

A RELATIONAL SIXTH AMENDMENT DURING INTERROGATION

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The Sixth Amendment right to counsel has been revered as fundamental to a fair criminal trial. The Supreme Court, moreover, has deemed this right critical to protecting a defendant's constitutional rights at a post-charge interrogation. Nevertheless, the Supreme Court's modern Sixth Amendment jurisprudence has undermined the practical import of the right to counsel in the interrogation context by undervaluing the attorney-client relationship itself. This Article critiques the Supreme Court's Sixth Amendment jurisprudence and presents an alternative "relational" model of the right to counsel during post-charge interrogations. The Article concludes by expressing the goal that states, under their own constitutions, elect for a relational right to counsel over the "offense-specific" federal model.

I. INTRODUCTION

[L]awyers in criminal courts are necessities, not luxuries.¹

Ever since the U.S. Supreme Court trumpeted the Sixth Amendment right to counsel in *Gideon v. Wainwright*,² our legal culture has extolled the value of this right in ensuring a fair criminal trial.³ Yet, a "fair trial"

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¹ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

² 372 U.S. 335. I of course play here upon GIDEON'S TRUMPET (1964), Anthony Lewis's famous account of Clarence Earl Gideon's story. The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

³ See Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 49 (1991) (observing that "[f]ew decisions have evoked as much popular support as *Gideon*"); Yale Kamisar, *The Gideon Case 25 Years Later*, N.Y. TIMES, Mar. 10, 1988, at A27 (characterizing *Gideon* as "one of the most popular decisions ever handed down by the United States Supreme Court"); Edward M. Kennedy, *The Promise of Equal Justice*, CHAMPION, Jan.-Feb. 2003, at 23 (contending that "[t]he *Gideon* decision . . . showed the Supreme Court at its best"); cf. Akhil Reed Amar, *Sixth Amendment*

implicates much more than the trial itself, particularly since the vast majority of today's criminal cases—90% or more—are resolved by negotiated disposition rather than trial.⁴ Defendants thus rarely face their accusers during traditional courtroom proceedings that pit skilled trial lawyers against each other. Instead, defense attorneys determine most clients' fate through telephone calls, meetings, and investigations, and by advising a client effectively on how properly to limit the scope or strength of a prosecution, all to achieve the best disposition possible.⁵ Increasingly,

First Principles, 84 GEO. L.J. 641 (1996). Some observers, however, have expressed concern that the reality of the Sixth Amendment does not match the rhetoric. See, e.g., Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1636 (2003) (arguing that “[t]he rhetoric of the Sixth Amendment is grand; the reality is grim”); Amanda Myra Hornung, Note, *The Paper Tiger of Gideon v. Wainright and the Evisceration of the Right to Appointment of Legal Counsel for Indigent Defendants*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 495, 497 (2005) (arguing that the Supreme Court’s post-*Gideon* approach to the right to appointed counsel, as well as effective assistance of counsel, has abridged the promise of *Gideon*). See also Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006), in which the authors detail the findings of the National Committee on the Right to Counsel, concluding:

[F]orty years after *Gideon*, this nation is still struggling to implement the right to counsel in state criminal and juvenile proceedings. Sadly, there is abundant evidence that systems of indigent defense routinely fail to assure fairness because of under-funding and other problems. It is also more evident now than ever before that innocent persons, sometimes represented by incompetent, unqualified, or overburdened defense lawyers, are convicted and imprisoned.

Id. at 1039-40 (citing Norman Lefstein, *In Search of Gideon’s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 838 (2004)).

⁴ I can attest to this fact from my own fifteen years of experience as a criminal defense attorney, including eleven years as a trial-level public defender. See U.S. SENTENCING GUIDELINES MANUAL part A(4)(c) (2005) (explaining that “[n]early ninety percent of all federal criminal cases involve guilty pleas”); Rebecca Hollander-Blumoff, *Getting to “Guilty”: Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 116-17 (1997) (noting that “[b]y most accounts, plea bargaining disposes of approximately ninety percent of all criminal cases in the United States”). I use the phrase “negotiated disposition” instead of “negotiated guilty plea” because not all case dispositions involve guilty pleas. See, e.g., N.Y. CRIM. PROC. LAW § 170.55 (McKinney 2007) (providing for an “adjournment in contemplation of dismissal”). For a very spirited critique of our plea bargaining system, see Paul Craig Roberts, *Seeking a Return to Justice*, WASH. TIMES, Feb. 13, 2001, at A15.

⁵ See Hollander-Blumoff, *supra* note 4, at 122-47 (discussing roles of defense counsel, prosecutors, and the courts in modern plea bargaining process); Metzger, *supra* note 3, at 1636-37 (“[N]ational trends of mandatory sentencing and sentencing guidelines revolutionized criminal procedure and dramatically altered the roles of the system’s key players. Now, defense counsel’s role outside the courtroom is substantially amplified.”). The “holistic advocacy,” or “therapeutic jurisprudence,” movement may represent a natural response to this increase in pretrial intervention, services, and dispositions. See David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, 280 (1993) (explaining that “[t]herapeutic jurisprudence is the study of the role of the law as a therapeutic agent”); see also Susan Daicoff, *Law as a Healing Profession: The*

the assistance of counsel during a criminal prosecution occurs in pretrial contexts where, after a charge has been filed,⁶ preemptive legal advice is imparted, damage is minimized, and bargains are struck.

Comprehensive Law Movement, 6 PEPP. DISP. RESOL. L.J. 1 (2006). For strong proponents of holistic advocacy by criminal defense lawyers, see, e.g., Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123 (2004); David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743 (2005). For some measured critiques of holistic advocacy in criminal defense work, see Brooks Holland, *Holistic Advocacy: An Important but Limited Institutional Role*, 30 N.Y.U. REV. L. & SOC. CHANGE 637 (2006); Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. REV. 539 (2007). For the response, see David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn's Concerns About Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597 (2007).

⁶ The filing of a charge or the initiation of an adversarial judicial proceeding is critical for Sixth Amendment purposes, as the Sixth Amendment does not convey a right to counsel during any and all law enforcement investigations. See *Moran v. Burbine*, 475 U.S. 412, 428-32 (1986) (rejecting argument that any right to counsel attaches under Sixth Amendment during pre-charge interrogation); *Hoffa v. United States*, 385 U.S. 293, 309-10 (1966) (rejecting argument that once the Government had enough evidence to charge Hoffa with jury tampering offenses, it could not continue a pre-charge investigation without violating Hoffa's right to counsel, since a charge would have triggered that right); see also WAYNE R. LAFAVE ET AL., *PRINCIPLES OF CRIMINAL PROCEDURE: INVESTIGATION* § 5.4(d), at 287 (2004) (noting that the Sixth Amendment right to counsel is not triggered "merely because the defendant ha[s] been arrested without a warrant, nor is it met . . . merely because the investigation has focused upon the defendant"); cf. *Kirby v. Illinois*, 406 U.S. 682, 688-91 (1972) (rejecting applicability of Sixth Amendment at pre-charge, post-arrest identification procedure). Rather, the Sixth Amendment assures a right to counsel upon "the initiation of adversary criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information or arraignment." *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991) (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984); *Kirby*, 406 U.S. at 689). See generally *Rothgery v. Gillespie Co.*, 128 S. Ct. 2578, 2592 (2008) (holding that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel"). The right to appointed counsel has been held to extend only to those defendants who are charged with a felony or an offense resulting in actual imprisonment. See *Scott v. Illinois*, 440 U.S. 367, 373 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972); see also *Alabama v. Shelton*, 535 U.S. 654, 674 (2002). The right also applies only during "critical stages" of pretrial proceedings. See *United States v. Wade*, 388 U.S. 218, 224 (1967); cf. *Rothgery*, 128 S. Ct. at 2594 (Alito, J., concurring) (agreeing that the right to counsel attached at defendant's magistration, but observing that "Texas counties need only appoint counsel as far in advance of trial, and as far in advance of any pretrial 'critical stage,' as necessary to guarantee effective assistance at trial" (emphasis added)); *United States v. Ash*, 413 U.S. 300, 310 (1973).

Prior to a charge or other adversarial proceeding, only the Fifth Amendment right to counsel may be invoked, and only to protect the right against self-incrimination. See *Gouveia*, 467 U.S. at 188 n.5 (explaining that "we have made clear that we required counsel in *Miranda* . . . in order to protect the Fifth Amendment privilege against self-incrimination

Perhaps in no pretrial context can this advice of counsel matter more than during an interrogation,⁷ where cases and deals often can be won or lost.⁸ Yet, the U.S. Supreme Court's current right to counsel jurisprudence profoundly minimizes the importance of the attorney-client relationship during post-charge, pretrial interrogation. For example, notwithstanding the Court's view that a post-charge interrogation constitutes a "critical stage," thus entitling a defendant to appointed counsel,⁹ the Court has undermined

rather than to vindicate the Sixth Amendment right to counsel"); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); *see also* LAFAVE ET AL., *supra*, § 10.1(c), at 532 (discussing derivative right to counsel under the Fifth Amendment); Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1, 16 (2001) (noting that "[e]arly in the [*Miranda*] oral arguments, it became clear that the heart of the controversy was the Fifth Amendment, not the Sixth"); Justin Bishop Grewell, Supreme Court Review, *A Walk in the Constitutional Orchard: Distinguishing Fruits of Fifth Amendment Right to Counsel from Sixth Amendment Right to Counsel in Fellers v. United States*, 95 J. CRIM. L. & CRIMINOLOGY 725, 727-31, 752-57 (2005) (outlining the differences between the Fifth and Sixth Amendment rights to counsel); Jennifer Diana, Comment, *Apples and Oranges and Olives? Oh My! Fellers, the Sixth Amendment, and the Fruit of the Poisonous Tree Doctrine*, 71 BROOK. L. REV. 985, 992-1007 (2005) (same).

⁷ *Cf. Brewer v. Williams*, 430 U.S. 387, 399-400 (1977) (identifying "deliberate elicitation" standard under Sixth Amendment).

⁸ *See Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) ("A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.'" (alterations in original) (quoting *Bruton v. United States*, 391 U.S. 123, 139-40 (1968) (White, J., dissenting)) (citing *Cruz v. New York*, 481 U.S. 186, 195 (1986) (White, J., dissenting)); *Fulminante*, 499 U.S. at 313 (Kennedy, J., concurring) ("If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case. Apart, perhaps, from a videotape of the crime, one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence."); *Hopt v. Utah*, 110 U.S. 574, 585 (1884) ("[A confession is] among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession."). For an overview of the complex factors informing plea bargaining that could be settled or compromised by a confession, *see, e.g.*, Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); Talia Fisher & Iaasachar Rosen-Zvi, *The Confessional Penalty*, 30 CARDOZO L. REV. 871 (2008); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992); Andrew E. Taslitz, *Prosecutorial Preconditions to Plea Negotiations*, 23 A.B.A. CRIM. JUSTICE, Fall 2008, at 14.

⁹ *Brewer*, 430 U.S. at 398 (identifying post-charge interrogation as a "critical stage" for Sixth Amendment purposes); *see, e.g.*, *Maine v. Moulten*, 474 U.S. 168, 176 (1985) (suppressing State's recording of conversation between defendant and undercover informant after right to counsel attached because "[t]he Sixth Amendment guarantees the accused . . . the right to rely on counsel as a 'medium' between him and the State"); *Massiah*

the real-world import of this ruling by holding that the Sixth Amendment right to counsel, even once attached, is not self-actuating and thus can be waived in the absence of counsel.¹⁰ Further, the Supreme Court largely gutted the notion that counsel's constitutional value to a client extends beyond the four corners of the charging instrument when the Court declared that the right to counsel is "'offense specific,'"¹¹ with *offense* defined narrowly under the *Blockburger* double-jeopardy test.¹² The practical consequence of these holdings is that law enforcement easily can work around an existing attorney-client relationship to question a charged defendant about nearly anything, up to and including the precise factual subject of filed charges.¹³

v. United States, 377 U.S. 201, 206 (1964) (suppressing defendant's statements to a co-conspirator acting as an agent of the police because "federal agents had deliberately elicited [them] after he had been indicted and in the absence of his counsel").

¹⁰ See *Patterson v. Illinois*, 487 U.S. 285, 290-92 (1988).

¹¹ *Texas v. Cobb*, 532 U.S. 162, 177 (2001) (quoting *McNeil*, 501 U.S. at 175). An offense-specific analysis of the Sixth Amendment actually can be seen as early as 1966 in *Hoffa v. United States*, 385 U.S. 293, where the Supreme Court rejected the claim that a government agent's surreptitious invasion of confidential trial preparation meetings should be suppressed in a separate prosecution for attempting to bribe jurors in that trial. See *id.* at 304-09. But, the Supreme Court never expressly defined the Sixth Amendment concept of an "offense" prior to *Cobb*. Cf. *McNeil*, 501 U.S. at 187 (Stevens, J., dissenting) (emphasizing that "[t]he Court . . . does not flesh out the precise boundaries of its newly created 'offense-specific' limitation on a venerable constitutional right").

¹² See *Cobb*, 532 U.S. at 173-74 (adopting *Blockburger* double-jeopardy test to define "offenses" for Sixth Amendment purposes); *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (explaining 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 an additional fact which the other does not").

¹³ Several commentators already have observed the doctrinal constriction that *Cobb* worked upon the Sixth Amendment right to counsel. See, e.g., Michael J. Howe, Note, *Tomorrow's Messiah: Towards a "Prosecution Specific" Understanding of the Sixth Amendment Right to Counsel*, 104 COLUM. L. REV. 134, 149 (2004) (observing that "[w]hile it is still too soon to know the total impact *Texas v. Cobb* will have on the Sixth Amendment right to counsel, it is clear that the scope of the *Massiah* right has been significantly narrowed"); see also Elkan Abramowitz & Barry A. Bohrer, *The Right to Counsel After Cobb: Is There Anything Left?*, N.J. L.J., July 2, 2001, at 33 (arguing that *Cobb* "pulls the rug out from under [the Court's previous Sixth Amendment decisions], leaving defendants open for additional questioning outside the presence of counsel even after their Sixth Amendment rights have attached"); Benjamin F. Diamond, Comment, *The Sixth Amendment: Narrowing the Scope of the Right to Counsel*, 54 FLA. L. REV. 1001, 1010-11 (2002) (observing that *Cobb* narrowed, constricted, or diminished the Sixth Amendment right to counsel); Angela Henson, Note, *Now You Have It, Now You Don't: The Sixth Amendment Right to Counsel After Texas v. Cobb*, 51 CATH. U. L. REV. 1359, 1382-83 (2002) (same); Beth G. Hungate-Noland, Casenote, *Texas v. Cobb: A Narrow Road Ahead for the Sixth Amendment Right to Counsel*, 35 U. RICH. L. REV. 1191, 1222-23 (2002) (same); Melissa Minas, Note, *Blurring the Line: Impact of Offense-Specific Sixth*

This Article examines and critiques this Sixth Amendment right-to-counsel jurisprudence, focusing on the Supreme Court's failure to establish Sixth Amendment rules that recognize and protect the necessary professional relationship that attorney and client share in a criminal case.¹⁴ To frame this discussion, Part II.A of the Article surveys the Supreme Court's right-to-counsel jurisprudence in the interrogation context, culminating in the *Patterson-Cobb* framework, and highlights the debate within the Court over the function that defense counsel serves under the Sixth Amendment.

In Part III, this Article distills the Court's Sixth Amendment jurisprudence to its core: a general apathy towards—if not outright disdain for—the real-world professional value of defense counsel during an interrogation. This view of counsel's role in this context has led the Court improperly to gauge Sixth Amendment problems by a counter-textual free-will theory of client decision-making imported from Fifth Amendment *Miranda* jurisprudence. This emphasis on free-will in the Sixth Amendment context is wholly disconnected from the counsel whose assistance the Constitution assures to guide defendant decision-making, resulting in precisely the sort of unequal footing between established adversaries that the attorney-client relationship is meant to counter-balance.¹⁵

Amendment Right to Counsel, 93 J. CRIM. L. & CRIMINOLOGY 195, 213 (2002) (same). *But cf.* Paul Greg Laughlin, Casenote, *The Court Means What It Says as It Gives One Sixth Amendment Exclusionary Defense a Christian Burial*, 43 S. TEX. L. REV. 935, 952 (2002) (defending *Cobb*, and asserting that “[t]he *Cobb* Court’s application of the *Blockburger* test is an effort to strengthen its stance on prophylactic safeguards and perhaps make the Sixth Amendment right to counsel a little broader in some respects”); *Texas v. Cobb Paves Way for Increase in Use of Informants*, 17 CRIM. PRAC. REP., April 16, 2008, at 11.

¹⁴ By “professional relationship,” I do not mean the type of “meaningful” relationship rejected in *Morris v. Slappy*, 461 U.S. 1 (1983)—assigned counsel of choice, essentially. Instead, I mean the type of professional relationship that a competent attorney would maintain with a client to protect the client’s procedural and substantive interests.

