SUPREME COURT OF THE UNITED STATES

No. 99–1702

TEXAS, PETITIONER *v.* RAYMOND LEVI COBB

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

[April 2, 2001]

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

This case focuses upon the meaning of a single word, "offense," when it arises in the context of the Sixth Amendment. Several basic background principles define that context.

First, the Sixth Amendment right to counsel plays a central role in ensuring the fairness of criminal proceedings in our system of justice. See *Gideon* v. *Wainwright,* 372 U. S. 335, 344 (1963); *Powell* v. *Alabama,* 287 U. S. 45, 57 (1932).

Second, the right attaches when adversary proceedings, triggered by the government's formal accusation of a crime, begin. See *Brewer* v. *Williams,* 430 U. S. 387, 401 (1977); *Kirby* v. *Illinois,* 406 U. S. 682, 689 (1972); *Massiah* v. *United States,* 377 U. S. 201, 206 (1964).

Third, once this right attaches, law enforcement officials are required, in most circumstances, to deal with the defendant through counsel rather than directly, even if the defendant has waived his Fifth Amendment rights. See *Michigan* v. *Jackson,* 475 U. S. 625, 633, 636 (1986) (waiver of right to presence of counsel is assumed invalid unless accused initiates communication); *Maine* v. *Moulton,* 474 U. S. 159, 176 (1985) (Sixth Amendment gives defendant right "to rely on counsel as a 'medium' between him and the State"). Cf. ABA Model Rule of Professional Conduct

4.2 (2001) (lawyer is generally prohibited from communicating with a person known to be represented by counsel "about the subject of the representation" without counsel's "consent"); Green, A Prosecutor's Communications with Defendants: What Are the Limits?, 24 Crim. L. Bull. 283, 284, and n. 5 (1988) (version of Model Rule 4.2 or its predecessor has been adopted by all 50 States).

Fourth, the particular aspect of the right here at issue– the rule that the police ordinarily must communicate with the defendant through counsel– has important limits. In particular, recognizing the need for law enforcement officials to investigate "new or additional crimes" not the subject of current proceedings, *Maine* v. *Moulton, supra,* at 179, this Court has made clear that the right to counsel does not attach to any and every crime that an accused may commit or have committed, see *McNeil* v. *Wisconsin,* 501 U. S. 171, 175–176 (1991). The right "cannot be invoked once for all future prosecutions," and it does not forbid "interrogation unrelated to the charge." *Id.,* at 175, 178. In a word, as this Court previously noted, the right is "offense specific." *Id.*, at 175.

This case focuses upon the last-mentioned principle, in particular upon the meaning of the words "offense specific." These words appear in this Court's Sixth Amendment case law, not in the Sixth Amendment's text. See U. S. Const., Amdt. 6 (guaranteeing right to counsel "[i]n all criminal prosecutions"). The definition of these words is not self-evident. Sometimes the term "offense" may refer to words that are written in a criminal statute; sometimes it may refer generally to a course of conduct in the world, aspects of which constitute the elements of one or more crimes; and sometimes it may refer, narrowly and technically, just to the conceptually severable aspects of the latter. This case requires us to determine whether an "offense"– for Sixth Amendment purposes– includes factually related aspects of a single course of conduct other

than those few acts that make up the essential elements of the crime charged.

We should answer this question in light of the Sixth Amendment's basic objectives as set forth in this Court's case law. At the very least, we should answer it in a way that does not undermine those objectives. But the Court today decides that "offense" means the crime set forth within "the four corners of a charging instrument," along with other crimes that "would be considered the same offense" under the test established by *Blockburger* v. *United States,* 284 U. S. 299 (1932). *Ante,* at 9. In my view, this unnecessarily technical definition undermines Sixth Amendment protections while doing nothing to further effective law enforcement.

