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TEXAS v. COBB, THE UNITED STATES SUPREME COURT LIMITS THE SIXTH AMENDMENT TO EXONERATE INNOCENT SUSPECTS—POLICE OFFICERS ACTING IN GOOD FAITH

I. INTRODUCTION

At first glance, the last phrase of the Sixth Amendment to the United States Constitution seems easily understandable. Read literally, all that it requires in a criminal case is that "the accused shall . . . have the Assistance of Counsel for his defence."[1] While one may think that this language merely entitles a defendant to assistance of an attorney *during* trial, the United States Supreme Court (the Supreme Court) has held that "to deprive a person of counsel during the period *prior* to trial may be more damaging than denial of counsel during the trial itself."[2] The Sixth Amendment right to counsel means that an accused is "entitled to the help of a lawyer at or after the time that

1. U.S. CONST. amend. VI.
2. Maine v. Moulton, 474 U.S. 159, 170 (1985) (emphasis added).

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judicial proceedings have been initiated against him."[3] In *Powell v. Alabama*,[4] the Supreme Court held that the Sixth Amendment's guaranty is applicable against the states through the Fourteenth Amendment's due process clause.[5] Furthermore, due process requires that states appoint counsel for criminal defendants who cannot afford counsel.[6]

Although the Supreme Court has declined to specifically mandate what constitutes initiation of a judicial proceeding,[7] Texas courts generally hold that initiation begins when a defendant is arraigned or when a formal indictment has been brought.[8] Once the right to counsel attaches, government efforts to elicit information from the accused, including interrogation, represent "critical stages" at which the right to counsel applies.[9]

> Indeed, after a formal accusation has been made—and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment—the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.[10]

Simply stated, once a defendant's right to counsel has attached to a particular charge, the government may no longer question the defendant about that crime without obtaining permission from the defendant's attorney.[11] The Supreme Court has held, however, that the Sixth Amendment right to counsel is "offense specific."[12] Therefore,

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3. Brewer v. Williams, 430 U.S. 387, 398 (1977).

4. 287 U.S. 45 (1932).

5. *See id.* at 71 ("[T]he failure of the trial court to make an effective appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment.").

6. Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963).

7. *See* Moore v. Illinois, 434 U.S. 220, 228 (1977) (quoting Kirby v. United States, 406 U.S. 682, 689 (1972)) (using vague language of "'at or after the initiation of adversary judicial criminal proceedings'" with no guidelines as to what specifically constitutes initiation).

8. Fuller v. State, 829 S.W.2d 191, 205 (Tex. Crim. App. 1992) (en banc) ("In Texas, a criminal prosecution is variously considered to be in progress after the accused has been formally arrested and taken before a magistrate, or when he has been indicted or charged by complaint and information with a criminal offense.").

9. Michigan v. Jackson, 475 U.S. 625, 629–30 (1986).

10. *Id.* at 632.

11. *Id.* at 636.

12. McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). *See also id.* at 174–75, 181 (refusing to exclude incriminating statements made by a defendant who had been indicted for armed robbery when the statements regarded the crimes of murder, attempted murder, and armed burglary, for which he had not yet been indicted). *Cf.* Minnick v. Mississippi, 498 U.S. 146, 156 (1990) (excluding incriminating statements made by a defendant regarding any offenses because the defendant had invoked his Fifth Amendment right to counsel). Unlike the Sixth Amendment right to counsel, the Fifth Amendment right to counsel is not "offense specific." *McNeil*, 501 U.S. at

the government is not precluded from eliciting incriminating statements from an indicted defendant about other unindicted crimes.[13] Until the Supreme Court's recent clarification in *Texas v. Cobb*,[14] the "offense specific" protection appeared to be somewhat limited by two earlier Supreme Court decisions regarding crimes that were closely related to the indicted crime.[15]

The purpose of this Note is to illustrate how the Texas Court of Criminal Appeals (the Texas Court), by its decision in *Cobb v. State*,[16] unnecessarily broadened the provided protections of the Sixth Amendment beyond those mandated by the Supreme Court.[17] In *Cobb*, the Texas Court reversed two murder convictions based on an alleged Sixth Amendment violation that occurred when police obtained a suspect's confession.[18] The Texas Court based its decision on federal court precedent,[19] holding that suspects be afforded a right to counsel for unindicted crimes that are closely related to an indicted crime.[20] On appeal, the Supreme Court reversed the Texas Court and reestablished the offense specific nature of the Sixth Amendment.[21] Accordingly, absent a showing of misconduct on the part of authorities, confessions involving crimes that are closely related to previously indicted crimes should be admissible under federal constitutional standards.

The issues raised in *Cobb*, however, do not end with the Supreme Court's recent decision. Article I, Section 10 of the Texas Constitution provides another version of the right to counsel.[22] Courts have often recognized that a state may offer more protections to defendants than those provided by the Federal Constitution.[23] Thus, the offense specific exceptions to the right to counsel could again come

177. Once a suspect invokes the Fifth Amendment right to counsel for interrogation regarding one offense, he may not be approached regarding any other offenses unless counsel is present. *Id.* at 176–77.

13. *See McNeil*, 501 U.S. at 176 (quoting Maine v. Moulton, 474 U.S. 159, 180 n.16 (1985)).

14. 121 S. Ct. 1335 (2001), *rev'g* Cobb v. State, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000) (en banc).

15. *See* cases cited *infra* notes 35–41.

16. Cobb v. State, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000) (en banc), *rev'd*, 121 S. Ct. 1335 (2001).

17. *See* cases cited *infra* notes 19–41.

18. *See* Cobb v. State, slip op. at 1, 7–8, 2000 WL 275644, at *1, *4–5.

19. United States v. Arnold, 106 F.3d 37 (3d Cir. 1997), *abrogated by* Texas v. Cobb, 121 S. Ct. 1335 (2001).

20. *See* Cobb v. State, dissent slip op. at 23, 2000 WL 275644, at *13 (McCormick, J., dissenting).

21. Texas v. Cobb, 121 S. Ct. 1335, 1344 (2001), *rev'g* Cobb v. State, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000) (en banc).

22. The Texas Constitution provides that the accused "shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both." TEX. CONST. art. I, § 10.

23. Simmons v. South Carolina, 512 U.S. 154, 174 (1994); Heitman v. State, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991) (en banc).

before the Texas Court on state, rather than federal, grounds. This Note argues that the Texas Court should adopt the Supreme Court's holding in *Cobb* on state constitutional claims as well, thus avoiding further entanglement in the "closely related" confusion.

For background purposes, Part II reviews the history of the Sixth Amendment right to counsel as provided by the Supreme Court and other lower courts prior to the Supreme Court's decision in *Cobb*. Part III discusses *Cobb*'s facts and procedural history and examines the analyses of both the Texas Court and the Supreme Court. Part IV analyzes how the questions left unanswered by the Supreme Court, prior to *Cobb*, resulted in the Texas Court's expansion of Sixth Amendment protections. Additionally, Part IV discusses why the Texas Court should recognize a defendant's ability to waive his right to counsel after it has attached—an issue which was not addressed by the Supreme Court in *Cobb*. Part V discusses alternative grounds not considered by the Texas Court that could have also rendered Cobb's confession admissible. In conclusion, this Note suggests how to resolve future Sixth Amendment questions in Texas.

