Case Comments

Dual Sovereignty and the Sixth Amendment Right to Counsel

United States v. Bird, 287 F.3d 709 (8th Cir. 2002); *United States v. Avants*, 278 F.3d 510 (5th Cir.), *cert. denied*, 536 U.S. 968 (2002).

In *Texas v. Cobb*, the Supreme Court affirmed that the Sixth Amendment right to counsel is "offense specific" and attaches only to charged offenses.[1] Prior to *Cobb*, lower courts had created an exception to this rule, holding that the right to counsel also attached to any additional uncharged crimes that were "factually related" to a specific charged offense.[2] But *Cobb* rejected this exception and held that "offense" in the right-to-counsel context is synonymous with "offense" in the double jeopardy context.[3] For double jeopardy purposes, a single criminal act that violates both state and federal law constitutes two separate offenses, because it violates the laws of two separate sovereigns.[4] Thus, read literally, *Cobb* implies that the right to counsel can attach to a charged offense against one sovereign, but not to the same (uncharged) offense against a different sovereign.

In *United States v. Avants*, the Fifth Circuit adopted this literal reading and held that *Cobb* requires lower courts to incorporate the "dual sovereignty doctrine" described above into the Sixth Amendment definition of offense.[5] In contrast, the Eighth Circuit concluded in *United States v. Bird* that *Cobb* does not strictly require application of the dual sovereignty

1. 532 U.S. 162, 167 (2001) (internal quotation marks omitted).
2. *Id.* at 168; *see also id.* at 168 n.1 (citing cases).
3. *Id.* at 173.
4. *See, e.g.*, Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959).
5. 278 F.3d 510 (5th Cir.), *cert. denied*, 536 U.S. 968 (2002).

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doctrine.[6] Although *Avants* is more faithful to the plain language of *Cobb*, the decision is problematic because it invites collusion among state and federal law enforcement during pretrial investigations, creating the potential for cooperating sovereigns to circumvent a defendant's Sixth Amendment right to counsel. *Bird*, on the other hand, at least implicitly recognizes this collusion problem. As a result, its holding better comports with the purpose and spirit of the Sixth Amendment. This Comment sides with *Bird*'s outcome, but places the case on a firmer doctrinal foundation, arguing that the importation of dual sovereignty into Sixth Amendment doctrine runs counter to both the logic and the history of the post-incorporation Bill of Rights. Part I sets forth relevant Sixth Amendment doctrine and examines *Cobb*. Part II assesses *Avants* and *Bird*. Part III supplies a structural argument for *Bird*'s result, and concludes.

I

The purpose of the Sixth Amendment right to counsel is "to protec[t] the unaided layman at critical confrontations with his expert adversary."[7] Defendants possess this right in the pretrial phase because, in the Court's view, the time between the defendant's arraignment and the beginning of his trial is "perhaps the most critical period of the proceedings."[8] The Sixth Amendment right to counsel is offense-specific and attaches only to the charged offense.[9] Once the defendant invokes his right, any statements "deliberately elicited"[10] by law enforcement regarding that offense may not be used as evidence at trial unless either (1) the defendant's counsel has agreed to the interrogation, or (2) the defendant waived his right to counsel.[11] But given the practical difficulties in obtaining a waiver, police are effectively unable to elicit statements from a represented defendant unless the *defendant* initiates the conversation.[12]

Because the right to counsel is offense-specific, the distinction between the charged offenses to which the right attaches and other uncharged

6. 287 F.3d 709 (8th Cir. 2002).

7. McNeil v. Wisconsin, 501 U.S. 171, 177 (1991) (alteration in original) (internal quotation marks omitted).

8. Massiah v. United States, 377 U.S. 201, 205 (1964) (internal quotation marks omitted).

9. Texas v. Cobb, 532 U.S. 162, 172 (2001); *McNeil*, 501 U.S. at 175. The Sixth Amendment right stands in contrast to the Fifth Amendment right to counsel under *Miranda v. Arizona*, 384 U.S. 436 (1966). Once a defendant invokes his *Miranda* right to counsel, police must cease interrogation about offenses for which the suspect was arrested *or any other offense*. *See* Arizona v. Roberson, 486 U.S. 675, 677-78 (1988).

10. *Massiah*, 377 U.S. at 206.

11. *See* Brewer v. Williams, 430 U.S. 387, 403-04 (1977).

12. *See* Michigan v. Jackson, 475 U.S. 625, 626 (1986). In *Jackson*, the Court decided that, once invoked, the Sixth Amendment right to counsel cannot be validly waived during a police interrogation. *Id.* at 636.