¹⁵ *Cf.* Garcia, *supra* note 3, at 35 (asserting that “[t]he rights delineated in the [Sixth] Amendment are meant to equalize the balance of power in the criminal process . . . against the natural advantage the prosecution enjoys in a criminal trial”); Metzger, *supra* note 3, at 1641 (arguing that the Sixth Amendment “reflected the colonists’ evolutionary intent: to create a level playing field for the defendant”). Admittedly, the Sixth Amendment jurisprudence has been seen as “a body of law lacking theoretical cohesion.” Martin R. Gardner, *The Sixth Amendment Right to Counsel and Its Underlying Values: Defining the Scope of Privacy Protection*, 90 J. CRIM. L. & CRIMINOLOGY 397, 398 (2000); *see also* Amar, *supra* note 3, at 641 (arguing that “the legal community lacks a good map of [the Sixth Amendment’s] basic contours, a good sense of its underlying ecosystem, a good plan for its careful cultivation”). But several values protected by the Sixth Amendment have been articulated that may overlap with this “level playing field” theory. *See, e.g.*, Amar, *supra* note 3, at 705 (arguing that “innocence protection and truth-seeking are, or should be, central” values to the Sixth Amendment); Gardner, *supra*, at 399-409 (identifying fairness,

In Part III.C, this Article presents an alternative “relational” model for the right to counsel. I argue that this alternate model properly takes the concept of a defendant’s free will from the Fifth Amendment *Miranda* context, and conditions its exercise in the Sixth Amendment context on the promised assistance of counsel if the subject or setting of interrogation intrudes into that attorney-client relationship or necessitates that relationship to preserve equal footing between established adversaries. This model, I argue, correctly conceptualizes the right to counsel in relational terms of attorney and client, not attorney and offenses.¹⁶

Part IV of this Article considers the potential for competing state-law models of the right to counsel. Part IV.A examines the New York State model of the right to counsel, which predates *Patterson* and *Cobb* and differs markedly from this federal model, protecting the attorney-client relationship in a manner similar to what this Article proposes. The New York model thus will be highlighted in particular as similar in form and

attorney-client privacy, and autonomy as potential Sixth Amendment values).

¹⁶ Remedy presents a whole other question. Suppression of derivative evidence, of course, would represent the most traditional remedy for right to counsel violations challenged in criminal proceedings. After *Hudson v. Michigan*, 547 U.S. 586 (2006), however, one might question the future of the exclusionary rule. See *id.* at 590-602 (referring to the remedy of suppression as one of “last resort,” and rejecting application of exclusionary rule to knock-and-announce violations under the Fourth Amendment). But see *id.* at 602-03 (Kennedy, J., concurring) (arguing that “the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt. Today’s decision determines only that in the specific context of the knock-and-announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression”); H. Mitchell Caldwell, *Fixing the Constable’s Blunder: Can One Trial Judge in One County in One State Nudge a Nation Beyond the Exclusionary Rule?*, 2006 BYU L. REV. 1, 5-6, 21-28 (arguing that this “is not meant to be just another academic alternative to the exclusionary rule that would quickly be relegated to the junkyard of such proposals, but is meant to be a guideline for actually moving past the rule,” and exploring data from several studies indicating the rule’s lack of success in achieving its asserted goals); Mark A. Summers, *The Constable Blunders but Isn’t Punished: Does Hudson v. Michigan’s Abolition of the Exclusionary Rule Extend Beyond Knock-and-Announce Violations?*, 10 BARRY L. REV. 25, 39-40 (2008) (observing that a “trend in the post-*Hudson* cases is the demise of the rule as a remedy for statutory violations of any kind unless the statute itself provides for suppression. Beyond that it is not possible to generalize that there have been inroads into the case-by-case approach to the exclusionary rule for other constitutional violations” (internal footnote omitted)). The Supreme Court’s recent decision in *Herring v. United States*, 129 S. Ct. 695 (2009), has generated further questions about the future of the exclusionary rule. See *id.* at 701 (holding that “[t]he extent to which the exclusionary rule is justified by . . . deterrence principles varies with the culpability of the law enforcement conduct”); see, e.g., SUSAN A. BANDES, *THE ROBERTS COURT AND THE FUTURE OF THE EXCLUSIONARY RULE* (2009), available at <http://www.acslaw.org/files/Bandes%20Issue%20Brief.pdf>; Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court’s Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1347310.

function to a relational model of the Sixth Amendment. Part IV.B surveys how state courts thus far have treated and applied *Cobb*: so far, courts have treated it modestly, although some questions remain in certain jurisdictions that have left open the possibility of competing state law approaches to the right to counsel during interrogation.

II. A PRIMER ON THE SIXTH AMENDMENT RIGHT TO COUNSEL

A. AN INTRODUCTION

The Sixth Amendment to the U.S. Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”¹⁷ This right was “intended to minimize the public prosecutor’s tremendous advantage” over lay-persons in matters of law and procedure.¹⁸ By the early twentieth century, the Supreme Court had “construed this [amendment] to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.”¹⁹ But as the Court

¹⁷ U.S. CONST. amend. VI.

¹⁸ Garcia, *supra* note 3, at 35 (asserting that “[t]he rights delineated in the [Sixth] Amendment are meant to equalize the balance of power in the criminal process . . . against the natural advantage the prosecution enjoys in a criminal trial”); Metzger, *supra* note 3, at 1640 (citing, *inter alia*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 117 (1998)); cf. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (observing that “[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime,” and “[t]hat government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries”); Powell v. Alabama, 287 U.S. 45, 71 (1932) (focusing on ability of counsel to equalize the adversarial setting between charged “ignorant,” “illiterate” youth and the State as essential to ascertainment of truth through the adversarial process). For a fuller historical survey of the Sixth Amendment, from its roots in colonial times to the Supreme Court’s modern “critical stage” doctrine, see Metzger, *supra* note 3, at 1637-57, in which Professor Metzger observes that “[t]he counsel guarantee has never been a rigid or static doctrine.” *Id.* at 1637; see also Powell, 287 U.S. at 60-71 (detailing the American Colonies’ rejection of the English rule denying right to counsel in treason and felony cases); Garcia, *supra* note 3, at 39-42 (summarizing the English and colonial background of the right to counsel); Eugene L. Shapiro, *Waiver of a State Constitutional Right to Counsel During Post-Attachment Interrogation*, 30 VAL. U. L. REV. 581, 582-84 (1996) (summarizing pre-colonial, colonial, and early constitutional approaches to the right to counsel).

¹⁹ *Gideon*, 372 U.S. at 340 (citing Johnson v. Zerbst, 304 U.S. 458 (1938)). The Supreme Court has observed, however, that “[t]here is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense.” Scott v. Illinois, 440 U.S. 367, 370 (1979) (citing WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 27-30 (1955)). Perhaps this original understanding accounts for the fact that “[f]rom the Sixth Amendment’s

embarked on its incorporation doctrine, folding rights “implicit in the concept of ordered liberty” into the Due Process Clause,²⁰ the Court truly began to examine the role that counsel plays in our system of justice.²¹

In the landmark 1963 decision of *Gideon v. Wainwright*,²² the Supreme Court declared:

[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided to him. This seems to us to be an obvious truth . . . [L]awyers in criminal courts are necessities, not luxuries.²³

The Court since *Gideon* consistently has reaffirmed that the “right to the assistance of counsel . . . is indispensable to the fair administration of our adversarial system of criminal justice,”²⁴ because it “safeguards the other rights deemed essential for the prosecution of a criminal proceeding.”²⁵

Yet, the generalized “right” to counsel recognized in *Gideon* did not fix the scope of a lawyer’s representation to which the Sixth Amendment entitles a defendant. For clearly, when that right attaches, “[i]t cannot be invoked once for all future prosecutions.”²⁶ But, the Court has not accepted that the right exists only when counsel appears at some formal proceeding along with the prosecutor.²⁷ As a result, the Supreme Court has devoted much energy to refining when and to what extent a defendant must be afforded this “indispensable” assistance of counsel.

ratification in December 1791 until the early 1930s, the Supreme Court did not issue any opinions of significance concerning the Sixth Amendment right to counsel.” Daniel R. Dinger, *Successive Interviews and Successful Prosecutions: The Interplay of the Sixth Amendment Right to Counsel and the Dual Sovereignty Doctrine in a Post-Cobb World*, 40 TEX. TECH L. REV. 917, 926 (2008).

²⁰ See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

²¹ See, e.g., *Powell*, 287 U.S. at 68 (reversing indigent youths’ convictions for capital murder after they stood trial without counsel, describing “the right to the aid of counsel” as having a “fundamental character”); cf. Garcia, *supra* note 3, at 42 (observing that “[t]he emergence of an expansive approach to the right to counsel may be traced to the Supreme Court’s seminal decision in *Powell v. Alabama*”).

²² 372 U.S. 335.

²³ *Id.* at 344.

²⁴ *Maine v. Molten*, 474 U.S. 159, 168 (1985).

²⁵ *Id.* at 169.

²⁶ *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991).

²⁷ See *Michigan v. Jackson*, 475 U.S. 625, 633 (1986) (rejecting the idea that “requests for the appointment of counsel should be construed to apply only to representation in formal legal proceedings”); *United States v. Wade*, 388 U.S. 218, 226 (1967) (noting that “the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial”).

The Supreme Court has determined that the Sixth Amendment right to counsel attaches when “a prosecution is commenced . . . ‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.’”²⁸ Prior to any actual trial, the right, once attached, applies only at a “critical stage” of the proceedings, which includes interrogations and lineups, for instance.²⁹ During such proceedings, “the State must of course honor [the right],”³⁰ meaning “the State [has] an affirmative obligation to respect and preserve the accused’s choice to seek this assistance.”³¹ At a minimum, the “Sixth Amendment guarantees the accused . . . the right to rely on counsel as a ‘medium’ between him [or her] and the State.”³²

Law enforcement’s obligation to honor counsel’s role as a medium, however, frustrates one of its greatest interests in investigating crimes—questioning the suspect.³³ The Supreme Court has acknowledged that the “police have an interest in the thorough investigation of crimes for which formal charges have already been filed,”³⁴ as well as “in investigating new or additional crimes.”³⁵ But, the Court also has explained that “[i]n seeking evidence pertaining to pending charges . . . the Government’s investigative powers are limited by the Sixth Amendment rights of the accused.”³⁶ “Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused’s right to have counsel present in a confrontation between the accused and a state agent.”³⁷ For example, “the surreptitious employment of a cellmate”³⁸ . . . or

²⁸ *McNeil*, 501 U.S. at 175 (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984)); see also *Rothgery v. Gillespie Co.*, 128 S. Ct. 2578, 2592 (2008); *Brewer v. Williams*, 430 U.S. 387, 398 (1977); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

²⁹ See *Moran v. Burbine*, 475 U.S. 412, 428 (1986) (recognizing that “the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches”); *Wade*, 388 U.S. at 224 (observing that “our cases have construed the Sixth Amendment guarantee to apply to ‘critical’ stages of the proceedings”).

³⁰ *Moulton*, 474 U.S. at 170.

³¹ *Id.* at 171.

³² *Id.* at 176.

³³ See *Fisher & Rosen-Zvi*, *supra* note 8, at 873 (observing that “the entire criminal justice system is organized around confessions The lure of the confession is too strong to resist. Like the Sirens’ Song, it casts a spell on all those who hear it.”); see also Fred E. Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 16 (1961) (arguing the importance of interrogating suspects when investigating crime).

³⁴ *Moulton*, 474 U.S. at 179.

³⁵ *Id.*

³⁶ *Id.* at 179-80.

³⁷ *Id.* at 176.

³⁸ *Michigan v. Jackson*, 475 U.S. 625, 632-33 (1986) (citing *United States v. Henry*, 447

the electronic surveillance of conversations with third parties³⁹ . . . may violate the defendant's Sixth Amendment right to counsel even though the same methods of investigation might have been permissible before arraignment or indictment."⁴⁰

B. *JACKSON TO COBB*: FROM A BROAD TO AN "OFFENSE SPECIFIC" RIGHT

I do not propose to quibble with these general Sixth Amendment standards governing the right to counsel. These standards, however, do not resolve the ultimate question of whether, once the right has attached, the Sixth Amendment bars any law enforcement questioning of a defendant without counsel. For example, must a defendant assert his or her desire for counsel during post-charge interrogation before law enforcement must honor that right? Does the freedom of choice protected by *Miranda* warnings adequately protect Sixth Amendment interests? Once in play, does the Sixth Amendment right to counsel protect the attorney-client relationship, or is this protective right limited to the precise subject matter—filed charges—that triggered the right in the first place?

Starting with *Michigan v. Jackson*,⁴¹ the Supreme Court issued a series of decisions initially suggesting that the Sixth Amendment takes a broad view of the attorney-client relationship during interrogation. Ultimately, however, the Court answered these questions firmly in the negative, leaving open numerous opportunities for law enforcement to question a represented defendant.

I. *Michigan v. Jackson: A Broad Sixth Amendment*

In *Jackson*, two separate defendants requested counsel at their arraignments on murder charges.⁴² The police subsequently questioned the defendants, who both remained incarcerated, about their pending charges without notifying their attorneys.⁴³ Both defendants agreed to speak to the police without counsel after receiving *Miranda* warnings,⁴⁴ and the trial court admitted the defendants' statements at trial.⁴⁵

U.S. 264 (1980)).

³⁹ *Jackson*, 475 U.S. at 632 (citing *Moulton*, 474 U.S. 159; *Massiah v. United States*, 377 U.S. 201 (1964)).

⁴⁰ *Id.* at 633.

⁴¹ *Id.*

⁴² *Id.* at 627-28.

⁴³ *Id.*

⁴⁴ Under *Miranda*, before the police may interrogate a suspect in custody, they must advise the suspect of the right to remain silent, that anything said may be used against the suspect, and of the right to counsel during interrogation, including appointed counsel if the

On appeal, the defendants argued that the Fifth Amendment rule from *Edwards v. Arizona*⁴⁶ should apply to police questioning after the Sixth Amendment right to counsel has attached: “[A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.”⁴⁷ Thus, the defendants argued, once their Sixth Amendment right to counsel attached at arraignment and they requested this assistance, the police should not have questioned the defendants without counsel unless the defendants initiated the conversation.⁴⁸

The Supreme Court embraced this position, finding that once the defendants’ Sixth Amendment right to counsel attached at arraignment, the police could not overcome the defendants’ request for counsel by administering *Miranda* rights.⁴⁹ Rather, the Court opined:

[T]he reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before . . . [because of] the significance of the formal accusation, and the corresponding attachment of the Sixth Amendment right to counsel Thus, the Sixth Amendment right to counsel at a postarraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation.⁵⁰

The Court rejected the State’s argument that the defendants “may not have actually intended their request for counsel [at arraignment] to encompass representation during any further questioning by the police.”⁵¹ On the contrary, the Court noted the strict standard for waiver of constitutional rights, which:

[R]equires us to give a broad, rather than a narrow, interpretation to a defendant’s request for counsel—we presume that the defendant requests the lawyer’s services at every critical stage of the prosecution. We thus reject the State’s suggestion that [defendants’] requests for the appointment of counsel should be construed to apply only to representation in formal legal proceedings.⁵²

suspect cannot afford counsel. See *Miranda v. Arizona*, 384 U.S. 486, 467-75 (1966).

⁴⁵ *Jackson*, 475 U.S. at 627-28.

⁴⁶ *Miranda*, 384 U.S. at 436.

⁴⁷ *Id.* at 484-85.

⁴⁸ See *id.* at 484-85; see also *Solem v. Stumes*, 465 U.S. 638, 641 (1984) (reaffirming that “once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him”).

⁴⁹ *Jackson*, 475 U.S. at 636.

⁵⁰ *Id.* at 631-32.

⁵¹ *Id.* at 632-33.

⁵² *Id.* at 633.

Jackson accordingly held 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.”⁵³

The decision in *Jackson* did not turn on the Court’s assessment of whether the defendant freely wanted to speak to the authorities, independent of any assistance that counsel may have provided. Rather, the Court indicated that beyond a certain point in a criminal proceeding, the Sixth Amendment ensures that a defendant will have assistance when making critical decisions, including whether to go it alone when talking with the authorities. *Jackson* consequently appears to extend broad entitlement to counsel during interrogation once the Sixth Amendment right to counsel has attached.⁵⁴ In *Patterson v. Illinois*,⁵⁵ however, the Supreme Court retreated from such a broad understanding of the right to counsel.

2. *Patterson v. Illinois: A Passive Sixth Amendment*

In *Patterson*, the Supreme Court made clear that it did not intend in *Jackson* for the attachment of the right to counsel alone to create an impenetrable barrier to law enforcement questioning a defendant. *Patterson* also highlights the Court’s soon-to-be-repeated division over the

⁵³ *Id.* at 636. In *Owens v. Bowersox*, 290 F.3d 960 (8th Cir. 2002), the Eighth Circuit Court of Appeals found that the defendant had “initiated” an interrogation, despite rather unusual circumstances. The defendant was arraigned on state murder charges and invoked his right to counsel. *See id.* at 962. After arraignment, a detective picked up the defendant’s mother to bring her to the station. *See id.* The defendant’s mother informed the detective that “she had talked to [the defendant] on the phone and had persuaded him to tell the truth and that [a relative] had nothing to do with the murders,” and that he “agreed he would talk to the police and tell the truth, and . . . was willing to talk to the police.” *Id.* (second alteration in original and internal quotation marks omitted). At the precinct, the detective told the defendant about his mother’s claim that he wanted to talk, which the defendant confirmed, and the defendant then gave an inculpatory statement. *See id.* In rejecting the defendant’s habeas claim, the Eighth Circuit concluded that “[a]lthough the state’s position undoubtedly would be stronger if [the defendant] himself had contacted the police, we do not believe that it was unreasonable for the state court to hold that a defendant may ‘evinced’ a willingness and desire to discuss the crime by communicating with the police through a third party, especially a close relative.” *Id.* at 963.

⁵⁴ *Cf.* *Moran v. Burbine*, 475 U.S. 412, 428 (1986) (noting that “[i]t is clear, of course, that, absent a valid waiver, the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches” (emphasis added)); *Carnley v. Cochran*, 369 U.S. 506, 513 (1962) (explaining that “when the Constitution grants protection against criminal proceedings without the assistance of counsel, counsel *must be furnished* ‘whether or not the accused requested the appointment of counsel’” (emphasis added) (citing *McNeal v. Culver*, 365 U.S. 109, 111 n.1 (1961))).