II. PRE-*COBB* DECISIONS ON THE SIXTH AMENDMENT RIGHT TO COUNSEL

A. *Supreme Court Decisions*

The Supreme Court has held that a defendant's own post-indictment incriminating statements, which are deliberately elicited by authorities, may not be used at the defendant's trial for the same indicted charge.[24] In *Massiah v. United States*,[25] the defendant and a man named Colson were indicted for possession of narcotics aboard a United States vessel.[26] While released on bond, Colson agreed to cooperate with authorities.[27] A detective installed a radio transmitter under Colson's automobile seat in order to hear elicited incriminating statements from the defendant about the pending charge.[28] The Supreme Court held "that the [defendant] was denied the basic protections" of the Sixth Amendment when his statements were used against him at his trial.[29] The Supreme Court reasoned that allowing police to interrogate a criminal after indictment for a pending charge "contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime."[30]

The Supreme Court reached a different result, however, regarding post-indictment statements concerning crimes that are *unrelated* to the

24. *See* Massiah v. United States, 377 U.S. 201, 206 (1964).
25. *Id.* at 201.
26. *Id.* at 202.
27. *Id.*
28. *Id.* at 202–03.
29. *Id.* at 206.
30. *Id.* at 205 (quoting People v. Waterman, 175 N.E.2d 445, 448 (N.Y. 1961)).

indicted charge.[31] In *McNeil v. Wisconsin*,[32] the Supreme Court stated that the Sixth Amendment right to counsel is not violated if authorities question an indicted defendant about other crimes that are not related to the indicted offense.[33] In *McNeil*, the defendant sought to suppress his post-indictment confession of crimes that did not relate to the indicted charge of armed robbery for which he was being held.[34] The Supreme Court rejected his claim, stating that the Sixth Amendment right to counsel was "offense specific."[35] The Supreme Court recognized that excluding evidence of an unindicted crime simply because a defendant was under indictment for another crime "'would unnecessarily frustrate the public's interest in the investigation of criminal activities.'"[36]

The "offense specific" requirement, however, appeared to be at least partially limited by two earlier Supreme Court cases decided before *Cobb*.[37] In *Brewer v. Williams*,[38] the defendant was charged with abducting a ten-year-old girl.[39] The investigating detective, aware of the defendant's religious background and believing the girl to be dead, used a "Christian burial speech"[40] to elicit the location of the girl's body from the defendant.[41] The Supreme Court held that the defendant's incriminating statements could not be used at his murder trial[42] despite having been indicted only for the kidnapping offense at the time of the statements.[43] Similarly, in *Maine v. Moulton*,[44]

31. *See* McNeil v. Wisconsin, 501 U.S. 171, 178 (1991).
32. *Id.*
33. *Id.* at 175.
34. *Id.* at 174.
35. *Id.* at 175.
36. *Id.* at 176 (quoting Maine v. Moulton, 474 U.S. 159, 180 (1985)).
37. *See* cases cited *infra* notes 38, 44.
38. 430 U.S. 387 (1977).
39. *Id.* at 390.
40. *Id.* at 392–93.

> "Reverend," . . . "I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."

Id. (quoting the investigating detective).
41. *Id.*
42. *See id.* at 405–06.
43. *Id.* at 390.
44. 474 U.S. 159 (1985).

the Supreme Court upheld the reversal of a defendant's conviction for theft and burglary because detectives elicited incriminating statements from the defendant about both crimes while he was under indictment only for the theft.[45] Significantly, the Supreme Court upheld the reversal of the burglary charge even though the defendant was not under indictment for that offense at the time of the statements.[46]

B. *Lower Court Decisions*

Largely because the Supreme Court's decisions in *Brewer* and *Moulton* appeared to limit the "offense specific" protections of the Sixth Amendment, lower courts attempted to define when police were precluded from questioning an indicted defendant about an unindicted charge.[47] Beginning in 1988 with *People v. Clankie*,[48] courts began to employ exceptions to the "offense specific" requirement whenever a subsequent charge was related to the originally indicted offense.[49] In an attempt to settle when the "offense specific" exception applied, courts used various names such as "closely related," "extremely closely related," and "inextricably intertwined"[50] to determine whether or not the right to counsel attached to an unindicted charge.[51]

The "closely related" test was by no means uniformly applied as federal and state courts used many differing standards. In determining whether an uncharged offense was closely related to the indicted offense, the Fifth Circuit adopted the same course of conduct test.[52] Specifically, the court noted that where one offense predated the other, the crimes did not arise from the same course of conduct; therefore, the exception was inapplicable.[53] In one Fifth Circuit case, the court created another rule when it held that as long as the two of-

45. *See id.* at 176–77, 180.

46. *Id.* at 162–63, 180; Peter Marshall Varney, State v. Adams*: When Mommy Talks, You Better Pay Attention . . . and, If No Indictment Has Been Issued, You Can Use Her Uncounseled Statements Against Her in Court*, 76 N.C. L. REV. 2388, 2401–02 (1998).

47. *See* Holly Larson, United States v. Covarrubias*: Does the Ninth Circuit Add to the Ambiguity of the Inextricably Intertwined Exception?*, 30 GOLDEN GATE U. L. REV. 1, 18 (2000).

48. 530 N.E.2d 448 (Ill. 1988).

49. Larson, *supra* note 47, at 17.

50. This Note collectively refers to these terms as "closely related."

51. Whittlesey v. State, 665 A.2d 223, 232–36 (Md. 1995).

52. United States v. Cooper, 949 F.2d 737, 743–44 (5th Cir. 1991). The defendant was charged with aggravated robbery. *Id.* at 740. While in jail, the defendant was questioned by a federal agent about the defendant's possession of an unlicensed firearm used during the robbery. *Id.* Prosecutors used information from the interrogation to charge the defendant with possession of an unregistered firearm. *Id.* at 740–41.

53. *See id.* at 744 (stating that the Sixth Amendment applies to charges that are "extremely closely related, involving the same crime . . . , victim, residence, time span, and sovereign").

fenses involved "two distinct types of conduct," the closely related exception did not apply, even if the same evidence was used for the prosecution of both offenses.[54]

The Tenth Circuit adopted the "*same* evidence" test, requiring the court to look at whether both crimes involved the same evidence in order for the exception to apply.[55] The Fourth Circuit adopted the "factual predicate" test when the court held that the closely related exception did not apply if the central purpose for committing each crime differed from one another.[56] The First Circuit introduced yet another standard.[57] It held that two offenses were closely related if those offenses arose out of a common "nucleii [sic] of operative fact," looking to mutuality of such factors as time of occurrence as well as the elements involved in the commission of the two crimes.[58]

More recently, the Ninth Circuit introduced an even broader and more inconclusive standard for determining when the offense specific exception applied when it held:

> Deciding whether the exception is applicable requires an examination and comparison of all of the facts and circumstances relating to the conduct involved, including the identity of the persons involved (including the victim, if any), and the timing, motive, and location of the crimes. No single factor is ordinarily dispositive; nor need all of the factors favor application of the exception in order for the offenses to be deemed inextricably intertwined or closely related—which concepts we, like some of the other circuits, deem to be the same.... The greater the commonality of the factors and the

54. *See* United States v. Walker, 148 F.3d 518, 529–30 (5th Cir. 1998). The defendant was charged with illegal possession of a firearm and suborning perjury in relation to the firearm charge. *Id.* at 520–21. The court refused to apply the "closely related" exception because illegal firearm possession and perjury were two distinct types of conduct. *Id.* at 529–30.

55. United States v. Mitcheltree, 940 F.2d 1329, 1344–45 (10th Cir. 1991). A friend of the defendant cooperated with police by secretly taping conversations with the defendant who was under indictment for drug possession. *Id.* at 1337–38. The tapes eventually were used as evidence when the defendant was charged with witness tampering in relation to the drug possession charge. *Id.* at 1340. The court held that the "closely related" exception applied because both offenses involved the same evidence. *Id.* at 1344–45.

56. United States v. Kidd, 12 F.3d 30, 33 (4th Cir. 1993). The defendant was charged with drug charges after government informants tape-recorded the defendant selling crack cocaine. *Id.* at 31. After indictment, another drug informant who had no knowledge of the prior indictment tape-recorded another sell. *Id.* at 31–32. The court declined to apply the "closely related" exception because the second charge was factually distinct and independent from the earlier charges. *Id.* at 33.

57. *See* United States v. Nocella, 849 F.2d 33 (1st Cir. 1988). The defendant was charged with possession of marijuana. *Id.* at 34. After indictment, an informant recorded the defendant making a crack cocaine sell. *Id.* at 34–35. The court declined to apply the "closely related" exception because both charges required proof of different elements and occurred at different times. *Id.* at 38.

