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BLURRING THE LINE: IMPACT OF OFFENSE-SPECIFIC SIXTH AMENDMENT RIGHT TO COUNSEL

Texas v. Cobb, 532 U.S. 162 (2001).

I. INTRODUCTION

In *Texas v. Cobb*,¹ the Supreme Court held that the right to counsel as provided for in the Sixth Amendment to the United States Constitution² attaches only to charged offenses, and there is no exception for crimes that are uncharged, yet “factually related” to a charged offense.³ In a 5–4 decision, the Court reasoned that a suspect’s Constitutional rights do not override the government’s interests in being able to investigate related crimes,⁴ and that the suspect’s rights are sufficiently protected by reading him his *Miranda* warnings.⁵ In addition, the Court held that the test set out in *Blockburger v. United States*⁶ should be applied to determine whether offenses should be considered the same offense for purposes of the Sixth Amendment.⁷ Generally, the *Blockburger* test states that if a different fact is needed to prove the offenses, then they cannot be considered the same offense.⁸

This Note argues that although the decision in *Cobb* follows past Supreme Court decisions,⁹ the Court failed to recognize the impact

¹ 532 U.S. 162 (2001).

² U.S. CONST. amend. VI.

³ *Cobb*, 532 U.S. at 167. Courts that have examined this exception use the terms “inextricably intertwined,” “closely related,” and “factually related” interchangeably. See *Commonwealth v. Rainwater*, 681 N.E.2d 1218, 1223 n.5 (Mass. 1997).

⁴ *Cobb*, 532 U.S. at 171–72.

⁵ *Id.* at 171.

⁶ 284 U.S. 299 (1932).

⁷ *Cobb*, 532 U.S. at 173.

⁸ *Blockburger*, 284 U.S. at 304.

⁹ See, e.g., *McNeil v. Wisconsin*, 501 U.S. 171, 175–76 (1991) (holding Sixth Amendment right attached only to the charged offense, and the Fifth Amendment right is not automatically invoked for that offense).

this decision would have in obliterating the Sixth Amendment right to counsel.¹⁰ Further, this Note examines issues raised by the dissent that could have potentially impacted the Court's decision or that may have implications in the future.¹¹ In addition, this Note considers that the Court imposed the rule with a purpose of increasing the ease of applying the Sixth Amendment right to counsel, instead of choosing a standard with exceptions that would ensure fairness and protection of the accused's rights.¹²

II. BACKGROUND

A. HISTORY AND PURPOSE BEHIND THE RIGHT TO COUNSEL

The right to counsel has arisen out of two different Constitutional Amendments.¹³ The right is explicitly stated in the Sixth Amendment to the U.S. Constitution: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."¹⁴ In addition, the right has arisen from case law interpreting the provision in the Fifth Amendment which states, "No person . . . shall be compelled in any criminal case to be a witness against himself."¹⁵

From the beginning of the cases discussing the Sixth Amendment right to counsel, there has been a tension between protecting the accused's Constitutional rights and allowing the authorities the leeway they need to investigate crimes.¹⁶ Throughout much of the history of the right to counsel jurisprudence, the majorities generally expanded the scope of the right to counsel to protect the rights of the accused.¹⁷ However, beginning in 1988, the focus of the Supreme Court switched from protecting the interests of the accused to facilitating the government's interest in investigating crimes through conversations with the suspect.¹⁸

¹⁰ See *infra* Part VI.

¹¹ *Id.*

¹² *Id.*

¹³ See U.S. CONST. amend. V; U.S. CONST. amend. VI.

¹⁴ U.S. CONST. amend. VI.

¹⁵ U.S. CONST. amend. V. See *Miranda v. Arizona*, 384 U.S. 436, 442 (1966).

¹⁶ See, e.g., *Maine v. Moulton*, 474 U.S. 159, 179–80 (1985) (stating that the police have an interest in investigating crimes, but that interest is limited by the rights of the accused).

¹⁷ See, e.g., *Michigan v. Jackson*, 475 U.S. 625, 636 (1986) (stating a suspect's waiver of the right to counsel is not valid when the police initiate the conversations).

¹⁸ Compare *Patterson v. Illinois*, 487 U.S. 285 (1988), with *Michigan v. Jackson*, 475

The history of the Sixth Amendment right to counsel can be traced back to *Massiah v. United States*, which was decided in 1964.¹⁹ In that case, the petitioner and a co-defendant were charged with possession of narcotics aboard a United States vessel.²⁰ After being charged, the co-defendant agreed to cooperate with government agents and allowed a conversation with the petitioner to be monitored.²¹ During this conversation, the petitioner made incriminating statements that were admitted in the petitioner's trial, resulting in his conviction.²² The Court held that allowing those statements was a violation of the Sixth Amendment and that the statements should have been suppressed.²³ However, even at this early date, the dissenters were urging that the right to counsel had extended too far, since the accused was never denied access to counsel.²⁴

Two years later, the Supreme Court decided the most significant case to discuss the Fifth Amendment right to counsel, *Miranda v. Arizona*.²⁵ In doing so, the Court held that statements obtained from defendants who were not fully warned of their Constitutional rights were not admissible because they violated the Fifth Amendment right to be free from compelled self-incrimination.²⁶ The overriding policy behind this decision was to respect the dignity and integrity of United States citizens.²⁷ As a consequence, if a defendant indicates to investigators that he would like to speak to an attorney, the questioning must then stop, and the defendant can refrain from answering any more questions without an attorney being present.²⁸

The next important case discussing the Sixth Amendment right

U.S. 625 (1986). In the years between *Jackson* and *Patterson*, the composition of the Court changed, with Justices Kennedy and Scalia replacing Chief Justice Burger and Justice Powell. Justices Rehnquist and O'Connor, members of the dissent in *Jackson*, gained the new majority in *Patterson* with the addition of the recently appointed Justices Kennedy and Scalia, and also Justice White, who had been a member of the majority in *Jackson*.

¹⁹ 377 U.S. 201 (1964).

²⁰ *Id.* at 202.

²¹ *Id.* at 202-03.

²² *Id.* at 203.

²³ *Id.* at 205-06.

²⁴ *Id.* at 209.

²⁵ 384 U.S. 436 (1966).

²⁶ *Id.* at 444.

²⁷ *Id.* at 460.

²⁸ *Id.* at 444-45.

to counsel was *Brewer v. Williams*²⁹ in 1977. In *Brewer*, the defendant was charged with abducting a child, who was still missing at the time of his arrest.³⁰ After his arrest and arraignment, the defendant was represented by counsel in both Davenport and Des Moines, Iowa.³¹ While the defendant was being transported from Davenport to Des Moines, unaccompanied by an attorney, one of the police officers continually made remarks regarding the right of the parents to have a Christian burial for the child.³² Because of these remarks, the deeply religious defendant³³ eventually made incriminating statements and led the police officers to the girl's body.³⁴

Relying on *Massiah*, the Supreme Court stated that Williams was entitled to counsel under the Sixth Amendment.³⁵ However, the issue was whether Williams voluntarily waived this right to counsel.³⁶ When the state court decided that Williams had waived this right, it relied on the length of time of the trip, the general circumstances, and the fact that Williams did not assert a desire not to speak without counsel.³⁷ However, the Supreme Court found that the supposed waiver was not an intentional relinquishment of his right to counsel and granted him a new trial.³⁸ The Court, however, declined to hold that the Sixth Amendment right to counsel could not be waived, only that it had not been waived in this situation.³⁹

Brewer was controversial, eliciting a concurrence and two separate dissents. Chief Justice Burger authored the most significant dissent and stated that, although following *Massiah* would suppress all evidence obtained in violation of the Sixth Amendment, a blanket ex-

²⁹ 430 U.S. 387 (1977).

³⁰ *Id.* at 390.

³¹ *Id.* at 391.

³² *Id.* at 392-93. The officer also stressed the fact that the weather was poor, and the chances of finding the girl's body after more snow had fallen would decrease significantly. *Id.*

³³ *Id.* at 403.

³⁴ *Id.* at 393. In allowing the incriminating statements to be presented at trial, the state court assumed that this "Christian burial speech" constituted an interrogation. *Id.* at 400.

³⁵ *Id.* at 401.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 404-06. The Court based its decision on the fact that Williams consulted two different attorneys and told the detective during the car ride that he would tell the whole story after speaking to his attorney. *Id.*

³⁹ *Id.* at 405-06.

clusionary rule should not be adopted.⁴⁰ Evidence should only be suppressed when the conduct of the police officers is so egregious that use of the evidence would “imperil the values [of] the Amendment.”⁴¹ Justice White’s separate dissent also stated that excluding the testimony in this case expanded the Sixth Amendment too broadly.⁴²

The next case dealing with the right to counsel was *Edwards v. Arizona*—however, this case dealt with the Fifth Amendment right to counsel.⁴³ The Court said that in order for a suspect to waive his Fifth Amendment right to counsel, the waiver must be a “knowing and intelligent relinquishment or abandonment of a known right or privilege,”⁴⁴ and the defendant must be the one to initiate the conversation or exchange with the police.⁴⁵

Although there were no dissents in *Edwards*, the concurring justices would not put such stringent requirements on waiver in different factual scenarios.⁴⁶ Chief Justice Burger stated that the dispositive fact in this case was that the police told the suspect he “had” to speak with the officers, and therefore his waiver was not voluntary.⁴⁷ However, Chief Justice Burger also stated that the determination of a valid, voluntary waiver depends on the facts and circumstances of each individual case, “including the background, experience, and conduct of the accused.”⁴⁸ Justice Powell, with whom Justice Rehnquist joined concurring, stated he would not impose the requirement that contact be initiated by the accused in order to waive the right to counsel.⁴⁹

The Supreme Court next addressed an issue that dealt with the Sixth Amendment right to counsel in 1985.⁵⁰ The specific issue in *Maine v. Moulton* was whether the Sixth Amendment right to counsel

⁴⁰ *Id.* at 425–26 (Burger, C.J., dissenting).