⁵⁵ 487 U.S. 285 (1988).

significance of counsel's role in representing defendants during interrogation and, ultimately, in contributing to a fair prosecution.

In *Patterson*, the defendant was indicted for a gang-related murder.⁵⁶ After the indictment was returned, the defendant spoke with a police officer transporting him to a new jail. This officer had interviewed the defendant two days earlier.⁵⁷ The officer administered *Miranda* warnings, and the defendant implicated himself in the murder.⁵⁸ Later that day, the defendant confessed again to a prosecutor working on the murder case, also after *Miranda* warnings.⁵⁹ The trial court admitted both of the defendant's statements.

On appeal, the defendant raised two Sixth Amendment arguments in support of suppression. First, the defendant argued that, under *Jackson*, "because his Sixth Amendment right to counsel arose with his indictment, the police were thereafter barred from initiating a meeting with him."⁶⁰ Second, the defendant asserted that the *Miranda* warnings the officer read, although sufficient for a waiver of his Fifth Amendment right to counsel, did not produce a valid waiver of his Sixth Amendment right to counsel.⁶¹

The Supreme Court resolved the defendant's first argument swiftly. The Court acknowledged that "[t]here can be no doubt that [defendant] had the right to have the assistance of counsel at his postindictment interviews with law enforcement authorities."⁶² However, the defendant:

[A]t no time sought to exercise his right to have counsel present. The fact that [defendant's] Sixth Amendment right came into existence with his indictment . . . does not distinguish him from the preindictment interrogatee whose [Fifth Amendment] right to counsel is in existence and available for his exercise while he is questioned.⁶³

The Court distinguished *Jackson*, as that decision "turned on the fact that the accused 'ha[d] asked for the help of a lawyer' in dealing with the police."⁶⁴ In *Patterson*, by contrast, the defendant "had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities."⁶⁵ That fact would have triggered "a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-

⁵⁶ *Id.* at 287-88.

⁵⁷ *Id.* at 288.

⁵⁸ *Id.*

⁵⁹ *Id.* at 288-89.

⁶⁰ *Id.* at 290.

⁶¹ *See id.* at 292.

⁶² *Id.* at 290.

⁶³ *Id.* at 290-91.

⁶⁴ *Id.* at 291 (citing *Michigan v. Jackson*, 475 U.S. 625, 631, 633-35 (1986)).

⁶⁵ *Id.* at 290 n.3.

client relationship Indeed, the analysis changes markedly once an accused even *requests* the assistance of counsel.”⁶⁶ The Court concluded by explaining:

Preserving the integrity of an accused’s choice to communicate with police only through counsel is the essence of *Edwards* and its progeny—not barring an accused from making an *initial* election as to whether he will face the State’s officers during questioning with the aid of counsel, or go it alone.⁶⁷

Patterson consequently precludes any argument that the Sixth Amendment limits law enforcement’s ability to question a defendant “pre-invocation” any more than the Fifth Amendment under *Miranda*—in either context, absent a request for counsel, law enforcement may prompt the questioning of a defendant, and the ball remains in the defendant’s court to alert law enforcement of his or her desire to deal with them only through counsel.⁶⁸ As one federal circuit court recently explained, “[a]ttachment and invocation are distinct legal events,”⁶⁹ and the “attachment of the right alone does not guarantee a defendant the assistance of counsel.”⁷⁰

Four Justices in *Patterson* dissented, along philosophical lines that continue to divide the Court. Justice Blackmun, writing for himself, simply would have held: “[A]fter formal adversary proceedings against a defendant have been commenced, the Sixth Amendment mandates that the defendant not be ‘subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates [any questioning].’”⁷¹ In Justice Blackmun’s view, “the Sixth Amendment does not allow the prosecution to take undue advantage of any gap between the commencement of the adversary process and the time at which counsel is appointed for a defendant.”⁷²

Justice Stevens, joined by Justices Marshall and Brennan, wrote more forcefully: “The Court should not condone unethical forms of trial preparation by prosecutors or their investigators.”⁷³ Drawing a strong connection between the attachment of a defendant’s Sixth Amendment rights and a prosecutor’s ethical obligation as an attorney not to contact

⁶⁶ *Id.*

⁶⁷ *Id.* at 291.

⁶⁸ *See, e.g.,* United States v. Percy, 250 F.3d 720, 726-27 (9th Cir. 2001) (rejecting a Sixth Amendment argument because the defendant “had not retained counsel, nor did he indicate that he wanted the assistance of counsel”).

⁶⁹ United States v. Harrison, 213 F.3d 1206, 1209 (9th Cir. 2000).

⁷⁰ *Id.*

⁷¹ *Patterson*, 487 U.S. at 300 (Blackmun, J., dissenting) (quoting *Michigan v. Jackson*, 475 U.S. 625, 626 (1986); *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)).

⁷² *Id.* at 301 (Blackmun, J., dissenting).

⁷³ *Id.* at 301 (Stevens, J., dissenting).

represented parties without permission,⁷⁴ Justice Stevens concluded that “the Sixth Amendment right to counsel demands that a firm and unequivocal line be drawn at the point at which adversary proceedings commence.”⁷⁵

Justice Stevens rejected the majority’s distinction of *Jackson* as turning on those defendants’ request for counsel. In *Jackson*, Justice Stevens noted that the Court “held the waiver invalid even though the appointed law firm had not yet received notice of the appointment and the defendant had not yet been informed that a law firm had been appointed to represent him.”⁷⁶ Consequently, no true attorney-client relationship had developed for the Court to protect beyond the attachment of the defendants’ right to that counsel. Justice Stevens thus distinguished defendants whose Sixth Amendment rights have attached from pre-charge suspects in the Fifth Amendment context by focusing upon the Court’s previous use of “strong language to emphasize the significance of the formal commencement of adversary proceedings.”⁷⁷ This strong language “would support the view that additional protection should automatically attach the moment the formal proceedings begin.”⁷⁸ Instead, Justice Stevens concluded, the majority incorrectly equated “the purported waiver of counsel in this case . . . with that of an unindicted suspect.”⁷⁹

The majority’s holding in *Patterson*, requiring defendants to invoke their right to counsel for the right to become operative, may rest in the majority’s view that the attorney-client relationship offers little constitutional value during pretrial interrogation. And, the Court may have revealed this view in its rejection of the defendant’s second argument in *Patterson*—that *Miranda* warnings did not support a waiver of his Sixth Amendment right to counsel.⁸⁰

In rejecting the defendant’s argument that, under *Johnson v. Zerbst*,⁸¹ a Sixth Amendment waiver should require a more informative catechism than *Miranda* warnings, the Court explained:

⁷⁴ See, e.g., *id.* at 301 n.1 (discussing various disciplinary rules limiting attorney contact with represented parties).

⁷⁵ *Id.* at 303.

⁷⁶ *Id.* at 302 n.2.

⁷⁷ *Id.* at 303.

⁷⁸ *Id.* at 303-04.

⁷⁹ *Id.* at 305.

⁸⁰ *Id.* at 292 (majority opinion).

⁸¹ 304 U.S. 458, 464 (1938) (holding that a valid waiver of the Sixth Amendment right to counsel entails “an intentional relinquishment or abandonment of a known right or privilege”).

While our cases have recognized a “difference” between the Fifth Amendment and Sixth Amendment rights to counsel, and the “policies” behind these constitutional guarantees, we have never suggested that one right is “superior” or “greater” than the other, nor is there any support in our cases for the notion that because a Sixth Amendment right may be involved, it is more difficult to waive than the Fifth Amendment counterpart.

Instead, we have taken a more pragmatic approach to the waiver question—asking what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he [or she] could provide to an accused at that stage—to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized.⁸²

The Court thus reviewed the “spectrum”⁸³ of assistance that counsel can provide during criminal proceedings, and concluded:

The State’s decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose that an attorney serves when the accused is questioned by authorities . . . [W]e do not discern a substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at postindictment questioning.⁸⁴

Indeed, the Court noted, “an attorney’s role at questioning is relatively limited.”⁸⁵ Therefore, “[b]ecause the role of counsel at questioning is relatively simple and limited, we see no problem in having a waiver procedure at that stage which is likewise simple and limited,”⁸⁶ such as a *Miranda* waiver.⁸⁷

Justice Stevens rejected the majority’s view that defense counsel plays an equally “simple” role during questioning in either a Fifth or a Sixth Amendment setting, because “important differences separate the two.”⁸⁸ First, “[o]nly after a formal accusation has ‘the [G]overnment . . . committed itself to prosecute, and only then [have] the adverse positions of the [G]overnment and defendant . . . solidified.’”⁸⁹ Second, the “indictment also presumably signals the [G]overnment’s conclusion that it has sufficient evidence to establish a *prima facie* case. As a result, any further interrogation can only be designed to buttress the

⁸² *Patterson*, 487 U.S. at 297-98 (footnote omitted).

⁸³ *Id.* at 298.

⁸⁴ *Id.* at 298-99.

⁸⁵ *Id.* at 300 n.13.

⁸⁶ *Id.* at 300.

⁸⁷ *Id.* at 296.

⁸⁸ *Id.* at 305-06 (Stevens, J., dissenting).

⁸⁹ *Id.* at 306 (Stevens, J., dissenting) (first alteration in original) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

[G]overnment's case; authorities are no longer simply attempting to solve a crime."⁹⁰

In this context, Justice Stevens viewed the majority's vision of defense counsel's role as a "gross understatement of the disadvantage of proceeding without a lawyer and an understatement of what a defendant must understand to make a knowing waiver."⁹¹ Indeed, Justice Stevens "reject[ed] the premise that a lawyer's skills are more likely to sit idle at a pretrial interrogation than at trial."⁹² Rather, Justice Stevens explained:

Both events require considerable experience and expertise and I would be reluctant to rank one over the other. Moreover . . . "[T]he 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination."⁹³

Justice Stevens also believed that "there are ethical constraints that prevent a prosecutor from giving legal advice to an uncounseled adversary,"⁹⁴ and that "the *Miranda* warnings themselves are a species of legal advice that is improper when given by the prosecutor after indictment."⁹⁵ Justice Stevens noted that "there are good reasons why such advice is deemed unethical"⁹⁶:

First, the offering of legal advice may lead an accused to underestimate the prosecuting authorities' true adversary posture Second, the adversary posture of the parties, which is not fully solidified until formal charges are brought, will inevitably tend to color the advice offered Finally, . . . advice offered by a lawyer (or his or her agents) with such an evident conflict of interest cannot help but create a public perception of unfairness and unethical conduct.⁹⁷

Patterson, therefore, is significant both as a firm turn away from *Jackson*'s hint at a broad Sixth Amendment and as a sign of the Court's view that counsel does not play an especially valuable role during post-charge interrogations. Nevertheless, *Patterson* likely has affected many defendants minimally, since in many jurisdictions defendants are appointed counsel promptly after a formal charge, leaving little practical window of opportunity under *Patterson*.⁹⁸ In *McNeil v. Wisconsin*,⁹⁹ however, the

⁹⁰ *Id.* (Stevens, J., dissenting) (internal citations and quotation marks omitted).

⁹¹ *Id.* at 307-08.

⁹² *Id.* at 308 n.5.

⁹³ *Id.* (alteration in original).

⁹⁴ *Id.* at 309.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 309-10.

⁹⁸ *Cf.* *Alabama v. Shelton*, 535 U.S. 654, 668-69 & nn.7-9 (2002) (identifying states that provide counsel to defendants automatically upon the filing of a charge, even on minor offenses).

Court applied its developing philosophy of a limited Sixth Amendment right to counsel to a defendant whose right to counsel both has attached and been invoked.

3. *McNeil v. Wisconsin: An “Offense Specific” Sixth Amendment Surfaces*

The Supreme Court framed the legal issue in *McNeil* as “whether an accused’s invocation of his Sixth Amendment right to counsel during a judicial proceeding constitutes an invocation of his *Miranda* right to counsel.”¹⁰⁰ Yet, in answering this question in the negative, the Court revealed a broader, policy-based concern over guaranteeing counsel to assist a defendant during a wide range of law enforcement interrogation, absent an express request for counsel of the sort required to invoke the Fifth Amendment right under *Miranda*.

In *McNeil*, the defendant was arrested in Nebraska for armed robbery charges arising out of Wisconsin.¹⁰¹ Before Wisconsin deputy sheriffs transported the defendant from Nebraska to Milwaukee County, Wisconsin, they attempted to question the defendant after advising him of his *Miranda* rights.¹⁰² The defendant refused to speak, but did not request counsel.¹⁰³ Once in Wisconsin, the defendant had a bail hearing on the robbery charge, at which the local public defender office represented the defendant.¹⁰⁴

After the bail hearing, a Milwaukee County detective approached the defendant regarding a murder and related crimes in Racine County, Wisconsin, which the detective was investigating.¹⁰⁵ The detective advised the defendant of his *Miranda* rights, after which the defendant did not deny knowledge of the murder, but denied involvement.¹⁰⁶ Over the next four days, however, the detective twice returned with detectives from Racine County to re-interview the defendant about the murder.¹⁰⁷ On each occasion, the defendant, after again receiving *Miranda* warnings, implicated himself in the murder and detailed the crimes.¹⁰⁸ The day after the final interview, the defendant was charged with the Racine County crimes,

⁹⁹ 501 U.S. 171 (1991).

¹⁰⁰ *Id.* at 173.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 173-74.

¹⁰⁷ *Id.* at 174.

¹⁰⁸ *Id.*

transported to Racine County, and convicted after the court admitted the defendant's statements at trial.¹⁰⁹

On appeal, the defendant argued that his courtroom appearance with counsel on the Milwaukee County charges invoked his *Miranda* right to counsel, which under *Edwards* and *Jackson* invalidated his subsequent *Miranda* waivers when he was questioned about the Racine County crimes.¹¹⁰ The Supreme Court rejected the defendant's position.

No one in *McNeil* disputed that the defendant's appearance with counsel at his bail hearing fully "invoked" his Sixth Amendment right to counsel on the Milwaukee County charges.¹¹¹ But, in dismissing any claim that the defendant's invoked right to counsel on the Milwaukee County charges alone prohibited questioning on the Racine County charges, the Court announced: "The Sixth Amendment right . . . is offense specific."¹¹² The Court acknowledged that the Fifth Amendment "*Edwards* rule . . . is *not* offense specific: Once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present."¹¹³ By contrast, "just as the [Sixth Amendment] right is offense specific, so also its *Michigan v. Jackson* effect of invalidating subsequent waivers in police-initiated interviews is offense specific."¹¹⁴

The Court, however, viewed the defendant as "seek[ing] to prevail by combining the two,"¹¹⁵ in that his invocation of his offense specific Sixth Amendment rights on the Milwaukee County charges right also invoked his non-offense specific Fifth Amendment rights as to the Racine County crimes.¹¹⁶ This contention the Court considered "false as a matter of fact and inadvisable (if even permissible) as a contrary-to-fact presumption of policy."¹¹⁷

First, the Court explained that the Fifth and Sixth Amendment rights to counsel maintain very distinct functions:

The purpose of the Sixth Amendment counsel guarantee . . . is to "protec[t] the unaided layman at critical confrontations" with his "expert adversary," the government, *after* "the adverse positions of government and defendant have solidified" with respect to a particular alleged crime. The purpose of the *Miranda*-

¹⁰⁹ *Id.*

¹¹⁰ *See id.*

¹¹¹ *Id.* at 175.

¹¹² *Id.*

¹¹³ *Id.* at 177.

¹¹⁴ *Id.* at 175.

¹¹⁵ *Id.* at 177.

¹¹⁶ *See id.*

¹¹⁷ *Id.*

Edwards guarantee, on the other hand . . . is to protect quite a different interest: the suspect's "desire to deal with the police only through counsel . . ." This is in one respect narrower than the interest protected by the Sixth Amendment guarantee (because it relates only to custodial interrogation) and in another respect broader (because it relates to interrogation regarding *any* suspected crime and attaches whether or not the "adversarial relationship" produced by a pending prosecution has yet arisen).¹¹⁸

Indeed, the Court noted, "[t]o invoke the Sixth Amendment interest is, as a matter of fact, not to invoke the *Miranda-Edwards* interest,"¹¹⁹ since "[o]ne might be quite willing to speak to the police without counsel present concerning many matters, but not the matter under prosecution."¹²⁰ The Court acknowledged the practical likelihood that charged defendants would not wish to face questioning without counsel.¹²¹ But, "the *likelihood* that a suspect would wish counsel to be present is not the test for the applicability of *Edwards*."¹²² Rather, in the Court's view, only an actual expression of this wish invokes the *Edwards* rule.¹²³

The Court rejected the defendant's argument that *Jackson* "contradict[s] the foregoing distinction,"¹²⁴ finding that "to the contrary, it *rests* upon it."¹²⁵ The Court noted that in *Jackson* it did not find that the defendants' request for counsel constituted a *Miranda-Edwards* expression, but rather "that it *did not have to*, since the relevant question was not whether the *Miranda* 'Fifth Amendment' right had been *asserted*, but whether the Sixth Amendment right to counsel had been *waived*."¹²⁶ Thus, "*Jackson* implicitly rejects any equivalence in fact between invocation of the Sixth Amendment right to counsel and the expression necessary to trigger *Edwards*."¹²⁷

Second, the Court concluded that "sound policy"¹²⁸ does not support construing an invocation of the Sixth Amendment right to counsel on one offense as invoking the Fifth Amendment right to counsel as to other offenses. The defendant's "proposed rule has only insignificant advantages."¹²⁹ But, the Court believed, this rule "would . . . seriously

¹¹⁸ *Id.* at 177-78 (citations omitted).

¹¹⁹ *Id.* at 178.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 179.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 180.