58. *Id.* at 38.

more directly linked the conduct involved, the more likely it is that courts will find the exception to be applicable.[59]

Prior to its decision in *Cobb*, the Texas Court considered the "closely related" exception in *State v. Frye*[60] and *Upton v. State*.[61] While the Texas Court appeared to adopt the "closely related" exception in both cases,[62] it did not explain in either opinion which of the many views it was following.[63] The majority of the Texas Court in *Cobb* cited both of these cases in its ultimate decision to overturn Cobb's conviction.[64]

III. THE *TEXAS V. COBB* DECISION

A. *The Facts*

Approximately twenty-three months after murdering a mother and her sixteen-month-old daughter in Walker County, Texas, Raymond Levi Cobb confessed committing the crime to his father.[65] Cobb's father notified the police in Odessa, Texas, where Cobb had moved since committing the murders.[66] After the Odessa police notified Walker County authorities of Cobb's confession,[67] Walker County investigators arranged for an arrest warrant to be faxed to Odessa.[68] Although Walker County investigators suspected Cobb had information on the "disappearances" of Margaret and Kori Rae Owings, they did not have enough evidence to charge him with anything other than burglarizing the Owings' home.[69] Walker County investigators had questioned Cobb about the disappearances on two prior occasions with the consent of Cobb's court-appointed attorney for the burglary

59. United States v. Covarrubias, 179 F.3d 1219, 1225 (9th Cir. 1999) (citation omitted), *overruled by* Texas v. Cobb, 121 S. Ct. 1335 (2001). The defendants were arrested for kidnapping. *Id.* at 1221–22. After counsel was appointed, an INS agent questioned the defendants about related federal charges of transporting illegal aliens across state lines. *Id.* at 1222. The court applied the "closely related" exception because of the commonality of such factors as conduct, persons, timing, location, and motivation. *Id.* at 1226.

60. 897 S.W.2d 324 (Tex. Crim. App. 1995) (en banc).

61. 853 S.W.2d 548 (Tex. Crim. App. 1993) (en banc).

62. *See Frye*, 897 S.W.2d at 329–30 (applying the "closely related" exception where a prosecution intern questioned a suspect about a dismissed misdemeanor theft charge and used the information to help prosecute a related felony theft charge); *Upton*, 853 S.W.2d at 555–56 (applying the "closely related" exception where police questioned a suspect about a murder after he was already under indictment for the related crime of stealing the victim's car).

63. *See Frye*, 897 S.W.2d at 329–30; *Upton*, 853 S.W.2d at 555–56.

64. Cobb v. State, No. 72,807, slip op. at 7, 2000 WL 275644, at *3 (Tex. Crim. App. Mar. 15, 2000) (en banc), *rev'd*, 121 S. Ct. 1335 (2001).

65. *Id.* at 3–6, 2000 WL 275644, at *1–3.

66. *Id.* at 5, 2000 WL 275644, at *3.

67. *Id.*, 2000 WL 275644, at *3.

68. *Id.*, 2000 WL 275644, at *3.

69. *See id.* at 4–5, 2000 WL 275644, at *2.

charge.[70] While Cobb previously had admitted to committing the burglary, he had denied having any knowledge of the fate of Margaret and Kori Rae Owings until he finally confessed to his father.[71]

After obtaining an arrest warrant, Odessa police arrested Cobb.[72] Odessa investigators were unaware that Cobb had counsel in the related burglary charge for which he was awaiting trial.[73] While in custody, an investigator read Cobb the *Miranda* warning.[74] Cobb verbally waived his Fifth Amendment right to counsel[75] and confessed that while committing a burglary, he stabbed twenty-four-year-old Margaret Owings to death and buried Kori Rae Owings alive.[76] After admitting that he killed Margaret and moved her body to a nearby wooded area, Cobb stated:

> "I went back to her house and I saw the baby laying on its bed. I took the baby out there and it was sleeping the whole time. I laid the baby down on the ground four or five feet away from its mother. I went back to my house and got a flat edge shovel. That's all I could find. Then I went back over to where they were and I started digging a hole between them. After I got the hole dug, the baby was awake. It started going toward its mom and it fell in the hole. I put the lady in the hole and I covered them up. I remember stabbing a different knife I had in the ground where they were. I was crying right then."[77]

Cobb subsequently led authorities to the shallow grave of Margaret and Kori Rae Owings.[78] At trial, prosecutors presented evidence recovered from the gravesite,[79] Cobb's in-custody confession to police,[80] and Cobb's pre-custody confession to his father.[81]

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70. *Id.* at 5, 2000 WL 275644, at *2–3.

71. *Id.* at 4–6, 2000 WL 275644, at *2–3.

72. *Id.* at 5, 2000 WL 275644, at *3.

73. *See id.*, 2000 WL 275644, at *3.

74. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966) (holding that a suspect must be warned prior to questioning that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning, if he so desires).

75. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .").

76. Cobb v. State, dissent slip op. at 2–3, 2000 WL 275644, at *5 (McCormick, J., dissenting).

77. *Id.* at 3, 2000 WL 275644, at *5 (McCormick, J., dissenting).

78. *Id.* at 4, 2000 WL 275644, at *6 (McCormick, J., dissenting); Allan Turner, *Prosecutors Tell of Burial Site in Woods; Search for 2 Bodies Described by Officer*, HOUSTON CHRON., Feb. 21, 1997, § A, at 25, *available at* 1997 WL 6541517.

79. Turner, *supra* note 78, § A, at 25.

80. Cobb v. State, slip op. at 4, 2000 WL 275644, at *2.

81. *Man Testifies Son Confessed in 1993 Slaying of Woman*, DALLAS MORNING NEWS, Feb. 21, 1997, § D, at 12.

B. *The Holding*

Based on the confessions and the recovered evidence, a jury convicted Cobb of capital murder and sentenced him to death.[82] However, the Texas Court later reversed Cobb's conviction,[83] holding that authorities violated Cobb's Sixth Amendment right to counsel when they obtained his confession.[84] The Texas Court reasoned that because Cobb's Sixth Amendment right to counsel had attached to the "factually interwoven" burglary charge, this right also attached to the murders that Cobb committed during the commission of the burglary.[85] Because the interrogation about the murders was a police-initiated interrogation, Cobb did not validly waive his Sixth Amendment right to assistance of counsel.[86] The Texas Court found that it did not matter that Odessa investigators were unaware that Cobb had an attorney because Walker County investigators had knowledge of it.[87] Rather, the Texas Court judicially imputed Walker County investigators' knowledge to Odessa investigators.[88] Cobb's case was remanded for a new trial.[89] The State appealed to the Supreme Court, and the Texas Court's decision was ultimately reversed.[90]

C. *The Texas Court's Analysis*

The Texas Court addressed two specific questions regarding the application of the Sixth Amendment in *Cobb*: (1) Does a "closely related" exception apply to the "offense specific" nature of the Sixth Amendment right to counsel;[91] and (2) May a "defendant whose Sixth Amendment right to counsel has attached to an offense unilaterally . . . [waive his] right to counsel upon a police-initiated interrogation about this offense?"[92]

Citing the Third Circuit case of *United States v. Arnold*,[93] the Texas Court held that the "closely related" exception applied to Cobb's con-

82. Cobb v. State, slip op. at 3, 8, 2000 WL 275644, at *1, *4. *See also* TEX. PEN. CODE ANN. § 19.03 (Vernon 1994) (defining capital murder).

83. Cobb v. State, slip op. at 8, 2000 WL 275644, at *5.

84. *Id.* at 7–8, 2000 WL 275644, at *4–5.

85. *Id.* at 7, 2000 WL 275644, at *4.

86. *See id.* at 6–8, 2000 WL 275644, at *3–4 (citing Michigan v. Jackson, 475 U.S. 625, 636 (1986)).

87. Cobb v. State, slip op. at 7, 2000 WL 275644, at *4.

88. *Id.*, 2000 WL 275644, at *4.

89. *Id.* at 1, 2000 WL 275644, at *2.

90. Texas v. Cobb, 121 S. Ct. 1335, 1344 (2001), *rev'g* Cobb v. State, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000) (en banc).

91. Cobb v. State, slip op. at 7, 2000 WL 275644, at *3; State v. Frye, 897 S.W.2d 324, 328–29 (Tex. Crim. App. 1995) (en banc); Upton v. State, 853 S.W.2d 548, 555–56 (Tex. Crim. App. 1993) (en banc).