For one thing, the majority's rule, while leaving the Fifth Amendment's protections in place, threatens to diminish severely the additional protection that, under this Court's rulings, the Sixth Amendment provides when it grants the right to counsel to defendants who have been charged with a crime and insists that law enforcement officers thereafter communicate with them through that counsel. See, *e.g.*, *Michigan* v. *Jackson*, *supra,* at 632 (Sixth Amendment prevents police from questioning represented defendant through informants even when Fifth Amendment would not); *Rhode Island* v. *Innis,* 446 U. S. 291, 300, n. 4 (1980) (Fifth Amendment right, unlike Sixth, applies only in custodial interrogation).

JUSTICE KENNEDY, JUSTICE SCALIA, and JUSTICE THOMAS, if not the majority, apparently believe these protections constitutionally unimportant, for, in their view, "the underlying theory of *Jackson* seems questionable." *Ante*, at 1 (KENNEDY, J., concurring). Both the majority and concurring opinions suggest that a suspect's ability to invoke his Fifth Amendment right and "refuse any police questioning" offers that suspect adequate constitutional protection. *Ante,* at 8, n. 2 (majority opinion);

see also *ante*, at 2–3 (KENNEDY, J., concurring). But that is not so.

Jackson focuses upon a suspect– perhaps a frightened or uneducated suspect– who, hesitant to rely upon his own unaided judgment in his dealings with the police, has invoked his constitutional right to legal assistance in such matters. See *Michigan* v. *Jackson*, 475 U. S., at 634, n. 7 ("The simple fact that [a] defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly") (quoting *People* v. *Bladel*, 421 Mich. 39, 63–64, 365 N. W. 2d 56, 67 (1984)). *Jackson* says that, once such a request has been made, the police may not simply throw that suspect– who does not trust his own unaided judgment– back upon his own devices by requiring him to rely for protection upon that same unaided judgment that he previously rejected as inadequate. In a word, the police may not force a suspect who has asked for legal counsel to make a critical legal choice without the legal assistance that he has requested and that the Constitution guarantees. See *McNeil* v. *Wisconsin*, *supra*, at 177 ("The purpose of the Sixth Amendment counsel guarantee . . . is to 'protec[t] the unaided layman at critical confrontations' with his 'expert adversary'") (quoting *United States* v. *Gouveia,* 467 U. S. 180, 189 (1984)). The Constitution does not take away with one hand what it gives with the other. See *Gideon* v. *Wainwright,* 372 U. S., at 344 (Sixth Amendment means that a person charged with a crime need not "face his accusers without a lawyer to assist him"); *Michigan* v. *Jackson*, *supra*, at 633, 635 (presuming "that the defendant requests the lawyer's services at every critical stage of the prosecution" even if the defendant fails to invoke his Fifth Amendment rights at the time of interrogation); cf. *Edwards* v. *Arizona,* 451 U. S. 477, 484–485 (1981) (when accused has expressed desire to deal with police through counsel, police may not reinitiate interrogation until counsel has been

made available); ABA Ann. Model Rule of Professional Conduct 4.2, p. 398, comment. (4th ed. 1999) ("Rule 4.2 . . . exists to prevent lawyers from taking advantage of uncounseled laypersons and to preserve the integrity of the lawyer-client relationship").

For these reasons, the Sixth Amendment right at issue is independent of the Fifth Amendment's protections; and the importance of this Sixth Amendment right has been repeatedly recognized in our cases. See, *e.g.*, *Michigan* v. *Jackson*, *supra*, at 636 ("We conclude that the assertion [of the right to counsel] is no less significant, and the need for additional safeguards no less clear, when the request for counsel is made at an arraignment and when the basis for the claim is the Sixth Amendment").

JUSTICE KENNEDY primarily relies upon *Patterson* v. *Illinois,* 487 U. S. 285 (1988), in support of his conclusion that *Jackson* is not good law. He quotes *Patterson*'s statement that the Constitution does "'not ba[r] an accused from making an *initial* election as to whether'" to speak with the police without counsel's assistance. *Ante*, at 1–2 (quoting *Patterson* v. *Illinois*, *supra*, at 291).

