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NOTES

NOW YOU HAVE IT, NOW YOU DON'T: THE SIXTH AMENDMENT RIGHT TO COUNSEL AFTER TEXAS V. COBB

Angela Henson*

The Sixth Amendment to the United States Constitution guarantees the accused the right to counsel in all criminal prosecutions.¹ The Framers sought to provide added protection for the accused, such as the right to counsel in capital crimes, which was not available under the English system of law.² Years later, the United States Supreme Court recognized the assistance of counsel as a fundamental right,³ applicable to the states through the Fourteenth Amendment.⁴ Since first hearing a Sixth Amendment right to counsel case, the Court has extended the scope of the protection beyond what the Framers likely envisioned.⁵ For example, the Court views counsel as a necessity for guidance throughout

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¹ J.D. candidate, May 2003, The Catholic University of America, Columbus School of Law. I would like to express sincere thanks to my expert reader, the Honorable Rosalind Miller, for her assistance and insight on my Note. Also, I would like to extend my gratitude to my parents and my husband for their encouragement and support.

² U.S. Const. amend. VI.

³ The Constitution of the United States of America Analysis and Interpretation, 1215, 1216 n.2 (Lester S. Jayson et al. eds., 1973) (noting the intent of the Framers to ensure that defendants who could afford to retain counsel would not lose that right). In addition to the Sixth Amendment, Congress passed two acts which allowed defendants to obtain counsel.

⁴ Id.

⁵ See Analysis and Interpretation, supra note 2, at 1216 (pointing out that the Court enlarged the protections of the amendment); see also 3 Wayne R. LaFave et al., Criminal Procedure § 11.1(a) (2d ed. 1999) (discussing the expansion from a mere right to retained counsel to the state’s obligation to appoint counsel for indigent defendants in some circumstances).
the criminal process, as well as a medium between the accused and the State.7

The Court's definition of the circumstances that trigger the attachment of the constitutional right to counsel is somewhat malleable.8 Nevertheless, the Court established that the Sixth Amendment right firmly attaches at arraignments,9 post-indictment lineups,10 and preliminary hearings.11 Further, the accused has the right to counsel's presence at any interrogation that is initiated after adversary proceedings are commenced.12

Once the Sixth Amendment right has attached, the State has a duty both to recognize and respect the accused's right to seek assistance.13

6. See, e.g., Powell, 287 U.S. at 57 (asserting the importance of the defendant's ability to consult with and prepare a defense with counsel); Gideon, 372 U.S. at 345 (recognizing the general inability of a layman to adequately assess and understand the legal intricacies necessary to build an effective defense).


8. See Kirby v. Illinois, 406 U.S. 682 (1972) (describing the commencement of criminal proceedings in terms of the adversarial forces of the government immersing the accused in the criminal law process); see also United States v. Wade, 388 U.S. 218, 224 (1967) (noting that the right to counsel cannot be constrained only to the trial, but rather extends to other "critical" stages during the criminal process).

9. Powell, 287 U.S. at 57 (asserting that the right to assistance of counsel for critical stages of the proceedings commences at the arraignment).

10. Wade, 388 U.S. at 236-37 (holding that the post-indictment lineup was a critical point of adversarial proceedings requiring the presence of counsel).

11. Coleman v. Alabama, 399 U.S. 1, 9-10 (1970) (discussing the right to have counsel present at a preliminary hearing).

12. See Massiah v. United States, 377 U.S. 201, 206 (1964) (holding that deliberately elicited incriminating statements, which are the product of a post-indictment interrogation held in the absence of counsel, are inadmissible at trial); see also Michigan v. Jackson, 475 U.S. 625, 632 (1986) (equating the protection afforded by the Fifth Amendment's right to counsel during custodial interrogations with the Sixth Amendment's counsel guarantee at post-arraignment interrogations); Brewer, 430 U.S. at 401 (providing for the right to legal representation for the accused at any government interrogation which occurs after criminal proceedings have begun). The Court deviated from the notion that the right only attaches after indictment in Escobedo v. Illinois. See 378 U.S. 478, 490-91 (1964) (holding that even prior to indictment, where the accused requested and was denied counsel during an interrogation, any statements made are inadmissible against the accused). The Court reasoned that because confessions possibly determining the legal fate of the defendant were often obtained prior to indictment, this constituted a critical stage for which legal assistance was necessary. Id. at 488. Nevertheless, the Court has subsequently viewed Escobedo as limited to the specific facts of the case. Kirby, 406 U.S. at 689 (discussing the Court's narrowing of Escobedo's holding); see also 2 LAFAVE, supra note 5, § 6.4(c) (pointing to language in Escobedo as illustrating that the Court wanted to limit the ruling).

13. Maine v. Moulton, 474 U.S. 159, 170-71 (1985) (identifying the obligations imposed on the State by the Sixth Amendment); see also 21 A AM. JUR. 2D Criminal Law
Moreover, police and prosecutors have an obligation to avoid tactics that may circumvent the protections guaranteed by the right to counsel. However, even after the right to counsel has attached, a defendant may effectively waive the right.

The establishment of the fundamental right to counsel under the Sixth Amendment has created tensions with society's interest in effective law enforcement. The Court's recent decisions, however, show a trend of favoring law enforcement goals, while limiting the protection of the constitutional right to counsel. In McNeil v. Wisconsin, the Court advocated the use of an offense-specific rule, which limits the attachment of counsel to offenses where formal criminal proceedings have been initiated. The Court justified McNeil's rule by espousing the interests of the police and society in efficient crime solving.

§ 1186 (1998) (summarizing the implications of the attachment of the right to counsel as a limit on the authorities).

14. Moulton, 474 U.S. at 171; see also Jackson, 475 U.S. at 632 (discussing the distinction between police information gathering techniques before and after the attachment of the right to counsel); 21A Am. Jur. 2d, supra note 13 (explaining the duties of the State after the Sixth Amendment is implicated).

15. Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (holding that the State must prove "an intentional relinquishment or abandonment of a known right or privilege" for a waiver to be effective); see also 2 LAFAVE, supra note 5, § 6.4(f) (observing that a defendant may waive his right to counsel in absence of counsel's participation).

16. See McNeil v. Wisconsin, 501 U.S. 171, 181 (1991) (observing that society would be disadvantaged if police access to uncoerced confessions was limited); Moulton, 474 U.S. at 180 (posing that the exclusion of evidence relating to an uncharged offense, which is obtained during the investigation of a charged offense, would hamper society's interest in investigating crimes); Brewer, 430 U.S. at 422 (Burger, C.J., dissenting) (arguing that the majority's use of the exclusionary rule ignores the cost that will be suffered by society); see also Alfredo Garcia, The Right to Counsel Under Siege: Requiem for an Endangered Right?, 29 AM. CRIM. L. REV. 35, 62 (1991) (discussing the Court's tendency to favor law enforcement).

17. See McNeil, 501 U.S. at 175 (establishing that the right to counsel provision in the Sixth Amendment is offense-specific and therefore only attaches to offenses for which a prosecution has commenced); Patterson v. Illinois, 487 U.S. 285, 290-91 (1988) (finding that the defendant's failure to request the assistance of counsel in post-indictment dealings with the police rendered a Jackson-type exclusion inapplicable).


19. McNeil, 501 U.S. at 175 (explaining that invocation of the right in a charged offense cannot extend to future or uncharged offenses).

20. Id. at 175-76; see also Kenneth P. Jones, Comment, McNeil v. Wisconsin: Invocation of Right to Counsel Under Sixth Amendment by Accused at Judicial Proceeding Does Not Constitute Invocation of Miranda Right to Counsel for Unrelated Charge, 26 GA. L. REV. 1049, 1058-59 (1992) (discussing the Court's policy rationale behind McNeil as focusing on law enforcement goals of crime solving).
The McNeil offense-specific rule formed the basis for the Court’s decision in Texas v. Cobb.21 In Cobb, the defendant appealed a conviction of capital murder.22 Raymond Levi Cobb was a suspect in a burglary and missing persons incident.23 Eventually, the state charged Cobb with burglary and appointed counsel for him.24 After his release on bail, Cobb confessed to his father that he had murdered one of the occupants of the burglarized home.25 Based on the statement from his father, the police took Cobb into custody, where he subsequently confessed to the murder of Margaret Owings and her sixteen-month old daughter, Kori Rae.26

In Cobb, the Court considered whether a defendant’s right to counsel attaches only to charged offenses or extends to other offenses “closely related factually”27 to the offense charged.28 In clarifying McNeil’s offense-specific rule, the Court determined that the right to counsel only attaches to charged offenses, unless the charged and uncharged offenses constitute the same offense under the test established in Blockburger v. United States,29 which was later applied in double jeopardy cases.30

This Note explores the Court’s jurisprudence on the Sixth Amendment right to counsel. First, this Note reviews the case law evolution from a broad view of the right to counsel during an interrogation, to an increasingly narrow interpretation culminating in the offense-specific rule. Next, this Note analyzes the various opinions in Texas v. Cobb. Finally, this Note concludes that the offense-specific rule, as determined by application of the Blockburger test, diminishes the defendant’s Sixth Amendment right to counsel and derogates the role of the defense attorney.

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22. Id. at 166.
23. Id. at 165.
24. Id.
25. Id.
26. Id.
29. 284 U.S. 299, 304 (1932) (establishing “same elements” test, which determines whether there are one or more offenses by comparing the statutory provisions to see if one crime requires proof of a fact that the other provision does not).
I. THE EROSION OF THE RIGHT TO COUNSEL IN THE INTERROGATION CONTEXT

Early in the 1930s, the Supreme Court recognized the fundamental nature of the Sixth Amendment right to counsel.\(^{31}\) The Court's decision in *Powell v. Alabama*\(^{32}\) acknowledged the complexities of the criminal justice system, and the likely inability of a layperson to adequately defend himself against government prosecution.\(^{33}\) Moreover, in *Massiah v. United States*,\(^{34}\) the Court asserted that the right to counsel was not limited to trial, but extended to other "critical stages" of prosecution, including interrogations.\(^{35}\)

31. *Powell v. Alabama*, 287 U.S. 45, 68 (1932). *Powell* involved a group of African-American defendants charged with raping two white women in Alabama. See id. at 49, 51. On the day of the trial, the defendants did not receive a formal designation of counsel. Id. at 56-7. An attorney from another state, who had no pre-trial preparation or interaction with the defendants, expressed his willingness to represent the defendants at trial, and the court allowed the representation. See id. 57-8. The Supreme Court found that the representation was inadequate and thus failed to satisfy the Sixth Amendment counsel requirements. Id. at 71. The trial became infamous as "The Scottsboro Boys" case. See, e.g., *Hernandez v. State*, 726 S.W.2d 53, 69 (Tex. Crim. App. 1986); *People v. Nation*, 604 P.2d 1051, 1056 (Cal. 1980).

