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## United States v. Covarrubias: Does the Ninth Circuit Add to the Ambiguity of the Inextricably Intertwined Exception?

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## NOTE

# ***UNITED STATES v. COVARRUBIAS:* DOES THE NINTH CIRCUIT ADD TO THE AMBIGUITY OF THE INEXTRICABLY INTERTWINED EXCEPTION?**

### **I. INTRODUCTION**

In 1991, the United States Supreme Court in *McNeil v. Wisconsin*<sup>1</sup> held that the Sixth Amendment to the United States Constitution right to counsel is offense specific.<sup>2</sup> The offense specific requirement prohibits government initiated interrogation regarding an offense to which the right to counsel has attached.<sup>3</sup> However, many federal circuit and state

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<sup>1</sup> See *McNeil v. Wisconsin*, 501 U.S. 171 (1991).

<sup>2</sup> See *McNeil*, 501 U.S. at 175. The *McNeil* court relied on *Maine v. Moulton*, 474 U.S. 159, 179-180 (1985) in recognizing that the police have an interest in investigating new or additional crimes. See *id.* at 175-176. The *McNeil* court then reasoned that to 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. See *id.* at 176. Furthermore, the *McNeil* Court maintained that any departure from the offense specific nature of the Sixth Amendment right to counsel would have the unacceptable entailment that most persons in pretrial custody for serious offenses would be unapproachable by police officers suspecting them of involvement in other crimes, even though they have never expressed any unwillingness to be questioned. See *id.* at 181.

<sup>3</sup> See *McNeil*, 501 U.S. at 175. The *McNeil* court explained that the Sixth Amendment right to counsel is offense specific because this right does not attach until the initiation of adversary judicial proceedings. See *id.* To hold otherwise would seriously impede effective law enforcement. See *id.* at 181. The Sixth Amendment states, in

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courts recognize two exceptions to the offense specific requirement.<sup>4</sup> First, the offense specific requirement does not apply if the two offenses are inextricably intertwined such that the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense.<sup>5</sup> Second, the offense specific requirement does not apply if the government breaches its affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.<sup>6</sup> Based on these two excep-

pertinent part: "The accused shall enjoy the right to...have the Assistance of counsel for his defence." See U.S. CONST. amend. VI.

<sup>4</sup> See *Taylor v. Florida*, 726 So.2d 841, 844-845 (1st Cir. 1999); *United States v. Mitcheltree*, 940 F.2d 1329, 1341-1342 (10th Cir. 1991); *United States v. Melgar*, 139 F.3d 1005, 1013-15 (4th Cir. 1998); *United States v. Arnold*, 106 F.3d 37, 41-42 (3d Cir. 1997); *United States v. Cooper*, 949 F.2d 737, 743-44 (5th Cir. 1991); *Whittlesey v. Maryland*, 665 A.2d 223, 236 (Md. 1995); *People v. Clankie*, 530 N.E.2d 448, 451-453 (Ill. 1988); *United States v. Terzado-Madruga*, 897 F.2d 1099, 1109-1110 (11th Cir. 1990); *United States v. Hines*, 963 F.2d 255, 257-258 (9th Cir. 1992); *United States v. Kidd*, 12 F.3d 30, 33-34 (4th Cir. 1993).

<sup>5</sup> See *United States v. Cooper*, 949 F.2d 737, 743-744 (5th Cir. 1991) (uncharged federal offense of unlawful possession of an unregistered firearm was not inextricably intertwined with pending state charge of armed robbery); *United States v. Hines*, 963 F.2d 255, 257-258 (9th Cir. 1992) (uncharged federal offense of firearms not inextricably intertwined with same state offense); *United States v. Kidd*, 12 F.3d 30, 33-34 (4th Cir. 1993) (series of cocaine sales were not inextricably intertwined with the cocaine sale that post-dated arraignment); *United States v. Arnold*, 106 F.3d 37, 41-42 (3d Cir. 1997) (intimidation of witness was closely related with attempted murder of the same witness); *Hendricks v. Vasquez*, 974 F.2d 1099, 1104-1105 (9th Cir. 1992) (interstate flight to avoid prosecution was not inextricably intertwined with murder); *United States v. Nocella*, 849 F.2d 33, 37-38 (1st Cir. 1988) (the federal crime of distributing or conspiring to distribute cocaine was not inextricably intertwined with earlier state charges of possession of marijuana); *United States v. Carpenter*, 963 F.2d 736, 740-741 (5th Cir. 1992) (the firearm charge was not inextricably intertwined with burglary charge); *United States v. Mitcheltree*, 940 F.2d 1329, 1341-1342 (10th Cir. 1991) (witness tampering was closely related with charged MDMA accounts); *United States v. Walker*, 148 F.3d 518, 529-530 (5th Cir. 1998) (suborning of perjury was not inextricably intertwined with the charged possession of firearm offense); *People v. Clankie*, 530 N.E.2d 448, 451-453 (Ill. 1988) (three burglary offenses were inextricably intertwined).

<sup>6</sup> See *Maine v. Moulton*, 474 U.S. 159, 176 (1985). If the federal and state authorities worked together in shuffling the defendant's charge from the state to the federal system, the defendant may suppress evidence based on the circumvention of right exception. See *United States v. Martinez*, 972 F.2d 1100, 1105 (9th Cir. 1992). See also *United States v. Mitcheltree*, 940 F.2d 1329, 1342-1343 (10th Cir. 1991); *United States v. Melgar*, 139 F.3d 1005, 1013-1015 (4th Cir. 1998); *United States v. Arnold*, 106 F.3d 37, 41-42 (3d Cir. 1997); *United States v. Kidd*, 12 F.3d 30, 33-34 (4th Cir. 1993); *United States v. Cooper*, 949 F.2d 737, 743-44 (5th Cir. 1991); *Hendricks v. Vasquez*, 974 F.2d 1099, 1104-1105 (9th Cir. 1992); *United States v. Hines*, 963 F.2d 255, 257-

tions, many defendants claim that their incriminating statements regarding a prospective charge should be suppressed.<sup>7</sup> The United States Court of Appeals for the Ninth Circuit addressed one such challenge in *United States v. Covarrubias*.<sup>8</sup>

In *Covarrubias*, the Ninth Circuit held that the Sixth Amendment right to counsel attached only to Covarrubias' and Ochoa's state kidnapping offense, not the federal crime of transporting an illegal alien.<sup>9</sup> Thus, the government was prohibited from initiating an interrogation concerning the state kidnapping offense.<sup>10</sup> Nevertheless, the Ninth Circuit held that, because the crime of kidnapping and transporting illegal aliens were inextricably intertwined, the statements made to United States Immigration and Naturalization Service (hereinafter, "I.N.S.") Agent Gonzalez must be suppressed.<sup>11</sup>

In Part II, this Note discusses *Covarrubias*' facts and procedural history. Part III outlines the history of the Sixth Amendment right to counsel, with an emphasis on the inextricably intertwined exception. Part IV analyzes the Ninth Circuit's reasoning in *Covarrubias*. Part V critiques this reasoning in light of the strong presumption against the finding of the application of the inextricably intertwined exception. Finally, Part VI concludes that the Ninth Circuit properly suppressed

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258 (9th Cir. 1992); *People v. Clankie*, 530 N.E.2d 448, 451-452 (Ill. 1988); *Whittlesey v. Maryland*, 665 A.2d 223, 235 (Md. 1995); *United States v. Terzado-Madruga*, 897 F.2d 1099, 1109-1110 (11th Cir. 1990); *Taylor v. Florida*, 726 So. 2d 841, 844 (1st Cir. 1999).

<sup>7</sup> See *supra* notes 5-6 and accompanying text.

<sup>8</sup> See *United States v. Covarrubias*, 179 F.3d 1219 (9th Cir. 1999). The appeal from the United States District Court for the Eastern District of Washington was argued and submitted March 9, 1999 before Circuit Judge William A. Fletcher, Circuit Judge Stephen R. Reinhardt and Circuit Judge Sidney R. Thomas. The decision was filed on June 14, 1999. Circuit Judge Reinhardt authored the opinion.

<sup>9</sup> See *id.* at 1223. The right to counsel attached to the state kidnapping charge at the defendants' preliminary hearing, when adversarial judicial proceedings had been initiated against the defendants. See *id.*

<sup>10</sup> See *id.*

<sup>11</sup> See *id.* at 1226. The Ninth Circuit did not consider the second exception, the circumvention of the Sixth Amendment right, because either exception provides an independent basis for suppressing evidence. See *Covarrubias*, 179 F.3d at 1226.

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the defendant's incriminating statements obtained by I.N.S. Agent Gonzalez, but would have set forth a stronger position had the Ninth Circuit evaluated in addition, or, in the alternative, under the circumvention of right exception.

## II. FACTS AND PROCEDURAL HISTORY

On December 18, 1997, defendants Covarrubias and Ochoa drove eight individuals, some of whom may have been undocumented immigrants, from Los Angeles, California to Washington state in Covarrubias' van in return for payment.<sup>12</sup> Due to a dispute over money, Covarrubias and Ochoa dropped everyone off in Washington except Hernandez.<sup>13</sup> Subsequently, Hernandez's wife contacted the police and told them that the Covarrubias and Ochoa held Hernandez for ransom.<sup>14</sup> The police supplied Mrs. Hernandez with \$700.00 of marked currency to meet the ransom demands.<sup>15</sup> When Mrs. Hernandez handed over the marked currency to Covarrubias and Ochoa, the police arrested them.<sup>16</sup>

Aware that Hernandez was in the United States illegally, the officers at Sunnyside Police Department had previously enlisted the services of I.N.S. Agent Gonzalez.<sup>17</sup> At the Sun-

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<sup>12</sup> See *id.* at 1221.

<sup>13</sup> See *id.* Apparently, the defendants called Mrs. Hernandez who was in Sunnyside and told her that they were transporting her husband. See Brief for Appellant at 8, *United States v. Covarrubias*, Order Granting in Part and Denying in Part Defendant's Motion to Suppress (No. CA-98-30167).

The defendants forced Mr. Hernandez back into Covarrubias' van once Mrs. Hernandez was unable to pay. See *id.*

<sup>14</sup> See *Covarrubias*, 179 F.3d at 1221. The Ninth Circuit believed that the police had reason to believe that Hernandez was being held against his will because Hernandez's wife told the police that the defendants were holding him for ransom. See *id.*

<sup>15</sup> See *id.* With Hernandez's wife's cooperation, the Sunnyside police officers executed a plan to apprehend the defendants. See *id.* The police gave her \$700 to give to the defendants so that she could retrieve her husband. See *id.*

<sup>16</sup> See *Covarrubias*, 179 F.3d at 1221.

<sup>17</sup> See *id.* The State argued that although Agent Gonzalez participated in the planning of the arrest and the arrest itself, it did not necessarily indicate collusion between the state and federal agents, since the I.N.S. agents frequently assist the Sunnyside

nyside Police Department, Detective Jose Trevino questioned Covarrubias while Officer Jarin Whitely<sup>18</sup> questioned Ochoa regarding the kidnapping charge.<sup>19</sup> Covarrubias and Ochoa made incriminating statements regarding both the pending kidnapping and the federal illegal transportation charges.<sup>20</sup> After the interviews, the defendants were transported to the Yakima County Jail.<sup>21</sup>

The following day, December 19, 1997, Covarrubias and Ochoa appeared for a preliminary hearing on the state kidnapping charge before the Superior Court of the State of Washington.<sup>22</sup> The court appointed counsel for both defendants.<sup>23</sup> Later that day, I.N.S. Agent Gonzalez visited Yakima County Jail to interview the defendants upon reading both defendants their Miranda rights.<sup>24</sup> Both defendants waived their Miranda

Police Department and go to the Sunnyside jail every day. *See* Appellants' Brief at 19-20, *Covarrubias* (No. CA-98-30167).

<sup>18</sup> It should be noted that the District Court used the name "Officer Whitby," whereas the Ninth Circuit used the name "Officer Whitely." It appears that the two names refer to the same person. For ease of reference, Officer Whitely will be used hereafter.

<sup>19</sup> *See Covarrubias*, 179 F.3d at 1221.

<sup>20</sup> *See id.* at 1221 n.2, n.1. The police asked who the van belonged to, how the defendants came to Sunnyside (which Covarrubias answered by explaining his agreement to transport Hernandez and the financial arrangement that was made), how many other individuals were transported to Washington State, whether Hernandez was detained against his will, and the nationality of the individuals involved in transporting. *See id.* at n.2. Covarrubias and Ochoa told the police officers that Covarrubias and Ochoa claimed that Hernandez's wife was supposed to meet them with \$900, \$200 of which was to pay them for the ride and the remainder of which was to reimburse them for a \$700 payment they made on Hernandez's behalf to the people who had brought him across the Mexican border. *See id.* at n.1.

<sup>21</sup> *See id.* at 1222.

<sup>22</sup> *See Covarrubias*, 179 F.3d at 1222. To be guilty of the state offense of First Degree Kidnapping, a person must intentionally abduct another person with the intent to hold him for ransom or reward, or as a shield or hostage. *See* Revised Code of Washington 9A.040.020.

<sup>23</sup> *See Covarrubias*, 179 F.3d at 1222.

<sup>24</sup> *See id.* The Fifth Amendment states, in pertinent part: "No person...shall be compelled in any criminal case to be a witness against himself." *See* U.S. CONST. amend. V. In interpreting the Fifth Amendment, the United States Supreme Court held that the Fifth Amendment requires government officials during a custodial interrogation to warn a defendant that he or she has a right to remain silent, right to the

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rights.<sup>25</sup> Then, Gonzalez proceeded to interrogate Covarrubias and Ochoa regarding the potential federal charge of transporting illegal aliens and the state kidnapping charge.<sup>26</sup>

On February 5, 1998, the state dismissed without prejudice its criminal kidnapping charges against Covarrubias and Ochoa because of an alleged promise of federal prosecution for charges arising out of the same incident.<sup>27</sup> On March 3, 1998, Covarrubias and Ochoa were indicted with two federal charges: transporting and moving an illegal alien in violation of 8 U.S.C. § 1324 (a) (1) (B) and forfeiture.<sup>28</sup>

presence of attorney whether retained or appointed, and that any statement may be used as evidence against him or her in order to preserve the Fifth Amendment right against self-incrimination. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Therefore, the Fifth Amendment limits the government's ability to use defendant's self incriminating statements as evidence in a criminal proceeding. See *Moran v. Burbine*, 475 U.S. 412, 421 (1986). In order for these statements to be admissible, these statements must be made knowingly, voluntarily and intelligently. See *id.* Further, a defendant's invocation of his Sixth Amendment right to counsel during judicial proceeding does not constitute an invocation of the right to counsel derived by *Miranda v. Arizona*, from the Fifth Amendment's guarantee against compelled self-incrimination. See *Maine v. Moulton*, 474 U.S. 159, 175-182 (1985).

<sup>25</sup> See *Covarrubias*, 179 F.3d at 1221-1222. The district court made a specific finding that both defendants voluntarily waived their Miranda rights to the Sunnyside police officers and I.N.S. Agent Gonzalez. See Order Granting in Part and Denying in Part Defendants' Motion to Suppress at 3-5, *United States v. Covarrubias* (No. CR-98-2030-RHW, No. CR-98-2031-RHW).

<sup>26</sup> See *Covarrubias*, 179 F.3d at 1222 n.4. I.N.S. While the defendants were formally charged with a kidnapping offense, I.N.S. Agent Gonzalez asked questions about the defendants' immigration status, their transporting of other illegal immigrants to Washington state and the financial arrangements for the trip, the defendants' prior experience with transporting illegal immigrants, their knowledge of the immigration status of the individuals they were transporting, what had happened regarding Hernandez's inability to pay, whether Hernandez had been forced to remain in the van against his will, what statements the defendants had made to Hernandez, and whether Hernandez had been kidnapped for ransom. See *id.* Although I.N.S. Agent Gonzalez argued that he was not aware that the defendants had been arraigned and counsel had been appointed, the court imputed knowledge to Agent Gonzalez, given his experience, that he was aware that the defendants had been arraigned and counsel had been appointed. See *id.* at 1222 n.3.

<sup>27</sup> See *id.* at 1222. Agent Gonzalez denied any promise of federal prosecution. See *Covarrubias*, 179 F.3d at 1222 n.5.

