its decision in *Gamble* v. *United States*, No. 17-646 (argued Dec. 6, 2018). Petitioner's claim on the first question is meaningfully distinct from the claim in *Turner* because it does not involve

plea discussions with federal prosecutors, and his claim on the second question is meaningfully distinct from the claim in *Turner* (and need not be held for *Gamble*) because he has forfeited a key element of his argument.

1. Applying its en banc decision in *Turner*, the court of appeals correctly rejected petitioner's claim that the Sixth Amendment applies to law enforcement interviews that occur before the initiation of formal criminal charges. The Sixth Amendment guarantees an "accused" the right to the assistance of counsel in "all criminal prosecutions." U.S. Const. Amend. VI. In keeping with the "plain language of the Amendment and its purpose," *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984), this Court has repeatedly held that the right to counsel "does not attach until a *prosecution is commenced*"—"that is, 'at or after the initiation of adversary judicial criminal proceedings,'" whether "'by way of formal charge, preliminary hearing, indictment, information, or arraignment,'" *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991) (emphasis added; citation omitted); see, *e.g.*, *Rothgery* v. *Gillespie Cnty.*, 554 U.S. 191, 198 (2008); *Fellers* v. *United States*, 540 U.S. 519, 523 (2004); *Davis* v. *United States*, 512 U.S. 452, 456-457 (1994); *Moran* v. *Burbine*, 475 U.S. 412, 432 (1986); *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1982) (plurality opinion) (citing additional cases dating back to *Powell* v. *Alabama*, 287 U.S. 45 (1932)).

As the government explained in its brief in opposition in *Turner*, see Br. in Opp. at 10-19, *Turner*, *supra* (No. 18-106),[1] this Court's longstanding interpretation of the Sixth Amendment is correct. And that "crystal

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[1] We have served petitioner with a copy of our brief in opposition in *Turner*.

clear" interpretation controls a claim of the kind asserted here. *Turner*, 885 F.3d at 953; see *id.* at 956 (Bush, J., concurring dubitante); *id.* at 966 (Clay, J., concurring in the judgment); *id.* at 976-977 (White, J., concurring in the judgment). Petitioner does not dispute that the alleged ineffective assistance of counsel arising from his meeting with state authorities came before "the initiation of adversary judicial criminal proceedings" in federal court. *Gouveia*, 467 U.S. at 189. Thus, under this Court's "firmly established" precedent, the right to counsel did not attach, and the court of appeals correctly rejected his claim. *Id.* at 187 (citation omitted).

Petitioner does not meaningfully contest this Court's longstanding interpretation of the Sixth Amendment's text, ask the Court to overrule any of its precedents, or identify any special factors that might support overruling this Court's decades-old precedents in this area. Insofar as petitioner asserts (Pet. 16) that it matters here that the third interview may have included the "direct or background involvement of the prosecutor," his argument lacks merit. He cites nothing in any decision suggesting that the identity of a government actor whose role falls outside the scope of a "criminal prosecution[]" is relevant to the scope of the Sixth Amendment right to counsel, and this Court has never suggested such an approach. The Court's decisions do not, for example, suggest that a prosecutor could trigger the right to counsel by accompanying a police officer to interview a suspect. See, *e.g.*, *Moran*, 475 U.S. at 428-432. To the contrary, the Court has made clear that the relevant line is a matter of formal judicial procedure: "The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings." *Davis*,

512 U.S. at 456. Indeed, as the court of appeals explained, Pet. App. 5-6, petitioner's claim would fail even under the position advanced by the dissent in *Turner* that "a plea offer qualifies as an adversary judicial proceeding," 885 F.3d at 978 (Stranch, J., dissenting). That reasoning does not apply to petitioner's interview with state authorities, which did not involve a plea offer.