32. 287 U.S. at 71 (holding that in instances where the defendant cannot employ counsel, the court has a duty to appoint counsel in a capital case, whether requested by the defendant or not).

33. See id. at 69; see also *Johnson v. Zerbst*, 304 U.S. 458, 462 -63 (1938) (noting that a lack of familiarity with the trial process would unfairly disadvantage a defendant).

34. 377 U.S. 201, 206 (1964) (finding the Sixth Amendment right to counsel was violated when incriminating statements were elicited from an uncounseled defendant after indictment). *Massiah* was indicted on a narcotics charge for transporting cocaine. Id. at 201-02. He obtained counsel and was released on bail. Id. at 202. A co-defendant, Colson, agreed to aid the police by allowing them to monitor conversations with Massiah. Id. at 201-03. During one conversation in Colson's car, Massiah made incriminating statements, which were used against him at trial. Id. at 203. Massiah was convicted for the narcotics charges, and the Court of Appeals affirmed his conviction. Id. The Supreme Court reversed the conviction on the grounds that the uncounseled statements, obtained during a surreptitious interrogation, were erroneously used in trial against Massiah. See id. at 206-07.

35. Id. at 204-06; see also Meredith B. Halama, *Loss of a Fundamental Right: The Sixth Amendment as a Mere "Prophylactic Rule,"* 1998 U. ILL. L. REV. 1207, 1211-12 (discussing the "critical stage" inquiry and noting the Court's recognizing post-indictment interrogations as a "critical stage"). In *Powell*, the Court indicated that there are other "critical stages" in the criminal process, aside from trial, where counsel's assistance is vital. *Powell*, 287 U.S. at 57. Moreover, the Court asserted that a defendant needs the aid of counsel during all adversarial proceedings. Id. at 69.

The *Wade* Court expanded on the concept of "critical stages" by stating:

[T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have
A. A Broad Scope for Application of the Right to Counsel

In *Michigan v. Jackson,* the Supreme Court held that any defendant's waiver during a police-initiated interrogation was invalid if obtained after the defendant's prior assertion of the right to counsel. *Jackson* involved two separate cases consolidated by the Michigan Supreme Court. In each case, the government obtained incriminating statements from the defendants after arraignment in the absence of counsel. Thus, both cases presented the issue of whether a valid waiver of the right to counsel was possible after arraignment. The Michigan Supreme Court held the waivers to be invalid. As a result, the statements of both defendants were inadmissible because they were obtained post-arraignment, after the right to counsel had attached.

In affirming the decision, the United States Supreme Court based part of its reasoning on precedent that analyzed the Fifth Amendment's right to counsel during a custodial interrogation. The principal case upon which the court relied was *United States v. Wade,* which established the standard for determining when a defendant was in custody. The court noted that the Sixth Amendment guarantee to apply to "critical" stages of the proceedings, and that the right to counsel during an interrogation is considered a "critical" stage.

United States v. Wade, 388 U.S. 218, 224 (1967); see also 32 N.Y. JUR. 2d Criminal Law § 714 (1995) (describing the factors the Court considers for the "critical stage" determination). But see Sherry F. Colb, Why the Supreme Court Should Overrule the Massiah Doctrine and Permit Miranda Alone to Govern Interrogations, FindLaw's Writ, at http://writ.news.findlaw.com/colb/20010509.html (May 9, 2001) (arguing that *Massiah* should no longer be the standard for protecting a defendant's right to counsel in the interrogation context, but rather *Miranda* should provide the protection).

37. Id. at 636.
41. *Bladel,* 365 N.W.2d at 58; see also *Jackson,* 475 U.S. at 626.
42. See *Bladel,* 365 N.W.2d at 68-9 (recognizing that the Sixth Amendment protection requires stringent measures to obtain a valid waiver of the right to counsel, and finding the requirement not met in these cases).
43. Id. (noting that a request of counsel to a magistrate at an arraignment is sufficient to prohibit police questioning in the absence of counsel).
44. *Jackson,* 475 U.S. at 629-30; see Miranda v. Arizona, 384 U.S. 436, 474 (1966) (establishing the procedure to be followed in an interrogation where the defendant
which the Court relied was *Edwards v. Arizona*. The rule in *Edwards* established that when the accused is in custody and requests to interact with the police only through counsel, the police are barred from subsequent interrogation until the accused has obtained counsel, unless the accused initiates further interaction.

The *Jackson* Court decided that the *Edwards* rule protecting the accused during custodial interrogation also applied to the Sixth Amendment right to counsel in post-arraignment questioning. Therefore, at a post-arraignment interrogation, a valid waiver of the right to counsel can only occur if the accused initiated the conversation with authorities.

requests the aid of counsel); *Edwards v. United States*, 451 U.S. 477, 484-85 (1981) (providing that once a defendant requests counsel, the police cannot initiate questioning and obtain a valid waiver of the Fifth Amendment right). Although not a Fifth Amendment case, the *Jackson* Court also cited *United States v. Gouveia* for an enunciation of the events that trigger the attachment of the Sixth Amendment right. *Jackson*, 475 U.S. at 629-31 (citing *United States v. Gouveia*, 467 U.S. 180 (1984)). In *Gouveia*, the Court found the Sixth Amendment was not violated. *See Gouveia*, 467 U.S. at 187. *Gouveia* involved defendants who were in prison for another crime when they were suspected of murdering an inmate. *Id.* at 182-83. They were placed in administrative detention and remained in that situation without the appointment of counsel for nineteen months prior to their indictment. *Id.* at 183. They were appointed counsel at a later arraignment, and before trial, moved to have the indictments dismissed. *Id.* Their motion was denied, and eventually they were convicted. *Id.* In their appeal, the defendants argued that their Sixth Amendment rights were violated because they were denied counsel during their confinement. *See id.* at 185. The Court of Appeals reversed their convictions, despite the fact that the defendants were not indicted at the time when they asserted their right to counsel. *See id.* at 186-87. The court distinguished *Gouveia* from *Kirby v. Illinois* by asserting that *Gouveia* was a prison case, and therefore the right to counsel was implicated differently. *Id.* at 185 (distinguishing *Kirby v. Illinois*, 406 U.S. 682 (1972)). The Supreme Court rejected the lower court's reasoning and reversed the decision, noting that there is no distinction as to the right to counsel for prison cases from any other type of case. *See id.* at 187.

45. *Edwards*, 451 U.S. at 487 (holding the waiver of the right to counsel invalid); see also *Jackson*, 475 U.S. at 630-32, 636 (finding the rule established in *Edwards* applicable to the Sixth Amendment right to counsel).

46. *Edwards*, 451 U.S. at 486-87; see also 2 LAFAvE, supra note 5, § 6.9(f) (describing the prophylactic nature of *Edwards* in protecting a defendant from interrogation by police after invoking counsel). In *Minnick v. Mississippi*, the Court determined that consulting with counsel, pursuant to a request made during an interrogation, would not end *Edwards' protection. 498 U.S. 146, 150 (1990). If the police initiate questioning after a defendant has requested counsel, the resulting waiver is invalid if the attorney is not present, even if the defendant had met with counsel between interrogations. *See id.* at 151-52.

47. *Jackson*, 475 U.S. at 632 (noting that the Sixth Amendment right requires the same level of protection as Fifth Amendment custodial interrogation rights); see also Halama, supra note 35, at 1220 (reviewing the expansion of *Edwards* beyond the custodial interrogation).

B. Drawing Distinctions That Limit the Sixth Amendment Right to Counsel

Two years after deciding *Jackson*, the Court reviewed another case involving a questionable waiver of the right to counsel. In *Patterson v. Illinois*, the Court upheld the defendant's waiver. The Court distinguished both *Jackson* and *Edwards* on the ground that Patterson did not expressly request the assistance of counsel at his post-arraignment interrogation.

Further, the Court found the waiver was "knowing and intelligent" because the police informed Patterson of his rights through a *Miranda* warning. The Court reasoned that the *Miranda* warning adequately informed Patterson of his right to counsel, as well as apprised him of the consequences of a waiver of his Sixth Amendment right. The Court explained, "[W]e have defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." Thus, the Court analogized the usefulness of counsel at a post-arraignment interrogation with the utility of counsel at a custodial interrogation and found the *Miranda* warning to be equally sufficient in both contexts.


50. 487 U.S. 285 (1988). A Cook County grand jury indicted Patterson for murder. *Id.* at 288. The police informed Patterson of his *Miranda* rights, and he signed waiver forms prior to making two confessions to police. *Id.* Patterson did not request the assistance of counsel at any time while issuing the statements. *See id.* at 291.

51. *Id.* at 293.

52. *See id.* at 290-91. The Court asserted that a defendant who has obtained, or merely requested, counsel will enjoy heightened constitutional protections unavailable to defendants like Patterson, who did not have, or ask for, counsel. *Id.* at 290 n.3.


55. *Id.* at 292-93 (finding that the waiver met the requirements established in *Zerbst*); *see also* Halama, *supra* note 35, at 1221 (noting that the Court found a valid waiver of *Miranda* rights sufficient to support a valid waiver of the Sixth Amendment right to counsel).

56. *Patterson*, 487 U.S. at 298; *see also* Halama, *supra* note 35, at 1221-22 (describing the Court's test for assessing waivers of counsel as a spectrum based upon the importance of legal assistance in a particular proceeding).

57. *See Patterson*, 487 U.S. at 298-99; *see also* Moran v. *Burbine*, 475 U.S. 412, 432 (1986) (reasoning that the potential for an interrogation to have an impact on the trial is not enough to automatically implicate the Sixth Amendment right to counsel). In *Burbine*, the defendant, Burbine, had been arrested for burglary and was also a suspect for
C. The Offense-Specific Rule: A More Expansive Limitation on the Right to Counsel

Later variation on the validity of waivers for Sixth Amendment purposes occurred in *McNeil v. Wisconsin*. In *McNeil*, the issue was whether the attachment and assertion of the Sixth Amendment right for a charged offense automatically invokes the Fifth Amendment right to counsel for a different offense. In addressing this issue, the Court created the offense-specific limitation on the Sixth Amendment.