<sup>28</sup> See *id.* at 1222. The Ninth Circuit addressed only the Sixth Amendment right to counsel claim. See *id.*

8 U.S.C. § 1321 (a)(1)(B) states, in pertinent part:

On or about April 10, 1998, Covarrubias and Ochoa brought a motion to suppress the statements made to Officer Whitley and Detective Trevino.<sup>29</sup> Additionally, the defendants sought to suppress their statements made to I.N.S. Agent Gonzalez.<sup>30</sup> Both motions alleged Fifth Amendment,<sup>31</sup> Sixth Amendment,<sup>32</sup> and Vienna Convention violations.<sup>33</sup> At the close of the evidentiary hearing on May 22, 1998, the United States District Court for the Eastern District of Washington rejected the defendant's Fifth Amendment<sup>34</sup> and Vienna Convention claims.<sup>35</sup> Further, the district court denied the motion to suppress the

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A person who violates (A) shall, for each alien be fined under title 18, United States Code. (A) Criminal penalties apply to any person who knows that a person is an alien, knowingly brings to or attempts to bring to the United States in any manner whatsoever...knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien with the United States by means of transportation or otherwise, in furtherance of such violation of law; knowing or in reckless disregard...conceals, harbors, or shields from detection...including any builder or any means of transportation; encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard will be in violation of law; or engages in any conspiracy to commit any order of the preceding acts, or aids and abets the commission.

<sup>29</sup> See *Covarrubias*, 179 F.3d at 1222.

<sup>30</sup> See *id.* at 1222-1223.

<sup>31</sup> See *supra* note 24 and accompanying text.

<sup>32</sup> See *Covarrubias*, 179 F.3d at 1222-1223. The Sixth Amendment states, in pertinent part: "The accused shall enjoy the right to...have the Assistance of counsel for his defence." See U.S. CONST. amend. VI.

<sup>33</sup> See *Covarrubias*, 179 F.3d at 1222-1223. Ochoa also argued that all of his statements must be suppressed because the investigating officers violated the Vienna convention by not advising him of his right to consult with Mexican consular officials. See Order Granting in Part and Denying in Part at 6, *Covarrubias* (No. CR-98-2030-RHW, No. CR-98-2031-RHW). Article 36 of the Vienna Convention of Consular Relations, which states that a citizen of a party-State who is arrested by authorities of another party-State shall be advised of the right to consult with consular officials. See 21 U.S.T. 77, Art. 36.

<sup>34</sup> See Order Granting in Part and Denying in Part at 7-8, *Covarrubias* (No. CR-98-2030-RHW, No. CR-98-2031-RHW).

<sup>35</sup> See *id.* at 12-13. Relying on *In re Estate of Ferdinand Marcos*, Human Rights Litig., 978 F.2d 493, 503 (9th Cir. 1992), the district court held that treaty-created rights are not enforceable by individuals unless they are either the subject of the implementing legislation or are deemed self executing, and therefore, the district court denied Ochoa's motion to suppress because Ochoa points to no implementing statute or regulation that would make the treaty effective. See *id.*



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statements made to Officer Whitely and Detective Trevino, who were investigating the state kidnapping offense.<sup>36</sup>

However, the district court found that the Sixth Amendment right to counsel had attached to the state kidnapping charge.<sup>37</sup> As a result, the district court granted the motion to suppress only statements regarding the violation of the Sixth Amendment regarding the federal charge of transporting illegal aliens.<sup>38</sup> Accordingly, the district court suppressed the incriminating statements made to I.N.S. Agent Gonzalez concerning the defendants' transportation of illegal aliens from California to Washington.<sup>39</sup>

On May 28, 1998, the government filed an interlocutory appeal.<sup>40</sup> Under review, the Ninth Circuit concluded that the crime of kidnapping and the federal transporting charges were inextricably intertwined.<sup>41</sup> Therefore, the Ninth Circuit af-

<sup>36</sup> See *Covarrubias*, 179 F.3d at 1222-1223. See also *supra* notes 25, 33 and accompanying text.

<sup>37</sup> See Order Granting in Part and Denying at 8, *Covarrubias* (No. CR-98-2030-RHW, No. CR-98-2031-RHW). "It is not disputed that Defendants' Sixth Amendment rights to counsel had attached and were invoked when they were appointed counsel during their preliminary hearings." *Id.*

<sup>38</sup> See *id.* The district court acknowledged that the Sixth Amendment right is offense specific. See *id.* at 9-10. The court concluded that the two exceptions to this rule caused the right to counsel to extend to the federal charges because 1) federal transporting charges was so inextricably intertwined with the state kidnapping charge; and 2) by questioning the defendants, who had been arrested and charged as a result of a joint state-federal effort, the federal government had acted to circumvent the defendants' right to counsel. See *id.*

<sup>39</sup> See Order Granting in Part and Denying at 13-14, *Covarrubias* (No. CR-98-2030-RHW, No. CR-98-2031-RHW).

<sup>40</sup> See *Covarrubias*, 179 F.3d at 1223. See also Notice of Appeal at 1, *United States v. Covarrubias* (No. 98-30167).

<sup>41</sup> See *Covarrubias*, 179 F.3d at 1226. For clarity, closely related, extremely closely related and inextricably intertwined all apparently seem to refer to the same exception. See *id.* at 1223 (using closely related and inextricably intertwined interchangeably); *Commonwealth v. Rainwater*, 681 N.E. 2d 1218, 1223 (Mass. 1997) (characterizing closely related and inextricably intertwined as "two terms which we take to mean the same thing"); *United States v. Melgar*, 139 F.3d 1005, 1011 (4th Cir. 1998) (using closely related and inextricably intertwined interchangeably); *United States v. Arnold*, 106 F.3d 37, 40-41 (3rd Cir. 1997) (characterizing closely related and inextricably intertwined as "two terms which we take to mean the same thing."); *United States v.*

firmed the district court's ruling that ordered suppression of the incriminating statements.

### III. BACKGROUND

#### A. SIXTH AMENDMENT RIGHT TO COUNSEL

The Sixth Amendment to the United States Constitution guarantees the right to have assistance of counsel in all criminal prosecutions.<sup>42</sup> In addition, the Sixth Amendment affords a defendant the right to rely on counsel as a medium between the defendant and the State.<sup>43</sup> The United States Supreme Court views the right to counsel as indispensable to the fair administration of our adversarial system of criminal justice.<sup>44</sup> However, the Sixth Amendment explicitly guarantees the right to counsel only upon the initiation of formal charges.<sup>45</sup>

Carpenter, 963 F.2d 736, 740-41 (5th Cir. 1992) (extremely closely related used along with inextricably intertwined).

<sup>42</sup> See U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the Assistance of Counsel for his defence." *Id.*

<sup>43</sup> See *Maine v. Moulton*, 474 U.S. 159, 176 (1985). The *Powell* court was the first major case where the United States Supreme Court discussed the Sixth Amendment right to counsel. See *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

<sup>44</sup> See generally *Moran v. Burbine*, 475 U.S. 412, 428 (1986); *Moulton*, 474 U.S. at 170; *Kirby v. Illinois*, 406 U.S. 682, 687 (1972); *Brewer v. Williams*, 430 U.S. 387, 401 (1977); *Michigan v. Jackson*, 475 U.S. 625, 636 (1986); *Hoffa v. United States*, 385 U.S. 293, 308 (1966); *Illinois v. Perkins*, 496 U.S. 292 (1990); *Gideon v. Wainwright*, 372 U.S. 335, 344-345, (1963); *Powell*, 287 U.S. at 68-69 (1932); *Massiah v. United States*, 377 U.S. 201, 206 (1964). "In sum, the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." See *United States v. Wade*, 388 U.S. 218, 227 (1967).

<sup>45</sup> See *Moran*, 475 U.S. at 431. For a discussion of the purpose and meaning of the Sixth Amendment right to counsel, see Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L. J. 641, 705-711 (1996); Charles E. Torcia, 3 Wharton's Criminal

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In *Kirby v. Illinois*,<sup>46</sup> the United States Supreme Court ruled that the Sixth Amendment right to counsel attaches only at or immediately after the initiation of an adversarial judicial proceeding whether by way of formal charge, preliminary hearing, indictment, information or arraignment.<sup>47</sup> The *Kirby* court reasoned that once a person stands formally accused of a crime, he or she is vulnerable to certain critical stages in the criminal justice process where the results of which might well settle the accused's fate and reduce the trial itself to a mere formality.<sup>48</sup> Thus, the Sixth Amendment right to counsel extends to all critical stages of the criminal proceedings between the accused and the forces of the government.<sup>49</sup> Once the Sixth Amendment right to counsel attaches, any subsequent waiver during a police-initiated custodial interview is presumptively ineffective.<sup>50</sup> Furthermore, deliberate elicitation of incriminat-

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Procedure, §§ 364-374, at 239-244 (13th ed. 1991 & West Supp. 1997) (discussing the right to counsel).

<sup>46</sup> See 406 U.S. 682 (1972) (plurality opinion).

<sup>47</sup> See *id.* at 687-688. The *Kirby* plurality held that its test encompassed all prior cases in which the Court had found a Sixth Amendment right to counsel. See *id.* These cases included *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970) (plurality opinion) (right to counsel attached at pre-indictment preliminary hearing); *United States v. Wade*, 388 U.S. 218, 236-37 (1967) (right to counsel attached at post-indictment, pretrial lineup); *Massiah v. United States*, 377 U.S. 201, 206 (1964) (right to counsel attached at post-indictment interrogation); *Hamilton v. Alabama*, 368 U.S. 52, 53-54 (1961) (right to counsel attached at arraignment); *Moore v. Illinois*, 434 U.S. 220, 229-31 (1977) (right to counsel attached for in-person identification at preliminary hearing because critical stage of prosecution); *Brewer v. Williams*, 430 U.S. 387, 401 (1977) (right to counsel attached at interrogation after arraignment because adversarial proceedings had begun).

<sup>48</sup> See *Kirby*, 406 U.S. at 688-689. The Court explained that a person is entitled to counsel once "the adverse positions of government and defendant have solidified, where the government is not longer investigatory but accusatory." See *id.*

<sup>49</sup> See *Wade*, 388 U.S. at 236-237. The *Wade* court defined a critical stage in the criminal justice process as "where the results might well settle the accused's fate and reduce the trial itself to a mere formality" or where there is a "potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of right to counsel to help avoid prejudice." See *id.* at 224, 227.

<sup>50</sup> See *Michigan v. Jackson*, 475 U.S. 625, 636 (1986). After the accused has requested counsel, the government may no longer question the defendant unless the defendant initiates a conversation with the government. See *id.* It is incumbent upon the State to prove "an intentional relinquishment or abandonment of a known right or privilege." See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings. See *Wade*, 388 U.S. at 236-237. The *Wade* Court ruled that a waiver of the Sixth Amendment right to counsel not only requires comprehen-

ing evidence from an accused after the right to counsel attaches violates the Sixth Amendment.<sup>51</sup> Therefore, any statements obtained in violation of a defendant's right to counsel are inadmissible.<sup>52</sup>

In 1964, *Massiah v. United States*<sup>53</sup> marked the first instance in which the United States Supreme Court required the exclusion of evidence based on a violation of the Sixth Amendment right to counsel.<sup>54</sup> In *Massiah*, the defendant, Massiah, made incriminating statements to a co-defendant, who had placed a hidden radio transmitter under the front his automobile.<sup>55</sup> The United States Supreme Court excluded Massiah's incriminating statements concerning pending charges surreptitiously coaxed by the government in the absence of counsel.<sup>56</sup>

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sion but also a relinquishment. *See id.* at 237. The United States Supreme Court has afforded a presumption against an implied waiver of counsel because this right is indispensable to the fair administration of justice. *See id.* Furthermore, the United States Supreme Court has held that a valid waiver only exists when it is a product of free and deliberate choice rather than intimidation, coercion, or deception, and when the waiver is made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *See id.*

<sup>51</sup> *See Massiah v. United States*, 377 U.S. 201, 204 (1964). The United States Supreme Court concluded that the need for counsel applied equally in an extra-judicial setting as at the trial itself. *See id.*

<sup>52</sup> *See Massiah*, 377 U.S. at 204.

<sup>53</sup> *See* 377 U.S. 201 (1964).

<sup>54</sup> *See id.* at 206. "We hold that the petitioner was denied the basic protections of [the Sixth Amendment right to counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *See id.* at 204. The *Massiah* court explained that the adversarial system and that the Sixth Amendment contemplated a defendant aided trial by counsel. *See id.*

<sup>55</sup> *See id.* at 202-203. Massiah and co-defendant Colson had been charged for a cocaine offense. *Massiah*, 377 U.S. at 202-203. Both were released on bail. *See id.* Colson later agreed to cooperate with the police. *See id.* Unbeknownst to Massiah, Massiah made incriminating statements to Colson. *See id.* Thus, the Sixth Amendment prohibits government-initiated interrogation even if it is indirect and surreptitious. *See id.*

<sup>56</sup> *See Massiah*, 377 U.S. at 206-207. Massiah's Sixth Amendment right to counsel attached when he was arraigned and subsequently indicted for possession of narcotics aboard a United States vessel. *See id.* at 202. The United States Supreme Court reasoned that the police had deliberately elicited incriminating evidence through Colson as the government's informant without the presence of counsel because Massiah had no idea that he was under an interrogation by a government agent. *See id.* When the

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Consequently, the government may not deliberately elicit incriminating evidence from the accused without the presence counsel for an offense to which the Sixth Amendment has already attached.<sup>57</sup>

Moreover, the Sixth Amendment right to counsel does not attach to other and different charges against the same defendant because the right to counsel is offense specific.<sup>58</sup> In *McNeil v. Wisconsin*,<sup>59</sup> the defendant, McNeil, admitted his involvement in murder, attempted murder and armed burglary charges to a sheriff after being formally charged with armed robbery.<sup>60</sup> The United States Supreme Court held that the government did not violate McNeil's Sixth Amendment right to counsel.<sup>61</sup> Hence, once the Sixth Amendment right to counsel

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government deliberately elected incriminating statements from Massiah, it amounted to a denial of the "basic protections" of the Sixth Amendment. *See id.* at 206.

<sup>57</sup> *See id.* at 207. For criticisms of the reasoning behind the *Massiah* exclusionary rule, Edwin Meese III, *Promoting Truth in the Courtroom*, 40 VAND. L. REV. 271, 276-281 (1987); H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1154-95 (1987).

<sup>58</sup> *See McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). *See also Hoffa v. United States*, 385 U.S. 293, 308 (1966). Hoffa's Sixth Amendment right to counsel attached concerning his prosecution for violation of the Taft-Hartley Act. *See id.* at 294. The United States Supreme Court reasoned that Hoffa's statements related to the commission of a separate offense, attempted bribery of jurors, which had no connection with the legitimate defense of the Test Fleet prosecution. *See id.* 308. *See also Illinois v. Perkins*, 496 U.S. 292 (1990). Perkins had made incriminating statements of murder to an undercover informant cellmate. *See id.* at 294. The United States Supreme Court found no Sixth Amendment violation since Perkins had made incriminating statements voluntarily to an undercover cop regarding an uncharged offense. *See id.* at 299-300. The United States Supreme Court further noted that the use of undercover agents is a recognized law enforcement technique often employed in the prison context. *See id.* at 300.

<sup>59</sup> *See* 501 U.S. 171 (1991).

<sup>60</sup> *See id.* at 174. A public defender represented McNeil at a bail hearing for an armed robbery charge in West Allis, Wisconsin. *See id.* at 173-174. While in jail on that charge, the police questioned McNeil about a murder charge in Caledonia, Wisconsin. *See id.* at 174. The police advised McNeil of his Miranda rights, McNeil signed forms waiving them, and made statements incriminating himself in the Caledonia offenses. *See id.* McNeil was then formally charged with the latter offense. *See McNeil*, 501 U.S. at 174.