Finally, contrary to petitioner's contention (Pet. 17), the decision below does not conflict with the decision of any other court of appeals. The en banc Third Circuit in *Matteo* v. *Superintendent*, 171 F.3d 877, cert. denied, 528 U.S. 824 (1999), concluded only that a defendant's Sixth Amendment right to counsel "had attached" after he "had undergone preliminary arraignment." *Id.* at 892-893. The First Circuit in *Roberts* v. *Maine*, 48 F.3d 1287 (1995), noted "the possibility that the right to counsel might conceivably attach before any formal charges are made," but cautioned that such "circumstances, however, must be extremely limited." *Id.* at 1291. And the Seventh Circuit in *United States* v. *Larkin*, 978 F.2d 964 (1992), cert. denied, 507 U.S. 935, and 510 U.S. 913 (1993), concluded that the defendant had no Sixth Amendment right to counsel at a pre-indictment lineup. Its suggestion in dicta that a hypothetical future defendant might be able to demonstrate "that, despite the absence of formal adversary judicial proceedings, the government had crossed the constitutionally significant divide from fact-finder to adversary," *id.* at 969 (citation and internal quotation marks omitted), does not suggest that it would have found a Sixth Amendment right to counsel in the circumstances of this case. As the en banc Sixth Circuit recognized in *Turner*, "[t]here is * * * no circuit split on this issue." 885 F.3d at 954.

2. As an alternative to his primary claim, petitioner contends (Pet. 19-22) that certiorari is warranted to consider the "narrower" question whether the Sixth Amendment right to counsel that attached when he was charged on state charges also created a right to effective assistance of counsel with respect to the related federal charges that had not yet been filed. That issue likewise does not warrant review.

a. Relying on its decision in *Turner*, the court of appeals correctly determined that the filing of state drug charges against petitioner did not give rise to a right to counsel for unfiled federal drug charges. Pet. App. 5-6.

As this Court explained in *McNeil*, the Sixth Amendment right to counsel is "offense specific." 501 U.S. at 175. Thus, the right to counsel attaches only with respect to the particular offense that is the subject of the "adversary judicial criminal proceedings" that have been initiated. *Ibid.* (citation omitted). In *Texas* v. *Cobb*, 532 U.S. 162 (2001), the Court clarified that the right to counsel also attaches to other, as-yet-uncharged offenses only if they would be considered "the same offense" under the test described in *Blockburger* v. *United States*, 284 U.S. 299 (1932), which addressed a double-jeopardy claim. *Cobb*, 532 U.S. at 173. The Court 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 of appeals correctly applied those principles in the decision below. In response to petitioner's claim that the filing of state drug charges meant that the right to counsel attached to unfiled federal drug charges, the court looked to this Court's double jeopardy law to determine whether those charges were for

the "same" offense. Pet. App. 6. The court of appeals relied on this Court's longstanding interpretation of the term "same offence" in the Double Jeopardy Clause, U.S. Const. Amend. V, under which federal and state offenses are not the same. See Pet. App. 5 ("[F]ederal and state charges are distinct for purposes of the Sixth Amendment because the federal and state government are separate sovereigns."); see also, *e.g.*, *Heath* v. *Alabama*, 474 U.S. 82, 88-89 (1985). Rather, when a defendant "in a single act" violates the laws of those two different sovereigns, "he has committed two distinct 'offences.'" *Heath*, 474 U.S. at 88 (citation omitted). The court of appeals thus correctly recognized that petitioner's state drug offense and federal drug offense were distinct and that the attachment of the right to counsel for charges filed by the State did not create a right to counsel for charges not filed by the federal government. Pet. App. 5-6; see *Turner*, 885 F.3d at 954-955.

b. Petitioner contends (Pet. 25-28) that the court of appeals' decision on this issue conflicts with decisions of the Second and Eighth Circuits. No such conflict exists.