While explaining the offense-specific limitation, the Court noted that the Sixth Amendment right to counsel is not triggered until the initiation of a prosecution. Consequently, invocation of the Sixth Amendment

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a murder. *Id.* at 416. Prior to indictment on either charge, Burbine’s sister retained counsel for him. *Id.* at 416-17. However, when Burbine’s counsel attempted to contact him in jail, the attorney was unable to speak to Burbine, and was informed by a police officer that Burbine would not be questioned or put in a line-up that night. *Id.* at 417. Additionally, counsel was not informed that Burbine was a suspect for murder. *See id.* Contrary to the officer’s statement to counsel, Burbine was questioned about the murder the same night. *Id.* Burbine was issued the Miranda warning and never requested the assistance of counsel. *Id.* at 417-18. However, the police did not inform Burbine that counsel had been obtained for him and had tried to contact him. *Id.* at 418. During the interrogation, he eventually signed three statements confessing to the murder and was later convicted. *Id.* The Supreme Court decided that Burbine’s waivers were valid regardless of the failure to inform him that his counsel had attempted to contact him. *Id.* at 423. Moreover, the Court reasoned that the misinformation given to Burbine’s counsel was irrelevant to the validity of the waivers. *See id.* at 424-25.

88. 501 U.S. 171, 175 (1991). McNeil was arrested for an armed robbery that occurred in West Allis, Wisconsin. *Id.* at 173. He had counsel at his initial appearance before the Milwaukee County Court. *Id.* A Milwaukee County detective talked to McNeil, while in jail, about a set of crimes for which McNeil was a suspect in the town of Caledonia, Wisconsin. *Id.* The Milwaukee and Caledonia detectives initiated several encounters with McNeil in which he made incriminating statements about his involvement in the Caledonia offenses. *Id.* at 174. Yet, during each encounter, McNeil was issued Miranda warnings, and he signed waivers. *Id.* at 173-74. McNeil was formally charged with the Caledonia crimes, and his statements were used in trial against him. *See id.* at 174. McNeil argued that his statements should have been suppressed because his appearance in court with his attorney for the West Allis charges served as an invocation of his Fifth Amendment right to counsel. *Id.* He argued further that the waivers were invalid because the police initiated the questioning that produced the inculpatory statements. *See id.* The Wisconsin Supreme Court determined that a request for counsel on a charged offense does not invoke the Fifth Amendment right to counsel and does not invalidate all future waivers. *See id.* at 175.

59. *Id.* at 173.

60. *Id.* at 175.

61. *Id.*; see also Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion) (explaining that a prosecution is commenced “at or after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment”); Jones, *supra* note 20, at 1056-57 (discussing the point of attachment of the right to counsel).
right in one prosecution will not extend the right to future judicial criminal proceedings. The Court reasoned that the limitation promotes the government's interest in effective criminal investigation. The Court asserted that excluding evidence related to an uncharged crime, while interrogating the accused about a pending prosecution for another offense, would unnecessarily hamper society's interest in solving crimes. The Court also decided the offense-specific rule applied to Jackson's determination of waiver validity in interrogations initiated by the police.

Additionally, the Court stated that the Edwards Fifth Amendment right to counsel rule is not offense-specific. Regardless of the subject matter of the questioning, police are barred from initiating any contact with the accused if counsel is not present. The Court justified the disparity in applying the offense-specific limitation to the Sixth Amendment and not the Fifth Amendment by considering the interests underlying the two amendments.

For the Sixth Amendment, the protection is perceived as giving the accused assistance against the government after it has commenced prosecution. The Court noted the existence of a presumption that the accused can request the assistance of counsel for any critical point in the criminal proceedings. However, this presumption applies to the defense

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64. *Id.*
65. *Id.* at 175.
66. *Id.* at 177; see also Garcia, supra note 16, at 74 (reviewing the Court's distinction between Jackson and Edwards).
67. *McNeil*, 501 U.S. at 176-77; see also Arizona v. Roberson, 486 U.S. 675, 684 (1988) (asserting that the Edwards protections cover any topic of police initiated questioning); Jones, supra note 20, at 1057 (stating the distinction on permissible questioning between the Sixth Amendment right and the Miranda-Edwards right to counsel).
68. *McNeil*, 501 U.S. at 177-78; see also Garcia, supra note 16, at 74-5 (elaborating on McNeil's distinction between the Fifth and Sixth Amendment's counsel protections); Jones, supra note 20, at 1058 (discussing the distinct purposes of the right to counsel afforded by the Fifth and Sixth Amendments).
69. See *McNeil*, 501 U.S. at 177-78 ("The purpose of the Sixth Amendment counsel guarantee -- and hence the purpose of invoking it -- is to 'protect 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.") (quoting United States v. Gouveia, 467 U.S. 180, 189 (1984)).
70. *Id.* at 179; see also Michigan v. Jackson, 475 U.S. 625, 633 (1986); 21A AM. JUR. 2D, supra note 13, at 1192 (discussing the presumption of a request for assistance at all critical stages).
of the present prosecution, and is not an implication of intent to avoid all future interrogations on any subject matter.\(^7\)

In contrast, the Fifth Amendment’s *Miranda-Edwards* protection focuses on the accused’s interests in interacting with the authorities only with counsel present.\(^2\) In the Fifth Amendment context, there is no presumption of a request for counsel. Rather the accused must clearly express a desire to have counsel present.\(^3\)

The Court rejected the policy argument that invoking the Sixth Amendment right should serve as an implication of the Fifth Amendment right established in *Miranda*.\(^4\) Recognition of such a rule, the opinion indicated, would “seriously impede effective law enforcement.”\(^5\) The offense-specific limitation on the Sixth Amendment right would continue to allow investigations of other, uncharged offenses, thereby, aiding in efforts to solve other crimes.\(^6\)

The progression in jurisprudence illustrates an increased constraint on the Sixth Amendment right to counsel.\(^7\) The president of the National Association of Criminal Defense, Alan Ellis, commented that *McNeil* was further evidence of the Court “tearing down the building blocks that form the foundation of the Bill of Rights.”\(^8\) The change in the Court’s views indicates that effective and efficient law enforcement goals have

\(^{71}\) *McNeil*, 501 U.S. at 180 n.1.

\(^{72}\) *Id.* at 178; see also *Tuite*, *supra* note 62, at 3 (reporting the Court’s perception of the *Edwards* guarantee).

\(^{73}\) See *McNeil*, 501 U.S. at 178-79; see also *Jones*, *supra* note 20, at 1058 (pointing to the need for an assertion of the Fifth Amendment right to counsel); *Tuite*, *supra* note 62, at 3 (stating that a defendant must express the desire to have counsel’s aid).

\(^{74}\) *McNeil*, 501 U.S. at 180; see also 2 *LAFAVE*, *supra* note 5, § 6.9(f) (describing the Court’s rejection of having a Sixth Amendment right invocation serving as an automatic invocation of the Fifth Amendment right to counsel). The policy argument supporting the implied dual invocation was that the average defendant does not recognize the distinction between the two counsel rights. *McNeil*, 501 U.S. at 180 n.1. Thus, it is not fair to protect only the defendants who are savvy enough to invoke both the Sixth and the Fifth Amendment rights separately. See *id*.

\(^{75}\) *McNeil*, 501 U.S. at 180.

\(^{76}\) See *id.* at 181; see also *Tuite*, *supra* note 62, at 3 (reporting the Court’s fear of restricting the police department’s ability to resolve other crimes).

\(^{77}\) See *Garcia*, *supra* note 16, at 103 (discussing the apparent decline in the protection of the right to counsel between *Jackson* and *Patterson*).

\(^{78}\) Ethan Bronner, *Power to Query Suspects Widened; Questions Allowed on Unrelated Crime*, *BOSTON GLOBE*, June 14, 1991, at 3 (summarizing the Court’s decision in *McNeil*).
greater weight than the protection of the accused's right to legal assistance.\textsuperscript{79}

\section*{II. \textit{Texas v. Cobb}: Extending the Offense-Specific Rule to Factually Related Offenses}

Raymond Levi Cobb was convicted of capital murder under Texas Penal Code section 19.03\textsuperscript{80} and sentenced to death.\textsuperscript{81} On December 27, 1993, Mr. Lindsey Owings reported to the Walker County Sheriff's Office that his home was burglarized and his wife and daughter, who were in the house at the time of the break-in, were missing.\textsuperscript{82} The police questioned Raymond Cobb, a neighbor of the Owings, about the incident in February 1994, but he denied any involvement.\textsuperscript{83}

In July 1994, while Cobb was under arrest for an unrelated crime, he confessed to the burglary of the Owings' home, but maintained he was not involved in the disappearance of Margaret and Kori Rae.\textsuperscript{84} The government subsequently indicted Cobb under Texas Penal Code section 30.02\textsuperscript{85} for burglary, and the court appointed Hal Ridley as counsel in August 1994.\textsuperscript{86} The Walker County investigators obtained Ridley's permission twice to question Cobb regarding the disappearances, only after the police asserted that Cobb was not a suspect.\textsuperscript{87} In both the August 1994 and September 1995 interrogations, Cobb insisted that he was not involved in the disappearances of Margaret and Kori Rae.\textsuperscript{88}

In November 1995, while living in Odessa, Texas, Cobb confessed to his father that he had murdered Margaret Owings.\textsuperscript{89} Cobb's father filed a statement with the Odessa police regarding the confession, which the

\textsuperscript{79} Garcia, supra note 16, at 75 (noting the \textit{McNeil} Court's assertion of the strong interest of the government in crime control).
\textsuperscript{80} Tex. Penal Code Ann. § 19.03(a)(7)(A) (Vernon 1994) (requiring murder of more than one person during a single criminal transaction for a conviction of capital murder).
\textsuperscript{82} Id. at *6.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Tex. Penal Code Ann. § 30.02(a)(1) (Vernon 1994) (requiring non-consensual entry into a habitation or building with the intent to commit a felony or theft).
\textsuperscript{87} Id. at *7.
\textsuperscript{88} Id.
\textsuperscript{89} Id. While Cobb was attempting to take items from the Owings' home, Margaret approached him, and he stabbed her in the stomach with a knife. Texas v. Cobb, 532 U.S. 162, 165-66 (2001). Cobb then buried her body in the woods near the house, along with her sixteen-month-old daughter. \textit{See id.} at 166.
Odessa police faxed to Walker County. The Walker County authorities faxed an arrest warrant to the Odessa police, who then took Cobb into custody and issued the *Miranda* warnings to him, which he subsequently waived. Walker County did not inform the Odessa police that Cobb had been appointed counsel for the pending burglary charge. During the questioning, Cobb gave a written statement confessing to both murders.

