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Answering Justice Scalia's Question: Dual Sovereignty and the Sixth Amendment Right to Counsel After Texas v. Cobb and Montejo v. Louisiana

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Cover Page Footnote

I would like to thank Professor Ian Weinstein for the many hours of insighful conversation and guidance throughout this process. I would also like to thank Professors Maria Marcus, Lloyd L. Weinreb, and Daniel Capra, Hon. Richard J. Sullivan, and Alexadra Lane for helping to shape this piece in various ways. Lastly I would like to thank my family and friends for their unwavering encouragement, and Matthew for always keeping me honest/

ANSWERING JUSTICE SCALIA'S QUESTION: DUAL SOVEREIGNTY AND THE SIXTH AMENDMENT RIGHT TO COUNSEL AFTER *TEXAS v. COBB* AND *MONTEJO v. LOUISIANA*

*Ryan M. Yanovich**

Since the U.S. Supreme Court decided Texas v. Cobb *in 2001, eight courts of appeals have reached divergent conclusions as to the scope and extent of a criminal defendant's Sixth Amendment right to counsel when he is being prosecuted by multiple sovereigns, including, most recently, the U.S. Court of Appeals for the Eleventh Circuit in 2008. Invariably, each circuit court purports to draw conclusive support for its holding from the plain language of* Cobb. *The conflict among the circuits reveals a tension between the courts' desire to balance fundamental individual and legitimate state interests, achieve uniformity and consistency in the area of constitutional criminal procedure, and give preclusive effect to a recent holding of the Supreme Court that appears, at least superficially, to control the outcome of the case. Adding a new wrinkle of yet unknown consequence to the debate is the Supreme Court's very recent holding in* Montejo v. Louisiana, *which overruled* Michigan v. Jackson *and a significant portion of the Sixth Amendment exclusionary rule.*

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* J.D. Candidate, 2010, Fordham University School of Law; B.A., 2005, University of Virginia. I would like to thank Professor Ian Weinstein for the many hours of insightful conversation and guidance throughout this process. I would also like to thank Professors Maria Marcus, Lloyd L. Weinreb, and Daniel Capra, Hon. Richard J. Sullivan, and Alexandra Lane for helping me to shape this piece in various ways. Lastly, I would like to thank my family and friends for their unwavering encouragement, and Matthew for always keeping me honest.

INTRODUCTION

> What does the *Jackson* rule actually achieve by way of preventing unconstitutional conduct? . . . A bright-line rule like that adopted in *Jackson* ensures that no fruits of interrogations made possible by badgering-induced involuntary waivers are ever erroneously admitted at trial.
>
> But without *Jackson*, how many would be? The answer is few if any.
>
> - Justice Antonin Scalia, *Montejo v. Louisiana*[1]

An individual criminal defendant is investigated and arrested by state law enforcement for a state law violation. Shortly thereafter, she is arraigned by a state judge and invokes her right to have an attorney to represent her on the charges, either appearing with private counsel or an appointed public defender. Sometime later, federal agents or the law enforcement officers of another state meet with the defendant either while she is still in custody or out on bail on the first state's charges. These other officers give the defendant warning of her *Miranda* rights, which she purports to waive, and in the course of a conversation, the defendant makes a statement or confession outside the presence of her counsel.

This new sovereign—another state or the federal government—now indicts the defendant on separate but essentially identical charges stemming from the same underlying course of conduct. Both governments want to use the defendant's statement against her in separate prosecutions. The defendant claims her right to counsel, guaranteed by the Sixth Amendment to the U.S. Constitution, was violated when she was approached by the officers outside the presence of her counsel for an essentially identical charge. Has there been a Sixth Amendment violation by either sovereign, by both, or by neither? Should the statement be suppressed?

Eight U.S. courts of appeals have heard this or factually similar cases and reached divergent conclusions as to the scope and extent of a criminal defendant's Sixth Amendment right to counsel when she is being prosecuted by multiple sovereigns. In each instance, courts have looked to the U.S. Supreme Court's recent holding in *Texas v. Cobb*[2] for guidance. This past May, however, the Supreme Court issued another potentially landmark opinion in *Montejo v. Louisiana*,[3] which, while not directly addressing this conflict, may implicitly answer some questions the Court appeared to leave open after *Cobb*.

This Note attempts to make sense of this ongoing debate and offers several pertinent observations and suggestions for further discussion. Part I discusses the relevant background Sixth Amendment, fundamental rights,

1. 129 S. Ct. 2079, 2089 (2009).
2. 532 U.S. 162 (2001).
3. 129 S. Ct. 2079.

double jeopardy, and dual sovereignty doctrine jurisprudence leading up to the Supreme Court's holding in *Cobb* and the lasting impact *Montejo* may have on Sixth Amendment analysis. Part II outlines the circuit split and addresses the arguments for and against incorporating the dual sovereignty doctrine into the Sixth Amendment. Part III argues that *Cobb* did not speak definitively to this issue, that the dual sovereignty doctrine may work an injustice in the Sixth Amendment context, and that the doctrine is otherwise incompatible with the current extent of information sharing between federal and state law enforcement. Finally, this Note posits that the Court's holding in *Montejo* is particularly problematic in light of its neglect of this intercircuit conflict.

I. THE PROCEDURAL RIGHTS OF CRIMINAL DEFENDANTS AND THE SPECTER OF MULTIPLE PROSECUTIONS

The Supreme Court's opinion in *Texas v. Cobb*, while seemingly quite simple, implicates a large swath of the Court's prior jurisprudence in various areas of constitutional law. Similarly, the courts of appeals have engaged in a fairly wide-ranging discussion of points of constitutional policy in those cases discussed further in Part II. Part I, therefore, discusses the background Sixth Amendment, fundamental rights, double jeopardy, and dual sovereignty doctrine jurisprudence leading up to the Supreme Court's holding in *Cobb*, and the lasting impact *Montejo v. Louisiana* may have on Sixth Amendment analysis. Part I further discusses the *Cobb* prosecution and Supreme Court opinion itself.

A. *The Sixth Amendment*

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[4] This amendment exists "to protec[t] the unaided layman at critical confrontations with his expert adversary"[5] and addresses the long held recognition that a lay defendant may lack the legal sophistication to advocate in his own best defense.[6] This fundamental right has since been incorporated against the states through the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.[7]

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4. U.S. CONST. amend. VI.

5. McNeil v. Wisconsin, 501 U.S. 171, 177 (1991) (alteration in original) (quoting United States v. Gouveia, 467 U.S. 180, 189 (1984)).

6. *See* Powell v. Alabama, 287 U.S. 45, 69 (1932) ("Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.").

7. *See* Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963). The Fourteenth Amendment to the U.S. Constitution states in pertinent part that no state shall, "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 2.

1. Attachment of the Sixth Amendment Right

Unlike the procedural guarantees emanating from the Fourth and Fifth Amendments, the Sixth Amendment is not generally applicable during the investigatory stage of a prosecution. A defendant may only invoke the Sixth Amendment right to counsel at the "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[8] In *Montejo*, the Supreme Court reaffirmed that an actual invocation by the defendant is required and that the Sixth Amendment right does not necessarily attach merely because a particular stage in the prosecution has begun.[9] Once the right has attached, however, the government may not "obtain[] incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent."[10] The Court has elsewhere noted that the stage of the prosecution between the arraignment and the trial itself is "perhaps the most critical period of the proceedings."[11] The government has an affirmative duty to safeguard against the circumstances under which a Sixth Amendment violation is likely to occur.[12]

2. The "Offense-Specific" Sixth Amendment

In *McNeil v. Wisconsin*,[13] the Supreme Court made clear that the Sixth Amendment attaches in an offense-specific manner and cannot be invoked once for any and all future charges.[14] Though the Supreme Court has since held that the Sixth Amendment right to counsel may attach to multiple offenses simultaneously where they are "essentially identical," it has expressly rejected the notion that the Sixth Amendment right may attach to all offenses that are merely "factually related" or inextricably linked by an underlying course of conduct.[15]

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8. Kirby v. Illinois, 406 U.S. 682, 689 (1972).

9. Montejo v. Louisiana, 129 S. Ct. 2079, 2085 (2009) ("Under [Montejo's] approach, once a defendant is *represented* by counsel, police may not initiate any further interrogation. Such a rule would be entirely untethered from the original rationale of *Jackson*.").

10. Maine v. Moulton, 474 U.S. 159, 176 (1985).

11. Massiah v. United States, 377 U.S. 201, 205 (1964) (quoting *Powell*, 287 U.S. at 69).

12. *See id.*

13. 501 U.S. 171 (1991).

14. *Id.* at 175; *see also Moulton*, 474 U.S. at 180 ("[T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities.").

15. *See* Texas v. Cobb, 532 U.S. 162, 168, 173 (2001).

3. The Sixth Amendment Exclusionary Rule

In *Michigan v. Jackson*,[16] the Supreme Court held that the Sixth Amendment right to counsel is so procedurally fundamental that once it attaches and has been properly invoked, any purported waiver by a defendant during a police-initiated interview is ineffective.[17] This protection could be triggered even in the face of a purported waiver of a defendant's *Miranda* rights, as is discussed below.[18] If the state violated its affirmative duty to safeguard against the circumstances in which a Sixth Amendment violation was likely to occur, any information gleaned from the defendant in a police-initiated encounter after attachment of the Sixth Amendment right was inadmissible in court.[19] The *Jackson* Court was particularly skeptical of police claims that they would be unduly burdened in having to be aware of the timing of indictments and arraignments, holding instead that these concerns were not sufficient to limit the constitutional claim.[20]

Nearly a quarter century later, in *Montejo v. Louisiana*, the Supreme Court has expressly overruled *Michigan v. Jackson*, in what can only be described as a clear retreat from the level of prophylaxis extended to criminal defendants by the *Jackson* Court.[21] In many ways, *Montejo* is a personal vindication for Justices Scalia, Kennedy, and Thomas, who were prepared as early as 2001 to jettison what they deemed a superfluous protection.[22] In particular, the Court now appears willing to weigh the overall impact on the administration of justice as a potentially determinative factor in the arena of criminal procedure—something the *Jackson* Court declined to do. Writing for the majority in *Montejo*, Justice Scalia opined,

> When this Court creates a prophylactic rule in order to protect a constitutional right, the relevant "reasoning" is the weighing of the rule's

16. 475 U.S. 625 (1986).

17. *See id.* at 636; *see also Massiah*, 377 U.S. at 206–07.

18. *See Jackson*, 475 U.S. at 629 (discussing the Fifth and Sixth Amendments as the joint sources of the fundamental right to have counsel present during questioning). Prior to the Court's holding in *Montejo v. Louisiana*, this portion of the *Michigan v. Jackson* opinion had been criticized by several current Justices. In *Texas v. Cobb*, Justice Kennedy added a concurring opinion in which Justices Scalia and Thomas joined, stating that "the underlying theory of *Jackson* seems questionable." *Cobb*, 532 U.S. at 174 (Kennedy, J., concurring). These Justices only continued to support *Jackson*'s prophylactic protection where the suspect makes a clear and unambiguous assertion of the right not to speak outside the presence of counsel at the time of the questioning. *Id.* at 176–77.

19. *See Jackson*, 475 U.S. at 636.

20. *Id.* at 634 ("Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual. One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court).").

21. *See* 129 S. Ct. 2079, 2090–91 (2009) ("*Jackson* was policy driven, and if that policy is being adequately served through other means, there is no reason to retain its rule. . . . *Michigan v. Jackson* should be and now is overruled.").

22. *See supra* note 18 and accompanying text.

> benefits against its costs. . . . We think that the marginal benefits of *Jackson* (viz., the number of confessions obtained coercively that are suppressed by its bright-line rule and would otherwise have been admitted) are dwarfed by its substantial costs (viz., hindering "society's compelling interest in finding, convicting, and punishing those who violate the law").[23]

After *Montejo*, individual criminal defendants must make affirmative invocations of their Sixth Amendment right to counsel and are no longer entitled to the presumption that all postattachment Sixth Amendment or *Miranda* waivers are invalid.[24] Part III further discusses the impact of this new ruling and the elimination of the *Jackson* presumption.

B. *Fifth Amendment Versus Sixth Amendment Protection*

Prior to the attachment of the Sixth Amendment right, only the Fifth Amendment right to be free from compelled self-incrimination protects the defendant vis-à-vis his interrogator.[25] The Fifth and Sixth Amendment rights differ in both purpose and scope. While the Sixth Amendment right to counsel attempts to assure a fair trial for the defendant, its Fifth Amendment counterpart exists only to secure the defendant's privilege against self-incrimination.

The Fifth Amendment provides that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself."[26] In *Miranda v. Arizona*,[27] the Supreme Court created a Fifth Amendment quasi-right[28] to counsel in an effort to protect suspects from overzealous police interrogation and unjust self-incrimination.[29] The Court held that anyone interrogated in police custody had a right, upon request, to consult with an attorney before the interrogation as well as to have the attorney present during interrogation.[30] This rule is broad and similarly prophylactic: as soon as an individual under interrogation requests the assistance of counsel, all questioning must cease, regardless of the offense being investigated.[31] The Fifth Amendment right thereby "assure[s] that the individual's right to

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23. *Montejo*, 129 S. Ct. at 2089 (quoting Moran v. Burbine, 475 U.S. 412, 426 (1986)).

24. *Id.* at 2088 ("[I]t would be completely unjustified to presume that a defendant's consent to police-initiated interrogation was involuntary or coerced simply because he had previously been appointed a lawyer.").

25. U.S. CONST. amend. V.

26. *Id.*

27. 384 U.S. 436 (1966).

28. "Quasi-right" is not the Court's terminology, but it is helpful in distinguishing the power to remain silent unless or until counsel is consulted with, which the *Miranda v. Arizona* Court determined emanated from the Fifth Amendment prohibition of compelled self-incrimination, and the Sixth Amendment's explicit reference to right to have the assistance of counsel. *See id.* at 465–66, 476–77.