This statement, however, cannot justify the overruling of *Jackson*. That is because, in *Patterson* itself, this Court noted, "as a matter of some significance," that, at the time he was interrogated, *the defendant had neither retained nor accepted the appointment of counsel*. 487 U. S., at 290, n. 3. We characterized our holding in *Jackson* as having depended upon "the fact that the accused 'ha[d] asked for the help of a lawyer' in dealing with the police," 487 U. S., at 291 (quoting *Michigan* v. *Jackson*, *supra*, at 631), and explained that, "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect," 487 U. S., at 290, n. 3 (citing *Maine* v. *Moulton*, 474 U. S., at 176).

JUSTICE KENNEDY also criticizes *Jackson* on the ground

that it prevents a suspect "from . . . making th[e] choice" to "give . . . a forthright account of the events that occurred." *Ante*, at 3. But that is not so. A suspect may initiate communication with the police, thereby avoiding the risk that the police induced him to make, unaided, the kind of critical legal decision best made with the help of counsel, whom he has requested.

Unlike JUSTICE KENNEDY, the majority does not call *Jackson* itself into question. But the majority would undermine that case by significantly diminishing the Sixth Amendment protections that the case provides. That is because criminal codes are lengthy and highly detailed, often proliferating "overlapping and related statutory offenses" to the point where prosecutors can easily "spin out a startlingly numerous series of offenses from a single . . . criminal transaction." *Ashe* v. *Swenson,* 397 U. S. 436, 445, n. 10 (1970). Thus, an armed robber who reaches across a store counter, grabs the cashier, and demands "your money or your life," may through that single instance of conduct have committed several "offenses," in the majority's sense of the term, including armed robbery, assault, battery, trespass, use of a firearm to commit a felony, and perhaps possession of a firearm by a felon, as well. A person who is using and selling drugs on a single occasion might be guilty of possessing various drugs, conspiring to sell drugs, being under the influence of illegal drugs, possessing drug paraphernalia, possessing a gun in relation to the drug sale, and, depending upon circumstances, violating various gun laws as well. A protester blocking an entrance to a federal building might also be trespassing, failing to disperse, unlawfully assembling, and obstructing Government administration all at one and the same time.

The majority's rule permits law enforcement officials to question those charged with a crime without first approaching counsel, through the simple device of asking

questions about any other related crime not actually charged in the indictment. Thus, the police could ask the individual charged with robbery about, say, the assault of the cashier not yet charged, or about any other uncharged offense (unless under *Blockburger*'s definition it counts as the "same crime"), all *without notifying counsel.* Indeed, the majority's rule would permit law enforcement officials to question anyone charged with any crime in any one of the examples just given about his or her conduct on the single relevant occasion without notifying counsel unless the prosecutor has charged every possible crime arising out of that same brief course of conduct. What Sixth Amendment sense— what common sense— does such a rule make? What is left of the "communicate through counsel" rule? The majority's approach is inconsistent with any common understanding of the scope of counsel's representation. It will undermine the lawyer's role as "'medium'" between the defendant and the government. *Maine* v. *Moulton, supra,* at 176. And it will, on a random basis, remove a significant portion of the protection that this Court has found inherent in the Sixth Amendment.

In fact, under the rule today announced by the majority, two of the seminal cases in our Sixth Amendment jurisprudence would have come out differently. In *Maine* v. *Moulton,* which the majority points out "expressly referred to the offense-specific nature of the Sixth Amendment right to counsel," *ante,* at 7, we treated burglary and theft as the same offense for Sixth Amendment purposes. Despite the opinion's clear statement that "[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses," 474 U. S., at 180, n. 16, the Court affirmed the lower court's reversal of both burglary and theft charges even though, at the time that the incriminating statements at issue were made, Moulton had been charged only with theft by receiving, *id.*, at 162, 167, 180.

Under the majority's rule, in contrast, because theft by receiving and burglary each required proof of a fact that the other did not, only Moulton's theft convictions should have been overturned. Compare Me. Rev. Stat. Ann., Tit. 17–A, §359 (1981) (theft) (requiring knowing receipt, retention, or disposal of stolen property with the intent to deprive the owner thereof), with §401 (burglary) (requiring entry of a structure without permission and with the intent to commit a crime).

