10-1-2011

WAVERING ON WAIVER: MONTEJO V. LOUISIANA AND THE SIXTH AMENDMENT RIGHT TO COUNSEL

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ABSTRACT

This Article analyzes the future of the Sixth Amendment right to counsel following the United States Supreme Court case of Montejo v. Louisiana*, 129 S. Ct. 2079 (2009). In* Montejo*, the Court overturned a long-standing prohibition on the interrogation of a represented defendant without his counsel present. Now, following* Montejo*, the police may approach a criminal defendant and ask him, outside the presence of his lawyer, to waive his Sixth Amendment right to have counsel present during an interrogation.*

This significant change in Sixth Amendment law raises many new questions regarding the scope and procedure of a waiver of the Sixth Amendment right to counsel. In addressing these questions, this Article first critiques the Montejo *decision for its conflation of the Sixth Amendment right to counsel with the Fifth Amendment right to counsel. This Article posits that the Court wrongly grafted Fifth Amendment notions of voluntariness and coercion onto its Sixth Amendment analysis, thereby ignoring traditional Sixth Amendment concerns, such as fairness in the adversarial process and the provision of counsel as an intermediary between the defendant and the State. This Article then considers several questions that arise in the wake of* Montejo*, including: whether a formal waiver is still needed to waive the Sixth Amendment right to counsel; if it is, what language constitutes a valid waiver; and what police conduct will invalidate a waiver? In answering each of these questions, this Article discusses the inherent limitations of the* Montejo *Court's conclusion that the protections afforded by the Fifth Amendment right to counsel, namely those of* Miranda *and its progeny, offer sufficient protection of a defendant's Sixth Amendment right to counsel. Finally, this Article argues that these Fifth Amendment-based protections are, in fact, insufficient, and courts should answer these post-*Montejo *questions by reaffirming the distinct fundamental principles that underlie the Court's traditional Sixth Amendment right to counsel jurisprudence.*

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* Acting Assistant Professor, New York University School of Law. I would like to thank my family and Professor Anthony Thompson for their unwavering support and guidance. I would also like to thank Professor Ty Alper, Professor Jenny M. Roberts, Chris Hudson, Adam Gardner, and the Lawyering Program of NYU School of Law.

INTRODUCTION

Imagine the following: a defendant is charged with a crime and released on bond. At his initial court appearance, he asks for and receives a court-appointed lawyer. A few days later, the police pick him up for questioning. When he arrives at the police station, his lawyer is not there. The police tell the defendant he is "free to go" if he chooses but suggest that it would be helpful to his case if he speaks with them. The defendant, unfamiliar with the criminal justice system and having not yet spoken to his lawyer, agrees to talk to the police without his lawyer being present. The defendant eventually admits he was at the scene of the crime, thus incriminating himself. This interrogation is conducted without the defense attorney's knowledge or consent.

For more than twenty years, this factual scenario was prohibited under Sixth Amendment jurisprudence. The Sixth Amendment generally prohibited the police from interrogating a suspect who had been charged with a crime and was represented by counsel.[1] Such questioning by an arm of the prosecution was considered a violation of a defendant's right to counsel under the Sixth Amendment. However, in the spring of 2009, the United States Supreme Court, in *Montejo v. Louisiana*,[2] overturned this bright-line prohibition. The *Montejo* Court held that a represented defendant could both waive his Sixth Amendment right to counsel and face police interrogation without his counsel being present.[3] As a result, the above hypothetical is likely now permissible under Sixth Amendment law.