29. *See id.* at 444–45 (holding that once a defendant has requested an attorney, government authorities may not question him until his counsel is present).

30. *See id.* at 469–70.

31. *See id.* at 444–45.

choose between silence and speech remains unfettered throughout the interrogation process."[32]

By contrast, "[t]he 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."[33] Thus, the Sixth Amendment protects defendants from prosecutorial abuse in a complex legal system with which defendants may have little or no expertise.[34] Therefore, while the two rights share a similar ethos and address a similar concern, they have distinct purposes.

This distinction was a point of disagreement in *Montejo*. In his agitated dissent, in which Justices Souter, Ginsburg, and Breyer joined, Justice Stevens objected to what he considered the majority's glib assumption that *Miranda* warnings will suffice to independently protect a suspect's Sixth Amendment rights.[35] Justice Stevens explained the faulty reasoning as follows:

> Because *Miranda* warnings do not hint at the ways in which a lawyer might assist her client during conversations with the police, I remain convinced that the warnings prescribed in *Miranda*, while sufficient to apprise a defendant of his Fifth Amendment right to remain silent, are inadequate to inform an unrepresented, indicted defendant of his Sixth Amendment right to have a lawyer present at all critical stages of a criminal prosecution. The inadequacy of those warnings is even more obvious in the case of a *represented* defendant.[36]

Justice Stevens's incredulity was based therefore on his view that the disparity in purpose and scope between the Fifth and Sixth Amendment precludes the sufficiency of *Miranda* waivers in the Sixth Amendment context. The *Montejo* dissenters noted that a "defendant's decision to forego counsel's assistance and speak openly with police is a momentous one"[37] and that in making it, a defendant must possess "'a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'"[38] The cases comprising the circuit split discussed in Part II—each turning on the applicability of the dual sovereignty doctrine—in many ways highlight Justice Stevens's concern.

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32. *Id.* at 469.

33. McNeil v. Wisconsin, 501 U.S. 171, 177–78 (1991) (alteration in original) (quoting United States v. Gouveia, 467 U.S. 180, 189 (1984)).

34. *See id.*

35. Montejo v. Louisiana, 129 S. Ct. 2079, 2101 (2009) (Stevens, J., dissenting).

36. *Id.* at 2100–01. Justice Stevens went on to note that, while it could be argued that informing an unrepresented defendant of his right to counsel "at least alerts him to the fact that he is entitled to obtain something he does not already possess, providing that same warning to a defendant who has *already* secured counsel is more likely to confound than enlighten." *Id.* at 2101.

37. *Id.* at 2101.

38. *Id.* (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)).

C. *The Dual Sovereignty Doctrine*

The constitutional theory of dual sovereignty is perhaps best summarized as follows: "[A]n offense is a transgression of a sovereign's law; the states and the federal government are distinct sovereignties; therefore, a single act violating federal and state laws constitutes two distinct offenses."[39] This construction of an offense is the central underpinning of the dual sovereignty doctrine.[40] In the double jeopardy context,[41] this doctrine dictates that successive prosecutions by different sovereigns—the federal and state governments—are permissible because the prosecutions are for different offenses.[42] The history and development of this doctrine, its modern application, and its judicially crafted exception are described below.

1. The History and Development of Dual Sovereignty

The dual sovereignty doctrine was addressed in the early nineteenth century in *Houston v. Moore*,[43] in which the Supreme Court upheld a Pennsylvania law that incorporated federal penalties against state militiamen failing to report for federal duty.[44] Justice William Johnson's concurring opinion noted that each citizen enjoys the protections of and owes allegiance to both the national and state governments and that there was therefore no reason why a single criminal act could not be punished by both the state and federal governments.[45]

The Supreme Court asserted the dual sovereignty theory even more firmly in *Fox v. Ohio*,[46] upholding a conviction under an Ohio anticounterfeiting statute that had been challenged on Fifth Amendment double jeopardy grounds.[47] The Court precluded the challenge based on a prior holding that the Bill of Rights did not apply to state governments.[48]

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39. Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 AM. J. CRIM. L. 1, 25 (1992) (internal quotation marks omitted).

40. *See, e.g.*, David Bryan Owsley, Note, *Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study*, 81 WASH. U. L.Q. 765, 766–67 (2003); *see also* Heath v. Alabama, 474 U.S. 82, 88 (1985) ("The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government."); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 290 (1992) ("The dual sovereignty doctrine derives from the common law notion that a crime is an offense against the sovereign.").

41. *See infra* Part I.E.

42. *See Heath*, 474 U.S. at 88–89.

43. 18 U.S. (5 Wheat.) 1 (1820).

44. *Id.* at 24–32.

45. *Id.* at 33 (Johnson, J., concurring) ("Why may not the same offence be made punishable both under the laws of the states, and of the United States? Every citizen of a state owes a double allegiance[ ]; he enjoys the protection and participates in the government of both the state and the United States.").

46. 46 U.S. (5 How.) 410 (1847).

47. *Id.* at 434–35.

48. *Id.* (citing Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833)).

The Court suggested, however, that prosecutorial discretion by the individual sovereigns would nonetheless yield just results.[49] In his forceful dissent, Justice John McLean appeared unconvinced that sovereigns would act in a self-limiting way, referring to the possibility of successive federal and state prosecutions as "a great defect in our system" and offensive to "common principles of humanity."[50] Nonetheless, the majority opinion in *Fox* was quickly affirmed in *Moore v. Illinois*.[51] The Court had become firmly convinced that successive or even concurrent prosecution by a state and the federal government was proper, owing largely to the dual allegiance any one citizen owed to each sovereign.[52]

The Supreme Court most explicitly endorsed the dual sovereignty doctrine in *United States v. Lanza*.[53] Citing both *Fox* and *Moore* for the proposition that dual sovereignty was "supported by a long line of decisions," a unanimous Court held that federal prosecution under the Eighteenth Amendment of the U.S. Constitution was permissible even though a defendant had already been convicted at the Washington state level for violations of the state's prohibition laws.[54] The Court specifically endorsed the notion of a dual sovereignty doctrine in this area, noting that a state's authority to separately legislate and prosecute under its own laws was a power reserved to it under the Tenth Amendment of the U.S. Constitution.[55]

2. Dual Sovereignty Reaffirmed: *Bartkus v. Illinois & Abbate v. United States*

In 1959, the Court revisited, and reaffirmed, the dual sovereignty doctrine in a pair of decisions: *Bartkus v. Illinois*[56] and *Abbate v. United States*.[57] In *Bartkus*, Illinois had prosecuted a defendant after a federal acquittal on essentially identical charges.[58] The Court specifically stated that the issue was "not a new question," having been "invoked and rejected in over twenty cases," and "not [having] been questioned by th[e] Court

49. *Id.* at 435.

50. *Id.* at 439 (McLean, J., dissenting) (arguing that the principle against subjecting an individual to double jeopardy "applies with equal force against a double punishment, for the same act, by a State and the federal government").

51. 55 U.S. (14 How.) 13 (1852).

52. *Id.* at 20 ("Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either.").

53. 260 U.S. 377 (1922).

54. *Id.* at 382, 384.

55. *Id.* at 381–82; *see also Dawson*, *supra* note 40, at 293 ("Chief Justice Taft identified the Tenth Amendment as the source of the dual sovereignty doctrine."). The Tenth Amendment to the U.S. Constitution states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

56. 359 U.S. 121 (1959).

57. 359 U.S. 187 (1959).

58. *Bartkus*, 359 U.S. at 121–22.

since the opinion in *Fox*."[59] Again the Court seemed to concede that the prospect of concurrent or multiple prosecutions was not ideal, but the Court had no authority to amend or interfere with a doctrine that appeared to have been an integral understanding at the time of the Founding.[60]

In another strongly worded dissent, Justice William J. Brennan, Jr. asserted that the "extent of participation of the federal authorities" should have barred the state trial.[61] While recognizing that "cooperation between federal and state authorities in criminal law enforcement is to be desired and encouraged," Justice Brennan believed that the price of such cooperative federalism was the requirement of "present[ing] the strongest case . . . at a single trial."[62]

In *Abbate*, the Court considered a state conviction followed by a federal prosecution and concluded that "the same act might . . . constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either."[63] Justice Brennan, despite his previous dissent, declined to overrule *Lanza* given the "undesirable consequences [that] would follow."[64] In so holding, the Court pointed out the difficulties involved in abandoning the dual sovereignty doctrine: prior state indictments would significantly hamstring federal law enforcement, and prior federal indictments would shift the traditional distribution of crime-fighting power, given that "the States under our federal system have the principal responsibility for defining and prosecuting crimes."[65] Justice Hugo Black dissented, noting that he was "not convinced that a State and the Nation can be considered two wholly separate sovereignties for the purpose of allowing them to do together what, generally, neither can do separately."[66]

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59. *Id.* at 128–29. The Court went on to say that abrogating the dual sovereignty doctrine "would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines." *Id.* at 137.

60. *Id.* at 137–39.

61. *Id.* at 165 (Brennan, J., dissenting).

62. *Id.* at 168–69. Justice Hugo Black also dissented, noting that the Court should be "suspicious of any supposed 'requirements' of 'federalism' which result in obliterating ancient safeguards." *Id.* at 155–56 (Black, J., dissenting) ("I have been shown nothing in the history of our Union, in the writings of its Founders, or elsewhere, to indicate that individual rights deemed essential by both State and Nation were to be lost through the combined operations of the two governments.").

63. Abbate v. United States, 359 U.S. 187, 191 (1953) (quoting United States v. Marigold, 50 U.S. (9 How.) 560, 569 (1850)).

64. *Id.* at 195.

65. *Id.*

66. *Id.* at 203 (Black, J., dissenting); *see also* Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1209 (1995) (arguing that in the specific context of enforcement of drug offenses, federal and state investigations are collaborative to such an extent as to blur the lines of sovereignty); John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1125 (1995) ("Whether desirable or not, the federalization of the substantive criminal law is largely an accomplished fact.").

3. The Sham Prosecution Exception

A particular passage in the *Bartkus v. Illinois*[67] decision has led some lower federal courts to recognize an exception to the application of dual sovereignty in the double jeopardy context. In *Bartkus*, Justice Felix Frankfurter observed of the record below:

> It does not support the claim that the State of Illinois in bringing its prosecution was merely a tool of the federal authorities, who thereby avoided the prohibition of the Fifth Amendment against a retrial of a federal prosecution after an acquittal. It does not sustain a conclusion that the state prosecution was a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution.[68]

Some lower federal courts have read this language as affirmatively establishing a cognizable exception to the application of dual sovereignty in the multisovereign context.[69] Under these precedents, prosecutors may not invoke dual sovereignty to engage in successive or concurrent prosecutions in "situations in which one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings."[70] Still, other federal courts, including the U.S. Courts of Appeals for the Fifth and Seventh Circuits, have declined to recognize the language as anything more than dicta.[71] Further, even among those courts that have chosen to recognize it as a

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67. 359 U.S. 121 (1959).

68. *Id.* at 123–24.

69. *See, e.g.*, United States v. Guzman, 85 F.3d 823, 826–27 (1st Cir. 1996) ("While some courts have brushed aside this language as dictum and hinted that the *Bartkus* exception to the dual sovereign rule may not exist at all, most courts have treated the *Bartkus* intimation as good law." (citations omitted)); *see also In re* Kunstler, 914 F.2d 505, 517 (4th Cir. 1990) (noting that the "'tool of the same authorities'" exception is available in "some circumstances"); United States v. Liddy, 542 F.2d 76, 79 (D.C. Cir. 1976). Some commentators have suggested that officially recognizing this exception and applying it in the Sixth Amendment context is a solution the Supreme Court could use to resolve the circuit split discussed in Part II. *See, e.g.*, David L. Lane, Comment, *Twice Bitten: Denial of the Right to Counsel in Successive Prosecutions by Separate Sovereigns*, 45 HOUS. L. REV. 1869, 1907 (2009) ("[T]he Court should clearly hold that the *Bartkus* 'sham prosecution' exception does, in fact, exist and will be enforced . . . ."); 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, 157 (2007) (arguing that the Court should clearly recognize the sham prosecution exception and craft an exclusionary application in the Sixth Amendment context).

70. *Guzman*, 85 F.3d at 827 (noting that the exception applies when "one sovereign was a pawn of the other, with the result that the notion of two supposedly independent prosecutions is merely a sham").

71. *See, e.g.*, United States v. Brocksmith, 991 F.2d 1363, 1366 (7th Cir. 1993) ("We have questioned whether *Bartkus* truly meant to create such an exception, and we have uniformly rejected such claims."); United States v. Patterson, 809 F.2d 244, 247 n.2 (5th Cir. 1987) ("It is unclear whether such a holding has been established by the Supreme Court. . . . The Court . . . did not squarely address the issue of whether, if substantiated by the record, a 'sham' situation would constitute an exception to the dual sovereignty doctrine.").

cognizable exception to dual sovereignty, there is little agreement or uniformity in its application.[72]

The existence and specific contours of a sham prosecution exception—allowing for the waiver of the dual sovereignty doctrine in the double jeopardy context—remain unclear and unaddressed by the Supreme Court. The Court has, however, explicitly waived the dual sovereignty doctrine in the context of other fundamental rights.

D. *Incorporation and the Silver Platter Doctrine*

In the twentieth century, the Supreme Court retreated from its decision in *Barron v. Baltimore*,[73] in which it held the Bill of Rights inapplicable as a limitation on the states' power,[74] and began to incorporate the Federal Bill of Rights against the states.[75] Many of the resultant "incorporation" cases dealt directly with the notion of dual sovereignty in the context of fundamental rights. Specifically, the Court was forced to address the interplay between dual sovereignty and the Fourth Amendment's prohibition of unreasonable search and seizure, and the Fifth Amendment's prohibition of compelled self-incrimination.

