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TEXAS V. COBB: A NARROW ROAD AHEAD FOR THE SIXTH AMENDMENT RIGHT TO COUNSEL

I. INTRODUCTION

Raymond Cobb (“Cobb”) stabbed sixteen-month-old Kori Rae Owings’s mother in the stomach while he was attempting to steal the stereo from their home.¹ He then took the mother’s body into the woods behind the house.² As Cobb later confessed:

I went back to her house and I saw the baby laying on its bed. I took the baby out there and it was sleeping the whole time. I laid the baby down on the ground four or five feet away from its mother. I went back to my house and got a flat edge shovel. That’s all I could find. Then I went back over to where they were and I started digging a hole between them. After I got the hole dug, the baby was awake. It started going toward its mom and it fell in the hole. I put the lady in the hole and I covered them up. I remember stabbing a different knife I had in the ground where they were. I was crying right then.³

Cobb’s story illustrates one of the most serious problems facing America today: crime. As a result, a top priority of our government is convicting criminals. But even baby killers like Raymond Cobb have constitutional rights, and the courts are charged with protecting those rights. Society must balance its right to be protected from crime with the rights of the accused.⁴ To preserve the integrity of the American adversarial system, the accused must be treated fairly. Otherwise, society will be the ultimate loser.⁵

The Sixth Amendment to the United States Constitution declares that “[i]n all criminal prosecutions, the accused shall enjoy

1. *Texas v. Cobb*, 121 S. Ct. 1335, 1339 (2001).

2. *Id.*

3. *Id.* at 1339–40 (quoting App. to Pet. for Cert. A-9 to A-10).

4. *See, e.g., Miranda v. Arizona*, 384 U.S. 436, 481 (1966) (“This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties.”).

5. *See* Charles J. Ogletree, Comment, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1842 n.91 (1987).

the right . . . to have the Assistance of Counsel for his defence.”⁶ The United States Supreme Court views the right to counsel as indispensable to the fair administration of our adversarial system of criminal justice.⁷ However, the Sixth Amendment, like most constitutional provisions, offers little guidance for determining the limits of its protections. The Constitution remains silent as to when the right to counsel attaches as well as the scope of protection afforded by the right once it does attach. Over the years, the Court has attempted to interpret and define the right to counsel.

Recently, the Court limited the right to counsel in *Texas v. Cobb*,⁸ holding that a person, already charged with a crime and represented by a lawyer, can be questioned by police without his lawyer present, so long as the questioning is technically directed at a different offense than the one charged.⁹ Prior to *Cobb*, a growing number of federal and state courts recognized the “closely related” exception¹⁰ by allowing the Sixth Amendment

6. U.S. CONST. amend. VI. The Sixth Amendment was made applicable to the states by incorporation of the Due Process Clause of the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

7. See generally *Michigan v. Jackson*, 475 U.S. 625, 632 (1986) (holding that the Sixth Amendment limits police from using techniques to gather information from accused that may otherwise have been permitted earlier in investigation); *Moran v. Burbine*, 475 U.S. 412, 430 (1986) (holding that the Sixth Amendment is applicable only when government's role shifts from investigation to accusation through initiation of adversary judicial proceedings); *Maine v. Moulton*, 474 U.S. 159, 170 (1985) (stating that “to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself”); *Brewer v. Williams*, 430 U.S. 387, 401 (1977) (indicating that once adversary proceedings have started, the accused has a right to counsel while he is being interrogated); *Kirby v. Illinois*, 406 U.S. 682, 688 (1972) (noting that the Sixth Amendment “attaches only at or after the time that adversary judicial proceedings have been initiated against him”); *Massiah v. United States*, 377 U.S. 201, 206 (1964) (holding that the accused was denied Sixth Amendment protections “when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel”); *Gideon*, 372 U.S. at 344 (stating that “the right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours”); *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (reasoning that the accused “requires the guiding hand of counsel at every step in the proceedings against him”).

8. 121 S. Ct. 1335 (2001).

9. *Id.* at 1339.

10. For purposes of clarity, this note uses “closely related” to refer to this exception. Courts have used the terms “closely related,” “extremely closely related,” and “inextricably intertwined,” all of which apparently mean the same thing. See *United States v. Arnold*, 106 F.3d 37, 41 (3d Cir. 1997) (characterizing “closely related” and “inextricably intertwined” as “two terms which we take to mean the same thing”); see also *United States v. Carpenter*, 963 F.2d 736, 740 (5th Cir. 1992) (considering “inextricably intertwined” and “extremely closely related” to be equivalent); *United States v. Hines*, 963 F.2d 255, 257

right to counsel to attach to a charge that was “extremely closely related to pending . . . charges.”¹¹ Despite these lower court rulings, the *Cobb* Court narrowly interpreted the Sixth Amendment right to counsel by eliminating the “closely related” exception.¹²

This note discusses the evolution of the Sixth Amendment right to counsel and ultimately concludes that *Cobb* reflects the Court’s ongoing merger of Fifth and Sixth Amendment analyses. Part II explores the development of the Sixth Amendment right to counsel, the recognition of a “closely related” exception, and the Fifth Amendment right to counsel. Part III sets out the facts and holding in *Cobb*. Part IV analyzes the Court’s narrow interpretation of the Sixth Amendment in *Cobb*. Part V discusses the potential impact of the *Cobb* holding.

II. DEVELOPMENT OF THE RIGHT TO COUNSEL

A. Sixth Amendment Right to Counsel

During the past forty years, the Supreme Court, along with other federal and state courts, has tried to define the scope of the Sixth Amendment. In *Kirby v. United States*,¹³ the Supreme Court determined that the Sixth Amendment right to counsel “attaches only at or after the time that adversary judicial proceedings have been initiated.”¹⁴ The *Kirby* plurality held that its test

(9th Cir. 1992) (per curiam) (using “inextricably intertwined”); *Whittlesey v. State*, 665 A.2d 223, 233 (Md. 1995) (using “closely related”), *cert. denied*, 516 U.S. 1148 (1996).

11. *United States v. Williams*, 993 F.2d 451, 457 (5th Cir. 1993) (quoting *United States v. Cooper*, 949 F.2d 737, 744 (5th Cir. 1991)).

12. *Cobb*, 121 S. Ct. at 1340–41.

13. 406 U.S. 682 (1972).

14. *Id.* at 688 (citations omitted). The Court emphasized the importance of the initiation of judicial criminal proceedings to Sixth Amendment jurisprudence:

The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the “criminal prosecutions” to which alone the explicit guarantees of the Sixth Amendment are applicable.

Id. at 689–90.

comprehensively included all prior cases in which the Court had found a Sixth Amendment right to counsel.¹⁵ As a result, the Sixth Amendment right to counsel extends to all critical stages of the criminal process between the State and the accused.¹⁶ Once the right attaches, any subsequent waiver during a police-initiated custodial interview is presumptively invalid.¹⁷

1. The Court Creates an Exclusionary Rule

*Massiah v. United States*¹⁸ marked a seminal decision of the Supreme Court by requiring the exclusion of evidence obtained in violation of an accused's Sixth Amendment right to counsel.¹⁹ After being indicted for violating federal narcotics laws, Massiah retained a lawyer, entered a plea of not guilty, and was released on bail.²⁰ A few days later, Massiah's co-defendant, Colson, cooperated with government agents by allowing them to install a radio transmitter in his car.²¹ Massiah and Colson eventually had a conversation in the car.²² Massiah made incriminating statements which were recorded by police and used against him at

15. *Id.* at 688. These cases include *Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970) (plurality opinion) (right to counsel attached at pre-indictment preliminary hearing), *United States v. Wade*, 388 U.S. 218, 236–37 (1967) (right to counsel attached at post-indictment, pretrial line-up), *Massiah v. United States*, 377 U.S. 201, 206 (1964) (right to counsel attached at post-indictment interrogation), and *Hamilton v. Alabama*, 368 U.S. 52, 53–54 (1961) (right to counsel attached at arraignment).

16. *Wade*, 388 U.S. at 236–37. The *Wade* Court defined the critical stage in the criminal process as the point “where the results might well settle the accused's fate and reduce the trial itself to a mere formality,” *id.* at 224, or where a “potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.” *Id.* at 227.

17. *Michigan v. Jackson*, 475 U.S. 625, 636 (1986). The burden is on the government to prove “an intentional relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

18. 377 U.S. 201 (1964).

19. *Id.* at 206. The Court stated:

We hold that the petitioner was denied the basic protections of [the Sixth Amendment right to counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel.

Id.

20. *Id.* at 201.

21. *Id.* at 202–03.

22. *Id.* at 203.

trial.²³ The Court concluded that the statements “could not constitutionally be used by the prosecution as evidence against [Messiah] at his trial.”²⁴ As a result, the Court created an exclusionary rule to the Sixth Amendment.²⁵

The *Massiah* Court held that the violation of the right to counsel was not complete until the prosecution attempted to admit the illegally procured evidence at trial.²⁶ The Sixth Amendment specifically addresses procedural aspects of prosecution and trial; therefore, the admission of evidence obtained in violation of the right to counsel infringes upon that constitutional right.²⁷

This placed the *Massiah* exclusionary rule on a different level²⁸ than the exclusionary rule established in *Miranda v. Arizona*,²⁹

23. *Id.* .

24. *Id.* at 207.

25. *See id.* at 204.