The *Montejo* Court suggested that its decision would have a minimal impact on the protections afforded criminal defendants.[4] The Court also reasoned that the safeguards rooted in the Fifth Amendment right to counsel were sufficient protection of a defendant's right to counsel under the Sixth Amendment.[5] Moreover, the Court stated that the mechanism for waiving these distinct but overlapping rights to counsel is the same—the reading of rights and the subsequent waiver of rights as established in the Fifth Amendment cases of *Miranda v. Arizona*[6] and its progeny.[7]

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1. *See infra* text accompanying notes 39–45 (discussing Michigan v. Jackson, 475 U.S. 625 (1986)).
2. 129 S. Ct. 2079 (2009).
3. *See id.* at 2091.
4. *See id.* at 2089 (stating that *Jackson* only marginally prevents unconstitutional conduct as such conduct is prohibited by other case law). It is interesting to note, however, that the Court recognized, at least to some extent, the significance of its decision. The authors of both the majority and dissenting opinions chose to read their opinions out loud from the bench. *See* Jesse J. Holland, *Justices Reverse a Rule on Police Questioning: Lawyers Don't Have to Be Present*, WASH. POST, May 27, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/05/26/AR2009052603147.html (noting that both Justice Scalia and Justice Stevens read their opinions out loud).
5. *Montejo*, 129 S. Ct. at 2090.
6. 384 U.S. 436 (1966); *see infra* text accompanying notes 25–30 (discussing the *Miranda* decision).
7. Montejo v. Louisiana, 129 S. Ct. 2079, 2090 (2009).

At face value, equating a waiver of the Fifth Amendment right to counsel with a waiver of the Sixth Amendment right to counsel has an easy symmetry. However, this symmetry only extends so far. Historically, the Fifth Amendment right to counsel and the Sixth Amendment right to counsel have distinct underlying goals and purposes. The right to counsel of the Fifth Amendment is a safeguard recognized by the Supreme Court as necessary to protect the Fifth Amendment right against compulsory self-incrimination. This right to counsel is therefore only constitutionally required in the setting of custodial interrogation, as it is in this factual context that concerns of coerced confessions arise.[8] By contrast, the Sixth Amendment right to counsel is in the text of the Amendment itself and protects all critical stages of criminal proceedings.[9] As such, the Sixth Amendment right to counsel serves the broader purpose of providing counsel as an intermediary between the defendant and the State and strives for the goal of a fair adversarial process.

The *Montejo* Court, however, failed to recognize the fundamental principles of the Sixth Amendment right to counsel and instead collapsed a Fifth Amendment analysis into its evaluation of a Sixth Amendment question. As a result, there are now many new questions about the scope of the Sixth Amendment right to counsel and the means by which a defendant may validly waive that right.[10] Specifically, the Court's assertion that the protections and procedures of *Miranda* and its progeny will govern a waiver of the Sixth Amendment right to counsel does not resolve the question of what constitutes a valid waiver in situations that fall outside the confines of *Miranda*. *Miranda* and its progeny only apply to the narrow factual circumstance of custodial interrogation.[11] Yet the Sixth Amendment right to counsel is implicated in numerous situations that arise outside this limited purview. It is, therefore, critical to examine whether the formal waiver procedure associated with the Fifth Amendment right to counsel is sufficient to safeguard the interests protected by the Sixth Amendment right to counsel in the many factual circumstances that implicate this Sixth Amendment right. Such an analysis raises additional questions regarding the validity of a waiver of the Sixth Amendment right to counsel, the circumstances under which a formal waiver would be necessary, and the extent to which the procedure for waiving these two rights can be the same.

Part I of this Article begins with a brief discussion of the fundamental purposes of—and the differences between—the Sixth Amendment right to counsel and the

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8. *See infra* Part I.A (discussing Fifth Amendment right to counsel).

9. *See infra* Part I.A (discussing Sixth Amendment right to counsel and defining the term "critical stage").

10. *Cf*. Penny J. White, *Relinquished Responsibilities*, 123 HARV. L. REV. 120, 134 (2009) (discussing the current Supreme Court makeup, stating that "it is almost commonplace for the Court to issue holdings that raise as many questions as are answered[,]" and finding the same comment applicable to recent dissents).

11. *See infra* Part I.A–B (describing how the Court continues to redefine the terms of *Miranda* and its progeny).

Fifth Amendment right to counsel. Part I also previews the reasoning of the *Montejo* Court by discussing the earlier analytical blurring of these two rights in the context of police interrogation. Part II focuses specifically on the case of *Montejo*. Part II posits that the majority's conflation of the Sixth Amendment right to counsel with the Fifth Amendment right to counsel, as well as its unfounded assumptions regarding defense counsel's role in the criminal justice system, led directly to its problematic holding.

