No.

In the Supreme Court of the United States

SAMUEL ANTONIO CONSTANZA ALVARADO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Following a joint federal-state investigation, petitioner was arrested by state officers; was interrogated by an agent of the federal Bureau of Alcohol, Tobacco, and Firearms ("ATF"); was charged with state offenses; and immediately requested and was appointed an attorney. Two months later, the same ATF agent interrogated petitioner, outside the presence of his counsel, and petitioner's statements were thereafter used against him in a federal prosecution.

The question presented is:

Whether the court of appeals, in agreement with the First and Fifth Circuits but in conflict with the Second and Eighth Circuits, correctly held that, because of the "dual sovereignty" doctrine, the federal charges were not the same "offense" as the state charges, and thus petitioner's later statements to the ATF agent were not taken in violation of the Sixth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes:

Other Authorities:

TABLE OF AUTHORITIES—Continued

Page(s)

PETITION FOR A WRIT OF CERTIORARI

Samuel Antonio Constanza Alvarado ("Constanza") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 440 F.3d 191. The district court's findings of fact and conclusions of law disposing of the motion to suppress (App., *infra*, 15a-19a) were delivered orally. The order denying the motion (*id*. at 20a) is unreported.

JURISDICTION

The court of appeals entered judgment on March 13, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

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

The Fifth Amendment provides in pertinent part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

The facts of this case are straightforward. Petitioner Constanza[1] was arrested in Virginia during a stake-out by federal and state authorities. He was interrogated by an agent of

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[1] The court of appeals referred to petitioner as "Alvarado." In petitioner's culture, however, his primary family name is Constanza, his father's family name. In fact, petitioner refers to himself as "Samuel Constanza." We adhere to that convention here.

the federal Bureau of Alcohol, Tobacco, and Firearms ("ATF"), and subsequently was charged by the Commonwealth of Virginia with conspiracy to distribute cocaine and possession of cocaine with intent to distribute. Constanza requested and was appointed a lawyer — and at that point, his Sixth Amendment right to counsel had clearly attached. Two months later, the Commonwealth dismissed its charges, and the same ATF agent immediately took petitioner into custody and interrogated him about a drug conspiracy alleged in a federal complaint filed the day before. Petitioner made inculpatory statements, which were thereafter used to convict him on federal narcotics charges that substantially overlapped with the prior state charges.

The Fourth Circuit affirmed the convictions, holding that the statements elicited by the ATF agent in connection with the federal charges were not taken in violation of petitioner's Sixth Amendment rights. The court of appeals recognized that the Sixth Amendment generally prohibits law enforcement officers from interrogating a defendant, without his attorney, with respect to "uncharged offenses that constitute the 'same offense' as one an accused has been formally charged with." App., *infra*, 6a. The court concluded, however, that petitioner's state and federal charges were necessarily different offenses for Sixth Amendment purposes because they had been brought by different sovereigns. In so holding, the court acknowledged the division among the circuits on whether "dual sovereignty" principles apply in the Sixth Amendment context. Casting its lot with those circuits that have embraced the dual sovereignty doctrine in this setting, the Fourth Circuit held that the later interrogation did not violate Constanza's Sixth Amendment rights.

A. The Joint Federal-State Investigation and the Appointment of Counsel

1. Acting on a tip that cocaine was being brought up from North Carolina, special agent Justin May of the U.S. Drug

Enforcement Administration ("DEA") set up surveillance in a parking lot in Dumfries, Virginia on October 1, 2003. The operation included, in addition to Agent May, two ATF agents and at least ten Prince William County police officers and detectives. Mar. 29, 2004 Tr. ("Tr.") 3-4, 21, 24.

Following an initial arrest, the county police officers and the federal agents learned that the suspected traffickers had brought half a kilogram of cocaine up from North Carolina and that some associates were staying in Room 333 of a motel across the street. Agent May and a county detective therefore rented a room across from Room 333. Around midnight, Agent May observed petitioner leaving Room 333, and alerted the surveilling officers. The county police arrested petitioner outside the motel and took him to ATF special agents Jordi Clop and Matthew Collins. Agent Clop, speaking in Spanish, read petitioner his *Miranda* rights and briefly interviewed him. Petitioner, who does not speak English, informed the agents that he was staying in Room 338 and consented to its search. Tr. 6-8, 16, 21-27, 29, 35, 40, 42, 58-62, 89-94.

At around 3 a.m. on October 2, Agent May and the county police searched Room 333. They recovered cocaine and other drug paraphernalia. Agent Clop arrived on the scene, and, together with the county officers, proceeded to Room 338, where they found marijuana and a handgun. Tr. 9, 17, 43-44, 63, 73.