<sup>61</sup> *See id.* at 181-182. The United States Supreme Court reasoned that because McNeil made statements with respect to the Caledonia offenses before the Sixth

attaches to a specific offense, it cannot be invoked once for all future prosecutions for it does not attach until a prosecution has commenced.<sup>62</sup> Accordingly, the government does not violate the Sixth Amendment right to counsel if evidence is obtained without deliberate elicitation or through luck or happenstance regarding an offense to which the Sixth Amendment has not yet attached.<sup>63</sup> Thus, incriminating statements obtained by the government pertaining to other crimes where the Sixth Amendment right to counsel has not attached may be used in a subsequent trial of those crimes.<sup>64</sup>

## B. EXCEPTIONS TO THE OFFENSE SPECIFIC RULE

Courts have developed two exceptions to the offense specific requirement.<sup>65</sup> First, the offense specific requirement does not apply when the subsequent uncharged offense is inextricably intertwined with the charged offense.<sup>66</sup> The exception focuses on whether the facts underlying the charged and uncharged offenses are identical.<sup>67</sup> Second, the offense specific require-

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Amendment had been invoked, and therefore, no Sixth Amendment violation occurred since the Sixth Amendment right to counsel had attached only to the armed robbery offense. *See id.*

<sup>62</sup> *See id.* at 175. And just as the right is offense specific, so also its *Michigan v. Jackson*, 475 U.S. 625, 636 (1986) effect of invalidating subsequent waivers in police-initiated interviews is offense specific. *See United States v. Gouveia*, 467 U.S. 180, 188 (1984).

<sup>63</sup> *See Maine v. Moulton*, 474 U.S. 159, 176 (1985). Deliberate elicitation occurs when the government purposely seeks to obtain incriminating evidence from the accused, not when obtained by luck or happenstance. *See id.* The term interrogation refers to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. *See Spano v. New York*, 360 U.S. 315, 321-322 (1959).

<sup>64</sup> *See McNeil*, 501 U.S. at 174-175.

<sup>65</sup> *See supra* notes 4-6 and accompanying text.

<sup>66</sup> *See supra* note 5 and accompanying text.

<sup>67</sup> *See Commonwealth v. Rainwater*, 681 N.E. 2d 1218, 1224 n.5 (Mass. 1997). The *Rainwater* court stated, "the more extensive line of cases focuses entirely on whether the facts underlying the charged and uncharged offenses are either closely related or inextricably intertwined." *See id.* at 1224. The *Rainwater* court noted that the inextricably intertwined exception is a narrow exception. *See id.* The *Rainwater* court relied

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ment does not apply when the government breaches its affirmative obligation not to circumvent the Sixth Amendment right to counsel.<sup>68</sup> Courts construe this exception more broadly than the inextricably intertwined exception where there is evidence that the police deliberately sought to circumvent the prohibition of questioning in respect to the charged offense.<sup>69</sup> The circumvention of right exception allows for the suppression of incriminating evidence when the formal and subsequent charge arose from the same course of conduct.<sup>70</sup>

### 1. *Inextricably Intertwined Exception*

The inextricably intertwined exception prohibits the government from initiating an interrogation with regard to the uncharged offense if the formal charge and subsequent charge are closely related.<sup>71</sup> The United States Supreme Court implicitly endorsed the inextricably intertwined exception in *Brewer v. Williams*<sup>72</sup> and *Maine v. Moulton*.<sup>73</sup>

In *Brewer*, the defendant, Robert Williams, abducted a ten-year-old girl after he escaped from a mental hospital in Iowa.<sup>74</sup> Williams' attorneys advised him not to say anything to the police without the presence of counsel.<sup>75</sup> The police officers agreed not to interrogate Williams during a long automobile drive to

on *Whittlesey v. State*, 340 Md. 30, 53-54 (Md. 1996) in observing the development of the two exceptions. See *id.* at 1224 n.5.

<sup>68</sup> See *supra* note 6 and accompanying text.

<sup>69</sup> See *Rainwater*, 681 N.E. 2d at 1223.

<sup>70</sup> See *United States v. Martinez*, 972 F.2d 1100, 1105 (9th Cir. 1992); *Rainwater*, 681 N.E.2d at 1223-1224 n.5 (Mass. 1997); *United States v. Mitcheltree*, 940 F.2d 1329, 1342 (10th Cir. 1991); *United States v. Melgar*, 139 F.3d 1005, 1013-1014 (4th Cir. 1998); *Whittlesey v. State*, 340 Md. 30, 53-54 (Md. 1995).

<sup>71</sup> See *supra* note 5 and accompanying text.

<sup>72</sup> See 430 U.S. 387 (1977).

<sup>73</sup> See 474 U.S. 159 (1985).

<sup>74</sup> See *Brewer*, 430 U.S. at 390.

<sup>75</sup> See *id.* Williams called his attorney at Davenport who had advised Williams to confess his murder in Davenport. See *id.* Thus, the police officers drove Williams from Des Moines to Davenport where Williams' attorney advised William to turn himself ay Davenport which was about 160 miles away. See *id.*

Des Moines.<sup>76</sup> Two officers drove Williams without the presence of counsel to Des Moines.<sup>77</sup> During the trip, one of the officers, who knew Williams was a former mental patient and deeply religious, mentioned that the parents of the victim should be entitled to a Christian burial.<sup>78</sup> A short time later, still without the presence of counsel, Williams directed the officers to the location of the girl's body.<sup>79</sup> The United States Supreme Court characterized the officer's action as purposely isolating Williams from his lawyers to obtain as much incriminating information as possible.<sup>80</sup> As a result, the United States Supreme Court held that the officer's actions clearly violated the Sixth Amendment right to counsel and suppressed William's statements concerning the murder charge.<sup>81</sup> Though the Sixth Amendment right to counsel formally attached only to the abduction charge, the United States Supreme Court extended the Sixth Amendment right to counsel to statements relevant to the murder charge against Williams.<sup>82</sup>

Similarly, in *Maine v. Moulton* the Court upheld the suppression of statements for two different charges.<sup>83</sup> In *Moulton*,

<sup>76</sup> See *id.* at 391. A Des Moines lawyer had previously informed officers there that he represented Williams. See *Brewer*, 430 U.S. at 390.

<sup>77</sup> See *id.* at 391.

<sup>78</sup> See *id.* at 392-393.

<sup>79</sup> See *id.*

<sup>80</sup> See *id.* at 399.

<sup>81</sup> See *Brewer*, 430 U.S. at 404. It should be noted, however, that these proceedings concerned the abduction charge and not the later murder charge for which Williams was convicted.

<sup>82</sup> See *id.* at 404-406. The United States Supreme Court held that the defendant's waiver of the Sixth Amendment right to counsel was invalid and that the statements he made to the police identifying the body's location were, therefore, inadmissible. See *id.*

<sup>83</sup> See *Maine v. Moulton*, 474 U.S. 159, 180 (1985). The *Moulton* court explained that a knowing exploitation by the State of an opportunity to confront the accused without counsel being present is a breach of State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. See *id.* at 176. *Moulton* court viewed the police recommendation of the use of body wire to Colson as intentionally creating a situation that they knew, or should have known, was likely to result in Moulton's making incriminating statements during his meeting with Colson. See *id.* at 168.



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prosecutors indicted defendants Perley Moulton and Gary Colson on four counts of theft.<sup>84</sup> Later, Colson confessed to his involvement in the thefts and agreed to cooperate with the police in the prosecution of Moulton.<sup>85</sup> Though the police knew that Moulton's right to counsel had attached to the theft charge, the police still suggested that Colson wear a hidden wire transmitter and record a conversation between himself and Moulton.<sup>86</sup> The Court stated that the Sixth Amendment places an affirmative obligation upon the government not to act in a manner that circumvents the Sixth Amendment right to counsel.<sup>87</sup> Consequently, the Court concluded that the police violated Moulton's Sixth Amendment right to counsel.<sup>88</sup> Therefore, the United States Supreme Court suppressed Moulton's statements regarding the burglary but admitted evidence regarding Moulton's alleged plan to kill a witness.<sup>89</sup> Thus, as *Brewer* and *Moulton* demonstrate, the United States Supreme Court has implied that the Sixth Amendment right to counsel may attach

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<sup>84</sup> See *Moulton*, 474 U.S. at 162-163. On April 7, 1981, a Waldo County grand jury returned indictments charging Moulton and Colson with four counts of theft by receiving in violation of Me. Rev. Stat. Ann., Tit. 17-A, § 359 (1983). See *id.* It should be noted that Gary Colson, the co-defendant, has no relationship to Messiah's Colson.

<sup>85</sup> See *id.* Colson gave full confessions of his participating with Moulton in committing the theft, and also admitted that he and Moulton broke into the local Ford dealership to steal the parts. See *id.* at 163. Colson also stated that he and Moulton had set fire to the dump truck and had committed other thefts. See *id.* The police told Colson that no additional charges would be brought against him in exchange for his help. See *Moulton*, 474 U.S. at 163.

<sup>86</sup> See *id.* at 163. The police argued that they had a legitimate purpose: to record conversations regarding the killing of a witness. See *id.* at 178. In the process, the police obtained incriminating evidence regarding Moulton's burglary charge. See *id.* The United States Supreme Court did not find this persuasive in the wake of a knowing circumvention of Moulton's Sixth Amendment right to counsel. See *id.* at 179. The United States Supreme Court reversed defendant's burglary conviction but allowed the possibility that the information could be used in a subsequent trial regarding the plan to kill the witness. See *Moulton*, 474 U.S. at 180. On the other hand, in a dissent by Justice Burger, he found the result bizarre, stating that the majority's decision turns the Sixth Amendment right to counsel into a magic cloak to protect criminals who engage in multiple offenses that are the subject of separate police investigations. See *id.* at 186.

<sup>87</sup> See *id.*

<sup>88</sup> See *id.* at 180.

<sup>89</sup> See *id.*

to other offenses that are closely related to the conduct that formed the basis for the initially charged crime.<sup>90</sup>

The inextricably intertwined exception to the offense specific requirement has been recognized since 1988 in *People v. Clankie*.<sup>91</sup> Relying on two prior United States Supreme Court decisions, the *Clankie* court concluded that the Sixth Amendment right to counsel that has attached to the formal charge also extends to a subsequent charge that is closely related.<sup>92</sup>

In *Clankie*, the government charged Thomas Clankie with three separate counts of residential burglary.<sup>93</sup> The *Clankie* court suppressed incriminating evidence recorded via wiretap because it violated Clankie's Sixth Amendment right to counsel.<sup>94</sup> The *Clankie* court determined that the inextricably intertwined exception applies when the two offenses are so similar that the right to counsel for the first offense can trigger the right to counsel for the subsequent offense.<sup>95</sup> The *Clankie* court held that the three burglary offenses were closely related for two reasons.<sup>96</sup> First, both defendants testified to the same course of conduct, the unlawful joint entry into the same victim's residence.<sup>97</sup> Second, the burglaries involved the same house, same owner, and same time span.<sup>98</sup> Though the *Clankie*

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<sup>90</sup> See generally *Moulton*, 474 U.S. at 180.

<sup>91</sup> See 530 N.E.2d 448 (Ill. 1988).

<sup>92</sup> See *id.* at 450-452. The *Clankie* court relied on *Brewer v. Williams* and *Maine v. Moulton*, in recognizing the inextricably intertwined exception. See *id.* The *Clankie* court asserted that from these two Supreme Court cases, the United States Supreme Court assumes that "the Sixth Amendment rights of one formally charged with an offense extend to offenses closely related to that offense and for which a defendant is subsequently formally accused." See *id.* at 452.

<sup>93</sup> See *id.* at 449. Clankie was charged by three separate counts of burglary under Ill.Rev.Stat.1983, ch. 38, par. 19--3) where the defendant entered the dwelling place of J. F. McNeil. See *Clankie*, 530 N.E.2d at 449.

<sup>94</sup> See *id.* at 453.

<sup>95</sup> See *id.* at 452-453.

<sup>96</sup> See at 452.

<sup>97</sup> See *id.*

<sup>98</sup> See *Clankie*, 530 N.E.2d at 452.

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court found that the charges were inextricably intertwined, it did not attempt to delineate the parameters as to when the inextricably intertwined exception applies.<sup>99</sup> After *Clankie*, several federal circuit and state courts recognized the closely related exception and attempted to define its specific requirements.<sup>100</sup> However, no uniform standard has been applied.<sup>101</sup> These courts have tried to cabin this unruly concept in one or more of the following tests.<sup>102</sup>

## a. Same Course of Conduct

The Fifth and Sixth Circuits have held that the inextricably intertwined exception applies if the charged and uncharged offenses involve the same course of conduct.<sup>103</sup> In *United States v. Cooper*,<sup>104</sup> the Fifth Circuit first recognized the inextricably intertwined exception under the "same course of conduct" test.<sup>105</sup> In *Cooper*, the prosecutors charged Clinton Cooper with aggravated robbery.<sup>106</sup> Six days later, a federal agent visited

<sup>99</sup> See *id.* The court acknowledged the closely related exception, but did not attempt to define a standard because all the crimes concerned the same offense of burglary that arose from the same course of conduct and factual predicate. See *id.*

<sup>100</sup> See *supra* note 5 and accompanying text. While it might appear that the United States Supreme Court's opinion in *McNeil* put an end to the inextricably intertwined exception because *McNeil* was decided after *Clankie*, the Fifth Circuit in *United States v. Cooper* acknowledged the same principle just six months after *McNeil*. See *United States v. Cooper*, 949 F.2d 737, 743-744 (5th Cir. 1991).

<sup>101</sup> See *United States v. Nocella*, 849 F.2d 33, 37-38 (1st Cir. 1988) (nuclei of operative fact); *United States v. Kidd*, 12 F.3d 30, 33-34 (4th Cir. 1993) (factual predicate test); *United States v. Hines*, 963 F.2d 255, 257-258 (9th Cir. 1992) (time, place, persons); *United States v. Cooper*, 949 F.2d 737, 743-744 (5th Cir. 1991) (same course of conduct); *United States v. Mitcheltree*, 940 F.2d 1329, 1342-1343 (10th Cir. 1991) (same evidence); *United States v. Arnold*, 106 F.3d 37-42 (3d Cir. 1997) (factual predicate, conduct, intent and circumstances).

<sup>102</sup> See *supra* note 102 and accompanying text.

<sup>103</sup> See *United States v. Cooper*, 949 F.2d 737, 743-744 (5th Cir. 1991); *United States v. Carpenter*, 963 F.2d 736, 740-741 (5th Cir. 1992); *United States v. Walker*, 148 F.3d 518, 529 (5th Cir. 1993); *United States v. Doherty*, 126 F.3d 769, 776 n.32 (6th Cir. 1997).

<sup>104</sup> See 949 F.2d 737 (5th Cir. 1991).

<sup>105</sup> See *id.* at 743-744.

<sup>106</sup> See *id.* at 740. Cooper was a suspect in a convenience store robbery in Mart, Texas. See *id.* The arresting officers conducted an inventory search of the car's con-

Cooper in jail and interrogated him about possession of an unlicensed firearm during the robbery.<sup>107</sup> The prosecutors used information from the interrogation to subsequently charge Cooper with unlawful possession of an unregistered firearm.<sup>108</sup> The Fifth Circuit held that even though the two cases would utilize essentially the same evidence, the robbery predated the possession of a firearm, and therefore, the two charges were not closely related.<sup>109</sup>

The Fifth Circuit reaffirmed the "same course of conduct" test later in *United States v. Carpenter*<sup>110</sup> and *United States v. Walker*.<sup>111</sup> In both cases, the court acknowledged the inextricably intertwined exception but found that the exception did not apply.<sup>112</sup>

In *Carpenter*, the officers arrested and charged James Carpenter with burglary.<sup>113</sup> The officers discovered a firearm and crack pipe on the back seat floorboard of the police cruiser where Carpenter had been placed to be transported to the county jail.<sup>114</sup> While in custody, Carpenter confessed to Agent

tents before turning the car over to the wrecker for towing to the station. *See id.* In the trunk they found a sawed-off shotgun. *See Cooper*, 949 F.2d at 740. The next day, the state charged Cooper with aggravated robbery. *See id.*

<sup>107</sup> *See id.*

<sup>108</sup> *See id.* at 740-741. Cooper was convicted for the federal crime of unlawful possession of an unregistered firearm, in violation of 26 U.S.C §§ 5845(a), 5861(d), and 5871. *See id.* at 739.

<sup>109</sup> *See Cooper*, 949 F.2d at 744. "Cooper's first claim, that his Sixth Amendment right to counsel was violated when the federal agent question him about the robbery, is captious at best." *Id.* at 743. This court applied the analysis from *People v. Clankie* of whether or not two offenses were extremely closely related. *See id.* at 743-744.

<sup>110</sup> *See* 963 F.2d 736 (5th Cir. 1992).