The Texas trial court convicted Cobb of capital murder and sentenced him to death. Cobb appealed to the Texas Court of Criminal Appeals asserting eleven points of error, including a claim that his confession to the Odessa police was erroneously admitted into evidence. Cobb argued that the statement was obtained in violation of his Sixth Amendment right because his counsel was not notified prior to, nor present during, the questioning.

The Texas Court of Criminal Appeals held that the murder was factually related to the burglary charge and therefore the right to counsel had attached for the murder offense when Cobb was indicted and appointed counsel for burglary. As a result, the appellate court ruled that the statement was inadmissible because it was obtained when Cobb's counsel was not present. The Texas Court of Criminal Appeals reversed the conviction and remanded the case for a new trial.

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91. *See id.* at *8.
92. *Id.* The Texas Court of Criminal Appeals stated that the constitutional right to counsel requires the knowledge of one state actor to be imputed to another state actor. *Id.* at *11. Thus, it was irrelevant that the Odessa police were not actually informed of Cobb's retention of counsel in the burglary because the law imputes the knowledge to them. *See id.* The Executive Director of National Association of Police Organizations (NAPO), Robert T. Scully, argued that such a presumption of knowledge would place an enormous burden on government officials and inhibit effective law enforcement. *See* Stephen McSpadden, *U.S. Supreme Court Hears Texas Murder Case* (Jan. 16, 2001), at http://www.napo.org/texas_murder.htm (announcing NAPO's filing of a brief stating its position on *Texas v. Cobb*).
94. *See id.* at *1.
95. *Id.*
96. *Id.* at *5.
97. *Id.* at *5-6. The State of Texas countered Cobb's argument by asserting that Cobb's right to counsel for the murder had not attached. *Id.* at *5. Even if the right had attached, the State argued that Ridley's consent to the prior uncounseled interrogations served as a waiver of the right. *Id.* at *5-6.
98. *Id.* at *11.
99. *Id.* at *11-12.
100. *Id.* at *13.
State of Texas sought review in the United States Supreme Court, which granted certiorari, and subsequently reversed the Texas Court of Criminal Appeals decision.

A. The Majority Opinion: Reaffirming McNeil's Offense-Specific Limitation and Holding That Cobb's Incriminating Statements Were Properly Admitted as Evidence Against Him

In Texas v. Cobb, the Court considered whether a defendant's Sixth Amendment right to counsel attaches only to charged offenses or also to additional offenses "closely related factually" to the charged offense. The Supreme Court made three significant rulings.

1. Reaffirming McNeil's Offense-Specific Rule

The Court reaffirmed McNeil's offense-specific limitation on the Sixth Amendment right to counsel. The opinion strongly admonished lower courts that McNeil v. Wisconsin, which established the offense-specific limitation on the Sixth Amendment right to counsel, "meant what it said." The Court relied on its prior holding in McNeil, that statements by a defendant relating to uncharged offenses are admissible even though the right to counsel had attached for a charged offense.

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103. See Cobb, 532 U.S. at 174.
106. Cobb, 532 U.S. at 167. Another issue relating to the validity of Cobb's waiver of counsel was also identified; however, the Court found it unnecessary to reach the second question. Id.
107. See generally Cobb, 532 U.S. at 164-174 (reaffirming the offense-specific rule, rejecting the "closely factually related" exception of the lower courts, and adopting the Blockburger offense test).
108. Id. at 164; see also Kathleen Dolegowski, Right to Counsel Is Offense Specific: Right Attaches to Offenses Meeting Blockburger Test, 3 LAW. J. 2 (2001) (reporting Court's holding).
110. Cobb, 532 U.S. at 164.
111. Id. at 167-68; see also McNeil, 501 U.S. at 175; Dolegowski, supra note 108, at 14 (describing the limitation on counsel under McNeil).
2. Rejection of the Factually Related or Inextricably Intertwined Exception

The opinion expressly rejected one of the lower-court-created exceptions to the offense-specific rule. Following the Court's decision in *McNeil*, several federal and state courts established an

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113. See Cobb, 532 U.S. at 168.

114. See Covarrubias, 179 F.3d at 1223 (describing the establishment of the "inextricably intertwined" exception in the Ninth Circuit and other circuits); United States v. Melgar, 139 F.3d 1005, 1014-15 (4th Cir. 1998) (finding the "closely related" or "inextricably intertwined" exception did not apply in Melgar's case), abrogated by Texas v. Cobb, 532 U.S. 162 (2001); United States v. Arnold, 106 F.3d 37, 42 (3d Cir. 1997) (adopting the "closely related" exception), abrogated by Texas v. Cobb, 532 U.S. 162 (2001); United States v. Doherty, 126 F.3d 769, 776 (6th Cir. 1997) (recognizing the "inextricably intertwined" exception, but finding it inapplicable because of the context of tribal arraignment), abrogated by Texas v. Cobb, 532 U.S. 162 (2001); United States v. Williams, 993 F.2d 451, 457 (5th Cir. 1993) (acknowledging that the right to counsel under the Sixth Amendment may attach to an uncharged offense that is "extremely closely related" to a charged offense), abrogated by Texas v. Cobb, 532 U.S. 162 (2001); United States v. Mitcheltree, 940 F.2d 1329, 1342-43 (10th Cir. 1991) (prohibiting the admission of incriminating statements regarding crimes that are closely related to charged crimes). But cf. Hellum v. Warden, United States Penitentiary-Leavenworth, 28 F.3d 903, 909 (8th Cir. 1994) (recognizing the existence of the exception in another circuit, but failing to adopt it). Prior to *McNeil*, the First Circuit indicated that a defendant might enjoy extension of the Sixth Amendment right if the offenses were closely related. See United States v. Nocella, 849 F.2d 33, 37-8 (1st Cir. 1988) (acknowledging that the right to counsel may apply to closely linked crimes but finding Nocella's offenses not closely related because they were distinct from the charged crimes, and the exception did not apply).

115. See Commonwealth v. Rainwater, 681 N.E.2d 1218, 1229 (Mass. 1997) (following the general trend of other courts and adopting the "inextricably intertwined" test), abrogated by Texas v. Cobb, 532 U.S. 162 (2001); In re Pack, 616 A.2d 1006, 1010-11 (Pa. Super. Ct. 1992) (explaining that the Pennsylvania Supreme Court interprets the right to counsel to extend from the charged offense to "all offenses arising from the same incident"), abrogated by Texas v. Cobb, 532 U.S. 162 (2001); Upton v. Texas, 853 S.W.2d 548, 555-56 (Tex. Crim. App. 1993) (rejecting the application of *McNeil*'s offense-specific rule on the grounds that the charged offense of theft was very closely related to the uncharged offense of capital murder), abrogated by State v. Panetti, 891 S.W.2d 281 (Tex. App. 1994). Even before the offense-specific rule was developed in *McNeil*, the Supreme Court of Illinois recognized that the Sixth Amendment right to counsel extended to
exception for crimes which were “closely related factually” to the charged offense.\textsuperscript{116} Based on two Supreme Court cases, \textit{Brewer v. Williams}\textsuperscript{117} and \textit{Maine v. Moulton},\textsuperscript{118} the lower courts reasoned that the protections of the Sixth Amendment should not be isolated from uncharged offenses when they are intertwined with the charged offenses.\textsuperscript{119}

The Court rejected the notion that \textit{Brewer} and \textit{Moulton} supported the lower courts’ exceptions, partially because the decisions came prior to \textit{McNeil}.\textsuperscript{120} More importantly, the Court asserted that \textit{Brewer} and \textit{Moulton} did not specifically address whether the right to counsel attached for factually related uncharged offenses, and therefore, the cases should not be the basis for the inferences by the lower courts.\textsuperscript{121} Additionally, the Court argued that \textit{Moulton} acknowledged that the constitutional right to counsel is offense-specific in nature, and therefore, statements regarding uncharged offenses should not be suppressed.\textsuperscript{122}
3. Adopting Blockburger’s Double Jeopardy Test to Determine Whether There Are Separate Offenses for Sixth Amendment Purposes

Finally, the majority adopted the test from Blockburger v. United States\textsuperscript{123} to ascertain if the right to counsel attaching to a charged offense, may extend to an uncharged offense.\textsuperscript{124} The Court created the Blockburger test to determine if there are identical charges, thereby avoiding multiple prosecutions in violation of the Fifth Amendment’s Double Jeopardy Clause.\textsuperscript{125} The inquiry regarding whether an act or transaction creates two separate offenses, or only one, turns on whether the elements of one offense require proof of a fact that the other offense does not require.\textsuperscript{126}

The Cobb Court reasoned that the meaning of “offense” in the Fifth Amendment double jeopardy context is not constitutionally distinguishable from the meaning of the term in the Sixth Amendment right to counsel realm.\textsuperscript{127} Therefore, the Court held that if an uncharged crime is considered the same offense as the charged crime under the Blockburger test, the Sixth Amendment right to counsel would attach to the uncharged offense.\textsuperscript{128} Applying this standard to the Cobb case, the Court determined that a capital murder offense\textsuperscript{129} required proof of different facts than a burglary offense,\textsuperscript{130} and therefore, the right to counsel did not attach for both offenses.\textsuperscript{131}

\textsuperscript{123} 284 U.S. 299, 304 (1932) (establishing the double jeopardy test).
\textsuperscript{124} Cobb, 532 U.S. at 173.
\textsuperscript{125} See Blockburger, 284 U.S. at 304; see also Cobb, 532 U.S. at 173.
\textsuperscript{126} Blockburger, 284 U.S. at 304; see also Kathryn A. Pamenter, Comment, United States v. Dixon: The Supreme Court Returns to the Traditional Standard for Double Jeopardy Clause Analysis, 69 NOTRE DAME L. REV. 575, 578 (1994) (summarizing the Blockburger test).
\textsuperscript{127} Cobb, 532 U.S. at 173.
\textsuperscript{128} Id.; see also Dolegowski, supra note 108, at 14 (noting that the right to counsel would attach for the uncharged murder if the Blockburger test is satisfied).
\textsuperscript{129} Tex. Penal Code Ann. § 19.03(a)(7)(A) (Vernon 1994) (requiring proof of intentional murder of two people within the same transaction).
\textsuperscript{130} Id. § 30.02(a)(1) (requiring proof of entry into a habitation without consent from the owner).
\textsuperscript{131} Cobb, 532 U.S. at 174; see also Dolegowski, supra note 108, at 14 (observing the Court’s application of the Blockburger test to the facts of Cobb).
B. The Concurrence: Advocating Overruling or Limiting Michigan v. Jackson

Justice Kennedy, joined by Justices Scalia and Thomas, concurred with the majority in reaffirming the offense-specific rule. Additionally, the concurrence asserted that *Michigan v. Jackson* should no longer be followed. The Court premised *Jackson* on the reasoning that, after the constitutional right to counsel attached, the accused could not be approached by the police for interrogation in the absence of counsel, unless the accused initiated the contact. The concurrence viewed the *Jackson* Court's ruling as flawed because it formed a barrier to the accused's voluntary choice to talk with the police alone, or with counsel. In *Patterson v. Illinois*, the Court asserted that the accused should have the choice of whether or not to interact with the authorities after asserting the Fifth Amendment right to counsel. The concurrence noted that the reasoning in *Patterson*, involving a Fifth Amendment waiver of counsel, should also apply to the Sixth Amendment right to counsel because the Court's holding in *Jackson* drew upon the reasoning of Fifth Amendment cases.