Petitioner was then taken to a county police station. There Agent Clop, joined by a county detective, read petitioner his *Miranda* rights and again interrogated him. Tr. 64, 77.

2. The Commonwealth of Virginia arraigned petitioner on charges of possession with intent to manufacture, sell, give, or distribute cocaine, see VA. CODE § 18.2-248 (2004), and conspiracy to manufacture, sell, give, or distribute cocaine, see *id*. §§ 18.2-22, 18.2-256. Petitioner immediately requested an

attorney and was appointed one on October 10, 2003. A preliminary hearing was set for December 12, 2003. Court of Appeals Joint Appendix ("JA") 23-25.

3. Meanwhile, the federal agents continued to investigate the same underlying events. Tr. 65, 79. On December 4, 2003, ATF Agent Collins swore out a complaint alleging conspiracy to distribute 500 grams or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 846. JA 26-33.

The next day, petitioner was brought into Prince William County General District Court, where ATF Agent Clop, DEA Agent May, and a county detective who had participated in the October 1 and 2 arrests all were in attendance. The Commonwealth announced that the state charges were being dropped in favor of federal prosecution. Agents Clop and May immediately took petitioner into federal custody and elicited more information relating to the conspiracy alleged in the complaint. They transported him to a nearby police station in Manassas (a trip that took less than one minute), during which time petitioner — who has a fifth-grade education from El Salvador — asked Agent Clop what was going on. The agent replied that everything would be explained at the station. Tr. 9-10, 12, 45-46, 65-66, 102; JA 173.

At the police station, the county detective escorted petitioner and Agents Clop and May to an interview room. According to Agent Clop, petitioner volunteered that he had been wanting to tell his side of the story. Agent Clop interrupted to give *Miranda* warnings, and then interrogated petitioner for approximately 45 minutes. Tr. 11-12, 66-68. Petitioner made statements about his associates' cocaine trafficking activities leading up to October 1, at the same time partially implicating himself. See JA 176-185.

B. The District Court Proceedings

Immediately after the December 5 interrogation, petitioner appeared before a magistrate judge, and a preliminary hearing was scheduled. JA 2. Counsel was appointed several days later, and Constanza was thereafter indicted on one count of conspiracy to distribute 500 grams or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 846, and one count of distribution of cocaine in violation of 21 U.S.C. § 841(a)(1). JA 13-18.

Petitioner moved to suppress the incriminating statements he had made during the December 5 interrogation on the grounds, among others, that they were taken in violation of his Sixth Amendment right to counsel. Under this Court's decision in *Texas* v. *Cobb*, 532 U.S. 162 (2001), he noted, the scope of an offense for which the right to counsel attaches is defined by the double-jeopardy formulation articulated in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932) — two offenses are distinct if each requires proof of a fact that the other does not. Under the *Blockburger* test, petitioner asserted, the conspiracy about which the federal agents interrogated him was the same offense as the conspiracy with which the Commonwealth had charged him — the same offense, in other words, for which he already had representation. Accordingly, argued petitioner, the agents were not permitted to initiate questioning on that offense outside the presence of his lawyer. Tr. 130-136.

Following a hearing that detailed the closely intertwined federal and state investigation, the district court denied the motion. App., *infra*, 20a. The district court explained, in pertinent part, that the federal and state governments represent separate sovereigns, and thus the ATF agents were not interrogating petitioner about the same "offense" following petitioner's release from state custody. See *id*. at 18a-19a. The December 5 inculpatory statements were thereafter introduced

at trial, JA 172-198, and a jury convicted petitioner on both counts, App., *infra*, 21a.

C. The Court of Appeals' Decision

The court of appeals affirmed the convictions.[2] App., *infra*, 1a-14a. At the outset, the court explained that the right to counsel "attaches only after the commencement of formal charges against a defendant," *id*. at 5a-6a, and that "[e]ven though an accused has a Sixth Amendment right to counsel for one offense — because formal charges have been brought — the right does not automatically attach to other offenses with which he has not been charged." *Id*. at 6a. Rather, the court continued, the right to counsel, once attached, extends only to "uncharged offenses that constitute the 'same offense' as one an accused has been formally charged with committing." *Id*. (citing *Texas* v. *Cobb*, 532 U.S. 162 (2001)). In *Cobb*, this Court applied the *Blockburger* double jeopardy test to determine whether two offenses were the same or distinct for purposes of the right to counsel. 532 U.S. at 173.