<sup>111</sup> *See* 148 F.3d 518 (5th Cir. 1993).

<sup>112</sup> *See Carpenter*, 963 F.2d at 740-741 (firearm offense was not inextricably intertwined with burglary offense because they arose out of a different course of conduct: the burglary offense predated the firearm offense); *Walker*, 148 F.3d at 529-530 (knowingly making false material declarations in front of a federal grand jury not inextricably intertwined with drug conspiracy because two offense involved different conduct and sovereigns).

<sup>113</sup> *See Carpenter*, 963 F.2d at 738.

<sup>114</sup> *See id.*

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Redman that the gun and crack pipe belonged to him.<sup>115</sup> Subsequently, Carpenter was charged in federal court with possession of a firearm by a convicted felon.<sup>116</sup> Applying the "same course of conduct" analysis, the Fifth Circuit did not find that the firearm charge was inextricably intertwined with the burglary offense because the burglary charge predated the firearm offense.<sup>117</sup> Therefore, the Fifth Circuit did not suppress Carpenter's statements to Agent Redman.<sup>118</sup>

In *Walker*, the court again declined to apply the inextricably intertwined exception based on the "same course of conduct" test.<sup>119</sup> In *Walker*, Jerry Lee Quinn detected the surveillance by Aberdeen Police Officer Pete Conwill and Bureau of Alcohol, Tobacco and Firearms Agent Joey Hall, and fled.<sup>120</sup> The police officers pursued a black and gold Pontiac Grand Am, which they believed to be driven by Quinn.<sup>121</sup> Police Officer Conwill attempted to apprehend the driver at an impromptu roadblock and found the car empty.<sup>122</sup> After impounding the Grand Am, the police found a loaded 9mm semiautomatic handgun in the backseat armrest.<sup>123</sup> Subsequently, the prosecutor charged

<sup>115</sup> See *id.* Agent Redman with the Bureau of Alcohol Firearms and Tobacco visited with Carpenter twice. See *id.* Redman received a report from the police department which indicted that Carpenter qualified as an armed career criminal. See *id.* Redman asked questioned solely about the firearm, advised Carpenter of his Miranda rights, and obtained signed waiver of his Miranda rights. *Carpenter*, 963 F.2d at 738. Carpenter confessed that the gun and the crack pipe belonged to him. See *id.*

<sup>116</sup> See *id.* at 739.

<sup>117</sup> See *id.* at 741. "We do not find the firearm offense and the state burglary offense to be 'inextricably intertwined' or 'extremely closely related.'" *Id.* at 740-741. The warrant for the burglary charge came before the events leading up to the firearm charge. See *Carpenter*, 963 F.2d at 741. Moreover, Carpenter does not even argue that the firearm was in any way linked to the burglary. See *id.*

<sup>118</sup> See *id.* at 741. The Fifth Circuit relied on its Circuit's prior holding in *Cooper*, 949 F.2d at 743-744 in finding that the inextricably intertwined exception applies if both offenses arise from the same course of conduct. See *id.* at 739-740.

<sup>119</sup> See *Walker*, 148 F.3d at 529-530.

<sup>120</sup> See *id.* at 520.

<sup>121</sup> See *id.*

<sup>122</sup> See *id.*

<sup>123</sup> See *id.*

Quinn with possession of a firearm by a convicted felon.<sup>124</sup> At Quinn's firearms possession trial, Santonio Lamond Walker testified that he, not Quinn, drove the car during the pursuit.<sup>125</sup> After Quinn was convicted, Quinn volunteered information to his cellmate that he, rather than Walker, drove the car.<sup>126</sup> The prosecutors subsequently charged Quinn with suborning Walker to commit perjury.<sup>127</sup> The Fifth Circuit found no Sixth Amendment violation because the suborning charge was not inextricably intertwined with the firearm charge.<sup>128</sup> The court reasoned that even though the same evidence was admitted for the prosecution of both charges against Quinn, the offenses were not inextricably intertwined because they involved two distinct types of conduct.<sup>129</sup>

Similarly, the Sixth Circuit in *United States v. Doherty*<sup>130</sup> acknowledged the "same course of conduct" test.<sup>131</sup> In *Doherty*,

<sup>124</sup> See *Walker*, 148 F.3d at 520.

<sup>125</sup> See *id.*

<sup>126</sup> See *id.* at 521. Suspecting that Quinn had suborned Walker's perjury in the firearms possession trials, Police Officer Hall asked Quinn's cellmate, Rodney Seaton, to be attuned to anything Quinn might say about his recent trial, but not to initiate any conversation with Quinn. See *id.* Quinn volunteered to Seaton that he should not be in jail because his "home boy" had "stood up in court and took the rap for him being in the car." See *id.*

<sup>127</sup> See *Walker*, 148 F.3d at 520. Quinn was indicted for suborning Walker via 18 U.S.C. § 1622 and Walker was indicted for knowingly making false material declarations while under oath via 18 U.S.C. § 1623(a). See *id.* Walker sought to suppress his statements made to his cellmate. See *id.*

<sup>128</sup> See *id.* at 529-530. The court maintained that the United States Supreme Court in *Moulton*, 474 U.S. at 179-180, identified the correct standard as whether the conduct leading to each offense is the same. See *id.* at 529. The court relied on *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), which held that no Sixth Amendment violation occurs where the defendant's statement to the informant were volunteered and the volunteering of the information was precipitated by events beyond the informant's control, in finding that no Sixth violation occurred when Quinn had volunteered incriminating statements to the informant. See *Walker*, 148 F.3d at 528-529.

<sup>129</sup> See *id.* at 529-530. The court further stated that the distinctly separate offense of firearms possession and subornation of perjury did not occur within a close temporal proximity. See *id.* at 529.

<sup>130</sup> See 126 F.3d 769 (6th Cir. 1997).

<sup>131</sup> See *id.* at 776. The Sixth Circuit acknowledged that the question of how inextricably intertwined two offenses must be so that the right to counsel attaches simulta-

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a Native American Tribal Court convicted Ross Allen Doherty of sexually abusing two children.<sup>132</sup> Subsequently, the FBI agents questioned Doherty regarding federal charges of knowingly engaging in a sexual act with a child.<sup>133</sup> Doherty confessed to committing the sexual offenses.<sup>134</sup> Because the same underlying conduct formed the basis for both offenses, the Sixth Circuit held that the right to counsel would have attached to both charges.<sup>135</sup> However, the tribal arraignment did not invoke the Sixth Amendment right to counsel because the right to counsel is created by the United States Constitution which does not apply to American Indian tribal criminal proceedings.<sup>136</sup> Thus, the Sixth Circuit acknowledged the inextricably intertwined exception but rejected its application because the first legal proceeding was an Indian tribal proceeding.<sup>137</sup>

## b. Same Evidence Test

Other courts have applied the inextricably intertwined exception when two offenses involved the same evidence.<sup>138</sup> For example, in *United States v. Mitcheltree*,<sup>139</sup> the Tenth Circuit applied the "same evidence" test to determine if the charged

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neously with respect to both offenses is open to some doubt and left the consideration of that question for another day. *See id.*

<sup>132</sup> *See id.* at 772. The Hannaville Indian Community Tribal Court charged Doherty with statutory rape. *See id.* The molested children were Doherty's two stepdaughters. *See Doherty*, 126 F.3d at 772.

<sup>133</sup> *See id.* at 772-773.

<sup>134</sup> *See id.* Doherty was convicted of knowingly engaging in a sexual act with a child via 18 U.S.C. § 2243(a) (1994), applicable to Native American reservations through 18 U.S.C. § 1153(a). *See id.*

<sup>135</sup> *See id.* at 776.

<sup>136</sup> *See Doherty*, 126 F.3d at 777. The Sixth Circuit relied on *Talton v. Mayes*, 163 U.S. 376, 383-384 (1896) in holding that the Sixth Amendment right to counsel does not apply to Indian tribes. *See id.* The court reasoned that, since the Indian tribes are distinct, independent political communities, retaining their original rights, the Sixth Amendment right did not apply to Indian tribes. *See id.*

<sup>137</sup> *See id.*

<sup>138</sup> *See generally* *United States v. Mitcheltree*, 940 F.2d 1329, 1334 (10th Cir. 1991); *Whittlesey v. Maryland*, 665 A.2d 223, 235-236 (Md. 1995); *Commonwealth v. Rainwater*, 681 N.E.2d 1218, 1223-1224 n.5 (Mass. 1997).

<sup>139</sup> *See United States v. Mitcheltree*, 940 F.2d 1329 (10th Cir. 1991).

MDMA counts and the uncharged witness tampering count were inextricably intertwined.<sup>140</sup> Rizzo, a friend of Mitcheltree, cooperated with the police by secretly taping her conversation with Mitcheltree.<sup>141</sup> During the conversation, Rizzo encouraged Mitcheltree to talk about the pending MDMA offense as well as the witness tampering offense.<sup>142</sup> Mitcheltree made incriminating statements concerning both offenses.<sup>143</sup> The Tenth Circuit found that the police obtained incriminating statements relating directly to both the MDMA and witness tampering offenses, because both offenses involved the same evidence.<sup>144</sup> Therefore, because the two crimes involved the same evidence in regards to proof of both the MDMA counts and witness tampering, the Tenth Circuit held that the Sixth Amendment right to counsel attached to both offenses.<sup>145</sup>

Likewise, the Court of Appeals of Maryland in *Whittlesey v. Maryland*<sup>146</sup> applied the “same evidence” test to determine if the two offenses are inextricably intertwined.<sup>147</sup> In *Whittlesey*, Mike Whittlesey asked David Strathy, Whittlesey's friend, to meet him at Gunpowder Falls State Park and help him dig up

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<sup>140</sup> See *id.* at 1344-1345. Mitcheltree was charged with the distribution of the drug methylenedioxymethamphetamine or MDMA. See *id.* at 1332. MDMA is a designer drug sometimes known as ecstasy, which did not become subject to federal controlled substance penalties until October 27, 1986. See *id.* at 1335. She was later convicted for introducing a misbranded drug into interstate commerce with the intent to mislead or defraud, 21 U.S.C. §§ 331(a) & 333(a)(2); conspiracy to commit this offense, 18 U.S.C. § 37; and witness tampering, 18 U.S.C. § 1512(b)(3). See *id.*

<sup>141</sup> See *Mitcheltree*, 940 F.2d at 1340. According to Rizzo her purpose was to see if the defendant was going to try to change her testimony. See *id.*

<sup>142</sup> See *id.* at 1337-1338.

<sup>143</sup> See *id.* The transcript of the conversation contains many personal details about Mitcheltree that one might reveal to a close friend. Rizzo sought Mitcheltree's advice as to what she should say and do in connection with the investigation. See *id.*

<sup>144</sup> See *Mitcheltree*, 940 F.2d at 1344-1345. MDMA offense involved the same evidence for the witness tampering evidence, therefore, the two offenses are closely related in time and subject matter. See *id.*

<sup>145</sup> See *id.*

<sup>146</sup> See 665 A.2d 223 (Md. 1995).

<sup>147</sup> See *id.* at 235-236.



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some gold and silver.<sup>148</sup> Once Strathy arrived at the park, Strathy learned that Whittlesey really wanted to bury a dead body.<sup>149</sup> Strathy immediately left the scene and made an anonymous report to the police.<sup>150</sup> Separate from the anonymous report, the police visited Strathy and Strathy reported incident involving the body in the woods.<sup>151</sup> The police enlisted Strathy to arrange meetings with Whittlesey to try to elicit information about Griffin's disappearance.<sup>152</sup> Strathy cooperated with the police and recorded a conversation between himself and Whittlesey through a body wire.<sup>153</sup> The body wire enabled the police to record several conversations in which Whittlesey made numerous incriminating statements.<sup>154</sup> The police used this evidence to support charges against Whittlesey for allegedly making false statements to the police.<sup>155</sup> Later, Whittlesey was convicted for murdering Griffin.<sup>156</sup> The court determined that the false statements charge could have been supported by evidence that Whittlesey told the police inconsistent stories in his two meetings with the police, without regard to which story was true.<sup>157</sup> Furthermore, the State could have disproved many of Whittlesey's statements to the police, such as his claim to have gone to Washington with Griffin, without having to show that Whittlesey had killed Griffin.<sup>158</sup> In addition, the court reasoned that committing murder is separate from an attempt to avoid responsibility for it.<sup>159</sup> Consequently,

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<sup>148</sup> See *id.* at 228.

<sup>149</sup> See *id.*

<sup>150</sup> See *id.* at 228-229.

<sup>151</sup> See *Whittlesey*, 665 A.2d at 228-229.

<sup>152</sup> See *id.* at 229.

<sup>153</sup> See *id.*

<sup>154</sup> See *id.* at 229. The Strathy conversations included a detailed description of how Whittlesey buried Griffin's body. See *id.*

<sup>155</sup> See *Whittlesey*, 665 A.2d at 232.

<sup>156</sup> See *id.* at 229.

<sup>157</sup> See *id.* at 236.

<sup>158</sup> See *id.*

<sup>159</sup> See *id.*

the *Whittlesey* court found that the two charges were not inextricably intertwined under the "same evidence" test because the proof elements for the two charges did not necessarily require identical evidence.<sup>160</sup>

In addition, the Court of Appeals of Maryland in *Whittlesey v. Maryland*<sup>161</sup> observed that some courts require that time, place and persons be the same to determine whether the facts underlying the charge and uncharged offenses are inextricably intertwined.<sup>162</sup> In *Whittlesey*, the court concluded that the false statements charge and the murder charge were not inextricably intertwined under the "time, place and persons" test, because the false statements occurred days after the murder in another location.<sup>163</sup> Therefore, the Sixth Amendment right to counsel did not cover both the false statement and murder offenses.<sup>164</sup>

### c. Time, Place, and Persons Test

The Ninth Circuit suggested that the inextricably intertwined exception applies if the charged and the uncharged offenses involve the same time, place, and persons.<sup>165</sup> In *United States v. Hines*,<sup>166</sup> the Ninth Circuit declined to apply the in-

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<sup>160</sup> See *Whittlesey*, 665 A.2d at 236. The court relied on *United States v. Williams*, 993 F.2d 451 (5th Cir. 1993) and *Hendricks v. Vasquez*, 974 F.2d 1099, 1104-1105 (9th Cir. 1992) where the Fifth and Ninth Circuit courts respectively held that the inextricably intertwined exception did not apply because the two offenses had totally independent elements, and the two crimes occurred at a different time and location. See *id.* at 235-236.

<sup>161</sup> See *Whittlesey v. Maryland*, 665 A.2d 223 (1995).

<sup>162</sup> See *id.* 234-236. The court reviewed many prior cases which have attempted to define what is required to fall under the inextricably intertwined exception. See *id.* For example, the court observed that the Ninth Circuit in *Hines*, 963 F.2d at 257-258, and *Hendricks*, 974 F.2d at 1104-1105 have looked for identity of time, place, and conduct to determine whether the same acts underlie both charges. See *id.* at 235-236.

<sup>163</sup> See *Whittlesey*, 665 A.2d at 236.

<sup>164</sup> See *id.*

<sup>165</sup> See *Hendricks v. Vasquez*, 974 F.2d 1099, 1104-1105 (9th Cir. 1992); *United States v. Hines*, 963 F.2d 255, 257-258 (9th Cir. 1992); *United States v. Martinez*, 972 F.2d 1100, 1104 (9th Cir. 1992).

<sup>166</sup> See 963 F.2d 255 (9th Cir. 1992).

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trically intertwined exception because the defendant's firearm crimes occurred in two separate months.<sup>167</sup> Although the formal and subsequent charges involved the identical firearm offense, the Ninth Circuit concluded that the time, place, and persons differed.<sup>168</sup>

In *United States v. Martinez*,<sup>169</sup> the Ninth Circuit again refused to apply the inextricably intertwined exception for similar firearm offenses.<sup>170</sup> Martinez was arrested and charged with possession of a firearm by a convicted felon, theft of a firearm, and possession of a controlled substance.<sup>171</sup> However, the state charges were dismissed.<sup>172</sup> Federal agents then questioned Martinez regarding the federal offense of possession of a firearm by a convicted felon.<sup>173</sup> During the interrogation, Martinez admitted that he had knowingly purchased the handgun.<sup>174</sup> On the same day, Martinez made his first appearance in federal court and counsel was appointed.<sup>175</sup> The Ninth Circuit stated that it would not extend the inextricably intertwined exception after dismissal of the initial charge,<sup>176</sup> reasoning that such a "broad prophylactic rule" ran counter to the established Sixth

<sup>167</sup> See *id.* at 257-258. At the time where agent questioned Hines about January 1989 activities, Hines had been provided counsel for state prosecution activities in December 1988. See *id.*

<sup>168</sup> See *id.*

<sup>169</sup> See 972 F.2d 1100 (9th Cir. 1992).