In *Brewer* v. *Williams,* the effect of the majority's rule would have been even more dramatic. Because first-degree murder and child abduction each required proof of a fact not required by the other, and because at the time of the impermissible interrogation Williams had been charged only with abduction of a child, Williams' murder conviction should have remained undisturbed. See 430 U. S., at 390, 393–395, 406. Compare Iowa Code §690.2 (1950 and Supp. 1978) (first-degree murder) (requiring a killing) with Iowa Code §706.2 (1950) (repealed 1978) (child-stealing) (requiring proof that a child under 16 was taken with the intent to conceal the child from his or her parent or guardian). This is not to suggest that this Court has previously addressed and decided the question presented by this case. Rather, it is to point out that the Court's conception of the Sixth Amendment right at the time that *Moulton* and *Brewer* were decided naturally presumed that it extended to factually related but uncharged offenses.

At the same time, the majority's rule threatens the legal clarity necessary for effective law enforcement. That is because the majority, aware that the word "offense" ought to encompass something beyond "the four corners of the charging instrument," imports into Sixth Amendment law the definition of "offense" set forth in *Blockburger* v. *United States,* 284 U. S. 299 (1932), a case interpreting the Double Jeopardy Clause of the Fifth Amendment, which Clause uses the word "offence" but otherwise has no relevance

here. Whatever Fifth Amendment virtues *Blockburger* may have, to import it into this Sixth Amendment context will work havoc.

In theory, the test says that two offenses are the "same offense" unless each requires proof of a fact that the other does not. See *ante*, at 9 (majority opinion). That means that most of the different crimes mentioned above are not the "same offense." Under many States' laws, for example, the statute defining assault and the statute defining robbery each requires proof of a fact that the other does not. Compare, *e.g.*, Cal. Penal Code Ann. §211 (West 1999) (robbery) (requiring taking of personal property of another) with §240 (assault) (requiring attempt to commit violent injury). Hence the extension of the definition of "offense" that is accomplished by the use of the *Blockburger* test does nothing to address the substantial concerns about the circumvention of the Sixth Amendment right that are raised by the majority's rule.

But, more to the point, the simple-sounding *Blockburger* test has proved extraordinarily difficult to administer in practice. Judges, lawyers, and law professors often disagree about how to apply it. See, *e.g.*, *United States* v. *Woodward,* 469 U. S. 105, 108 (1985) *(per curiam)* (holding that lower court misapplied *Blockburger* test). Compare *United States* v. *Dixon,* 509 U. S. 688, 697–700 (1993) (opinion of SCALIA, J.) (applying *Blockburger* and concluding that contempt is same offense as underlying substantive crime), with 509 U. S., at 716–720 (REHNQUIST, C. J., concurring in part and dissenting in part) (applying *Blockburger* and deciding that the two are separate offenses). The test has emerged as a tool in an area of our jurisprudence that THE CHIEF JUSTICE has described as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." *Albernaz* v. *United States,* 450 U. S. 333, 343 (1981). Yet the Court now asks, not the lawyers and judges who ordinarily work with double

jeopardy law, but police officers in the field, to navigate *Blockburger* when they question suspects. Cf. *New York* v. *Belton,* 453 U. S. 454, 458 (1981) (noting importance of clear rules to guide police behavior). Some will apply the test successfully; some will not. Legal challenges are inevitable. The result, I believe, will resemble not so much the Sargasso Sea as the criminal law equivalent of Milton's "Serbonian Bog . . . Where Armies whole have sunk."