92. Cobb v. State, dissent slip op. at 11, 2000 WL 275644, at *8 (McCormick, J., dissenting).

93. 106 F.3d 37 (3d Cir. 1997).

fession.[94] In *Arnold*, the Third Circuit recognized that courts "look[ ] for similarities of time, place, person, and conduct"[95] to determine whether the "closely related" exception applies.[96] The Texas Court stated that Cobb's right to counsel for the burglary charge carried over to the murders because it was "very closely related factually to the offense charged."[97] The Texas Court reasoned that the "closely related" test prevents the government from knowingly circumventing "'the Sixth Amendment right to counsel merely by charging a defendant with additional related crimes' after questioning him without counsel present"[98] or "by charging predicate crimes with the purpose of questioning a suspect on an aggravated crime."[99]

Having decided that the Sixth Amendment was applicable to the confession, the Texas Court held that investigators should not have initiated questioning of Cobb about the murders without permission from his attorney.[100] The Texas Court relied on the Supreme Court case of *Michigan v. Jackson*,[101] which established that a suspect cannot make a valid waiver of his Sixth Amendment right to counsel if the interrogation is police-initiated.[102] As for Odessa investigators' lack of knowledge about Cobb's appointed counsel, the Texas Court determined that the "'Sixth Amendment . . . require[d] that [the Court] impute the State's knowledge from one state actor to another.'"[103] The Texas Court explained that "'[o]ne set of state actors . . . may not claim ignorance of defendants' unequivocal request for counsel to another state actor.'"[104] Therefore, before the Odessa police could lawfully question Cobb about the Owings murders, they were under an obligation to contact Cobb's attorney and obtain permission.[105]

D. *The Supreme Court's Analysis*

On appeal, a majority of the Supreme Court rejected the "closely related" line of reasoning by stating that the decision in *McNeil* "meant what it said, and that the Sixth Amendment right is 'offense

94. Cobb v. State, slip op. at 7, 2000 WL 275644, at *3–4.

95. *Arnold*, 106 F.3d at 41.

96. *Id.* at 41–42.

97. Cobb v. State, slip op. at 7, 2000 WL 275644, at *3 (citing *Arnold*, 106 F.3d at 41; State v. Frye, 897 S.W.2d 324, 328–29 (Tex. Crim. App. 1995) (en banc); Upton v. State, 853 S.W.2d 548, 555–56 (Tex. Crim. App. 1993) (en banc)).

98. *Arnold*, 106 F.3d at 41.

99. *Upton*, 853 S.W.2d at 556.

100. Cobb v. State, slip op. at 7, 2000 WL 275644, at *4.

101. 475 U.S. 625 (1986); Cobb v. State, slip op. at 6, 2000 WL 275644, at *3.

102. *Jackson*, 475 U.S. at 636.

103. Cobb v. State, slip op. at 7, 2000 WL 275644, at *4 (quoting *Jackson*, 475 U.S. at 634).

104. *Id.*, 2000 WL 275644, at *4 (quoting *Jackson*, 475 U.S. at 634).

105. *Id.*, 2000 WL 275644, at *4.

specific.'"[106] Chief Justice Rehnquist wrote that the correct standard for determining whether the right to counsel attaches to two separate charges was established in *Blockburger v. United States*.[107] In *Blockburger*, the Supreme Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[108] Under Texas law, burglary and capital murder each contain different elements of proof, so they are not the same offense under the *Blockburger* test.[109] Chief Justice Rehnquist wrote that to hold otherwise would unnecessarily frustrate investigations because police officers may not be "aware of the exact sequence and scope of events they are investigating."[110] Adhering to the "closely related" exception would likely cause police to "refrain from questioning certain defendants altogether"[111] because of the "possibility of violating the Sixth Amendment."[112] Furthermore, the majority stated that the *Blockburger* test adequately affords Sixth Amendment protection to defendants of unindicted offenses that "even if not formally charged, would be considered the same offense" as the indicted offense.[113]

Because the outcome of *Cobb* was decided without considering whether an indicted defendant may waive his right to counsel upon a police-initiated interrogation, the Supreme Court declined to address this issue.[114]

IV. ANALYSIS OF *TEXAS V. COBB*

A. *The "Closely Related" Confusion*

In *Cobb*, the Texas Court chose yet another phrase describing the "closely related" test when it discussed the "factually interwoven" nature of the burglary to the murders.[115] The Texas Court's reasoning was similar to that of many other courts that had previously excluded

106. Texas v. Cobb, 121 S. Ct. 1335, 1339 (2001), *rev'g* Cobb v. State, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000) (en banc).
107. *Id.* at 1343.
108. *Id.* (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)).
109. *Id.* at 1344 (pointing out that burglary and capital murder each contain elements that the other does not). Burglary is committed when, "without the effective consent of the owner, [a] person enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault." TEX. PEN. CODE ANN. § 30.02(a) (Vernon Supp. 2001). Capital murder is committed if a person "murders more than one person . . . during the same criminal transaction." TEX. PEN. CODE ANN. § 19.03(a)(7)(A) (Vernon 1994).
110. Texas v. Cobb, 121 S. Ct. at 1343.
111. *Id.*
112. *Id.* at 1344.
113. *Id.* at 1343.
114. *Id.* at 1340.
115. *Id.*

evidence through application of the "closely related" test.[116] These same courts, however, needlessly overturned convictions in applying the "closely related" test because they failed to recognize a major reason why the Supreme Court decided *Brewer* and *Moulton* how it did. The Supreme Court focused on police misconduct, not the close relation of the indicted offense to the later charged offense.[117]

The detective in *Brewer* elicited incriminating statements from the defendant during a lengthy car trip with him, even after assuring the defendant's counsel that no interrogation would occur.[118] Similarly, in *Moulton*, police violated the Sixth Amendment when they knowingly circumvented the defendant's right to counsel by concealing the fact that his accomplice was acting as their agent.[119] The Supreme Court held that by such conduct "the police denied [the defendant] the opportunity to consult with counsel and thus denied him the assistance of counsel guaranteed by the Sixth Amendment."[120] Even the Texas Court's own opinions that the majority cited as precedent for applying the "closely related" test involved misconduct on the part of authorities.[121] The majority failed to make this distinction when it decided *Cobb*.[122]

Instead of relying on the "closely related" exception, the Texas Court should have used *Brewer* and *Moulton* to uphold Cobb's confession. Unlike the facts of *Brewer* and *Moulton*, there was no attempt by investigators to knowingly circumvent Cobb's Sixth Amendment right to counsel.[123] Odessa police informed Cobb of his right to counsel before interrogating him about the murders.[124] The

116. *See supra* notes 47–56.

117. *See* Maine v. Moulton, 474 U.S. 159, 177 (1985); Brewer v. Williams, 430 U.S. 387, 404–05 (1977). *See also* Texas v. Cobb, 121 S. Ct. at 1341 ("The Court's opinion [in *Brewer*] . . . simply did not address the significance of the fact that the suspect had been arraigned only on the abduction charge, nor did the parties in any way argue this question."); *id.* at 1342 ("[T]he *Moulton* Court did not address the question now before us, and to the extent *Moulton* spoke to the matter at all, it expressly referred to the offense-specific nature of the Sixth Amendment right to counsel.").

118. *Brewer*, 430 U.S. at 391–93.

119. *Moulton*, 474 U.S. at 176–77.

120. *Id.* at 177.

121. State v. Frye, 897 S.W.2d 324, 329–30 (Tex. Crim. App. 1995) (en banc) (holding that it was a Sixth Amendment violation for an assistant district attorney to continue to elicit incriminating statements from a defendant despite being advised by the defendant that he was represented by an attorney); Upton v. State, 853 S.W.2d 548, 557–58 (Tex. Crim. App. 1993) (en banc) (holding that a detective who convinced the defendant to talk to the police despite an instruction from the defendant's attorney telling him not to talk to the police violated the defendant's Sixth Amendment rights).

122. *See* Cobb v. State, No. 72,807, slip op. at 1–8, 2000 WL 275644, at *1–5 (Tex. Crim. App. Mar. 15, 2000) (en banc), *rev'd*, 121 S. Ct. 1335 (2001).

123. *See id.*, 2000 WL 275644, at *1–5; Texas v. Cobb, 121 S. Ct. 1335, 1342 (2001) ("In the present case, police scrupulously followed *Miranda*'s dictates when questioning respondent."), *rev'g* Cobb v. State, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000) (en banc).