26. *See id.* at 207 (“All that we hold is that the defendant’s own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial.”). The dissent described the Court’s holding as creating “a constitutional rule . . . barring the use of evidence.” *Id.* at 208 (White, J., dissenting).

27. *See* Steven J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 889 (1981). Professor Schulhofer claims:

[T]he *Massiah* “exclusionary rule” . . . is not intended to deter any pretrial behavior whatsoever. Rather, *Massiah* explicitly permits government efforts to obtain information from an indicted suspect, so long as that information is not used “as evidence against *him* at his trial.” The failure to exclude evidence, therefore, cannot be considered *collateral* to some more fundamental violation. Instead it is the admission at trial that in itself denies the constitutional right.

Id. (quoting *Massiah*, 377 U.S. at 207).

28. Similarly, the exclusionary rule articulated in *Mapp v. Ohio*, 367 U.S. 643 (1961), is considered to be on “very different footing” than the rule established by *Massiah*. Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was it a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 175 (1984). *Mapp* held that evidence taken by state officials in violation of the Fourth Amendment guarantee against unreasonable searches and seizures was inadmissible in state court proceedings. *Mapp*, 367 U.S. at 655. As in the application of *Miranda*, the exclusionary rule that attaches to a *Mapp* violation is not compelled by the Constitution:

The current conception of *Mapp* is that a fourth amendment violation is complete when the police withdraw from the area they have searched. The evidentiary fruits of that illegal search may, later, be excluded from court, but the point is not that their admission would violate any personal right of the person aggrieved. . . . It is, rather, that excluding this evidence today will tend to discourage the police from violating somebody else’s fourth amendment rights tomorrow.

Wasserstrom & Mertens, *supra* at 175.

29. 384 U.S. 436 (1966).

the landmark Supreme Court decision requiring the suppression of evidence acquired in violation of the Fifth Amendment.³⁰ Unlike *Massiah*, evidence acquired in violation of *Miranda* may be used against a defendant without violating the Constitution.³¹

Overshadowed by *Miranda*, *Massiah*'s potential reach was "lost in the shuffle,"³² and the decision remained dormant for over a decade. The first major application of *Massiah* occurred in *Brewer v. Williams*,³³ which was decided thirteen years after *Massiah*. In *Brewer*, the defendant was charged and arraigned in Davenport, Iowa, for the abduction of a ten-year-old girl.³⁴ A Des Moines lawyer had previously informed officers in Des Moines that he represented Williams.³⁵ After the arraignment in Davenport, however, another lawyer instructed Williams not to speak to the police until he had conferred with his lawyer in Des Moines; the attorney also instructed the police not to question Williams until he could meet with his other lawyer.³⁶ The police placed Williams in the back seat of a squad car and two officers drove him to Des Moines.³⁷ During the trip, one of the officers, Detective Learning—who knew Williams to be a former mental patient and a deeply religious person—mentioned that the parents of the victim should be entitled to a Christian burial for their daughter.³⁸ Shortly thereafter, Williams, without the presence of counsel, directed the officers to the location of the girl's body.³⁹ Subsequently, Williams was indicted for murder.⁴⁰

The Court viewed the situation in *Brewer* as indistinguishable from the "clear rule of *Massiah* . . . that once adversary proceedings have commenced against an individual, he has a right to le-

30. For further discussion of *Miranda*, see *infra* notes 101–18 and accompanying text.

31. See *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (holding that the procedural safeguards established in *Miranda* "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected").

32. Schulhofer, *supra* note 27, at 884 (quoting YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 160 (1980)).

33. 430 U.S. 387 (1977).

34. *Id.* at 390.

35. *Id.*

36. *Id.* at 391–92.

37. *Id.* at 392.

38. *Id.* at 392–93.

39. *Id.* at 393.

40. *Id.*

gal representation when the government interrogates him.”⁴¹ The Court noted that “[d]espite Williams’ express and implicit assertions of his right to counsel, Detective Leaming proceeded to elicit incriminating statements from Williams.”⁴² Such considerations led the Court to conclude that “so clear a violation of the Sixth . . . Amendment as here occurred cannot be condoned.”⁴³ Accordingly, the Court held that

the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at, or after, the time that judicial proceedings have been initiated against him—“whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.”⁴⁴

As a result, the Court extended the Sixth Amendment right to counsel to the statements relevant to the murder charge against Williams, even though the right to counsel had only formally attached to the abduction charge.⁴⁵

In *Maine v. Moulton*,⁴⁶ a case factually similar to *Massiah*, the Court upheld the suppression of incriminating statements for two separate charges.⁴⁷ Defendants Moulton and Colson were indicted on four counts of theft.⁴⁸ Over a year and a half later, Colson contacted the local police, confessed his participation in the thefts,

41. *Id.* at 401. It should be noted that these proceedings concerned the abduction charge and not the murder charge for which Williams was later convicted. *Id.* at 390, 395.

42. *Id.* at 405.

43. *Id.* at 406.

44. *Id.* at 398 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). Chief Justice Burger, writing in dissent, believed that “[t]he result in this case ought to be intolerable in any society which purports to call itself an organized society.” *Id.* at 415 (Burger, C.J., dissenting). Burger argued that the Sixth Amendment was meant to serve as a constitutional guarantor of an incorrupt fact-finding process and a fair trial. *Id.* at 426 (Burger, C.J., dissenting). Burger concluded that the suppression of Williams’ statements was unjustified because the facts surrounding the statements implicated “no issue either of fairness or evidentiary reliability.” *Id.* (Burger, C.J., dissenting). In a separate dissent, Justice White also emphasized that conditions which he felt the right to counsel was designed to protect were not present in this case. *See id.* at 433–34 (White, J., dissenting). Because “the officers’ conduct did not, and was not likely to, jeopardize the fairness of [Williams’] trial or in any way risk the conviction of an innocent man,” the statements should not have been suppressed as fruits of that conduct. *Id.* at 437 (White, J., dissenting).

45. *Id.* at 404–06. The Court held that Williams’ waiver of the Sixth Amendment right to counsel was invalid and that the statements he made to the police identifying the body’s location were inadmissible. *Id.*

46. 474 U.S. 159 (1985).

47. *Id.* at 180.

48. *Id.* at 162.

and agreed to cooperate in the prosecution of Moulton.⁴⁹ Colson also informed the police of additional thefts and an inchoate plan devised by Moulton to kill an opposing witness.⁵⁰ Though the police knew that Moulton's right to counsel had attached to the theft charge, the police placed a recording device on Colson's telephone and wired Colson to record conversations between himself and Moulton.⁵¹ The trial court convicted Moulton of burglary and theft, despite his efforts to suppress the recorded statements.⁵² However, the Maine Supreme Judicial Court reversed his convictions and remanded the case for a new trial,⁵³ and the state appealed to the United States Supreme Court.⁵⁴

The Supreme Court affirmed the decision of the Maine Supreme Judicial Court, explaining that "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself."⁵⁵ The Court clarified that once the right to counsel has attached, "the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."⁵⁶ Consequently, the Court concluded that the police violated Moulton's Sixth Amendment right to counsel by recording conversations in which the police "knew that Moulton would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel."⁵⁷ The Court affirmed the state appellate court's decision to suppress the statements regarding the pending theft charges, but stated that evidence regarding an alleged plan to kill a witness may be admissible in separate proceedings because such charges had not yet commenced at the time the recordings were made.⁵⁸ Fairness interests, the Court reasoned, required the right to counsel be applied to certain pretrial proceedings unless the "results [there]

49. *Id.* at 162-63. In exchange for his help, the police informed Colson that no additional charges would be brought against him. *Id.* at 163.

50. *Id.* at 165.

51. *Id.* at 163-67.

52. *Id.* at 166-67.

53. *Maine v. Moulton*, 481 A.2d 155 (Me. 1984).

54. *Moulton*, 474 U.S. at 168.

55. *Id.* at 170.

56. *Id.* at 171.

57. *Id.* at 177.

58. *See id.* at 180.

might well settle the accused's fate and reduce the trial itself to a mere formality."⁵⁹

2. The Court Defines the Sixth Amendment as Offense-Specific

In *McNeil v. Wisconsin*,⁶⁰ the Supreme Court limited the protection provided by the Sixth Amendment by announcing that the right to counsel is "offense specific."⁶¹ McNeil was arrested in Nebraska for an armed robbery that occurred in West Allis, Wisconsin.⁶² Authorities transferred him back to Wisconsin and appointed him counsel.⁶³ Thereafter, a detective questioned McNeil regarding an unrelated murder, attempted murder, and armed burglary in Caledonia, Wisconsin.⁶⁴ McNeil admitted involvement in these events,⁶⁵ and police later formally charged McNeil with these crimes.⁶⁶ The trial court denied McNeil's motion to suppress his incriminating statements.⁶⁷

On appeal, the United States Supreme Court acknowledged that McNeil's Sixth Amendment right to counsel had attached for the initial armed robbery charge, but stated that the right is "offense specific."⁶⁸ Because McNeil made his statements before he had been formally charged, arraigned, or indicted for the Caledonia crimes, the Court concluded that his right to counsel relating to those offenses had not yet attached.⁶⁹ The Court explained that "[the Sixth Amendment right to counsel] cannot be invoked once for all future prosecutions, for it does not attach until a prosecu-

59. *Id.* at 170 (quoting *United States v. Wade*, 388 U.S. 218, 224 (1967)).