<sup>170</sup> See generally *id.* at 1103-1105.

<sup>171</sup> See *id.* 1101.

<sup>172</sup> See *id.* at 1102.

<sup>173</sup> See *id.* The federal agents advised Martinez of his Miranda rights, which he waived. See *Martinez*, 972 F.2d at 1102.

<sup>174</sup> See *id.* Martinez executed an affidavit admitting that he had knowingly purchased the handgun. See *id.*

<sup>175</sup> See *id.*

<sup>176</sup> See *id.* at 1104. First, the Ninth Circuit observed that the two firearm offenses arose from the same conduct. See *Martinez*, 972 F.2d at 1104. Second, the Ninth Circuit declined to extend the inextricably intertwined indefinitely for it would improperly require suppression of a statement given to federal authorities regarding a federal crime, if unknown to the federal agents, the suspect had been charged for the same substantive act at some earlier time. See *id.* at 1104-1105.

Amendment right to counsel jurisprudence.<sup>177</sup> Therefore, in order satisfy the “time, place and persons test,” the defendant must not only show that the time, place, and persons were identical in both offenses, the defendant must also have a charge pending to which the Sixth Amendment right to counsel attaches before the court will extend that protection to a subsequent offense.<sup>178</sup>

#### d. Factual Predicate Test

The Third and Fourth Circuits provide that the inextricably intertwined exception applies when the factual predicate of each offense are identical.<sup>179</sup> In *United States v. Arnold*,<sup>180</sup> the Third Circuit held that the right to counsel may carry over from the pending charge to a new charge if the new charge arose from the same acts and factual predicate on which the pending charges were based.<sup>181</sup> In *Arnold*, Dean Arnold stole money and told his then fiancée, Jennifer Kloss, about the theft.<sup>182</sup> Fearing that Kloss would tell the FBI about his crimes, Arnold told several people including Alex Introcaso, a private investigator, that he would pay \$20,000.00 to kill Kloss.<sup>183</sup> Introcaso contacted the FBI and reported Arnold’s of-

<sup>177</sup> See *id.* at 1104-1105. The Ninth Circuit observed that the United States Supreme Court in *Maine v. Moulton* and *McNeil v. Wisconsin* stressed the narrow application of the Sixth Amendment and also recognized the importance of allowing the police to initiate and pursue investigations of new or additional crimes. See *Martinez*, 972 F.2d at 1104-1105. See also *Hendricks*, 974 F.2d at 1104, where the Ninth Circuit again rejected the application of the inextricably intertwined exception. See *id.* at 1104-1105. The court noted that this exception is a “limited exception.” See *id.*

<sup>178</sup> See *Hines*, 963 F.2d at 257-258; *Martinez*, 972 F.2d at 1104-1105.

<sup>179</sup> See *United States v. Kidd*, 12 F.3d 30, 33-34 (4th Cir. 1993); *United States v. Arnold*, 106 F.3d 37, 41-42 (3d Cir. 1997).

<sup>180</sup> See 106 F.3d 37 (3rd Cir. 1997).

<sup>181</sup> See *id.* at 41-42. “We adopt the ‘closely related’ exception and hold that it applies here.” See *id.* at 42. The Third Circuit relied on *Whittlesey v. Maryland*, 665 A.2d 223 (Md. 1995) in determining whether the same acts and factual predicates underlie both charges. See *id.* at 41. The Third Circuit observed that courts have looked for similarities of time, place, person and conduct. See *id.*

<sup>182</sup> See *Arnold*, 106 F.3d at 38.

<sup>183</sup> See *id.* at 39. Introcaso suspected that Arnold had committed the federal Armed Express thefts and contacted the police to obtain a reward. See *id.*

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fer to have Kloss killed.<sup>184</sup> The prosecutor obtained a sealed indictment against Arnold charging him with bank theft, money laundering and witness intimidation.<sup>185</sup> That afternoon, Arnold stated his threat to kill Kloss to an undercover officer posing as a professional hit man.<sup>186</sup> Subsequently, the government indicted Arnold with attempted murder of a witness.<sup>187</sup> Arnold sought to suppress his conversation with the undercover officer.<sup>188</sup> The court agreed and adopted the "factual predicate" test, finding that the central purpose and the intended results of both offenses were the same.<sup>189</sup> Therefore, the Third Circuit held that both offenses arose from the same predicate facts, conduct, intent and circumstances, and consequently, concluded that the inextricably intertwined exception applied.<sup>190</sup>

Similarly, in *United States v. Kidd*,<sup>191</sup> the Fourth Circuit held that the uncharged offense must derive from the same factual predicate as the charged offense in order to fall within the closely related exception.<sup>192</sup> In *Kidd*, the government in-

<sup>184</sup> See *id.* The FBI recorded a meeting between Introcaso and Arnold where Introcaso told Arnold that he had located a hit man willing to kill Kloss for \$20,000.00. See *id.*

<sup>185</sup> See *Arnold*, 106 F.3d at 39. The witness charge specifically alleged that Arnold had threatened to kill Kloss if she provided information to law enforcement officers about the thefts. See *id.*

<sup>186</sup> See *id.*

<sup>187</sup> See *id.* The tape recording Arnold's interest in killing Kloss was the only evidence the government submitted with respect to the attempted murder charge. See *id.*

<sup>188</sup> See *Arnold*, 106 F.3d at 39.

<sup>189</sup> See *id.* at 41-42.

<sup>190</sup> See *id.* The Third Circuit observed that both offenses involved the same witness, were related in time, and had the same motive. See *id.*

<sup>191</sup> See 12 F.3d 30 (4th Cir. 1993).

<sup>192</sup> See *id.* at 33. This court held that although the uncharged crime involved the same type of crime as the charged offense, it involved a different purchaser-informant, occurred at a different time, and took place in a different location. See *id.* The Fourth Circuit further asserted that the Sixth Amendment does not create a sanctuary for the commission of additional crimes during the pendency of an indictment. See *id.* Furthermore, the Fourth Circuit held that even if time, place, persons all are the same as to both offenses, a defendant must also demonstrate that the interrogation on the new offenses produced incriminating evidence as to the previously charged offense. See

dicted Norman Kidd on six drug charges after government informants tape-recorded approximately seven of Kidd's sales of cocaine base, also known as crack.<sup>193</sup> On July 3, 1992, government officials arrested Kidd and appointed counsel for him.<sup>194</sup> On August 26, an undercover informant who had no prior contact with Kidd made a tape-recorded crack purchase from Kidd.<sup>195</sup> The court concluded that the August 26 sale was factually distinct from and independent of the prior offenses for which the Sixth Amendment right had been invoked.<sup>196</sup> Therefore, the charge of selling cocaine did not relate to the earlier charges for which Kidd had been indicted.<sup>197</sup> The court stated that even if the court applied the "same course of conduct" test, Kidd would still be convicted of a superseding charge of conspiracy to possess with the intent to distribute cocaine and cocaine possession and distribution.<sup>198</sup> Thus, the court focused on the factual predicate of the underlying offenses rather than evaluating whether the two offenses involved the same course of conduct.<sup>199</sup> As a result, the Fourth Circuit acknowledged the

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United States v. Melgar, 139 F.3d 1005, 1014-1015 (4th Cir. 1998). The Fourth Circuit reasoned that the inextricably intertwined exception must be crafted to avoid hampering legitimate, necessary law enforcement investigations. *See id.*

<sup>193</sup> *See Kidd*, 12 F.3d at 31. Kidd was charged with five counts of cocaine possession and distribution under 21 U.S.C. § 841(a) and one count of conspiracy to possess with intent to distribute cocaine base per 21 U.S.C. § 846. *See id.*

<sup>194</sup> *See id.* Counsel was appointed three days after Kidd's arrest. *See id.*

<sup>195</sup> *See id.* at 31-32.

<sup>196</sup> *See Kidd*, 12 F.3d at 33-34.

<sup>197</sup> *See id.* The later drug investigation concerned only new criminal activity. *See id.* The court suggested that a Sixth Amendment violation would have resulted if the sale had involved the same time, place, and persons. *See id.*

<sup>198</sup> *See id.* at 34. The defendant argued that both drug transactions were identical, and therefore, arose from the same course of conduct. *See Kidd*, 12 F.3d at 34. The court disagreed, stating that even if the court applied the same course of conduct, the facts underlying the offenses is still controlling. *See id.*

<sup>199</sup> *See id.* at 34. This court held that the same course of conduct is more semantic than real and is controlled by factual and temporal relationships among the offenses. *See id.* The court explained that the mere fact that both the pending offense and new offense involved drug distribution does not mean the right to counsel attached to both. *See id.* To hold otherwise would essentially permit charged suspects to commit similar crimes with impunity. *See Kidd*, 12 F.3d at 33.

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inextricably intertwined exception, yet rejected its application.<sup>200</sup>

## e. Nucleii of Operative Fact Test

The First Circuit, in *United States v. Nocella*,<sup>201</sup> suggested that the inextricably intertwined exception applied when the charged offense and the subsequent offense arose out a common nucleii of operative fact.<sup>202</sup> In *Nocella*, after the state charged Robert Nocella with possession of marijuana, an informant recorded an order of cocaine from Nocella.<sup>203</sup> Nocella alleged that his Sixth Amendment right to counsel attached to the subsequent cocaine charges, and therefore, should be suppressed.<sup>204</sup> The First Circuit disagreed, stating that the purpose of the continuing investigation against Nocella was not to be used to unearth incriminating evidence for the marijuana charge, but for the new drug offense.<sup>205</sup> Thus, the government acted in an investigatory, not accusatory, manner with regard to the cocaine offense.<sup>206</sup> The First Circuit concluded that the marijuana and cocaine charges arose out of a different nucleii of operative fact, because the possession of marijuana and cocaine offenses necessitated proof of disparate elements and

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<sup>200</sup> See *id.* at 34. In rejecting Kidd's right to counsel claim, the Fourth Circuit reasoned that "[t]he Sixth Amendment does not create a sanctuary for the commission of additional crimes during the pendency of an indictment and to exclude such evidence would unnecessarily frustrate the public's interest in the investigation of criminal activities." See *id.* at 33 (citing *Maine v. Moulton*, 474 U.S. 159, 180 (1985)).

<sup>201</sup> See 849 F.2d 33 (1st Cir. 1988).

<sup>202</sup> See *id.* at 38.

<sup>203</sup> See *id.* at 34-35.

<sup>204</sup> See *id.* at 35.

<sup>205</sup> See *id.* at 37-38.

<sup>206</sup> See *Nocella*, 849 F.2d at 38. The First Circuit held that the Sixth Amendment right had not attached to the cocaine offense. See *id.* Therefore, when the government had investigated charges to the new offense, it was investigatory not accusatory. See *id.*

occurred at different times.<sup>207</sup> Thus, the First Circuit rejected the application of the inextricably intertwined exception.<sup>208</sup>

In *Taylor v. Florida*,<sup>209</sup> the court again focused on the underlying facts of both offenses in order to determine whether the inextricably intertwined exception applied.<sup>210</sup> In *Taylor*, Dennis J. Taylor had been arrested and charged with dealing in stolen property.<sup>211</sup> Later, Detective Graham interrogated Taylor regarding a burglary offense.<sup>212</sup> The court suppressed Taylor's incriminating statements regarding the burglary offense based on the inextricably intertwined exception.<sup>213</sup> The court observed that the two offenses involved the same physical evidence, acts and factual predicates.<sup>214</sup> Moreover, Taylor's knowledge that the jewelry had been stolen was a crucial element of the dealing in dealing in stolen property offense.<sup>215</sup> Therefore, the court found that both offenses arose from the same facts and circumstances because the offense of dealing in

<sup>207</sup> See *id.* at 38. The First Circuit explained the state and federal offenses were "scissile" rather than inextricably intertwined. See *id.* To ignore the separateness would "needlessly frustrate the public's interest in investigation of criminal activities." See *Nocella*, 849 F.2d at 38. The court asserted that the Sixth Amendment's intended function is not to wrap a protective cloak around the defendant. See *id.* at 38.

<sup>208</sup> See *id.*

<sup>209</sup> 726 So. 2d 841(1st Cir. 1999).

<sup>210</sup> See *id.* at 845.

<sup>211</sup> See *id.* at 842. A burglary investigation by Detective Graham revealed that four pieces of jewelry belonging to Curry were pawned in the name of Taylor and thumbprint were found on the pawn ticket for these items. See *id.*

<sup>212</sup> See *id.* at 842-843. Detective Graham asked Taylor if he had anything to do with the burglary of the Curry residence, because Detective Graham was interested in where the stolen property initially came from. See *Taylor*, 726 So. at 843. The State did not prosecute the burglary charge. See *id.*

<sup>213</sup> See *id.* at 846.

<sup>214</sup> See *id.* Furthermore, the First Circuit stated that the similarities of time, place, person and conduct of both offense were striking. See *id.*

<sup>215</sup> See *Taylor*, 726 So. at 846. "Here, the inquiry concerning the burglary sought information from Taylor concerning the loss of the very same jewelry that formed the basis of the offense for which had been charged." *Id.*



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stolen property involved the act of obtaining and using property belonging to the burglary victim.<sup>216</sup>

## 2. Circumvention of the Sixth Amendment Right Exception

Although the Ninth Circuit in *United States v. Covarrubias* only addressed the inextricably intertwined exception, this Note briefly discusses the circumvention of right exception.<sup>217</sup> As previously mentioned, the United States Supreme Court in *Maine v. Moulton* ruled that law enforcement has an affirmative obligation to act in a manner that does not circumvent, and thereby, dilute the protection afforded by the Sixth Amendment right to counsel.<sup>218</sup> Accordingly, several courts have construed the circumvention of right exception more broadly than the inextricably intertwined exception where evidence indicates that the police deliberately circumvented the prohibition of questioning in respect to the charged offense.<sup>219</sup>

In *United States v. Martinez*,<sup>220</sup> the Ninth Circuit offered several factors for determining whether the circumvention of right exception applies.<sup>221</sup> For example, the Ninth Circuit will consider: first, the degree of federal participation in the state's decision to dismiss state charges; second, the degree of state participation in its decision to interrogate and charge the de-

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<sup>216</sup> See *id.*

<sup>217</sup> See *United States v. Covarrubias*, 179 F.3d 1219, 1226 (9th Cir. 1999). "Because our holding that the offenses were 'inextricably intertwined' or 'closely related' provides a sufficient basis to affirm the district court's suppression order, we do not consider whether the district judge was also correct in holding the 'circumvention of Sixth Amendment right' exception applicable as well." *Id.*

<sup>218</sup> See *Maine v. Moulton*, 474 U.S. 159, 171 (1985).

<sup>219</sup> See *Commonwealth v. Rainwater*, 681 N.E.2d 1218, 1223-1224 n.5 (Mass. 1997); *Whittlesey v. Maryland*, 665 A.2d 223, 235 (Md. 1995). See also generally *United States v. Mitcheltree*, 940 F.2d 1329, 1342-43 (10th Cir. 1991); *United States v. Martinez*, 972 F.2d 1100, 1104-1105 (9th Cir. 1992); *United States v. Rodriguez*, 931 F. Supp. 907, 926-927 (D. Mass. 1996); *United States v. Melgar*, 139 F.3d 1005, 1013-1015 (4th Cir. 1998).

<sup>220</sup> See, 972 F.2d 1100 (9th Cir. 1992).