⁴¹ *Id.* at 420–26 (Burger, C.J., dissenting).

⁴² *Id.* at 437–38 (White, J., dissenting).

⁴³ 451 U.S. 477 (1981).

⁴⁴ *Id.* at 482.

⁴⁵ *Id.* at 485.

⁴⁶ *See id.* at 487 (Burger, C.J., concurring) (“I do not agree that either any constitutional standard . . . calls for a special rule as to how an accused in custody may waive the right to be free from interrogation.”); *see id.* at 491 (Powell, J., concurring) (stating initiation could be relevant, but should not be the *sine qua non*).

⁴⁷ *Id.* at 488 (Burger, C.J., concurring).

⁴⁸ *Id.* (Burger, C.J., concurring) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

⁴⁹ *Id.* at 489–90 (Powell, J., concurring).

⁵⁰ *Maine v. Moulton*, 474 U.S. 159 (1985).

was violated when statements made by the defendant to a co-defendant, who was cooperating with the police, were admitted at trial.⁵¹ The Court held that the State violated the Sixth Amendment by “knowingly circumventing the accused’s right to have counsel present in a confrontation between the accused and a state agent.”⁵² The incriminating statements obtained in this manner should not have been allowed into evidence.⁵³ In the opinion, however, the Court alluded to the offense-specific nature of the right to counsel by stating that the statements could be admitted in a prosecution for charges for which the adversary proceedings had not yet begun, but they could not be admitted in the trial for crimes that the defendant had already been charged with.⁵⁴

This case also marked some of the strongest language in support of the policy behind the right to counsel.⁵⁵ The Court stated that the average criminal does not have the professional legal skills to protect himself,⁵⁶ and therefore the right to counsel under the Sixth Amendment is “indispensable to the fair administration of our adversarial system of criminal justice.”⁵⁷ The state thus has an affirmative obligation to respect the accused’s choice to have counsel,⁵⁸ but the Sixth Amendment is not violated when the State obtains a confession by luck or coincidence.⁵⁹ In addition, the State’s interest in gathering information should not be frustrated by the attachment of the Sixth Amendment when the defendant has not yet been charged.⁶⁰

The dissent was authored by Chief Justice Burger, and joined by Justices White, Rehnquist, and O’Connor in part,⁶¹ who are essentially the majority in *Cobb*.⁶² They would impose a standard that, if there was a legitimate reason for the questioning of the defendant, then there would be no Sixth Amendment violation.⁶³ They also

⁵¹ *Id.* at 161.

⁵² *Id.* at 176.

⁵³ *Id.* at 168.

⁵⁴ *Id.* (citing *State v. Moulton*, 481 A.2d 155, 161 (Me. 1984)).

⁵⁵ *See id.* at 168–69.

⁵⁶ *Id.* at 169 (citing *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938)).

⁵⁷ *Id.* at 168–69.

⁵⁸ *Id.* at 171.

⁵⁹ *Id.* at 176.

⁶⁰ *Id.* at 180.

⁶¹ *Id.* at 181 (Burger, C.J., dissenting).

⁶² *Texas v. Cobb*, 532 U.S. 162, 163 (2001) (Rehnquist, C.J., writing for the majority, joined by O’Connor, Scalia, Kennedy, and Thomas, JJ.).

⁶³ *Maine v. Moulton*, 474 U.S. 159, 185 (1985) (Burger, C.J., dissenting).

stated that they did not want the Sixth Amendment to unnecessarily protect criminals who are charged with multiple offenses,⁶⁴ and they did not want to broaden the right to counsel any more than it was under *Massiah*.⁶⁵

The very next year, the Court applied the doctrine regarding waiver from *Edwards* to the Sixth Amendment right to counsel,⁶⁶ stating that the Sixth Amendment right deserved as much protection as the right under the Fifth Amendment.⁶⁷ In *Michigan v. Jackson*, the Court decided that a defendant cannot waive his right to counsel under the Sixth Amendment when the police initiate the conversation.⁶⁸ In *Jackson*, the defendants had requested counsel at their arraignments, but the police initiated contact with them again before they were allowed to speak with their counsel.⁶⁹ The Court stated that as soon as the right to counsel attaches, counsel is assumed to be requested for every stage of the litigation.⁷⁰ Since the right to counsel attached at their arraignments,⁷¹ the defendants could not have waived their Sixth Amendment right to counsel during any subsequent police-initiated interrogations.⁷² The decision implies, however, that the defendant must affirmatively make a request for counsel at some point and not merely allow the right to counsel to attach to the offense.⁷³

Again, the same Justices who dissented in *Moulton* joined in a dissent that stated *Edwards* should not be applied to cases under the Sixth Amendment, absent evidence that police officers routinely violate the Sixth Amendment right to counsel.⁷⁴ The dissent also states that the holding is only limited to situations where the defendant asserts his right to counsel, not situations where the right simply attaches without an assertion.⁷⁵ However, unlike the Fifth Amendment, the Sixth Amendment right to counsel does not depend on an invoca-

⁶⁴ See *id.* at 186.

⁶⁵ See *id.* at 190.

⁶⁶ *Michigan v. Jackson*, 475 U.S. 625, 636 (1986).

⁶⁷ *Id.* at 631.

⁶⁸ *Id.* at 636.

⁶⁹ *Id.* at 627–28.

⁷⁰ *Id.* at 632–33.

⁷¹ *Id.* at 628.

⁷² *Id.* at 636.

⁷³ See *id.*

⁷⁴ *Id.* at 639 (Rehnquist, J., dissenting).

⁷⁵ *Id.* at 640.

tion by the defendant in order to attach.⁷⁶

The decision in *Patterson v. Illinois* in 1988 marked a shift from the Court's expansion of the right to counsel to the contraction of that right.⁷⁷ The dissenters who had been arguing for years to limit the right to counsel finally gained a majority.⁷⁸ The majority in *Patterson* stated that the petitioner had never asserted his Sixth Amendment right to counsel after his indictment.⁷⁹ That lack of assertion implied he made the decision not to be represented by counsel, and the statements he made to the police could be admitted at trial.⁸⁰ Again, this is seemingly contrary to the idea in *Brewer* that the Sixth Amendment right attaches without an invocation by the accused.⁸¹ The petitioner argued that he did not waive his right to counsel, but the Court said that the *Miranda* warnings were sufficient to alert the petitioner of his rights, and therefore the waiver was valid.⁸²

The dissents in this case, which had formerly been the majority, addressed three issues that would arise again in *Cobb*.⁸³ They first stated that since it is unethical for an attorney to contact the adversary's client without counsel in civil proceedings, the same rule should be applied in criminal proceedings.⁸⁴ They also stated that while the majority assumes that the *Miranda* warnings were sufficient to warn the defendant of the danger of proceeding without counsel, there are many things that an attorney can do for a client above advising him to remain silent, of which the defendant may not be aware.⁸⁵ Further, the dissent stated that the adverse party cannot ethically provide the accused with advice, particularly related to whether or not the accused should have counsel present.⁸⁶

The contraction of the Sixth Amendment right to counsel contin-

⁷⁶ See *Brewer v. Williams*, 430 U.S. 387, 404 (1977).

⁷⁷ 487 U.S. 285 (1988).

⁷⁸ See *supra* note 18.

⁷⁹ *Patterson*, 487 U.S. at 290-91.

⁸⁰ *Id.* at 291.

⁸¹ See *Brewer*, 430 U.S. at 404.

⁸² *Patterson*, 487 U.S. at 293.

⁸³ See *id.* at 301-11 (Stevens, J., dissenting).

⁸⁴ *Id.* at 301 (Stevens, J., dissenting). See also MODEL RULES OF PROF'L CONDUCT R. 4.2 (1984) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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.").

⁸⁵ *Patterson*, 487 U.S. at 307-08 (Stevens, J., dissenting).