Taking *Cobb* one step further, the Fourth Circuit observed that another "central feature" of double jeopardy law is the "dual sovereignty" doctrine, under which "federal and state crimes are not the same offense, no matter how identical the conduct they proscribe." App., *infra*, 6a. "Because *Cobb* clearly indicates that the definition of offense is the same in the right to counsel and double jeopardy contexts, 532 U.S. at 173, the dual sovereignty doctrine has equal application in both." *Ibid*. Accordingly, the Fourth Circuit held that "[s]ince defendant'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.

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[2] The court vacated petitioner's sentence under *United States* v. *Booker*, 543 U.S. 220 (2005), and remanded for resentencing. App., *infra*, 14a. The sentence is not at issue here.

In so holding, the court below recognized that the circuits are sharply divided over the applicability of the dual sovereignty doctrine in this setting. It chose to "join those circuits that have employed the dual sovereignty doctrine in the Sixth Amendment context" — here it cited decisions from the First and Fifth Circuits — and to "disagree with the Second Circuit's decision to the contrary." App., *infra*, 9a.[3]

REASONS FOR GRANTING THE PETITION

This Court has held that the Sixth Amendment right to counsel is offense-specific, and in *Cobb*, this Court clarified that the scope of an "offense" is defined by the *Blockburger* inquiry from double jeopardy law — does each offense require proof of a fact that the other does not? In the context of double jeopardy claims, moreover, offenses that would otherwise be the same under *Blockburger* are nevertheless distinct when they are brought by different sovereigns. The "dual sovereignty" doctrine has long permitted separate sovereigns to initiate separate prosecutions on what would otherwise be the same offense. The recurring question that has divided the circuit

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[3] The court of appeals observed that "[o]ne of the chief virtues of our system of dual sovereignty is that each sovereign can approach problems in divergent ways." App., *infra*, 11a. In that connection, the court noted that there were certain differences in the way the federal and state governments charged the conspiracy counts in petitioner's case. See *id*. at 10a-11a. For example, whereas the state had charged a conspiracy "on or about October 2, 2003," the federal government charged a conspiracy that ran "from August to October 2003." *Id*. at 11a. And whereas the federal indictment specified an amount of narcotics, the state charges did not. *Id*. The court of appeals did not suggest, however, that as a result of these factual differences in the charging instruments, the state and federal offenses were distinct under *Blockburger*. Nor could it have done so. The two conspiracies were at the very least concentric circles, with the state conspiracy a subset of the federal conspiracy.

courts is whether the dual sovereignty doctrine also applies to the definition of an offense under the Sixth Amendment. Put another way, should "dual sovereignty" be used to define as two separate offenses what would otherwise be a single offense for purposes of the right to counsel? The First, Fifth, and now Fourth Circuits have said yes; the Second and Eighth Circuits, and the Seventh in dicta, disagree. Only this Court can resolve the conflict and clarify the meaning of *Cobb*.

Moreover, the court below chose the wrong side of the conflict. The dual sovereignty doctrine is rooted in core federalism concerns; its purpose is to preserve each sovereign's prerogative to enforce its own laws. But the Sixth Amendment right has nothing to do with those concerns. It is designed rather to protect the defendant in his confrontations with the government, and respecting that right in no way prevents either sovereign from prosecuting violations of its own laws. Indeed, this Court has long rejected claims that the tribunal of one sovereign may overlook constitutional violations committed by the authorities of another. At a minimum, the dual sovereignty doctrine should not apply in a case like this, in which the two sovereigns seamlessly cooperated using a common questioner.

Finally, the rule adopted below creates the potential for manipulation and confusion in an era of joint investigations by the federal and state governments, and at a time of expanded federal criminal jurisdiction. Under the rule adopted below, separate sovereigns working together could easily contrive (as they evidently did here) to interrogate a defendant about an offense with which he has already been charged outside the presence of his lawyer. Constitutional protections should not be so easy to manipulate. This Court should grant the petition and hold that dual sovereignty has no bearing on the scope of the right to counsel.

I. The Court of Appeals' Decision Deepens a Circuit Conflict Regarding the Application of the "Dual Sovereignty" Doctrine to the Scope of an "Offense" Under the Sixth Amendment

The Sixth Amendment right to counsel is "offense specific." *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991). In *Texas* v. *Cobb*, 532 U.S. 162 (2001), this Court held that the scope of the "offense" to which the right attaches is defined by the *Blockburger* test from double jeopardy law. The question in this case is whether, along with the *Blockburger* test, "dual sovereignty" principles under double jeopardy must also be imported into the Sixth Amendment context. Based on a broad (and, in our view, unnecessary) reading of *Cobb*, the court below said yes. In that respect, the Fourth Circuit's decision accords with decisions of the First and Fifth Circuits, but squarely conflicts with decisions of the Second and Eighth Circuits. This case is an ideal vehicle in which to resolve that disagreement about the reach of *Cobb*.