There is, of course, an alternative. We can, and should, define "offense" in terms of the conduct that constitutes the crime that the offender committed on a particular occasion, including criminal acts that are "closely related to" or "inextricably intertwined with" the particular crime set forth in the charging instrument. This alternative is not perfect. The language used lacks the precision for which police officers may hope; and it requires lower courts to specify its meaning further as they apply it in individual cases. Yet virtually every lower court in the United States to consider the issue has defined "offense" in the Sixth Amendment context to encompass such closely related acts. See *ante*, at 5, n. 1 (majority opinion) (citing cases from the Third, Fourth, Fifth, Sixth, and Ninth Circuits as well as state courts in Massachusetts and Pennsylvania); *Taylor* v. *State,* 726 So. 2d 841, 845 (Fla. Ct. App. 1999); *People* v. *Clankie,* 124 Ill. 2d 456, 462–466, 530 N. E. 2d 448, 451–453 (1988); *State* v. *Tucker*, 137 N. J. 259, 277–278, 645 A. 2d 111, 120–121 (1994), cert. denied, 513 U. S. 1090 (1995). These courts have found offenses "closely related" where they involved the same victim, set of acts, evidence, or motivation. See, *e.g.*, *Taylor* v. *State, supra,* at 845 (stolen property charges and burglary); *State* v. *Tucker*, *supra,* at 278, 645 A. 2d, at 121 (burglary, robbery, and murder of home's occupant); *In re Pack*, 420 Pa. Super. 347, 355–356, 616 A. 2d 1006, 1010 (1992) (burglary, receiving stolen property, and theft charges), appeal denied, 535 Pa. 669, 634 A. 2d 1117 (1993). They have found offenses

unrelated where time, location, or factual circumstances significantly separated the one from the other. See, *e.g.*, *Commonwealth* v. *Rainwater*, 425 Mass. 540, 547–549, and n. 7, 681 N. E. 2d 1218, 1224, and n. 7 (1997) (vehicle theft charge and earlier vehicle thefts in same area), cert. denied, 522 U. S. 1095 (1998); W*hittlesey* v. *State*, 340 Md. 30, 56–57, 665 A. 2d 223, 236 (1995) (murder and making false statements charges), cert. denied, 516 U. S. 1148 (1996); *People* v. *Dotson*, 214 Ill. App. 3d 637, 646, 574 N. E. 2d 143, 149 (murder and weapons charges), appeal denied, 141 Ill. 2d 549, 580 N. E. 2d 123 (1991).

One cannot say in favor of this commonly followed approach that it is perfectly clear– only that, because it comports with common sense, it is far easier to apply than that of the majority. One might add that, unlike the majority's test, it is consistent with this Court's assumptions in previous cases. See *Maine* v. *Moulton,* 474 U. S., at 162, 167, 180 (affirming reversal of both burglary and theft convictions); *Brewer* v. *Williams,* 430 U. S., at 389, 390, 393, 406 (affirming grant of habeas which vacated murder conviction). And, most importantly, the "closely related" test furthers, rather than undermines, the Sixth Amendment's "right to counsel," a right so necessary to the realization in practice of that most "noble ideal," a fair trial. *Gideon* v. *Wainwright,* 372 U. S., at 344.

The Texas Court of Criminal Appeals, following this commonly accepted approach, found that the charged burglary and the uncharged murders were "closely related." All occurred during a short period of time on the same day in the same basic location. The victims of the murders were also victims of the burglary. Cobb committed one of the murders in furtherance of the robbery, the other to cover up the crimes. The police, when questioning Cobb, knew that he already had a lawyer representing him on the burglary charges and had demonstrated their belief that this lawyer also represented Cobb in respect to

the murders by asking his permission to question Cobb about the murders on previous occasions. The relatedness of the crimes is well illustrated by the impossibility of questioning Cobb about the murders without eliciting admissions about the burglary. See, *e.g.*, Tr. 157 (Feb. 19, 1997) (testimony by police officer who obtained murder confession) ("Basically what he told us is he had gone over to the house to burglarize it and nobody was home"); 22 Record, State's Exh. 20 (typed statement by Cobb) (admitting that he committed the murders after entering the house and stealing stereo parts). Nor, in my view, did Cobb waive his right to counsel. See *supra*, at 4–5. These considerations are sufficient. The police officers ought to have spoken to Cobb's counsel before questioning Cobb. I would affirm the decision of the Texas court.

Consequently, I dissent.