60. 501 U.S. 171 (1991).

61. *Id.* at 175.

62. *Id.* at 173.

63. *Id.* A public defender represented McNeil at a bail hearing for an armed robbery charge in West Allis, Wisconsin. *Id.* at 173-74.

64. *Id.* at 173-74. The detectives questioned McNeil three times. *Id.* Each time, the police advised him of his *Miranda* rights, and he signed waiver forms and typed copies of his statements. *Id.*

65. *Id.*

66. *Id.* at 174.

67. *Id.*

68. *Id.* at 175. Justice Stevens viewed the offense-specific description of the Sixth Amendment right to counsel as inconsistent with legal precedent and "the ordinary understanding of the scope of the right and accepted practice." *Id.* at 184 (Stevens, J., dissenting).

69. *See id.* at 175-76.

tion is commenced."⁷⁰ Hence, a person questioned by government officials does not have a Sixth Amendment right to counsel with respect to unrelated offenses if prosecution has not commenced on those charges, nor does an earlier invocation of the Sixth Amendment activate the *Miranda*-Fifth Amendment right regarding unrelated offenses.⁷¹

B. *The "Closely Related" Exception to the Offense-Specific Sixth Amendment Right to Counsel*

Prior to *McNeil*, lower courts reasoned that the Sixth Amendment right to counsel may attach to "closely related" but uncharged offenses.⁷² In one of the first decisions implementing this exception, *People v. Clankie*,⁷³ the Supreme Court of Illinois declared that the *Moulton* Court⁷⁴ had recognized that charged offenses can be "so closely related to certain offenses for which formal charges have not been made that the right to counsel for the charged offenses cannot constitutionally be isolated from the right to counsel for the uncharged offense."⁷⁵ The *Clankie* court explained that the United States Supreme Court recognized this principle by affirming the state appellate court's decision to vacate both *Moulton*'s theft and burglary convictions even though the defendant had not been charged with burglary at the time of the incriminating statements.⁷⁶ Furthermore, the court observed that the United States Supreme Court applied the same principle

70. *Id.* at 175.

71. *See id.* at 177. *See generally* Note, *Supreme Court Review: Fifth and Sixth Amendments—The Right to Counsel in Multiple Charge Arraignments*, 82 J. CRIM. L. & CRIMINOLOGY 904, 915 (1992) (arguing that the *McNeil* Court correctly refused to allow invocation of the Sixth Amendment right to counsel to imply invocation of the Fifth Amendment). *But see* Craig R. Johnson, Note, *McNeil v. Wisconsin: Blurring a Bright Line on Custodial Interrogation*, 1992 WIS. L. REV. 1643, 1660–63 (1992) (predicting that *McNeil* will undermine earlier decisions that strongly protected the Sixth Amendment right to counsel).

72. *See, e.g.*, *United States v. Mitcheltree*, 940 F.2d 1329, 1342–43 (10th Cir. 1991); *United States v. Nocella*, 849 F.2d 33, 37–38 (1st Cir. 1988); *United States v. Louis*, 679 F. Supp. 705, 709 (W.D. Mich. 1988); *People v. Clankie*, 530 N.E.2d 448, 451–53 (Ill. 1988); *People v. Hoskins*, 523 N.E.2d 80, 83–84 (Ill. App. Ct. 1988).

73. 530 N.E.2d 448 (Ill. 1988).

74. 474 U.S. 159 (1985). *See supra* notes 46–59 and accompanying text.

75. *Clankie*, 530 N.E.2d at 451.

76. *Id.*

in *Brewer v. Williams*⁷⁷ by barring the use of Williams's admission in his murder trial despite the fact that, at the time of the admission, he had been indicted only for abduction.⁷⁸ The Illinois court stated that "[t]he United States Supreme Court has thus apparently assumed that sixth amendment [sic] rights of one formally charged with an offense extend to offenses closely related to that offense and for which a defendant is subsequently formally accused."⁷⁹

The United States Supreme Court's opinion in *McNeil* appeared to put an end to the "closely related" exception.⁸⁰ However, only six months after the *McNeil* decision, the Fifth Circuit, in *United States v. Cooper*,⁸¹ acknowledged that some courts still believed *Moulton* provided for a "closely related" exception, although the facts in the case at bar did not support a reversal of the defendant's conviction.⁸² Moreover, other federal courts continued to recognize the "closely related" exception.⁸³ For example,

77. 430 U.S. 387 (1977). See *supra* notes 33–45 and accompanying text.

78. *Clankie*, 530 N.E.2d at 451.

79. *Id.* at 452.

80. See *supra* notes 60–71 and accompanying text for a discussion of *McNeil v. Wisconsin* and the Sixth Amendment as "offense-specific."

81. 949 F.2d 737 (5th Cir. 1991), *cert. denied*, 504 U.S. 975 (1992).

82. *Id.* at 743–44. The state charged Cooper with aggravated robbery. *Id.* at 740. Six days later, a federal agent interrogated Cooper about his possession of a firearm during the robbery. *Id.* Cooper confessed to possession of an unlicensed firearm and was indicted on federal charges. *Id.* at 740–41. Cooper argued that the federal agent's questioning violated his Sixth Amendment right to counsel. *Id.* at 743. The Fifth Circuit held that although the federal and state prosecutions would use the same evidence, they involved different conduct and were not "extremely closely related." *Id.* at 744.

83. See, e.g., *United States v. Covarrubias*, 179 F.3d 1219, 1223–26 (9th Cir. 1999) (noting that a state kidnapping charge was closely related to federal charges of transporting and moving illegal alien); *United States v. Doherty*, 126 F.3d 769, 776 (6th Cir. 1997) (indicating that a tribal statutory rape charge was based on same underlying conduct as federal charges of engaging in sexual act), *cert. denied*, 524 U.S. 917 (1998); *United States v. Arnold*, 106 F.3d 37, 40–42 (3d Cir. 1997) (holding that witness intimidation was closely related to attempted murder of a witness); *United States v. Laury*, 49 F.3d 145, 150 n.11 (5th Cir. 1995) (holding that where the federal and state charges are identical, invocation of Sixth Amendment right on state charges is sufficient to invoke the right on the federal charges); *United States v. Kidd*, 12 F.3d 30, 33 (4th Cir. 1993) (reasoning that a cocaine distribution conspiracy ending in May 1992 was not inextricably intertwined with a subsequent cocaine sale in August 1992), *cert. denied*, 511 U.S. 1059 (1994); *United States v. Williams*, 993 F.2d 451, 456–57 (5th Cir. 1993) (holding that perjury is "not extremely closely related" to drug conspiracy); *Hendricks v. Vasquez*, 974 F.2d 1099, 1104 (9th Cir. 1992) (indicating that a charge of flight to avoid prosecution on a Los Angeles murder charge was not inextricably intertwined with a San Francisco murder charges); *United States v. Carpenter*, 963 F.2d 736, 740–41 (5th Cir. 1992) (concluding that a burglary charge was not closely related to possession of firearm by a felon since the crimes took

the Ninth Circuit in *United States v. Hines*⁸⁴ stated that “[a]n exception to the offense-specific requirement of the Sixth Amendment occurs when the pending charge is so inextricably intertwined with the charge under investigation that the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense.”⁸⁵ In *United States v. Kidd*,⁸⁶ the Fourth Circuit also recognized the exception by stating that “in order to fall within [this exception], the offense being investigated must derive from the same factual predicate as the charged offense.”⁸⁷ As recently as 1997, the Third Circuit found the exception applicable to the facts in *United States v. Arnold*,⁸⁸ which involved separate charges of witness intimidation and attempted murder.⁸⁹ The court stated that “[g]iven that [the defendant’s] central purpose and the intended results of both offenses were the same, we cannot but conclude that the two offenses were sufficiently related for purposes of the Sixth Amendment exception.”⁹⁰

Despite the ruling in *McNeil*, state courts also continued to implement the offense-specific exception.⁹¹ In *In re Pack*,⁹² one of the

place at different times and the firearm was not linked to the burglary); *United States v. Hines*, 963 F.2d 255, 257–58 (9th Cir. 1992) (per curiam) (holding that a pending December offense was not logically distinct from an uncharged January offense because the offenses involved different people, places and times).

84. 963 F.2d 255 (9th Cir. 1992) (per curiam).

85. *Id.* at 257 (citing *Cooper*, 949 F.2d at 737). The court distinguished the defendant’s activities in two separate months. Even though the same offense was charged in both instances, the time, place, and persons involved were all different. *Id.* Therefore, the court held, for Sixth Amendment purposes, that the offenses were “separate and distinct.” *Id.* at 257–58.

86. 12 F.3d 30 (4th Cir. 1993), *cert. denied*, 511 U.S. 1059 (1994).

87. *Id.* at 33. The court intimated that a Sixth Amendment violation could have resulted if the drug exchange had not “involved a different purchaser-informant, occurred at a different time, and took place in a different location.” *See id.*

88. 106 F.3d 37 (3d Cir. 1997).

89. *Id.* at 42.