¹²⁹ *Id.*

impede effective law enforcement,”¹³⁰ because “most persons in pretrial custody for serious offenses would be *unapproachable* by police officers suspecting them of involvement in other crimes, *even though they have not expressed any unwillingness to be questioned.*”¹³¹

The Court’s emphasized this counterproductive function that, in its view, counsel plays during interrogations as justifying a limited, offense-specific role for counsel under the Sixth Amendment, absent a specific request for counsel’s aid:

Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser. Admissions of guilt resulting from valid *Miranda* waivers “are more than merely ‘desirable’; they are essential to society’s compelling interest in finding, convicting and punishing those who violate the law.”¹³²

Justice Stevens dissented forcefully again, with Justices Marshall and Blackmun joining. Justice Stevens asserted that “[t]he Court’s opinion demeans the importance of the right to counsel,” reflecting “a preference for an inquisitorial system that regards the defense lawyer as an impediment rather than a servant to the cause of justice.”¹³³

Justice Stevens divided his opinion into three main arguments. First, Justice Stevens argued that the majority’s “parsimonious ‘offense-specific’ description of the right to counsel”¹³⁴ ignores commonsense understandings of the meaning and scope of the constitutional right to counsel. While lawyers and judges may understand the finer distinctions between invocation of the Fifth or Sixth Amendment right to counsel, Justice Steven wrote, most lay-persons do not. The majority “cannot explain away the commonsense reality that petitioner in this case could not have known that his invocation of his Sixth Amendment right to counsel was restricted to the Milwaukee County offense, given that investigations . . . were concurrent and conducted by overlapping personnel.”¹³⁵

Second, Justice Stevens observed that the Court’s offense-specific characterization of the right to counsel ignores the historical understanding of the attorney-client relationship, especially in our system of criminal justice.¹³⁶ Justice Stevens explained that long-standing professional norms recognize that an attorney-client relationship in a criminal case “is as broad as the subject matter that might reasonably be encompassed by negotiations

¹³⁰ *Id.*

¹³¹ *Id.* at 181.

¹³² *Id.* (quoting *Moran v. Burbine*, 475 U.S. 412, 426 (1986)).

¹³³ *Id.* at 183 (Stevens, J., dissenting).

¹³⁴ *Id.* at 184.

¹³⁵ *Id.* at 186.

¹³⁶ *See id.* at 187.

for a plea bargain or the contents of a presentence report.”¹³⁷ A doctrinal construction of the Sixth Amendment to something less than the profession’s long-developed understanding of the relationship guaranteed by the amendment “is both unrealistic and invidious.”¹³⁸

Finally, Justice Stevens opined that “the offense-specific limitation on the Sixth Amendment right to counsel can only generate confusion in the law,”¹³⁹ as “the Court’s new rule can only dim the ‘bright line’ quality of prior cases such as *Edwards v. Arizona* . . . and *Michigan v. Jackson*.”¹⁴⁰ Perhaps foreseeing the ultimate point of an offense-specific Sixth Amendment standard, Justice Stevens presciently commented: “I trust that its boundaries will not be patterned after the Court’s double jeopardy jurisprudence.”¹⁴¹

4. *Texas v. Cobb: Sixth Amendment, Meet Blockburger*

In December 1993, Lindsey Owens, a resident of Walker County, Texas, reported that his house had been burglarized and his wife and sixteen-month-old daughter were missing.¹⁴² In February 1994, the police received an anonymous tip that Raymond Cobb, a seventeen-year-old who lived across the street from the Owens residence, was involved in the burglary.¹⁴³ When the police questioned Cobb, he denied any involvement.¹⁴⁴ In July 1994, however, while under arrest for another offense, Cobb confessed to burglarizing the Owens residence, but he continued to deny any knowledge of the wife’s and daughter’s disappearance.¹⁴⁵ Cobb was indicted for the burglary and appointed an attorney.¹⁴⁶

While the burglary case remained pending, in August 1994 and September 1995, the police obtained permission from Cobb’s attorney to question Cobb again about Owens’s wife’s and daughter’s disappearance.¹⁴⁷

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 188 (citations omitted).

¹⁴¹ *Id.* at 187.

¹⁴² *See Texas v. Cobb*, 532 U.S. 162, 164-65 (2001).

¹⁴³ *See Cobb v. State*, 93 S.W.3d 1, 4 (Tex. Crim. App. 2000).

¹⁴⁴ *See id.*

¹⁴⁵ *See id.* at 4-5; *Cobb*, 532 U.S. at 165.

¹⁴⁶ *See Cobb*, 532 U.S. at 165.

¹⁴⁷ *See Cobb*, 93 S.W.3d at 5. Cobb’s attorney consented each time after being assured that Cobb was not suspected in the disappearances. *See id.* Cobb and his attorney apparently were approached by the police on occasions when Cobb was in court. *See Transcript of Oral Argument at 5, Cobb*, 532 U.S. 162 (No. 99-1702) (“I don’t think that [the police] called. I think the record indicated that, in fact, [Cobb] was in court with [his

Cobb continued to deny involvement.¹⁴⁸ In November 1995, however, Cobb's father, with whom Cobb had resided in Odessa, Texas, while free on bond, contacted the police to report that his son had confessed to killing the wife during the burglary,¹⁴⁹ and burying her in the woods near the Owens home.¹⁵⁰ Cobb's father also reported that Cobb planned to leave Odessa the next morning.¹⁵¹ After taking a further statement from Cobb's father,¹⁵² Odessa police officers secured a warrant, arrested Cobb, and administered *Miranda* warnings.¹⁵³ Cobb waived his *Miranda* rights, and confessed to stabbing the wife in the stomach when she confronted him during the burglary and dragging her body to a wooded area near the house.¹⁵⁴ Cobb added the following details:

I went back to the 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 edged 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

attorney] when they asked if they could talk, and so he was there.”). In addition to granting the police express permission to question Cobb on these two occasions, “[i]n September 1995, when Cobb was returning to Odessa, [his attorney] said, here’s my card and my number. If the police try to contact you, call me.” *Id.* at 9.

¹⁴⁸ See *Cobb*, 532 U.S. at 165.

¹⁴⁹ See *id.*

¹⁵⁰ See *Cobb*, 93 S.W.3d at 5.

¹⁵¹ See *Cobb v. State*, 85 S.W.3d 258, 261 (Tex. Crim. App. 2002).

¹⁵² Cobb's father's statement read, as excerpted by the Texas Court of Criminal Appeals:

About 9:00 p.m. tonight, I went to my son, Raymond Cobb's house at 1918 Golder We got to Raymond's house and he came out. I told him to get in the car, that we needed to talk We talked for a little while and I kept pumping him for the answers. He broke down crying and told me how he had killed the woman. I asked him why and how. He told me he was stoned on drugs, that he went to break into the house. He said he looked in the window and didn't see anyone. He said the door was unlocked and he just walked in. He took a quick glance around and didn't see anyone, so he just started gathering stuff up so he could get to them real easy. He turned around to go back into the living room and that this woman jumped on him from behind and was trying to choke him. He said he stabbed her and killed her. He didn't say how many times he stabbed her. I asked him about the blood, and he said she didn't bleed. I asked him what he done with her and he said he carried her off in the woods and buried her where no one would find her. I asked him what about the little girl, and he just said: "She's dead." He told me that he was by himself completely. He told me he was sorry he done it and asked me to help him.

Id. at 261 n.2. Cobb apparently confessed to his father because, as he later told a magistrate after his arrest and return to Walker County, “he just couldn't live with this anymore.” *Id.* at 269 n.42.

¹⁵³ See *Miranda v. Arizona*, 384 U.S. 436 (1966). Cobb was arrested and interrogated by Odessa police officers, who were not informed by Walker County investigators that Cobb was represented by counsel in the pending burglary case. See *Cobb*, 93 S.W.3d at 5.

¹⁵⁴ See *Texas v. Cobb*, 532 U.S. 162, 165-66 (2001).

them up. I remember stabbing a different knife I had in the ground where they were. I was crying right then.¹⁵⁵

Cobb was convicted of capital murder and sentenced to death.¹⁵⁶

On appeal, the Texas Court of Criminal Appeals reversed.¹⁵⁷ The court found that Cobb's right to counsel had attached under *Michigan v. Jackson*,¹⁵⁸ when counsel was appointed on the burglary case.¹⁵⁹ The court further concluded that because the capital murder charges were "factually interwoven with the burglary" on which Cobb was represented for Sixth Amendment purposes, Cobb's right to counsel had attached to the capital murder offenses when it attached on the burglary charge.¹⁶⁰

On the State of Texas's appeal to the U.S. Supreme Court, five Justices disagreed with the Texas court. Writing for the majority, Chief Justice Rehnquist began by emphasizing that "our decision in *McNeil v. Wisconsin* . . . meant what it said [T]he Sixth Amendment right to counsel is 'offense specific.'"¹⁶¹ Accordingly, the Court rejected the post-*McNeil* approach of the Texas Court of Criminal Appeals and other federal and state courts that *McNeil's* offense-specific definition includes "crimes that are 'factually related' to the charged offense."¹⁶² Cobb argued that *Brewer v. Williams*¹⁶³ and *Maine v. Moulton*¹⁶⁴ supported this related-offenses approach, but the Court concluded that "the *Moulton* Court did not address the question,"¹⁶⁵ and to the extent that *Brewer* implicitly may have, "[c]onstitutional rights are not defined by inferences from opinions which did not address the question at issue."¹⁶⁶

The Court further rejected Cobb's argument that a "parade of horrors" would follow from a narrow definition of the Sixth

¹⁵⁵ *Id.* at 166.

¹⁵⁶ *See id.*; TEX. PENAL CODE ANN. § 19.03(a)(7)(A) (Vernon 2003 & Supp. 2008) (addressing murder of more than one person during the same criminal transaction).

¹⁵⁷ *See Cobb*, 93 S.W.3d at 3.

¹⁵⁸ 475 U.S. 625 (1986).

¹⁵⁹ *See Cobb*, 93 S.W.3d at 6.

¹⁶⁰ *Id.*

¹⁶¹ *Texas v. Cobb*, 532 U.S. 162, 164 (2001) (citation omitted).

¹⁶² *Id.* at 168 & n.1 (citing *United States v. Covarrubias*, 179 F.3d 1219, 1223-24 (9th Cir. 1999); *United States v. Melgar*, 139 F.3d 1005, 1013 (4th Cir. 1998); *United States v. Doherty*, 126 F.3d 769, 776 (6th Cir. 1997); *United States v. Arnold*, 106 F.3d 37, 41 (3rd Cir. 1997); *United States v. Williams*, 993 F.2d 451, 457 (5th Cir. 1993); *Commonwealth v. Rainwater*, 681 N.E.2d 1218, 1229 (Mass. 1997); *In re Pack*, 616 A.2d 1006, 1010-11 (Pa. Super. Ct. 1992)).

¹⁶³ 430 U.S. 387 (1977).

¹⁶⁴ 474 U.S. 159 (1985).

¹⁶⁵ *Cobb*, 532 U.S. at 170.

¹⁶⁶ *Id.* at 169.

Amendment's offense-specific right, noting that Cobb had offered no evidence of these deleterious consequences "in those jurisdictions that have not enlarged upon *McNeil*."¹⁶⁷ Moreover, the Court observed, Cobb "fails to appreciate the significance of two critical considerations."¹⁶⁸ One was that "the Constitution does not negate society's interest in the ability of the police to talk to witnesses and suspects, even those who have been charged with other offenses."¹⁶⁹ In this respect, the Court reiterated its view in *McNeil* that "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good."¹⁷⁰ The other consideration was that the police still will be subject to the requirements of *Miranda* when questioning represented suspects, and *Miranda* warnings will protect suspects' right against compulsory self-incrimination.¹⁷¹

Nevertheless, the Court recognized that "in other contexts . . . the definition of an 'offense' is not necessarily limited to the four corners of the charging instrument."¹⁷² The Court concluded that "[w]e see no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel."¹⁷³ Therefore, the Court held that "offense" in the Sixth Amendment should be defined by the Fifth Amendment *Blockburger* test: "[W]here 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 an additional fact which the other does not."¹⁷⁴

¹⁶⁷ *Id.* at 171.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 171-72.

¹⁷⁰ *Id.* at 172 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991)).

¹⁷¹ *Id.* at 171. Indeed, to the extent that oral argument reveals anything of an individual Justice's actual views, it is worth noting that during oral argument in *Cobb*, one Justice referred to the ongoing protection of *Miranda* as the State's "best argument." Transcript of Oral Argument at 16, *Cobb*, 532 U.S. 162 (No. 99-1702) ("[Y]our best argument seems to be that you don't have to recognize a Sixth Amendment right here because there's going to be, as there was in this case, an adequate warning that one doesn't have to speak, and an adequate Fifth Amendment opportunity to get a lawyer, probably the same one, but in any case to get a lawyer prior to the commencement or continuation of any interrogation."). During argument by counsel for Cobb, moreover, one or more Justices repeatedly questioned why Cobb was not adequately protected by *Miranda*, including the Fifth Amendment right to counsel under *Miranda*. See *id.* at 29-30, 40-44; see also *Cobb*, 532 U.S. at 171 n.2 (asserting that "the dissenters give short shrift to the Fifth Amendment's role (as expressed in *Miranda* and *Dickerson*) in protecting a defendant's right to consult with counsel before talking to police").

¹⁷² *Cobb*, 532 U.S. at 173.

¹⁷³ *Id.*

¹⁷⁴ *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

In this sense, we could just as easily describe the Sixth Amendment as “prosecution specific,” insofar as it prevents discussion of charged offenses as well as offenses that, under *Blockburger*, could not be the subject of a later prosecution. And, indeed, the text of the Sixth Amendment confines its scope to “all criminal prosecutions.”¹⁷⁵

Since under Texas law burglary and capital murder were not the same offense,¹⁷⁶ “the Sixth Amendment right to counsel did not bar police from interrogating [Cobb] regarding the murders, and [his] confession was therefore admissible.”¹⁷⁷

Three of the five Justices in the majority—Justices Kennedy, Scalia and Thomas—concurred in a brief but strongly-worded opinion by Justice Kennedy.¹⁷⁸ This group directly challenged *Jackson* as a preventative rule independent from *Miranda* and its progeny. They focused on the constitutional need to ensure only that the police do not undermine a suspect’s voluntary decision whether to speak with the authorities, not to prevent a suspect from exercising that choice at all.¹⁷⁹ Justice Kennedy wrote:

The *Miranda* rule, and the related preventative rule of *Edwards v. Arizona* . . . serve to protect a suspect’s voluntary choice not to speak outside his lawyer’s presence. The parallel rule announced in *Jackson*, however, supersedes the suspect’s voluntary choice to speak with investigators.

....

We ought to question the wisdom of a judge-made preventative rule to protect a suspect’s desire not to speak when it cannot be shown that he had that intent.¹⁸⁰

¹⁷⁵ *Cobb*, 532 U.S. at 173 n.3.

¹⁷⁶ *See id.* at 174; *see also* *Cobb v. State*, 85 S.W.3d 258, 265 (Tex. Crim. App. 2002) (concluding that “burglary and capital murder are clearly not the ‘same’ offense”).

¹⁷⁷ *Cobb*, 532 U.S. at 174. Although *Cobb*’s conviction and death sentence were affirmed by the Texas Court of Criminal Appeals after remand from the U.S. Supreme Court, *see Cobb*, 85 S.W.3d at 259, *Cobb* no longer remains on death row. *Cobb* was only seventeen years old at the time of the murders. Consequently, following the U.S. Supreme Court’s decision in *Roper v. Simmons*, 543 U.S. 551 (2005), which banned the execution of individuals less than eighteen years of age at the time they commit a capital crime, Texas Governor Rick Perry commuted *Cobb*’s sentence to life imprisonment. *See Cobb v. Dretke*, 138 Fed. App’x. 702, 703 (5th Cir. 2005) (dismissing *Cobb*’s petition for a certificate of appealability as moot because the petition challenged only *Cobb*’s sentence, and “Governor Perry has granted him the relief that he requested”). Because the Supreme Court found that *Cobb*’s Sixth Amendment right to counsel did not extend to the interrogation about the homicides, the Court did not reach the State of Texas’s alternative argument that *Cobb* had validly waived that right. *See Cobb*, 532 U.S. at 167.

¹⁷⁸ *See Cobb*, 532 U.S. at 174 (Kennedy, J., concurring).

¹⁷⁹ *See id.* at 176-77.

¹⁸⁰ *Id.* at 175-76.

Although not explicitly suggesting that pretrial interrogations no longer should be viewed as a “critical stage” of the proceedings for Sixth Amendment purposes, Justice Kennedy asked:

[T]he acceptance of counsel at an arraignment or similar proceeding only begs the question: acceptance of counsel for what? It is quite unremarkable that a suspect might want the assistance of an expert in the law to guide him through hearings and trial, and the attendant complex legal matters that might arise, but nonetheless might choose to give on his own a forthright account of the events that occurred. A court-made rule that prevents a suspect from even making this choice serves little purpose, especially given the regime of *Miranda* and *Edwards*.¹⁸¹

The dissent was written by Justice Breyer, with Justices Stevens, Souter, and Ginsburg joining.¹⁸² Justice Breyer began by reviewing “[s]everal basic background principles”¹⁸³ to the Sixth Amendment:

First, the Sixth Amendment right to counsel plays a central role in ensuring the fairness of criminal proceedings in our system of justice. Second, the right attaches when adversary proceedings . . . begin. Third, once this right attaches, law enforcement officials are required, in most circumstances, to deal with the defendant through counsel rather than directly, even if the defendant has waived his Fifth Amendment rights.¹⁸⁴

Justice Breyer then moved to “the particular aspect of the right here at issue”¹⁸⁵—the limits on the requirement that the police communicate with a charged defendant through counsel. Justice Breyer acknowledged that the right is offense-specific and thus “‘cannot be invoked once for all future prosecutions,’ and it does not forbid ‘interrogation unrelated to the charge.’”¹⁸⁶ But, he noted, “[t]he definition of these words is not self-evident,”¹⁸⁷ and “[w]e should answer this question in light of the Sixth Amendment’s basic objectives”¹⁸⁸ In Justice Breyer’s view, the majority’s “unnecessarily technical definition undermines Sixth Amendment protections while doing nothing to further effective law enforcement.”¹⁸⁹

Justice Breyer did not find the same solace that the majority did in the *Miranda* rule, as he and the other dissenters viewed the Sixth Amendment

¹⁸¹ *Id.* at 177.