Moreover, the concurrence argued that the rules established in *Miranda v. Arizona* and *Edwards v. Arizona*, on which *Jackson* relied, require the accused to make a "clear and unambiguous" invocation of the right to have counsel present in a custodial

132. *Cobb*, 532 U.S. at 174 (Kennedy, J., concurring).
133. 475 U.S. 625 (1986).
134. *See Cobb*, 532 U.S. at 174-76 (Kennedy, J., concurring).
137. 487 U.S. 285, 291 (1988) (acknowledging that the accused may make the initial choice of whether to speak to the police with or without the aid of counsel, as long as the accused makes an informed decision).
138. *Id.* at 291 (arguing that a rule should not prevent the accused from speaking to the police).
139. *See Cobb*, 532 U.S. at 175 (Kennedy, J., concurring).
140. 384 U.S. 436, 474 (1966) (requiring police to cease an interrogation when the accused has requested the assistance of counsel, and not to resume interrogation until counsel is present).
141. 451 U.S. 477, 486-87 (1981) (invalidating a waiver of the right to counsel where the accused had requested the assistance of counsel during a custodial interrogation, was never furnished with such counsel, but nevertheless made a statement to police during a subsequent interrogation).
143. *Cobb*, 532 U.S. at 176 (Kennedy, J., concurring).
interrogation. Yet, the Sixth Amendment protections begin with the commencement of a formal prosecution, and not at the accused's specific assertion of the right. According to the concurrence, because the Edwards protections of the accused are independent of the attachment of the Sixth Amendment right to counsel after arraignment, the protective rule should not apply, absent a specific election by the accused.

The concurrence argued that the judge-made rule in Jackson is problematic because it protects the accused's desire not to interact with the authorities, without any showing that the accused had that intent. The concurrence reasoned that if Jackson were to remain valid, its protections should be limited to instances where there is a "clear and unambiguous" assertion of the right to counsel by the accused.

C. The Dissent: Supporting the Alternative "Closely Related" or "Inextricably Intertwined" Test for Determining the Attachment of the Sixth Amendment Right to Counsel

Justice Breyer, joined by Justices Stevens, Souter and Ginsburg, dissented on the grounds that the Court's definition of "offense" under the test in Blockburger v. United States was too narrow and its application undermined the protections of the Sixth Amendment. The dissent viewed the issue as whether the term "offense," in the Sixth Amendment context, "includes factually related aspects of a single course of conduct other than those few acts that make up the essential elements of the crime charged."

The dissent's resolution was that the

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144. Id. at 175-76 (Kennedy, J., concurring) (stating that the Fifth Amendment right to counsel is not presumed, but must be requested); see also Jones, supra note 20, at 1058 (acknowledging the requirement that the Fifth Amendment right to counsel must be invoked).

145. Cobb, 532 U.S. at 176 (Kennedy, J., concurring); see also 21A AM. JUR. 2D, supra note 13, § 1192 (triggering of Sixth Amendment does not hinge on a request by the defendant).

146. See Cobb, 532 U.S. at 176 (Kennedy, J., concurring). This is in direct conflict with the reasoning in Jackson. See Jackson, 475 U.S. at 632 (arguing that the legal basis of Edwards provides support for applying the same rule in Sixth Amendment cases).

147. Cobb, 532 U.S. at 176 (Kennedy, J., concurring).

148. Id. The concurrence notes that Cobb did not request the assistance of counsel during his interrogations and therefore enjoys no protection. See id.

149. Id.

150. 284 U.S. 299 (1932).

151. See Cobb, 532 U.S. at 179 (Breyer, J., dissenting).

152. Id.
definition of “offense” for Sixth Amendment purposes includes those aspects that are sufficiently factually related to the charged crime.\textsuperscript{153}

1. Guiding Principles of the Sixth Amendment Right to Counsel

The dissent noted four principles underlying the constitutional right to counsel.\textsuperscript{154} First, the Sixth Amendment right to counsel is a critical facet of providing a fair criminal prosecution.\textsuperscript{155} Second, the commencement of formal criminal proceedings attaches to the right to counsel.\textsuperscript{156} Third, after the right has attached, the police are obligated, in most cases, to interact with the accused through counsel, despite the accused’s waiver of his or her rights under the Fifth Amendment.\textsuperscript{157} Finally, there are limitations on the application of the Sixth Amendment right to counsel that permit police to continue investigations of “new or additional crimes”\textsuperscript{158} that are not the focus of the ongoing criminal proceeding.\textsuperscript{159}

2. Maintaining the Validity of the Jackson Decision

The dissent disagreed with the concurrence that \textit{Patterson v. Illinois}\textsuperscript{160} undermined \textit{Michigan v. Jackson},\textsuperscript{161} and asserted that \textit{Patterson} was
distinguishable because the accused in that case had not accepted the appointment of counsel. Moreover, the dissent rejected the proposition that the Fifth Amendment right to refuse to speak with police adequately protects the full scope of the accused's constitutional rights to the assistance of counsel.

The dissent argued that the Sixth Amendment principle underlying Jackson sought to provide fairness in criminal proceedings by not forcing the layperson to confront the government adversary absent the aid of counsel. The dissent noted that, in addition to the ruling in Jackson, Rule 4.2 of the American Bar Association Model Rules of Professional Conduct forbids lawyers from taking advantage of a person who is not assisted by counsel. Thus, the dissent asserted that the Sixth

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162. **Cobb**, 532 U.S. at 181 (Breyer, J., dissenting). In **Patterson**, the Court specifically acknowledged the significance of Patterson's lack of legal representation. **Patterson**, 487 U.S. at 290 n.3. Moreover, the Court asserted that different constitutional protections are implicated when there is representation of counsel or a request for assistance. *Id.*

163. See **Cobb**, 532 U.S. at 179-80 (Breyer, J., dissenting); see also People v. Bladel, 365 N.W.2d 56, 63 (Mich. 1984) (asserting that **Miranda** may not provide as much protection as the Sixth Amendment demands) aff'd sub nom. Michigan v. Jackson, 475 U.S. 625 (1986). *But see Colb*, supra note 35 (arguing that **Miranda** alone is enough to provide adequate protection of the defendant's rights during an interrogation).

164. **Cobb**, 532 U.S. at 180 (Breyer, J., dissenting); see also United States v. Gouveia, 467 U.S. 180, 189 (1984) (recognizing that the right to counsel has extended beyond trial to other points in the pretrial proceedings so as to level the playing field between the defendant and his expert adversary); **Johnson v. Zerbst**, 304 U.S. 458, 462-63 (1938) (pointing to the complexities of the criminal justice system as necessitating the assistance of counsel).

165. **Ann. Model Rules of Prof'L Conduct** R. 4.2 (1999) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.").

166. **Ann. Model Rules of Prof'L Conduct** R. 4.2 cmt. (1999) (commenting that the purpose of Rule 4.2 is to preserve the lawyer-client relationship in part by preventing lawyers from taking advantage of defendants); see also **Cobb**, 532 U.S. at 181 (Breyer, J., dissenting). Many states have enacted "no-contact" rules patterned after Rule 4.2. See Elkan Abramowitz & Barry A. Bohrer, *The Right to Counsel After 'Cobb': Is There Anything Left?*, 225 N.Y. L.J. 3 (2001) (discussing local no-contact rules); Greenhouse, supra note 116, at A17 (reporting that all fifty states have enacted rules limiting contact). Contacts between prosecutors and defendants are also addressed in Rule 3.8(b). **Ann. Model Rules of Prof'L Conduct** R. 3.8(b) (1996). The rule requires prosecutors to take reasonable measures assuring that defendants know they have a right to, know how to obtain, and have been given a chance to obtain counsel. *Id.* Commentary on Rule 3.8(b) states that the rule is applicable during the investigatory stage. **Ann. Model Rules of Prof'L Conduct** R. 3.8 cmt. (1996).