90. *Id.*

91. *See, e.g.*, *People v. Spivey*, 615 N.E.2d 852, 854–55 (Ill. 1993) (concluding that crimes occurring a year apart were not closely related); *Whittlesey v. State*, 665 A.2d 223, 232–36 (Md. 1995) (holding that a false statement charge was not closely related to a murder charge), *cert. denied*, 516 U.S. 1148 (1996); *Commonwealth v. Rainwater*, 681 N.E.2d 1218, 1223–24 (Mass. 1997) (holding that auto thefts were not inextricably intertwined), *cert. denied*, 522 U.S. 1095 (1998); *In re Pack*, 616 A.2d 1006, 1010 (Pa. Super. Ct. 1992) (holding that a burglary charge was closely related to charges of receiving stolen property and theft). *But see* *People v. Clair*, 828 P.2d 705, 722 (Cal. 1992) (concluding that, under *McNeil*, cases which implemented early versions of the closely related exception “are no longer vital”).

first cases to apply the exception after *McNeil*, the Superior Court of Pennsylvania concluded that “the Pennsylvania Supreme Court has interpreted the Sixth Amendment right to counsel, which is offense-specific, to apply to all the offenses arising from the same incident for which a defendant is charged.”⁹³ The court concluded that the prosecution should not be able “to circumvent the Sixth Amendment right to counsel merely by charging a defendant with additional related crimes.”⁹⁴ Similarly, in *Whittlesey v. State*,⁹⁵ the Court of Appeals of Maryland recognized that the application of the exception depended exclusively on whether the two offenses stemmed from the same set of facts.⁹⁶ The court noted that while all the courts require identity of “time, place, and conduct,”⁹⁷ some also require the same prosecuting sovereign

92. 616 A.2d 1006 (Pa. Super. Ct. 1992).

93. *Id.* at 1010–11 (citing *Commonwealth v. Santiago*, 599 A.2d 200, 202 (Pa. 1991)). In *Pack*, a youth was formally charged with theft and appointed an attorney. An officer questioned him afterward concerning a burglary charge and obtained incriminating statements. *Id.* at 1007–08. The court held that these charges “arose from the same incident” and that the statements should have been suppressed at trial. *Id.* at 1011.

94. *Id.* at 1011.

95. 665 A.2d 223 (Md. 1995), *cert. denied*, 516 U.S. 1148 (1996).

96. *Id.* at 235 (citing *United States v. Cooper*, 949 F.2d 737, 743–44, (5th Cir. 1991); *In re Michael B.*, 178 Cal. Rptr. 291, 295–96 (Ct. App. 1981); *People v. Clankie*, 530 N.E.2d 448, 451–52 (Ill. 1988)). The court identified another instance in which the exception would apply: cases of police misconduct. *Id.* This subject is beyond the scope of this Note. For more information, see the following cases mentioned by the Court of Appeals of Maryland: *United States v. Martinez*, 972 F.2d 1100 (9th Cir. 1992) (remanding for a determination of whether state prosecutors deliberately dropped charges against the defendant to facilitate a federal investigation of the same conduct); *United States v. Mitcheltree*, 940 F.2d 1329 (10th Cir. 1991) (reversing a witness tampering conviction where the government exploited contact between the defendant, who was indicted for a drug offense, and a government witness, to acquire evidence for both the drug prosecution and a tampering charge related to contact with witness); *United States v. Olsen*, 840 F. Supp. 842 (D. Utah 1993) (concluding that there was no misconduct, and that the disputed statements were admissible in a federal prosecution, where federal agents had elicited statements from the defendant after the right to counsel had attached with respect to state charge arising from the same incident).

97. *Whittlesey*, 665 A.2d at 235 (citing *United States v. Kidd*, 12 F.3d 30, 33 (4th Cir. 1993); *Hendricks v. Vasquez*, 974 F.2d 1099, 1104–05 (9th Cir. 1992); *United States v. Carpenter*, 963 F.2d 736, 741 (5th Cir. 1992); *United States v. Hines*, 963 F.2d 255, 257 (9th Cir. 1992); *Bruno v. State*, 613 A.2d 440, 447 (Md. Ct. Spec. App. 1992), *aff'd*, 632 A.2d 1192 (Md. 1993); *Upton v. State*, 853 S.W.2d 548, 555–56 (Tex. Crim. App. 1993) (en banc).

for both charges,⁹⁸ and others look to see if the incriminating statements served as evidence for both charges.⁹⁹

C. *The Miranda Fifth Amendment Right to Counsel*

The Sixth Amendment is not the only constitutional source of a right to counsel. The Fifth Amendment states that a person shall not be "compelled in any criminal case to be a witness against himself."¹⁰⁰ In *Miranda v. Arizona*¹⁰¹ the Court held that the prosecution may not use statements derived from custodial interrogation of a suspect, unless it can demonstrate the use of procedural safeguards effective in securing the privilege against self-incrimination.¹⁰² As for the nature of the procedural safeguards to be used, the Court held that "unless other fully effective means are devised to inform accused persons of their right to silence and to assure a continuous opportunity to exercise it," the familiar warnings must be given to the accused.¹⁰³ The suspect must be informed that he has the right to remain silent; that if he gives up that right, anything he says can and will be used against him in court; that he has the right to an attorney; and that if he cannot afford an attorney, one will be appointed to represent him.¹⁰⁴

While the Fifth Amendment addresses the right against self-incrimination and does not specifically discuss the right to coun-

98. *Id.* (citing *United States v. Williams*, 993 F.2d 451, 457 (5th Cir. 1993)); *United States v. Nocella*, 849 F.2d 33, 37-38 (1st Cir. 1988); *Olsen*, 840 F. Supp. at 849.

99. *Id.* (citing *Pack*, 616 A.2d at 1010-11).

100. U.S. CONST. amend. V. Unlike the Sixth Amendment right to counsel, the Fifth Amendment is not offense-specific. Thus, once the accused has asserted his right to counsel, the police cannot interrogate him about any crime without counsel present as long as he remains in custody. *Arizona v. Roberson*, 486 U.S. 675, 684 (1988).

101. 384 U.S. 436 (1966).

102. *See id.* at 467. Justice Warren, writing for the majority, stated:

We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of a crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights, and the exercise of those rights must be fully honored.

Id.

103. *Id.* at 444.

104. *Id.* at 479.

sel,¹⁰⁵ the *Miranda* court concluded that the right to have an attorney present during interrogation is indispensable to the protection of the Fifth Amendment privilege.¹⁰⁶ The *Miranda* opinion basically superimposed the right to counsel on the prohibition against compulsory self-incrimination.¹⁰⁷ Thus, the Fifth Amendment right to counsel, which the Court would later refer to as a “prophylactic rule” rather than a constitutional right,¹⁰⁸ was created.¹⁰⁹ The Court only recently determined that *Miranda* is a constitutional decision which cannot be overturned by Congress.¹¹⁰

The Fifth and Sixth Amendment counsel protections are not mutually exclusive. At times, suspects are simultaneously pro-

105. U.S. CONST. amend. V. The Sixth Amendment specifically addresses the right to counsel. U.S. CONST. amend. VI.

106. *Miranda*, 384 U.S. at 469. The Court noted that:

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process.

Id.

107. *Id.* at 461–62.

108. See, e.g., *Withrow v. Williams*, 507 U.S. 680, 690 (1993) (stating “we have sometimes called the *Miranda* safeguards ‘prophylactic’ in nature”); *Michigan v. Harvey*, 494 U.S. 344, 350 (1990) (referring to the “prophylactic *Miranda* rules”); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (stating that “the *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights”); *Oregon v. Elstad*, 470 U.S. 298, 309 (1985) (referring to “prophylactic *Miranda* procedures”); *New York v. Quarles*, 467 U.S. 649, 653 (1984) (referencing the “prophylactic rules enunciated in *Miranda*”); *United States v. Henry*, 447 U.S. 264, 274 (1980) (referring to the “prophylactic requirements in *Miranda*”); see also Meredith B. Halama, Note, *Loss of a Fundamental Right: The Sixth Amendment as a Mere “Prophylactic Rule,”* 1998 U. ILL. L. REV. 1207, 1214 (1998) (discussing the Court's misinterpretation of the Sixth Amendment right to counsel by equating it with the Fifth Amendment *Miranda* right to counsel). See generally Ogletree, *supra* note 5 (discussing the Fifth Amendment and *Miranda*).

109. *Miranda*, 384 U.S. at 536–37 (White, J., dissenting) (“[I]nstead of confining itself to protection of the right against compelled self-incrimination the Court has created a limited Fifth Amendment right to counsel.”)