¹⁸² *Id.* at 177 (Breyer, J., dissenting).

¹⁸³ *Id.*

¹⁸⁴ *Id.* (citations omitted).

¹⁸⁵ *Id.* at 178.

¹⁸⁶ *Id.* (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175-76 (1991)).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 179.

¹⁸⁹ *Id.*

as independent of the Fifth Amendment's protections.¹⁹⁰ Under the Sixth Amendment, Justice Breyer explained, "the police may not force a suspect who has asked for legal counsel to make a critical legal choice without the legal assistance that he has requested and that the Constitution guarantees."¹⁹¹ Justice Breyer noted that his rule does not, as Justice Kennedy's concurrence argued, prevent a suspect from choosing whether to speak with the police, even without counsel's assistance, as a defendant may initiate communication with the police. Here, however, the police initiated the communication with Cobb, which required him to elect to speak without the benefit of counsel.¹⁹²

Justice Breyer opined further that *Blockburger* does not provide a satisfactory answer. Not only does application of the *Blockburger* definition of *offense* compress the scope of the right to counsel to less than what the Court previously had recognized in *Brewer* and *Moulton*,¹⁹³ but the test "has proved extraordinarily difficult to administer in practice,"¹⁹⁴ and its application has divided even the Supreme Court.¹⁹⁵ Although not "perfectly clear,"¹⁹⁶ the "closely related" rule adopted by the Texas Court of Criminal Appeals and employed by numerous lower courts in one form or another "comports with common sense, is far easier to apply than that of the majority," and "is consistent with this Court's assumptions in previous cases."¹⁹⁷ Here, under this standard, "[t]he relatedness of the crimes is well illustrated by the impossibility of questioning Cobb about the murders without eliciting admissions about the burglary."¹⁹⁸ Thus, "[t]he police officers ought to have spoken to Cobb's counsel before questioning Cobb."¹⁹⁹

C. THE BREADTH OF *PATTERSON* AND *COBB*

The Supreme Court's *Patterson-Cobb* framework clarifies several aspects of its view on the Sixth Amendment right to counsel during pretrial interrogation.

- The Sixth Amendment right to counsel is not self-executing

¹⁹⁰ *Id.* at 181.

¹⁹¹ *Id.* at 180.

¹⁹² *See id.* at 181-82.

¹⁹³ *See id.* at 182-85.

¹⁹⁴ *Id.* at 185.

¹⁹⁵ *See id.* (citing *United States v. Dixon*, 509 U.S. 688, 697-700, 716-20 (1993) (Rehnquist, C.J., and Scalia, J.)).

¹⁹⁶ *Id.* at 187 (Breyer, J., dissenting).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 187-88.

¹⁹⁹ *Id.* at 188.

upon constitutional “attachment.” Rather, before law enforcement’s dealings with a defendant must pass through counsel, the defendant’s interest in counsel must be invoked, either by affirmative request, or by the actual appearance or appointment of counsel. This requirement remains in place even when interrogation, a “critical stage” of the proceeding, has been initiated by the State.²⁰⁰

- Short of Sixth Amendment “invocation,” the defendant’s free will remains the critical focus of the Court’s inquiry: whether the defendant made a voluntary choice to proceed without counsel into questioning, not whether that choice was counseled.
- Even once the Sixth Amendment right to counsel has “attached” and been “invoked,” the scope of that right is defined, not by recognized understandings of the resulting attorney-client relationship, but by the four-corners of the charging instrument that the prosecution has chosen to file. Absent interrogation that is directed at this charging instrument, the Court again will inquire only whether the defendant’s choice to speak with the authorities was voluntary.

The *Patterson-Cobb* framework thus substantially minimizes the value of an attorney’s advice to defendant decision-making, at least in the interrogation context, even when Sixth Amendment interests have attached—a position from which the Court appears disinclined to retreat.²⁰¹

²⁰⁰ On October 1, 2008, the Supreme Court granted *certiorari* in *Montejo v. Louisiana*, No. 07-1529, which presents this question: “When an indigent defendant’s right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to ‘accept’ the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present?” U.S. Supreme Court, No. 07-01529 Question Presented, <http://www.supremecourtus.gov/qp/07-01529qp.pdf> (last visited Mar. 10, 2009). If the Court answers this question in the affirmative, the mere appointment of counsel would not suffice to “invoke” the right to counsel under *Patterson*. After oral argument, the Court asked the parties to submit briefs on the question of whether *Michigan v. Jackson* should be overruled. SCOTUS Blog, *Montejo* Order, <http://www.scotusblog.com/wp/wp-content/uploads/2009/03/montejo-order-3-27-09.pdf> (last visited Mar. 29, 2009). In the U.S. Government’s brief as *amicus curiae*, U.S. Solicitor General Elena Kagan argued that “*Michigan v. Jackson* was incorrectly decided and has been undermined by recent precedent. The decision therefore should be overruled.” Brief for the United States as Amicus Curiae Supporting Overruling of *Michigan v. Jackson* at 1, *Montejo v. Louisiana*, No. 07-1529 (U.S. Apr. 14, 2009), available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/04/us-amicus-in-montejo-4-14-09.pdf>.

²⁰¹ See *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2584-87 (2008) (reaffirming that Sixth Amendment right to counsel attaches upon initiation of adversary judicial proceedings).

The resulting potential breadth of *Patterson* and *Cobb* may not require tremendous imagination. Of the many cases applying *Patterson* and *Cobb*, however, two cases distinctly illustrate their full breadth: *United States v. Spruill*,²⁰² and *United States v. Avants*.²⁰³ Both cases quite literally, but also quite logically, apply the lessons of *Patterson* and *Cobb* to reject Sixth Amendment right-to-counsel claims—claims to counsel that, absent *Patterson* and *Cobb*, likely would have struck many as rock solid.

1. No Right to Counsel Even When the Government Calls a Lawyer for You

On December 13, 2000, Rodney Spruill was indicted by a federal grand jury on charges relating to a child prostitution ring.²⁰⁴ On January 11, 2001, the Chicago Police Department arrested Spruill on the indictment and held him overnight.²⁰⁵ At about 7:00 a.m. the next morning, two FBI Agents transported Spruill to the FBI's main office in Chicago.²⁰⁶ The agents did not ask Spruill questions during the trip, nor did Spruill say anything.²⁰⁷ At the FBI office, Spruill was advised of the charges against him and a co-conspirator, and after waiving his *Miranda* rights, Spruill acknowledged some awareness of the prostitution ring, but implicated his co-conspirator, and in later interviews that day implicated other individuals.²⁰⁸

During this time, the court scheduled an initial appearance for Spruill at 5:20 p.m. under Illinois's "seventeen-hour rule," under which the Government must present a defendant for an initial appearance within seventeen hours after arrest.²⁰⁹ The local U.S. Attorney's Office contacted the federal defender's office to notify them of Spruill's arrest and scheduled an appearance, for which a specific federal defender was assigned.²¹⁰ The federal defender arranged with the assigned Assistant U.S. Attorney (AUSA) to meet with Spruill at 5:00 p.m. for an interview prior to the initial appearance.²¹¹

²⁰² 296 F.3d 580 (7th Cir. 2002).

²⁰³ 278 F.3d 510 (5th Cir. 2002).

²⁰⁴ *Spruill*, 296 F.3d at 583; *see also* 18 U.S.C. § 2422(a) (2006) (coercion and enticement to engage in prostitution); *id.* § 2423(a) (transportation of minors with intent to engage in criminal sexual activity).

²⁰⁵ *Spruill*, 296 F.3d at 583.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

As 5:00 p.m. approached, the agents advised Spruill that he had one last chance to revise his story or else his existing statement would be memorialized and given to the prosecutors.²¹² Spruill stated that he wanted to tell the truth about the prostitution ring, but with the seventeen-hour deadline at hand, the agents needed Spruill to waive his right to an initial appearance.²¹³ Spruill agreed, declined another advisement that he had the right to consult with counsel, and signed a waiver.²¹⁴ The AUSA and federal defender were advised that the initial appearance would need to be rescheduled because Spruill wanted to cooperate and had signed a waiver.²¹⁵ The federal defender “expressed concern” to the AUSA that Spruill had waived his right to an initial appearance without the benefit of his assigned counsel.²¹⁶ That night, Spruill admitted his role in the prostitution ring.²¹⁷

On January 15, 2001, Spruill was arraigned and formally appointed counsel.²¹⁸ Spruill moved to suppress his confession on the Sixth Amendment grounds.²¹⁹ The District Court denied this motion, and upon Spruill’s conditional guilty plea, sentenced Spruill to fifty-seven months in prison.²²⁰

On appeal, the Seventh Circuit Court of Appeals recognized that Spruill’s Sixth Amendment right to counsel had “attached” with his indictment, and that his interrogation constituted a “critical stage” of the proceedings.²²¹ The court, however, moved quickly to *Patterson* to question whether Spruill’s right to counsel, although “attached,” had been “invoked.”²²² The court summarized Spruill’s position on appeal:

Sпруill argues that while he did not verbally invoke his right to counsel, his right to counsel was implicitly “asserted” when an attorney from the public defender’s office . . . was assigned by the federal defender’s office to be his counsel at his initial appearance. Spruill contends that because of this implicit “assertion,” his subsequent waiver of his right to counsel upon signing his confession was invalid.²²³

²¹² *Id.*

²¹³ *Id.* at 584.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 585-86 (internal quotations omitted).

²²² *Id.* at 586.

²²³ *Id.*

The court rejected Spruill's argument, concluding that *Michigan v. Jackson* "does not substantiate Spruill's claims."²²⁴

The court observed that while *Jackson* identified the Sixth Amendment right to counsel as "an abstract right"²²⁵ that does not depend on the defendant's assertion of the right, "the [Supreme] Court put this abstract right into focus through analogy to the Fifth Amendment context where the assertion of the right to counsel made by a defendant must be an expression of the 'defendant's desire to deal with the police only through counsel.'"²²⁶ *Patterson* "further illuminated"²²⁷ this Fifth Amendment focus to Sixth Amendment rights, and made clear:

[T]he assertion of the right by an affirmative request for counsel is a necessary step in Sixth Amendment jurisprudence The mere appointment of counsel, without the invocation of that right, simply does not constitute the assertion of the Sixth Amendment when the defendant has previously waived his right to counsel.²²⁸

Spruill therefore illustrates what *Patterson* appears to hold: the Sixth Amendment largely leaves to the defendant the decision whether he or she should have counsel during a critical stage of the pretrial proceedings. So long as the choice is voluntary, the Sixth Amendment remains unconcerned that the defendant did not have the aid of counsel during a post-charge interrogation.

2. *The Right to Counsel Changes with the Courthouse*

In 1966, Ben Chester White, an elderly African-American sharecropper, was found murdered in a national forest in Mississippi.²²⁹ Following a police investigation, Ernest Henry Avants and two other men were indicted in state court for Mr. White's murder.²³⁰ Avants obtained counsel and was released on bond.²³¹ During this time, the FBI was investigating the murder of a Mississippi civil rights worker who was killed by a car bomb, and in early 1967, two FBI agents went to Avants's home to interview him about the civil rights worker's death.²³² The FBI agents confirmed with Avants that he had a pending state murder case and was represented by counsel, and after the agents read *Miranda* warnings to Avants, he stated that he did not wish to have an attorney during the

²²⁴ *Id.*

²²⁵ *Id.* (internal quotation omitted).

²²⁶ *Id.* (quoting *Michigan v. Jackson*, 475 U.S. 625, 626 (1986)).

²²⁷ *Id.*

²²⁸ *Id.* at 587.

²²⁹ *United States v. Avants*, 278 F.3d 510, 513 (5th Cir. 2002).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

interview.²³³ The FBI agents asked about the status of Avants's murder case, and during the ensuing conversation Avants said, "[y]eah, I shot [him], but before I shot him [a co-defendant] had already shot him with a carbine, had emptied the full magazine of 15 rounds into him before I shot him. I blew his head off with a shotgun."²³⁴

In the late 1960s, a state jury acquitted Avants of murder.²³⁵ In 2000, however, a federal grand jury indicted Avants for the same murder of Mr. White.²³⁶ The Government sought to use Avants's 1967 statements to the FBI agents as evidence, but Avants moved to suppress the statements, arguing the FBI had violated his Sixth Amendment right to counsel by interviewing him about his state-murder charge without his attorney present.²³⁷ The District Court for the Southern District of Mississippi granted Avants's motion, and the Government appealed.²³⁸

The Fifth Circuit Court of Appeals noted both that Avants's right to counsel had fully attached and been invoked with respect to the state charge under *Michigan v. Jackson*,²³⁹ and that except for a jurisdictional element, the Mississippi and federal murder statutes "are virtually identical."²⁴⁰ Nevertheless, the court invoked the "dual sovereignty doctrine," which holds that "a defendant's conduct in violation of the laws of two separate sovereigns constitutes two distinct offenses for purposes of the Double Jeopardy Clause."²⁴¹ The court observed that "it seems rather clear that the Supreme Court would require us to apply double jeopardy principles in determining whether two offenses are the same in the Sixth Amendment context."²⁴² Consequently, the Supreme Court "effectively foreclosed any argument that the dual sovereignty doctrine does not inform the definition of 'offense' under the Sixth Amendment."²⁴³ And under this definition, the court concluded, Avants's Sixth Amendment right to counsel had not attached to the *federal* murder charge when the FBI agents interviewed him about the murder.²⁴⁴

²³³ *See id.*

²³⁴ *Id.*

²³⁵ *Id.* at 514.

²³⁶ *Id.* The federal government had jurisdiction because Mr. White's murder was committed on federal land. *See* 18 U.S.C. §§ 1111-12 (2006).

²³⁷ *See Avants*, 278 F.3d at 512.

²³⁸ *Id.* at 512.

²³⁹ *See id.* at 516.

²⁴⁰ *Id.* at 518.

²⁴¹ *Id.* at 516 (citing *Heath v. Alabama*, 474 U.S. 82, 88-93 (1985)).

²⁴² *Id.* at 517.

²⁴³ *Id.*

²⁴⁴ *Id.* at 518. In 2003, Avants was found guilty and sentenced to life in prison, a result affirmed by the Fifth Circuit. *United States v. Avants*, 367 F.3d 433 (5th Cir. 2004).

This parsimonious approach to the right to counsel seems to place form wholly above substance. But, despite a split in the circuit courts on this application of the double jeopardy, dual sovereignty exception to the right to counsel,²⁴⁵ the Fifth Circuit's approach appears well justified by the reasoning of *Cobb*; the right to counsel does not apply to clients, but to offenses, and only those offenses charged in the accusatory instrument or that would be precluded as the "same offense" for double-jeopardy purposes. Regardless of how this dual-sovereignty issue is ultimately resolved, *Cobb's* constitutional separation of the right to counsel from the attorney-client relationship that this right presumably protects is clear.

III. A JURISPRUDENCE HOSTILE TO THE ROLE OF DEFENSE COUNSEL

Patterson and *Cobb* work hand-in-hand to limit the importance, and thus the scope, of the Sixth Amendment right to counsel, a distinct right from the Fifth Amendment right to counsel under *Miranda*, and a right that is defined by a well-understood professional relationship between attorney and client. This professional relationship was not conceived solely by defense lawyers. On the contrary, this professional relationship and its purposes are well known to the legal profession as a whole, including prosecutors, police officers, and courts. However, by transforming the Sixth Amendment into a right that protects offenses instead of individuals and that permits the State to seek confessions without counsel's aid, the Supreme Court allows law enforcement to game the Constitution and incorrectly substitutes Fifth Amendment voluntariness for the Sixth Amendment right to be counseled during critical decision-making.

²⁴⁵ At least two federal circuit courts agree with the Fifth Circuit on this issue. See *United States v. Alvarado*, 440 F.3d 191, 195-99 (4th Cir. 2006); *United States v. Coker*, 433 F.3d 39, 41-47 (1st Cir. 2005). And at least one circuit court parted company. *United States v. Mills*, 412 F.3d 325, 330 n.2 (2d Cir. 2005) (rejecting "the government's invitation to follow the Fifth Circuit's lead in *United States v. Avants*"); cf. *United States v. Krueger*, 415 F.3d 766, 775-78 (7th Cir. 2005) (questioning, but not deciding, whether the dual-sovereignty doctrine should define "offense" for Sixth Amendment purposes). See Dinger, *supra* note 19; Ali C. Rodriguez, *Detaching Dual Sovereignty from the Sixth Amendment: Use of the Blockburger Offense Test Does not Incorporate Double Jeopardy Doctrines*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 213 (2007); David J. D'Addio, Comment, *Dual Sovereignty and the Sixth Amendment Right to Counsel*, 113 YALE L.J. 1991, 1992 (2004); Charles Morrison, Comment, *The Supreme Court May Have Meant What It Said, but It Needs to Say More: A Comment on the Circuit Split Regarding the Application of the Dual Sovereignty Doctrine to the Sixth Amendment Right to Counsel*, 39 U. TOL. L. REV. 153 (2007).