In 1998, Congress enacted the McDade law, which makes attorneys representing the federal government subject to state laws and rules. 28 U.S.C. § 530B (Supp. V 2000). Thus, federal prosecutors are bound by the same no-contact rules as their state counterparts. See James S. Montana, Jr. & John A. Galotto, *Right to Counsel: Courts
Amendment protections, as established in *Jackson*, are distinct and independent from the Fifth Amendment guarantees, yet equally important.\textsuperscript{167}

3. The Potential for Abuse Under the Court's Holding

Additionally, the dissent expressed concern that, due to the length and detail of criminal codes, prosecutors would be able to take advantage of the inevitable overlap of statutory provisions by charging several offenses, all stemming from the same criminal incident.\textsuperscript{168} Under the Court's ruling in *Cobb*, the police are permitted to question anyone charged with a crime about any related, although uncharged, offense without informing counsel.\textsuperscript{169} The dissent asserted that the Court's approach would negate an important facet of the Sixth Amendment protection by allowing police a manner by which to exclude counsel for the accused in interrogations.\textsuperscript{170}

\textit{Adhere to Bright-Line Limits}, CRIM. JUST., Summer 2001, at 4, 15 (explaining the application of the McDade law). Moreover, violations of statutory ethics rules by prosecutors may justify exclusion of evidence. See United States v. Hammad, 858 F.2d 834, 840-41 (2d Cir. 1988) (holding exclusion of evidence within the court's discretion where an ethical breach has occurred). The Second Circuit also asserted in *Hammad* that the ethics rule applies before indictment, as contrasted with the Sixth Amendment. See id. at 839. However, several courts are hesitant to establish a rule allowing exclusion of evidence based on breaches of ethics rules. Montana, supra at 16 (citing cases illustrating the reluctance of courts to exclude evidence due to ethics violations). Nevertheless, the harshness of the offense-specific restriction on the right to counsel may be mitigated if courts construe violations of ethics rules, similar to 4.2 and 3.8(b), as grounds for excluding evidence obtained in the absence of counsel. \textit{Id.} at 17 (arguing that courts should use these rules to provide greater protection to defendants); \textit{see also} Abramowitz, supra at 3 (noting that the no-contact rules could fill the gap after *Cobb's* limit on the Sixth Amendment right during interrogations).

167. *Cobb*, 532 U.S. at 181 (Breyer, J., dissenting); \textit{see also} Michigan v. Jackson, 475 U.S. 625, 632 (1986) (arguing that in the context of the post-arraignment interrogation, the protections of the Sixth Amendment right to counsel are just as important as the Fifth Amendment right in the context of a custodial interrogation); People v. Bladel, 365 N.W.2d 56, 68 (Mich. 1984) (noting that courts have considered the Sixth Amendment right to be equally, if not more important than the Fifth Amendment's judge-made right to counsel), aff'd sub nom. Michigan v. Jackson, 475 U.S. 625 (1986).

168. *Cobb*, 532 U.S. at 182 (Breyer, J., dissenting); \textit{see also} Greenhouse, supra note 116, at A17 (reporting the dissent's concern as to the manipulation of the interrogation and charging process).

169. \textit{See Cobb}, 532 U.S. at 182-83 (Breyer, J., dissenting); \textit{see also} Abramowitz, supra note 166 (summarizing the dissent's discussion of the problem of the ease for potential abuse by authorities under the Court's ruling); Thomas Healy, \textit{Justices Make Police Questioning Easier}, ADVOC., Apr. 3, 2001, at 16C (noting that the decision will enable police to avoid the accused's counsel).

170. *Cobb*, 532 U.S. at 183 (Breyer, J., dissenting); \textit{see also} supra note 169 and accompanying text. \textit{But see} David G. Savage, \textit{Supreme Court Clarifies Suspect's Right to
4. Questioning the Majority’s Use of Blockburger and Proposing an Alternative

The dissent also questioned the appropriateness of using the test from Blockburger v. United States\(^ {171}\) to determine the meaning of “offense” in Sixth Amendment right to counsel cases.\(^ {172}\) The dissent asserted that use of the Blockburger test would only serve to complicate the Sixth Amendment jurisprudence.\(^ {173}\) The dissent noted that, in practice, the Blockburger test has been “extraordinarily difficult” for judges and lawyers to apply in the Fifth Amendment double jeopardy context.\(^ {174}\) Moreover, the dissent argued that adopting the test into the Sixth Amendment right to counsel context would require police officers to apply Blockburger when interrogating suspects, leading to inevitable challenges charging improper application.\(^ {175}\)

Alternatively, the dissent advocated the adoption of the “closely related to” or “inextricably intertwined with” tests to define “offense.”\(^ {176}\) Under either of these concepts, the definition of “offense” encompasses factually related crimes committed during the same course of conduct as the particular crime charged.\(^ {177}\) The dissent noted that many of the lower courts defined “offense,” within the context of the Sixth Amendment, to

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\(^{171}\) Lawyer, L.A. Times, Apr. 3, 2001, at 13 (quoting Eric Freedman, a law professor of Hofstra University, as viewing the Cobb decision as a minor alteration of the law).

\(^{172}\) Cobb, 532 U.S. at 184-85 (Breyer, J., dissenting) (finding the “same elements” test unsuitable for answering the Sixth Amendment counsel question).

\(^{173}\) Id.

\(^{174}\) Id. at 185 (Breyer, J., dissenting) (acknowledging that within the practicing and academic legal communities there is disagreement in application of the test). For a specific example of the lack of consistency in applying the Blockburger test, see United States v. Woodward, 469 U.S. 105, 108 (1985) (per curiam). But see State v. Vassos, 579 N.W.2d 335, 343 (Wis. 1998) (stating that Blockburger is simple and easy to apply); Transcript of Oral Argument at 20-21, Texas v. Cobb, 532 U.S. 162 (2001) (No. 99-1702) (arguing that the “same elements” test furthers predictability and consistency).

\(^{175}\) Cobb, 532 U.S. at 185-86 (Breyer, J., dissenting) (reasoning that the police will fare no better in applying Blockburger than judges and lawyers). But see Transcript of Oral Argument, supra note 174, at 25 (suggesting that the elements test is easier for police to apply); Brief for U.S., supra note 121, at 13 (asserting that Blockburger is the proper test because its focus on elements is familiar to police).

\(^{176}\) Cobb, 532 U.S. at 186 (Breyer, J., dissenting); see also Montana, supra note 166, at 15 (recognizing the dissent’s suggestion of using the inextricably intertwined inquiry).

\(^{177}\) Cobb, 532 U.S. at 186 (Breyer, J., dissenting). See generally Larson, supra note 112, at 13-22, 25-30 (summarizing the factors considered by the courts to determine whether the right to counsel has attached for offenses arising from the same act or transaction).
include "closely related" acts. The dissent argued that either of the two alternatives would be easier to apply than the Blockburger test because of the common sense nature of the alternatives.

III. THE DIMINUTION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL RESULTING FROM TEXAS V. COBB

The Cobb Court's extension of the offense-specific limitation on the Sixth Amendment right to counsel is clearly favorable to law enforcement. The Cobb decision is consistent with the trend illustrated by Patterson v. Illinois and McNeil v. Wisconsin, which places the government's crime-solving objectives above the rights of defendants. However, by continuing down this path, the Court is undermining prior Sixth Amendment cases that provide defendants with protections afforded by the assistance of counsel.

A. Taking Away With One Hand What the Court Gave With the Other

The Court does not overrule Michigan v. Jackson, but the legal underpinnings of the decision are drastically eroded. Little remains of


179. Cobb, 532 U.S. at 187 (Breyer, J., dissenting). But see Brief for U.S., supra note 121, at 26 (arguing that the "factually related" test would be unworkable because officers are often unaware of all facts surrounding a crime, and therefore, unable to ascertain whether the right to counsel is implicated); McSpadden, supra note 92 (quoting Robert T. Scully, NAPO's Executive Director, as arguing against the "inextricably intertwined" test because it would require police to function like attorneys in making legal determinations whether when one crime might be closely related factually to another crime).

180. See Savage, supra note 170, at 13 (noting that the Cobb decision makes it easier for the police to interrogate suspects in absence of counsel); see also Andrew Tallmer, Juris Prudent: Recent Legal Cases of Interest to Law Enforcement, at http:www.jus.state.nc.us/NCJA/cobb.htm (asserting that Cobb is favorable to law enforcement because it limits the extent of the Sixth Amendment); A Weekly Summary of Snippets of Justice From the Federal Courts, Punch and Jurists Weekly Newsletter (Punch & Jurists, Ltd., New York, N.Y.), Mar. 12, 2001, at http://www.federimlaw.com/visitors/punchltd/2001/03-12-01.html (stating that Chief Justice Rehnquist's opinion in Cobb "stressed the law and order philosophy of the current Court").


183. See Garcia, supra note 16, at 72-75 (discussing the subordination of the Sixth Amendment right to counsel in the rationales of Patterson and McNeil).

184. See Cobb, 532 U.S. at 182-84 (Breyer, J., dissenting) (describing the protections of Jackson, Moulton, and Brewer that are undermined by the Court's holding).

the broad holding of Jackson, which established that the police are barred from initiating contact with the accused after the attachment or invocation of counsel. By interpreting the meaning of "offense" under the narrow Blockburger test, the Jackson Court's grant of protection from unaided interrogation after arraignment rings hollow.

The concurrence argued that the Court should have gone a step further in Cobb by overruling Jackson. Based on the opinion that Jackson prevents the free choice of the accused to confess to the police, the concurrence decries the decision as an unwise judge-made rule. However, Jackson does not prevent the accused from confessing to the police if the accused initiates contact with the police voluntarily. Jackson simply sought to prevent the police from circumventing the Sixth Amendment by prohibiting police initiated questioning in the absence of counsel at a "critical stage" of the prosecution.

B. By Rejecting the "Inextricably Intertwined" Exception, the Court Ignores Prior Case Law

In rejecting the factually related exception created by the lower courts, the Cobb Court dismissed the idea that the exception could be read into the Court's jurisprudence. However, the dissent noted that, while not

186. Cobb, 532 U.S. at 182 (Breyer, J., dissenting); see also Abramowitz, supra note 166, at 3 (noting that the Cobb decision "pulls the rug out from under" Jackson); Greenhouse, supra note 116, at 17A (reporting the precedential status of Jackson); Snippets of Justice, supra note 180 (discussing the Court's treatment of Jackson).
187. 532 U.S. at 182-83 (Breyer, J., dissenting) (arguing that the Court's decision gives the police too much latitude in questioning).
188. See Abramowitz, supra note 166, at 3 (discussing the evisceration of Jackson by the Cobb holding).
189. See Cobb, 532 U.S. at 174-76 (Kennedy, J., concurring).
190. See id.
191. See id. at 182 (Breyer, J., dissenting) (noting that a defendant can willingly go to the police and confess); see also Jeffrey M. Rosenfeld & Sheri Kliment, Right To Counsel, 89 GEO. L.J. 1485, 1486 n.1466 (2001) (explaining that Jackson allows a valid waiver if the defendant initiates communication with the authorities); Kimberly A. Crawford, The Sixth Amendment Right to Counsel: Applications and Limitations, 70 FBI L. ENFORCEMENT BULL., 27, 30 (2001) (stating that once the right to counsel is invoked, a valid waiver can be attained only if the accused initiates contact with the police).
192. See Michigan v. Jackson, 475 U.S. 625, 629-32 (1986) (asserting that the protections provided by the Sixth Amendment were designed to provide the accused with assistance when confronting the police and that the government should not attempt to evade the rights of the accused).
193. Cobb, 532 U.S. 168-171; see also Dolegowski, supra note 108, at 14 (describing the Court's rejection of Brewer and Moulton as support for an exception to McNeil); Montana, supra note 166, at 14 (criticizing the Court's decision to dispense with the exception).
addressing the exact issue of the right to counsel attaching for uncharged offenses, *Brewer v. Williams* and *Maine v. Moulton* illustrated that the Sixth Amendment implicitly assumed the right extended to factually related, but uncharged, crimes. In *Brewer*, the defendant had been arraigned on a charge of abduction and had retained counsel. While being transported to another location, the police elicited incriminating statements from Williams about the location of the abducted child's body. Subsequently, Williams was indicted for murdering the child. Williams' statements to the police were introduced as evidence in the murder trial, and he was found guilty.