1. The Fourth Amendment—Unreasonable Search and Seizure

Before the Fourth Amendment was incorporated against the states, evidence seized unreasonably by state officials could be used at federal trial and vice versa; this was known as the "silver platter doctrine."[76] At the time, the Supreme Court had yet to hold that state governments were bound by the Bill of Rights.[77] But after incorporation, retaining the dual

72. *Compare* United States v. Knight, No. 05-81155, 2006 WL 1722199, at *2–3 (E.D. Mich. June 22, 2006) (finding a sham prosecution where a state officer functioned as part of a federal taskforce in the other prosecution) *and* United States v. Bowlson, 240 F. Supp. 2d 678, 684 (E.D. Mich. 2003) (finding a sham prosecution where there was evidence that state officers functioned as part of a joint state-federal taskforce and there was explicit direction of one sovereign by the other), *with* United States v. Peña, 910 F. Supp. 535, 540 (D. Kan. 1995) (finding no sham prosecution even where the state attorney who prosecuted the state action was later designated a federal prosecutor in the second case).

73. 32 U.S. (7 Pet.) 243 (1833).

74. *Id.* at 250.

75. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 341–45 (1963) (incorporating the Sixth Amendment right to counsel); *see also, e.g.*, Malloy v. Hogan, 378 U.S. 1, 8 (1964) (incorporating the Fifth Amendment rule against compelled self-incrimination); Robinson v. California, 370 U.S. 660, 666 (1962) (incorporating the Eighth Amendment bar of cruel and unusual punishment); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (incorporating the Fourth Amendment prohibition of unreasonable search and seizure). Prior to these incorporation cases, individuals alleging state violations of a fundamental right could only avail themselves of the vague "shocks the conscience" test in federal court. *See, e.g.*, Rochin v. California, 342 U.S. 165, 172–74 (1952) (holding that even though California was not bound to observe federal Fourth Amendment protections, the pumping of a suspect's stomach to obtain evidence of drug use "shocked the conscience" and triggered a violation of the Fourteenth Amendment Due Process Clause).

76. Elkins v. United States, 364 U.S. 206, 208 (1960).

77. *See generally Barron*, 32 U.S. (7 Pet.) 243.

sovereignty principle made little sense because it enabled the two sovereigns to do collectively what the Constitution prohibited either from doing alone: collect and then use at trial unreasonably seized evidence. *Elkins v. United States*[78] addressed this problem by abandoning the dual sovereignty approach to unreasonable searches and seizures.[79] The *Elkins* Court believed that its holding would eliminate "inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation."[80]

2. The Fifth Amendment—Compelled Self-Incrimination

The Court faced a similar dilemma, in the context of the Fifth Amendment privilege against compelled self-incrimination, in *Murphy v. Waterfront Commission*.[81] After incorporation, a state could no longer compel incriminating testimony, and might have to confer immunity to overcome an individual's right not to incriminate himself.[82] However, dual sovereignty permitted the federal government to use that state-immunized testimony against the defendant in a federal trial for the same crime.[83] Because this practice would frustrate the "policies and purposes" of the Fifth Amendment privilege, the Court discarded the dual sovereignty theory.[84] The Court found that there was "no continuing legal vitality to, or historical justification for, the rule that one jurisdiction . . . may compel a witness to give testimony which could be used to convict him of a crime in another jurisdiction."[85]

E. *Double Jeopardy*

As noted above, the policies and purposes of fundamental rights have compelled the Supreme Court to waive the dual sovereignty doctrine in the context of unreasonable search and seizure and compelled self-

78. 364 U.S. 206.

79. *See id.* at 215 ("To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer.").

80. *Id.* at 222. The *Elkins v. United States* Court certainly seems to have correctly anticipated the increase in federal and state cooperation with this holding. *See, e.g.*, NORMAN ABRAMS & SARAH SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 64–72 (3d ed. 2000) (detailing the dramatic increase in federal-state cooperation); Harry Litman & Mark D. Greenberg, *Reporters' Draft for the Working Group on Federal-State Cooperation*, 46 HASTINGS L.J. 1319, 1322 (1995) (discussing the U.S. Department of Justice's Law Enforcement Coordination Committee program, which requires every U.S. Attorney's office to create a committee consisting of federal, state, and local law enforcement officers for the purposes of communication, resource sharing, and cooperation). Calls for intergovernmental cooperation in the arena of criminal law enforcement are again on the rise in the wake of the attacks of September 11, 2001. *See, e.g.*, MICHAEL E. O'HANLON ET AL., PROTECTING THE AMERICAN HOMELAND: ONE YEAR ON 127 (2002).

81. 378 U.S. 52 (1964).

82. *See* Malloy v. Hogan, 378 U.S. 1, 8 (1964).

83. *Murphy*, 378 U.S. at 57.

84. *Id.* at 55.

85. *Id.* at 77.

incrimination. The Fifth Amendment also requires, however, that no individual "be subject for the same offence to be twice put in jeopardy."[86] For the purposes of Double Jeopardy Clause analysis, the dual sovereignty doctrine posits that prosecutions by multiple sovereigns for essentially the same conduct, be they two states or a state and the federal government, do not offend the Fifth Amendment because each sovereign derives its power to prosecute from an independent source of authority.[87] Departing from the tradition of *Elkins* and *Murphy*, the Supreme Court has declined to waive dual sovereignty in the double jeopardy context, noting that "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'"[88] The evolution of Double Jeopardy Clause jurisprudence and its impact on federal and state prosecutorial discretion is discussed below.

1. The *Blockburger* Test

The Fifth Amendment's prohibition of double jeopardy has long been applied to states' internal attempts at multiple prosecutions.[89] In the intrasovereign context, the Court has developed an evidentiary elements test to determine when two offenses are sufficiently similar such that prosecution for one would bar prosecution for the other. In *Blockburger v. United States*,[90] the Supreme Court indicated that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[91] If the two statutes contain the "same elements," prosecution under the first will bar prosecution under the second.[92]

2. *Heath v. Alabama*

The Supreme Court incorporated the protection against double jeopardy against the states in *Benton v. Maryland*.[93] Despite this incorporation, and

86. U.S. CONST. amend. V. In *Green v. United States*, 355 U.S. 184 (1957), the Supreme Court described the rationale behind the Double Jeopardy Clause:

> [t]he underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187–88.

87. *See* Heath v. Alabama, 474 U.S. 82, 88 (1985).

88. *Id.* (quoting United States v. Lanza, 260 U.S. 377, 382 (1922)).

89. *See generally* Benton v. Maryland, 395 U.S. 784 (1969).

90. 284 U.S. 299 (1932).

91. *Id.* at 304 (citing Gavieres v. United States, 220 U.S. 338, 342 (1911)).

92. United States v. Dixon, 509 U.S. 688, 696 (1993) ("The same-elements test, sometimes referred to as the '*Blockburger*' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution.").

93. 395 U.S. at 787.

although the Court abandoned dual sovereignty concepts in the unreasonable search and seizure[94] and self-incrimination[95] contexts following their incorporation, the Court declined to abandon dual sovereignty in the double jeopardy context in *Heath v. Alabama*.[96] Indeed, *Heath* itself was a central point of discussion in those circuit court cases that have addressed the applicability of the dual sovereignty doctrine in the context of the Sixth Amendment right to counsel.[97]

In *Heath*, the Supreme Court was faced with a new context in which to assess the dual sovereignty doctrine: successive state prosecutions by Georgia and Alabama.[98] The Court posed the question on certiorari as follows:

> The sole remaining question upon which we granted certiorari is whether the dual sovereignty doctrine permits successive prosecutions under the laws of different States which otherwise would be held to "subject [the defendant] for the same offence to be twice put in jeopardy."[99]

Here again the Court upheld the dual sovereignty doctrine,[100] calling it an "inescapable"[101] conclusion, and stating that the real underlying question was "whether the two entities that seek successive[ ] . . . prosecut[ions] . . . draw their authority to punish the offender from distinct sources of power."[102] Writing for the Court, Justice Sandra Day O'Connor affirmed that the two states' separate and plenary power to prosecute criminal violations derived from the Tenth Amendment.[103] The Court rejected the notion that the doctrine is "simply a fiction," pointing to its "weighty support in the historical understanding and political realities of the States' role in the federal system."[104] Given these interests, a state could not be denied its inherent power to prosecute crimes simply because another sovereign had "won the race to the courthouse."[105] The most important doctrinal holding in *Heath* was that even if the two state statutes were essentially identical in their evidentiary elements, and thus could satisfy the *Blockburger* test, the dual sovereignty doctrine was fundamental enough in the double jeopardy context to allow a subsequent prosecution to go forward.[106] *Heath* appears to have all but closed the door on any similar

94. *See supra* Part I.D.1.
95. *See supra* Part I.D.2.
96. 474 U.S. 82, 92–93 (1985).
97. *See infra* Part II.
98. *Heath*, 474 U.S. at 84–86.
99. *Id.* at 88 (alteration in original) (citing U.S. CONST. amend. V).
100. *Id.* at 89.
101. *Id.* at 88.
102. *Id.*
103. *Id.* at 89.
104. *Id.* at 92.
105. *Id.* at 93 ("A State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of *its* own laws.").
106. *Id.* at 88 ("The dual sovereignty doctrine, as originally articulated and consistently applied by this Court, compels the conclusion that successive prosecutions by two States for

challenges in the future. As Professor Adam Harris Kurland has summarized, the doctrine of dual sovereignty in the double jeopardy context is "unlikely to be altered by the Supreme Court in the foreseeable future."[107]

3. The U.S. Department of Justice and the *Petite* Policy

In 1847, the Supreme Court observed,

> It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor.[108]

In spite of this sentiment, the Court ultimately held that while this was a preferred policy outcome, multiple sovereigns retained a plenary power to punish criminal activity:

> [W]ere a contrary course of policy and action either probable or usual, this would by no means justify the conclusion, that offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration.[109]

The Court's observation that sovereigns could be relied upon to self-limit their prosecutorial discretion seems to have been proven correct with the U.S. Department of Justice's (DOJ) adoption of the *Petite* policy.[110] With limited exceptions, the policy "precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s)."[111] U.S. Attorney General William Rogers initiated this policy in a 1959 memo to U.S. Attorneys as a

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the same conduct are not barred by the Double Jeopardy Clause."). *Id. But see generally* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1 (1995) (arguing that when viewed through the lens of the Fourteenth Amendment, countervailing constitutional and policy considerations merit eliminating the dual sovereignty doctrine from double jeopardy jurisprudence in all but a narrow class of civil rights cases involving state actors).

107. ADAM HARRIS KURLAND, SUCCESSIVE CRIMINAL PROSECUTIONS: THE DUAL SOVEREIGNTY EXCEPTION TO DOUBLE JEOPARDY IN STATE AND FEDERAL COURTS xxvi (2001).

108. Fox v. Ohio, 46 U.S. (5 How.) 410, 435 (1847).

109. *Id.*

110. The theretofore unnamed policy was discussed at length in *Petite v. United States*, 361 U.S. 529 (1960). There, the government had attempted to dismiss a federal indictment on the ground that it was the general policy of the Federal Government "that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement." *Id.* at 530.

111. *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-2.031(a) (2009) [hereinafter DOJ, ATTORNEYS' MANUAL], *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2031; U.S. DEP'T OF JUSTICE, U.S. DEPARTMENT OF JUSTICE MANUAL § 9-2.142 (1996).

response to *Bartkus v. Illinois* and *Abbate v. United States*.[112] The Attorney General recognized that while prosecutors might not violate prescriptions against double jeopardy when there was a successive prosecution, the practice was nonetheless unwise and should be informally controlled:

> "In such event I doubt that it is wise or practical to attempt to formulate detailed rules to deal with the complex situation which might develop, particularly because a series of related acts are often involved. However, no federal case should be tried when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the Department. No such recommendation should be approved by the Assistant Attorney General in charge of the Division without having it first brought to my attention."[113]

The central rationale for the *Petite* policy is to "vindicate substantial federal interests through appropriate federal prosecutions, to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s), to promote efficient utilization of [DOJ] resources, and to promote coordination and cooperation between federal and state prosecutors."[114] Moreover, courts have been careful to find the *Petite* policy to be "doctrine" of "federal prosecutorial policy, not a matter of constitutional law."[115] Thus, courts have repeatedly held that failure by the DOJ to adhere to its own internal guidelines does not warrant court action.[116] The *Petite* policy allows the government to proceed with a case

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112. *See* ABRAMS & BEALE, *supra* note 80, at 667.

113. United States v. Mechanic, 454 F.2d 849, 855–56 n.5 (8th Cir. 1971) (quoting Memorandum from William P. Rogers, U.S. Attorney General, U.S. Dep't of Justice, to United States Attorneys (Apr. 6, 1959)).

114. DOJ, ATTORNEYS' MANUAL, *supra* note 111, § 9-2.031(a); *see also* ABRAMS & BEALE, *supra* note 80, at 668.

115. United States v. Booth, 673 F.2d 27, 30 (1st Cir. 1982) ("The *Petite* policy and cases construing it stand only for the proposition that the government's motion to dismiss should be granted when it discovers that it is conducting separate prosecutions for the same offense. The doctrine does not create a corresponding right in the accused."); *see also* United States v. Rodriguez, 948 F.2d 914, 915 (5th Cir. 1991) (finding "no error in denial of the motion, because the *Petite* policy is merely an internal rule of the Justice Department"); United States v. Robinson, 774 F.2d 261, 275 (8th Cir. 1985) (stating that "even a genuine failure by the Government to follow the *Petite* policy does not create a right that a defendant can invoke to bar federal prosecution"); United States v. Ng, 699 F.2d 63, 71 (2d Cir. 1983) (finding that "[i]t is not a statute or regulation; nor is it constitutionally mandated"); United States v. Byars, 762 F. Supp. 1235, 1240 n.6 (E.D. Va. 1991) (finding the *Petite* policy to be a Department of Justice internal policy); United States v. Bouthot, 685 F. Supp. 286, 296–97 (D. Mass. 1988) (affirming that the *Petite* policy does not create any substantive or due process rights that a criminal defendant may invoke against the government).