⁸⁶ *Id.* at 309-10.

ued in *McNeil v. Wisconsin*.⁸⁷ The issue presented to the Court in that case was whether the defendant's request for counsel on a charged offense under the Sixth Amendment establishes an invocation of his Fifth Amendment right to counsel, thus preventing police-initiated interrogation on unrelated and uncharged offenses.⁸⁸ The Court held that the Sixth Amendment right to counsel had attached only with respect to the charged offense, and the Fifth Amendment right had not automatically been invoked for the other offenses.⁸⁹ Therefore, incriminating statements made about other uncharged crimes are admissible at the trial of those offenses.⁹⁰ The Court also stated that the purpose behind the Sixth Amendment is to "protec[t] the unaided layman at critical confrontations with his expert adversary," the government, *after* 'the adverse positions of government and defendant have solidified' with respect to a particular alleged crime."⁹¹

B. LOWER COURT EXCEPTIONS TO THE RIGHT TO COUNSEL

The decision in *McNeil* laid the foundation for the decision made in *Cobb*. However, in the years between *McNeil* and *Cobb*, several federal appellate courts created exceptions to the offense-specific nature of the right to counsel.⁹² The two most common exceptions are that the uncharged offense was "inextricably intertwined" with the charged offense such that the right to counsel should have attached to both crimes,⁹³ and that the government had circumvented the right to counsel by interrogating the defendants without counsel present.⁹⁴

The first exception arose out of *Brewer* where the Court implicitly used it in order to suppress statements regarding a murder when the defendant had only been charged with an abduction.⁹⁵ However,

⁸⁷ 501 U.S. 171 (1991).

⁸⁸ *Id.* at 175.

⁸⁹ *See id.* at 175–77. In fact, the Court expressly refrained from stating that an assertion of the Sixth Amendment right to counsel necessarily implies an assertion of the Fifth Amendment right to counsel. *Id.* at 180.

⁹⁰ *Id.* at 175–76.

⁹¹ *Id.* at 177–78 (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)).

⁹² *See, e.g., United States v. Covarrubias*, 179 F.3d 1219 (9th Cir. 1999); *United States v. Melgar*, 139 F.3d 1005 (4th Cir. 1998); *United States v. Arnold*, 106 F.3d 37 (3d Cir. 1997); *United States v. Doherty*, 126 F.3d 769 (6th Cir. 1997); *United States v. Williams*, 993 F.2d 451 (5th Cir. 1993); *Commonwealth v. Rainwater*, 681 N.E.2d 1218 (Mass. 1997); *In re Pack*, 616 A.2d 1006 (Pa. Super. Ct. 1992).

⁹³ *Covarrubias*, 179 F.3d at 1223.

⁹⁴ *Id.*

⁹⁵ *See Brewer v. Williams*, 430 U.S. 387 (1977). *See also Covarrubias*, 179 F.3d at 1224.

deciding when to apply the exception was highly factualized, depending on the circumstances relating to the conduct involved, the identity of the persons involved and the timing, motive, and location of the crimes.⁹⁶

The second exception, commonly termed "circumventing the Sixth Amendment," has also been considered in courts of appeals cases.⁹⁷ The "circumventing the Sixth Amendment" exception applies when there is "evidence of deliberate police misconduct in the process of eliciting the incriminating statements."⁹⁸ Many courts have not had the occasion to consider this exception, however, since they have relied primarily on the "closely related" exception.⁹⁹

C. THE DEFINITION OF "OFFENSE"

The Supreme Court had its first opportunity, in *Cobb*, to consider what constitutes an "offense" for the purposes of right to counsel.¹⁰⁰ The Supreme Court had considered this issue in terms of double jeopardy, but not the right to counsel.¹⁰¹ In the double jeopardy context, the Court applies the test from *Blockburger v. United States*, which states, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied . . . is whether each provision requires proof of a fact which the other does not."¹⁰² In *Blockburger*, the Court found that although there was only one transaction (a drug sale), that sale constituted a violation of two statutory sections and, therefore, there were two offenses.¹⁰³

III. STATEMENT OF FACTS

In December 1993, while Lindsey Owings was at work, his home was burglarized and his wife Margaret and 16-month-old daughter Kori Rae disappeared.¹⁰⁴ Based on an anonymous tip, the police questioned Raymond Levi Cobb, who lived across the street

⁹⁶ *Covarrubias*, 179 F.3d at 1225.

⁹⁷ See, e.g., *United States v. Arnold*, 106 F.3d 37 (3d Cir. 1997); *United States v. Martinez*, 972 F.2d 1100 (9th Cir. 1992).

⁹⁸ *Arnold*, 106 F.3d at 41.

⁹⁹ See, e.g., *Covarrubias*, 179 F.3d at 1223.

¹⁰⁰ *Texas v. Cobb*, 532 U.S. 162, 173 (2001).

¹⁰¹ See *Blockburger v. United States*, 284 U.S. 299 (1932).

¹⁰² *Id.* at 304.

¹⁰³ *Id.*

¹⁰⁴ *Cobb*, 532 U.S. at 164-65.

from the Owings, regarding the burglary and disappearances.¹⁰⁵ Cobb denied any knowledge of, or involvement, in either the burglary or the disappearances.¹⁰⁶

In July 1994, Cobb was under arrest for an unrelated offense.¹⁰⁷ At that time, the police questioned him again with respect to the incident at the Owings'.¹⁰⁸ Cobb then gave a written statement confessing to the burglary but continued to deny any involvement in the disappearance of Margaret and Kori Rae.¹⁰⁹ Cobb was subsequently indicted for only the burglary charge.¹¹⁰

In August 1994, Hal Ridley was appointed to represent Cobb on the burglary charge.¹¹¹ Following his appointment as Cobb's counsel, investigators asked Ridley for permission to question Cobb regarding the disappearances.¹¹² At that time, Cobb was not a suspect in the murders, but the police believed he knew more than he was telling.¹¹³ Ridley gave his permission to the police and stated that it was not necessary for him to be there.¹¹⁴ This situation occurred again in September 1995.¹¹⁵ Throughout this entire time frame, Cobb continued to deny any involvement in the disappearances.¹¹⁶

In November 1995, Cobb was free on bond and living with his father in Odessa, Texas.¹¹⁷ On November 11, Charles Cobb, Raymond's father, contacted the Walker County Sheriff's Office and stated that his son had confessed to killing Margaret and Kori Rae during the burglary.¹¹⁸ Cobb's father gave a statement to that effect to the police in Odessa, through which they obtained a warrant for Cobb's arrest.¹¹⁹ On November 12, the detectives arrested Cobb, read

¹⁰⁵ *Id.* at 165.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Petitioner's Brief at 3 n.1, *Texas v. Cobb*, 532 U.S. 162 (2001) (No. 99-1702), available at 2000 WL 1236042.

¹¹⁴ *Id.* at 3.

¹¹⁵ *Cobb*, 532 U.S. at 165.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*; Petitioner's Brief at 3, *Cobb* (No. 99-1702), available at 2000 WL 1236042.

¹¹⁹ *Cobb*, 532 U.S. at 165.

him his *Miranda* rights and took him into custody.¹²⁰

After taking Cobb into custody, the Odessa detectives received permission from the Walker County Sheriff's Office to question Cobb; the detectives were not aware at that point that he was represented by counsel on the burglary charge.¹²¹ After *Mirandizing* Cobb again, the detectives began to question him around 3 a.m.¹²² Cobb did not request counsel during this questioning nor indicate that he was tired.¹²³ Shortly thereafter, Cobb confessed to murdering Margaret and Kori Rae, both orally and in writing.¹²⁴

After his confession, Cobb consented to a search of his home.¹²⁵ The officers did not find the murder weapon there, but did find numerous other knives, newspaper articles about the disappearances, Walt Disney videos alleged to be stolen from the Owings, and Margaret's wedding band.¹²⁶ Around 9 a.m. that same morning, Cobb was arraigned in Odessa on capital murder charges.¹²⁷ He was then flown to Walker County and arraigned again in the airport there.¹²⁸ After arriving in Walker County, Cobb led the police to the place where the victims' bodies were buried.¹²⁹ Cobb was then taken to jail and booked.¹³⁰ During that time, Cobb never indicated that he wanted to speak with an attorney, nor that he was represented by an attorney on the burglary charge.¹³¹

¹²⁰ *Id.*; Petitioner's Brief at 4, *Cobb* (No. 99-1702), available at 2000 WL 1236042.

¹²¹ Petitioner's Brief at 4, *Cobb* (No. 99-1702), available at 2000 WL 1236042.

¹²² *Id.*

¹²³ *Id.* at 4-5.

¹²⁴ *Cobb*, 532 U.S. at 165; Petitioner's Brief at 4, *Cobb* (No. 99-1702) available at 2000 WL 1236042. In Cobb's confession, he stated that on the day in question he had been drinking beer, tequila and smoking marijuana. While he was stealing the Owings' stereo, Margaret confronted him and he stabbed her in the stomach. He then dragged her body to a wooded area a few hundred yards from the house. After returning to the house, he found Kori Rae asleep and took her outside to be with her mother. He then dug a hole between them. After he had finished digging the hole, Kori Rae woke up and started crawling toward her mother, falling in the hole as a result. Cobb then placed Margaret's body in the hole on top of Kori Rae. After covering the bodies up, he stabbed a knife into the ground where he had buried them. Petitioner's Brief at 4-5, *Cobb* (No. 99-1702), available at 2000 WL 1236042.