110. *Dickerson v. United States*, 530 U.S. 428, 438 (2000). Although the Court conceded that their opinions have shown support for the view that *Miranda* is a prophylactic rule, Justice Rehnquist, writing for the majority, stated that “*Miranda* is a constitutional decision.” *Id.* Ironically, in the majority opinion of *Michigan v. Tucker*, 417 U.S. 433 (1974), then-Justice Rehnquist stated that the “procedural safeguards” adopted in *Miranda* “were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected” and to “provide practical reinforcement for the [Fifth Amendment] right.” *Id.* at 444.

tected by both.¹¹¹ However, even when they overlap, each provides a distinct protection with a different purpose.¹¹² The Sixth Amendment right can be characterized as necessary to the maintenance of the adversarial nature of our criminal justice system.¹¹³ The purpose of this right is to protect the suspect “after ‘the adverse positions of government and defendant have solidified’ with respect to a particular alleged crime.”¹¹⁴ The Fifth Amendment entitlement, on the other hand, is considered vital to preserving the accusatorial nature of our system.¹¹⁵ The *Miranda* rule is designed to protect a “suspect’s ‘desire to deal with the police only through counsel’”¹¹⁶ during “custodial interrogation”¹¹⁷ “regarding *any* suspected crime.”¹¹⁸

III. FACTS, LOWER COURT DISPOSITION, AND THE HOLDING OF *TEXAS V. COBB*

On December 27, 1993, Lindsey Owings notified the Walker County, Texas Sheriff’s Office that his home had been burglarized, and his wife Margaret and sixteen-month-old daughter Kori Rae were missing.¹¹⁹ After receiving an anonymous tip, Walker County police investigators questioned Raymond Cobb, a neighbor, about the burglary and disappearances.¹²⁰ Cobb denied any involvement in these events.¹²¹

In July of 1994, the police again questioned Cobb, who was under arrest for an unrelated crime.¹²² Cobb confessed to the bur-

111. See, e.g., *Brewer v. Williams*, 430 U.S. 387, 395 (1977).

112. See James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 993 (1986) (discussing the origins and purposes of *Massiah* versus *Miranda*).

113. *Id.*

114. *McNeil v. Wisconsin*, 501 U.S. 171, 177–78 (1991) (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)).

115. Tomkovicz, *supra* note 112, at 993.

116. *McNeil*, 501 U.S. at 178 (quoting *Edwards v. Arizona*, 451 U.S. 477, 484 (1981)).

117. The Court defined “custodial interrogation” as questioning initiated by the police in any setting which the suspect was “deprived of his freedom of action in any significant way.” *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

118. *McNeil*, 501 U.S. at 178 (quoting *Edwards v. Arizona*, 451 U.S. 477, 484 (1981)).

119. *Cobb v. State*, No. 72,807, 2000 Tex. Crim. App. LEXIS 32, at *6 (Tex. Crim. App. Mar. 15, 2000).

120. *Id.*

121. *Id.*

122. *Id.*

glary of the Owings home, and a grand jury subsequently indicted Cobb for that crime.¹²³ On August 15, 1994, the court appointed Hal Ridley to represent Cobb on the burglary charge.¹²⁴

Walker County police investigators thereafter sought Ridley's permission to question Cobb about the disappearance of Margaret and Kori Rae.¹²⁵ After being assured that Cobb was not considered a suspect in the disappearances, Ridley granted permission.¹²⁶ During the investigators' questioning, Cobb again denied any involvement.¹²⁷ On September 13, 1995, investigators again requested Ridley's permission to question Cobb.¹²⁸ Still believing Cobb was not a suspect, Ridley gave his permission.¹²⁹ Cobb continued to deny involvement in the disappearances.¹³⁰

On November 11, 1995, the Walker County Sheriff's Office received a telephone call from Cobb's father, who resided in Odessa, Texas.¹³¹ Charles Cobb reported that his son, who was free on bond in the pending burglary case and residing in Odessa, confessed to killing Margaret Owings while burglarizing her home.¹³² Charles Cobb gave his statement to the Odessa police, who then faxed the statement to Walker County.¹³³ Soon after, Walker County faxed an arrest warrant to Odessa.¹³⁴ At such time, they neglected to inform the Odessa police that Cobb had counsel in the related burglary case.¹³⁵

The Odessa police arrested Cobb, read him his *Miranda* warnings, and proceeded to interrogate him.¹³⁶ Cobb waived his *Miranda* right to have an attorney present during the interrogation.¹³⁷ After ninety minutes of questioning, Cobb gave a written

123. *Id.*

124. *Id.*

125. *Id.* at *7.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at *8.

135. *Id.*

136. *Id.*

137. *Id.* at *16 (McCormick, J., dissenting).

statement admitting to the murders of Margaret and Kori Rae Owings.¹³⁸ Cobb was found guilty of killing two people in a single criminal transaction¹³⁹ and sentenced to death.¹⁴⁰

On appeal, the Texas Court of Criminal Appeals was asked to determine whether the Sixth Amendment right to counsel had attached to the murder charge.¹⁴¹ Cobb asserted that his confession was obtained by police in violation of his Sixth Amendment right to counsel because the police initiated interrogation without first notifying his counsel.¹⁴² The State argued that, at the time of the police interrogation, the Sixth Amendment right had not attached.¹⁴³

The Court of Criminal Appeals reversed the trial court.¹⁴⁴ The court relied upon “the Sixth Amendment rule that once the right to counsel attaches to the offense charged, it also attaches to any other offense that is very closely related factually to the offense charged.”¹⁴⁵ Based on this exception, the Court of Criminal Appeals found that once Cobb was indicted for burglary, his Sixth Amendment right to counsel attached to that offense as well as the murders because the murders were factually interwoven with the burglary.¹⁴⁶

The United States Supreme Court granted certiorari and reversed the Texas Court of Criminal Appeals.¹⁴⁷ Chief Justice Rehnquist, writing for the majority, held that a criminal suspect’s constitutional right to have an attorney present during a custodial interrogation is “offense specific” and does not extend to a police interrogation into a “factually related” offense.¹⁴⁸

138. *Id.*; see *supra* notes 1–3 and accompanying text.

139. TEX. PENAL CODE ANN. § 19.03(a)(7)(A) (Vernon 1994).

140. *Cobb*, 2000 Tex. Crim. App. LEXIS 32, at *1.

141. *Id.* at *11.

142. *Id.* at *5.

143. *Id.*

144. *Id.* at *13.

145. *Id.* at *10 (citing *United States v. Arnold*, 106 F.3d 37, 41 (3d Cir. 1997); *State v. Frye*, 897 S.W.2d 324, 328–39 (Tex. Crim. App. 1995); *Upton v. State*, 853 S.W.2d 548, 555–56 (Tex. Crim. App. 1993) (en banc)). See *supra* notes 72–99 and accompanying text for a discussion of “closely related” exception.

146. *Cobb*, 2000 Tex. Crim. App. LEXIS 32, at *11.

147. *Texas v. Cobb*, 121 S. Ct. 1335, 1344 (2001).

148. *Id.* at 1340 (citing *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991)).

IV. ANALYSIS

A. *Majority Opinion*

The Supreme Court majority, in a 5–4 decision, affirmed its holding in *McNeil* that the Sixth Amendment right to counsel is “offense specific.”¹⁴⁹ The *Cobb* Court resolved the issue raised by the *McNeil* dissent, which questioned the circumstances under which an offense would be considered related to the initial charge, thus precluding any police-initiated questioning, and when it would be considered unrelated, allowing police to initiate questioning after obtaining a *Miranda* waiver.¹⁵⁰ The Court answered by declining to recognize that *Brewer* and *Moulton* supported an exception to the offense-specific rule for crimes that are “factually related” to a charged offense.¹⁵¹ The Court applied the Fifth Amendment *Blockburger* test¹⁵² to Sixth Amendment offenses,¹⁵³ despite the *McNeil* dissent’s hopes that the offense-specific “boundaries will not be patterned after the Court’s double jeopardy jurisprudence.”¹⁵⁴

1. The Fifth Amendment is a Protector of the Sixth Amendment Right to Counsel

The Court emphasized the importance of a suspect’s right against self-incrimination.¹⁵⁵ Because of this right, law enforcement officers would not be permitted to initiate “unwanted and uncounseled interrogations.”¹⁵⁶ In cases where the Sixth Amendment right has not attached to uncharged offenses, the Court reminded the dissent that a suspect must still be advised of his *Miranda* rights.¹⁵⁷ The majority stated that “[c]uriously, while predicting disastrous consequences for the core values underlying

149. *Id.* at 1339; *see supra* notes 60–71 and accompanying text.

150. *See McNeil*, 501 U.S. at 187 (Stevens, J., dissenting).

151. *See Cobb*, 121 S. Ct. at 1340–42.

152. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932); *infra* notes 163–69 and accompanying text.

153. *See Cobb*, 121 S. Ct. at 1343.

154. *McNeil*, 501 U.S. at 187 (Stevens, J., dissenting).

155. *Cobb*, 121 S. Ct. at 1342.

156. *Id.*

157. *Id.* at 1343 n.2.

the Sixth Amendment, . . . the dissenters give short shrift to the Fifth Amendment's role . . . in protecting a defendant's right to consult with counsel before talking to police."¹⁵⁸ The accused reserves the right under *Miranda* to decline answering police questions regarding any uncharged offenses.¹⁵⁹ Therefore, the *Cobb* decision, according to the majority's reasoning, would have little impact on a suspect's ability to assert his Sixth Amendment right to counsel.¹⁶⁰ Furthermore, the Court felt it crucial to point out that "the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses."¹⁶¹ The Court stressed a "law and order" philosophy by reiterating its reasoning in *McNeil* that confessions resulting from *Miranda* waivers are "essential to society's compelling interest in finding, convicting, and punishing those who violate the law."¹⁶²

2. The *Blockburger* Test is Applicable to the Sixth Amendment Right to Counsel

The Court reemphasized its endorsement of Fifth Amendment case law by incorporating an established test into Sixth Amendment cases. The Court has traditionally defined "same offense" in the double jeopardy arena by applying the *Blockburger* test:¹⁶³ "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."¹⁶⁴ Courts,

158. *Id.*

159. *Id.*

160. *Id.* Because the suspect is being questioned on a charge other than the one for which he had requested counsel, "there is not the remotest chance that [the accused] will feel 'badgered' by [the police] asking to talk to him without counsel present." *McNeil v. Wisconsin*, 501 U.S. 171, 180 (1991).