124. *See* Cobb v. State, slip op. at 5–6, 2000 WL 275644, at *3.

evidence suggests that Cobb voluntarily waived this right.[125] However, the majority of the Texas Court did not take the lack of police misconduct into consideration; rather, the majority adhered to the overly broad "closely related" test.[126]

Furthermore, Odessa investigators' lack of knowledge about Cobb's counsel for the pending burglary charge negated any suggestion that they intentionally circumvented Cobb's Sixth Amendment right to counsel when they questioned him about the related murders.[127] Walker County investigators' knowledge that Cobb had counsel on the burglary charge did not provide an adequate reason to set aside a confession obtained in good faith.[128] However, citing *Michigan v. Jackson*,[129] the Texas Court held that before the Odessa police could lawfully question appellant about the Owings murders, they were under an obligation to contact Cobb's attorney and obtain permission.[130] Having failed to do so, the Texas Court held that "the fruits of the Odessa police interrogation, including appellant's written statement, were inadmissible in the prosecution's case-in-chief."[131] The Texas Court applied too broad of a standard when it suppressed the confession despite evidence that Odessa investigators acted with good faith.[132]

Guidance could have been obtained by looking at another federal court decision involving the Sixth Amendment. In *United States v. Crouch*,[133] the Fifth Circuit analyzed a claim that a defendant's due process rights were violated when detectives failed to timely investigate a crime.[134] The defendant claimed that his Sixth Amendment right to a speedy trial[135] had been denied by the delay.[136] The court held that "preindictment delay does not violate due process unless

125. *See* Texas v. Cobb, 121 S. Ct. at 1344 (Kennedy, J., concurring) ("In the instant case, Cobb at no time indicated to law enforcement authorities that he elected to remain silent about the double murder."). *See also* Cobb v. State, slip op. at 5–6, 2000 WL 275644, at *3.

126. *See* Cobb v. State, slip op. at 7–8, 2000 WL 275644, at *3–5.

127. *See id.* at 5–6, 2000 WL 275644, at *3.

128. *See* Michigan v. Tucker, 417 U.S. 433, 447 (1974).

> By refusing to admit evidence gained as a result of [negligent or willful] conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Id.

129. 475 U.S. 625 (1986).

130. Cobb v. State, slip op. at 7, 2000 WL 275644, at *4.

131. *Id.*, 2000 WL 275644, at *4.

132. *See generally id.* at 5, 2000 WL 275644, at *3 (indicating that Odessa investigators were not informed that Cobb already had counsel).

133. 84 F.3d 1497 (5th Cir. 1996) (en banc).

134. *Id.* at 1505.

135. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.").

136. *Crouch*, 84 F.3d at 1503–05.

that delay, in addition to prejudicing the accused, was intentionally brought about by the government for the purpose of gaining some tactical advantage over the accused in the contemplated prosecution or for some other bad faith purpose."[137] As in *Crouch*, nothing in the facts of *Cobb* suggests that detectives acted in bad faith in order to gain a tactical advantage;[138] therefore, the Supreme Court rightly decided that the confession was admissible.

The Supreme Court's decision in *Cobb* was based on the United States Constitution.[139] However, Texas courts are not precluded in future cases from applying the "closely related" exception when interpreting the right to counsel provisions of the Texas Constitution.[140] While states may afford more constitutional rights to defendants, the Texas Court has traditionally held that such rights are interpreted the same as the federal standards.[141] To avoid further confusion on the "closely related" issue, the Texas Court should follow the Supreme Court's guidance in *Cobb*.

B. *Questions Unanswered—Defendant's Ability to Waive Assistance of Counsel*

The Supreme Court did not address the Texas Court's opinion that Cobb could not have validly waived his Sixth Amendment right to counsel because Cobb's confession was police-initiated.[142] However, the Supreme Court has dealt with the issue of whether a defendant may unilaterally waive his Sixth Amendment right to counsel in both *Michigan v. Jackson*[143] and *Brewer v. Williams*.[144] Remarkably, the Supreme Court reached different opinions on the issue in each case.[145] As Justice McCormick points out in his dissenting opinion, the majority of the Texas Court relied on *Michigan v. Jackson*,[146] which applied "Fifth Amendment *Miranda v. Arizona/Edwards v. Arizona* prophy-

137. *Id.* at 1523.

138. *See* Cobb v. State, No. 72,807, slip op. at 5–8, 2000 WL 275644, at *3–4 (Tex. Crim. App. Mar. 15, 2000) (en banc), *rev'd*, 121 S. Ct. 1335 (2001).

139. *See* Texas v. Cobb, 121 S. Ct. 1335, 1339 (2001), *rev'g* Cobb v. State, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000) (en banc).

140. *See supra* note 22.

141. *See* Marquez v. State, 725 S.W.2d 217, 243 & n.9 (Tex. Crim. App. 1987) (en banc) (noting that Article I, Section 10 of the Texas Constitution provides the same protection as the federal constitution does with regard to an impartial jury drawn from a source made up of a fair cross section of the community); Hull v. State, 699 S.W.2d 220, 221 (Tex. Crim. App. 1985) (en banc) (noting that Article I, Section 10 of the Texas Constitution guarantees the right to a speedy trial, and the test applied under either the state or federal constitution is the same).

142. *See* Texas v. Cobb, 121 S. Ct. at 1340–41.

143. 475 U.S. 625 (1986).

144. 430 U.S. 387 (1977).

145. *See Jackson*, 475 U.S. at 636; *Brewer*, 430 U.S. at 405–06.

146. Cobb v. State, No. 72,807, dissent slip op. at 14–15, 2000 WL 275644, at *10 (Tex. Crim. App. Mar. 15, 2000) (en banc) (McCormick, J., dissenting) (citing Michigan v. Jackson, 475 U.S. 625 (1986)), *rev'd*, 121 S. Ct. 1335 (2001).

lactic procedural rules to the Sixth Amendment context."[147] Relying on Supreme Court precedent, the Texas Court held that once the right to counsel has attached, any subsequent waiver during *police-initiated* interrogation is ineffective.[148] However, as Justice McCormick explains, this language is contradicted by *Brewer v. Williams*.[149]

In *Brewer*, Justice Stewart wrote for the majority that although the defendant did not waive his right to counsel,[150] the majority did not hold that "[the defendant] *could not*, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments."[151] Justice Powell later reiterated this point when he wrote:

> [T]he opinion of the Court is explicitly clear that the right to assistance of counsel may be waived, after it has attached, without notice to or consultation with counsel. We would have such a case here if petitioner had proved that the police officers refrained from coercion and interrogation, as they had agreed, and that [the defendant] freely on his own initiative had confessed the crime.[152]

In *Michigan v. Jackson*,[153] the Supreme Court inexplicably departed from its reasoning in *Brewer*, holding that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."[154] Instead of overruling *Brewer*, however, the Supreme Court in *Jackson* actually relied on *Brewer*.[155] As Justice McCormick points out, "[t]his is curious since *Brewer* is flatly inconsistent with and contrary to *Jackson*'s holding."[156] "This creates a conflict between *Brewer* and *Jackson* either of which the Court may choose to apply."[157] The majority failed to see the conflict when they chose to apply *Jackson*.[158]

Assuming that *Jackson* was the correct standard, the majority of the court also failed to recognize that Cobb, unlike the defendant in *Jackson*,[159] did not assert his right to counsel at any time before the police-

147. *Id.* at 15, 2000 WL 275644, at *10 (McCormick, J., dissenting) (footnote omitted).

148. Cobb v. State, slip op. at 6–7, 2000 WL 275644, at *3–4 (citing Michigan v. Jackson, 475 U.S. 625, 636 (1986)).

149. Cobb v. State, dissent slip op. at 16, 2000 WL 275644, at *10 (McCormick, J., dissenting).

150. *Brewer*, 430 U.S. at 405.

151. *Id.* at 405–06.

152. *Id.* at 413 (Powell, J., concurring) (citations omitted).

153. 475 U.S. 625 (1986).

154. *Id.* at 636.

155. Cobb v. State, No. 72,807, dissent slip op. at 16, 2000 WL 275644, at *10 (Tex. Crim. App. Mar. 15, 2000) (en banc) (McCormick, J., dissenting) (citing *Jackson*, 475 U.S. at 635 n.9), *rev'd*, 121 S. Ct. 1335 (2001).

156. *Id.* at 16, 2000 WL 275644, at *10 (McCormick, J., dissenting) (citing *Jackson*, 475 U.S. at 640 (Rehnquist, J., dissenting)).

157. *Id.*, 2000 WL 275644, at *10 (McCormick, J., dissenting).