¹²⁵ Petitioner's Brief at 5, *Cobb* (No. 99-1702), available at 2000 WL 1236042.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Cobb*, 532 U.S. at 166; Petitioner's Brief at 5, *Cobb* (No. 99-1702), available at 2000 WL 1236042.

¹³⁰ Petitioner's Brief at 5, *Cobb* (No. 99-1702), available at 2000 WL 1236042.

¹³¹ *Id.*

Later that evening, the Walker County District Attorney contacted Ridley to tell him about Cobb's confession and capture.¹³² Although conflict in the record exists, either that same evening or the next evening the investigators contacted Ridley and asked him if it would be okay to take Cobb back to the murder site, to which Ridley agreed.¹³³ On November 14, Ridley came to the jail to help Cobb with emotional problems and shortly thereafter he was appointed as Cobb's counsel on the murder charge.¹³⁴

IV. PROCEDURAL HISTORY

During Cobb's lower court trial, he made a motion to suppress his confession as being obtained in violation of the Sixth Amendment, which the trial court denied.¹³⁵ Cobb was subsequently convicted of capital murder for murdering more than one person in the course of a single criminal transaction and sentenced to death.¹³⁶

The Texas Court of Criminal Appeals reversed Cobb's conviction and remanded for a new trial on the basis that the murder conviction was "factually interwoven" with the burglary, and therefore the right to counsel had attached when Cobb accepted Ridley as his counsel on the burglary charge.¹³⁷ The court stated that "once the right to counsel attaches to the offense charged, it also attaches to any other offense that is very closely related factually to the offense charged."¹³⁸ Since the murder was so interwoven with the burglary, the right to counsel had attached to that crime as well, even though Cobb had not yet been charged.¹³⁹ They also held that Cobb had asserted his right to counsel when he accepted Ridley as his counsel on the burglary charge.¹⁴⁰ Therefore, the introduction of Cobb's confession during the trial was not harmless error.¹⁴¹

The dissent in the Texas Court of Criminal Appeals case, however, thought that *Cobb* was distinguishable from *Michigan v. Jack-*

¹³² *Id.* at 6.

¹³³ *Id.*

¹³⁴ *Id.* at 7.

¹³⁵ *Id.*

¹³⁶ *Cobb*, 532 U.S. at 166; Petitioner's Brief at 7, *Cobb* (No. 99-1702).

¹³⁷ *Cobb v. State*, No. 72-807, 2000 WL 275644, at *1, *4 (Tex. Crim. App. Mar. 15, 2000).

¹³⁸ *Id.* at *3.

¹³⁹ *Id.* at *4.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

son because Cobb had waived his right to counsel before confessing.¹⁴² They stated Cobb's waiver was valid, unlike the waiver in *Jackson*, because it was given seventeen months after he was charged with the first crime.¹⁴³ Cobb did not unequivocally invoke his right to counsel,¹⁴⁴ and the State repeatedly received permission from Cobb's attorney to question him.¹⁴⁵

The State sought certiorari in the United States Supreme Court.¹⁴⁶ There were three issues in front of the Court on certiorari: (1) whether the Sixth Amendment's right to counsel attached only to charged offenses and not to uncharged, but "factually related" offenses; (2) whether Cobb made a valid unilateral waiver of his right to counsel in this case; and (3) what test was used to determine whether an uncharged offense is the same as the charged offense.¹⁴⁷ Since the Court determined the Sixth Amendment right to counsel had not attached to the uncharged offenses, the Court did not consider whether Cobb waived his right to counsel in this case.¹⁴⁸

V. SUMMARY OF OPINIONS

A. MAJORITY OPINION

The case was decided in the Supreme Court by a 5–4 decision.¹⁴⁹ Chief Justice Rehnquist authored the majority opinion.¹⁵⁰ The Supreme Court, relying on *McNeil v. Wisconsin*, held that the Sixth Amendment right to counsel is offense-specific, in that the right only attaches to charged offenses and not to uncharged offenses that are factually related to the charged offense.¹⁵¹ Moreover, it held that when the Sixth Amendment right to counsel attaches, it encompasses offenses that would be considered the same offense under the *Block-*

¹⁴² *Id.* at *10–*11.

¹⁴³ *Id.* at *11 (interrogation in *Jackson* occurred shortly after the request for counsel, here it occurred seventeen months later).

¹⁴⁴ *Id.* The court said accepting counsel at an arraignment is not an unequivocal assertion to the right to counsel. *Id.* at n.11.

¹⁴⁵ *Id.* at *11 (stating the interrogations over the seventeen month period amounted to a waiver).

¹⁴⁶ *Texas v. Cobb*, 530 U.S. 1260 (2000).

¹⁴⁷ *Texas v. Cobb*, 532 U.S. 162, 167 (2001).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 163.

¹⁵⁰ *Id.* (joining in the majority were O'Connor, Scalia, Kennedy, and Thomas, JJ.).

¹⁵¹ *Id.* at 164.

burger test, even if those offenses have not been formally charged yet.¹⁵²

The Court held the Sixth Amendment right to counsel is offense-specific and only attaches to a charged offense.¹⁵³ However, many lower courts have read an exception into this rule that allows the right to attach to crimes that are “factually related” to a charged offense.¹⁵⁴ Specifically in this case, the Texas Criminal Court of Appeals used this exception to say that Cobb’s right to counsel for the murder attached at the time of arraignment for the burglary.¹⁵⁵ This exception has grown out of its implicit use in *Brewer v. Williams* and *Maine v. Moulton*; however, the Court refused to rely on this because *Brewer* and *Moulton* did not address the specific question.¹⁵⁶ In addition, the Court pointed to a phrase in *Moulton* that refers to the offense-specific nature of the right to counsel as supporting the public interest in investigating crimes.¹⁵⁷ The Court in *Moulton* stated, “[t]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at the time, would unnecessarily frustrate the public’s interest in the investigation of criminal activities.”¹⁵⁸ Thus, in order to promote the public interest, the Court saw no reason to read an exception into the offense-specific rule of the Sixth Amendment.¹⁵⁹

The Court rejected the argument raised by Cobb that the offense-specific rule would invade a suspect’s constitutional rights by allowing police officers wide discretion to conduct investigations and to use uncounseled interrogations in those investigations.¹⁶⁰ To support this position, the Court stated that the suspect must be informed of his rights against compulsory self-incrimination and right to counsel before a custodial interrogation.¹⁶¹ That was not an issue in this

¹⁵² *Id.* at 173.

¹⁵³ *Id.* at 167–68.

¹⁵⁴ *Id.* at 168; *see, e.g.,* United States v. Covarrubias, 179 F.3d 1219, 1225 (9th Cir. 1999) (holding state kidnapping charges and federal charges for transporting an illegal alien were “inextricably intertwined”).

¹⁵⁵ Cobb v. State, No. 72–807, 2000 WL 275644, at *4 (Tex. Crim. App. Mar. 15, 2000).

¹⁵⁶ Cobb, 532 U.S. at 168–70.

¹⁵⁷ *Id.* at 170–71.

¹⁵⁸ *Id.* at 172 (quoting Maine v. Moulton, 474 U.S. 159, 179–80 (1985)).

¹⁵⁹ Cobb, 532 U.S. at 171–72.

¹⁶⁰ *Id.* at 171.

¹⁶¹ *Id.*

case, since Cobb was *Mirandized* twice before confessing to police.¹⁶²

The Court also stated that even a suspect's Constitutional rights do not negate the public interest in allowing police to talk to witnesses and suspects, even if they have been charged with other offenses.¹⁶³ The overriding public interest is "finding, convicting and punishing those who violate the law," and the type of confession the police obtained from Cobb is essential to promoting that interest.¹⁶⁴

After deciding that the Sixth Amendment right was indeed offense-specific, the Court then turned to considering what would actually be considered the same offenses.¹⁶⁵ The Court realized that the definition of offense is not necessarily limited to the "four corners of a charging instrument."¹⁶⁶ In doing so, the Court relied on the definition in *Blockburger* which described the same offense in terms of double jeopardy.¹⁶⁷ The Court stated "where the same act or transaction constitutes a violation of two or more distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."¹⁶⁸ The Court saw no reason why the definition of same offense in the context of double jeopardy was any different than the definition in Sixth Amendment right to counsel cases.¹⁶⁹ Applying this reasoning to the facts in Cobb's case, the Court determined that under the Texas Criminal Codes, murder and burglary are not the same offense by definition, and therefore, Cobb's confession was admissible.¹⁷⁰

B. CONCURRENCE

In a concurring opinion,¹⁷¹ Justice Kennedy discussed the importance of not reaffirming or approving *Michigan v. Jackson* in the majority opinion, since the concurring justices believed *Jackson* was

¹⁶² *Id.*

¹⁶³ *Id.* at 171-72.

¹⁶⁴ *Id.* at 172.

¹⁶⁵ *Id.* at 172-73.

¹⁶⁶ *Id.* at 173.

¹⁶⁷ *Id.* at 163.