116. *See, e.g.*, United States v. Harrison, 918 F.2d 469, 475 (5th Cir. 1990) (holding that a violation of the *Petite* policy, an "internal rule," is not a basis for dismissal of an action); United States v. Patterson, 809 F.2d 244, 248 (5th Cir. 1987) (holding that "the *Petite* policy is an internal rule, [and therefore] criminal defendants may not invoke it to bar prosecution by the federal government"); United States v. Schwartz, 787 F.2d 257, 267 (7th Cir. 1986) (holding that the "Department of Justice may give such weight as it chooses to its internal rules"); United States v. Catino, 735 F.2d 718, 725 (2d Cir. 1984) (holding that the *Petite*

involving "a substantial federal interest" that might go "unvindicated" if the federal prosecution did not proceed.[117] The policy is ultimately about discretion, economy, and flexibility, and there is some anecdotal evidence that it has achieved those ends.[118]

The preceding sections detailed the relevant background fundamental rights jurisprudence, history of the dual sovereignty doctrine, and other policy considerations weighing heavily on the Court's holding in *Texas v. Cobb* and the ensuing circuit split. The next section describes the *Cobb* prosecution and Supreme Court opinion, which itself sets the stage for the circuit split discussed in Part II.

F. Texas v. Cobb

In *Texas v. Cobb*, the Supreme Court revisited the attachment of the Sixth Amendment right to counsel, focusing on what exactly would constitute identical offenses.[119] Even though the words "dual sovereignty" appear nowhere in the text of the *Cobb* opinion,[120] it has become the central interpretive battleground in assessing the application of dual sovereignty in the Sixth Amendment context.[121]

In December 1993, Margaret Owings and her infant daughter Kori Rae disappeared following the burglary of their Texas home.[122] The following July, law enforcement investigators interviewed Raymond Cobb, a

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policy does not afford the defendant any substantive rights); United States v. McInnis, 601 F.2d 1319, 1323 (5th Cir. 1979) (stating that "[w]e have repeatedly refused to enforce that policy by dismissing an indictment; the practice of avoiding dual prosecution sets only an internal guideline for the Justice Department"); United States v. Nelligan, 573 F.2d 251, 255 (5th Cir. 1978) (holding "that the *Petite* policy is intended to be no more than self-regulation on the part of the Department of Justice"); United States v. Welch, 572 F.2d 1359, 1360 (9th Cir. 1978) (holding that the court will not enforce an "Attorney General's in house rules").

117. *See* ABRAMS & BEALE, *supra* note 80, at 668; *supra* note 111 and accompanying text.

118. For a discussion of empirical results of the *Petite* policy, see Harry Litman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72, 77 (1996) ("Statistics on dual prosecutions reflect the selectivity that the *Petite* Policy has produced. Dual prosecutions are quite rare. The Justice Department's 94 U.S. Attorney's Offices and litigating divisions together typically bring fewer than 150 dual prosecutions each year. This represents a tiny fraction of the total number of state prosecutions that, because of overlapping federal and state jurisdiction, could be reprosecuted in the federal system, and a small fraction of the approximately 65,000 annual federal prosecutions."). These statistics may also owe in no small part to various state analogs to the *Petite* policy promulgated since 1959. For an exhaustive review of these state policies, see KURLAND, *supra* note 107, at 87–289.

119. Many lower federal and state courts had read an exception into *McNeil*'s "offense-specific" requirement for "factually related" offenses. *See* Texas v. Cobb, 532 U.S. 162, 168 & n.1 (2001) (listing the application of a "factually related" exception in several courts of appeals and state courts); *see also, e.g.*, 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, 41–42 (3d Cir. 1997); United States v. Williams, 993 F.2d 451, 457 (5th Cir. 1993).

120. *See Cobb*, 532 U.S. 162.

121. *See infra* Part II.

122. *See Cobb*, 532 U.S. at 164–65.

neighbor, about the burglary.[123] During the interview, Cobb confessed to committing the burglary, but he denied knowing anything about the disappearance of the two females.[124] Cobb was later indicted on a state charge of burglary, and an attorney was appointed to represent him on that charge.[125] During November 1995, while the burglary charge was still pending and while Cobb was living with his father, Cobb's father contacted law enforcement and reported that his son had confessed to murdering Owings.[126] Cobb was thereafter taken into custody and confessed to both murders after waiving his *Miranda* rights.[127] He was later convicted of capital murder and sentenced to death.[128]

The Texas Court of Criminal Appeals overturned Cobb's conviction, concluding that, because the burglary and the murders were committed at the same time, the murder charge was "factually interwoven with the burglary" charge.[129] The court held that because an attorney had been appointed for the burglary charge, the Sixth Amendment right to counsel had attached to the uncharged murder, and thus the confession was taken in violation of Cobb's constitutional right to counsel.[130] The government appealed, and the Supreme Court granted certiorari to consider "whether the Sixth Amendment right to counsel extends to crimes that are 'factually related' to those that have actually been charged."[131] In an opinion written by Chief Justice William Rehnquist, the Court held by a vote of five to four that it did not.[132]

The Supreme Court reaffirmed, "'The Sixth Amendment right [to counsel] . . . is offense specific. It cannot be invoked once for all future prosecutions.'"[133] Though noting that "[s]ome state courts and Federal Courts of Appeals . . . have read into *McNeil*'s offense-specific definition an exception for crimes that are 'factually related' to a charged offense,"[134] Chief Justice Rehnquist dismissed the reliance on these precedents as "misplaced."[135] Responding to Cobb's arguments about the likelihood of police overreaching,[136] Rehnquist noted two additional factors: "[A] suspect must be apprised of his [Fifth Amendment] rights against

123. *Id.* at 165.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 166.
129. Cobb v. State, 93 S.W.3d 1, 6 (Tex. Crim. App. 2000).
130. *See Cobb*, 532 U.S. at 167.
131. *Id.*
132. *Id.* at 173.
133. *Id.* (alterations in original) (quoting McNeil v. Wisconsin, 501 U.S. 171, 175 (1991)).
134. *Id.* at 168.
135. *Id.* at 171.
136. Cobb had argued that the strict offense-specific rule was "'disastrous' to suspects' constitutional rights and [would] 'permit law enforcement officers almost complete and total license to conduct unwanted and uncounseled interrogations.'" *Id.* (quoting Respondent's Brief at 8–9, *Cobb*, 532 U.S. 162 (No. 99-1702)).

compulsory self-incrimination and to consult with an attorney"[137] and "the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, [including] those who have been charged with other offenses."[138]

Though *Cobb* rejected the application of the Sixth Amendment right to counsel to merely "factually related" charges,[139] the Court held that the Sixth Amendment could nonetheless attach simultaneously to multiple charges in certain other circumstances.[140] The Court noted that this extended to certain offenses not yet formally charged.[141] Referencing its prior double jeopardy jurisprudence,[142] the Court specifically incorporated the statutory elements test discussed in *Blockburger v. United States* into its Sixth Amendment analysis.[143] As this Note discussed above, in *Blockburger*, the Court had held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[144] In *Cobb*, the Court noted that in other cases, it had applied the *Blockburger* test to the Double Jeopardy Clause of the Fifth Amendment to determine whether two separate prosecutions were for the same offense.[145] Consequently, the Sixth Amendment right to counsel could be viewed as attaching to any offense that shares precisely the same elements as the charged offense.[146]

However, in a section that has been particularly puzzling to lower courts, Chief Justice Rehnquist summarized the Court's legal conclusion:

> We see no constitutional difference between the meaning of the term "offense" in the contexts of double jeopardy and of the right to counsel.

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137. *Id.*

138. *Id.* at 171–72.

139. *See id.* at 168.

140. This has been the source of significant confusion in the lower federal courts. *See infra* Part II.

141. *Cobb*, 532 U.S. at 172–73 ("[W]e have recognized in other contexts that the definition of an 'offense' is not necessarily limited to the four corners of a charging instrument.").

142. *See generally* Heath v. Alabama, 474 U.S. 82 (1985); Blockburger v. United States, 284 U.S. 299 (1932).

143. *Cobb*, 532 U.S. at 173.

144. *Blockburger*, 284 U.S. at 304.

145. *Cobb*, 532 U.S. at 173 (citing Brown v. Ohio, 432 U.S. 161, 164–66 (1977)); *see also* Illinois v. Vitale, 447 U.S. 410, 424–25 (1980).

146. *See Cobb*, 532 U.S. at 173. Indeed, some commentators view the use of the *Blockburger* test outside the double jeopardy context as proof that it is both separate and distinct from the dual sovereignty doctrine and that *Cobb* cannot be read to suggest, at least not conclusively, that dual sovereignty has been incorporated into Sixth Amendment analysis. *See, e.g.*, 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, 237 (2007) ("The fact that the Supreme Court in *Cobb* applied the *Blockburger* test to a context outside of double jeopardy is further proof that the test is not circumscribed by double jeopardy jurisprudence.").

> Accordingly, we hold that when the Sixth Amendment right to counsel attaches, it does encompass offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test.[147]

To this Chief Justice Rehnquist added a footnote which has itself been the subject of considerable analysis: "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."[148] Finally, the Court applied the *Blockburger* test to the offenses with which Cobb was charged and held that, because burglary and capital murder each require proof of a fact that the other does not, they are not the same offense under *Blockburger*.[149] Therefore, "the Sixth Amendment right to counsel did not bar police from interrogating [Cobb] regarding the murders, and [Cobb's] confession was therefore admissible."[150]

Part I discussed the Sixth Amendment, fundamental rights, double jeopardy, and dual sovereignty doctrine jurisprudence leading up to the Supreme Court's holding in *Cobb*, as well as the lasting impact *Montejo* may have on Sixth Amendment analysis. Part II examines the confusion and circuit split resulting from *Cobb*'s language as well as various considerations weighing heavily on the question of whether the Sixth Amendment right to counsel may attach to identical offenses in cross-sovereign settings.

II. THE SEARCH FOR A UNIFORM INTERPRETATION AFTER *TEXAS V. COBB*

After *Cobb*, confusion has arisen in cases where multiple sovereigns, be they two states or a state and the federal government, attempt to prosecute the same individual under essentially identical statutes that would satisfy the *Blockburger* test. In that situation, the ultimate question is whether the Sixth Amendment right to counsel may attach against both governments at the time the first formally charges. This distinction is critically important in instances where a Sixth Amendment violation turns on the effectiveness of a defendant's *Miranda* waiver. While the Court's recent holding in *Montejo* has eliminated the automatic presumption that such waivers are invalid,[151] the specter of simultaneous investigation by two sovereigns raises concerns about the extent to which a Fifth or Sixth Amendment waiver can be "voluntary, knowing, and intelligent" in these circumstances.[152]

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147. *Cobb*, 532 U.S. at 173.
148. *Id.* at 173 n.3.
149. *Id.* at 174.
150. *Id.*
151. *See supra* notes 21–24 and accompanying text.
152. Montejo v. Louisiana, 129 S. Ct. 2079, 2085 (2009) ("Our precedents also place beyond doubt that the Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent.").

Eight U.S. courts of appeals have addressed whether a defendant's invocation of the right to counsel in either a state or federal criminal prosecution carries over to a simultaneous or subsequent prosecution by another sovereign for an identical or nearly identical offense. The U.S. Courts of Appeals for the First, Fourth, Fifth, and Eleventh Circuits have held that an invocation of the right to counsel in one proceeding does not apply to or limit what can be done in an investigation or prosecution by the other sovereign.[153] Alternatively, the U.S. Courts of Appeals for the Second and Eighth Circuits have found the dual sovereignty doctrine inapplicable, holding that a defendant's invocation of his Sixth Amendment right in one prosecution is an invocation in an investigation and prosecution for an identical offense prosecuted by a different sovereign.[154] The Seventh Circuit, while not ultimately making a conclusion of law, has expressed doubt as to the applicability of the dual sovereignty doctrine in this context and sympathized with the Second Circuit analysis.[155] Similarly, the Tenth Circuit has tacitly acknowledged that there may be no dual sovereignty bar to the simultaneous attachment of the Sixth Amendment to state and federal prosecutions.[156] Invariably, each of these courts purports to draw conclusive support from the language of *Texas v. Cobb*. Part II.A discusses those circuits applying the dual sovereignty doctrine in Sixth Amendment analysis. Part II.B discusses those circuits that have declined to do so.

A. *The Dual Sovereignty Doctrine Applies to the Sixth Amendment Right to Counsel*

To date, four U.S. courts of appeals have ruled that the dual sovereignty doctrine applies in the context of the Sixth Amendment right to counsel and that the attachment and invocation of the right to counsel in one sovereign's proceeding does not carry over to an identical prosecution by another arising from the same course of conduct.

1. The Fifth Circuit: *United States v. Avants*

In *United States v. Avants*,[157] the Fifth Circuit became the first circuit in the post-*Cobb* era to hold that the dual sovereignty doctrine applied to the Sixth Amendment right to counsel.[158] The court held that invoking the right in a state or federal proceeding does not limit or color any prosecution under an identical charge initiated by a separate sovereign.[159]

153. United States v. Burgest, 519 F.3d 1307, 1311 (11th Cir. 2008); United States v. Alvarado, 440 F.3d 191, 196 (4th Cir. 2006); United States v. Coker, 433 F.3d 39, 44–45 (1st Cir. 2005); United States v. Avants, 278 F.3d 510, 517 (5th Cir. 2002).

154. United States v. Mills, 412 F.3d 325, 330 (2d Cir. 2005); United States v. Red Bird, 287 F.3d 709, 715 (8th Cir. 2002).

155. United States v. Krueger, 415 F.3d 766, 777–78 (7th Cir. 2005).

156. United States v. Terrell, 191 F. App'x 728, 734 (10th Cir. 2006).

157. 278 F.3d 510 (5th Cir. 2002).

158. *Id.* at 512–13.