161. *Cobb*, 121 S. Ct. at 1343.

162. *Id.* (quoting *McNeil*, 501 U.S. at 181).

163. *Grady v. Corbin*, 495 U.S. 508, 527 (1990) (Scalia, J., dissenting) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

164. *Blockburger*, 284 U.S. at 304. The defendant in *Blockburger* claimed that his conviction on two separate drug-selling charges was improper because both charges involved the same sale and, thus, the same offense. *Id.* at 301-02. He argued that he had committed only one offense; therefore, only one penalty could be imposed. *Id.* at 301. The Court rejected this argument, finding that, although the defendant had made only one sale, the applicable test revealed that the two offenses were not the same since each of these of-

accordingly, must focus on the statutory elements of the offenses charged and determine whether they constitute the “same offense.”¹⁶⁵

In *Cobb*, the Court acknowledged that the Sixth Amendment right to counsel is linked to charged offenses only; nevertheless, “the definition of an ‘offense’ is not necessarily limited to the four corners of a charging instrument.”¹⁶⁶ The Court then extended the *Blockburger* test to the Sixth Amendment right to counsel by professing that “[w]e see no constitutional difference between the meaning of the term ‘offense’ in the contexts of double jeopardy and of the right to counsel.”¹⁶⁷ Regardless of whether the offenses are formally charged, the Sixth Amendment comprehensively includes those deemed the same offense under the *Blockburger* test.¹⁶⁸ The Court, after applying the *Blockburger* test, determined that the burglary and the murders were not the same offenses; therefore, Cobb’s confession was admissible.¹⁶⁹

The majority criticized the dissent’s “closely related” test as being blind to reality.¹⁷⁰ Such a test fails to recognize that law enforcement officials often lack a full awareness of the scope and sequence of the events under investigation.¹⁷¹ As a result of this test, the police would be deterred from interrogating suspects for fear of violating their Sixth Amendment rights.¹⁷² Therefore, the *Blockburger* test would be the optimal test to determine whether the Sixth Amendment right to counsel attaches because “the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good.”¹⁷³

fenses required “proof of a fact which the other did not.” *Id.* at 304. Justice Scalia, providing insight into the application of this test, stated: “If it is possible to violate each one without violating the other, then they cannot constitute the ‘same offense.’” *Grady*, 495 U.S. at 529 (Scalia, J., dissenting) (emphasis added).

165. The Supreme Court in each of its major Double Jeopardy Clause decisions has recognized *Blockburger* as the established standard. See *Illinois v. Vitale*, 447 U.S. 410, 416 (1980); *Brown v. Ohio*, 432 U.S. 161, 166 (1977).

166. *Cobb*, 121 S. Ct. at 1343.

167. *Id.*

168. *Id.*

169. *Id.* at 1344.

170. *Id.* at 1343.

171. *Id.*

172. *Id.* at 1344.

173. *Id.* at 1343 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991)). *But see* Anne Bowen Poulin, *Double Jeopardy Protection Against Successive Prosecutions in Complex*

B. *Concurring Opinion*

Justice Kennedy, in his concurring opinion, addressed *Michigan v. Jackson*¹⁷⁴ and applauded the majority for not relying on the “questionable” theory in that case.¹⁷⁵ In *Jackson*, the Court examined the waiver of the Sixth Amendment right to counsel in the context of a Fifth Amendment waiver of right to counsel, using *Edwards v. Arizona*¹⁷⁶ as its guide.¹⁷⁷ The *Jackson* Court held that “if police initiate interrogation after a defendant’s assertion, at an arraignment or similar proceeding, of his right to counsel [after the Sixth Amendment right to counsel has attached], any waiver of the defendant’s right to counsel for that police-initiated interrogation is invalid.”¹⁷⁸

The *Cobb* concurrence reasoned that the *Jackson* holding should be doubted because it supersedes a suspect’s right to voluntarily speak with police.¹⁷⁹ After applying the Fifth Amendment rulings in *Miranda* and *Edwards*, Justice Kennedy determined that the *Jackson* rule should be applied only in the event that “a suspect has made a clear and unambiguous assertion of the right not to speak outside the presence of counsel.”¹⁸⁰ *Cobb* failed to make such an assertion.¹⁸¹

After praising the majority, the concurrence criticized the dissent for defending *Jackson*.¹⁸² Justice Kennedy rejected the dis-

Criminal Cases: A Model, 25 CONN. L. REV. 95, 101 (1992) (noting how the *Blockburger* test is not a satisfactory guide in all situations).

174. 475 U.S. 625 (1986).

175. *Cobb*, 121 S. Ct. at 1344 (Kennedy, J., concurring).

176. 451 U.S. 477 (1981). The *Edwards* Court held that an accused person in custody who has “expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.” *Id.* at 484–85.

177. See *Jackson*, 475 U.S. at 636. The Court’s Sixth Amendment waiver analysis was first developed in *Johnson v. Zerbst*, 304 U.S. 458 (1938). Considering an alleged waiver of a federal felony defendant’s Sixth Amendment right to counsel, the Court attested that it would “indulge every reasonable presumption against waiver’ of fundamental constitutional rights.” *Id.* at 464 (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)).

178. *Jackson*, 475 U.S. at 636. The Court’s decisions in *Massiah* and *Moulton* likewise suggest that law enforcement officials may not bypass counsel by communicating directly with the accused.

179. *Cobb*, 121 S. Ct. at 1344 (Kennedy, J., concurring).

180. *Id.* at 1345 (Kennedy, J., concurring).

181. *Id.* (Kennedy, J., concurring).

182. *Id.* (Kennedy, J., concurring).

sent's position that the rule should exclude Cobb's confession.¹⁸³ In the concurrence's view, acceptance of counsel at an arraignment or at other proceedings should not equate acceptance of counsel for every event.¹⁸⁴ The majority sought to prevent such an all-encompassing result because it would eliminate the possibility of voluntary confessions.¹⁸⁵

C. *Dissenting Opinion*

Justice Breyer, writing for the dissent, concluded that the importance of *Cobb* revolved around the meaning of "offense" as it is related to the Sixth Amendment and incorporated into "offense specific."¹⁸⁶ The dissent noted that these words do not appear in the text of the Constitution itself, but instead surfaced in the Court's case law.¹⁸⁷ In light of this fact, the dissent would have held that "offense" should be defined "in terms of the conduct that constitutes the crime that the offender committed on a particular occasion, including criminal acts that are 'closely related to' or 'inextricably intertwined with' the particular crime set forth in the charging instrument."¹⁸⁸

1. The Sixth Amendment Right to Counsel is Independent of the Fifth Amendment

In the dissent's view, a suspect's additional protections under the Sixth Amendment have been undermined by the majority's and the concurrence's belief that the Fifth Amendment provides a suspect "adequate constitutional protection."¹⁸⁹ *Jackson* illustrated how the *Miranda* warnings may not be adequate for suspects who are frightened or uneducated.¹⁹⁰ The dissent reminded the concurrence that the *Jackson* holding relied upon "the fact that the accused 'had asked for the help of a lawyer' in dealing

183. *Id.* (Kennedy, J., concurring).

184. *Id.* (Kennedy, J., concurring).

185. *Id.* (Kennedy, J., concurring).

186. *Id.* at 1346 (Breyer, J., dissenting).

187. *Id.* (Breyer, J., dissenting).

188. *Id.* at 1350 (Breyer, J., dissenting).

189. *Id.* at 1346 (Breyer, J., dissenting).

190. *Id.* at 1347 (Breyer, J., dissenting).

with the police.¹⁹¹ It is critical, Justice Breyer explained, that police not force a suspect who has requested legal counsel to make a critical decision without the professional advice of that counsel.¹⁹² But that should not mean, as the concurrence believes, that the suspect may not himself initiate communications with law enforcement officials.¹⁹³

Unlike the concurrence, the majority did not question the holding in *Jackson*.¹⁹⁴ Nevertheless, the dissent felt the majority's reasoning was flawed because its reasoning would allow police to interrogate those charged with an offense—without first consulting counsel—by simply asking about other related crimes not yet charged in the indictment.¹⁹⁵ As a result, Sixth Amendment protections could be greatly diminished.¹⁹⁶ Emphasizing that “[t]he Constitution does not take away with one hand what it gives with another,”¹⁹⁷ the dissent asserted that the majority ignored precedent by not recognizing the importance of the Sixth Amendment right to counsel as independent of that provided by the Fifth Amendment.¹⁹⁸

2. The *Blockburger* Test Undermines the Sixth Amendment Right to Counsel

Unfortunately, the dissent's worries in *McNeil*¹⁹⁹ came true in *Cobb* when the majority chose to apply an irrelevant test from Fifth Amendment double jeopardy jurisprudence to the Sixth Amendment right to counsel.²⁰⁰ Justice Breyer characterized the

191. *Id.* at 1348 (Breyer, J., dissenting).

192. *Id.* at 1347 (Breyer, J., dissenting). The dissent in *McNeil* noted that the average person does not understand the “subtle distinctions” between the Fifth and Sixth Amendment rights to counsel. *McNeil v. Wisconsin*, 501 U.S. 171, 185 (1991) (Stevens, J., dissenting) (quoting *Michigan v. Jackson*, 475 U.S. 625, 633–34 n.7 (1981)).