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offenses is crucial. The Court recognized in *Texas v. Cobb* that "the definition of an 'offense' is not necessarily limited to the four corners of a charging instrument."[13] To determine just how far beyond the four corners courts were permitted to reach, the Supreme Court borrowed doctrine from another area of law where the definition of offense is crucial: double jeopardy. Specifically, *Cobb* imported the test of *Blockburger v. United States*, which states that a criminal act that violates two statutes will be considered two separate offenses when each violated statute "'requires proof of a fact which the other does not.'"[14] *Cobb* chose this test because it saw "no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel."[15] This statement is, at the very least, an invitation for lower courts to import dual sovereignty into Sixth Amendment jurisprudence.[16] If there is truly "no difference" between the meanings of offense in the double jeopardy and right-to-counsel contexts, then it follows that dual sovereignty—an integral part of the double jeopardy definition of offense—should be part of the right-to-counsel definition of offense as well.

The theory of dual sovereignty is simple: "[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."[17] Yet if federal and state charges for the same act are separate offenses for Sixth Amendment purposes, opportunities arise for cooperating sovereigns to undercut the right to counsel. First, federal officials acting in good faith could interrogate a defendant facing state charges without informing the defendant's lawyer, and could then provide those statements to the state prosecutor for use at trial—or use them in a federal prosecution for the same offense.[18] Second, state investigators could conduct the interrogation themselves, rendering its fruits inadmissible at a state trial, but potentially admissible in a subsequent federal trial for the same crime.[19]

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13. 532 U.S. at 173.

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

15. *Id.*

16. It is important to note that *Cobb* was a case involving two state crimes, and so dual sovereignty was never explicitly addressed. But other opinions besides *Avants* have also stated that the broad language used in *Cobb* invites application of the doctrine. *See, e.g.*, United States v. Coker, 298 F. Supp. 2d 184, 190 (D. Mass. 2003) (holding that the application of dual sovereignty to the right to counsel "though not reached in *Cobb*, logically follows from it").

17. 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); *see also id.* at 25-42 (sharply criticizing the definitions of sovereignty that underlie this formulation).

18. For a recent example of federal officials interrogating a defendant facing state charges, and then using his statements in a subsequent federal prosecution for the same offense, see *Coker*, 298 F. Supp. 2d 184.

19. *See, e.g.*, United States v. Bowlson, 240 F. Supp. 2d 678, 684 (E.D. Mich. 2003) (declining to apply dual sovereignty analysis out of a concern that states would be able to pass

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II

United States v. Avants interprets *Cobb* in a manner that permits the Sixth Amendment circumvention described in Part I. Ernest Henry Avants was indicted by Mississippi authorities for the 1966 murder of an elderly sharecropper. Avants obtained counsel and was released on bond pending state trial, but was subsequently questioned by two FBI agents about the murder. Despite having been apprised of his *Miranda* rights, Avants said that he "blew [the victim's] head off with a shotgun."[20]

Avants was acquitted of the state murder charge, but because the murder was committed in a national forest, the crime fell within federal jurisdiction. Thirty years later, a federal grand jury indicted Avants for the murder. Before trial, Avants moved to suppress the statements he had made to the FBI agents in 1967, arguing that they were taken in violation of his Sixth Amendment right to counsel. The Southern District of Mississippi agreed and suppressed the statements.[21] But the Fifth Circuit reversed, finding that the evidence was admissible under *Cobb* because the state and federal murder charges were separate offenses, and the right to counsel had attached only to the state charge when Avants confessed.[22] The court explained, "[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."[23] According to the Fifth Circuit, *Cobb* mandated this conclusion:

> 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. Stated differently, the Supreme Court has incorporated double jeopardy analysis, including the dual sovereignty doctrine, into its Sixth Amendment jurisprudence.[24]

Two points about *Avants* are worth emphasizing. First, the case involved a single criminal act that, despite being a violation of both federal

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inadmissible evidence to the federal government for prosecution). There are limits to the degree of cooperation state and federal governments can undertake. *See* Bartkus v. Illinois, 359 U.S. 121, 123-24 (1959) (suggesting an exception to the dual sovereignty doctrine for "sham prosecutions"). But this exception is exceedingly narrow. *See* Braun, *supra* note 17, at 59-64. Principles of agency law also limit the permitted degree of cooperation. *See* Byars v. United States, 273 U.S. 28, 33 (1927).

20. United States v. Avants, 278 F.3d 510, 513 (5th Cir.), *cert. denied*, 536 U.S. 968 (2002).
21. *See id.* at 514.
22. *Id.* at 522.
23. *Id.* at 517.
24. *Id.*

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and state law, would constitute a single "offense" under the *Blockburger* test. The Fifth Circuit readily conceded this point,[25] yet because the murder violated the laws of two separate sovereigns, the court held that the single criminal act nevertheless constituted two separate offenses for Sixth Amendment purposes.[26] Second, nothing in the opinion suggests that the court was concerned about the *relationship* between the sovereigns—whether they worked together, shared investigative resources, or consulted each other on prosecutorial decisions. In short, *Cobb*'s statement equating "offense" in the right-to-counsel context with "offense" in the double jeopardy context carries practically the entire weight of the Fifth Circuit's decision.