The Second Circuit in *United States* v. *Mills*, 412 F.3d 325 (2005), concluded that the federal government, in prosecuting a defendant for federal gun possession charges, could not use statements that state officials had obtained in conceded violation of the right to counsel while pursuing state gun possession charges. *Id.* at 326-327. As the Second Circuit subsequently emphasized, *Mills* "noted the government's concession that the state's interrogation of the defendant had violated the Sixth Amendment with respect to the pending state charges" by interviewing him in the absence of counsel after he had been charged by the State. *United States* v. *Worjloh*, 546 F.3d 104, 108 (2008) (per curiam), cert.

denied, 560 U.S. 979 (2010); see *Mills*, 412 F.3d at 327-328. It is far from clear that the Second Circuit would require suppression of petitioner's statements here, which were made in an interview with counsel present and where petitioner's claim of ineffective assistance of counsel relates not to the State charges, but only to the not-yet-filed federal charges.

The Eighth Circuit in *United States* v. *Bird*, 287 F.3d 709 (2002), concluded that statements made by a defendant in response to questioning by federal and tribal authorities could not be used at a subsequent federal rape trial because the federal investigator "worked in tandem with the tribal criminal investigator to deliberately elicit information from [the defendant], knowing that [he] had been indicted in an adversarial proceeding for the same charge and that [he] was represented by an attorney on that charge." *Id.* at 714. The decision below does not conflict with *Bird*, because nothing here suggests that federal and state prosecutors worked together "to deliberately elicit information" in violation of petitioner's Sixth Amendment right to counsel. *Ibid.* Moreover, like *Mills*, *Bird* involved an interview in the absence of counsel, see *id.* at 711-712 (noting that FBI agent "knew about * * * Bird's legal representation, but" did not contact his "attorney or received the attorney's permission to conduct the interview"), not an allegation of ineffective assistance with respect to not-yet-extant federal charges by counsel present at the interview that was conducted by State authorities, see Pet. App. 4.

c. In any event, even if petitioner's asserted conflict existed, this case would be an unsuitable vehicle for this Court's review. As the court of appeals explained, peti-

tioner "failed to argue that his state and federal offenses share the same elements" under the *Blockburger* test and accordingly "forfeited" that argument. Pet. App. 6. Furthermore, even if the Court were to overlook that forfeiture, success on this argument would likely have little practical significance for petitioner. Petitioner's state charge for possession with intent to distribute cocaine would not be the "same" offense under *Blockburger*, 284 U.S. at 304, as his federal drug-*conspiracy* offense. See *United States* v. *Felix*, 503 U.S. 378, 389-390 (1992) (stating "the rule that a substantive crime and a conspiracy to commit that crime are not the 'same offence' for double jeopardy purposes"). And because petitioner received identical concurrent sentences for his federal drug-conspiracy and federal substantive drug offenses, no basis exists to conclude that his sentence would be altered in any practical way even if his substantive federal drug-offense conviction were vacated.[2]

3. This case would also be an unsuitable vehicle for further review because the district court correctly rejected petitioner's ineffective-assistance claim on the merits. See Pet. App. 10-24. Nor does any need exist to hold the petition for a writ of certiorari pending resolution of the petition in *Turner* and this Court's decision on the merits in *Gamble*, as petitioner requests (Pet. 22 n.3). As explained above, see p. 8, *supra*, petitioner's claim that the Sixth Amendment attaches to his interview with state investigators is meaningfully distinct from the claim in *Turner* that the Sixth Amendment attaches to pre-indictment plea discussion with

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[2] As the court of appeals noted, the State later charged petitioner with conspiracy, but not until after the interview with state officials that forms the basis of petitioner's claim here. See Pet. App. 2 n.1.

federal prosecutors. Indeed, as the court of appeals explained, petitioner's claim would fail even under the Sixth Amendment approach proposed by the *dissent* in *Turner*. Pet. App. 5. Likewise, as the court of appeals further explained, petitioner's claim on the second question is meaningfully distinct from the claim in *Turner* because he has "forfeited" a critical element of his argument—"that his state and federal offenses share the same elements." *Id.* at 6. Because petitioner's second claim is the only one that could in theory be affected by *Gamble*, his forfeiture of a critical component of that claim also renders a hold for *Gamble* unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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