A. Like the Fourth Circuit below, the First and Fifth Circuits have held that *Cobb* requires that the dual sovereignty doctrine applies to the scope of an offense under the Sixth Amendment. In those circuits, even if two offenses would otherwise be the same under *Blockburger*, they are separate offenses for purposes of the right to counsel when prosecuted by separate sovereigns.

1. In *United States* v. *Coker*, 433 F.3d 39 (1st Cir. 2005), the defendant was charged under Massachusetts law with arson and injury to property, and was appointed an attorney. Soon after the incident, the local fire department notified ATF, which began its own investigation. ATF eventually elicited a confession from Coker, who was convicted after the federal district court denied his motion to suppress. *Id*. at 40-41.

The issue on appeal was "whether the uncharged federal arson offense was the same offense as the state arson offense for Sixth Amendment purposes." 433 F.3d at 42. The two offenses had essentially the same elements. Nevertheless, writing for two panel members, Judge Torruella pointed out that *Cobb* had equated the meaning of "offense" in the contexts of double jeopardy and the right to counsel, and that under double jeopardy jurisprudence, "conduct in violation of two separate sovereigns . . . constitutes two distinct offenses." *Id*. at 43. The question for the court thus became "whether the Court in *Cobb* incorporated all of its double jeopardy jurisprudence (including the dual sovereignty doctrine) or merely the *Blockburger* test into its Sixth Amendment right to counsel jurisprudence." *Ibid*.

The majority acknowledged that whereas "[t]he Second Circuit has held that the Court incorporated only the *Blockburger* test into its Sixth Amendment jurisprudence and that the dual sovereignty doctrine does not apply in the Sixth Amendment context," the Fifth Circuit, by contrast, "has taken the position that the dual sovereignty doctrine should be applied in the Sixth Amendment context." 433 F.3d at 43-44. "After carefully examining *Cobb*," the majority concluded that "the dual sovereignty doctrine applies for the purposes of defining what constitutes the same offense in the Sixth Amendment right to counsel context." *Id*. at 44. The First Circuit explained that it was "reject[ing] the reasoning of the Second Circuit . . . and adopt[ing] the reasoning of the Fifth Circuit." *Ibid*.

The court was not persuaded that "applying the dual sovereignty doctrine to cases such as [t]his will permit law enforcement to perform an end run around a defendant's Sixth Amendment right to counsel." 433 F.3d at 45. Under the exception to dual sovereignty articulated in *Bartkus* v. *Illinois*, 359 U.S. 121 (1959), the dual sovereignty doctrine would not apply "if it appears that one sovereign is controlling the prosecution of another merely to circumvent the defendant's

Sixth Amendment right to counsel." 433 F.3d at 45. In the First Circuit's view, "this exception will help prevent law enforcement officials from making an end run around the right to counsel." *Ibid*. The panel had no trouble concluding, however, that the *Bartkus* exception did not apply in that case. *Id*. at 46-47.

Judge Cyr disagreed with the majority's reading of *Cobb*.[4] He pointed out that the Court in *Cobb* did not face, and therefore did not consider the policy issues raised by, prosecutions by separate sovereigns. 433 F.3d at 50. Before *Cobb*, he noted, "there was no question but that the 'separate sovereign' doctrine . . . had no application outside the double jeopardy context." 433 F.3d at 49. The Fourth Amendment protection against unreasonable searches and seizures and Fifth Amendment privilege against self-incrimination are not subject to a dual sovereignty exception, which in those contexts "would encourage collusion between the federal and state sovereigns, one sovereign obtaining evidence in violation of defendants' constitutional rights." *Id*. at 49-50. Judge Cyr took little comfort from the *Bartkus* exception because it fails to reach a great deal of "mutual collusion of independent sovereigns" and "creates a portentous risk of abuse in this age of increasing federal-state cooperation." *Id*. at 51.

2. The Fifth Circuit has likewise embraced the "dual sovereignty" principle in defining the scope of an offense under the Sixth Amendment. *United States* v. *Avants*, 278 F.3d 510 (5th Cir. 2002). In 1966 or 1967, Mississippi charged Avants with the murder of Ben White. Avants was acquitted. Shortly before his trial — that is, at a time when the right to counsel already had attached for the state charge — he was interviewed by, and made incriminating statements to, FBI agents investi-

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[4] He nevertheless concurred because he concluded that any constitutional error was harmless.

gating a different murder. In 2000, the federal government initiated a prosecution for the White murder, and sought to introduce the statements from the FBI interview. *Id*. at 512.