A. A FLAWED UNDERSTANDING OF THE ATTORNEY-CLIENT
RELATIONSHIP

In *Patterson*, the Supreme Court defined the Sixth Amendment interest at stake by judicially weighing “what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage.”²⁴⁶ Concluding that “the role of counsel at questioning is relatively simple and limited,”²⁴⁷ the Court embraced a right that requires affirmative invocation to become complete and that short of such invocation, may be waived through no more than *Miranda* warnings.²⁴⁸ The Court’s offense-specific rulings in *McNeil* and *Cobb* can be viewed in a similar light; the Court balanced its understanding of the value that a lawyer can provide to a charged defendant during interrogation against the Court’s perceived harm that this assistance imparts to society’s interest in convicting guilty offenders.²⁴⁹ Striking this balance in favor of voluntary confessions, the Court limited the Sixth Amendment right to charged offenses.²⁵⁰

To the extent the Sixth Amendment permits such judicial consideration of “sound policy” in appraising the value of counsel weighed against the State’s interests,²⁵¹ the Supreme Court’s policy analysis sorely

²⁴⁶ *Patterson v. Illinois*, 487 U.S. 285, 298 (1987).

²⁴⁷ *Id.* at 299.

²⁴⁸ *See id.* at 296, 300. *But see, e.g., Faretta v. California*, 422 U.S. 806, 835 (1975) (holding that “[a]lthough a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open’” (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942))).

²⁴⁹ *See, e.g., McNeil v. Wisconsin*, 501 U.S. 171, 180-81 (1991).

²⁵⁰ *See Texas v. Cobb*, 532 U.S. 162, 171-75 (2001).

²⁵¹ *See, e.g., McNeil*, 501 U.S. at 180 (justifying the offense-specific right-to-counsel rule on “sound policy” grounds, and noting that a rule more expansively defining the right to counsel “has only insignificant advantages,” but would “seriously impede effective law enforcement”). This methodology may be particularly curious for Justice Scalia, who often decries judicial balancing of policy interests and valuation of constitutional rights, especially under the Sixth Amendment. *See, e.g., Giles v. California*, 128 S. Ct. 2678, 2691 (2008) (rejecting the dissent’s approach, “under which the Court would create exceptions that it thinks consistent with the policies underlying the confrontation guarantee . . . the boundaries of the doctrine seem to us intelligently fixed so as to avoid a principle repugnant to our constitutional system of trial by jury: that those murder defendants whom the judge considers guilty . . . should be deprived of fair-trial rights”); *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (condemning the Court’s previous “reliability” test for determining the admissibility of testimonial hearsay because of its inherent judicial subjectivity, and arguing that “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because the defendant is obviously guilty”); *Apprendi v. New Jersey*, 530 U.S. 466, 499 (2000) (Scalia, J., concurring) (“Justice Breyer proceeds on the

misconceives the role and value of the attorney-client relationship during a post-charge interrogation. During the interrogation itself, counsel often, though not always, plays a more passive role of observational advisor to his or her client. Nonetheless, the Court's opinions in *Patterson*, *McNeil*, and *Cobb* appear to envision counsel's services at the interrogation as some sort of *à la carte* dish, a single-serving of counsel isolated to the plate on which it is delivered; a truly passive advisor, participating solely in the interrogation. In *Patterson*, the Court made its perspective explicit: "[D]uring postindictment questioning, a lawyer's role is rather *unidimensional*: largely limited to advising his client as to what questions to answer and which ones to decline to answer."²⁵²

In reality, a post-charge interrogation requires very active participation by counsel, and tremendous foresight and strategy—all equal in required skill and diligence to the strategic mindset that law enforcement properly will bring to the interrogation too.²⁵³ Moreover, counsel's considered judgment will not be limited to the interrogation itself, judged in a legal and factual vacuum; rather, counsel must consider the interrogation in the broader context of litigating the filed charges, as well as any other charges that may await the client, or that were filed in related or even unrelated cases. Prior to the interrogation, therefore, counsel will negotiate the terms and scope of the interrogation, how the interrogation may or may not be used in future proceedings, and what if any benefit the client may realize from agreeing to communicate with his or her prosecuting authority. Finally, counsel will monitor the interrogation to ensure that it conforms to these understandings and the client's current and future interests.

This comprehensive, strategic role of defense counsel is far from unknown in the profession. On the contrary, this role reflects a long-standing professional understanding of defense counsel's function,²⁵⁴ and a

erroneous and all-too-common assumption that the Constitution means what we think it ought to mean. It does not; it means what it says."); *Maryland v. Craig*, 497 U.S. 836, 864 (1990) (Scalia, J., dissenting) (contending that the Court's views on "[t]he 'necessities of trial and the adversary process' are irrelevant here, since they cannot alter the constitutional text"); *id.* at 869-70 ("I have no need to defend the value of confrontation, because the Court has no authority to question it.").

²⁵² *Patterson v. Illinois*, 487 U.S. 285, 294 n.6 (1987) (emphasis added).

²⁵³ I can confirm this fact from more than fourteen years of criminal defense practice experience. *See id.* at 307-08, 308 n.5 (Stevens, J., dissenting) (observing that counseling a client through a post-charge interrogation "require[s] considerable experience and expertise"); STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-1.2 (1993) (identifying defense counsel along with the prosecutor as critical elements to a "court properly constituted to hear a criminal case").

²⁵⁴ *See, e.g.*, STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-3.6 ("Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights

defense attorney who fails to approach an interrogation with a client's interests strategically in mind likely falls well short of constitutionally effective representation:

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable *adversarial testing process*.²⁵⁵

An adversarial process as the proper test of justice is equally familiar:

American justice relies on an adversary system The adversary system proceeds on the assumption that parties to a lawsuit are in the best position to determine its scope and content in a way that will generate substantial justice One consequence of this theory is that, with few exceptions, lawyers in an adversary contest have no obligation to parties or interests other than their own clients Consequently, justice, or the right result, is not the responsibility of either lawyer This system is justified on the theory that, when two or more lawyers singlemindedly pursue the interests of their individual clients, the confrontation will lead to the most just result.²⁵⁶

Of course, this understanding of defense counsel's role places a highly strategic actor between the State and a charged defendant's confession. However, any concern about the impact of this strategic actor on the State's interests is wholly different in kind from—and seemingly inconsistent with—the Supreme Court's vision of defense counsel's role as “simple and limited.”²⁵⁷ Indeed, that this strategic actor sometimes will subject the State's ability to obtain a confession to the defendant's own competing legal interests would appear to provide all the more reason to maximize the value of counsel's role, not to minimize it as the Supreme Court has done. That is, unless the Sixth Amendment in fact is not meant to subject the

at the earliest opportunity and take all necessary action to vindicate such rights. Defense counsel should consider all procedural steps which in good faith may be taken”); *cf.* MODEL RULES OF PROF'L CONDUCT 1.3 cmt. 1, at 15 (2008) (advising that “[a] lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1) (2000) (providing that “a lawyer must . . . proceed in a manner reasonably *calculated* to advance a client's lawful objectives, as defined by the client after consultation” (emphasis added)).

²⁵⁵ *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (citations omitted and emphasis added).

²⁵⁶ Stephen Gillers, *The American Legal Profession*, in *FUNDAMENTALS OF AMERICAN LAW* 151, 166-67 (Alan B. Morrison ed., 1996).

²⁵⁷ *See Patterson*, 487 U.S. at 300.

State's interest in a confession to an "adversarial testing process."²⁵⁸ Neither the text of the Sixth Amendment nor the Court's interpretation of that text supports this proposition.²⁵⁹ Instead, the Court has resorted to an inaccurate judicial assessment that counsel simply does little to protect a client's interests during an interrogation, and so Sixth Amendment rights should prove correspondingly flexible to accommodate the State's interest in a confession. This subjective judicial perspective on counsel's value to a defendant during post-charge interrogation should not inform this constitutional right any more than judicial assessment of the "reliability" of hearsay evidence should define whether confrontation serves a value worth enforcing,²⁶⁰ or whether practical modern litigation realities should inform whether facts necessary for punishment may be treated as "sentencing" facts not subject to Fifth and Sixth Amendment requirements.²⁶¹

B. AN IMPROPER FOCUS ON THE FIFTH AMENDMENT RIGHT TO COUNSEL IN SIXTH AMENDMENT CONTEXTS

In addition to evaluating the value of the attorney-client relationship during a post-charge interrogation, the Court in *Patterson*, *McNeil*, and *Cobb* also defined and limited the Sixth Amendment right to counsel in light of the Fifth Amendment right to counsel under *Miranda*. For example, in *Patterson*, the Court opined: "The fact that [defendant's] Sixth Amendment right came into existence with his indictment . . . does not distinguish him from the preindictment interrogatee whose [Fifth Amendment] right to counsel is in existence and available for his exercise while he is questioned."²⁶² In *McNeil*, the Court emphasized that "[t]o invoke the Sixth Amendment interest is, as a matter of *fact*, *not* to invoke the *Miranda-Edwards* interest *Jackson* implicitly rejects any equivalence in fact between invocation of the Sixth Amendment right to counsel and the expression necessary to trigger *Edwards*."²⁶³ And in *Cobb*,

²⁵⁸ *Strickland*, 466 U.S. at 687.

²⁵⁹ *See id.*; *see also* *United States v. Wade*, 388 U.S. 218, 237-38 (1967) ("[T]o refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the basic assumptions upon which this Court has operated in Sixth Amendment cases '[A]n attorney is merely exercising the good professional judgment he has been taught . . . to protect to the extent of his ability the rights of his client.'" (quoting *Miranda v. Arizona*, 384 U.S. 436, 480-81 (1966))); *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964) (noting that "[n]o system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights").

²⁶⁰ *See Crawford v. Washington*, 541 U.S. 36 (2004); *Maryland v. Craig*, 497 U.S. 836 (1990) (Scalia, J., dissenting).

²⁶¹ *See Apprendi v. New Jersey*, 530 U.S. 466 (2000).

²⁶² *Patterson*, 487 U.S. at 290-91.

²⁶³ *McNeil v. Wisconsin*, 501 U.S. 171, 178-79 (1991).

Justices Kennedy, Scalia, and Thomas outright questioned the relevance of the Sixth Amendment preventative rule under *Jackson* altogether in light of the Fifth Amendment *Miranda-Edwards* doctrine:

The *Miranda* rule, and the related preventative rule of *Edwards v. Arizona* serve to protect a suspect's voluntary choice not to speak outside the lawyer's presence. The parallel rule announced in *Jackson*, however, supersedes the suspect's voluntary choice to speak with investigators.

....

We ought to question the wisdom of a judge-made preventative rule to protect a suspect's desire not to speak when it cannot be shown that he had that intent.

....

A court-made rule that prevents a suspect from even making this choice serves little purpose, especially given the regime of *Miranda* and *Edwards*.²⁶⁴

The Court's focus on the Fifth Amendment right to counsel as the presumptively adequate preventative rule is unfounded.²⁶⁵ Unlike the Sixth Amendment right to counsel, the Fifth Amendment right to counsel does not exist independently of a custodial interrogation.²⁶⁶ Instead, the Fifth Amendment right to counsel exists solely as a prophylactic measure to protect a suspect's Fifth Amendment right not to incriminate him or herself involuntarily.²⁶⁷ The Fifth Amendment itself provides no textual right to

²⁶⁴ *Texas v. Cobb*, 532 U.S. 162, 175-77 (2001) (Kennedy, J., concurring) (citations omitted).

²⁶⁵ See, e.g., Meredith B. Halama, Note, *Loss of a Fundamental Right: The Sixth Amendment as a Mere "Prophylactic Rule,"* 1998 U. ILL. L. REV. 1207, 1224, 1227 (criticizing the Supreme Court's "merger of the Fifth and Sixth Amendments," and the Sixth Amendment's "subordination to the Fifth Amendment").

²⁶⁶ See *Sapp v. State*, 690 So. 2d 581, 584-85 (Fla. 1997) (concluding that a suspect cannot invoke the Fifth Amendment right to counsel under *Miranda* if "custodial interrogation has not begun or is not imminent," since "*Miranda*'s safeguards were intended to protect the Fifth Amendment right against self-incrimination by countering the compulsion that inheres in *custodial interrogation*"); see also *Alston v. Redman*, 34 F.2d 1237, 1244 (3d Cir. 1994), *cert. denied*, 513 U.S. 1160 (1995) (holding that "the presence of both a custodial setting and official interrogation is required to trigger the *Miranda* right-to-counsel . . . absent one or the other, *Miranda* is not implicated"); cf. *McNeil*, 501 U.S. at 183 n.3 (expressing doubt that the Court "will allow [the Fifth Amendment right to counsel] to be asserted initially outside the context of custodial interrogation"); *Rhode Island v. Innis*, 446 U.S. 291, 300 (1980) (defining interrogation under *Miranda*).

²⁶⁷ The Fifth Amendment provides, in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V; see *Holloway v. State*, 780 S.W.2d 787, 792 (Tex. Crim. App. 1989) ("*Miranda* counsel acts as a buffer against state agents capable of amassing resources to extract confessions from unwilling suspects [T]he promise of legal assistance is intended to counter compulsion The Fifth Amendment bars only compulsory self-incrimination; it does not bar unwise confessions."); cf. *New York v. Quarles*, 467 U.S. 649, 654 (1984) (referring to *Miranda*

counsel.²⁶⁸ In fact, even as construed in *Miranda*, the Fifth Amendment does not quite afford a substantive *right to counsel*, but more accurately only the right to request counsel as a condition to questioning, a request law enforcement must honor.²⁶⁹ Thus, so long as law enforcement advises a suspect of this right, law enforcement may invite the suspect to choose whether to proceed without counsel, and voluntariness of suspect decision-making is assured.

Under the Sixth Amendment, by contrast, once the State commences prosecution, the right to counsel exists for the defendant regardless of custodial interrogation²⁷⁰ because the Sixth Amendment is not merely a judicially-created prophylactic designed to protect other constitutional rights; the Sixth Amendment itself assures the right to counsel as a constitutional interest.²⁷¹ Further, the Constitution envisions a “Sixth Amendment right to counsel [that] is much more pervasive [than the Fifth Amendment right] because it affects the ability of the accused to assert any other rights he might have,”²⁷² rights including, but far beyond, the right against self-incrimination,²⁷³ and rights deemed essential to the realization of a fair and just trial.²⁷⁴ Indeed, for this reason, in other post-charge settings, such as a post-indictment lineup, the prosecution must afford

warnings as “prophylactic” rules to protect the Fifth Amendment right against self-incrimination); *Michigan v. Tucker*, 417 U.S. 433, 439 (1974) (also discussing *Miranda* warnings’ role as “prophylactic rules developed to protect that right [against self-incrimination]”).

²⁶⁸ See *supra* note 6.

²⁶⁹ See *United States v. Myers*, 123 F.3d 350, 359-60 (6th Cir. 1997) (rejecting the existence of a right to appointed counsel under the Fifth Amendment); *Holloway*, 780 S.W.2d at 792 (referring to the “promise” of counsel under the Fifth Amendment); Daniel C. Nester, *Distinguishing Fifth and Sixth Amendment Rights to Counsel During Police Questioning*, 16 S. ILL. U. L.J. 101, 115 (1991) (discussing how “[t]he Fifth Amendment right to counsel attaches only after the suspect has invoked the right”).

²⁷⁰ See *Massiah v. United States*, 377 U.S. 201 (1964).

²⁷¹ See Halama, *supra* note 265, at 1228-29 (criticizing the Supreme Court’s equation of Fifth and Sixth Amendment rights to counsel and characterization of the Sixth Amendment right as a prophylactic right). *But cf.* *Michigan v. Harvey*, 494 U.S. 344, 353 (1990) (identifying Sixth Amendment preventative rule under *Jackson* and *Edwards* as a prophylactic rule).

²⁷² *Harvey*, 494 U.S. at 356 (Stevens, J., dissenting) (footnote omitted).

²⁷³ See *Maine v. Moulton*, 474 U.S. 159, 169 (1985) (emphasizing that the right to counsel “safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding”).

²⁷⁴ See *id.* at 168-69 (observing that “[t]he right to the assistance of counsel . . . is indispensable to the fair administration of our adversarial system of criminal justice”); *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (noting that “[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results”).

counsel to the defendant, regardless of whether the defendant “invokes” this right by requesting counsel’s assistance.²⁷⁵ Therefore, once a defendant acquires the right “to have the Assistance of Counsel for his defense,”²⁷⁶ the defendant similarly should not need to assert that right for counsel’s presence to become a requisite condition to law enforcement questioning of the defendant; only the defendant should position him or herself to choose whether to proceed without counsel.²⁷⁷

Yet, ironically, by making the Sixth Amendment right to counsel offense-specific but not the Fifth Amendment right,²⁷⁸ the Supreme Court embraces a broader vision of the Fifth Amendment right to counsel in the interrogation context. For example, in *McNeil*, the Court asserted the curious proposition that “[t]o invoke the Sixth Amendment interest is, as a matter of *fact*, not to invoke the *Miranda-Edwards* interest,” because “[o]ne might be quite willing to speak to the police without counsel present concerning many matters, but not the matter under prosecution.”²⁷⁹

This observation might prove true in an individual case, a circumstance that even Justice Scalia acknowledged is not practically likely in most cases.²⁸⁰ But that it might prove true in a few, or even in many cases, misses the constitutional point: the Sixth Amendment requires law enforcement to *presume* that a charged and represented defendant wishes to proceed only with the aid of counsel unless the *defendant* makes his or her contrary wish clear by initiating the questioning. To place the burden of asserting the need for counsel’s assistance on a charged defendant, for whom the Constitution’s text guarantees that assistance, and to limit that interest solely to the offenses with which the defendant has been charged,

²⁷⁵ See *United States v. Wade*, 388 U.S. 218, 237, 224 (1967) (holding that, regardless of defendant’s request, defense counsel “should have been notified of the impending [post-indictment] lineup, and counsel’s presence should have been a requisite to conduct of the lineup, absent an ‘intelligent waiver,’” because “critical confrontations of the accused by the prosecution at pretrial proceedings . . . might well settle the accused’s fate and reduce the trial itself to a mere formality”); see also *Gilbert v. California*, 388 U.S. 263, 272 (1967).