<sup>221</sup> See *id.* at 1106.

fendant; three, the degree of joint decision-making over the forum in which the defendant should be prosecuted.<sup>222</sup>

Furthermore, the Eleventh Circuit in *United States v. Terzado-Madruga*<sup>223</sup> held that the government violates the Sixth Amendment whenever a government informant actively engages a defendant in a conversation that is likely to elicit incriminating statements about the defendant's upcoming trial.<sup>224</sup> By obtaining information through an undercover informant, the police deny the defendant the right to rely on counsel as the medium between the accused and the government.<sup>225</sup> Therefore, when the government uses an agent such as an informant to actively initiate a conversation that is likely to elicit incriminating evidence to which the Sixth Amendment right to counsel has attached, the government has circumvented the defendant's Sixth Amendment right to counsel.<sup>226</sup>

Likewise, in *United States v. Mitcheltree*,<sup>227</sup> discussed *infra*, the court suppressed a taped conversation based on the circumvention of right exception.<sup>228</sup> When there is a deliberate Sixth Amendment violation, the government may not use the defendant's uncounseled incriminating statements of those or very closely related subsequent charges at trial.<sup>229</sup> Mitcheltree's hairdresser, Rizzo, cooperated with the police by agreeing to ask broad questions to Mitcheltree about the subject matter of the charged offense.<sup>230</sup> These open-ended questions made it virtually certain that the defendant would discuss the

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<sup>222</sup> See *id.* The Ninth Circuit stated that the key factor is the extent of coordination between state and federal authorities. See *id.*

<sup>223</sup> See *United States v. Terzado-Madruga*, 897 F.2d 1099 (11th Cir. 1990).

<sup>224</sup> See *id.* at 1110.

<sup>225</sup> See *id.* at 1109-1110.

<sup>226</sup> See *id.*

<sup>227</sup> See 940 F.2d 1329 (10th Cir. 1991).

<sup>228</sup> See *id.* at 1341.

<sup>229</sup> See *id.* at 1341-1342.

<sup>230</sup> See *Mitcheltree*, 940 F.2d at 1337-1338. The defendant's attorney specifically advised her not to talk to anybody that might be a potential witness. See *id.* at 1336.

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details of the pending MDMA counts.<sup>231</sup> The Tenth Circuit characterized the behavior by the police as circumventing Mitcheltree's Sixth Amendment right to counsel.<sup>232</sup> Hence, the Sixth Amendment right to counsel covered both the charged and uncharged offenses.<sup>233</sup>

## IV. THE NINTH CIRCUIT'S ANALYSIS

In *United States v. Covarrubias*,<sup>234</sup> the Ninth Circuit considered whether questioning of Covarrubias and Ochoa by I.N.S. Agent Gonzalez violated their Sixth Amendment right to counsel.<sup>235</sup> The Ninth Circuit evaluated the government's appeal in light of Sixth Amendment jurisprudence and decided that the government had violated the defendant's Sixth Amendment right to counsel.<sup>236</sup>

## A. THE RIGHT TO COUNSEL ATTACHED TO THE STATE KIDNAPPING CHARGE

In determining whether or not the Sixth Amendment right to counsel attached to the defendants' state kidnapping

<sup>231</sup> See *id.* at 1340. Because the informant asked such broad questions to cover the pending charge although aimed at another uncharged offense, it was a knowing circumvention of the Sixth Amendment right to counsel. See *id.* at 1340-1341. At least seven times, Rizzo sought the defendant's advice as to what she should say and do in connection with the investigation. See *id.* at 1340. Rizzo also asked about defendant's testimony and her knowledge of the conspiracy. See *Mitcheltree*, 940 F.2d at 1340.

<sup>232</sup> See *id.* The Tenth Circuit found that Rizzo was more than a passive listener; she exercised skill at leading the conversation into particular topics and prompting particular replies. See *id.* The Tenth Circuit stated, "[I]n an effort to lead the defendant into witness tampering, Rizzo inquired into the pending charges in more than a tangential way, and violated the defendant's sixth amendment rights on the pending MDMA charges." See *id.* Furthermore, the court found that the prosecutor took no steps to insure that the informant did not communicate with the defendant about the pending charges and consequently the defendant's Sixth Amendment right to counsel was compromised. See *id.* n.13.

<sup>233</sup> See *Mitcheltree*, 940 F.2d at 1344-1345.

<sup>234</sup> See 179 F.3d 1219 (9th Cir. 1999).

<sup>235</sup> See generally *id.*

<sup>236</sup> See *id.*

charge,<sup>237</sup> the Ninth Circuit stated that the right to counsel attaches once the prosecution has initiated adversary judicial proceedings against the defendant(s).<sup>238</sup> Therefore, the right to counsel had attached to the state crime of kidnapping when the defendants were arraigned and appointed counsel.<sup>239</sup>

The Ninth Circuit acknowledged that the Sixth Amendment right to counsel is offense specific,<sup>240</sup> which prohibits government initiated interrogation regarding only the offense to which the right to counsel has attached.<sup>241</sup> Thus, the Sixth Amendment prohibited government initiated interrogation only concerning the state kidnapping charge.<sup>242</sup> Nevertheless, the Ninth Circuit explained that appellate courts, in applying the Sixth Amendment right to counsel, have recognized two clear exceptions to this offense specific requirement: the inextricably intertwined and the circumvention of the Sixth Amendment right exception.<sup>243</sup> Since the court held that the right to counsel attached to the state kidnapping charge, the court went on to discuss whether the right to counsel also attached to the subsequent charge of transporting illegal aliens.<sup>244</sup>

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<sup>237</sup> See *id.* at 1223.

<sup>238</sup> See *id.* The United States Supreme Court stated that adversarial judicial proceedings are initiated only when the government has committed itself to prosecute. See *United States v. Gouveia*, 467 U.S. 180, 187-188 (1984).

<sup>239</sup> See *Covarrubias*, 179 F.3d at 1223. Arraignment and appointment of counsel at the preliminary hearing are adversarial judicial proceeding. See also *Kirby v. Illinois*, 406 U.S. 682, 687-688 (1972) (the Sixth Amendment right to counsel attaches only at or immediately after the initiation of an adversarial judicial proceeding whether by way of formal charge, preliminary hearing, indictment, information or arraignment).

<sup>240</sup> See *Covarrubias*, 179 F.3d at 1223. See also *supra* note 2 and accompanying text (discussing the offense specific requirement).

<sup>241</sup> See *supra* note 3 and accompanying text.

<sup>242</sup> See *Covarrubias*, 179 F.3d at 1223.

<sup>243</sup> See *id.*

<sup>244</sup> See *id.*

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## B. APPLICATION OF THE INEXTRICABLY INTERTWINED EXCEPTION

The inextricably intertwined exception provides that when the pending charge is so closely related with the charge under investigation, the right to counsel attaches to both charges, even if the government has not formally initiated an adversarial judicial proceeding on the pending charge.<sup>245</sup> In its discussion of the inextricably intertwined exception, the Ninth Circuit relied on decisions from both the United States Supreme Court and other Circuits.<sup>246</sup>

The Ninth Circuit conceded that the United States Supreme Court had not expressly adopted the inextricably intertwined exception.<sup>247</sup> However, the court stressed that the United States Supreme Court implicitly endorsed the inextricably intertwined exception in *Brewer v. Williams*<sup>248</sup> and *Maine v. Moulton*.<sup>249</sup>

In *Brewer*, the United States Supreme Court suppressed statements made by the defendant regarding the murder charge even though the right to counsel attached only for the abduction charge.<sup>250</sup> Based on *Brewer*, the Ninth Circuit reasoned that the United States Supreme Court "treated the right as if it also applied to the murder charges involving the same incident and victim."<sup>251</sup>

In *Moulton*, the United States Supreme Court expressed the same principle.<sup>252</sup> In *Moulton*, although the right to counsel

<sup>245</sup> See *id.*

<sup>246</sup> See *Covarrubias*, 179 F.3d at 1224.

<sup>247</sup> See *id.* at 1224.

<sup>248</sup> See generally 430 U.S. 387 (1977) (suppressing incriminating statements for defendant's murder trial although formally charged with abduction).

<sup>249</sup> See generally 474 U.S. 159 (1985) (suppressing incriminating statements for burglary although formally charged with theft).

<sup>250</sup> See *Brewer*, 430 U.S. at 404-406.

<sup>251</sup> See *Covarrubias*, 179 F.3d. at 1224.

<sup>252</sup> See *Moulton*, 474 U.S. at 180.

attached to only a theft charge, the United States Supreme Court suppressed statements regarding a subsequent burglary charge because the police breached their affirmative obligation to honor the Sixth Amendment right to counsel.<sup>253</sup>

Analyzing the two United States Supreme Court decisions in *Brewer* and *Moulton*, the Ninth Circuit concluded that the right to counsel may attach to separate offenses as long as the court finds a close factual relationship between them.<sup>254</sup> Thus, the Ninth Circuit in *Covarrubias* court recognized the inextricably intertwined exception to the offense specific requirement.<sup>255</sup>

As the United States Supreme Court has not delineated the parameters of the inextricably intertwined exception, the Ninth Circuit also relied on the decisions of other federal circuits, including its own, that have previously applied the inextricably intertwined exception.<sup>256</sup> The court began with the first case in which it acknowledged the inextricably intertwined exception.<sup>257</sup>

In *United States v. Hines*,<sup>258</sup> the Ninth Circuit held that if time, place, and persons differed even for the same offense, the inextricably intertwined exception does not apply.<sup>259</sup> Later, in

<sup>253</sup> See *id.* The Court found that the state breached its affirmative obligation not to circumvent the right to assistance of counsel. See *id.*

<sup>254</sup> See *Covarrubias*, 179 F.3d at 1224. The *Covarrubias* court believed that every circuit court that has considered or adopted the inextricably intertwined exception has uniformly read *Brewer v. Williams* and *Maine v. Moulton* in the same manner. See *id.* at 1223. "On the basis of a uniform reading of the two United States Supreme Court cases, every circuit to consider the question, including our own, has recognized an exception to the offense-specific requirement of the Sixth Amendment." *Id.*

<sup>255</sup> See *id.* at 1224.

<sup>256</sup> See *Covarrubias*, 179 F.3d at 1224-1225.

<sup>257</sup> See *id.*

<sup>258</sup> See 963 F.2d at 255.

<sup>259</sup> See *id.* The Ninth Circuit decided that the inextricably intertwined exception did not apply because the place, time, and persons involved were all different. See *id.*

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*United States v. Martinez*, the Ninth Circuit declined to apply the exception when the state charge had been dismissed.<sup>260</sup>

Aware that no single test determines when the inextricably intertwined exception applies, the Ninth Circuit looked to the other circuits for guidance.<sup>261</sup> For example, the court discussed *United States v. Arnold*,<sup>262</sup> in which the Third Circuit utilized the "factual predicate" test.<sup>263</sup> In *Arnold*, the Third Circuit held that the inextricably intertwined exception will apply if the two offenses arose from the same predicate facts, intent, circumstances and conduct.<sup>264</sup> Conversely, if the factual predicate differed, then the inextricably intertwined exception would not apply.<sup>265</sup>

Finally, the Ninth Circuit reviewed the district court's reasons for applying the inextricably intertwined exception.<sup>266</sup> The district court held that the state kidnapping charges and federal charges for transportation of an illegal alien were inextricably intertwined.

<sup>260</sup> See *United States v. Martinez*, 972 F.2d 1100, 1104 (9th Cir. 1992). The Ninth Circuit denied the application of the inextricably intertwined exception due to their reluctance to extend the doctrine indefinitely into the future after the initial charge was dismissed. See *id.* The Ninth Circuit held that the reasoning of *Maine* and *Moulton*, which stressed both the narrow application of the Sixth Amendment right to counsel and the importance of allowing police to initiate and pursue investigations. See *id.* at 1104-1105.

<sup>261</sup> See *Covarrubias*, 179 F.3d at 1225-1226. The Ninth Circuit stated that the Ninth Circuit in *Hines* failed to identify the specific factors for when the inextricably intertwined exception applies. See *id.* at 1224 (citing *Hines*, 963 F.2d at 257-258).

<sup>262</sup> See *United States v. Arnold*, 106 F.3d 37 (3rd Cir. 1997).

<sup>263</sup> See *id.* at 42.

<sup>264</sup> See *id.* at 41-42. The Third Circuit found that the inextricably intertwined exception applied for witness intimidation and attempted murder because the intended victim of both crimes was the same, the offenses arose from the same facts and circumstances, the conduct was closely related in time, and the two acts were in furtherance of the same purpose. See *id.*

<sup>265</sup> See *United States v. Kidd*, 12 F.3d 30, 33-34 (4th Cir. 1993). The Fourth Circuit held that the cocaine distribution conspiracy, which ended in May 1992, was not inextricably intertwined with a subsequent sale in August of 1992. See *id.* The Fourth Circuit came to this conclusion because the individuals involved, the time, and location of the offenses were all different. See *id.*

<sup>266</sup> See *Covarrubias*, 179 F.3d at 1225 n.7.

cably intertwined based on the "same course of conduct" test.<sup>267</sup> The district court stated that the inextricably intertwined exception applied because it would have been difficult to confine one's questioning to the facts and circumstances of one offense without straying into a discussion of the other.<sup>268</sup>

The Ninth Circuit created a new "continuous course of conduct" test.<sup>269</sup> Thus, to decide whether the inextricably intertwined exception applies, a court should examine and compare all of the facts and circumstances relating to the conduct involved, including the identity of the persons involved, and the timing, motive, and location of the crimes.<sup>270</sup> In addition, no single factor is dispositive.<sup>271</sup> The court stated that the greater the commonality of the factors and the more the conduct is directly involved between the formal and subsequent offenses, the two offenses will likely fall under the inextricably intertwined exception.<sup>272</sup> Applying the "continuous course of conduct" test, the Ninth Circuit held that the kidnapping and transportation of an illegal alien offenses were inextricably intertwined.<sup>273</sup>

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<sup>267</sup> See *id.* The government's evidence alleges that the defendants unlawfully transported Hernandez, in reckless disregard for his alien status and then unlawfully detained Hernandez against his will when he did not have sufficient funds to pay for his transfer. See *id.* Because of the relatedness of the kidnapping and unlawful transport charges, the defendants' Sixth Amendment right to counsel became effective as to both offenses once defendants were assigned counsel during their state court proceedings. See *id.*

<sup>268</sup> See Order Granting in Part and Denying in Part Defendants' Motion to Suppress at 9-10, *United States v. Covarrubias* (No. CR-98-2030-RHW, No. CR-98-2031-RHW). The district court also held that even if the two offenses were not inextricably intertwined, the Sixth Amendment attached for both offenses at the time of the state court preliminary hearing because the two investigations and prosecutions were the result of a joint effort between state and federal authorities. See *id.* at 9.

<sup>269</sup> See *id.*

<sup>270</sup> See *id.* at 1225 n.6.

<sup>271</sup> See *id.* (relying on the Third Circuit in *Arnold*, 106 F.3d at 41-42).

<sup>272</sup> See *id.* (quoting *Arnold*, 106 F.3d at 41-42).

<sup>273</sup> See *Covarrubias*, 179 F.3d at 1226. The Ninth Circuit held that the inextricably intertwined exception applied for Seven reasons. See *id.* First, the timing of the federal and state crimes overlapped in part in Sunnyside Washington while the defendants



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The Ninth Circuit rejected the government's contention that the two offenses involved different time, place and persons.<sup>274</sup> Further, the Ninth Circuit rejected the government's argument that the federal crime of transporting of an illegal alien was a completed offense, but rather concluded that it was a continuing offense.<sup>275</sup> Consequently, the timing of the federal and state crimes did overlap.<sup>276</sup> Moreover, the defendants perpetrated both offenses: holding Hernandez for ransom and transporting Hernandez who was an illegal alien.<sup>277</sup> This overlap persuaded the court that the two offenses involved a continuous course of conduct, not a separate and distinct course of conduct.<sup>278</sup> Hernandez' role in both crimes supported this conclusion.<sup>279</sup> The court added that, even if the defendants committed the federal crime in multiple locations, both crimes took

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restrained Hernandez, an illegal alien, against his will in the Covarrubias' van. *See id.* at 1226. Second, the two offenses involved a continuous course of conduct because the federal crime of transportation of an illegal alien continued by the time the defendants detained Hernandez against his will. *See id.* Third, the defendants Covarrubias and Ochoa were the perpetrators of both offenses. *See id.* Fourth, Hernandez was the victim in the kidnapping charge and one of the persons illegally transported in the other crime. *See Covarrubias*, 179 F.3d at 1226. Fifth, both crimes took place, at least in part, in Sunnyside, Washington. *See id.* Sixth, the defendants had an identical motive, obtaining remuneration, in committing both crimes. *See id.* Seventh, both crimes arose from the same set of facts, the transportation of Hernandez. *See id.*

<sup>274</sup> *See id.* at 1225-1226. The government claimed that the defendants completed the federal offense when the defendants left Los Angeles with the intention of transporting illegal aliens, whereas the kidnapping offense did not begin until they held Hernandez for ransom in Washington. *See Covarrubias*, 179 F.3d at 1225 n.7. Thus, the government argued that the state and federal offenses differed in the dates, times, and locations, because the defendants completed the federal crime of transportation of an illegal alien before the state kidnapping crime began. *See id.* The government also contended that the victims of both crimes differed: Hernandez as the victim of kidnapping and the United States as the victim of the federal crime of transportation of an illegal alien. *See id.*

<sup>275</sup> *See Covarrubias*, 179 F.3d at 1225-1226.