158. Cobb v. State, slip op. at 6, 2000 WL 275644, at *3.

159. *See Jackson*, 475 U.S. at 627.

initiated interrogation.[160] Rather, Cobb's attorney was appointed by the court to represent Cobb in the burglary case.[161] This distinction is important because the Fifth Circuit ruled that a *Jackson* assertion requires an "actual, positive statement or affirmation of the right to counsel."[162] In *Jackson*, the Supreme Court stated that "additional safeguards are necessary when the accused *asks* for counsel."[163] This language is consistent with the Supreme Court's opinion in *Patterson v. Illinois*[164] which held that *Jackson* applies "once an accused even *requests* the assistance of counsel."[165] The purpose of the rule upheld in *Jackson* was to protect defendants' "*choice* to communicate with police only through counsel"[166] because of the belief that such defendants "are unlikely to waive that right voluntarily in subsequent interrogations."[167] Because Cobb failed to make such an assertion, he should not be able to argue later that Odessa police violated a right that he never invoked.[168]

V. ALTERNATIVE GROUNDS FOR CONVICTION

Even with the Texas Court's decision to apply the confusing "closely related" test as an exception to the "offense specific" requirement of the Sixth Amendment, the Texas Court still could have found that Cobb's confession was admissible on alternative grounds, as illustrated in the following sections.[169]

A. *The Federal Exclusionary Rule*

1. The *Brady* Materiality Standard

The exclusionary rule is a remedy designed by courts providing that when evidence has been obtained in violation of fundamental rights guaranteed by the Constitution, such evidence may not be used at the trial of a defendant.[170] In *Brady v. Maryland*,[171] the Supreme Court upheld application of the exclusionary rule for violation of such a

160. Cobb v. State, dissent slip op. at 16–17, 2000 WL 275644, at *11 (McCormick, J., dissenting).

161. Cobb v. State, slip op. at 7, 2000 WL 275644, at *4.

162. Montoya v. Collins, 955 F.2d 279, 282 (5th Cir. 1992).

163. *Jackson*, 475 U.S. at 636 (1986) (emphasis added) (quoting Edwards v. Arizona, 451 U.S. 477, 484 (1981)).

164. 487 U.S. 285 (1988).

165. *Id.* at 290 n.3.

166. *Id.* at 291 (emphasis added).

167. Michigan v. Harvey, 494 U.S. 344, 350 (1990).

168. *See* Cobb v. State, No. 72,807, dissent slip op. at 16–18, 21–22, 2000 WL 275644, at *11–12 (Tex. Crim. App. Mar. 15, 2000) (en banc) (McCormick, J., dissenting), *rev'd*, 121 S. Ct. 1335 (2001).

169. *See infra* Part V.A–D.

170. BLACK'S LAW DICTIONARY 587 (7th ed. 1999); Alison H. Southall & Robert L. Jacobsen, *Twenty-Eighth Annual Review of Criminal Procedure*, 87 GEO. L.J. 1519, 1522–23 (1999).

171. 373 U.S. 83 (1963).

right.[172] Although *Brady* dealt with the omission of exculpatory evidence,[173] the exclusionary rule has been applied to other violations of constitutional rights.[174] In *Brady*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[175] "[E]vidence is material . . . if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different . . . [or] confidence in the outcome" of the trial would have been undermined.[176] "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome" of the trial.[177] The purpose of the exclusionary rule provided in *Brady* is not punishment of society for the misconduct of government agents but avoidance of an unfair trial to the accused.[178] The Supreme Court reasoned that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair."[179]

The materiality standard of *Brady* provides the correct standard for applying the exclusionary rule. Instead of determining whether the burglary and murders were "closely related," the Texas Court should have asked whether society's confidence in Cobb's guilt on the burglary charge would have reasonably been changed if Odessa investigators had not obtained his murder confession.[180] Cobb had already confessed committing the burglary to Odessa investigators,[181] so the second interrogation did not prejudice his Sixth Amendment right on the burglary charge.[182]

Furthermore, courts should be cautious when applying the exclusionary rule. In *United States v. Leon*,[183] the Supreme Court held that "[i]ndiscriminate application of the exclusionary rule . . . may well

172. *See id.* at 90–91.

173. *Id.* at 84–85.

174. Massiah v. United States, 377 U.S. 201, 205–07 (1964) (applying the exclusionary rule to violations of the Sixth Amendment right to counsel); Mapp v. Ohio, 367 U.S. 643, 657 (1961) (applying the exclusionary rule to violations of the Fourth Amendment right to privacy); Bram v. United States, 168 U.S. 532, 563–64 (1897) (applying the exclusionary rule to violations of the Fifth Amendment right to silence).

175. *Brady*, 373 U.S. at 87.

176. *See* United States v. Bagley, 473 U.S. 667, 682 (1985).

177. *Id.*

178. *See Brady*, 373 U.S. at 87 (discussing Mooney v. Holohan, 294 U.S. 103 (1935)).

179. *Id.*

180. *See Bagley*, 473 U.S. at 682 (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)).

181. Cobb v. State, No. 72,807, slip op. at 4–5, 2000 WL 275644, at *2 (Tex. Crim. App. Mar. 15, 2000) (en banc), *rev'd*, 121 S. Ct. 1335 (2001).

182. *See Bagley*, 473 U.S. at 682.

183. 468 U.S. 897 (1984).

'generat[e] disrespect for the law and administration of justice.'"[184] Any court applying the exclusionary rule should understand that the function of the exclusionary rule is to deter police misconduct rather than to protect a personal constitutional right.[185] In the facts of *Cobb*, there was no willful misconduct by law enforcement officials.[186] In such a circumstance, the Texas Court should have applied rationale that focused on the deterrent purpose of the exclusionary rule and recognized the need for the questioning of suspects like Cobb with respect to serious crimes.[187] Valid confessions are "more than merely 'desirable.'"[188] Valid confessions "are essential to society's compelling interest in finding, convicting, and punishing those who violate the law."[189]

2. The "Independent Source" Doctrine

If Odessa investigators denied Cobb assistance of counsel in direct violation of the Sixth Amendment, Cobb's confession still could have been upheld because the federal exclusionary rule is subject to the "independent source" doctrine recognized in *Murray v. United States*.[190] This doctrine was developed specifically to serve as a check on the exclusionary rule.[191] In *Murray*, law enforcement officers illegally forced entry into a warehouse and observed burlap bags in plain view.[192] The officers later discovered marijuana in the burlap bags.[193] The officers left the warehouse without disturbing the bags and then obtained a search warrant.[194] The officers did not mention their prior entry, nor did they rely on observations made during that entry, in their application for the search warrant.[195] A judge issued the warrant, and the officers then conducted a second search of the warehouse and seized the burlap bags containing the marijuana.[196]

In assessing whether the evidence discovered during the second search could be admitted, the Supreme Court examined the applicability of the independent source doctrine.[197] The Supreme Court noted that it had developed this doctrine as a direct consequence of the exclusionary rule because

184. *Id.* at 908 (quoting Stone v. Powell, 428 U.S. 465, 491 (1976)).
185. *Id.* at 906 (citing United States v. Calandra, 414 U.S. 338, 348 (1974)).
186. *See* Cobb v. State, slip op. at 5–8, 2000 WL 275644, at *3–5.
187. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 224–25 (1973).
188. Moran v. Burbine, 475 U.S. 412, 426 (1986) (quoting United States v. Washington, 431 U.S. 181, 187 (1977)).
189. *Id.*
190. 487 U.S. 533 (1988).
191. *See id.* at 537.
192. *Id.* at 535.
193. *Id.*
194. *Id.*
195. *Id.* at 535–36.
196. *Id.* at 536.
197. *Id.* at 537.

> "[t]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation."[198]

While the facts of *Cobb* do not include a search warrant, the issue of independently obtained information is relevant.[199] Cobb confessed to his father before confessing to police;[200] therefore, his confession should not have been excluded because it was independently obtained from the police interrogation. However, while the prosecution may have used the independent source doctrine, it was not necessary to invoke the doctrine in *Cobb*. Some sort of police or prosecutorial error or misconduct must exist before a court may even look for imposition of the independent source doctrine.[201] Under the facts of *Cobb*, the use of the doctrine would have been irrelevant if the Texas Court had recognized Cobb's ability to waive his right to counsel.