193. *Cobb*, 121 S. Ct. at 1348 (Breyer, J., dissenting).

194. *Id.* (Breyer, J., dissenting).

195. *Id.* (Breyer, J., dissenting).

196. *Id.* at 1349 (Breyer, J., dissenting).

197. *Id.* at 1347 (Breyer, J., dissenting).

198. *Id.* (Breyer, J., dissenting).

199. Justice Stevens, writing for the dissent, stated: “The Court therefore does not flesh out the precise boundaries of its newly created offense-specific limitation on a venerable constitutional right. I trust its boundaries will not be patterned after the Court’s double jeopardy jurisprudence.” *McNeil v. Wisconsin*, 501 U.S. 171, 187 (1991) (Stevens, J., dissenting) (referring to *Blockburger*).

200. *Cobb*, 121 S. Ct. at 1349 (Breyer, J., dissenting).

Blockburger test as a failure because it would be unable to resolve the significant issues concerning the Sixth Amendment.²⁰¹ Echoing the *McNeil* dissent's concern that a narrow definition of "offense," like the one relied upon in *Blockburger*, would give too much latitude to the police in "[filing] charges selectively in order to preserve opportunities for custodial interrogation,"²⁰² the *Cobb* dissent enumerated the multiple offenses with which a suspect could be charged arising out of a single incident of conduct.²⁰³ For example, a person using and selling drugs on a single occasion might be charged with possession of drugs, conspiracy to sell drugs, possession of drug paraphernalia, and being under the influence of drugs.²⁰⁴ The disastrous effects of such an example, the dissent advocated, would be eviscerated if courts employed the "closely related" test.²⁰⁵

Furthermore, the *Blockburger* test has proven difficult to apply, and courts have often disagreed about its proper application.²⁰⁶ The dissent opined that the majority ignored *Blockburger's* difficulties by asking law enforcement officials to apply the test when questioning suspects.²⁰⁷ Justice Breyer concluded that the use of the technical definition of "offense" as established by *Blockburger* would not only weaken the protections afforded suspects by the Sixth Amendment, but would also fail to improve effective police investigations.²⁰⁸

V. IMPACT OF COBB

A. *The Fifth Amendment's Effect on the Sixth Amendment Right to Counsel*

The Sixth Amendment right to counsel has been part of the United States' adversarial system for over 200 years.²⁰⁹ On the

201. *Id.* (Breyer, J., dissenting).

202. *McNeil*, 501 U.S. at 187 (Stevens, J., dissenting).

203. *Cobb*, 121 S. Ct. at 1348 (Breyer, J., dissenting).

204. *Id.* (Breyer, J., dissenting).

205. *Id.* at 1350 (Breyer, J., dissenting).

206. *Id.* (Breyer, J., dissenting).

207. *Id.* (Breyer, J., dissenting).

208. *Id.* at 1349 (Breyer, J., dissenting).

209. *See* U.S. CONST. amend. VI.

other hand, the United States Supreme Court articulated the Fifth Amendment right to counsel thirty-five years ago in *Miranda*, and that right extends only to protect against self-incrimination.²¹⁰ The *McNeil* Court noted that the rights have differing purposes:

The purpose of the Sixth Amendment counsel guarantee—and hence the purpose of invoking it—is to “protec[t] the unaided layman at critical confrontations” with his “expert adversary,” the government, after “the adverse positions of government and defendant have solidified” with respect to a particular alleged crime. . . . The purpose of the *Miranda-Edwards* guarantee, on the other hand—and hence the purpose of invoking it—is to protect quite a different interest: the suspect’s “desire to deal with the police only through counsel.”²¹¹

Even Rehnquist, the author of *Cobb*’s majority opinion, once believed that at least one Fifth Amendment rule should not be applied outside the context of the Fifth Amendment.²¹² The Court, however, now ignores those differences, thereby belittling the importance of the Sixth Amendment as an essential equalizing force between the accused and the state.

The majority in *McNeil* admitted that “[i]t can be said, perhaps, that it is *likely* that one who has asked for counsel’s assistance in defending against a prosecution would want counsel present for all custodial interrogation, even interrogation unrelated to the charge.”²¹³ In *Jackson*, the Court agreed with the Michigan Supreme Court’s comments regarding an accused’s request for counsel:

Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further in-

210. See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)).

211. *McNeil v. Wisconsin*, 501 U.S. 171, 177–78 (1991) (citations omitted).

212. See *Michigan v. Jackson*, 475 U.S. 625, 637 (1986) (Rehnquist, J., dissenting) (“Does the *Edwards* rule make sense in the context of the Sixth Amendment? I think it does not, and I therefore dissent from the Court’s unjustified extension of the *Edwards* rule to the Sixth Amendment.”).

213. *McNeil*, 501 U.S. at 178.

terrogation to a defendant who asks a police officer for an attorney, but permit further interrogation to a defendant who makes an identical request to a judge. The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly.²¹⁴

The accused should receive the benefit of the doubt. The Court has admitted that the average defendant does not understand the difference between the Fifth and Sixth Amendment rights to counsel sufficiently enough to know which right he is invoking. Nevertheless, the Court in *Cobb* chose to weigh the benefit of the doubt in favor of the police, irrespective of suggestions that *Miranda* warnings are not an effective tool for informing suspects of their privilege against self-incrimination and their right to consult with counsel prior to making any statements.²¹⁵

Under *Miranda*, the police must advise a suspect of his rights.²¹⁶ It is important to recognize, however, that these officials have little interest in protecting the suspect's right to a waiver made "voluntarily, knowingly, and intelligently."²¹⁷ Because their objective is to obtain a confession, it is unlikely that they will fully inform the suspect of his right to counsel or his right to remain silent, or eliminate any misconceptions about those

214. *Jackson*, 475 U.S. at 633-34 n.7 (quoting *People v. Bladel*, 365 N.W.2d 56, 67 (Mich. 1984)). However, in *McNeil*, the majority felt that these comments "are assuredly not true in the quite different context of deciding whether such a request implies a desire never to undergo custodial interrogation, about anything, without counsel present." *McNeil*, 501 U.S. at 180 n.1. The *McNeil* dissent argued that it was still "the commonsense reality that petitioner in this case could not have known that his invocation of his Sixth Amendment right to counsel was restricted to the Milwaukee County offense, given that investigations of the Milwaukee County offense and [the other offense] were concurrent and conducted by overlapping personnel." *Id.* at 186 (Stevens, J., dissenting). For a related discussion, see *Powell v. Alabama*, 287 U.S. 45, 66-71 (1932), in which the Court held:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime [sic], he is incapable, generally, of determining for himself whether the indictment is good or bad. . . . Left without the aid of counsel he may be put on trial without a proper charge. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id. at 68-69.

215. See Ogletree, *supra* note 5, at 1827-28.

216. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

217. *Id.*

rights.²¹⁸ The majority in *Cobb* has hindered the ability of the innocent, as well as the guilty, to participate on an even playing field with their adversaries. Society will be the ultimate loser when courts do not maintain the rights of the accused, and it appears impossible to sustain such rights when the accused are not fully informed.

B. *The Blockburger Test's Effect on the Sixth Amendment Right to Counsel*

It is important to note that the *Blockburger* test is textually oriented and, therefore, requires a rather strict interpretation of "same offense."²¹⁹ As a result, courts have encountered problems in certain situations when trying to implement this narrow test and still protect defendants' rights,²²⁰ prompting Chief Justice Rehnquist to describe the test as a "veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator."²²¹ If courts have difficulty applying the test, so too may police officers struggle due to their responsibility to determine whether counsel may be present at interrogations. Furthermore, the Court has recognized other tests to determine whether successive prosecutions impermissibly involve the same offense.²²² Nevertheless,

218. The *Miranda* Court emphasized the pressures placed on suspects subjected to custodial interrogation:

An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to [police] techniques of [psychological] persuasion. . . cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.

Id. at 461.

219. Justice Scalia advocated a very literal definition for "same offense," referring to various dictionaries to determine the meaning of the term. See *Grady v. Corbin*, 495 U.S. 508, 528 (1990) (Scalia, J., dissenting).

220. Justice Brennan recognized that the Court has "not relied exclusively on the *Blockburger* test." *Id.* at 519; see also Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1814 (1997) ("*Blockburger*, it seems, is a mess, legally and logically.>").

221. *Texas v. Cobb*, 121 S. Ct. 1335, 1350 (2001) (Breyer, J., dissenting) (quoting *Albernaz v. United States*, 450 U.S. 333, 343 (1981)).

222. In *Brown v. Ohio*, 432 U.S. 161 (1977), the Court endorsed the principle that successive prosecutions require a broader double jeopardy clause protection than that offered by the required evidence test:

The *Blockburger* [required evidence] test is not the only standard for deter-

the majority in *Cobb* determined that *Blockburger* is the standard to be implemented in Sixth Amendment cases,²²³ despite its belief that the test is not a satisfactory guide in every situation.

As a result of its focus on the elements of the charged offenses, the test has been found inadequate due to the vast number and overlapping nature of offenses with which a suspect can be charged.²²⁴ The definitional nature of crimes has substantially changed over time. Early American common law severely limited the number of offenses for which a person could be charged.²²⁵ Today, however, there are countless offenses distinguishable only by subtle differences. It is highly possible that a prosecutor would divide a crime in such a manner that a defendant could be subjected to numerous criminal proceedings for essentially the same conduct.²²⁶ Because any type of distinct element makes otherwise identical offenses “different” under *Blockburger*, and modern leg-

mining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first.