<sup>276</sup> *See id.*

<sup>277</sup> *See id.*

<sup>278</sup> *See id.* The court stated that the transportation of illegal aliens continued for as long as the defendants transported Hernandez. *See id.* at 1225-1226.

<sup>279</sup> *See Covarrubias*, 179 F.3d at 1226. Hernandez was the victim of the kidnapping offense and was one of the aliens of the transportation of illegal aliens, rather than focusing on the issue who was the victim. *See id.*

place at least in part in Washington, so the “continuous course of conduct” test controlled.<sup>280</sup>

For the aforementioned reasons, the Ninth Circuit held that the right to counsel, which had attached to the crime of kidnapping, extended to the uncharged federal crime of illegal transportation of an illegal alien because both crimes were inextricably intertwined.<sup>281</sup> As a result, the questioning of Covarrubias and Ochoa by I.N.S. Agent Gonzalez regarding the uncharged offense of transportation of an illegal alien without the presence of counsel constituted a violation of their Sixth Amendment right to counsel.<sup>282</sup> Accordingly, the Ninth Circuit affirmed the district court’s decision to suppress the incriminating statements made by Covarrubias and Ochoa.<sup>283</sup>

## V. CRITIQUE

The Ninth Circuit’s conclusion is based solely on the applicability of the inextricably intertwined exception to the offense specific requirement of the Sixth Amendment right to counsel.<sup>284</sup> This note asserts that the Ninth Circuit’s “continuous course of conduct” test runs counter to existing precedent. In addition, the court should have applied the circumvention of right exception instead of the inextricably intertwined exception.

The United States Supreme Court offers no guidelines for applying the inextricably intertwined exception and has not expressly adopted the inextricably intertwined exception.<sup>285</sup> In fact, the United States Supreme Court stands for the principle that the Sixth Amendment right to counsel is offense

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<sup>280</sup> See *id.*

<sup>281</sup> See *Covarrubias*, 179 F.3d at 1226.

<sup>282</sup> See *id.* at 1226.

<sup>283</sup> See *id.*

<sup>284</sup> See *id.* at 1223.

<sup>285</sup> See *United States v. Covarrubias*, 179 F.3d 1219, 1224 (9th Cir. 1999). The United States Supreme Court has only implicitly endorsed this exception. See *id.*

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specific.<sup>286</sup> Consequently, the circuit courts that have adopted the inextricably intertwined exception have defined this exception narrowly and applied it sparingly.<sup>287</sup> More specifically, the majority of the courts that have recognized the inextricably intertwined exception have rejected its application.<sup>288</sup> By contrast, the Ninth Circuit broadly construed and applied the inextricably intertwined exception.<sup>289</sup> Therefore, the Ninth Circuit's broad application in *United States v. Covarrubias* is unprecedented and questionable. Instead, the Ninth Circuit could have suppressed the incriminating statements made by Covarrubias and Ochoa since I.N.S. Agent Gonzalez knowingly circumvented the defendants' Sixth Amendment right to counsel.

#### A. THE APPLICATION OF THE INEXTRICABLY INTERTWINED EXCEPTION IN *COVARRUBIAS* IS TENUOUS

##### 1. *The Ninth Circuit Did Not Follow Its Own Precedent*

Previous Ninth Circuit cases have defined the inextricably intertwined exception narrowly.<sup>290</sup> In *United States v. Hines*,<sup>291</sup> the Ninth Circuit determined that the inextricably intertwined exception did not apply for similar firearm offenses since time, place and persons differed.<sup>292</sup> In *Martinez*, the Ninth Circuit declined to extend the inextricably intertwined exception in-

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<sup>286</sup> See *supra* note 2 and accompanying text.

<sup>287</sup> See *supra* note 5 and accompanying text.

<sup>288</sup> See *id.*

<sup>289</sup> See *Covarrubias*, 179 F.3d at 1225-1226 (adopting the "continuous course of conduct" test).

<sup>290</sup> See *United States v. Hines*, 963 F.2d 255, 258 (9th Cir. 1992) (charged firearms possession was not inextricably intertwined to the uncharged firearms offense, since time, place, and persons differed); *United States v. Martinez*, 972 F.2d 1100, 1103-1105 (9th Cir. 1992) (the inextricably intertwined exception did not apply for two similar firearms offenses, since the court was reluctant to extend the doctrine indefinitely after the state charge was dismissed); *Hendricks v. Vasquez*, 974 F.2d 1099, 1104-1105 (9th Cir. 1992) (the murder charge and interstate flight charge to avoid murder charges were not inextricably intertwined, because each crime had totally independent elements and did not arise from the same course of conduct).

<sup>291</sup> See 963 F.2d 255 (9th Cir. 1992).

<sup>292</sup> See *Hines*, 963 F.2d at 257-258.

definitely to a subsequent firearm charge when the state dismissed the initial firearm offense.<sup>293</sup>

Furthermore, in *Hendricks v. Vasquez*,<sup>294</sup> the Ninth Circuit utilized both the "same course of conduct" and "time, place, and persons" tests to find that interstate flight to avoid prosecution of murder was not inextricably intertwined with the underlying murder charge under either test.<sup>295</sup> The court concluded that the exception did not apply because one offense predated the other and each offense had totally different proof elements.<sup>296</sup> These cases clearly demonstrate that the Ninth circuit has previously defined the inextricably intertwined exception narrowly requiring identical time, place, and persons or identical elements of proof.<sup>297</sup>

In *Covarrubias*, the kidnapping and transportation of an illegal alien were not inextricably intertwined based on previous Ninth Circuit decisions because the time, place and per-

<sup>293</sup> See *Martinez*, 972 F.2d at 1104-05. The Ninth Circuit found against the application of the inextricably intertwined exception, because a broad prophylactic application of the Sixth Amendment runs counter to the reasoning of *Moulton* and *McNeil*, which stressed both the narrow application of the Sixth Amendment right to counsel and the importance of allowing police to initiate and pursue investigations. See *id.* Implementation of this rule would mean that a federal agent could not question a suspect without first determining that that stat had not charged the suspect with a crime arising out of the same acts which would needlessly frustrates the public's interest. See *id.*

<sup>294</sup> See 974 F.2d 1099 (9th Cir. 1992).

<sup>295</sup> See *id.* at 1104-1105.

<sup>296</sup> See *id.* The Ninth Circuit acknowledged that interstate flight to avoid prosecution for murder and the murder offense in San Francisco were related. See *id.* However, the two offenses have totally independent elements and the two offenses did not arise from the same conduct. See *id.* Therefore, the court held that as uncharged and distinct "additional crimes," they were not subject to the sixth amendment right to counsel that attached when *Hendricks* was arraigned on his flight charge. See *Hendricks*, 974 F.2d at 1104-1105.

<sup>297</sup> See *Hines*, 963 F.2d at 257-258. Even for the same exact offense that may be closely related in time (December activities versus January activities), the exception will not apply. See *id.* Furthermore, the Ninth Circuit becomes more reluctant to apply the exception for two offenses that have totally different elements that are necessary to prove the respective offenses and that did not arise from the same course of conduct. See *Hendricks*, 974 F.2d at 1104-1105.

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sons were not identical.<sup>298</sup> As a result, the Ninth Circuit could not have suppressed Covarrubias' and Ochoa's incriminating statements made to I.N.S. Agent Gonzalez under the time, place, and persons test.

## 2. The Ninth Circuit Did Not Follow Other Circuits

The majority of federal circuit courts focus on whether underlying facts are the same for each offense before applying the inextricably intertwined exception.<sup>299</sup> Thus, only under extremely narrow circumstances will the Sixth Amendment right to counsel also attach to other offenses.<sup>300</sup> Despite the strong presumption against applying the inextricably intertwined exception and the narrow interpretation of this exception by other courts, the Ninth Circuit held that the "continuous course of conduct" test controlled.<sup>301</sup> Using this broader test, the Ninth Circuit implicitly states that the questioning by I.N.S. Agent Gonzalez did not constitute a Sixth Amendment right to counsel violation if confined to one of the preexisting tests.<sup>302</sup> Instead, the Ninth Circuit should have avoided this unruly concept because the circumvention of the Sixth Amendment right supplies an independent basis for suppression of evidence.<sup>303</sup>

<sup>298</sup> See generally *Covarrubias*, 179 F.3d at 1224-1226.

<sup>299</sup> See *supra* note 5 and accompanying text.

<sup>300</sup> See *United States v. Williams*, 993 F.2d 451, 456 (5th Cir. 1993).

<sup>301</sup> See *United States v. Covarrubias*, 179 F.3d 1219, 1225-1226 (9th Cir. 1999). The Ninth Circuit examined and compared all the facts and circumstances relating to the conduct involved, including the identity of the persons involved, the timing, motive, and location. See *id.*

<sup>302</sup> The preexisting tests are: 1) nulecii of operative fact, *United States v. Nocella*, 849 F.2d 33, 38 (1st Cir. 1988); 2) factual predicate test, *United States v. Kidd*, 12 F.3d 30, 33 (4th Cir. 1993); 3) time, place, and persons, *United States v. Hines*, 963 F.2d 255, 258 (9th Cir. 1992); 4) same course of conduct, *United States v. Cooper*, 949 F.2d 737, 743-44 (5th Cir. 1991); same evidence, *United States v. Mitcheltree*, 940 F.2d 1329, 1342-43 (10th Cir. 1991).

<sup>303</sup> See *Covarrubias*, 179 F.3d at 1226 (recognizing that each exception, the inextricably intertwined and circumvention of right exceptions, provides an independent basis for suppression of incriminating evidence when the government violated the Sixth Amendment right to counsel).

The Ninth Circuit held that the two offenses involved a continuous course of conduct such that one offense could not be separated from the other.<sup>304</sup> However, the Ninth Circuit's "continuous course of conduct" test is too broad. It is extremely difficult to determine whether an offense is continuous or completed to avoid violating the Sixth Amendment right to counsel. Implementation of the "continuous course of conduct" test would effectively prohibit a federal agent from questioning a suspect without first determining that that state had not charged the suspect with a crime arising out of the same acts. Requiring such actions would needlessly frustrate the public's interest in investigating new and additional crimes.<sup>305</sup> Furthermore, a federal agent will additionally have to determine if the offense the defendant is charged with is a continuing or a completed offense before investigating any new offense.<sup>306</sup>

The narrow interpretation and application within the Ninth Circuit and other circuit courts militates against the finding that the inextricably intertwined exception applies in *Covarru-*

<sup>304</sup> See *Covarrubias*, 179 F.3d at 1225-1226. The federal crime of transporting an illegal alien was a continuing offense as long as the defendants were transporting Hernandez. See *id.* at 1225. The Ninth Circuit explained further that even if the federal offense had completed, the two offenses involved a continuous course of conduct. See *id.* at 1225-1226.

<sup>305</sup> See *Martinez*, 972 F.2d at 1104-1105. The Ninth Circuit found against the application of the inextricably intertwined exception, because a broad prophylactic application of the Sixth Amendment runs counter to the reasoning of *Moulton* and *McNeil*, which stressed both the narrow application of the Sixth Amendment right to counsel and the importance of allowing police to initiate and pursue investigations. See *id.* Furthermore, the Sixth Amendment does not create a sanctuary for the commission of additional crimes during the pendency of an indictment. See *United States v. Melgar*, 139 F.3d 1005, 1014-1015 (4th Cir. 1998).

<sup>306</sup> See *Martinez*, 972 F.2d at 1104-1105. The Ninth Circuit declined to extend the inextricably intertwined exception indefinitely because it may prohibit investigation on a second crime which may have no relation to the first. See *id.* It would require suppression of a statement given to federal authorities regarding a federal crime if, unbeknownst to the federal agents, the suspect had been charged for the same substantive act at some earlier time. See *id.* Furthermore, the government would be hampered if they had to check before hand before any investigation began to see if there were any pending charges. See *Melgar*, 139 F.3d at 1014-1015. This requirement, the *Melgar* court found would unnecessarily frustrate the public's interest in investigating new and additional crimes. See *id.* The *Melgar* court reasoned that the inextricably intertwined exception must be crafted to avoid hampering legitimate, necessary law enforcement investigations. See *id.*

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*bias*.<sup>307</sup> First, the great weight of authority among those courts which have adopted the inextricably intertwined exception have narrowly defined the inextricably intertwined exception.<sup>308</sup> Second, the majority of these courts have sparingly applied the inextricably intertwined exception.<sup>309</sup> In contrast, the Ninth Circuit went against the majority by applying a broader "continuous course of conduct" test. Therefore, the Ninth Circuit implicitly states that the facts in *Covarrubias* would have insufficient to satisfy any of the previously existing tests.

## a. Time, Place, and Persons Test

The "time, place and persons" test requires that the time, place, and persons be identical for both the charged and the subsequent charge in order to suppress incriminating evidence under the inextricably intertwined exception.<sup>310</sup> If the Ninth Circuit adopted the "time, place, and persons" test,<sup>311</sup> I.N.S. Agent Gonzalez's interrogation would not constitute a violation of the defendants' Sixth Amendment right to counsel.<sup>312</sup>

First, the two charges against Covarrubias and Ochoa did not involve the same person.<sup>313</sup> Specifically, the kidnapping charge involved only Hernandez while six other illegal aliens participated in the federal transportation of an illegal alien.<sup>314</sup>

<sup>307</sup> See *supra* note 303 and accompanying text.

<sup>308</sup> See *id.*

<sup>309</sup> See *supra* note 5 and accompanying text for a list of cases that have acknowledged, but rejected the application of the inextricably intertwined exception.

<sup>310</sup> See *Hines*, 963 F.2d at 257-258.

<sup>311</sup> See *United States v. Hines*, 963 F.2d 255, 257-258 (9th Cir. 1992).

<sup>312</sup> See *Covarrubias*, 179 F.3d at 1225-1226. The Ninth Circuit side steps the time, place, and persons test by arguing that the federal crime of transporting illegal immigrants was a continuing offense as long as the defendants were transporting Hernandez. See *id.*

<sup>313</sup> See *id.* at 1221. The government argued that transportation of illegal aliens was completed when the defendants left Los Angeles and that the state offense did not begin until they began holding Hernandez for ransom. Therefore, the time, place, and persons all differed. See *id.* at 1225 n.7.

<sup>314</sup> See *id.*

Further, Hernandez was the victim of kidnapping, while the United States was the victim of the federal transportation of an illegal alien.<sup>315</sup>

Second, the timing and place also differed.<sup>316</sup> The crime of transporting illegal aliens began in California, whereas kidnapping of Hernandez did not occur until the Covarrubias and Ochoa entered Washington.<sup>317</sup> As a result, Washington did not have jurisdiction to prosecute the alien transportation and the federal government did not have jurisdiction to prosecute the kidnapping case.<sup>318</sup> In addition, Covarrubias and Ochoa violated the federal law against transporting illegal aliens across state borders when Covarrubias and Ochoa departed Los Angeles, California.<sup>319</sup> Thus, the Ninth Circuit would not have been able to suppress the incriminating statements based upon the "time, place, and persons" test.

#### b. Same Course of Conduct Test

The kidnapping and transportation of illegal aliens did not satisfy the inextricably intertwined exception under the "same course of conduct" test, which requires that the two offenses arise from the same course of conduct.<sup>320</sup> Under the "continuous course of conduct" test, the Ninth Circuit focused on the fact that the two crimes intersect at only one location, Sun-

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<sup>315</sup> See *id.* at 1225. "The victims of the two crimes are also different: technically the United States was the victim of the crime of Transportation of an Illegal Alien. The victim in the state kidnapping case was the alien, Martin Hernandez, and his family." See Brief for Appellant at 19-20, *United States v. Covarrubias*, Order Granting in Part and Denying in Part Defendant's Motion to Suppress (No. CA-98-30167).