¹⁶⁸ *Id.* at 173 (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

¹⁶⁹ *Cobb*, 532 U.S. at 173.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 174 (Kennedy, J., concurring) (Justice Kennedy was joined by Justices Scalia and Thomas in his concurrence).

questionable.¹⁷² The justices believed that *Edwards* and *Miranda* were sufficient to protect the accused's right to counsel.¹⁷³ According to *Edwards* and *Miranda*, the accused must unambiguously assert that he was invoking his right to counsel, and the concurrence states the right should not apply unless the accused makes that assertion.¹⁷⁴ However, the Sixth Amendment right to counsel attaches independently of the accused's expressed request, regardless of any expressed intent of the accused to remain silent.¹⁷⁵ The concurring Justices found this rule questionable.¹⁷⁶

If *Jackson* applied in this situation, Cobb would not have been allowed to voluntarily waive his right to counsel.¹⁷⁷ However, if *Jackson* should only be applied where a suspect unambiguously asserts his right to counsel, as the concurring Justices believed, *Jackson* did not apply in this case, since Cobb did not unambiguously assert this right.¹⁷⁸ Therefore, the concurring Justices believed that Cobb validly waived his right to counsel by voluntarily choosing to speak to the police.¹⁷⁹

C. DISSENT

The four-member dissent was authored by Justice Breyer.¹⁸⁰ The dissent stated that the definition of same offense used by the majority was too technical and undermined the protections of the Sixth Amendment.¹⁸¹ Although they felt that Cobb's charged and uncharged offenses were sufficiently related to require the presence of counsel at his confession,¹⁸² the dissenting justices did not urge that the right to counsel attaches to every crime the accused committed.¹⁸³ Instead, they urged that some limits must still be enforced.¹⁸⁴

¹⁷² *Id.* (Kennedy, J., concurring).

¹⁷³ *Id.* at 174–75 (Kennedy, J., concurring).

¹⁷⁴ *Id.* at 175–76 (Kennedy, J., concurring).

¹⁷⁵ *Id.* at 176 (Kennedy, J., concurring).

¹⁷⁶ *Id.* (Kennedy, J., concurring).

¹⁷⁷ *Id.* at 175–76 (Kennedy, J., concurring).

¹⁷⁸ *Id.* at 176 (Kennedy, J., concurring).

¹⁷⁹ *Id.* at 175–76 (Kennedy, J., concurring).

¹⁸⁰ *Id.* at 177 (Breyer, J., dissenting) (Justices Stevens, Souter and Ginsburg joined in his dissent).

¹⁸¹ *Id.* at 178–79 (Breyer, J., dissenting).

¹⁸² *Id.* at 187–88 (Breyer, J., dissenting).

¹⁸³ *Id.* at 178 (Breyer, J., dissenting).

¹⁸⁴ *Id.* (Breyer, J., dissenting).

The dissenters believed that once a suspect asserts his need for counsel, he should not be forced to make a critical legal choice without the assistance of counsel.¹⁸⁵ By asserting the Sixth Amendment right to counsel, the suspect has shown that he "does not believe that he is sufficiently capable of dealing with his adversaries single-handedly."¹⁸⁶ This would include being capable of choosing whether to speak to prosecutors without an attorney present.¹⁸⁷ Although the concurrence stated that *Jackson* does not allow for a defendant to give his own account of the events that occurred, the dissent believed that nothing stops the defendant from initiating contact with the police.¹⁸⁸ When the defendant is the one to initiate the contact with the police, the protections of the Sixth Amendment can be waived.¹⁸⁹

The dissent also stated that due to the fact that criminal codes in many states are extremely detailed, it is easy to find overlapping offenses that may arise out of a single transaction, thus allowing the police to question the suspect on any number of the uncharged offenses without notifying counsel.¹⁹⁰ The dissent used a simple hypothetical to illustrate how an armed robbery, for instance, can result in at least four different offenses.¹⁹¹

The dissent also noted that, although the majority relied on *Brewer* and *Moulton*, if those cases had been decided after *Cobb*, they would have had different outcomes.¹⁹² For example, in *Moulton*, the defendant was charged with burglary and theft.¹⁹³ If the *Blockburger* test were to apply, those would be considered separate offenses, and the conviction on the initial charged offense would have been overturned.¹⁹⁴

The dissent also stated that the *Blockburger* test is difficult to administer in practice, yet the majority's decision now forces police officers, as opposed to lawyers and judges, to apply this test before

¹⁸⁵ *Id.* at 180 (Breyer, J., dissenting).

¹⁸⁶ *Id.* (Breyer, J., dissenting) (quoting *People v. Bladel*, 365 N.W.2d 56, 67 (1984)).

¹⁸⁷ *Id.* (Breyer, J., dissenting).

¹⁸⁸ *Id.* at 181 (Breyer, J., dissenting).

¹⁸⁹ *Michigan v. Jackson*, 475 U.S. 625, 636 (1986).

¹⁹⁰ *Cobb*, 532 U.S. at 182 (Breyer, J., dissenting).

¹⁹¹ *Id.* (According to the majority, an armed robber who reaches across a store counter and grabs a cashier while threatening the cashier's life could potentially be charged with the separate offenses of "armed robbery, assault, battery, trespass, use of a firearm to commit a felony and perhaps possession of a firearm by a felon.").

¹⁹² *Id.* at 183-84 (Breyer, J., dissenting).

¹⁹³ *Maine v. Moulton*, 474 U.S. 159, 167 (1985).

¹⁹⁴ *Cobb*, 532 U.S. at 185 (Breyer, J., dissenting).

questioning suspects.¹⁹⁵ Therefore, the dissent urged an adoption of the alternative that would define an offense in terms of the conduct of a particular occasion and would include acts that are “closely related to” or “inextricably intertwined with” the charged offense, using the standards applied in the lower courts as a guideline.¹⁹⁶

VI. ANALYSIS

In *Cobb*, the Court decided that the defendant’s right to counsel had not attached as to the uncharged murder.¹⁹⁷ Although this decision is well-supported by precedent,¹⁹⁸ the Court failed to recognize the overall effect this will have on obliterating the Sixth Amendment right to counsel.¹⁹⁹ The Court opted to use a rule that purportedly increased the ease of administration instead of a standard that ensured fairness and the protection of the accused’s rights.²⁰⁰ In addition, the Court did not consider some issues that potentially could have impacted their decision.²⁰¹ These issues include the “circumventing the Sixth Amendment” exception to the right to counsel and possible protections afforded by the no-contact ethics rule for attorneys.²⁰²

A. THE DECISION MADE IN *COBB* BLURS THE DISTINCTION BETWEEN THE FIFTH AMENDMENT AND SIXTH AMENDMENT RIGHTS TO COUNSEL AND DIMINISHES THE ADDED PROTECTIONS OF THE SIXTH AMENDMENT RIGHT.

Before considering the effect of the *Cobb* decision on Sixth Amendment case law, it is necessary to examine the differences between the right to counsel under the Fifth Amendment and under the Sixth Amendment. To begin, the purposes behind the rights differ.²⁰³ The purpose of the Sixth Amendment right is to protect the accused during confrontations with his “expert adversary,” the government, during the prosecution of the alleged crime, whereas the purpose of

¹⁹⁵ *Id.* (Breyer, J., dissenting).

¹⁹⁶ *Id.* at 186. (Breyer, J., dissenting).

¹⁹⁷ *Id.* at 174 (Kennedy, J., concurring).

¹⁹⁸ *See, e.g.,* *McNeil v. Wisconsin*, 501 U.S. 171 (1991); *Patterson v. Illinois*, 487 U.S. 285 (1988).

¹⁹⁹ *Cobb*, 532 U.S. at 179, 183, 185 (Breyer, J., dissenting).

²⁰⁰ *Id.* at 185–87. The majority said this test is easier to use, but the dissent said a fact-based inquiry was easier because it comports with common sense.

²⁰¹ *See infra* Part VI. C.

²⁰² *Id.*

²⁰³ *McNeil*, 501 U.S. at 178.

the Fifth Amendment right is to protect the suspect's desire to deal with police only through counsel.²⁰⁴

The Fifth Amendment right to counsel was first established in *Miranda v. Arizona*, where the Court held that suspects had the right to counsel during custodial interrogations,²⁰⁵ but the right could be waived if the suspect "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."²⁰⁶ The right cannot be waived, though, if the police initiate contact with the accused after he has requested counsel, since the suspect's statements are then presumed to be involuntary and are inadmissible.²⁰⁷ The most important distinction between the Fifth Amendment right to counsel and the Sixth Amendment right to counsel is that the Fifth Amendment right is not offense-specific; therefore once the suspect invokes this right, officers cannot approach him regarding any offense without counsel present.²⁰⁸ The right was created to "counteract the inherent pressures of custodial interactions."²⁰⁹ In addition, the Fifth Amendment right to counsel does not attach automatically, it requires some affirmative statement by the defendant that can be construed as an expression of desire for counsel "*in dealing with custodial interrogation by the police.*"²¹⁰

In contrast, the Sixth Amendment right is offense-specific.²¹¹ As such, the right does not attach until the beginning of the adversary proceedings, whether that be a formal charge, preliminary hearing, indictment or arraignment.²¹² Therefore, when the accused makes incriminating statements with respect to crimes for which he has not been formally charged, those statements are admissible at a trial of those offenses.²¹³ Once the right to counsel under the Sixth Amendment has been invoked, however, the right cannot be waived by the accused during a police-initiated conversation.²¹⁴

²⁰⁴ *Id.*

²⁰⁵ 384 U.S. 436 (1966).