159. *Id.*

In 1966, authorities discovered the body of Ben Chester White, an elderly African-American sharecropper, in the Homochitto National Forest. Ernest Henry Avants was arrested on a Mississippi State charge of murder for White's death.[160] Avants retained an attorney and was released from custody on bond.[161] Avants was at this time also a suspect in a separate federal murder investigation of the death of Wharlest Jackson, a civil rights worker.[162] In March 1967, while he was out on bond from the Mississippi proceedings, two Federal Bureau of Investigation (FBI) agents met with Avants at his home, where he waived his *Miranda* rights and was questioned about Jackson's death.[163] The conversation was wide-ranging and eventually turned to his pending prosecution for the murder of Ben White.[164] Avants told the agents that he "blew [White's] head off with a shotgun," but, at the time, White had already been killed by Claude Fuller, a coconspirator.[165] The FBI agents did not ask any further questions regarding the White murder,[166] and Avants was later acquitted of the Mississippi murder charge.[167]

In June 2000, a full thirty-three years later, a federal grand jury indicted Avants of aiding and abetting the murder of White based largely on the statements he had made to FBI agents more than thirty years prior.[168] Avants argued that "because he had retained an attorney in connection with the state murder charge, and the attorney was not present for the interview," the federal prosecutor's use of the comments amounted to a Sixth Amendment violation.[169] The district court agreed.[170] The government appealed that decision and argued that the dual sovereignty doctrine required the two charges to be treated as distinct offenses and that Avants's Sixth Amendment right had not attached to the federal charge at the time of the questioning.[171] The Fifth Circuit agreed with the government's argument and found that the suppression of the statements below had been clear error.[172]

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160. *Id.* at 513.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 514.
167. *Id.*
168. *Id.*
169. *Id.*
170. The district court ruled that "the statements were inadmissible as substantive evidence at trial" because they were the result of an FBI interrogation after Avants's Sixth Amendment right to counsel had both attached and been invoked as to the state murder charge. *Id.*
171. *Id.*
172. *Id.* The U.S. Court of Appeals for the Fifth Circuit noted that the government had not "waived" this legal argument in the district court below, but merely "forfeited" it. *Id.* The court went on to note that because this was entirely an issue of law that required no additional finding of fact by the district court, the district court's conclusion of law could be reviewed for "plain error." *Id.* at 519–21.

Avants argued that the federal charge was "effectively the same offense as the state murder charge," while the government argued that, even if this was true, the dual sovereignty doctrine should nonetheless control.[173] While the Fifth Circuit did appear to concede that these two statutes might satisfy the *Blockburger* test,[174] the court pointed to the Supreme Court's recognition 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."[175] Therefore, "the federal government may . . . prosecute a defendant after an unsuccessful state prosecution based on the same conduct, even if the elements of the state and federal offenses are identical."[176]

The Fifth Circuit then applied this double jeopardy jurisprudence to the question of whether a defendant's invoking his Sixth Amendment right to counsel in one sovereign's prosecution would impact a subsequent prosecution by a separate sovereign under essentially identical charges.[177] The court looked to *Cobb*.[178] "In *Cobb*," the Fifth Circuit wrote, "the Supreme Court clarified the meaning of 'charged offense' in the Sixth Amendment context,"[179] and held that there was "'no constitutional difference between the meaning of the term "offense" in the contexts of double jeopardy and of the right to counsel.'"[180] The Fifth Circuit went on to observe the following:

> [I]t 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. As we have earlier observed, identical offenses under the respective laws of separate sovereigns do not constitute the "same offense" under the Double Jeopardy Clause. By concluding without limitation that the term "offense" has the same meaning under the Sixth Amendment as it does under the Double Jeopardy Clause, the Court effectively foreclosed any argument that the dual sovereignty doctrine does not inform the definition of "offense" under the Sixth Amendment.[181]

Ultimately, the Fifth Circuit concluded that "the Supreme Court has incorporated double jeopardy analysis, including the dual sovereignty doctrine, into its Sixth Amendment jurisprudence."[182] Even where the elements of the two charges were "virtually identical," the Fifth Circuit concluded that the federal and Mississippi murder charges could not be

173. *Id.* at 516.
174. *Id.* (citing Blockburger v. United States, 284 U.S. 299, 303 (1932)).
175. *Id.* (citing Heath v. Alabama, 474 U.S. 82, 88–93 (1985); Abbate v. United States, 359 U.S. 187, 193–94 (1959)).
176. *Id.*
177. *Id.* at 516–17.
178. *Id.*
179. *Id.* at 516.
180. *Id.* at 517 (quoting Texas v. Cobb, 532 U.S. 162, 173 (2001)).
181. *Id.* at 517 (citing Heath v. Alabama, 474 U.S. 82, 88–93 (1985)).
182. *Id.*

considered the same offense, and Avants's Sixth Amendment right to counsel had attached only to the Mississippi charge at the time of the FBI questioning.[183]

2. The First Circuit: *United States v. Coker*

In *United States v. Coker*,[184] the First Circuit also held that the dual sovereignty doctrine foreclosed the simultaneous attachment of a defendant's Sixth Amendment right to counsel to essentially identical state and federal charges.[185]

The First Circuit decision came on appeal of Edward Coker's conviction of attempted arson.[186] Coker had been charged with two state crimes of burning or aiding in the burning of a dwelling house and malicious or wanton injuries to personal property.[187] On July 31, 2002, Coker was arraigned and appointed an attorney.[188] At the same time, agents with the Federal Bureau of Alcohol, Tobacco, and Firearms (ATF) received information regarding the fire, and they began an investigation into possible federal crimes.[189] ATF agents interviewed Coker knowing that he had been charged with a state crime and had been appointed an attorney for that charge.[190] After waiving his *Miranda* rights, Coker confessed to starting the fire.[191] Approximately nine months later, a federal grand jury indicted Coker for one count of attempted arson.[192] The district court denied Coker's Sixth Amendment motion to suppress, and he was convicted and sentenced to sixty months in prison.[193] Coker appealed the denial of the motion to suppress.[194]

The First Circuit opinion succinctly stated the issue before the court in *Coker*:

> The issue currently before us is whether the uncharged federal arson offense was the same offense as the state arson offense for Sixth Amendment purposes when Coker confessed to the [ATF] agents. As Coker notes, both offenses involved the same essential elements of proof. If the two offenses were the same, then Coker's Sixth Amendment right to counsel had attached to the federal offense and was violated when the federal agents interviewed him.[195]

183. *Id.* at 518.
184. 433 F.3d 39 (1st Cir. 2005).
185. *See id.* at 44.
186. *Id.* at 40.
187. *Id.* at 41.
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* at 42.

The court noted that in *Coker*, "the state and federal arson charges contained the same essential elements" and that, therefore, "one might conclude that, under *Cobb* and *Blockburger*, Coker's federal and state offenses were the same for Sixth Amendment right to counsel purposes."[196] The court went on, however, to suggest that "of significant importance . . . is the fact that the Court in *Cobb* stated 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.'"[197] At a minimum, the court concluded, "under the dual sovereignty doctrine, Coker's federal offense would be considered separate from his state offense for double jeopardy purposes."[198]

The First Circuit reduced the question on appeal to the basic question *Cobb* appeared to have left open: "whether the Court in *Cobb* incorporated all of its double jeopardy jurisprudence (including the dual sovereignty doctrine) or merely the *Blockburger* test into its Sixth Amendment right to counsel jurisprudence."[199] The First Circuit concluded "that the dual sovereignty doctrine applies for the purposes of defining what constitutes the same offense in the Sixth Amendment right to counsel context."[200] The court reasoned that if "the [Supreme] Court intended to incorporate only the *Blockburger* test into its Sixth Amendment jurisprudence, then its statement in *Cobb* would make no sense, as there would be a difference in the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel."[201]

The First Circuit also specifically referenced Chief Justice Rehnquist's footnote three in the *Cobb* opinion, reasoning that it meant "the Court was referring to *Blockburger* in the context of its general double jeopardy jurisprudence."[202] The First Circuit summed up the significance of the footnote:

> [i]n other words, we understand the Court to have meant that if the government could not prosecute a defendant for an offense due to double jeopardy principles, then it could not question the defendant about that offense without implicating his Sixth Amendment right to counsel, even if the defendant had not yet been charged with the offense.[203]

The Court reasoned that in Coker's case, the reverse must also be true: "it follows . . . that the Sixth Amendment did not prevent discussion of the uncharged federal offense"[204] and that "the dual sovereignty doctrine serves as an exception to the *Blockburger* test."[205]

196. *Id.* at 43.
197. *Id.* (alteration in original) (citing Texas v. Cobb, 532 U.S. 162, 173 (2001)).
198. *Id.* at 43.
199. *Id.*
200. *Id.* at 44.
201. *Id.*
202. *Id.*
203. *Id.* at 44–45.
204. *Id.* at 45.
205. *Id.* at 45 & n.9.

The First Circuit also specifically addressed the possibility that applying this rule would lead to a "silver platter" problem similar to the evidentiary issues in *Elkins v. United States* and *Murphy v. Waterfront Commission*.[206] The court was unconvinced, noting that "a similar argument was raised in *Cobb* and rejected by a majority of the Supreme Court."[207]

The First Circuit also specifically discussed the sham prosecution—or *Bartkus* exception—to the dual sovereignty doctrine in support of its holding.[208] The court cited its prior precedent in this area: "an exception . . . exists where 'one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings.'"[209] The First Circuit stated that, in its view, the sham prosecution exception "applies with equal force in the Sixth Amendment context" and "if it appears that one sovereign is controlling the prosecution of another merely to circumvent the defendant's Sixth Amendment right to counsel . . . the dual sovereignty doctrine will not apply."[210]

Though he concurred in the judgment based on a finding of "harmless" error,[211] Judge Conrad Cyr was not only "unable to agree with the panel decision that no Sixth Amendment violation occurred," but he also warned that the ruling "may invite serious precedential consequences."[212] Noting that the dual sovereignty doctrine "had no application outside the double jeopardy context,"[213] Judge Cyr cited *Elkins v. United States* and *Murphy v. Waterfront Commission* as ample evidence that the Supreme Court had limited the application of dual sovereignty in the context of fundamental rights:

> [A]llowing the separate sovereign doctrine to operate in the context of these important constitutional protections would encourage collusion between the federal and state sovereigns, one sovereign obtaining evidence in violation of defendants' constitutional rights, then passing the evidence on a "silver platter" to the other sovereign, which would then be free to utilize the tainted evidence in its own prosecution with no risk of suppression. Obviously, no comparable policy concerns regarding evidence-gathering are presented in the double jeopardy context.[214]

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206. *Id.* at 50. Coker had argued that "applying the dual sovereignty doctrine to cases such as his will permit law enforcement to perform an end run around a defendant's Sixth Amendment right to counsel." *Id.* at 45.

207. *Id.* at 45.

208. *Id.*

209. *Id.* (quoting United States v. Guzman, 85 F.3d 823, 827 (1st Cir. 1996)).

210. *Id.* The argument for the use of the sham prosecution exception as a Sixth Amendment safeguard in multisovereign prosecutions appears elsewhere in academic literature. *See, e.g.*, Lane, *supra* note 69, at 1907; Morrison, *supra* note 69, at 157.

211. *Coker*, 433 F.3d at 49 (Cyr, J., concurring).

212. *Id.*

213. *Id.*

214. *Id.* (citing Elkins v. United States, 364 U.S. 206, 208 (1960)).

Judge Cyr insisted that *Cobb* could not be read to say that "federal and state authorities [may] violate a defendant's Sixth Amendment right to counsel where they are prohibited from undertaking similar collusive actions with respect to Fourth Amendment and Fifth Amendment rights."[215] To so hold, he argued, would mean "that the Sixth Amendment right to counsel should be treated less cordially than the Fourth and Fifth Amendment rights."[216]

Judge Cyr also specifically rebutted the sufficiency of the sham prosecution exception, arguing that it "leaves out much of the mutual collusion of independent sovereigns which is the subject of *Elkins* and *Murphy*, and creates a portentous risk of abuse in this age of increasing federal-state cooperation."[217] He concluded, "I see no principled reason that the Sixth Amendment right to counsel ought to be subject to the separate sovereign doctrine when the Fourth Amendment and Fifth Amendment self-incrimination rights are not."[218]

3. The Fourth Circuit: *United States v. Alvarado*

In *United States v. Alvarado*,[219] the Fourth Circuit agreed with the First and Fifth Circuits that the dual sovereignty doctrine applies to the Sixth Amendment right to counsel, and thus "federal and state crimes are necessarily separate offenses for the purposes of the Sixth Amendment, because they originate from autonomous sovereigns that each have the authority to define and prosecute criminal conduct."[220]

Alvarado stemmed from the federal prosecution of Samuel Alvarado on charges of distribution of and conspiracy to distribute cocaine.[221] Alvarado was arrested in Virginia on October 1, 2003, during a joint federal and state narcotics investigation.[222] Following his arrest and with his consent, ATF agents searched Alvarado's motel room. After a post-*Miranda* interrogation by an ATF agent, Alvarado was charged in state court with the crimes of possession with intent to distribute cocaine and conspiracy to distribute cocaine.[223] At a subsequent arraignment on the state charges, Alvarado was appointed an attorney and ordered to remain in custody pending a trial on the charges.[224] Two months later, the state dismissed all of the state charges at a preliminary hearing.[225]

Prior to the dismissal of the state charges, a federal complaint charging Alvarado with distribution of and conspiracy to distribute cocaine was filed,

215. *Id.*
216. *Id.* at 51.
217. *Id.*
218. *Id.*
219. 440 F.3d 191 (4th Cir. 2006).
220. *Id.* at 194.
221. *Id.* at 194–95.
222. *Id.* at 194.
223. *Id.* at 194–95.
224. *Id.* at 195.
225. *Id.*

and a warrant was issued.[226] Alvarado was taken into federal custody and, after being given his *Miranda* warnings, was interrogated by the same ATF agent who had interrogated him at the time of his arrest.[227] During the interrogation, Alvarado "provided incriminating statements about his involvement in the drug conspiracy."[228] A federal grand jury later indicted Alvarado, who was subsequently convicted and sentenced.[229] Alvarado appealed, arguing that these statements were taken in violation of his Sixth Amendment right to counsel.[230] He argued that the "commencement of formal proceedings on his state charges caused the Sixth Amendment right to counsel to attach to his federal charges . . . because the state and federal charges were the 'same offense.'"[231]