In sharp contrast, *Bird* declined to import dual sovereignty into its Sixth Amendment analysis, and did so with little explanation. Instead, it assessed the two crimes at issue—violations of federal law and Native American tribal law—solely through the lens of *Blockburger*. Andrew Red Bird, a Native American, was arraigned on a rape charge in Rosebud Sioux Tribal Court in the fall of 2000. As guaranteed by the tribe's constitution, Red Bird was appointed counsel at his arraignment.[27] Later that fall, tribal authorities informed the FBI of the rape charge, as rape is subject to concurrent federal jurisdiction when perpetuated by an "Indian in Indian Country."[28] An FBI agent and a tribal agent—both aware of the pending tribal charge as well as the fact that Red Bird was represented by counsel—together interrogated the defendant about the rape without permission from his attorney. Red Bird waived his *Miranda* rights and confessed. The following spring, a federal indictment charged Red Bird with four counts of aggravated sexual assault.[29]

Had the Eighth Circuit applied *Avants*'s interpretation of *Cobb*, it would have concluded that Red Bird's Sixth Amendment right had not been violated with respect to the federal charge.[30] Native American tribes and the federal government are separate sovereigns for double jeopardy purposes,[31] and the federal indictment had not yet been filed when Red Bird confessed to the FBI agent. Yet *Bird* held that the defendant's right to counsel attached to both the federal *and* tribal charges, and therefore affirmed the

25. *See id.* at 518 ("[T]he elements of the Mississippi murder statute and the federal murder statute are virtually identical." (citations omitted)).

26. *See id.*

27. The Bill of Rights and the Fourteenth Amendment do not apply directly to tribes. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1990). The Rosebud Sioux Tribal Constitution, however, includes a right to an attorney that the *Bird* court viewed as analogous to the Sixth Amendment right in state proceedings. United States v. Bird, 287 F.3d 709, 713 (8th Cir. 2002).

28. *Bird*, 287 F.3d at 711 (citing 18 U.S.C. § 1153 (2000)).

29. *Id.* at 711-12.

30. The court did not face the question of whether Red Bird's quasi-Sixth Amendment *tribal* right with respect to the *tribal* charge was violated, and so the subject is not addressed here.

31. United States v. Wheeler, 435 U.S. 313, 323 (1978), *cited in Bird*, 287 F.3d at 713.

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district court's suppression of the confession.[32] The Eighth Circuit found that "the tribal rape charge ha[d] identical essential elements when compared with the later federal charges filed,"[33] and concluded from this that the two offenses were the "same" under the *Blockburger* test. The court did "not believe that it [was] appropriate" to apply a dual sovereignty analysis,[34] yet it provided little doctrinal or historical support for this assertion, merely stating that "the tribal charge . . . initiated the federal investigation" and that "the tribe and the U.S. worked in tandem to investigate the rape."[35]

III

When constitutional rights have been threatened in the past, the Supreme Court has discarded the dual sovereignty doctrine: In the contexts of unreasonable searches and seizures and the privilege against self-incrimination, the Court has recognized that a constitutional right should not be circumvented simply because a crime violated the laws of separate sovereigns.[36] This same reasoning should apply to the Sixth Amendment right to counsel.

Yet the Supreme Court has painted lower courts into a doctrinal corner with its coarse reasoning in *Cobb*. First, if courts take seriously the idea that "offense" in the right-to-counsel context is equivalent to "offense" in the double jeopardy context, then the dual sovereignty doctrine—alive and well in double jeopardy jurisprudence—*must* apply with equal force to the right to counsel. Second, if the right to counsel is truly offense-specific, then federal, state, and tribal governments can do in tandem what none could do alone: deliberately elicit incriminating statements from the accused without the knowledge or presence of an attorney, and use those statements against the accused at a trial on the very matter for which the defendant is represented. This is the harsh result of *Avants*. *Bird* rejects this outcome by refusing to apply dual sovereignty to the right to counsel, but does so with minimal explanation. The remainder of this Comment attempts to supply a

32. *Bird*, 287 F.3d at 714-16.

33. *Id.* at 715 (internal quotation marks omitted).