The Texas Court has repeatedly refused to incorporate the independent source doctrine in Texas on state suppression issues.[202] In *Garcia v. State*, the Texas Court held that the independent source doctrine is irrelevant because Texas has provided a stricter exclusionary rule[203] than the federal rule.[204] However, this line of reasoning has been strongly criticized by several judges on the Texas Court.[205]

B. *The Texas Exclusionary Rule*

The Texas Code of Criminal Procedure[206] provides the relevant form of the exclusionary rule applied in *Cobb*:

> No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be

198. *Id.* (quoting Nix v. Williams, 467 U.S. 431, 443 (1984)).

199. *See* Nix v. Williams, 467 U.S. 431, 443 (1984) (allowing evidence to be admitted if it is more likely than not to be discovered through a source independent of the illegal activity).

200. Cobb v. State, No. 72,807, slip op. at 5, 2000 WL 275644, at *3 (Tex. Crim. App. Mar. 15, 2000) (en banc), *rev'd*, 121 S. Ct. 1335 (2001).

201. *See, e.g.*, *Murray*, 487 U.S. at 537 (applying the independent source doctrine when the police illegally entered a warehouse and seized evidence).

202. *See* Garcia v. State, 829 S.W.2d 796, 798–99 (Tex. Crim. App. 1992) (en banc).

203. TEX. CRIM. PROC. CODE ANN. art. 38.23(a) (Vernon Supp. 2001).

204. *See Garcia*, 829 S.W.2d at 798.

205. *See id.* at 801–03; Green v. State, 615 S.W.2d 700, 709, 711–13 (Tex. Crim. App. [Panel Op.] 1980) (McCormick, J., dissenting).

206. TEX. CRIM. PROC. CODE ANN. art. 38.23(a).

> admitted in evidence against the accused on the trial of any criminal case.[207]

Again, even if Odessa investigators denied Cobb assistance of counsel in direct violation of the Sixth Amendment, Cobb's confession still could have been upheld because in Texas, the exclusionary rule is subject to the attenuation of taint doctrine.[208] The Texas Court recognized this doctrine in *Johnson v. State*.[209] The appellee in *Johnson* was suspected by Harris County investigators in a double homicide.[210] Investigators received information that the defendant had fled to Austin, Texas.[211] Harris County investigators notified Austin investigators who then assisted.[212] Austin investigators located the girlfriend and obtained a written statement from her that implicated the defendant in the murders.[213] The statement was faxed to Harris County investigators who then attempted to obtain an arrest warrant.[214] Meanwhile, as Austin investigators were returning the girlfriend to her place of employment, they observed the defendant enter her car.[215] Investigators immediately arrested the defendant approximately two-and-one-half hours before Harris County investigators were able to obtain the warrant.[216] The defendant gave investigators a written statement approximately three hours after the warrant was finally obtained.[217]

On appeal, the defendant argued that because he was illegally arrested, the subsequent statement should have been suppressed under the exclusionary rule.[218] However, the Texas Court allowed the confession to stand.[219] Following the conclusions of the court of appeals, the Texas Court reasoned that the attenuation doctrine applies "if the evidence is so attenuated from the illegal conduct that it cannot be said to be a product of the illegality."[220] The Texas Court referred to the Supreme Court case of *Brown v. Illinois*[221] as the proper authority in determining the application of the "attenuation of taint" doctrine.[222]

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207. *Id.*
208. *See* Bell v. State, 724 S.W.2d 780, 787 (Tex. Crim. App. 1986) (en banc) (citing Wong Sun v. United States, 371 U.S. 471, 485 (1963)).
209. 871 S.W.2d 744 (Tex. Crim. App. 1994) (en banc).
210. *Id.* at 746.
211. *Id.*
212. *See id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *See id.* at 746 & n.1.
217. *See id.*
218. *See id.* at 745, 748–49.
219. *Id.* at 745, 751.
220. *Id.* at 750.
221. 422 U.S. 590 (1975).
222. *Johnson*, 871 S.W.2d at 751.

In *Brown*, the Supreme Court set forth the following factors for courts to consider in answering whether there is a significant break in events between the illegal conduct and the confession: (1) the presence or absence of *Miranda* warnings; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances; and (4) the purpose and flagrancy of the official misconduct.[223] The Supreme Court further explained that "[t]he voluntariness of the statement is a threshold requirement," and that the government has the burden of proving the admissibility of the challenged confession.[224] In the end, courts must ascertain whether the means used to obtain a confession were "compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means [or] whether the defendant's will was in fact overborne."[225] The flagrancy of official misconduct weighs the heaviest in evaluating attenuation of taint.[226]

While the facts of *Cobb* do not include an illegal arrest,[227] the attenuation of taint doctrine can easily be applied to the facts. Cobb received a *Miranda* warning from Odessa Police.[228] Although Cobb's confession occurred shortly after his arrest in Odessa, it occurred nearly sixty days after Walker County detectives last questioned him.[229] Finally, the questioning detectives were unaware that Cobb had counsel in the pending burglary charge,[230] negating any flagrant official misconduct. All of these variables certainly indicate sufficient intervening circumstances to allow the confession to stand.

C. *Bad Faith Requirement for Prophylactic Procedural Violations*

While the concept of assistance of counsel includes fundamental rules of due process, "prophylactic rules of procedure [have been] designed, in most cases by the Legislature, to impose a uniform requirement where the fairness of a flexible rule is too uncertain."[231] In *Miranda v. Arizona*,[232] the Supreme Court recognized that in a coercive environment, certain protections are necessary to "assure that the [defendant] is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself."[233] To

223. *Brown*, 422 U.S. at 603–04.
224. *Id.* at 604.
225. Miller v. Fenton, 474 U.S. 104, 116 (1985).
226. *See* Self v. State, 709 S.W.2d 662, 668 (Tex. Crim. App. 1986) (en banc).
227. *See* Cobb v. State, No. 72,807, 2000 WL 275644 (Tex. Crim. App. Mar. 15, 2000) (en banc), *rev'd*, 121 S. Ct. 1335 (2001).
228. *Id.* at 5–6, 2000 WL 275644, at *3.
229. *Id.*, 2000 WL 275644, at *3.
230. *Id.* at 5, 2000 WL 275644, at *3.
231. *See* Marin v. State, 851 S.W.2d 275, 281 (Tex. Crim. App. 1993) (en banc), *rev'd on other grounds*, 891 S.W.2d 267 (Tex. Crim. App. 1994) (en banc).
232. 384 U.S. 436 (1966).
233. *See id.* at 439.

accomplish this measure, the Supreme Court created the prophylactic procedural safeguard of the *Miranda* warning.[234] Similarly, the Supreme Court created another prophylactic procedural rule when it barred police from initiating an interrogation with an indicted defendant.[235] However, the Supreme Court recognized the difference between fundamental rights and prophylactic procedural rules when it held that it had "never prevented use by the prosecution of relevant voluntary statements by a defendant, particularly when the violations alleged by a defendant relate only to procedural safeguards that are 'not themselves rights protected by the Constitution,'[236] but are instead measures designed to ensure that constitutional rights are protected."[237] The Supreme Court has also held that the "search for truth in a criminal case"[238] outweighs the "speculative possibility" that exclusion of evidence might deter future violations of rules not directly compelled by the Constitution.[239]

Cobb was not denied assistance of counsel in direct violation of the Sixth Amendment.[240] At most, only a procedural safeguard was violated when investigators obtained Cobb's confession without first receiving his attorney's permission.[241] Therefore, even if Cobb's confession was obtained in violation of a prophylactic rule meant to safeguard Sixth Amendment rights, "[t]he 'fruits' of voluntary confessions obtained in violation of prophylactic [procedural] rules are admissible."[242] Before excluding such evidence, courts have looked to whether there was any misconduct on the part of authorities.[243] Furthermore, when reviewing allegations of the right to counsel, the Texas Court has held that it should examine "the totality of the circumstances surrounding the interrogation" and the alleged invoca-

234. *Id.* at 478–79; Elizabeth E. Levy, *Non-Continuous Custody and the* Miranda-Edwards *Rule: Break in Custody Severs Safeguards*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 539, 543–44 (1994). *But cf.* Dickerson v. United States, 120 S. Ct. 2326, 2333 (2000) (stating that "*Miranda* is a constitutional decision"). However, the Supreme Court declined to overrule prior decisions that held *Miranda* to be a prophylactic measure. *See id.*

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

236. Michigan v. Harvey, 494 U.S. 344, 351 (1990) (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)) (discussing *Miranda*, 384 U.S. at 436).