The Fifth Circuit considered whether the federal murder charge was the same offense as the state charge for purposes of the right to counsel. The panel determined that *Cobb* disposed of the issue:

> By concluding without limitation that the term "offense" has the same meaning under the Sixth Amendment as it does under the Double Jeopardy Clause, the Court effectively foreclosed any argument that the dual sovereignty doctrine does not inform the definition of "offense" under the Sixth Amendment. Stated differently, the Supreme Court has incorporated double jeopardy analysis, including the dual sovereignty doctrine, into its Sixth Amendment jurisprudence.

278 F.3d at 517. The Fifth Circuit accordingly held that even if a federal and state offense have identical elements, they "do not constitute the 'same offense' under the Sixth Amendment . . . because they are violations of the laws of two separate sovereigns." *Id*. at 522.

B. By contrast, the Second and Eighth Circuits have held just the opposite — that *Cobb* does not import dual sovereignty into the Sixth Amendment context.

1. In *United States* v. *Mills*, 412 F.3d 325 (2d Cir. 2005), the defendant was charged under Connecticut law with firearms violations, including criminal possession of a firearm by a convicted felon. A day later — when the right to counsel had attached for the state charges — local police officers interviewed Mills. Eight months later, he was indicted by a federal grand jury for unlawful possession of a firearm by a convicted felon, which was conceded to have the same elements

as the state felon-in-possession charge. Mills moved to suppress the statements he had made to the local police. *Id*. at 327-328.

On appeal, the government did not challenge the district court's determination that the interview had violated Mills' right to counsel as to the state charges. 412 F.3d at 328. The government argued, however, that there was no violation as to the federal charge because after *Cobb*, the dual sovereignty doctrine applies to the Sixth Amendment and distinguishes the federal offense from the state offense. *Id*. at 329-330.

The Second Circuit was not persuaded. Citing for support the Eighth Circuit's decision in *United States* v. *Red Bird*, 287 F.3d 709 (2002), and expressly "reject[ing] the government's invitation to follow the Fifth Circuit's lead," 412 F.3d at 330 & n.2, the court observed that "[n]owhere in *Cobb*, either explicitly or by [implication], is there support for a dual sovereignty exception." *Id.* at 330. In the Second Circuit's view, "the fact that *Cobb* appropriates the *Blockburger* test . . . does not demonstrate that *Cobb* incorporates the dual sovereignty doctrine: The test is used simply to define identity of offenses." *Ibid*. The Second Circuit was concerned that:

> [w]here, as here, the same conduct supports a federal or a state prosecution, a dual sovereignty exception would permit one sovereign to question a defendant whose right to counsel had attached, to do so in the absence of counsel, and then to share the information with the other sovereign without fear of suppression. We easily conclude that *Cobb* was intended to prevent such a result.

Ibid.

2. The Eighth Circuit has also declined to apply the dual sovereignty doctrine in defining the scope of Sixth Amendment rights. In *Red Bird*, the defendant was arraigned on a rape

charge in the Rosebud Sioux Tribal Court.[5] The tribal court appointed an attorney, who was also licensed in federal court. The tribal authorities notified an FBI agent of the alleged rape, and helped the agent locate and interview the defendant, who made inculpatory statements. The tribal authorities and the FBI knew of the defendant's representation on the tribal charge but did not notify the lawyer of the interview. The defendant was eventually indicted on federal sexual abuse charges, and moved to suppress his statements. 287 F.3d at 711-712 & n.4.

The Eighth Circuit rejected the government's argument that the tribal and federal charges were separate offenses for Sixth Amendment purposes because they were charged by separate sovereigns. Noting "the way that tribal and federal authorities cooperated in connection with these charges," the court did not "believe that it is appropriate to fully rely on double jeopardy analysis here." 287 F.3d at 714-715. The Eighth Circuit then followed *Cobb*'s command to apply *Blockburger*, and determined that "the federal and tribal complaints charge the same offense for Sixth Amendment purposes" because the charges had "'identical essential elements.'" *Id*. at 715.[6]

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[5] The Rosebud Sioux Tribe's constitution guarantees the right to an attorney in tribal court. Furthermore, as relevant here, Native American tribes and the federal government are separate sovereigns for purposes of double jeopardy law. See *United States* v. *Lara*, 541 U.S. 193, 210 (2004).