<sup>316</sup> See *Covarrubias*, 179 F.3d at 1225.

<sup>317</sup> See Appellants' Brief at 18-20, *Covarrubias* (No. CA-98-30167).

<sup>318</sup> See *id.* at 20.

<sup>319</sup> See *id.* at 18. The defendants could have been prosecuted for the federal crime of transportation of an illegal alien in the Central District of California, the Northern District of California, the District of Oregon, or the Eastern District of Washington prior to being charged with kidnapping in Washington. See *id.*

<sup>320</sup> See *id.* at 20. See also *United States v. Cooper*, 949 F.2d 737, 743-744 (5th Cir. 1991).



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nyside, Washington.<sup>321</sup> However, courts generally do not look at one point in time but the overall course of conduct in determining if both offenses arose from the "same course of conduct."<sup>322</sup>

In *United States v. Cooper*,<sup>323</sup> the Fifth Circuit held that when one offense predates the other, the two crimes do not arise from the same course of conduct.<sup>324</sup> Furthermore, the Fifth Circuit in *United States v. Walker*<sup>325</sup> held that even though the same evidence may be used for the prosecution of both offenses, the inextricably intertwined exception would not apply so long as the two offenses involved two distinct types of conduct.<sup>326</sup> In *Walker*, the offense of suborning perjury was not inextricably intertwined with the possession of firearm offense by a convicted felon, one not leading necessarily to the other.<sup>327</sup>

Likewise, the crime of transporting illegal aliens and kidnapping did not arise from the same course of conduct. The crime of transporting illegal aliens involved cooperation on the part of the person being transferred, while the defendants in the kidnapping charge required restraint.<sup>328</sup> Thus, though the defendants may have had the same motive for each offense,<sup>329</sup>

<sup>321</sup> See *Covarrubias*, 179 F.3d at 1226. The Ninth Circuit found that both crimes took place, at least in part, in Sunnyside, Washington because the federal crime of transporting illegal immigrants was a continuing offense. See *id.*

<sup>322</sup> See, e.g., *United States v. Walker*, 148 F.3d 518, 529-530 (5th Cir. 1998); *United States v. Cooper*, 949 F.2d 737, 743-744 (5th Cir. 1991); *United States v. Williams*, 993 F.2d 451, 456-457 (5th Cir. 1993); *United States v. Carpenter*, 963 F.2d 736, 740-741 (5th Cir. 1992); *United States v. Doherty*, 126 F.3d 769, 776-777 (6th Cir. 1997).

<sup>323</sup> See 942 F.2d 737 (5th Cir. 1991).

<sup>324</sup> See *id.* at 744.

<sup>325</sup> See 148 F.3d 518 (5th Cir. 1993).

<sup>326</sup> See *id.* at 529-530.

<sup>327</sup> See *id.*

<sup>328</sup> See Appellants' Brief at 19, *Covarrubias* (No. CA-98-30167).

<sup>329</sup> See *Covarrubias*, 179 F.3d at 1225-1226. For example, Hernandez probably voluntarily entered Covarrubias's van and cooperated with the defendants in the commission of the federal crime of illegally transportation aliens. The defendants did, however, had to restrain against Hernandez's will who was allegedly held for ransom due to a dispute over payment.

the defendant's conduct differed in fulfilling that goal under each offense.

Furthermore, although the two crimes were related in time, the purpose behind both differed.<sup>330</sup> The purpose of illegally transporting Hernandez was to evade immigration laws of the United States in return for money.<sup>331</sup> In contrast, the purpose of the kidnapping was to hold Hernandez for ransom due to a dispute over money.<sup>332</sup> Moreover, the federal crime of transportation of an illegal alien predated the kidnapping offense.<sup>333</sup> Consequently, the two offenses did not arise from the same course of conduct. Therefore, the Ninth Circuit would not have been able to suppress the incriminating statements based upon the "same course of conduct" test.

### c. Factual Predicate Test

Additionally, the kidnapping and transportation of an illegal alien offenses were not inextricably intertwined under the "factual predicate" test.<sup>334</sup> The Fourth Circuit in *United States v. Kidd*<sup>335</sup> held that even when the defendant is charged with the same offense, the inextricably intertwined exception does not apply if the factual predicate needed to accomplish each crime differs.<sup>336</sup> Furthermore, the Fourth Circuit suggested that the government would have violated Kidd's Sixth Amendment right to counsel if the sale of cocaine had involved the same time, place, and persons.<sup>337</sup> Therefore, the Fourth

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<sup>330</sup> See *id.*

<sup>331</sup> See *id.*

<sup>332</sup> See *id.* at 1221.

<sup>333</sup> See, e.g., *Cooper*, 949 F.2d at 743-744 (robbery offense predated firearm offense); *Carpenter*, 963 F.2d at 741 (burglary offense predated firearm offense). Similarly, the transportation of illegal aliens, which completed when Covarrubias and Ochoa left California with the knowing intention to transport an illegal alien, predated the kidnapping offense which did not begin until the defendants were in Washington.

<sup>334</sup> See *United States v. Kidd*, 12 F.3d 30, 33 (4th Cir. 1993).

<sup>335</sup> See 12 F.3d 30 (4th Cir. 1993).

<sup>336</sup> See *id.* at 34.

<sup>337</sup> See *id.* at 33.

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Circuit concluded that the similar drug sale involved new criminal activity that was factually distinct from the prior offense.<sup>338</sup>

Similarly, the subsequent crime of kidnapping involved new criminal activity.<sup>339</sup> The federal offense began when the defendants knowingly transported the illegal aliens out of California, whereas kidnapping did not occur until the defendants restrained the victim-alien while holding him for ransom in Sunnyside, Washington.<sup>340</sup> Further, unlike *Kidd*, the two offenses were not identical.<sup>341</sup> Hence, the Ninth Circuit would not have been able to suppress the incriminating statements based upon the "factual predicate" test.

#### d. Nucleii of Operative Fact Test

In addition, the inextricably intertwined exception does not apply to the kidnapping and transportation of an illegal alien offenses under the "nucleii of operative fact" test.<sup>342</sup> The First Circuit in *United States v. Nocella*<sup>343</sup> held that two offenses are inextricably intertwined if they arise out of a common nucleii of operative fact.<sup>344</sup> The First Circuit held that if the proof elements for each offense differ, then the inextricably intertwined exception does not apply.<sup>345</sup> The First Circuit rejected the application of the inextricably intertwined exception because pos-

<sup>338</sup> See *id.*

<sup>339</sup> See Brief for the State at 20, *Covarrubias* (No. 98-30167).

<sup>340</sup> See *id.*

<sup>341</sup> See generally *United States v. Covarrubias*, 179 F.3d 1219 (9th Cir. 1999). It should be noted that the offenses in *Kidd* involved two similar drug offenses, whereas, the offenses in *Covarrubias* involved two different offenses: kidnapping and transportation of an illegal alien.

<sup>342</sup> See generally *Nocella*, 849 F.2d at 37-38.

<sup>343</sup> See 849 F.2d 33 (1st Cir. 1988).

<sup>344</sup> See *id.* at 37-38.

<sup>345</sup> See *id.* Marijuana and cocaine offenses necessitated disparate proof element, and therefore, the inextricably intertwined exception does not apply. See *id.*

session of marijuana and cocaine offenses necessitated disparate proof elements.<sup>346</sup>

Similarly, in *Covarrubias*, the kidnapping and transportation of illegal aliens charges required disparate elements of proof. Specifically, transportation of an illegal alien requires that the defendant must know or with reckless disregard transport or move a person who is not a citizen.<sup>347</sup> In contrast, kidnapping requires that the defendant must intentionally abduct another person with intent to hold him for ransom or reward, or as a shield or hostage kidnapping.<sup>348</sup> Kidnapping does not require that the defendant have knowledge or reckless disregard that the person the defendant is holding is not a citizen.<sup>349</sup> Further, transportation of illegal alien does not require that the defendant intends to hold the person for ransom, reward, shield, or as a hostage.<sup>350</sup> In *Covarrubias*, Hernandez voluntarily entered Covarrubias' van and through the joint effort between Covarrubias, Hernandez, and Ochoa.<sup>351</sup> Together they completed the transportation of an illegal alien offense so that Hernandez could remain in the United States.<sup>352</sup> On the other hand, Covarrubias and Ochoa together detained Hernandez against his will due to a dispute over a payment.<sup>353</sup> Thus, the crime of kidnapping and transportation of an illegal alien did not satisfy the "nucleii of operative fact" test.

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<sup>346</sup> See *id.*

<sup>347</sup> See 18, U.S.C § 1324(a)(1)(B). The elements of transportation of an illegal alien are: the defendant knowingly or with reckless disregard transported or attempted to move a person who is not a citizen of the United States in order to help the person transported remain in the United States. See *id.*

<sup>348</sup> See Revised Code of Washington 9A.040.020.

<sup>349</sup> See *id.*

<sup>350</sup> See *supra* note 394 and accompanying text.

<sup>351</sup> See *id.*

<sup>352</sup> See *Covarrubias*, 179 F.3d at 1221-1222.

<sup>353</sup> See *id.*

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## e. Same Evidence Test

In *United States v. Mitcheltree*,<sup>354</sup> the Tenth Circuit evaluated whether the two offenses involved the same evidence to identify when two offenses are inextricably intertwined.<sup>355</sup> The Tenth Circuit found that the inextricably intertwined exception applied, because the incriminating statements obtained by the police related directly to both the drug distribution and witness tampering offenses.<sup>356</sup>

Similarly, Agent Gonzalez questioned Covarrubias and Ochoa regarding both the kidnapping and transportation of illegal alien charges.<sup>357</sup> However, the Tenth Circuit considered "same evidence" with respect to proof elements; it did apply the test when the offenses were related in other ways.<sup>358</sup> However, in *Covarrubias*, the evidence related to both offenses but were not directly linked with regard to proof elements.<sup>359</sup> Additionally, the Fifth Circuit stated in *United States v. Cooper*<sup>360</sup> that the two offenses are not inextricably intertwined if one offense predates the other offense, even if the two cases would utilize essentially the same evidence in prosecuting the defendant.<sup>361</sup> For the aforementioned reasons, the evidence did not satisfy the Tenth Circuit's definition of the "same evidence" because kidnapping and transportation of illegal alien requires disparate proof elements.<sup>362</sup> Hence, the Ninth Circuit would not have been able to suppress the incriminating statements based upon the "same evidence" test.

<sup>354</sup> See 940 F.2d 1329 (10th Cir. 1991).

<sup>355</sup> See *id.* at 1344.

<sup>356</sup> See *id.* at 1344-1345.

<sup>357</sup> See *Covarrubias*, 179 F.3d at 1222 n.2, n.4.

<sup>358</sup> See *Mitcheltree*, 940 F.2d at 1344-1345.

<sup>359</sup> See Brief for the State at 19-20, *Covarrubias* (No. 98-30167) (stating that the kidnapping offense and transportation of an illegal alien necessitated disparate proof elements).

<sup>360</sup> See 949 F.2d 737 (5th Cir. 1991).

<sup>361</sup> See *id.* at 744.

<sup>362</sup> See 18, U.S.C § 1324(a)(1)(B); Revised Code of Washington 9A.040.020.

## B. THE NINTH CIRCUIT SHOULD HAVE APPLIED THE CIRCUMVENTION OF RIGHT EXCEPTION

The Ninth Circuit should have suppressed the defendants' incriminating evidence based upon on the circumvention of right exception. Unlike the inextricably intertwined exception, the United States Supreme Court expressly endorsed this exception in *Maine v. Moulton*.<sup>363</sup> A majority of federal circuit and state supreme courts have adopted the circumvention of right exception in the same manner.<sup>364</sup>

For example, in *United States v. Mitcheltree*,<sup>365</sup> the Tenth Circuit suppressed statements regarding drug charges although the government purported to investigate witness tampering.<sup>366</sup> The Tenth Circuit characterized the interview as a knowing circumvention of defendant's Sixth Amendment right to counsel.<sup>367</sup> Therefore, the right to counsel attached to both the charged and uncharged offenses for two reasons.<sup>368</sup> First, as in *Moulton*, the police knew that the Sixth Amendment right to counsel attached to defendant's drug charges.<sup>369</sup> Second, the informant's open-ended questions made it virtually certain that the defendant would discuss the details of the pending drug charges.<sup>370</sup>

Like *Moulton* and *Mitcheltree*, the Ninth Circuit should have suppressed the statements based on the circumvention of right exception. Agent Gonzalez knew or should have known that the Sixth Amendment right to counsel had attached to the

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<sup>363</sup> See *Maine v. Moulton*, 474 U.S. 159, 171 (1985).

<sup>364</sup> See *supra* note 6 and accompanying text.

<sup>365</sup> See *United States v. Mitcheltree*, 940 F.2d 1329 (10th Cir. 1991).

<sup>366</sup> See *id.* at 1344-1345.

<sup>367</sup> See *id.*

<sup>368</sup> See *id.*

<sup>369</sup> See *id.* at 1335.

<sup>370</sup> See *Mitcheltree*, 940 F.2d 1340-1341.

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defendants' charge of kidnapping.<sup>371</sup> In addition, Agent Gonzalez asked open-ended questions which were likely to elicit incriminating statements regarding the kidnapping charge.<sup>372</sup> Furthermore, Agent Gonzalez did not confine his questions solely to the issue of transportation of illegal aliens.<sup>373</sup> Moreover, Agent Gonzalez participated in the planning of the arrest of the two defendants as well the arrest itself.<sup>374</sup> Finally, the state dismissed the state charge in exchange for an alleged promise of a federal conviction arising out of the same incident.<sup>375</sup> Agent Gonzalez deliberately sought to circumvent the prohibition of questioning in respect to the kidnapping charge by participating in the arrest of Ochoa and Covarrubias and asking open-ended questions.

As in *Covarrubias*, when evidence indicates that the police deliberately sought to circumvent the defendants' Sixth Amendment right to counsel protection, the Ninth Circuit should have granted Covarrubias' and Ochoa's Motion to Suppress based on this exception.

## VI. CONCLUSION

The *Covarrubias* decision illustrates the uncertainty and ambiguity of the inextricably intertwined exception. Given that most courts have narrowly interpreted and applied the inextricably intertwined exception sparingly,<sup>376</sup> the Ninth Circuit in *Covarrubias* improperly applied this exception. As such, the Ninth Circuit has added to the confusion between the circuits as to which test governs the application of the inextricably in-

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<sup>371</sup> See *Covarrubias*, 179 F.3d at 1222 n.3. Agent Gonzalez argued that he did not in fact know that the defendants' Sixth Amendment right to counsel had attached to the kidnapping crime. See *id.* However, given Agent Gonzalez's experience, the Ninth Circuit imputed knowledge that the defendants' had been arraigned and appointed counsel. See *id.*

<sup>372</sup> See *supra* note 26 and accompanying text.

<sup>373</sup> See *id.*

<sup>374</sup> See *Covarrubias*, 179 F.3d at 1221.

<sup>375</sup> See *id.* at 1222.

<sup>376</sup> See *supra* note 5 and accompanying text.

tertained exception. Nevertheless, the Ninth Circuit should have suppressed the defendants' statement based on the circumvention of right exception. Courts generally have applied the circumvention of right exception more broadly on a showing that the government breached its affirmative obligation not to circumvent the Sixth Amendment right to counsel. The facts in *Covarrubias* demonstrate that I.N.S. Agent Gonzalez knowingly circumvented Covarrubias and Ochoa's Sixth Amendment right to counsel.<sup>377</sup>

Therefore, the Ninth Circuit could have suppressed the defendants' incriminating statements relying solely on the circumvention of right exception because each exception provides an independent basis for suppression.<sup>378</sup> The court should have avoided the issue concerning the split as to which test applies for the inextricably intertwined exception. To aid these circuit courts, the United States Supreme Court should expressly endorse the inextricably intertwined exception. Should the Court decide to endorse the inextricably intertwined exception, the Court must resolve the split as to which test to apply and spell out the parameters for when the inextricably intertwined exception applies.

*Holly Larsen\**

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<sup>377</sup> See *supra* notes 364-376 and accompanying text.

<sup>378</sup> See *id.* at 1226.

\* J.D. candidate, 2001. UCSD. I wish to thank my family and friends for their continued understanding, love and support. I would also like to thank Dean Peter Keane for his invaluable assistance, direction, support and contributions.