The Fourth Circuit held that the "state and federal offenses [were] not the same for purposes of the Sixth Amendment right to counsel" because they arose from different sovereigns.[232] The court relied heavily on the Supreme Court's statement in *Cobb* that there is "'no constitutional difference between the meaning of the term "offense" in the contexts of double jeopardy and of the right to counsel.'"[233] The Fourth Circuit read this to mean that "the definition of offense is the same in the right to counsel and double jeopardy contexts," and "if dual sovereignty is a central feature of double jeopardy analysis, it cannot help but be a central feature of offense-specificity analysis since the two after *Cobb* are constitutionally one and the same."[234] The court specifically noted that adopting Alvarado's proposed reading of the Sixth Amendment "would be an affront to both state and federal sovereignty."[235] Specifically, the court observed that "Virginia can no more define what constitutes a federal criminal offense than the federal government can promulgate Virginia's criminal law," and that "[b]y virtue of their separate sovereignty, each may separately establish and enforce criminal laws in accordance with the Constitution's commands."[236]

In spite of the legal conclusion as to the applicability of the dual sovereignty doctrine in the Sixth Amendment context, the Fourth Circuit engaged in an entirely separate *Blockburger*-style analysis.[237] "The charges in the federal indictment and the evidence introduced at [Alvarado's] federal trial also described a conspiracy broader in scope than the one alleged in the state charge," the court noted, and "the federal indictment

226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at 195–96.
232. *Id.* at 196.
233. *Id.* (quoting Texas v. Cobb, 532 U.S. 162, 173 (2001)).
234. *Id.*
235. *Id.* at 197. "To suggest, as [Alvarado] does, that state and federal offenses are the same would strip both sovereigns of a central attribute of sovereignty in derogation of our federal design." *Id.*
236. *Id.*
237. *Id.* at 199; *see also supra* Part I.E.1.

charged [Alvarado] with conspiracy to distribute 500 grams of cocaine, whereas the [State] did not designate a drug amount."[238] "These differences," the court concluded, "provide[d] ample support for the conclusion that the conspiracies were not the same offense."[239]

4. The Eleventh Circuit: *United States v. Burgest*

Most recently, the Eleventh Circuit decided *United States v. Burgest*,[240] a case arising from a similar Sixth Amendment challenge. The Eleventh Circuit joined the First, Fourth, and Fifth Circuits in holding that the dual sovereignty doctrine is readily applicable in Sixth Amendment analysis of essentially identical offenses, and thus the right to counsel does not attach to a second sovereign's investigation merely because it has attached in the first.[241]

A federal grand jury indicted Earl Burgest for possession with intent to distribute crack cocaine.[242] Burgest challenged the admissibility of statements he had made to federal agents during interrogation on the grounds that Florida had already formally charged him with possession of cocaine, and that he had been represented by counsel regarding the state charge when he was interrogated by federal agents outside the presence of that counsel.[243] Specifically, Burgest asserted that his written *Miranda* waiver was insufficient to overcome his Sixth Amendment rights.[244] The district court denied the motion, and Burgest was sentenced to 360 months imprisonment on each of two counts.[245] Burgest appealed the denial of his suppression motion.[246]

The Eleventh Circuit upheld the denial of Burgest's motion to suppress on the Sixth Amendment grounds.[247] The court did not take this opportunity to add to the substantive discussion among the circuits on this issue, instead issuing a brief four-page opinion that largely endorsed the reasoning of the First, Fourth, and Fifth Circuits and rejected the reasoning of the Second and Eighth Circuits.[248] The Eleventh Circuit noted that

> "because [the charges] originate[d] from autonomous sovereigns that each ha[d] the authority to define and prosecute criminal conduct," Burgest's state drug charge was a different offense than his federal drug charges for Sixth Amendment purposes. Burgest's prior invocation of his right to counsel for the state drug charge did not attach to the uncharged federal drug offenses at the time of the interview. Therefore, we conclude that

238. *Alvarado*, 440 F.3d at 199.
239. *Id.*
240. 519 F.3d 1307 (11th Cir. 2008).
241. *Id.* at 1311.
242. *Id.* at 1308.
243. *Id.* at 1308–09.
244. *Id.* at 1309.
245. *Id.*
246. *Id.*
247. *Id.* at 1311.
248. *Id.* at 1310.

> the federal agents' questioning, which occurred after Burgest's voluntary waiver of his right to counsel and did not consist of any questions concerning the pending state drug charge, did not violate his Sixth Amendment right to counsel.[249]

In upholding the denial of Burgest's suppression motion, the Eleventh Circuit concluded that "'[a] federal offense and a state offense do not constitute the "same offense" under the Sixth Amendment—even if the offenses are identical in their respective elements—because they are the violations of the laws of two separate sovereigns.'"[250]

Part II.A discussed those circuits applying the dual sovereignty doctrine to Sixth Amendment analysis. Part II.B discusses those circuits that, along with Judge Cyr above, have reached the opposite conclusion.

B. *The Dual Sovereignty Doctrine Does Not Apply to the Sixth Amendment Right to Counsel*

Unlike the First, Fourth, Fifth, and Eleventh Circuits, four circuits have held or strongly suggested that the dual sovereignty doctrine does not apply in the Sixth Amendment context. The Second[251] and Eighth[252] Circuits have explicitly held that the attachment and invocation of the Sixth Amendment right to counsel in one prosecution may suffice to invoke the Sixth Amendment protection in another for essentially identical offenses, even when promulgated by separate sovereigns. The Seventh Circuit,[253] while not formally making a conclusion of law, has also sympathized with this view. Similarly, the Tenth Circuit has implicitly endorsed this view.[254]

1. The Eighth Circuit: *United States v. Red Bird*

The first federal circuit court of appeals to reach this opposite conclusion was the Eighth Circuit in its 2002 decision in *United States v. Red Bird*.[255] Andrew Red Bird was charged and arraigned in the Rosebud Sioux Tribal Court with the crime of rape, entered a plea of not guilty, and was appointed an attorney to represent him.[256] Two months later, an FBI special agent and a tribal investigator, both of whom were aware of the pending tribal charge, interviewed Red Bird outside the presence of his tribal court-appointed attorney.[257] Red Bird told the investigators that he had been with the victim but denied having intercourse with her.[258] Five

249. *Id.* at 1310–11 (alterations in original) (quoting United States v. Alvarado, 440 F.3d 191, 194 (4th Cir. 2006)).
250. *Id.* at 1311 (quoting United States v. Avants, 278 F.3d 510, 522 (5th Cir. 2002)).
251. *See infra* Part II.B.2.
252. *See infra* Part II.B.1.
253. *See infra* Part II.B.3.
254. *See infra* Part II.B.4.
255. 287 F.3d 709 (8th Cir. 2002).
256. *Id.* at 711.
257. *Id.* at 711–12.
258. *Id.* at 712 n.4.

months later, a federal grand jury indicted Red Bird on four counts of aggravated sexual abuse arising from the same course of conduct.[259] Responding to Red Bird's motion to suppress the statements made to the federal authorities, the district court held that "the federal and tribal charges were identical," the federal and tribal authorities "were working in tandem," and the federal and tribal investigators knew that Red Bird had counsel appointed for the tribal rape charge.[260] The district court "held that Red Bird's Sixth Amendment right to counsel attached when he was arraigned on the rape charges in tribal court and that the subsequent interview violated" that constitutional right.[261]

The Eighth Circuit affirmed the district below.[262] The court concluded that "[w]e do not believe that it is appropriate to fully rely on double jeopardy analysis" but also noted that "tribal sovereignty is 'unique and limited' in character."[263] Despite the unique wrinkle of tribal sovereignty in this case, the court read *Cobb* to have defined the scope of the Sixth Amendment inquiry in terms of the "offense-specific" requirement and the *Blockburger* test: "'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'"[264] The Eighth Circuit concluded that "the tribal rape charge has 'identical essential elements when compared with the later federal charges filed,'"[265] and therefore the federal interview was conducted in violation of Red Bird's Sixth Amendment right to counsel.[266]

2. The Second Circuit: *United States v. Mills*

In 2005, the Second Circuit confronted the dual sovereignty and Sixth Amendment issue in *United States v. Mills*.[267] This case in the circuit split is unique in that there was no second interview with another sovereign's law enforcement agents; federal prosecutors merely wanted to use Mills's statements to state officials as evidence in the federal case.[268]

In June 2002, a Connecticut police officer was shot by an unknown assailant.[269] Detectives tied the gun to Gary Mills, an incarcerated felon who was then charged in state court with multiple firearms violations.[270]

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259. *Id.* at 712.
260. *Id.*
261. *Id.*
262. *Id.* at 716.
263. *Id.* at 715 (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)).
264. *Id.* (quoting Texas v. Cobb, 532 U.S. 162, 173 (2001)).
265. *Id.* (quoting United States v. Red Bird, 2001 DSD 15, ¶ 14, 146 F. Supp. 2d 993, 999).
266. *Id.* at 715.
267. 412 F.3d 325 (2d Cir. 2005).
268. *Id.* at 327–28.
269. *Id.* at 327.
270. *Id.*

Prior to his arraignment on the new state gun charges, two detectives interviewed Mills.[271] At this time, Mills had a court-appointed attorney for the old charges but "did not ask to consult that attorney and the attorney was not contacted."[272] During the interview, Mills did not admit to ever possessing the gun used in the shooting, but he did make some statements linking himself to the gun.[273] The next day, Mills was arraigned on the state firearms charges, and, eight months later, a federal grand jury indicted him on a charge of unlawful possession of a firearm by a convicted felon.[274] The federal district court granted Mills's motion to suppress the statements made to the state authorities and concluded that, because the interview took place after an indictment had been filed with respect to the former state charges, "Mills's right to counsel had attached . . . [and] the interview should not have occurred in the absence of counsel."[275]

On appeal, the issue was framed as follows: "whether statements taken by local police, in violation of a defendant's right to counsel as to previously charged state offenses but prior to the filing of federal charges for the same crime, can be admitted in the federal prosecution."[276] The Second Circuit sided with Mills and held that statements secured by state officers in violation of a defendant's Sixth Amendment right to counsel cannot be entered as evidence in a separate federal proceeding—the federal authorities could not use the fruit of a poisonous tree.[277] The Second Circuit specifically addressed the interplay between the Sixth Amendment and the *Blockburger* test, rejecting the government's argument that the dual sovereignty doctrine had also been implicitly incorporated:

> We reject the government's proposed approach. *Cobb* recently, and in our view definitively, set forth the controlling test. Nowhere in *Cobb*, either explicitly or by imputation, is there support for a dual sovereignty exception to its holding that when the Sixth Amendment right to counsel attaches, it extends to offenses not yet charged that would be considered the same offense under *Blockburger*. . . . The fact that *Cobb* appropriates the *Blockburger* test, applied initially in the double jeopardy context, does not demonstrate that *Cobb* incorporates the dual sovereignty doctrine: The test is used simply to define identity of offenses. Where, as here, the same conduct supports a federal or a state prosecution, a dual sovereignty exception would permit one sovereign to question a defendant whose right to counsel had attached, to do so in the absence of counsel and then to share the information with the other sovereign without fear of

271. *Id.*
272. *Id.*
273. *Id.* at 328.
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*

> suppression. We easily conclude that *Cobb* was intended to prevent such a result.[278]

The Second Circuit ultimately concluded that the dual sovereignty doctrine and the *Blockburger* test were distinct and separate formulations and that *Cobb* should not be read to have incorporated the entirety of double jeopardy jurisprudence into Sixth Amendment analysis.[279]

3. The Seventh Circuit: *United States v. Krueger*

Two months after *Mills*, the Seventh Circuit decided *United States v. Krueger*.[280] While the Seventh Circuit found it "unnecessary to decide the Sixth Amendment question,"[281] the court appeared very sympathetic to the Second Circuit's reasoning in *Mills*.[282]

The Seventh Circuit posed the question as follows: "whether a defendant's invocation of his right to representation in a state prosecution can trigger the *Jackson* bar against interrogation as to a subsequent federal prosecution on a related charge."[283] The court acknowledged the contrary holdings of the Fifth Circuit in *United States v. Avants*[284] and the First Circuit in *United States v. Coker*.[285] The court wrote that, despite these holdings, "the dual sovereignty doctrine may not pose an insurmountable obstacle for someone in Krueger's position."[286] The Seventh Circuit quoted approvingly from the *Mills* decision:

> "Where, as here, the same conduct supports a federal or a state prosecution, a dual sovereignty exception would permit one sovereign to question a defendant whose right to counsel had attached, to do so in the absence of counsel and then to share the information with the other sovereign without fear of suppression. We easily conclude that *Cobb* was intended to prevent such a result."[287]

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278. *Id.* at 330. This view is also reflected in some academic treatment. *See, e.g.*, David J. D'Addio, Case Comment, *Dual Sovereignty and the Sixth Amendment Right to Counsel*, 113 YALE L.J. 1991, 1992 (2004) (arguing that dual sovereignty principles should not be imported into Sixth Amendment jurisprudence, because to do so "creat[es] the potential for cooperating sovereigns to circumvent a defendant's Sixth Amendment right to counsel").

279. *Mills*, 412 F.3d at 330.

280. 415 F.3d 766 (7th Cir. 2005).

281. *Id.* at 778.

282. *Id.* at 776.

283. *Id.* at 775. The U.S. Court of Appeals for the Seventh Circuit is referring here to *Michigan v. Jackson*, 501 U.S. 171 (1991). *See supra* Part I.A.3.

284. *See supra* Part II.A.1.

285. *See supra* Part II.A.2.

286. *Krueger*, 415 F.3d at 776.