Part III challenges *Montejo*'s conclusion that the formal waiver procedure established by *Miranda* and its progeny provides sufficient protection of a defendant's Sixth Amendment right to counsel. By illuminating the numerous questions that now exist in Sixth Amendment jurisprudence, this Part demonstrates that the *Miranda* cases provide little guidance for answers. These open questions are divided into three general inquiries: first, is a "formal waiver"[12] required to waive the Sixth Amendment right to counsel in situations in which a formal waiver is not required under *Miranda*? Second, if a formal waiver is required, what language should comprise such a waiver? Third, what police conduct will invalidate a Sixth Amendment waiver of counsel? Finally, this Article concludes by proposing ways in which courts should ensure a protective Sixth Amendment right to counsel in the wake of the *Montejo* decision.

I. PAVING THE WAY FOR *MONTEJO*

A. The Right to Counsel of the Fifth and Sixth Amendments

The right to counsel of the Fifth Amendment and the right to counsel of the Sixth Amendment have distinct constitutional underpinnings.[13] In addition, while both rights come into play in the context of police interrogation, they do so from different perspectives and with their own guiding concerns.

The Sixth Amendment right to counsel is a substantive right within the text of

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12. For the sake of clarity, I use the term "formal waiver" to mean a waiver that is given after a recitation of one's rights and the consequences of waiving one's rights (spoken usually by a judge or a police officer) and the subsequent agreement by the suspect to give up those rights. This is the type of "formal waiver" as generally used in the procedures of both *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Faretta v. California*, 422 U.S. 806 (1975). *See infra* note 30 (describing the requirements of a formal waiver under *Miranda*) and *infra* text accompanying notes 130–32 (detailing waiver procedure under *Faretta*).

13. *See* McNeil v. Wisconsin, 501 U.S. 171, 177–78 (1991) (discussing the differences between a Fifth and Sixth Amendment invocation and noting that "[t]o invoke the Sixth Amendment interest is, as a matter of *fact*, *not* to invoke the *Miranda-Edwards* interest"); Michigan v. Jackson, 475 U.S. 625, 629 (1986) (finding that a Fifth Amendment waiver of counsel during a police interrogation does not subsequently become a Sixth Amendment waiver of counsel post-arraignment); *see also* Justin Bishop Grewell, *A Walk in the Constitutional Orchard: Distinguishing Fruits of Fifth Amendment Right to Counsel From Sixth Amendment Right to Counsel in* Fellers v. United States, 95 J. CRIM. L. & CRIMINOLOGY 725, 727 (2005) (explaining that "[t]he Fifth and Sixth Amendments provide two different sources for the right to counsel" but that the rights are distinct because "the amendments serve different purposes").

the Amendment,[14] which provides for "the accused . . . to have the Assistance of Counsel for his defence."[15] The central purposes of this right are to protect the fundamental rights of criminal defendants and to ensure fairness in criminal proceedings.[16] In order to achieve these goals, the Sixth Amendment guarantees a criminal defendant "the right to rely on counsel as a 'medium' between him and the State."[17] The provision of counsel is rooted in the recognition that the typical criminal defendant does not have legal knowledge or skills and that counsel is needed when a defendant is faced with an opponent who does have such knowledge and training.[18]

This fundamental interest in ensuring a fair adversarial process is reflected in the well-established principle that the Sixth Amendment right to counsel attaches at the beginning of criminal proceedings.[19] It is at this point that the defendant is faced with the State as prosecutor and is required to understand both substantive and procedural law.[20] Placing the attachment point at the initial stage of criminal

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14. *See* Bidish J. Sarma et. al., *Interrogations and the Guiding Hand of Counsel:* Montejo*,* Ventris*, and the Sixth Amendment's Continued Vitality*, 103 NW. U. L. REV. COLLOQUY 456, 460 (2009) (discussing the Sixth Amendment textual guarantee of counsel); *see also* BLACK'S LAW DICTIONARY 1438 (9th ed. 2009) (defining "substantive right" as a "right that can be protected or enforced by law; a right of substance rather than form").