²⁰⁶ *Id.* at 475.

²⁰⁷ *Edwards v. Arizona*, 451 U.S. 477, 484 (1988).

²⁰⁸ *Arizona v. Roberson*, 486 U.S. 675 (1988) (holding the *Edwards* rule applies even in the context of a separate investigation).

²⁰⁹ *Roberson*, 486 U.S. at 685.

²¹⁰ *McNeil*, 501 U.S. at 178 (emphasis in original).

²¹¹ *Id.* at 175.

²¹² *Id.* (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984) (citation omitted)).

²¹³ *Maine v. Moulton*, 474 U.S. 159, 180 (1985).

²¹⁴ *McNeil*, 501 U.S. at 175.

In different respects, each right is somewhat broader and narrower than the other.²¹⁵ The Fifth Amendment right is narrower than the Sixth Amendment right since it applies only in custodial interrogations, whereas the Sixth Amendment right applies at every stage of the prosecution.²¹⁶ However, the Fifth Amendment right is broader in the sense that it applies to questioning regarding any offense by the accused without requiring the beginning of adversary proceedings.²¹⁷ The Sixth Amendment right only applies to crimes for which the defendant has been charged.²¹⁸ Further, invoking one right does not necessarily trigger the other right, since a suspect may be willing to speak with police in the absence of counsel about crimes unrelated to the charged offense.²¹⁹

The decision in *Cobb* further limits the Sixth Amendment right to counsel²²⁰ and places suspects and their attorneys in a precarious position.²²¹ Following *Cobb*, suspects are no longer protected from questioning regarding offenses which may have occurred at the same time as a charged offense, but for which the suspects have not been charged.²²² Since many suspects are unsophisticated, they will likely not realize the distinctions between the different rights to counsel.²²³ This places a heavy burden on the attorney to inform his client that he must unequivocally reassert his Fifth Amendment right to counsel in every discussion with the police, so that he will not be questioned regarding related offenses.²²⁴ The defendant would not be allowed to invoke his Sixth Amendment right with respect to other crimes, because those crimes have not been charged yet.²²⁵

²¹⁵ *Id.* at 178.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ See *Texas v. Cobb*, 532 U.S. 162 (2001).

²²¹ Elkan Abramowitz & Barry A. Bohrer, *The Right to Counsel After Cobb: Is There Anything Left?*, 165 N.J.L.J. 33 (2001).

²²² See generally *Cobb*, 532 U.S. at 162.

²²³ See Abramowitz & Bohrer, *supra* note 221, at 33; *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) ("that which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex, and mysterious"); *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (stating the defendant "requires the guiding hand of counsel at every step in the proceedings against him").

²²⁴ See Abramowitz & Bohrer, *supra* note 221, at 33; Respondent's Brief at 9, *Texas v. Cobb*, 532 U.S. 162 (2001) (No. 99-1702).

²²⁵ Brief for Respondent at 10, *Texas v. Cobb*, 532 U.S. 162 (2001) (No. 99-1702).

However, the protection of the Fifth Amendment assertion will only protect the suspect in custodial interrogations.²²⁶ If the defendant is approached in any other non-custodial setting without counsel present regarding an uncharged offense, he will not have any protection under either the Sixth Amendment²²⁷ or the Fifth Amendment.²²⁸

There appear to be several reasons why the facts in *Cobb* were more susceptible to a limitation of the Sixth Amendment. A long period of time passed between the charging of the first crime and the confession, making it less likely the suspect was in contact with counsel regarding that offense.²²⁹ Further, it was Cobb who initiated the confession process by confessing to his father, and he did not unequivocally invoke his right to counsel.²³⁰ If he had remained silent and was approached by the police for questioning regarding the murder, the case may have turned out differently. However, in this case, Cobb and his attorney had repeatedly waived his right to counsel during questioning regarding the burglary and murder.²³¹ Lastly, murder and burglary are very distinct offenses, especially under the *Blockburger* test.²³²

However, the majority did not consider the ramifications of their decision with respect to charged and uncharged offenses that are described more similarly in the criminal codes.²³³ Since criminal codes are very lengthy and detailed, there are now increased chances of finding overlapping offenses arising out of one transaction.²³⁴ The dissent presents several scenarios where conduct such as an armed robbery, drug sale, or protest could produce several related of-

²²⁶ *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991).

²²⁷ *See id.* at 175 (right does not attach until the beginning of criminal proceedings); *Maine v. Moulton*, 474 U.S. 159, 180 (1985) (statements regarding uncharged crimes are admissible at the trial of those offenses).

²²⁸ *See Miranda v. Arizona*, 384 U.S. 436 (1966) (Stating suspects have right to counsel during custodial interrogations); *McNeil*, 501 U.S. at 178 (Stating Fifth Amendment right arises only in custodial interrogations).

²²⁹ *See Cobb v. State*, No. 72, 807, 2000 WL 275644, at *10–11 (Tex. Crim. App. Mar. 15, 2000) (McCormick, P.J., dissenting).

²³⁰ *See id.*

²³¹ *See id.*

²³² *See Texas v. Cobb*, 532 U.S. 162, 174 (2001) (Burglary requires “entry into or continued concealment in a building,” while capital murder requires “murder of more than one person during a criminal transaction.”).

²³³ *See id.* at 173–74 (applying the *Blockburger* rule to *Cobb* without discussion of why this may be appropriate in Sixth Amendment right to counsel cases or cases with differing facts).

²³⁴ *Cobb*, 532 U.S. at 182 (Breyer, J., dissenting).

fenses.²³⁵ This creates the unlimited potential for authorities to charge a suspect with one aspect of the crime, such as assault, and then conduct questioning of the suspect outside of counsel with respect to a battery charge.²³⁶ Any information gained from the defendant can then be used in a trial on the battery charge.²³⁷

The majority in *Cobb* downplays the impact that the decision will have on the Constitutional rights of the suspects by stating that no “parade of horrors,” such as law enforcement officials with unlimited ability to conduct interrogations without counsel present, “has occurred in those jurisdictions that have not enlarged upon *McNeil*.”²³⁸ However, following the decision in *Cobb*, there is now evidence that the police manipulation feared by the dissent is exactly what is going to occur.²³⁹ In July 2001, the FBI’s Law Enforcement Bulletin contained an article advocating “creative charging” by law enforcement officials as a means of taking full advantage of the limited protections afforded to suspects under the Sixth Amendment.²⁴⁰ Such creative techniques would include charging the defendant with one crime while continuing to investigate other related crimes and using a cellmate informant to question a suspect on uncharged offenses.²⁴¹ These are the identical tactics that the *Cobb* dissent warned against as undermining the attorney–client relationship and removing the protections of the Sixth Amendment.²⁴²

The *Cobb* decision is a strict departure from earlier case law recognizing the strong policy of protecting the rights of the accused.²⁴³ The Court had previously worried that the increased ability of police officers to manipulate the Sixth Amendment would eviscerate the

²³⁵ See *Michigan v. Jackson*, 475 U.S. 625 (1986). A drug sale could constitute possession of drugs, conspiring to sell drugs, being under the influence of drugs and possession of drug paraphernalia, among other things. A protestor could potentially be charged with trespass, failing to disperse and unlawful assembly. *Cobb*, 532 U.S. at 182 (Breyer, J., dissenting).

²³⁶ *Cobb*, 532 U.S. at 182 (Breyer, J., dissenting). See also Kimberly A. Crawford, *The Sixth Amendment Right to Counsel: Application and Limitations*, 70–7 FBI L. ENFORCEMENT BULL. 27 (July 2001), available at 2001 WL 13957447.

²³⁷ *Cobb*, 532 U.S. at 182 (Breyer, J., dissenting). See also Crawford, *supra* note 236.

²³⁸ *Cobb*, 532 U.S. at 171.

²³⁹ See Crawford, *supra* note 236.

²⁴⁰ *Id.* at 31.

²⁴¹ *Id.*

²⁴² *Cobb*, 532 U.S. at 181 (Breyer, J., dissenting).