Id. at 166–67 n.6.

223. *Cobb*, 121 S. Ct. at 1343. The Court commented that “we could just as easily describe the Sixth Amendment as ‘prosecution specific,’ insofar as it prevents discussion of charged offenses as well as offenses that, under *Blockburger*, could not be the subject of a later prosecution.” *Id.* at 1343 n.3.

224. *Ashe v. Swenson*, 397 U.S. 436, 445 n.10 (1970) (noting that “with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction”). Justice Breyer offers these examples:

[A]n armed robber who reaches across a store counter, grabs the cashier, and demands “your money or your life,” may through that single instance of conduct have committed several “offenses,” in the majority’s sense of the term, including armed robbery, assault, battery, trespass, use of a firearm to commit a felony, and perhaps possession of a firearm by a felon, as well. . . . A protester blocking the entrance to a federal building might also be trespassing, failing to disperse, unlawfully assembling, and obstructing Government administration all at one and the same time.

Cobb, 121 S. Ct. at 1348 (Breyer, J., dissenting).

225. Only 160 offenses existed at the time the Bill of Rights was ratified. Note, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 342 n.14 (1956).

226. See *Grady v. Corbin*, 495 U.S. 509, 520 (1990) (noting that if the *Blockburger* test were applied to the facts of the case, the defendant could be tried four separate times for one criminal act); *Ashe*, 397 U.S. at 451 (Brennan, J., concurring) (noting that a prosecutor could bring numerous charges if the offense affected several victims, if the criminal action could be divided into chronologically discrete crimes, or if it was illegal under numerous different statutes).

islatues pass many overlapping statutes, real-life examples of *Blockburger*'s failure abound. For example, assault with intent to murder is a different *Blockburger* offense from assault with intent to rob while armed.²²⁷ The same assault can be punished as many times as the legislature articulates distinct intent requirements: to murder, to rape, to sodomize, to rob, to kidnap, and to injure.²²⁸

Given the usefulness of questioning an uncounseled defendant, *Cobb* provides a strong incentive for prosecutors to extend the charging process, making already vulnerable defendants even more susceptible to government harassment. *Cobb* also eliminates any assurance previously offered by *Jackson* that once arraigned, the defendant will be free from further interrogation without counsel's consent, unless that defendant is charged with every possible offense from the start.²²⁹ *Cobb* forces defendants, even those who have obtained counsel on the specific matter charged, to rely on their own instincts in dealing with the government in any on-going investigation.²³⁰

C. The "Closely Related" Test is the Most Workable Test

The *Cobb* dissent recognized the imperfections of the "closely related" test;²³¹ nevertheless, lower courts continue to include closely-related acts in their definition of "offense."²³² Moreover, as the dissent illustrated, it is consistent with precedent that "the Court's conception of the Sixth Amendment right at the time that *Moulton* and *Brewer* were decided naturally presumed that it extended to factually related but uncharged offenses."²³³ Thus, the "closely related" test should be considered the common-sense approach²³⁴ that strengthens the Sixth Amendment right to counsel.

227. *People v. Bryan*, 284 N.W.2d 765, 772-73 (Mich. Ct. App. 1979).

228. See *supra* note 224 for other examples.

229. See *Michigan v. Jackson*, 475 U.S. 625, 633-34 n.7 (1986).

230. *Texas v. Cobb*, 121 S. Ct. 1335, 1351 (2001) (Breyer, J., dissenting).

231. *Id.* (Breyer, J., dissenting).

232. *Id.* at 1350 (Breyer, J., dissenting) (citing note 5 of the majority opinion which lists cases from both federal and state courts). See *supra* notes 72-99 and accompanying text for discussion of cases recognizing the "closely related" exception.

233. *Cobb*, 121 S. Ct. at 1349 (Breyer, J., dissenting).

234. *Id.* at 1351 (Breyer, J., dissenting).

The rule that the Sixth Amendment right to counsel is offense-specific does not comport with the broad scope of the attorney-client relationship:

The scope of the relationship between an individual accused of crime and his attorney is as broad as the subject matter that might reasonably be encompassed by negotiations for a plea bargain or the contents of a presentence investigation report. Any notion that a constitutional right to counsel is, or should be, narrowly defined by the elements of a pending charge is both unrealistic and invidious.²³⁵

Moreover, for every possible criminal charge that may stem from a single incident, must courts appoint different attorneys for defendants who cannot afford counsel? One can only imagine the confusion. The “closely related” test eliminates such possibilities by extending the Sixth Amendment right to counsel to offenses that arise from a single occasion.²³⁶

Despite its imperfections, it appears that judges have found the “closely related” test workable. Some courts have defined offenses as “closely related” if they involve the same victim, acts, evidence, or intent.²³⁷ Others have defined offenses that do not constitute “closely related.”²³⁸ In applying the test to *Cobb*, the dissent agreed with the reasoning of the Texas Court of Criminal Appeals that burglary and murder were “closely related” offenses.²³⁹ Cobb’s confessions should have been suppressed because the court appointed counsel for a crime arising out of the same facts as the murder. The murder was an offshoot of the burglary, and Cobb’s Sixth Amendment right to counsel should therefore have attached. In the end, it would appear that the majority is

235. *McNeil v. Wisconsin*, 501 U.S. 171, 187 (1991) (Stevens, J., dissenting).

236. *See supra* notes 201–03 and accompanying text.

237. *Cobb*, 121 S. Ct. at 1350 (Breyer, J., dissenting) (citing *Taylor v. State*, 726 So. 2d 841, 845 (Fla. Ct. App. 1999); *State v. Tucker*, 645 A.2d 111, 120–21 (N.J. 1994), *cert. denied*, 513 U.S. 1090 (1995); *In re Pack*, 616 A.2d 1006, 1010 (Pa. Super. Ct. 1992)).

238. *Id.* (Breyer, J., dissenting) (citing *Commonwealth v. Rainwater*, 681 N.E.2d 1218, 1224 (Mass. 1997), *cert. denied*, 522 U.S. 1095 (1998); *Whittlesey v. State*, 665 A.2d 223, 236 (Md. 1995), *cert. denied*, 516 U.S. 1148 (1996); *People v. Dotson*, 574 N.E.2d 143, 149 (Ill. App. Ct. 1991)).

239. *Id.* at 1351 (Breyer, J., dissenting). When questioning Cobb, the police were aware that he had an attorney representing him on the burglary charges. *Id.* (Breyer, J., dissenting). Moreover, the police appeared to have acted in the belief that this counsel was also representing Cobb on the possible murder charges, because they requested his permission to question Cobb on previous occasions. *Id.* (Breyer, J., dissenting). The “relatedness of the crimes is well illustrated by the impossibility of questioning Cobb about the murders without eliciting admissions about the burglary.” *Id.* (Breyer, J., dissenting).

blind to the reality that courts have found the “closely related test” workable.²⁴⁰

VI. CONCLUSION

In *Texas v. Cobb*, the United States Supreme Court once again had to define the parameters of the Sixth Amendment right to counsel. The Court had two options: expand or constrict. In the end, the Court chose the latter, deciding that the Sixth Amendment right to counsel does not extend to factually related uncharged offenses.²⁴¹

The majority’s reasoning diminishes the Sixth Amendment right by effectively asserting that the Fifth Amendment is adequate protection for suspects.²⁴² The Fifth Amendment right to counsel, however, is an entitlement, not a constitutional right like that provided by the Sixth Amendment.²⁴³ The Court appears to analyze the rights in the same manner simply because they both include a “right to counsel” and require a “knowing and intelligent” waiver.²⁴⁴ As a result of this merger, the Court chose to apply the Fifth Amendment *Blockburger* test to the Sixth Amendment right to counsel.²⁴⁵ However, as the Fifth Amendment and Sixth Amendment have different goals and purposes, the tests applied to these amendments should remain distinctly different. Therefore, the test to determine what constitutes an offense in the context of the Sixth Amendment right to counsel should be the “closely related” test.

Furthermore, the majority focused on a concept that is not stated in the Constitution: “society’s interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses.”²⁴⁶ According to Justice Goldberg in *Escobedo v. Illinois*:²⁴⁷

240. See *supra* notes 72–99 and accompanying text.

241. *Cobb*, 121 S. Ct. at 1339.

242. See *id.* at 1347 (Breyer, J., dissenting).

243. See *supra* notes 108–10 and accompanying text.

244. See Halama, *supra* note 108, at 1223.

245. *Cobb*, 121 S. Ct. at 1344.

246. *Id.* at 1343.

247. 378 U.S. 478 (1964).

We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something wrong with that system.²⁴⁸

Nevertheless, the *Cobb* ruling gives more power to the police by encouraging them to work around a suspect's constitutional rights, regardless of the effect it will have on our adversarial system. *Cobb* opted to narrowly define the Sixth Amendment right to counsel by favoring law enforcement officials over the accused and by dismissing the "closely related" exception that lower courts have applied.²⁴⁹

The question thus remains: how far will the Court go in narrowing the Sixth Amendment right to counsel? Hopefully, it has gone far enough.

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248. *Id.* at 490.

249. *Cobb*, 121 S. Ct. at 1343.