[6] As the court below recognized (see App., *infra*, 9a), the Seventh Circuit has strongly suggested that it, too, would decline to apply dual sovereignty principles in deciding the scope of Sixth Amendment rights. In *United States* v. *Krueger*, 415 F.3d 766 (7th Cir. 2005) — a case substantially identical to petitioner's — the defendant was charged in state court with marijuana trafficking, and an attorney was assigned to represent him. Local officials then dismissed their charges in favor of federal prosecution, and incriminating statements were elicited by federal agents. Those statements were then offered to

II. The Court of Appeals' Decision Is Wrong

A. In our view, the Second and Eighth Circuits (and quite likely, the Seventh as well) have much the better of the argument. By wrenching isolated language from *Cobb* and applying it to circumstances entirely different from those at issue in that case, the court of appeals ignored both the purposes of the dual sovereignty doctrine and the role of the Sixth Amendment right to counsel in our system of justice.

The dual sovereignty doctrine is rooted in core federalism concerns. The doctrine reflects the basic principle that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." *United States* v. *Lanza*, 260 U.S. 377, 382 (1922). The doctrine is intended, in short, to respect the *authority* of each sovereign to prosecute cases, even when another sovereign has already prosecuted the defendant for identical conduct.

By contrast, the right to counsel is designed to protect the *defendant* in his confrontations with the *government*. Respecting the Sixth Amendment right in no way prevents any sovereign from prosecuting violations of its laws. The decision below thus got off on the wrong foot when it declared at the outset: "The

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enhance the defendant's sentence following a guilty plea. 415 F.3d at 769-774. Although the court of appeals ultimately concluded that the statements could be used for sentencing purposes, it cast serious doubt on whether they were admissible as substantive evidence under the Sixth Amendment. Citing the Eighth Circuit's decision in *Red Bird* and the Second Circuit's decision in *Mills*, the Seventh Circuit observed that "[i]n view of th[e] apparent coordination" between the federal and state officials, "an argument could be made along the lines of *Red Bird* that the federal charges, although brought by a different sovereign, were essentially the same ones that had been asserted against Krueger in state court for purposes of the Sixth Amendment." *Id*. at 778.

instant case touches upon the sovereign authority of the state and federal governments to create and enforce criminal laws." App., *infra*, 1a. That sentiment — fully appropriate in a case where a sovereign's power is truly at stake — is entirely misplaced in a case involving a criminal defendant's right to counsel. Excluding statements made during a police-initiated interrogation about offenses for which petitioner already had counsel would have had absolutely no effect on the federal government's authority to enforce its laws, let alone to create them. Indeed, the only cost saved by the court of appeals' rule is the loss of a particular piece of evidence, not the wholesale foreclosure of prosecution.

Unlike the dual sovereignty doctrine, the *Blockburger* test fits comfortably in the Sixth Amendment context. A defendant who has engaged counsel in a prosecution for one offense may well understand that investigation of a different offense with different elements raises different issues. The defendant may be willing to speak about one offense but not the other. But where state and federal offenses are identical, it is practically unimaginable that a defendant who invokes the right to counsel as to the state offense would not also want counsel as to the federal. To argue for a contrary result on dual sovereignty grounds is to insist on a mechanical application of a doctrine conceived for entirely different purposes.

This Court has consistently been skeptical of assertions that constitutional rights should give way simply because one sovereign has handed its case off to another. Thus, this Court has held that evidence seized by state officers in violation of the Fourth Amendment is inadmissible in a federal criminal trial, *Elkins* v. *United States*, 364 U.S. 206, 223 (1960), and that the Fifth Amendment privilege against self-incrimination prohibits the use in one sovereign's courts of testimony immunized in another's, *Murphy* v. *Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 77-79 (1964). Indeed, before *Cobb*, dual sovereignty

principles had no application outside of double jeopardy law. See also David J. D'Addio, Case Comment, *Dual Sovereignty and the Sixth Amendment Right to Counsel*, 113 YALE L.J. 1991, 1997-1998 (2004) (arguing that the Court "should focus on the individual in the Sixth Amendment context," just as it does in the Fourth and Fifth Amendment contexts, particularly given the opportunities created by federal-state cooperation to frustrate the purposes of the right to counsel).

B. At a minimum, the dual sovereignty doctrine should not apply in cases like this, where there was indisputably a joint investigation and a common questioner — where, in other words, the separate sovereigns behaved in a decidedly non-separate fashion. This is what the Seventh Circuit recognized in *Krueger*, see note 6, *supra*, and it was one of the grounds for the Eighth Circuit's decision in *Red Bird*. If the state and federal authorities jointly investigate and then seamlessly coordinate their prosecutions, the federal government must not be heard to argue that its sovereign prerogatives are so sacrosanct that federal agents may question a defendant in circumstances when state agents could have done no such thing, and then introduce statements that would be flatly inadmissible in state court. Cf. Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 73 (1992) (arguing in the double jeopardy context that "[t]he Court should recognize the dual sovereignty doctrine as a fiction when" — because of federal-state cooperation — "it tells a story that is not true.").