The Supreme Court determined that Williams' waiver of the right to counsel was invalid, and the statements should not have been admitted. In this instance, the Sixth Amendment right to counsel had formally attached to the abduction charge. However, the Court invalidated Williams' statements regarding the uncharged murder offense. Lower courts relied on the result in *Brewer* as support for the "closely related factually" exception.

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196. Cobb, 532 U.S. at 184 (Breyer, J., dissenting); see also People v. Clankie, 530 N.E.2d 448, 451-52 (Ill. 1988) (reviewing *Brewer* and *Moulton* and concluding that "[t]he United States Supreme Court has thus apparently assumed that Sixth Amendment rights of one formally charged with an offense extend to offenses closely related to that offense").
198. Id. at 392-93. The police officer, knowing Williams to be religious, engaged him in a conversation discussing the need for the dead child to have a proper religious burial. *Id.* at 393, 403. Consequently, *Brewer* is also referred to as the "Christian Burial Speech" case. *Id.* at 392; see also *Crawford*, supra note 191, at 31 n.12; *Montana*, supra note 166, at 14; Colb, supra note 36.
199. *Brewer*, 430 U.S. at 393.
200. *Id.* at 394.
201. See *id.* at 405-06. The Court was convinced that Williams had not willingly waived his right to counsel, because his words and actions indicated a continuing reliance on his counsel. *See id.* at 404. The Court acknowledged that it was only after coercive psychological pressure from the police officer that Williams made the incriminating statements. *Id.* at 402-03. One of the concurring opinions noted that the majority's decision drew a proper distinction between good police work and outright police misconduct. *See id.* at 408 (Marshall, J., concurring).
202. See *id.* at 400-01.
203. See *id.* at 405-06.
204. See United States v. Covarrubias, 179 F.3d 1219, 1224 (9th Cir. 1999) (asserting that the Court implicitly applied the "inextricably intertwined" exception in *Brewer*), abrogated by Texas v. Cobb, 532 U.S. 162 (2001); United States v. Mitcheltree, 940 F.2d 1329, 1342 (10th Cir. 1991) (stating the *Brewer* Court recognized that the charges were "closely related"); see also Dolegowski, supra note 108, at 14 (discussing the reliance on
In *Maine v. Moulton*, the defendant was indicted on four counts of theft. Later, a co-defendant, acting on behalf of the police, questioned Moulton. Moulton made incriminating statements to the co-defendant, which were recorded and used against him at trial. The state dismissed the pending charges, but it obtained seven other indictments against Moulton, including the same previous charges and additional indictments for burglary, arson, and three other thefts. At Moulton's trial, some of the recorded statements to the co-defendant were offered into evidence. The court convicted Moulton for burglary and theft.

On appeal, the Supreme Court held that Moulton's constitutional right to counsel was violated because the police intentionally circumvented his right to have counsel present at the questioning. The Court affirmed the lower court ruling that a new trial should be granted on both the burglary and the theft charges. Moulton had not been indicted for burglary at the time the police obtained the incriminating statements; he had only been indicted for theft. Yet, the Court held the statements regarding the burglary were inadmissible because they were obtained in the absence of counsel, after the right had attached for the theft indictments. As with *Brewer*, lower courts used the rationale in

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*Brewer* by the lower courts. Prior to *McNeil*, the Supreme Court of Illinois decided that *Brewer* supported the concept that the right to counsel extends to closely factually related offenses. *People v. Clankie*, 530 N.E.2d 448, 451-52 (Ill. 1988) (explaining the Court's disposition in *Brewer* as an assumption that closely related crimes are all covered by the Sixth Amendment).

206. *Id.* at 162.
207. *Id.* at 164-65. Gary Colson, the co-defendant of Perley Moulton, agreed to testify against Moulton and cooperate in the investigation. *Id.* at 163-64.
208. *Id.* at 164-66. Moulton made the incriminating statements in a face-to-face meeting with Colson. *Id.*
209. *Id.* at 167.
210. *Id.*
211. *Id.*
212. *Id.* at 176-77. The Court acknowledged that incriminating statements obtained "by luck or happenstance" after the right to counsel has attached are still admissible against the accused. *Id.* at 176. However, in instances where it can be demonstrated that the State was reasonably certain of obtaining incriminating statements, when counsel is not present in the questioning, the statements cannot be used as evidence. *Id.* at 176 n.12; see also *United States v. Henry*, 447 U.S. 264, 270-73 (1980) (holding Henry's conviction invalid because police "deliberately elicited" incriminating statements).
213. See *Moulton*, 474 U.S. at 180.
214. See *id.* at 162.
215. See *id.* at 179-80 (discussing the Sixth Amendment limitations on the government's ability to obtain and admit evidence which has been obtained in an interrogation in the absence of counsel).
Moulton to provide a basis for the "inextricably intertwined" exception.\(^\text{216}\)

The Court refused to read Brewer and Moulton as the lower courts had because both cases predated McNeil, and neither case addressed whether the right to counsel attached for uncharged offenses "inextricably intertwined" with the charged crime.\(^\text{217}\) Yet, as argued by lower courts, the right to counsel would be easily circumvented if the police merely had to charge the accused with a related offense to facilitate questioning regarding a whole host of other connected offenses.\(^\text{218}\)

\(^\text{216}\) See United States v. Covarrubias, 179 F.3d 1219, 1223-25 (9th Cir. 1999) (finding that Moulton implied the attachment of the right to counsel to "closely related" offenses), abrogated by Texas v. Cobb, 532 U.S. 162 (2001); United States v. Melgar, 139 F.3d 1005, 1011-13 (4th Cir. 1998) (asserting that lower courts rely on Moulton in extending the right to counsel to "inextricably intertwined" offenses), abrogated by Texas v. Cobb, 532 U.S. 162 (2001); United States v. Arnold, 106 F.3d 37, 40 (3d Cir. 1997) (arguing that the Court's reversal of both the theft and the burglary convictions evidenced a recognition of the close relation of the crimes), abrogated by Texas v. Cobb, 532 U.S. 162 (2001); United States v. Carpenter, 963 F.2d 736, 740 (5th Cir. 1992) (interpreting Moulton as supporting the extension of counsel to closely intertwined offenses); In re Pack, 616 A.2d 1006, 1008-11 (Pa. Super. Ct. 1992), abrogated by Texas v. Cobb, 532 U.S. 162 (2001). Even before the creation of the offense-specific limitation, the Supreme Court of Illinois viewed Moulton as implying that the right to counsel covered closely related uncharged offenses. See People v. Clankie, 530 N.E.2d 448, 451-52 (Ill. 1988). However, Justice O'Connor argued in Moran v. Burbine that "[t]he Court [in Moulton] made clear, however, that the evidence concerning the crime for which the defendant had not been indicted -- evidence obtained in precisely the same manner from the identical suspect -- would be admissible at a trial limited to those charges." 475 U.S. 412, 431 (1986).

\(^\text{217}\) Texas v. Cobb, 532 U.S. 162, 168-171 (2001); see also Montana, supra note 166, at 14 (discussing the Court's rejection of the two cases as support for an exception); Dolegowski, supra note 108, at 14 (summarizing the Court's view of the inapplicability of Brewer and Moulton).

\(^\text{218}\) See Arnold, 106 F.3d at 41 (reasoning that the Sixth Amendment right to counsel should not be isolated from uncharged, but related crimes because the protections of the right could be avoided by the police); In re Pack, 616 A.2d at 1011 (asserting that counsel attaching for one charged offense will extend to other charges arising from the same criminal transaction in order to prevent police from circumventing the accused's right to counsel by charging additional related crimes); see also Anne Gearan, Court: Cops Can Probe Without Lawyer, Am. Sovereign, at http://www.americansovereign.com/articles/righttocounsel.htm (quoting Lawrence S. Goldman, vice president of the National Association of Criminal Defense Lawyers (NACDL), as arguing that Cobb gives the government the power to evade a defendant's right to counsel). But see id. (quoting Stephen McSpadden, counsel for NAPO, as asserting that police need to have the ability to question on new leads, and the fact that a crime is closely related should not jeopardize the admissibility of the statement); McSpadden, supra note 92 (advancing NAPO's position that suppressing voluntary statements of the accused would greatly reduce crime resolution and efficiency); Brief for U.S., supra note 121, at 26-8 (arguing that voluntary confessions are essential to police efforts to solve crime and that there is no justification for interfering with this interest by extending the right to counsel to uncharged related offenses).
C. Adopting the Inadequacies of the Blockburger Test Into the Sixth Amendment Context Threatens the Right to Counsel

The Cobb Court’s adoption of the Blockburger test for Sixth Amendment jurisprudence is problematic.\textsuperscript{219} As noted by the dissent, the Blockburger test has not been applied consistently in double jeopardy cases.\textsuperscript{220} Moreover, the Blockburger test has been criticized in both case law\textsuperscript{221} and legal commentary.\textsuperscript{222} Chief Justice Rehnquist conceded that the test is “a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.”\textsuperscript{223} Additionally, the Court’s view of the Blockburger test has not been consistent.\textsuperscript{224}

Justice Brennan advocated a “same transaction”\textsuperscript{225} approach in determining the meaning of “offense” in the Fifth Amendment Double Jeopardy Clause context.\textsuperscript{226} The Court has expressly rejected adoption of

\textsuperscript{219.} Cobb, 532 U.S. at 184-85 (Breyer, J. dissenting); see also McNeil v. Wisconsin, 501 U.S. 171, 187 (1991) (Stevens, J., dissenting) (noting the Court’s lack of clarity in defining the limits of the offense-specific rule and asserting a hope that the Court would not choose to fashion the boundaries after the double jeopardy test); Montana, supra note 166, at 14-5 (arguing that the Court’s use of Blockburger is ill-conceived because of the formalistic nature of the test).