²⁴³ See, e.g., *Maine v. Moulton*, 474 U.S. 159, 169 (1985) (stating average criminals do not have professional legal skills to protect themselves, and right to counsel is necessary for the fair administration of justice system).

right to counsel.²⁴⁴ The Court had also stated that all doubts regarding waiver of the Sixth Amendment right to counsel should be resolved in favor of protecting the constitutional claim.²⁴⁵ However, the decision in *Cobb* places the interests of the police in investigating crimes above the interests of the accused.²⁴⁶ Allowing this situation to occur exploits the vulnerability of the defendant,²⁴⁷ who does not have the requisite legal skills to protect himself.²⁴⁸ It also overrides the purpose behind the Sixth Amendment to “protect the unaided layman at critical confrontations” with his “expert adversary,”²⁴⁹ since now the defendant can be questioned during those “critical confrontations” without counsel present.²⁵⁰ Finally, the majority’s decision will decrease the effectiveness of a lawyer’s role as a “medium” between the suspect and the government²⁵¹ by removing the buffer of an attorney in questioning regarding uncharged offenses.²⁵²

B. THE COURT GIVES NO JUSTIFICATION FOR APPLYING
BLOCKBURGER IN SIXTH AMENDMENT CASES, EVEN THOUGH
THERE IS NO INDICATION THAT LOWER COURTS WERE UNABLE
TO APPLY THE “FACTUALLY RELATED” EXCEPTION.

As discussed in many lower court cases,²⁵³ there has been an exception to the offense-specific nature of the Sixth Amendment for “factually related” or “inextricably intertwined” offenses.²⁵⁴ In these situations, the government may not question a suspect regarding

²⁴⁴ See *Moulton*, 474 U.S. at 180.

²⁴⁵ *Michigan v. Jackson*, 475 U.S. 625, 633 (1986).

²⁴⁶ *Cobb*, 532 U.S. at 172.

²⁴⁷ See *Abramowitz & Bohrer*, *supra* note 221, at 33.

²⁴⁸ *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938).

²⁴⁹ *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991).

²⁵⁰ See *Abramowitz & Bohrer*, *supra* note 221, at 33.

²⁵¹ *Cobb*, 532 U.S. at 178 (Breyer, J., dissenting) (citing *Maine v. Moulton*, 474 U.S. 159, 176 (1985)). See also *McNeil*, 501 U.S. at 183 (Stevens, J., dissenting) (“[T]oday’s decision is ominous because it reflects a preference for an inquisitorial system that regards the defense lawyer as an impediment rather than a servant to the cause of justice.”).

²⁵² See *Abramowitz & Bohrer*, *supra* note 221, at 33.

²⁵³ See, e.g., *United States v. Covarrubias*, 179 F.3d 1219 (9th Cir. 1999); *United States v. Melgar*, 139 F.3d 1005 (4th Cir. 1998); *United States v. Arnold*, 106 F.3d 37 (3d Cir. 1997); *United States v. Doherty*, 126 F.3d 769 (6th Cir. 1997); *United States v. Williams*, 993 F.2d 451 (5th Cir. 1993); *Commonwealth v. Rainwater*, 681 N.E.2d 1218 (Mass. 1997); *In re Pack*, 616 A.2d 1006 (Pa. Super. Ct. 1992).

²⁵⁴ See, e.g., *Covarrubias*, 179 F.3d at 1223 (suppressing statements related to the federal charge of transporting illegal immigrants when the defendants had only been charged by the state with kidnapping, because the offenses were “inextricably intertwined”).

crimes that are closely related to the charged crime, without the presence of counsel.²⁵⁵ If a suspect is questioned regarding these crimes and subsequently confesses, those confessions are inadmissible at trial.²⁵⁶

In determining whether offenses are closely related, the courts consider all the facts and circumstances related to the offenses.²⁵⁷ This includes the place, time and people involved in the crimes, as well as the motive behind the crime; however, none of these factors are dispositive.²⁵⁸ In addition, crimes have been found to be unrelated where the acts were separated by time, location or other circumstances.²⁵⁹ For example, in *Commonwealth v. Rainwater*, the defendant was charged with a theft that occurred on September 10, however, after his arraignment he was questioned and confessed to thefts that had taken place earlier in the year.²⁶⁰ The court found that even though the same three people were involved in all the crimes, the offenses were not “inextricably intertwined,” since they occurred at different times.²⁶¹

This fact-based inquiry has been applied in many cases, and the courts that have applied it show no difficulty in doing so.²⁶² In addition, this “closely related” test furthers the policies behind the Sixth Amendment right to counsel by allowing the defendant a fair trial.²⁶³ The *Cobb* dissent realizes that this test is not perfect, however, the application is rooted in common sense, which they assert makes it easier to apply.²⁶⁴ Instead of adopting this test, however, the majority, in essence, abolished the exception by applying the factors of the *Blockburger* test instead.

The *Blockburger* test arose in context of double jeopardy and has never been applied in the right to counsel cases.²⁶⁵ The *Cobb* majority did not elaborate on their reasons for deciding to apply *Block-*

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 1226.

²⁵⁷ *Id.* at 1225.

²⁵⁸ *Id.*

²⁵⁹ See, e.g., *Commonwealth v. Rainwater*, 681 N.E.2d 1218 (Mass. 1997).

²⁶⁰ *Id.* at 1220.

²⁶¹ *Id.* at 1224. See also *United States v. Williams*, 993 F.2d 451, 457 (5th Cir. 1993) (“These charges brought by different sovereigns and concerning different conduct are not ‘extremely closely related.’”).

²⁶² See, e.g., *Rainwater*, 681 N.E.2d at 1223-25.

²⁶³ *Texas v. Cobb*, 532 U.S. 162, 187 (2001) (Breyer, J., dissenting).

²⁶⁴ *Id.* at 186-87 (Breyer, J., dissenting).

²⁶⁵ *Cobb*, 532 U.S. at 172-73.

burger to the Sixth Amendment cases.²⁶⁶ In other cases, even Chief Justice Rehnquist has stated the test should not be applied where there is contrary legislative intent.²⁶⁷ Although there is no strict legislative intent not to apply the *Blockburger* test to the right to counsel cases, there is already an established line of cases applying the "closely related" test.²⁶⁸

Chief Justice Rehnquist has also elaborated on the purposes behind the Double Jeopardy clause,²⁶⁹ but those purposes differ significantly from the purposes behind the right to counsel. The primary purposes behind the Double Jeopardy clause are to "protect against a second prosecution for the same offense after an acquittal . . . after a conviction . . . and against multiple punishments for the same offense."²⁷⁰ However, the purpose behind the Sixth Amendment right to counsel is to protect the defendant in confrontations with his adversary during the criminal prosecution.²⁷¹

While the purposes of the Double Jeopardy clause turn on the definition of "same offense,"²⁷² the purpose behind the Sixth Amendment right to counsel does not mention the same offense.²⁷³ Throughout legal discussions, it has been pointed out that "the tendency to assume that a word which appears in two or more rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them . . . has all the tenacity of original sin and should be guarded against."²⁷⁴ The Supreme Court in *Cobb* did not "guard against" this fallacy when deciding to apply *Blockburger* to the Sixth Amendment context without addressing the differing purposes behind the right to counsel and double jeopardy.

The *Blockburger* test is also not as simple to administer as the majority seems to believe.²⁷⁵ Even the Supreme Court has differed on

²⁶⁶ *Id.*

²⁶⁷ *United States v. Albernaz*, 450 U.S. 333, 340-42 (1981); *see also* *Whalen v. U.S.*, 445 U.S. 684, 708 n.3 (1980) (Rehnquist, J., dissenting) ("[T]he dispositive question is whether the legislature intended to allow multiple punishments, and the *Blockburger* test should be employed only to the extent that it advances that inquiry.").

²⁶⁸ *See, e.g.*, *United States v. Covarrubias*, 179 F.3d 1219 (9th Cir. 1999).

²⁶⁹ *Whalen*, 445 U.S. at 700 (Rehnquist, J., dissenting).

²⁷⁰ *Id.*

²⁷¹ *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991).

²⁷² *Whalen*, 445 U.S. at 700 (Rehnquist, J., dissenting).

²⁷³ *McNeil*, 501 U.S. at 178.

²⁷⁴ WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 159 (1949).

²⁷⁵ *Cobb*, 532 U.S. at 185 (Breyer, J., dissenting).

the correct application.²⁷⁶ For example, in *United States v. Dixon*, the Court was fractured on whether the test applied to the statutory elements of the charged offenses or whether it applied to the particular facts of each case.²⁷⁷ In addition, the author of the majority opinion, Chief Justice Rehnquist, has described the *Blockburger* test in the double jeopardy context as a “veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.”²⁷⁸ As the dissent realizes, however, now police officers and investigators will be asked to apply this test to each particular case, instead of having legal professionals decide.²⁷⁹ This situation creates the possibility of increased litigation regarding this issue.²⁸⁰

The Supreme Court’s decision is additionally puzzling due to the fact that two of the foundational cases would likely have turned out differently if decided after *Cobb*.²⁸¹ In crafting the “inextricably interwoven” exception, the lower courts relied on the implicit use of this exception in *Brewer v. Williams* and *Maine v. Moulton*.²⁸²

In *Moulton*, the defendant was first charged with theft, then made incriminating statements, and was then charged with burglary.²⁸³ The Court affirmed the decision of the Supreme Judicial Court of Maine, which had remanded the case for a new trial on both counts because the incriminating statements were allowed at trial.²⁸⁴ However, under the Maine statutes, the crimes of burglary and theft each required proof of different facts.²⁸⁵ Therefore, if *Cobb* had already been decided, only Moulton’s theft conviction would have been overturned, as that was the only offense charged at the time of the

²⁷⁶ See, e.g., *United States v. Dixon*, 509 U.S. 688 (1993); *Whalen*, 445 U.S. at 684.