From a defendant's standpoint, distinctions between sovereigns will likely make no sense at all. Indeed, in this case, Constanza had no apparent reason to distinguish the "federal" interrogation from the "state" interrogations. The questioner in each instance was the same ATF agent. What is more, the "state" interrogations occurred in the company of the local police, after they arrested petitioner and turned him over to the

agent. The "federal" interrogation occurred in a local police station. The county detective who escorted petitioner and the ATF agent to an interview room at the station had participated in the October 1 and 2 stake-out and attended the state-court hearing that very day. Under such circumstances, a defendant could be forgiven for the perception that he was being interrogated about offenses for which he already had counsel.

III. The Court of Appeals' Decision Presents an Important and Recurring Issue of Constitutional Criminal Law

A. The question presented here comes up regularly. The six courts of appeals decisions reviewed above are far from the only ones to have considered the applicability of dual sovereignty to the Sixth Amendment in light of *Cobb*.[7] Indeed, even before *Cobb*, numerous courts had faced fact patterns that, post-*Cobb*, would raise the precise issue presented here, and many specifically considered whether dual sovereignty could separate what would otherwise have been (under pre-*Cobb* standards) the same offense for Sixth Amendment purposes.[8]

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[7] See *United States* v. *Stroman*, No. CRIM. 05-66-P-S, 2006 WL 83404, at *17 (D. Me. Jan. 9, 2006) (M.J.) (following First Circuit in *Coker*), *aff'd*, 2006 WL 348321 (D. Me. Feb. 14, 2006); *United States* v. *Terrell*, No. 02-40154-02-JAR, 2005 WL 643464, at *4 (D. Kan. Jan. 11, 2005); *United States* v. *Bowlson*, 240 F. Supp. 2d 678, 684 (E.D. Mich. 2003) (rejecting dual sovereignty because the federal and state investigations were intertwined); *United States* v. *Gidden*, No. 02-CR-947 (JBW), 2003 WL 22992074, at *3 (E.D.N.Y. Dec. 16, 2003) (following Fifth Circuit in *Avants*); see also *United States* v. *Plumman*, 409 F.3d 919, 926-927 (8th Cir. 2005) (declining to follow *Red Bird* because FBI agent not aware of pending tribal charge at time of interview); *United States* v. *Hudson*, 267 F. Supp. 2d 818, 821-822 (S.D. Ohio 2003) (*Blockburger* test used to separate charged state and uncharged federal offenses without resort to dual sovereignty).

[8] See *United States* v. *Covarrubias*, 179 F.3d 1219, 1225-1226 (9th Cir. 1999); *United States* v. *Swiger*, 172 F.3d 46, 1999 WL 22728, at

There are good reasons to believe that the issue will arise with still greater frequency in the future. For one thing, federal and state authorities have increasingly cooperated on law-enforcement, particularly in the narcotics context. See, *e.g.*, Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1180-1187 (1995). As a result, the occasions for confusion about — or even outright manipulation of — a defendant's Sixth Amendment right to counsel can be expected to multiply. This case is an excellent illustration: Federal and state officials investigated the case jointly; they interrogated the defendant jointly; and they passed the prosecutorial baton from one to the other just in time to elicit an uncounseled statement that neither government on its own could have secured.

The increasing federalization — perhaps over-federalization — of state law doubly ensures that the issue presented in this case will recur with great regularity. See Paul Rosenzweig,

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*2-3 (4th Cir. 1999) (table decision); *United States* v. *Melgar*, 139 F.3d 1005, 1013-1016 (4th Cir. 1998); *United States* v. *James*, 156 F.3d 1240, 1998 WL 482938, at *2 (9th Cir. 1998) (table decision); *United States* v. *Laury*, 49 F.3d 145, 150 n.11 (5th Cir. 1995); *United States* v. *Fairchild*, 24 F.3d 250, 1994 WL 161949, at *1 n.1 (9th Cir. 1994) (table decision); *United States* v. *Martinez*, 972 F.2d 1100, 1103-1105 (9th Cir. 1992); *United States* v. *Swift Hawk*, 125 F. Supp. 2d 384, 387-389 (D.S.D. 2000); *Hurd* v. *Stinson*, No. 99 CIV. 2426 LBS, 2000 WL 567014, at *12 n.12 (S.D.N.Y. May 10, 2000); *United States* v. *Foreman*, 993 F. Supp. 186, 191 (S.D.N.Y. 1998); *United States* v. *Santiago*, 3 F. Supp. 2d 392, 396-397 (S.D.N.Y. 1998); *United States* v. *Holland*, 59 F. Supp. 2d 492, 502-504, 507-508 (D. Md. 1998); *United States* v. *Friedman*, No. 95-CR-192 (S-3) (ARR), 1996 WL 612456, at *34-35 (E.D.N.Y. June 25, 1996); *United States* v. *Rodriguez*, 931 F. Supp. 907, 926-928 (D. Mass. 1996); *United States* v. *Olsen*, 840 F. Supp. 842, 849-853 (D. Utah 1993); *United States* v. *Louis*, 679 F. Supp. 705, 709 (W.D. Mich. 1988); *People* v. *Riggs*, 568 N.W.2d 101, 117-118 (Mich. Ct. App. 1997).