34. *Id.*

35. *Id.* The court also mentioned that "tribal sovereignty is 'unique and limited' in character." *Id.* (quoting *Wheeler*, 435 U.S. at 323). To the extent that this factor would suggest that Native American tribes are not fully "sovereign" in their own right, and thus not susceptible to dual sovereignty analysis in the Sixth Amendment context, such a factor might provide a weak independent justification for the Eighth Circuit's ruling in *Bird*. This Comment's goal is somewhat more ambitious—to elaborate a doctrinal foundation for repudiating the dual sovereignty doctrine across all permutations of the Sixth Amendment right to counsel.

36. *See* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 11-15 (1995) (charting the process of incorporation of the Fourth and Fifth Amendments against the states and the subsequent erosion of the dual sovereignty doctrine).

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more robust doctrinal account by examining the Court's response to the impact of dual sovereignty on unreasonable searches and seizures and the privilege against self-incrimination.

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."[37] This result was justified by the fact that the Fourth Amendment exclusionary rule applied only to the federal government.[38] The state government—a separate sovereign—was not bound by the Bill of Rights.[39] But after incorporation, retaining the dual 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* addressed this problem by abandoning the dual sovereignty approach to unreasonable searches and seizures.[40] The *Elkins* Court believed that its holding would eliminate "inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards [would] be promoted and fostered."[41]

The Court faced a similar dilemma in the context of the Fifth Amendment privilege against compelled self-incrimination in *Murphy v. Waterfront Commission*.[42] After incorporation, a state could no longer compel incriminating testimony without a grant of immunity. However, dual sovereignty permitted the federal government to use that state-immunized testimony against the defendant in a federal trial for the same crime. Because this practice would frustrate the "policies and purposes" of the Fifth Amendment privilege, the Court discarded the dual sovereignty theory.[43] 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."[44]

Many of the same reasons that prompted the Supreme Court to abandon dual sovereignty in these Fourth and Fifth Amendment contexts apply with equal force in the Sixth Amendment context. Acting alone, neither the

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

38. *See id.* app. at 224 tbl.1 (charting the admissibility in state courts of evidence illegally seized by state officers).

39. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

40. *See Elkins*, 364 U.S. at 215 (reasoning that "[t]o the victim it matters not whether his constitutional right has been invaded by a federal agent or a state officer"). Shortly after *Elkins*, the Court held that the exclusionary rule applies to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961).

41. *Elkins*, 364 U.S. at 222.

42. 378 U.S. 52 (1964).

43. *Id.* at 55.

44. *Id.* at 77.

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federal government nor the state government can interrogate a represented defendant about a charged offense and use his statements at trial. Yet, as illustrated in the self-incrimination and search-and-seizure contexts, dual sovereignty principles would permit cooperation between sovereigns that could easily frustrate the purpose of the right to counsel. Dual sovereignty would enable one sovereign to question the defendant without a lawyer present while the defendant awaited trial before another sovereign. Should that questioning yield fruit, the prosecution could be handed off to whichever sovereign is in the best position to make use of the incriminating evidence.[45] Just as the Supreme Court focused on the rights of the individual in these Fourth and Fifth Amendment contexts, the Court should focus on the individual in the Sixth Amendment context as well. This focus is particularly appropriate in the current era of cooperative federalism, where joint federal-state investigations are ever-increasing[46] and federal and state jurisdiction overlap in nearly every substantive area of criminal law.[47]

Texas v. Cobb created doctrinal confusion, but the appropriate response is clear. As Justice Breyer noted in his *Cobb* dissent, "The Constitution does not take away with one hand what it gives with the other."[48] Dual sovereignty would take away what *Massiah* and its Sixth Amendment progeny have given; *Bird* was right to wink at some of *Cobb*'s sweeping language and protect the substance of the Sixth Amendment right. This Comment provides a firm foundation for that decision by treating the right to counsel in the same manner as the Court has treated the constitutional protections against unreasonable searches and seizures and against compelled self-incrimination.

—*David J. D'Addio*

45. None of this necessarily entails bad faith on the part of either government, nor need it entail "hand-in-glove" cooperation, Braun, *supra* note 17, at 72 (internal quotation marks omitted), that might otherwise render the practice unconstitutional.

46. *See id.* at 7-9; *see also* Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 297-99 (1992) (describing federal-state cooperation in the enforcement of drug laws).

47. *See* 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 feat."). Although these criticisms of dual sovereignty are global, the Court need not abandon the doctrine in all contexts: The doctrine could still play a limited role in double jeopardy law, even if it were abandoned elsewhere. For instance, Akhil Amar and Jonathan Marcus argue that although the Fourteenth Amendment has "rendered [dual sovereignty] largely obsolete," Amar & Marcus, *supra* note 36, at 19, the doctrine may protect the federal government's Fourteenth Amendment interest in prosecuting abusive state officials when the states themselves fail to do so, *id.* at 16-19.

48. Texas v. Cobb, 532 U.S. 162, 180 (Breyer, J., dissenting).

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