²⁷⁷ *Dixon*, 509 U.S. at 716–17 (Rehnquist, J., concurring in part and dissenting in part).

The

majority in *Dixon* was only joined in four out of five parts. Justices Rehnquist, Blackmun, Souter, and White all wrote separate opinions concurring and dissenting in part.

²⁷⁸ *Albernaz v. United States*, 450 U.S. 333, 343 (1981).

²⁷⁹ *Cobb*, 532 U.S. at 185 (Breyer, J., dissenting).

²⁸⁰ *Id.* at 185–86.

²⁸¹ *Id.* at 184.

²⁸² *United States v. Covarrubias*, 179 F.3d 1219, 1224 (9th Cir. 1999).

²⁸³ *Maine v. Moulton*, 474 U.S. 159, 162–67 (1985).

²⁸⁴ *Moulton*, 474 U.S. at 167–68.

²⁸⁵ Compare Me. Rev. Stat. Ann. 17–A § 353(1) (1983) (“A person is guilty of theft if he obtains or exercises unauthorized control over the property of another with intent to deprive him thereof.”), with Me. Rev. Stat. Ann. 17–A § 401 (1983) (“A person is guilty of burglary if he enters or surreptitiously remains in a structure . . .”). To be guilty of burglary the person must enter a building. However, that fact is not required to be found guilty of theft.

statements.²⁸⁶

Likewise, *Brewer v. Williams* contained a situation that likely would have turned out differently if decided after *Cobb*.²⁸⁷ At the time of his confession to a murder, Williams had only been charged with abduction.²⁸⁸ However, the Federal District Court stated that Williams was entitled to a new trial on the murder charge, which the United States Supreme Court upheld.²⁸⁹ This decision illustrates that the Supreme Court assumed that the Sixth Amendment right to counsel extended to those related charges.²⁹⁰ At the very least, the majority in *Cobb* should have addressed the fact that the reasoning in those cases was inconsistent with their reasoning in *Cobb*, instead of merely asserting that the cases did not address the precise issue.²⁹¹

C. THE COURT NEGLECTED TO CONSIDER SEVERAL ISSUES RAISED IN LOWER COURT PROCEEDINGS AND PRIOR CASE LAW, INCLUDING THE EXCEPTION FOR CIRCUMVENTING THE SIXTH AMENDMENT.

Although the Court considered the “inextricably intertwined” exception to the offense-specific nature of the right to counsel, the Court has not yet had the opportunity to consider the “circumventing the Sixth Amendment” exception.²⁹² This exception applies when “the government breach[es] its ‘affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.’”²⁹³ Since many lower courts ended up applying the “inextricably intertwined” exception, they have not had as much opportunity to apply the “circumventing the Sixth Amendment exception.”²⁹⁴ However, since the “inextricably intertwined” exception no longer exists after *Cobb*, it is possible that courts may still rely on the “circumventing the Sixth Amendment” exception.

If lower courts and the Supreme Court decide to apply this exception in the future, the types of situations the dissent warns against, such as charging a suspect with only one offense, but questioning him

²⁸⁶ *Cobb*, 532 U.S. at 184 (Breyer, J., dissenting).

²⁸⁷ *Id.*; *Brewer v. Williams*, 430 U.S. 387 (1977).

²⁸⁸ *Brewer*, 430 U.S. at 391–94.

²⁸⁹ *Id.* at 389–90.

²⁹⁰ *Cobb*, 532 U.S. at 184 (Breyer, J., dissenting).

²⁹¹ *Id.* at 162, 168.

²⁹² *Id.* at 184.

²⁹³ *United States v. Hines*, 963 F.2d 255, 258 (9th Cir. 1992) (quoting *Maine v. Moulton*, 474 U.S. 159, 171 (1985)).

²⁹⁴ *See, e.g., United States v. Covarrubias*, 179 F.3d 1219, 1223 (9th Cir. 1999).

regarding related ones, can be avoided.²⁹⁵ Although it is not nearly as protective of the accused's rights as the "inextricably intertwined" exception, it may keep the Sixth Amendment right to counsel from being eviscerated, because it will apply in situations where the police officers are specifically trying to avoid dealing with the suspect through counsel.²⁹⁶ For example, the encouragement of the FBI Law Enforcement Bulletin to use "creative charging" to circumvent the limited protections of the amendment could be considered one such prohibited situation.²⁹⁷

Further protection for the accused may be afforded by the no-contact ethics rule.²⁹⁸ As provided by Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct, "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."²⁹⁹

Although this rule is examined for potential applicability in *Mas-siah*, the Court determined that it only applies to attorneys and not investigators and therefore should not be applied in this context.³⁰⁰ The main protection afforded by the no-contact rule is to protect the litigant from having to deal with the legal skill and knowledge of the opposing lawyer.³⁰¹ That purpose is not served when the person doing the questioning is a police officer with no legal skill.³⁰²

The dissent in *Patterson* states that the same notions of fairness apply in the criminal context that apply in the civil context, but the dissent does not address the fact that investigators will be conducting the questioning.³⁰³ Any "private interview" conducted by the *prosecutor* or his or her agents would be unethical.³⁰⁴ Further, prosecutors are not ethically allowed to give advice to the accused.³⁰⁵ This posi-

²⁹⁵ *Cobb*, 532 U.S. at 182–83 (Breyer, J., dissenting).

²⁹⁶ *Hines*, 963 F.2d at 258.

²⁹⁷ See Crawford, *supra* note 236, at 31.

²⁹⁸ Abramowitz & Bohrer, *supra* note 221, at 35.

²⁹⁹ *Id.* See also MODEL RULES OF PROF'L CONDUCT R. 4.2 (1984).

³⁰⁰ *Mas-siah v. United States*, 377 U.S. 201, 210–11 (1964).

³⁰¹ *Id.*

³⁰² See *id.*

³⁰³ *Patterson v. Illinois*, 487 U.S. 285, 301 (1988) (Stevens, J., dissenting).

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 308–09.

tion is strengthened by the recent passage of the "McDade Bill,"³⁰⁶ which imposes the same ethical rules on prosecutors that it does on any other attorney.³⁰⁷ However, the Court that addressed this issue realized that often the contact between a prosecutor and a suspect will be "authorized by law."³⁰⁸ Only in severe cases will the prosecutor violate the no-contact rule.³⁰⁹

In one sense, this protection is even broader than the Sixth Amendment because it applies prior to indictment.³¹⁰ However, the ethical rules are not applicable to the officers who conduct investigations, such as in *Cobb*. Therefore, the protections afforded to the accused are not great enough to ensure the continued protection of the Sixth Amendment right to counsel for all suspects.

VII. CONCLUSION

In determining that the right to counsel is offense-specific and that there is no exception for "factually related" offenses, the Supreme Court continued its trend of contracting the Sixth Amendment right to counsel.³¹¹ Since suspects do not need to be represented by counsel with respect to closely related crimes, there is now ample opportunity for police officers to manipulate the charges brought against suspects in order to gain evidence admissible at trial.³¹² In fact, this method has already been advocated in at least one context.³¹³

Further, the litigation on this issue will likely continue as police officers are now forced to apply the *Blockburger* test in determining which offenses can be considered the same offense.³¹⁴ The majority did not discuss why this test is applicable in the right to counsel context, and previous litigation has indicated that this test is not as simple as the majority would indicate.³¹⁵ In contrast, applying the

³⁰⁶ Ethical Standards for Attorneys for the Government, 28 U.S.C. § 350B (2002).

³⁰⁷ *Id.*; Abramowitz & Bohrer, *supra* note 221, at 35.

³⁰⁸ Abramowitz & Bohrer, *supra* note 221, at 35 (citing *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1998)).

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ See, e.g., *McNeil v. Wisconsin*, 501 U.S. 171 (1991).

³¹² *Cobb*, 532 U.S. at 182–83 (Breyer, J., dissenting).

³¹³ Crawford, *supra* note 236.

³¹⁴ *Cobb*, 532 U.S. at 185–86 (Breyer, J., dissenting).

³¹⁵ See, e.g., *United States v. Dixon*, 509 U.S. 688 (1993); *Whalen v. United States*, 445 U.S. 684 (1980).

“closely related” exception did not seem to pose major problems in the lower courts.³¹⁶ However, the impact of this new test remains to be seen.

Although there are indications that suspects may be protected by the “circumventing the Sixth Amendment” exception and the no-contact rule, there has not been much opportunity to apply these rules up until now, and their impact is doubtful. Attorneys will have to strongly urge their clients to invoke their Fifth Amendment right during every contact with law enforcement, and suspects will need to rely on their own unsophisticated knowledge and experience.³¹⁷ The protections inherent in the prior Sixth Amendment right to counsel cases simply are not as effective as they once were.

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³¹⁶ See, e.g., *United States v. Covarrubias*, 179 F.3d 1219 (9th Cir. 1999).

³¹⁷ See *Abramowitz & Bohrer*, *supra* note 221, at 34.