Overcriminalization: An Agenda for Change, 54 AM. U. L. REV. 809, 818 (2005) ("much of the growth of federal crimes [is] a result of federal law taking on too many responsibilities that were best left to state law enforcement agencies"). As a result of "[t]he expanding overlap of federal and state law," there will be many more occasions in the future in which a common course of conduct will give rise to both federal and state investigations and potential prosecutions. Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 770-771 (2005). The opportunities for mistakes and abuses with respect to Sixth Amendment rights are apt to increase.

B. The question presented is also surpassingly important. The Sixth Amendment right to counsel — a right that protects all other rights in a criminal case, see *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463 (1938) — "arises from the fact that the suspect has been formally charged with a particular crime and thus is facing a state apparatus that has been geared up to prosecute him." *Arizona* v. *Roberson*, 486 U.S. 675, 685 (1988). The purpose of the right is to "'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government." *McNeil* v. *Wisconsin*, 501 U.S. 171, 177 (1991).

The purposes of the Sixth Amendment are severely compromised by the rule adopted by the court below and those circuits that agree with it. The dual sovereignty doctrine permits two sovereigns to "do in tandem what none could do alone: deliberately elicit incriminating statements from the accused without the knowledge or presence of [his] attorney, and use those statements . . . at a trial on the very matter for which the defendant is represented." D'Addio, *supra*, at 1996. The potential for a shell game here has troubled a number of courts, including, as discussed earlier, the Second Circuit in *Mills*. See also, *e.g.*, *United States* v. *Martinez*, 972 F.2d 1100, 1105 (9th Cir. 1992); *United States* v. *Bowlson*, 240 F. Supp. 2d 678, 684

(E.D. Mich. 2003). Indeed, similar concerns in the Fourth Amendment context prompted this Court's decision in *Elkins*. See 364 U.S. at 222 ("If . . . it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation.").

At the same time, however, cooperation between federal and state or tribal authorities is often crucial to the effective enforcement of criminal laws. *E.g.*, *Elkins*, 364 U.S. at 211, 221. The First Circuit in *Coker* was satisfied that cooperation is unlikely to slide into collusion because the so-called *Bartkus* exception overrides the dual sovereignty doctrine when a successive state prosecution is "a sham and a cover for a federal prosecution," *Bartkus*, 359 U.S. at 124. Not so. This "sham prosecution" exception is so narrow as to be non-existent. Commentators have called it "illusory," and some courts have questioned its existence.[9] As a practical matter, under the rule adopted below, there is nothing to prevent federal and state authorities from tag-teaming a defendant, outside the presence of counsel, until he confesses — knowing that the only consequence is that the statement cannot be used in the jurisdiction that assigned the defendant a lawyer.

But even if one assumes complete good faith on the part of all law-enforcement officers, the rules of the road are highly uncertain. In New York, Connecticut, Vermont, Arkansas, Missouri, Iowa, Minnesota, North Dakota, South Dakota, and Nebraska, after a criminal defendant engages counsel, defendant and lawyer can both be secure in the knowledge that no law-

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[9] See, *e.g.*, 21 Am. Jur. 2d *Criminal Law* § 370; Braun, *supra*, at 60-61; Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 296 (1992); *United States* v. *Angleton*, 314 F.3d 767, 773-774 (5th Cir. 2002); *United States* v. *Brocksmith*, 991 F.2d 1363, 1366 (7th Cir. 1993).

enforcement officer, state or federal, will question the defendant unless the subject of the interrogation concerns a separate offense in the *Blockburger* sense. By contrast, in Maine, New Hampshire, Massachusetts, Rhode Island, Puerto Rico, West Virginia, Virginia, North Carolina, South Carolina, Texas, Louisiana, and Mississippi, state and federal police seamlessly cooperating on an investigation may freely interrogate a defendant about the precise subject of a pending indictment, provided that they plan to use the statement in a jurisdiction other than the one that assigned him a lawyer. The Sixth Amendment right to counsel deserves better.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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