237. *Id.*

238. Oregon v. Hass, 420 U.S. 714, 722 (1975).

239. United States v. Havens, 446 U.S. 620, 626 (1980) (citing *Hass*, 420 U.S. at 722–23).

240. *See* Cobb v. State, No. 72,807, slip op. at 6–8, 2000 WL 275644, at *3–5 (Tex. Crim. App. Mar. 15, 2000) (en banc), *rev'd*, 121 S. Ct. 1335 (2001).

241. *See* Cobb v. State, dissent slip op. at 23, 2000 WL 275644, at *13 (McCormick, J., dissenting) (citing Michigan v. Jackson, 475 U.S. 625, 636 (1986); Baker v. State, 956 S.W.2d 19, 23–24 (Tex. Crim. App. 1997) (en banc)).

242. *Id.* at 23, 2000 WL 275644, at *13 (McCormick, J., dissenting).

243. *See, e.g.*, United States v. Morrison, 449 U.S. 361, 365 (1981).

tion.[244] However, the Texas Court appears to have ignored its own precedent by its decision in *Cobb*.[245] Finally, as Justice McCormick pointed out in his dissenting opinion, violations of the Sixth Amendment prophylactic protections are subject to a "harmless error" analysis.[246] Cobb's confession to investigators could be considered "harmless" because Cobb's father also testified about a pre-custody confession Cobb gave him.[247]

D. *The "Break in Custody"* Miranda *Rule*

The Texas Court chose to apply the *Jackson* standard when it held that police could not initiate the questioning of Cobb.[248] However, in applying the *Jackson* standard, the majority of the Texas Court failed to recognize a crucial factual distinction between *Cobb* and *Jackson*.[249] In *Jackson*, police initiated questioning of the defendants shortly after an arraignment, and there was no break in custody before interrogation.[250] In *Cobb*, however, police initiated questioning over fifteen months after Cobb's arraignment while he was out on bond for the burglary charge.[251] It is important to recognize that the Supreme Court's opinion in *Jackson* relied on protections already established in *Edwards*.[252] The Supreme Court appears to have suggested that a break in custody might render the *Edwards* rule inapplicable.[253] In fact, a number of courts have already ruled that *Edwards* does not apply when there has been a break in custody that

244. Dinkins v. State, 894 S.W.2d 330, 351 (Tex. Crim. App. 1995) (en banc) (citing Lucas v. State, 791 S.W.2d 35, 45–46 (Tex. Crim. App. 1989) (en banc); Russell v. State, 727 S.W.2d 573, 576 (Tex. Crim. App. 1987) (en banc)).

245. *See* Cobb v. State, slip op. at 6–8, 2000 WL 275644, at *3–5; Garcia v. State, 829 S.W.2d 796 (Tex. Crim. App. 1992) (en banc); Green v. State, 615 S.W.2d 700 (Tex. Crim. App. [Panel Op.] 1980).

246. *See* Cobb v. State, dissent slip op. at 22–23, 2000 WL 275644, at *12 (McCormick, J., dissenting) (citing Leday v. State, 983 S.W.2d 713, 717 (Tex. Crim. App. 1998) (en banc)). "If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." TEX. R. APP. P. 44.2(a).

247. *See* Cobb v. State, dissent slip op. at 22–23, 2000 WL 275644, at *12 (McCormick, J., dissenting) (citing Leday v. State, 983 S.W.2d 713, 717 (Tex. Crim. App. 1998) (en banc)); Turner, *supra* note 78, § A, at 25.

248. *See* Cobb v. State, slip op. at 6, 2000 WL 275644, at *3.

249. Cobb v. State, dissent slip op. at 16, 2000 WL 275644, at *10 (McCormick, J., dissenting).

250. *Id.*, 2000 WL 275644, at *10 (McCormick, J., dissenting).

251. Cobb v. State, slip op. at 4–5, 2000 WL 275644, at *2–3; Cobb v. State, dissent slip op. at 16, 2000 WL 275644, at *10 (McCormick, J., dissenting) (noting the discrepancy between the timeline of fifteen months and twenty-eight days and the dissent's statement of seventeen months).

252. *See* Michigan v. Jackson, 475 U.S. 625, 629–30 (1986).

253. State v. Consaul, 982 S.W.2d 899, 900–01 & n.1 (Tex. Crim. App. 1998) (en banc) (per curiam) (Price, J., concurring) (citing McNeil v. Wisconsin, 501 U.S. 171, 176–77 (1991)).

affords the defendant a significant opportunity to seek assistance of counsel.[254] The Texas Court, however, has never ruled on how a break in custody might affect an *Edwards* claim.[255]

A break in custody should negate the *Edwards* rule because "the inherently coercive nature of custody itself is diminished and there is little to no risk of badgering by the authorities."[256] This language is consistent with the Supreme Court's definition of the federal due process standard for voluntary confessions; "[i]s the confession the product of an essentially free and unconstrained choice by its maker?"[257] Similarly, the Texas Court has recognized in a prior decision that "determination of whether a confession is voluntary under the . . . United States Constitution must be based upon an examination of the totality of the circumstances surrounding its acquisition."[258] This burden would not be hard to overcome, given that nearly sixty days had passed since Cobb was last questioned about the crimes,[259] that Cobb was reminded of his right to counsel when investigators read him the *Miranda* warning,[260] and that he outwardly manifested his waiver of this right.[261] The Texas Court's decision in *Cobb* ignored the "totality of the circumstances" language.[262]

VI. CONCLUSION

The exclusionary rule should apply to confessions obtained when a defendant is denied assistance of counsel in direct violation of the Sixth Amendment, regardless of misconduct on the part of government agents. In the interest of justice, however, the Texas Court should recognize the independent source doctrine to counter the drastic effects of the exclusionary rule. Additionally, the attenuation of taint doctrine should continue to be available to the prosecution.

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254. *See* United States v. Hines, 963 F.2d 255, 256–57 (9th Cir. 1992); Dunkins v. Thigpen, 854 F.2d 394, 397–98 (11th Cir. 1988); McFadden v. Garraghty, 820 F.2d 654, 661 (4th Cir. 1987); United States *ex rel.* Espinoza v. Fairman, 813 F.2d 117, 125 (7th Cir. 1987); United States v. Skinner, 667 F.2d 1306, 1309 (9th Cir. 1982).

255. *See Consaul*, 982 S.W.2d at 904 (Keller, J., dissenting).

> The [break in custody] issue in the present case is an important one and one of first impression in this state. The Supreme Court has indicated that the protections in *Edwards* are not implicated when there has been a break in custody. . . . I believe this Court should address the issue.

Id. (Keller, J., dissenting) (citation omitted).

256. United States v. Bautista, 145 F.3d 1140, 1150 (10th Cir. 1998).

257. Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973) (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

258. Armstrong v. State, 718 S.W.2d 686, 693 (Tex. Crim. App. 1985) (en banc).

259. Cobb v. State, No. 72,807, slip op. at 5–6, 2000 WL 275644, at *3 (Tex. Crim. App. Mar. 15, 2000) (en banc), *rev'd*, 121 S. Ct. 1335 (2001).

260. *Id.* at 5, 2000 WL 275644, at *3.

261. *See id.* at 5–6, 2000 WL 275644, at *3.

262. *See id.* at 1–8, 2000 WL 275644, at *1–5.

Unlike direct Sixth Amendment violations, however, violations of Sixth Amendment procedural rules should be subject to the exclusionary rule only when there is evidence of misconduct on the part of a government agent. Accordingly, absent misconduct designed to circumvent the protections of the Sixth Amendment, police should not be barred from interrogating an in-custody defendant about an unindicted charge without notice to counsel, regardless of its close relation to the indicted charge. Furthermore, the Sixth Amendment protections should apply only after a defendant has affirmatively asserted his right to counsel. Finally, by applying a "totality of the circumstances" test to determine the voluntary nature of confessions, the Texas Court should recognize a criminal defendant's ability to unilaterally waive assistance of counsel when there has been a reasonable break in custody after the right to counsel has attached.

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