287. *Id.* at 777 (quoting United States v. Mills, 412 F.3d 325, 330 (2d Cir. 2005)).

4. The Tenth Circuit: *United States v. Terrell*

In *United States v. Terrell*,[288] the Tenth Circuit implicitly endorsed a reading of *Cobb* that did not incorporate the dual sovereignty doctrine into the Sixth Amendment.[289] The court reviewed the order of a district court denying defendant Randall Terrell's motion to suppress certain statements he had made to federal Drug Enforcement Administration (DEA) officers.[290] Terrell had already been arraigned and appointed a government defender on Kansas state charges of possession of cocaine with intent to distribute.[291] Before he had an opportunity to consult with that attorney, however, he purportedly waived his *Miranda* rights and was interrogated by a DEA officer while still in state custody.[292] Federal charges of possession with intent to distribute and conspiracy were then brought against Terrell, and he moved to suppress the statements he had made to the DEA agent on the theory that his Sixth Amendment right to counsel had been violated.[293] The DEA agent testified that he only questioned Terrell with respect to the federal conspiracy charges, and the district court concluded that no Sixth Amendment violation had occurred.[294]

The Tenth Circuit affirmed the lower court's holding as to the federal conspiracy charge, but not on the grounds of dual sovereignty.[295] Rather, the Tenth Circuit noted that the Kansas state crime of possession with intent to distribute and the federal conspiracy charge would not satisfy the *Blockburger* test after *Cobb*,[296] and therefore, "while Terrell's statements might be inadmissible at his trial on the state possession charge, his Sixth Amendment right to counsel was not violated in this case."[297] Importantly, the parties had already agreed and the district court had already concluded that the state charge of possession with intent to distribute would be the same offense as the first count of the federal indictment under *Blockburger*, a concession that went unchallenged by the Tenth Circuit.[298]

Part II examined the confusion and circuit split resulting from the language in *Texas v. Cobb*, as well as various considerations weighing heavily on the question of whether the Sixth Amendment right to counsel may attach to identical offenses in cross-sovereign settings. Part III

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288. 191 F. App'x 728 (10th Cir. 2006).
289. *Id.* at 733–34.
290. *Id.* at 730–32.
291. *Id.* at 730–31.
292. *Id.*
293. *Id.*
294. *Id.* at 731.
295. *Id.* at 733–34 n.6 ("[W]e need not reach the government's invitation to apply 'the dual sovereignty doctrine,' wherein double jeopardy is not invoked when a defendant's conduct violates the laws of two separate sovereigns.").
296. *Id.* at 733 ("It is well-settled 'that a substantive crime and a conspiracy to commit that crime are not the "same offense" for double jeopardy purposes.'" (quoting United States v. Felix, 503 U.S. 378, 389 (1992))).
297. *Id.* at 734.
298. *Id.* at 733.

discusses whether *Texas v. Cobb* did in fact speak directly to the issue of dual sovereignty in the Sixth Amendment context, or whether this issue is now otherwise resolved by *Montejo v. Louisiana*. Further, Part III examines the various underlying jurisprudential and policy considerations that each of the circuit courts has addressed in reaching its own conclusions.

III. AMBIGUITY AND THE WAY FORWARD

Part III argues that *Cobb* did not speak definitively to the issue of dual sovereignty, that the dual sovereignty doctrine may work an injustice in the Sixth Amendment context, and that the doctrine is otherwise incompatible with the current extent of information sharing between federal and state law enforcement. All of these factors counsel in favor of a holistic review of the circuit split, with emphasis on the underlying policies and purposes of the Sixth Amendment right to counsel. Additionally, Part III posits that the Supreme Court's holding in *Montejo v. Louisiana* is particularly problematic in light of its neglect of this intercircuit conflict and that *Cobb* and *Montejo* serve to mutually reinforce a significant gap that now exists in Sixth Amendment jurisprudence.

A. *A Plain-Text Reading of* Texas v. Cobb

To a greater or lesser extent, each court of appeals has claimed support for its holding from the plain language of *Cobb*, and it is not difficult to see why: the language and scope of *Cobb* is sufficiently ambiguous as to support both readings.

The Second Circuit concluded that "[n]owhere in *Cobb*, either explicitly or by imputation, is there support for a dual sovereignty exception to its holding that when the Sixth Amendment right to counsel attaches, it extends to offenses not yet charged that would be considered the same offense under *Blockburger*."[299] The Second Circuit viewed the "offense" analysis in *Cobb* as defining the limits of the *Blockburger* test only and took care to separate the *Blockburger* analysis and a possible dual sovereignty "exception" to its application in the multisovereign context.[300] The Second Circuit explained that "[t]he fact that *Cobb* appropriates the *Blockburger* test, applied initially in the double jeopardy context, does not demonstrate that *Cobb* incorporates the dual sovereignty doctrine: The test is used simply to define identity of offenses."[301]

The Second Circuit's reading is arguably flawed—it is difficult to square with the language highlighted by the First and Fifth Circuits: "[w]e see no constitutional difference between the meaning of the term 'offense' in the

299. United States v. Mills, 412 F.3d 325, 330 (2d Cir. 2005); *see also supra* note 278 and accompanying text.

300. United States v. Coker, 433 F.3d 39, 50 (Cyr, J., concurring); *see also supra* notes 278–79 and accompanying text.

301. *Mills*, 412 F.3d at 330; *see also supra* note 278 and accompanying text.

contexts of double jeopardy and of the right to counsel,"[302] and "[i]n 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."[303] The First Circuit concluded, "we understand the Court to have meant that if the government could not prosecute a defendant for an offense due to double jeopardy principles, then it could not question the defendant about that offense without implicating his Sixth Amendment right to counsel, even if the defendant had not yet been charged with the offense."[304]

This alternative reading, however, is also flawed. No part of the *Cobb* opinion states that the holding extends beyond the consideration of two intrastate statutes and the Sixth Amendment right to counsel.[305] The words "dual sovereignty" never appear.[306] The First, Fourth, Fifth, and Eleventh Circuits have all nonetheless concluded that the Supreme Court's definition of an "offense" as mentioned in *Cobb* incorporates both the *Blockburger* test and the dual sovereignty doctrine, even in the intersovereign context.[307] The Fifth Circuit concluded that this definition must extend beyond the intrasovereign context because the term offense was mentioned in *Cobb* "without limitation."[308] But Judge Cyr of the First Circuit noted that the dual sovereignty doctrine "had no application outside the double jeopardy context"[309] and that, in any event, the Sixth Amendment right to counsel deserved the same solicitude vis-à-vis dual sovereignty as the Fourth and Fifth Amendments receive after *Elkins v. United States* and *Murphy v. Waterfront Commission.*[310]

Just as the case can be made that the term "offense" was used in *Cobb* without limitation, it is also significant that the *Cobb* court applied the *Blockburger* test outside its double jeopardy jurisprudence and in an entirely intrasovereign context. Ali C. Rodriguez has described this as "further proof that the test is not circumscribed by double jeopardy jurisprudence."[311] It would seem to indicate, at minimum, that the *Blockburger* test and the dual sovereignty doctrine are distinct from one another and need not necessarily be applied together in the Sixth Amendment context.

Ultimately, because the plain text of *Cobb* is sufficiently ambiguous, and because the facts in *Cobb* implicated only two Texas state statutes, the

302. Texas v. Cobb, 532 U.S. 162, 173 (2001); *see also supra* note 147 and accompanying text.
303. *Cobb*, 532 U.S. at 173 n.3; *see also supra* note 148 and accompanying text.
304. *Coker*, 433 F.3d at 44–45; *see also supra* note 203 and accompanying text.
305. *See supra* note 120 and accompanying text.
306. *See supra* note 120 and accompanying text.
307. *See supra* Part II.A.
308. *See supra* note 181 and accompanying text.
309. *See supra* note 213 and accompanying text.
310. *See supra* notes 214–16 and accompanying text.
311. *See* Rodriguez, *supra* note 146, at 237.

Supreme Court will likely be free to issue an opinion on the basis of the jurisprudential and policy considerations that the circuit courts have addressed. This does not, of course, foreclose the possibility that the Court will simply read into *Cobb* one version or the other as a matter of "plain reading," as each of the circuits has done. In reviewing this circuit split, however, the Supreme Court should engage in a more searching inquiry that focuses on the policies and purposes of the Sixth Amendment, much as it did with the Fourth and Fifth Amendments in *Elkins v. United States* and *Murphy v. Waterfront Commission*.[312]

B. *The Silver Platter Doctrine in the Sixth Amendment Context*

The Sixth Amendment right to counsel has been long recognized as among the constitutional protections most critical to ensuring the conduct of fair criminal trials.[313] The Second Circuit rightly noted, however, that "a dual sovereignty exception would permit one sovereign to question a defendant whose right to counsel had attached, to do so in the absence of counsel and then to share the information with the other sovereign without fear of suppression."[314] This concern for the ability of sovereigns to circumvent fundamental procedural guarantees is a real one. As Judge Cyr of the First Circuit noted in his concurring opinion in *Coker*, "Read properly, *Cobb* does not . . . permit[] federal and state authorities to violate a defendant's Sixth Amendment right to counsel where they are prohibited from undertaking similar collusive actions with respect to Fourth Amendment and Fifth Amendment rights."[315]

There is a real concern that the dual sovereignty doctrine would produce a "silver platter" in the Sixth Amendment context as well where it allows one sovereign that has formally charged the defendant to admit at trial evidence secured by another that has not formally charged, even though the defendant can demonstrate that the charging statutes satisfy the *Blockburger* test. The sovereign that obtained this information could then share it with the prosecuting sovereign and use it as evidence against the defendant. Like the protections of the Fourth and Fifth Amendments, the Sixth Amendment right to counsel is a fundamental protection, lying at the heart of due process.[316] The Supreme Court has held that a defendant "requires the guiding hand of counsel at every step in the proceedings against him," and that the Sixth Amendment is necessary to ensure the defendant's individual liberty.[317]

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312. *See supra* Part I.D.

313. *See supra* Part I.A.

314. United States v. Mills, 412 F.3d 325, 330 (2d Cir. 2005); *see also supra* note 278 and accompanying text.

315. *See supra* notes 215–16 and accompanying text.

316. *See supra* Part I.A.

317. Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)); *see also supra* notes 6–7 and accompanying text.

At the same time, the "silver platter" problem that the Court addressed in *Elkins* and in *Murphy* was far more exaggerated. Because the Court was struggling to incorporate the Federal Bill of Rights against the states, individual federal defendants had been left with no recourse to challenge the admission of evidence in federal court gathered by state agents except via the Fourteenth Amendment "shocks the conscience" test.[318] By contrast, even without the simultaneous attachment of the Sixth Amendment right to counsel to essentially identical multisovereign offenses, the individual criminal defendant would still retain the full scope of his uninhibited Fifth Amendment rights during questioning by the noncharging sovereign.[319] The Fifth Amendment right to be free from compelled self-incrimination may function as a substantial proxy for the Sixth Amendment right to counsel.[320] Whereas the "shocks the conscience" test was applied unpredictably and as a post-hoc judicial review, the Fifth Amendment is prophylactic and may be invoked by a defendant at any time during questioning.[321]

Ultimately, however, it is troubling that the Sixth Amendment right to counsel would receive less reverence than companion procedural protections in the Fourth and Fifth Amendments. This is particularly true if the right to counsel is, as the Supreme Court has said, "necessary to insure fundamental human rights of life and liberty."[322]

C. *Issues of Sovereignty Considered in the Double Jeopardy and Sixth Amendment Contexts*

Dual sovereignty seems to be more readily balanced against individual interests in the double jeopardy context where, although there is a second prosecution, each must be internally consistent with procedural guarantees.[323] In *Heath v. Alabama*, Justice O'Connor noted that one sovereign could not be denied its inherent power to prosecute crimes simply because another had "won the race to the courthouse," and that "[a] State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of *its* own laws."[324] Had the Court in *Heath* held that the Fifth Amendment Double Jeopardy Clause should be read to proscribe any subsequent prosecution by another state or the federal government for essentially identical crimes, these would be apt concerns. But the absence of a strict dual sovereignty doctrine in the Sixth Amendment context does not raise parallel concerns for significant abridgment of state sovereignty or plenary

318. *See supra* note 75 and accompanying text.
319. *See supra* Part I.B.
320. *See supra* Part I.B.
321. *See supra* Part I.B.
322. Johnson v. Zerbst, 304 U.S. 458, 462 (1938).
323. *See supra* note 75 and accompanying text.
324. Heath v. Alabama, 474 U.S. 82, 92–93 (1985); *see also supra* note 105 and accompanying text.

power. Instead, it would merely place an affirmative burden on law enforcement to make themselves aware of existing or pending charges for the same underlying course of conduct by other sovereigns. Both the states and the federal government are required to observe Sixth Amendment protections after *Gideon v. Wainwright*,[325] and the Court has upheld affirmative duties on sovereigns in other right to counsel contexts.[326] In particular, the Court has sustained a general presumption of knowledge and information sharing between law enforcement officers and the courts.[327]

Judge Cyr is also correct that the dual sovereignty doctrine has had no application outside the double jeopardy context, perhaps because the procedural protections against unreasonable search and seizure and compelled self-incrimination, and in favor of the assistance of counsel, weigh more heavily in favor of the individual than does the Fifth Amendment Double Jeopardy Clause. In *Maine v. Moulton*,[328] the Court noted that liberalizing the Sixth Amendment regime could frustrate the public's interest in the investigation of criminal activities,[329] but it is unclear here that an affirmative duty would have this effect. It would, however, serve the public's interest in the preservation of procedural guarantees. The impact on overall sovereignty is significantly attenuated, and, as several of the circuits have pointed out, dual sovereignty here would essentially allow sovereigns to work together to prosecute defendants in a way that neither would be permitted to pursue alone.[330]