²⁷⁶ U.S. CONST. amend. VI.

²⁷⁷ Cf. *Harvey*, 494 U.S. at 359-60 (Stevens, J., dissenting); *Patterson v. Illinois*, 487 U.S. 285, 306-307 (1987) (Stevens, J., dissenting) (observing that “[g]iven the significance of the initiation of formal proceedings and the concomitant shift in the relationship between the state and the accused, I think it quite wrong to suggest that *Miranda* warnings—or for that matter, any warnings offered by an adverse party—provide a sufficient basis for permitting the undoubtedly prejudicial—and, in my view, unfair—practice of permitting trained law enforcement personnel and prosecuting attorneys to communicate with as-of-yet unrepresented criminal defendants”).

²⁷⁸ See *Arizona v. Roberson*, 486 U.S. 675, 684 (1988).

²⁷⁹ *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991).

²⁸⁰ See *id.*

but to presume that interest without limitation to charges under an implied Fifth Amendment right, makes no jurisprudential sense.

No sense, at least, unless one considers jurisprudential interests apart from a neutral application of the Sixth Amendment. The Court's language in *Patterson*, *McNeil*, and *Cobb* makes clear that the Justices in the majority view the *Miranda* rule as an already substantial obstacle to the "unmitigated good" of voluntary confessions.²⁸¹ Rather than viewing the Sixth Amendment as the further constitutional dividing line between when the State may invite an *un-counseled* confession, even if voluntary, and when the Constitution presumes that counsel will assist in any interrogation, these Justices appear to see any role for counsel beyond assuring the basic voluntariness of a confession as irrelevant to constitutional law, if not an outright obstruction.²⁸² Defendant free-will predominates as the critical inquiry, not whether the defendant has received competent legal advice.²⁸³

²⁸¹ See *Texas v. Cobb*, 532 U.S. 162, 172 (2001) (quoting *McNeil*, 501 U.S. at 181); see also *id.* at 175-77 (Kennedy, J., concurring).

²⁸² See, e.g., *id.* at 175-76 (Kennedy, J., concurring) ("The *Miranda* rule, and the related preventative rule of *Edwards v. Arizona* serve to protect a suspect's voluntary choice not to speak outside his lawyer's presence. The parallel rule announced in *Jackson*, however, supersedes the suspect's voluntary choice to speak with investigators We ought to question the wisdom of a judge-made preventative rule to protect a suspect's desire not to speak when it cannot be shown that he had that intent." (citations omitted)); *Dickerson v. United States*, 530 U.S. 428, 449 (2000) (Scalia, J., dissenting) (commenting that the right to counsel under *Miranda* incorrectly helps to assure, not that a suspect will confess only voluntarily, but that a suspect will not confess "foolishly," an outcome that the Constitution does not prohibit).

²⁸³ Oral argument in *Montejo v. Louisiana* appears to confirm this coercion-driven understanding of the Sixth Amendment right to counsel. See Transcript of Oral Argument, *Montejo v. Louisiana*, 2009 WL 793514 (Jan. 13, 2009) (No. 07-1529), available at 2009 WL 76296. The issue in *Montejo* is whether *Michigan v. Jackson* is triggered when a charged defendant is appointed, but has not requested, counsel. See *supra* note 200. Early in the argument, Justice Scalia queried:

I thought that the rationale of *Jackson* was that the confession is simply deemed to be coerced if the defendant has expressed—has expressed—his desire to have counsel present or even to be represented by counsel. It isn't clear that, which is already a stretch, to assume that simply because I said, you know, I would like to have counsel, if the police continue to say, well, come on, won't you talk to us—it's already a stretch to say it's automatically coerced.

But now you're saying, even if the defendant has never expressed even a desire to be represented by counsel but has simply had counsel appointed, in fact even if he doesn't know about the appointment of counsel, the—his confession is automatically deemed to be coerced. That seems to me quite, even more extravagant than *Jackson*.

Transcript of Oral Argument, *supra*, at *4. A short time later, Justice Kennedy surmised bluntly: "[I]t seems to me . . . the *Miranda* rules give you all the protection you need." *Id.* at *7-8. Justice Souter, however, subsequently highlighted the critical distinction:

[T]here is a difference between the way you are phrasing the Sixth Amendment right and the way, for example, Justice Scalia has phrased it in his question. Justice Scalia has phrased it in

The text of the Sixth Amendment itself, however, seems to embrace a role for defense counsel well beyond the narrow Fifth Amendment function of ensuring that defendants' choices are voluntary.²⁸⁴ The Sixth Amendment right ensures *effective* counsel in the comprehensive sense of that function that is recognized in the profession—strategically protecting a client's substantive and procedural legal interests.²⁸⁵ Yet, in no other critical stage context has the Court so frankly limited the value of counsel and the attorney-client relationship as in the interrogation context.²⁸⁶ The

terms of determining what is a coerced confession. You have phrased it in your argument in terms of saying a right to rely upon counsel, which is a much broader concept Isn't it the case that you understand Jackson to be a broader rule than a merely no-coercion rule?

Id. at *23.

²⁸⁴ Indeed, the Fifth Amendment right to counsel has been viewed as so narrow in function that defendants may not be able to assert *ineffective* assistance of counsel relating to an interrogation when only the Fifth Amendment right can be claimed. *See, e.g.*, *Sweeney v. Carter*, 361 F.3d 327, 333 (7th Cir. 2004) (observing that “as far as we can tell, the Supreme Court has not mentioned effective assistance of counsel (in the *Strickland* sense) and the Fifth Amendment in the same breath”); *United States v. Radford*, No. Civ. A. 00-70255, 2000 WL 1137712, at *3-5 (E.D. Mich. July 7, 2000) (rejecting defendant's ineffective assistance of counsel claim rooted in a Fifth Amendment right to counsel under *Miranda*); *see also* *Wainwright v. Tora*, 455 U.S. 586, 587-88 (1982) (per curiam) (finding that to prevail on an ineffective assistance of counsel claim, a defendant must show that he or she was constitutionally entitled to counsel when the allegedly deficient representation was provided); *United States v. Myers*, 123 F.3d 350, 358-59 (6th Cir. 1997) (rejecting existence of a right to appointed counsel under the Fifth Amendment); *United States v. Zazzara*, 626 F.2d 135, 137-38 (9th Cir. 1980); *Brown v. United States*, 551 F.2d 619, 620 (5th Cir. 1977). *Contra* *State v. Joseph*, 128 P.3d 795, 804 (Haw. 2006) (finding that defendant, under both the Hawaii State Constitution and the Fifth Amendment to the U.S. Constitution, “had the right to effective assistance of counsel during both the pre-*Miranda* and the post-*Miranda* portions of the January 8 custodial interrogation”).

²⁸⁵ *See* *Holloway v. State*, 780 S.W.2d 787, 793 (Tex. Crim. App. 1989) (“Unlike the Fifth Amendment, the Sixth Amendment right to counsel guarantees more than an entitlement to counsel upon invocation . . . [and] ‘envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.’” (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984))); *supra* notes 253-56 and accompanying text; *cf.* *United States v. Wade*, 388 U.S. 218, 224 (1967) (noting that “[t]he Framers of the Bill of Rights envisioned a broader role for counsel than under the practice then prevailing in England”); *id.* at 237-38 (“[T]o refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the basic assumptions upon which this Court has operated in Sixth Amendment cases [A]n attorney is merely exercising the good professional judgment he has been taught . . . to protect to the extent of his ability the rights of his client.” (quoting *Miranda v. Arizona*, 384 U.S. 436, 480-81 (1966))); *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964) (noting that “[n]o system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights”); *LAFAVE ET AL.*, *supra* note 6, §10, at 519 (observing that “[t]he constitutional right to counsel . . . provides the vehicle through which all other criminal process rights are presented”).

²⁸⁶ *Cf.* *Halama*, *supra* note 265, at 1234 (arguing that “current Sixth Amendment

apparent constitutional goal, which the Court embraces as an “unmitigated good,”²⁸⁷ is to encourage un-counseled—or more accurately, poorly strategized—confessions that inevitably will compromise defendants’ bargaining and litigation position in a criminal justice system predicated on fair plea bargaining and litigation as a means to justice.²⁸⁸ The Fifth Amendment might countenance the Court’s constitutional prioritization of voluntariness alone, but the Sixth Amendment should not.

C. THE PROPER ANALYSIS: A RELATIONAL SIXTH AMENDMENT

The Sixth Amendment, once attached, triggers a constitutionally protected professional relationship that is presumed to place a trained strategic actor between the State and the accused. This actor is understood to *contribute* to a more fair trial, not to detract from one.²⁸⁹ Rather than permit a sliding scale of protection, therefore, contingent on the Justices’ view of the relative value of this relationship weighed against the State’s interests, the Court should frame constitutional rules around the premise of the constitutional guarantee: that the State must “honor” the attorney-client relationship, and thus it has “an affirmative obligation to respect and preserve the accused’s choice to seek this assistance . . . [and] rely on counsel as a ‘medium’ between him and the State.”²⁹⁰ In the interrogation context, these rules would be familiar, clear-cut, and predictable.

At a minimum, once the Sixth Amendment right attaches with the initiation of adversarial proceedings, the Constitution should presume that the defendant will proceed only with the advice of counsel. The right should be self-executing.²⁹¹ Contrary to some Justices’ apparent concern for preserving defendant autonomy to choose,²⁹² this approach will not force counsel upon an unwilling defendant, since a defendant still may initiate interrogation without counsel. Rather, by prohibiting the State from *inviting* the defendant to proceed with interrogation without counsel, this constitutional rule recognizes the existence of a critical professional relationship to our fundamental notion of a fair trial, a relationship the State

jurisprudence has lost sight of the importance of the attorney-client relationship”).

²⁸⁷ *Cobb*, 532 U.S. at 172 (quoting *McNeil*, 501 U.S. at 181).

²⁸⁸ See *supra* notes 4-5, 8, and accompanying text.

²⁸⁹ See *supra* notes 255-56.

²⁹⁰ *Maine v. Moulton*, 474 U.S. 159, 171, 176 (1985).

²⁹¹ See Colin E. Fritz, Comment, *Patterson v. Illinois: Applying Miranda Waivers to the Sixth Amendment Right to Counsel*, 74 IOWA L. REV. 1261, 1263, 1272 (1989) (arguing that “the Court’s decision in *Patterson* breaks from established constitutional precedent by denying automatic application of counsel for postindictment interrogation”).

²⁹² See *Cobb*, 532 U.S. at 175-76 (Kennedy, J., concurring).

is duty-bound to respect and preserve once the State itself has formalized its adversarial position to the defendant.²⁹³

Once the State's adversarial relationship to the defendant implicates the Sixth Amendment, the State's constitutional obligation should recognize that the *defendant*, not the indictment, assumes a constitutionally protected professional relationship with an attorney. In the interrogation context, this relational understanding of the Sixth Amendment entails two requirements that depart from the Supreme Court's "offense-specific" approach adopted in *Cobb*.

First, law enforcement should not initiate questioning of the defendant outside of counsel's presence when officers know that the questions are reasonably likely to intrude into the subject matter covered by an existing attorney-client relationship—questions, for instance, that will prompt disclosure of confidential facts,²⁹⁴ or evidence of strategic decision-making between client and lawyer. This rule would by no means be novel. Lawyers in every jurisdiction operate under an essentially identical rule that prohibits lawyers from communicating with represented parties without their attorney's permission, all to protect the attorney-client relationship from intrusion by adverse parties.²⁹⁵ So, for example, if the police who questioned Cobb knew that by asking him about the missing family members, they likely would elicit confidential information about the burglary on which Cobb was represented by counsel, the Sixth Amendment should have prohibited this questioning, except in counsel's presence or if Cobb had initiated the questioning.

This rule would require awareness and even some inquiry by law enforcement before questioning a represented defendant. Yet, this rule surely requires no more, and likely quite a bit less, than what *Cobb*'s technical *Blockburger* analysis currently requires of law enforcement.²⁹⁶

²⁹³ Cf. *Patterson v. Illinois*, 487 U.S. 285, 300-01 (1988) (Blackmun, J., dissenting) (distinguishing the Fifth and Sixth Amendment rights to counsel, and observing that "[w]hen the Constitution grants protection against criminal proceedings without the assistance of counsel, counsel must be furnished whether or not the accused requested the appointment of counsel" (quoting *Carnley v. Cochran*, 369 U.S. 506, 513 (1962))).

²⁹⁴ Cf. MODEL RULES OF PROF'L CONDUCT 1.6 (2008) (defining confidentiality).

²⁹⁵ See, e.g., *id.* 4.2 cmt. 1 ("This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation."). Indeed, this ethical restraint goes beyond the proposed constitutional rule, for Rule 4.2 "applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule." *Id.* at cmt. 3.

²⁹⁶ See, e.g., *Cobb*, 532 U.S. at 185 (Breyer, J., dissenting) (observing that "[t]he test has

Additionally, a relational rule has the virtue of focusing law enforcement's attention on the correct Sixth Amendment issue: whether law enforcement questions directed at a charged defendant intrude into the attorney-client relationship, instead of whether the questions are directed at the existing accusatory instrument or derivative offenses under double-jeopardy analysis. A relational rule will not preclude law enforcement questioning of a charged defendant if the questions address topics not covered by the attorney-client relationship. Otherwise, a phone call to the defendant's lawyer is required for questioning to proceed.

Second, even if law enforcement's questioning of a represented defendant does not intrude into the subject matter of the attorney-client relationship, the Sixth Amendment still should preclude State initiation of questioning if the *setting* of the interrogation necessitates counsel's presence to maintain equal footing between established adversaries. Principally, this component of the Sixth Amendment rule would restrict in-custody interrogation of represented defendants outside of counsel's presence. This rule at first blush may appear simply to carry over the custodial interrogation focus of the Fifth Amendment. But, this rule distinctly emphasizes equal footing in a context when the defendant *already* is represented against the State, and equal footing between established adversaries is a core value of the Sixth Amendment right to counsel.²⁹⁷ This rule thus may extend beyond custodial questioning if the setting isolates or leverages a represented defendant such that he or she likely could not maintain the appropriate barriers between law enforcement and the subject matter on which the defendant is represented. Custody, however, has this well-documented effect. Thus, when a represented defendant is interrogated while incarcerated by the very same authority that seeks a confession from the defendant, the defendant's dealings with the State in this context cannot confidently be characterized as an independent choice to proceed without counsel, free of State interference with the existing attorney-client relationship.

Each of these components to a relational Sixth Amendment is predictable and clear to law enforcement. These rules, moreover, do not privilege a represented defendant absolutely from any law enforcement

emerged as a tool in an area of our jurisprudence that the Chief Justice has described as 'a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator'" (quoting *Albernaz v. United States*, 450 U.S. 333, 343 (1981))).

²⁹⁷ See *Holloway v. State*, 780 S.W.2d 787, 793 (Tex. Crim. App. 1989) (observing that "parity between parties is critical to prevent unfair and unjust outcomes that would be tainted by one side's superiority"); *supra* note 18; see also James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 980-81 (1986) (identifying "parity" as a core value of the Sixth Amendment).

questioning on matters beyond the attorney-client relationship or when the defendant initiates questioning. Accordingly, the State's interest in ongoing investigation and the opportunity to obtain voluntary confessions is preserved. On the other hand, these rules do require the State to honor the Sixth Amendment right to counsel as a professional relationship between a lawyer and an *individual*,²⁹⁸ consistent with long-standing professional norms, and not to treat defense lawyers as the constitutional representative of an indictment and nothing more.

IV. STATE LAW MODELS: A TURN AWAY FROM COBB?

This Article does not presume that the Supreme Court is prepared to revisit its Sixth Amendment interrogation jurisprudence, and the lower federal courts of course must follow Supreme Court's rulings. Nonetheless, we live in a federal system where the States remain free, as a matter of policy or state constitutional law, to raise the floor of individual rights that the U.S. Constitution sets.²⁹⁹ As Supreme Court Justice William Brennan once explained in his seminal article, *State Constitutions and the Protection of Individual Rights*:

The essential point I am making, of course, is not that the United States Supreme Court is necessarily wrong in its interpretation of the federal Constitution, or that ultimate constitutional truths invariably come prepackaged in the dissents It is simply that the decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law Rather, state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.³⁰⁰

In the years following the *Patterson* decision in 1988, a handful of state courts held under state law what Justice Blackmun's dissent had argued in *Patterson*: "[T]he Sixth Amendment does not allow the prosecution to take undue advantage of any gap between the commencement of the adversary process and the time at which counsel is appointed for a defendant."³⁰¹ Along with courts that had pre-existing state

²⁹⁸ See *State v. Piorkowski*, 700 A.2d 1146, 1152 (Conn. 1997) (observing "we always have recognized that the right to counsel is a *personal* right" (emphasis added)).

²⁹⁹ See *Oregon v. Hass*, 420 U.S. 714, 719 (1975) (observing that "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards").

³⁰⁰ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (footnote omitted).