\textsuperscript{220.} Cobb, 532 U.S. at 185 (Breyer, J., dissenting) (giving an example of the inconsistency resulting from an application of the Blockburger test by the Supreme Court); compare United States v. Dixon, 509 U.S. 688, 697-700 (1993) (concluding under the Blockburger test that the crime of contempt constitutes the same offense as the underlying crime) with Dixon, 509 U.S. at 716-720 (Rehnquist, C.J., concurring in part and dissenting in part) (identifying the two crimes as separate offenses after applying the Blockburger test).

\textsuperscript{221.} See State v. Vassos, 579 N.W.2d 35, 41-43 (Wis. 1998) (Bradley, J., concurring) (arguing that the Blockburger test is inadequate to protect against double jeopardy); People v. Robideau, 355 N.W.2d 592, 603 (Mich. 1984) (rejecting the Blockburger test as questionable and non-determinative of legislative intent behind the meaning of “offense”).

\textsuperscript{222.} See Akhil Reed Amar, Double Jeopardy Law Made Simple, 106 YALE L.J. 1807, 1814 (1997) (“Blockburger, it seems, is a mess, legally and logically.”); Pamenter, supra note 126, at 596 (concluding that the Court’s return to the original Blockburger test is too narrow of an interpretation of defendants’ rights under the Fifth Amendment Double Jeopardy Clause).


\textsuperscript{224.} See Grady v. Corbin, 495 U.S. 508, 510 (1990) (establishing a two-prong analysis including the Blockburger test, and the additional inquiry of whether the same conduct proved in one prosecution is used to establish an essential element of the second offense in the second prosecution), overruled by United States v. Dixon, 509 U.S. 688 (1993). But see Dixon, 509 U.S. at 704 (overruling Grady and expressly rejecting the same conduct inquiry as inconsistent with the Court’s jurisprudence).

\textsuperscript{225.} Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring) (arguing that any crimes resulting from a single act, or transaction should be considered the same offense for the purposes of prosecution and the double jeopardy protection).

\textsuperscript{226.} See id.
the transaction test. However, in \textit{Grady v. Corbin}, the Court, in an opinion written by Justice Brennan, adopted a same-conduct inquiry to be added to the traditional \textit{Blockburger} test. Under this concept, a second prosecution would not be permitted if, in an effort to prove an essential element of the second offense, the prosecution would have to prove conduct constituting the prior offense already prosecuted. Nevertheless, the Court overruled \textit{Grady} in \textit{United States v. Dixon} and reestablished the single analysis of \textit{Blockburger}.

The "closely related" alternative is predicated on a similar consideration of the conduct involved in a single criminal transaction. Several of the lower courts that developed the "inextricably intertwined" exception considered the conduct involved to be a crucial element in determining whether the exception applies. A rule that considers the underlying conduct of a single criminal transaction when determining the

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\item \textsuperscript{227} Garrett v. United States, 471 U.S. 773, 790 (1985); see also Pamenter, supra note 126, at 596 (discussing the Court's refusal to recognize the "same transaction" test).
\item \textsuperscript{228} 495 U.S. 508, 523 (1990) (holding that, because of the Double Jeopardy Clause, the prior conviction for drunk driving and failing to stay on the correct side of the road barred prosecution for manslaughter, homicide, and assault as conduct from the two convicted offenses would be used to prove the later three crimes), overruled by United States v. Dixon, 509 U.S. 688 (1993).
\item \textsuperscript{229} \textit{Grady}, 495 U.S. at 510; see also Pamenter, supra note 126, at 581-82 (summarizing the Court's alteration of the \textit{Blockburger} analysis).
\item \textsuperscript{230} \textit{Grady}, 495 U.S. at 521-22 (discussing the proper inquiry as to proof of conduct in addition to the \textit{Blockburger} test).
\item \textsuperscript{231} 509 U.S. 688 (1993) (holding that \textit{Grady}'s same conduct test was wrong, and by overruling the decision, prosecution of some counts against Dixon were not barred).
\item \textsuperscript{232} See Dixon, 509 U.S. at 704 (rejecting \textit{Grady} as lacking precedential support). \textit{But see id.} at 749-61 (Souter, J., concurring in part and dissenting in part) (citing \textit{In re Neilson}, 131 U.S. 176 (1889), Harris v. Oklahoma, 433 U.S. 682 (1977) (per curiam), and Illinois v. Vitale, 447 U.S. 410 (1980), as support for the rationale and holding in \textit{Grady}).
\item \textsuperscript{233} See Texas v. Cobb, 532 U.S. 162, 186 (2001) (Breyer, J., dissenting); see also United States v. Mitcheltree, 940 F.2d 1229, 1342-43 (10th Cir. 1991) (noting an instance where the police violate a defendant's right to counsel).
\item \textsuperscript{234} See United States v. Covarrubias, 179 F.3d 1219, 1225 (9th Cir. 1999) (articulating the factors to be considered in whether the exception applies: facts, circumstances, conduct, locus of the crime, timing, and victim), abrogated by Texas v. Cobb, 532 U.S. 162 (2001); United States v. Melgar, 139 F.3d 1005, 1014 (4th Cir. 1998) (describing the "closely related" to exception as requiring the same victims, place, conduct and time), abrogated by Texas v. Cobb, 532 U.S. 162 (2001); United States v. Arnold, 106 F.3d 37, 42 (3d Cir. 1997) (listing factors to consider for the "closely related" exception including: witnesses, facts and circumstances, time, and conduct), abrogated by Texas v. Cobb, 532 U.S. 162 (2001).}
\end{itemize}
meaning of the term "offense" for the purposes of the constitutional right to counsel "comports with common sense." Moreover, Cobb argued that defining "offense" to include factually related offenses with the same underlying conduct would aid in preventing the police from intentionally trying to evade the Sixth Amendment counsel guarantees. The Court criticized Cobb for providing no support for this "parade of horribles." However, the dissent noted a valid concern that law enforcement officials would develop ways to circumvent the accused's right to counsel by relying on overlapping statutory language. The FBI advocates finding ways to circumvent suspects' rights:

[F]ollowing the Supreme Court's decision in Cobb, agencies should not be reluctant to engage in creative charging. If there is probable cause to believe that one individual has committed numerous crimes, agencies can charge that individual, secure their [sic] arrest, and proceed with the prosecution on one crime, thereby allowing continued investigation of other separate offenses unhampered by Sixth Amendment protections. In light of suggested FBI tactics, the dissent is justified in worrying that the government may view a single criminal incident as violating a vast number of criminal offenses, allowing for greater latitude in questioning suspects.

235. See Cobb, 532 U.S. at 187 (Breyer, J., dissenting); see also Montana, supra note 166, at 15 (characterizing the dissent's approach as a sensible alternative to Blockburger).

236. See Cobb, 532 U.S. at 182-83 (Breyer, J., dissenting); see also Arnold, 106 F.3d at 40-1 (reasoning that the right to counsel should extend to uncharged, but related, crimes to ensure the protections of the right could not be avoided by the police); In re Pack, 616 A.2d 1006, 1011 (Pa. Super. Ct. 1992) (arguing against a rule which would allow police to circumvent the accused's right to counsel by charging additional related crimes).

237. Cobb, 532 U.S. at 171. During oral argument before the Court, Cobb's counsel argued that limiting the right only to the charged offense would allow for increased police contact with uncharged defendants, thereby increasing the possibility for abuse. See Transcript of Oral Argument, supra note 174, at 40-3.

238. See Cobb, 532 U.S. at 182 (Breyer, J., dissenting); see also Gearan, supra note 218 (quoting the vice president of NACDL as saying that the ruling promotes the circumvention of the right to counsel).

239. Crawford, supra note 191, at 31 (emphasis added) (footnote omitted). For example, the document advocates the use of a cell mate for questioning the accused, without counsel, regarding uncharged related offenses as a creative charging technique. Id. Moreover, because of the leeway provided by Cobb, the FBI stresses that policies and practices of law enforcement agencies should be crafted as to maximize obtaining confessions. See id.

240. Cobb, 532 U.S. at 182-83 (Breyer, J., dissenting).
D. The Implications of Cobb for Defense Counsel

Earlier Supreme Court cases recognized the importance of counsel for the accused. The Court viewed the right to counsel as an integral element of ensuring fairness in the criminal justice system. However, the Court’s decision in Patterson v. Illinois framed the assistance of counsel at a post-indictment interrogation as being practically superfluous. Through the establishment of McNeil’s offense-specific rule, which narrowed the application of the right further, the Court seemed to indicate that the importance of counsel diminished at the point where the government commenced criminal proceedings.

The Cobb decision further reinforced the idea that the role of counsel is less important by extending the scope of the offense-specific rule. The concurrence implied that counsel’s presence hinders effective law enforcement, because the presence of counsel impedes police and voluntary defendant confessions. Not only is the importance of counsel severely diminished after Cobb, but defense counsel must now advise the accused as to every possible danger involved with talking to the police regarding any subject matter.

IV. CONCLUSION

In reaffirming McNeil’s offense-specific rule, the Cobb Court’s clarification of when the right to counsel attaches for related, but
uncharged offenses, removes vital protections provided by the Sixth Amendment. By striking the balance in favor of crime resolution, the Court allows government authorities to question a person regarding an uncharged crime that may have occurred simultaneously with the charged offense. In applying the *Blockburger* test to determine when the right to counsel attaches for uncharged offenses, the Court allows all of the *Blockburger* test’s inconsistencies and inadequacies to complicate the Sixth Amendment right to counsel jurisprudence. Instead, the “inextricably intertwined” test should provide the framework for determining whether the right to counsel, which has attached for a charged offense, extends to an uncharged offense. The “inextricably intertwined” inquiry would reduce the potential for police circumvention of the defendants’ rights.

The Court’s decision in *Texas v. Cobb* does not advance the protections guaranteed by the Sixth Amendment right to counsel. Instead, the decision inhibits effective assistance and advising by defense counsel. More importantly, the ruling diminishes the accused’s right to counsel under the Sixth Amendment by applying the *Blockburger* test and narrowly construing the meaning of “offense,” so that the right only attaches to charged offenses.