D. *Applicability of the Sham Prosecution Exception*

Though mere conversation between or sharing of resources by two prosecuting sovereigns does not alone give rise to an inference of collusion,[331] some proponents of the dual sovereignty doctrine have suggested that defendants may rely on the sham prosecution exception to the doctrine to protect their Sixth Amendment rights if such collusion is asserted.[332] Though some lower federal courts have inferred such an exception to the dual sovereignty doctrine from dicta in *Bartkus v. Illinois*,[333] it has never since been squarely recognized by the Supreme Court and does not appear to have been considered a sufficient safeguard against the admission of unreasonably seized evidence in *Elkins v. United States* or self-incriminating statements in *Murphy v. Waterfront Commission*.[334] Indeed, two circuits have questioned the very existence of

325. *See supra* note 7 and accompanying text.
326. *See supra* notes 8–10 and accompanying text.
327. *See supra* note 20 and accompanying text.
328. 474 U.S. 159 (1985).
329. *See supra* note 14 and accompanying text.
330. *See supra* Part II.B.
331. *See supra* notes 68–70 and accompanying text.
332. *See* Morrison, *supra* note 69, at 157; *see also* Lane, *supra* note 69, at 1909.
333. *See supra* notes 68–70 and accompanying text.
334. Indeed, though *Bartkus v. Illinois* was decided in 1959, the Supreme Court did not consider a sham prosecution exception as a possible safeguard of fundamental Fourth or

the exception.[335] Those courts that have recognized the exception have been extraordinarily wary in applying it.[336]

It would seem the larger problem inherent in applying this sham prosecution exception as part of dual sovereignty in the Sixth Amendment context is that courts have required, at minimum, a showing of intent to collude. In the Fourth Circuit, for example, a defendant would have to show that one sovereign was so dominated, controlled, or manipulated by the other as to have "had little or no independent volition in their proceedings."[337] Similarly, two recent decisions in the U.S. District Court for the Eastern District of Michigan have sustained sham prosecution challenges only where there was evidence of state officers functioning as part of a joint federal and state task force or clear evidence of manipulation of one sovereign by the other.[338] While this affirmative requirement of collusion may be appropriate for suspending the presumption that separate sovereigns will not be barred under a double jeopardy theory, Sixth Amendment protections have never ultimately turned on the intent of the government to violate them.[339] Clear coordination of resources and strategy alone may weigh heavily in favor of safeguarding defendants' Sixth Amendment right to counsel. As Judge Cyr noted, the purported exception "leaves out much of the mutual collusion of independent sovereigns which is the subject of *Elkins* and *Murphy*."[340] It is unclear whether the sham prosecution exception, even were the Supreme Court to recognize it, would combat the concern many have raised that the dual sovereignty doctrine would encourage governments to subvert individual Sixth Amendment protections.

E. *Dual Sovereignty and Cooperative Federalism*

The dual sovereignty doctrine, whatever its benefit to upholding the plenary power of separate sovereigns to prosecute as part of double jeopardy analysis, is inconsistent with safeguarding individual procedural guarantees in the Sixth Amendment context. The Supreme Court has previously recognized that limiting the scope of the dual sovereignty doctrine was necessary to safeguard defendants' Fifth Amendment protections in large part because the expanding federal effort to fight crime

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Fifth Amendment procedural guarantees in the multisovereign prosecutions addressed in *Elkins v. United States*, 364 U.S. 206 (1960), or *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964). *See supra* Part I.D.

335. *See supra* note 71 and accompanying text.

336. *See supra* note 72 and accompanying text.

337. *In re* Kunstler, 914 F.2d 505, 517 (4th Cir. 1990).

338. *See supra* note 72 and accompanying text.

339. The Sixth Amendment exclusionary rule is not limited to surreptitious police activity. *See generally* Michigan v. Jackson, 475 U.S. 625 (1986).

340. United States v. Coker, 433 F.3d 39, 50 (1st Cir. 2005) (Cyr, J., concurring); *see also supra* note 217 and accompanying text.

had brought about a new age of cooperative federalism.[341] Modern prosecutions take place in an infinitely more integrated federal environment.[342] Where two sovereigns prosecute the same individual under essentially identical statutes, the application of strict dual sovereignty may no longer be as readily justified.

1. The Exclusionary Rule After *Montejo*

The general Sixth Amendment ethos and the overall concern the Court addressed in *Michigan v. Jackson*[343] that led to the need for a broad and prophylactic exclusionary rule still exists in cross-sovereign prosecutions and is, if anything, reinforced by it. It is unclear how the interplay between the sovereigns would do anything but augment the need for affirmative Sixth Amendment duties on the part of government agents. Recall the language of the *Jackson* Court, responding to the claim that law enforcement officers would be unduly burdened to make themselves aware of pending indictments and arraignments:

> Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual. One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court).[344]

Yet, in deciding *Montejo*, the Supreme Court has taken a backward step in protecting defendants' Sixth Amendment rights, largely based on the Court's assumption that the *Jackson* prophylaxis is no longer necessary.[345] Writing for the majority, Justice Scalia specifically posed these questions:

> What does the *Jackson* rule actually achieve by way of preventing unconstitutional conduct? . . . A bright-line rule like that adopted in *Jackson* ensures that no fruits of interrogations made possible by badgering-induced involuntary waivers are ever erroneously admitted at trial.

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341. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55–56 (1964) (limiting dual sovereignty to protect the Fifth Amendment right against self-incrimination in part because the United States had entered an "age of 'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity").

342. *See, e.g.*, Bartkus v. Illinois, 359 U.S. 121, 123 (1959) (describing communication and cooperation between federal and state authorities as "the conventional practice between the two sets of prosecutors throughout the country"); United States v. 6 Fox St., 480 F.3d 38, 46 (1st Cir. 2007) (citing federal Drug Enforcement Administration provisions tasking the agency with the "development and maintenance of a National Narcotics Intelligence system in cooperation with Federal, State and local officials"); United States v. Antone, 603 F.2d 566, 570 (5th Cir. 1979) (finding that knowledge of a state official functioning as part of a joint federal-state investigation could be imputed to federal officials); *see also* ABRAMS & BEALE, *supra* note 80, at 64–72; O'HANLON, ET AL., *supra* note 80; Guerra, *supra* note 66; Litman & Greenberg, *supra* note 80, at 1322.

343. *See supra* Part I.A.3.

344. Michigan v. Jackson, 475 U.S. 625, 636 (1986); *see also supra* note 20 and accompanying text.

345. *See supra* notes 21–24 and accompanying text.

> But without *Jackson*, how many would be? The answer is few if any.[346]

Elsewhere in the opinion, Justice Scalia refers to the benefits of *Jackson* as "marginal," using this as justification for discarding its rule.[347] But this quantitative cost-benefit analysis, which the *Jackson* Court rejected, appears to undervalue the correspondingly greater risk of involuntary waivers that can take place in cross-sovereign investigations and interrogations. The concern is particularly apt where two states or a state and the federal government attempt to prosecute an individual under essentially identical charges in an environment of intersovereign communication and coordination.[348] It may be that the specter of multisovereign prosecutions is itself the answer to the questions posed by Justice Scalia in *Montejo*. If, as he generally suggests, "doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver,"[349] the cases comprising the current circuit split may illustrate the exceptions.

The argument can certainly be made, and will likely be made in future commentary, that *Montejo* itself answers the questions *Cobb* appears to have left open—establishing definitively that the Sixth Amendment cannot attach simultaneously to identical state and federal charges, not because of a dual sovereignty doctrine, but because criminal defendants may always invoke their Fifth Amendment protections during interrogation, and that these alone are sufficient. Indeed, *Montejo* did specifically foreclose at least one argument that has been advanced against the dual sovereignty doctrine—that legal ethics outside the Sixth Amendment should serve to make such waivers presumptively invalid.[350] But other compelling constitutionally grounded policy arguments remain. In *Murphy v. Waterfront Commission*, the Court held that strict dual sovereignty would frustrate the "policies and purposes" of the Fifth Amendment privilege.[351] Here too, an application of strict dual sovereignty, or a reading of *Montejo*

346. Montejo v. Louisiana, 129 S. Ct. 2079, 2089 (2009).

347. *See supra* note 23 and accompanying text.

348. *See supra* notes 341–42 and accompanying text.

349. *Montejo*, 129 S. Ct. at 2090.

350. The American Bar Association's (ABA) Model Rules of Professional Conduct mandate that "a lawyer shall not communicate about the subject of [a] representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 694 (2d ed. 2008) (discussing ABA Model Rule 4.2). At least one commentator had previously argued that the Model Rules might be enough to justify "broadening" the Sixth Amendment right to counsel, and that "[a] prosecutor's questioning of a suspect concerning uncharged offenses against the second sovereign, after his Sixth Amendment right to counsel has attached in the first offense, is a clear breach of this rule." *See* Lane, *supra* note 69, at 1901. *But see Montejo*, 129 S. Ct. at 2087 ("Montejo's rule appears to have its theoretical roots in codes of legal ethics, not the Sixth Amendment. . . . But the Constitution does not codify the ABA's Model Rules, and does not make investigating police officers lawyers.").

351. *See supra* note 84 and accompanying text.

that enforces it, threatens to frustrate the policies and purposes of the Sixth Amendment, at least in the context of multisovereign prosecutions. As the Second Circuit said in *Mills*, "We easily conclude that *Cobb* was intended to prevent such a result."[352]

2. The *Petite* Policy

The *Petite* policy, though it does reflect some of the earliest Supreme Court predictions as to the "benevolence" of the sovereigns,[353] is ultimately (1) a discretionary prosecutorial policy and not a matter of constitutional law; and (2) even when enforced by the DOJ, only a limitation on going forward with formal proceedings, not mere investigatory steps by the federal government, during which a Sixth Amendment violation may still occur.[354] The policy cannot be viewed as a sufficient safeguard of defendants' rights when one sovereign has already arraigned but a second is still in the investigatory phase. Even in drafting the policy, Attorney General Rogers noted that he "'doubt[ed] it [was] wise or practical to attempt to formulate detailed rules to deal with the complex situation which might develop,'"[355] perhaps anticipating that entangling federal and state prosecutions might ultimately require judicial reexamination.

CONCLUSION

The applicability of the dual sovereignty doctrine in the Sixth Amendment right to counsel context is an issue yet unanswered by the Supreme Court. The confusion resulting from circuit courts' reliance on the text of *Texas v. Cobb* owes principally to the fact that the Supreme Court's rejection of the "factually related" standard for Sixth Amendment attachment to two intrastate statutes did not authoritatively nor definitively address the issues presented in this Note. Not surprisingly, all the circuits to have considered this issue have attempted to draw conclusive authority from *Cobb* and have reached divergent results. If the Supreme Court has occasion to hear this issue as a matter of first impression it may issue a holding based on a "plain reading" of *Cobb*, adopting one of the readings of the circuit courts below, but will likely be better served by a more searching inquiry that considers the various jurisprudential and policy issues this conflict presents.

While it is clear that the Fifth Amendment right against compelled self-incrimination and the Sixth Amendment right to counsel serve different purposes and vary in both attachment and scope, the Sixth Amendment right to counsel hews more closely to the fundamental procedural protections embodied in the Fourth Amendment's prohibition of

352. *See supra* note 278 and accompanying text.

353. *See supra* note 108 and accompanying text.

354. *See supra* notes 110–18 and accompanying text.

355. United States v. Mechanic, 454 F.2d 849, 855–56 n.5 (8th Cir. 1971) (quoting Memorandum from William P. Rogers, U.S. Attorney General, *supra*, note 113).

unreasonable searches and seizures and the Fifth Amendment's prohibition of compelled self-incrimination than the Fifth Amendment's Double Jeopardy Clause. Judge Cyr's concurring opinion in the First Circuit most directly asks the relevant question of proponents of dual sovereignty here: why should the Sixth Amendment right to counsel receive less solicitude than its companion procedural protections in the Fourth and Fifth Amendments?[356] Dual sovereignty has not been applied outside the double jeopardy context and the Court has waived it in favor of other individual rights in the past.[357]

Strict reliance on the semantic or linguistic issues of "attachment" or "offense-specificity" loses sight of the larger relationship between sovereign authority and individual rights that the Court has always balanced in such cases. Unlike a rule that would allow only one sovereign to prosecute a criminal defendant for essentially identical offenses, waiving strict dual sovereignty in the Sixth Amendment context does not generally diminish a sovereign's plenary power to codify, investigate, and prosecute criminal activity and enforce its own laws. Rather, it merely establishes an affirmative duty, like so many that already exist, on the part of government officials to safeguard the individual rights of the criminal defendant.

While such a duty certainly does nothing to ease the burden on law enforcement or serve the interests of judicial economy, these considerations alone are simply not enough to countermand the constitutional insistence on fundamental criminal procedural guarantees. Cleaving to a dogmatic reliance on stare decisis or original understanding is similarly unavailing in the post-incorporation era. After *Gideon v. Wainwright*, all sovereigns in our federal system are required to uphold individual Sixth Amendment protections,[358] and as Professor Akhil Reed Amar and other scholars have pointed out, the balance between government and individual interests must always be viewed through the lens of the Fourteenth Amendment.[359] To the extent that the Court's recent holding in *Montejo* may be read to foreclose this inquiry, Justice Stevens will be proven correct in observing that "the dubious benefits [the Court] hopes to achieve are far outweighed by the damage it does to the rule of law and the integrity of the Sixth Amendment right to counsel."[360] As Justice Black so presciently noted in his *Bartkus* dissent, there is "nothing in the history of our Union, in the writings of its Founders, or elsewhere, to indicate that individual rights deemed essential by both State and Nation were to be lost through the combined operations of the two governments."[361]

356. *See supra* notes 215–16 and accompanying text.
357. *See supra* Part I.C–D.
358. *See supra* note 7 and accompanying text.
359. *See generally* Amar & Marcus, *supra* note 106.
360. Montejo v. Louisiana, 129 S. Ct. 2079, 2101 (2009) (Stevens, J., dissenting).
361. Bartkus v. Illinois, 359 U.S. 121, 155–56 (Black, J., dissenting); *see also supra* note 62 and accompanying text.