³⁰¹ *Patterson v. Illinois*, 487 U.S. 285, 301 (1988) (Blackmun, J., dissenting); see, e.g., *State v. Liulama*, 845 P.2d 1194, 1199-1204 (Haw. Ct. App. 1992) (rejecting *Patterson*

law right-to-counsel rules that opted them out of *Patterson*,³⁰² a fair number of states have expressed dissatisfaction with *Patterson*'s post-charge, pre-“invocation” window of opportunity to question a defendant by securing only a *Miranda* waiver.³⁰³ The state response to *Cobb*'s perhaps more dramatic offense-specific approach to the Sixth Amendment has been less clear, however, despite the passage of more than seven years since the Supreme Court decided *Cobb*.

A. PRE-EXISTING STATE LAW MODELS: NEW YORK STATE

Prior to the Supreme Court's *Cobb* decision in 2001, New York State already had a state-law right-to-counsel model that ensured that the state would opt out of the Court's vision of an offense-specific Sixth Amendment. Often described as the “indelible” right to counsel,³⁰⁴ New York's right-to-counsel model is the closest parallel to the model that this Article proposes for the interrogation context. Indeed, New York's indelible right-to-counsel rule may protect the attorney-client relationship even more broadly than the rule that I have proposed.³⁰⁵

under state constitutions); *State v. Sanchez*, 609 A.2d 400, 406-09 (N.J. 1992) (same). *But cf.* Edwin J. Butterfoss & Lisa J. Burkett, *Extending the Guiding Lefthand of Counsel: The Minnesota Supreme Court Provides Protection Against Uncounseled Waivers of the Right to Counsel During Interrogations*, 17 HAMLIN L. REV. 307 (1993) (analyzing variations in Minnesota state right to counsel rules, particularly state law restriction of the *Patterson* decision); Shapiro, *supra* note 18, at 592-99 (considering state constitutional-law responses to *Patterson*).

³⁰² See, e.g., *People v. Samuels*, 400 N.E.2d 1344, 1347 (N.Y. 1980) (holding that “[o]nce a matter is the subject of a legal controversy any discussions relating thereto should be conducted by counsel: at that point the parties are in no position to safeguard their rights” (quoting *People v. Settles*, 385 N.E.2d 612, 617 (N.Y. 1978))).

³⁰³ See Halama, *supra* note 265, at 1237 (“Several state courts have gone beyond limiting *Patterson* to its facts, demanding a higher standard of waiver once adversarial judicial proceedings have begun, regardless of whether the defendant is represented. These courts have relied upon their state constitutional guarantee to counsel and their supervisory powers . . .”).

³⁰⁴ See *People v. Grice*, 794 N.E.2d 9, 10 (N.Y. 2003) (noting that “[t]he indelible right to counsel arises from the provision of the State Constitution that guarantees due process of law, the right to effective assistance of counsel and the privilege against compulsory self-incrimination”); see also Ofer Raban, *The Embarrassing Saga of New York's Derivative Right to Counsel: The Right to Counsel of Defendants Suspected of Two Unrelated Crimes*, 80 ST. JOHN'S L. REV. 389, 390 (2006) (“New York courts habitually ground their [right to counsel] determinations in the collective authority of the New York Constitution's right to counsel clause, the right against self incrimination, and the right to due process of law (probably because all three clauses are grouped together in Article I, Section 6 of the New York Constitution).”).

³⁰⁵ See Peter J. Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731, 764 (1982) (arguing that the New York indelible right to counsel rule “constitute[s] the strongest protection of right to counsel anywhere in

First, the New York State right to counsel attaches in a broader range of circumstances than the Sixth Amendment right: it adheres “when a criminal action is formally commenced,”³⁰⁶ but it “can also attach before an action is commenced when a person in custody requests to speak with an attorney or when an attorney who is retained to represent the suspect enters the matter under investigation.”³⁰⁷ Once this right attaches, New York law protects the attorney-client relationship assiduously:

Once an attorney enters the proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant’s right to counsel. There is no requirement that the attorney or the defendant request the police to respect this right of the defendant.³⁰⁸

In evaluating the scope of this “indelible” right to counsel once it attaches, New York courts have held that it operates derivatively in two important respects that correspond to key ingredients of this Article’s proposal.³⁰⁹ The first circumstance involves interrogation on an unrepresented matter when the defendant is represented on a separate “offense,” but where:

[T]he two criminal matters are so closely related transactionally, or in space or time, that questioning on the unrepresented matter would all but inevitably elicit incriminating responses regarding the matter in which there had been an entry of counsel. In such cases, interrogation on the unrepresented crime is prohibited even in the absence of direct questioning regarding the crime on which counsel had appeared.³¹⁰

When the unrepresented matter involves “crimes less intimately connected” to the represented matter,³¹¹ a confession still will be suppressed under New York law if the court determines that “the police were aware that the defendant was actually represented by an attorney” and exploited that attorney-client relationship to secure a confession on the unrepresented matter.³¹²

The second New York rule, like the one proposed by this Article, addresses defendants who are both represented and incarcerated at the time

the country”).

³⁰⁶ *Grice*, 794 N.E.2d at 10.

³⁰⁷ *Id.* at 10-11; *see also* *People v. Ramos*, 780 N.E.2d 506, 509 (N.Y. 2002); *People v. West*, 615 N.E.2d 968, 970 (N.Y. 1993); *People v. Hobson*, 384 N.E.2d 894, 897 (N.Y. 1976).

³⁰⁸ *People v. Arthur*, 239 N.E.2d 537, 539 (N.Y. 1968) (citation omitted); *see also Hobson*, 384 N.E.2d at 897.

³⁰⁹ *See* Raban, *supra* note 304, at 420-28 (explaining and criticizing the derivative function of New York’s indelible right to counsel).

³¹⁰ *People v. Cohen*, 687 N.E.2d 1313, 1316-17 (N.Y. 1997).

³¹¹ *Id.* at 1317.

³¹² *Id.*

of interrogation. In this circumstance, if the represented defendant is in custody, the defendant may “not be interrogated in the absence of counsel on any matter, whether related or unrelated to the subject of the representation.”³¹³

New York courts have seen these rules as “confer[ring] no undue advantage to the accused.”³¹⁴ Rather, as this Article has argued, these courts have recognized consistently that “[t]he attorney’s presence serves to equalize the positions of the accused and sovereign, mitigating the coercive influence of the State and rendering it less overwhelming.”³¹⁵ Moreover, “the right protects against undue interference with any existing attorney-client relationship,”³¹⁶ a professional relationship that New York courts have emphasized is critical to realization of the right to counsel itself:

An attorney is charged with protecting the rights of his client and it would be to ignore reality to deny the role of counsel when the particular episode of questioning does not concern the pending charge. It cannot be assumed that an attorney would abandon his client merely because the police represent that they seek to question on a matter unrelated to the charge on which the attorney has been retained or assigned . . . *it is the role of defendant’s attorney, not the State, to determine whether a particular matter will or will not touch upon the extant charge . . . the attorney’s function cannot be negated by the simple expedient of questioning in his absence.*³¹⁷

Observing that these controlling values are established by the Constitution and our adversarial system of justice, not judicial conceptions of the value of counsel weighed against the State’s interests, New York courts have consistently acknowledged the fact that “the rule diminishes the likelihood of a waiver of self-incriminating statements is immaterial to our system of justice.”³¹⁸

The New York indelible right to counsel rule is certainly an aggressive constitutionalization of the attorney-client relationship under state law. Other states have considered and declined to adopt state law rules as protective as New York’s right to counsel rules.³¹⁹ However, prior to *Cobb*, “virtually every lower court in the United States to consider the issue ha[d] defined ‘offense’ in the Sixth Amendment context to encompass such

³¹³ *People v. Burdo*, 690 N.E.2d 854, 855 (N.Y. 1997) (emphasis omitted) (quoting *People v. Bing*, 558 N.E.2d 1011, 1016 (N.Y. 1990)); *see also* *People v. Rogers*, 397 N.E.2d 709 (N.Y. 1979).

³¹⁴ *Rogers*, 397 N.E.2d at 713.

³¹⁵ *Burdo*, 690 N.E.2d at 855 (quoting *Rogers*, 397 N.E.2d at 713).

³¹⁶ *People v. West*, 615 N.E.2d 968, 971 (N.Y. 1993).

³¹⁷ *Rogers*, 397 N.E.2d at 713 (emphasis added).

³¹⁸ *Burdo*, 690 N.E.2d at 855-56 (quoting *Rogers*, 397 N.E.2d at 713).

³¹⁹ *See, e.g.*, *Commonwealth v. Anderson*, 862 N.E.2d 749, 758 (Mass. 2007); *Lara v. State*, 740 S.W.2d 823, 835 (Tex. Ct. App. 1987).

closely related acts.”³²⁰ Therefore, one might expect that some states might opt out of *Cobb*’s restrictive offense-specific standard for a state-law rule that, if not as protective as the New York model, still might define the right to counsel more broadly. For instance, states might invoke state law to preclude interrogation of a represented suspect on subject matters factually related to, or intertwined with, the subject matter of the representation, such that questioning on the unrepresented case likely would elicit statements protected by the attorney-client relationship.

B. STATE RESPONSES TO *COBB*?

The post-*Cobb* right-to-counsel landscape reveals a relatively modest state reaction thus far. In *State v. Hopson*,³²¹ a Wisconsin appellate court in 2004 applied a three-factor test to determine whether a crime about which a represented defendant was interrogated was “directly related” to the matter on which counsel represented the defendant.³²² Three other states explicitly have left open the question of whether their state constitutions provide greater protection than the Sixth Amendment rule under *Cobb*: Georgia,³²³ Washington,³²⁴ and Oklahoma.³²⁵ Alaska courts post-*Cobb* have rejected the New York right-to-counsel model,³²⁶ but also apparently never have cited to *Cobb*, and prior to *Cobb* Alaska courts had indicated some openness to a broader state right to counsel than offered by the federal model.³²⁷ Montana courts also have suggested a broader state right to counsel than the federal model, even subsequent to *Cobb*,³²⁸ and have not cited to *Cobb* itself, although they have cited to *Patterson* and *McNeil*.³²⁹ Finally, a Tennessee court post-*Cobb* has suggested, although equivocally,

³²⁰ *Texas v. Cobb*, 532 U.S. 162, 186 (2001) (Breyer, J., dissenting) (citing cases from Florida, Illinois, New Jersey, and Maryland); *see also Cobb*, 532 U.S. at 168 n.1 (citing Massachusetts and Pennsylvania cases applying a “factually related” standard rather than an “offense-specific” standard).

³²¹ No. 03-2696-CR, 2004 WL 1534129 (Wis. Ct. App. Jul. 7, 2004) (unpublished table decision), *rev. denied*, 691 N.W.2d 354 (Wis. 2004).

³²² *See id.* at *5 (considering “the persons involved, the types of offenses, the locations of the crimes, and the time each was committed” (citing *State v. Badker*, 623 N.W.2d 142, 150 (Wis. Ct. App. 2000))).

³²³ *See Chenoweth v. State*, 635 S.E.2d 730, 733 (Ga. 2006).

³²⁴ *See State v. Gregory*, 147 P.3d 1201, 1233 (Wash. 2006).

³²⁵ *See Warner v. State*, 144 P.3d 838, 866 (Okla. Crim. App. 2006).

³²⁶ *See State v. Garrison*, 128 P.3d 741 (Alaska Ct. App. 2006).

³²⁷ *See Loveless v. State*, 592 P.2d 1206 (Alaska 1979). *But cf. Carr v. State*, 840 P.2d 1000 (Alaska Ct. App. 1992) (referring to the right to counsel as “case specific”).

³²⁸ *See State v. Buck*, 134 P.3d 53 (Mont. 2006).

³²⁹ *See id.*; *cf. State v. Reavley*, 79 P.3d 270 (Mont. 2003).

that state law might provide a broader right than the federal model in some respects.³³⁰

Some lower state courts, by contrast, have embraced an offense-specific right-to-counsel standard post-*Cobb*, but have not cited to *Cobb*, usually citing to *McNeil* instead.³³¹ Other states courts have not cited to *Cobb*, nor have explored the offense-specific standard in depth, but typically have applied federal Sixth Amendment standards and have not indicated that their state constitutions afford greater protection.³³²

Several other state courts, however, have fallen squarely into the offense-specific right-to-counsel camp. These courts either have applied *Cobb* to similar factual circumstances or have cited to *Cobb* as authority when addressing right-to-counsel issues outside of concrete offense-specific circumstances.³³³

The state law response to *Cobb*, therefore, appears to trend in favor of adopting the Supreme Court's "offense-specific" right-to-counsel standard. A handful of notable open questions remain, however, particularly at the state supreme court level. Still, the state law trend is most notable for its modest and relatively quiet response so far to *Cobb*. Perhaps this quiet

³³⁰ See *State v. Mitchell*, 137 S.W.3d 630 (Tenn. Crim. App. 2003).

³³¹ See, e.g., *State v. Johnson*, 2005 WL 1953066 (Del. Super. Ct. June 29, 2005) (unpublished decision); *Hall v. State*, 870 N.E.2d 449 (Ind. Ct. App. 2007); *J.D.P. v. State*, 857 N.E.2d 1000 (Ind. Ct. App. 2006); *State v. Violette*, No. CR-03-477, 2004 WL 3196905 (Me. Nov. 3, 2004); *State v. Rouse*, No. CR-03-727, 2004 WL 1433627 (Me. Apr. 1, 2004).

³³² See, e.g., *Ex parte Stewart*, 853 So. 2d 901 (Ala. 2002); *Olive v. State*, 10 S.W.3d 443 (Ark. 2000); *State v. Transon*, 924 P.2d 486 (Ariz. Ct. App. 1996); *People v. Anderson*, 842 P.2d 854 (Colo. 1992); *State v. Stenner*, 917 A.2d 28 (Conn. 2007); *State v. Abada*, 68 P.3d 618 (Haw. Ct. App. 2002); *Nika v. State*, 97 P.3d 1140 (Nev. 2004); *State v. Lefthand*, 523 N.W.2d 63 (N.D. 1994); *State v. Holland*, 430 A.2d 1263 (R.I. 1981); *Peterson v. Kennard*, 156 P.3d 834 (Utah Ct. App. 2007); *State v. Lang*, 702 A.2d 135 (Vt. 1997); *State ex rel. Sims v. Perry*, 515 S.E.2d 582 (W.Va. 1999).

³³³ See, e.g., *State v. Dempsey*, Nos. CR01-7, CR01-8, 2001 WL 34034961 (D. Neb. Aug. 6, 2001); *People v. Wheelock*, 11 Cal. Rptr. 3d 796 (Cal. Ct. App. 2004); *State v. Anderson*, 95 P.3d 635 (Idaho 2004); *State v. Pennington*, 80 P.3d 44 (Kan. 2003); *State v. Tsolainos*, No. 2007 KW 2443, 2008 WL 4539246 (La. Ct. App. Oct. 10, 2008); *Walker v. State*, 892 A.2d 547 (Md. 2006); *State v. Benson*, 2008 WL 853128 (Minn. Ct. App. Apr. 1, 2008) (unpublished opinion); *Smith v. State*, 977 So. 2d 1227 (Miss. Ct. App. 2008); *State v. Dykes*, 238 S.W.3d 737 (Mo. Ct. App. 2007); *State v. Matey*, 891 A.2d 592 (N.H. 2006); *State v. Harris*, 859 A.2d 364 (N.J. 2004); *State v. Desnoyers*, 55 P.3d 968 (N.M. 2002), *abrogated by State v. Forbes*, 119 P.3d 144 (N.M. 2005); *State v. Strobel*, 596 S.E.2d 249 (N.C. Ct. App. 2004); *State v. Sapp*, 822 N.E.2d 1239 (Ohio 2004); *Commonwealth v. Steward*, 775 A.2d 819 (Pa. 2001); *State v. Owens*, 552 S.E.2d 745 (S.C. 2001), *overruled by State v. Gentry*, 610 S.E.2d 494 (S.C. 2005); *State v. Hoadley*, 651 N.W.2d 249 (S.D. 2002); *Alston v. Commonwealth*, 570 S.E.2d 801 (Va. 2002). *But see People v. Kruger*, 845 N.E.2d 96 (Ill. App. Ct. 2006); *Martin v. Commonwealth*, No. 2003-CA-000721-MR, 2004 WL 2755854 (Ky. Ct. App. Dec. 3, 2004); *People v. Libbett*, 650 N.W.2d 407 (Mich. Ct. App. 2002); *Anderson*, 862 N.E.2d 749; *Lewis v. State*, 48 P.3d 1063 (Wyo. 2002).

signals that state law constitutionalism has receded from Justice Brennan's grand vision. Or, maybe it signals that in many states law enforcement has not employed or abused the offense-specific model of interrogation in a manner that has attracted significant judicial attention. Nevertheless, perhaps over time some of these states, like New York, will opt out of the federal right-to-counsel model, and prioritize the promise of counsel and the attorney-client relationship during interrogation. At a minimum, the trend is worth watching.

V. CONCLUSION

The Sixth Amendment right to counsel means what it says: when an accused faces his or her accuser at a critical stage of the proceedings, like an interrogation, "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."³³⁴ The accused should not need to ask for this assistance before the State is required to provide it. Nor should the core professional relationship that this right conveys be one between attorney and charging instrument. Attorneys represent *people*, people who need legal services from a trained and strategic professional who can level the playing field between the accused and the State, and ensure that the accused's decision-making is informed by the substantive and procedural rights that the law provides to an individual charged with crime. Accordingly, the right to counsel during interrogation should be understood in relational terms, where the State's authority to seek a confession from a charged adversary must honor and preserve the attorney-client relationship. If federal law itself remains unable to honor and preserve this relationship fully, states should consider invoking their own constitutions to recognize this relationship as a critical component to adversarial justice in their own jurisdictions.

³³⁴ U.S. CONST. amend. VI.