15. U.S. CONST. amend. VI. The complete Sixth Amendment reads as follows:

> 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 witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.; *see also* Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (holding that the Sixth Amendment right to counsel applies to states through the Due Process Clause of the Fourteenth Amendment); Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that federal due process is violated when a state fails to appoint counsel in a capital case).

16. Massiah v. United States, 377 U.S. 201, 205 (1964) (stating that the purpose of the Sixth Amendment is to protect "the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime") (internal citation omitted); *see also Gideon*, 372 U.S. at 344 (asserting that the right to counsel in criminal proceedings is a fundamental right); *Powell*, 287 U.S. at 57 (finding the defendants were denied their right to counsel during "perhaps the most critical period" of "vitally important" proceedings); James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 987 (1986) (stating that the Sixth Amendment right to counsel offers protection against government conduct that poses risks to adversarial equality).

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

18. United States v. Gouveia, 467 U.S. 180, 189 (1984) (stating that purpose of right is to protect "the unaided layman at critical confrontations with his adversary"); *see also* United States v. Ash, 413 U.S. 300, 309 (1973) (stating that the purpose of defense counsel is to "minimize the imbalance in the adversary system"); *Powell*, 287 U.S. at 69 (discussing defendant's need for "the guiding hand of counsel").

19. *See* Rothgery v. Gillespie County, 554 U.S. 191, 197–98 (2008) (holding that the Sixth Amendment right to counsel attaches once prosecution is commenced) (citations omitted); Kirby v. Illinois, 406 U.S. 682, 689–90 (1972) (stating that the right to counsel attaches when adversarial judicial proceedings are initiated "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment"); *cf.* Moran v. Burbine, 475 U.S. 412, 432 (1986) (finding no violation of Sixth Amendment because interrogation took place prior to "formal initiation of adversary judicial proceedings").

20. *Moulton*, 474 U.S. at 170 (stating that "the adverse positions of government and defendant have solidified" by the beginning of adversarial proceedings) (quoting *Gouveia*, 467 U.S. at 189).

proceedings also reflects an understanding that events may occur in pretrial stages, "the results [of which] might well settle the accused's fate and reduce the trial itself to a mere formality."[21] Therefore, the Supreme Court has long recognized that the scope of the Sixth Amendment right to counsel includes all "critical" stages of the prosecution.[22]

In the context of police interrogation, the Sixth Amendment right to counsel applies to law enforcement questioning that takes place after the initiation of criminal proceedings. Post-arraignment interrogation is a "critical stage" in which the Sixth Amendment guarantees the assistance of counsel.[23] The provision of counsel during post-arraignment interrogation is justified by the Sixth Amendment goals of leveling the playing field between the defendant and the prosecutorial forces of the State and ensuring the defendant has counsel as an intermediary. Thus, the provision of counsel by the Sixth Amendment in the context of post-arraignment police interrogation explicitly recognizes that a lawyer is needed in this setting in order to achieve the overarching objective of a fair adversarial process.

The provision of the right to counsel under the Fifth Amendment is rooted in distinctly different concerns than those at the core of the Sixth Amendment right to counsel. The Fifth Amendment right to counsel is not mentioned in the text of the Amendment. On its face, the Fifth Amendment guarantees the right against compulsory self-incrimination.[24] In the seminal case of *Miranda v. Arizona*,[25] the Supreme Court recognized that the risk of coerced self-incrimination is particu-

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21. United States v. Wade, 388 U.S. 218, 224 (1967); *see also infra* note 84 (presenting evidence that the great majority of defendants plead guilty prior to trial).

22. *Gouveia*, 467 U.S. at 189; *see also* Coleman v. Alabama, 399 U.S. 1, 9–10 (1970) (finding preliminary hearing to be a critical stage); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (recognizing that a defendant is entitled to assistance of counsel during a guilty plea); *Wade*, 388 U.S. at 237 (holding that post-indictment lineup is a "critical stage"); Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (holding that an arraignment is a "critical stage"); *cf. Ash*, 413 U.S. at 321 (holding that the Sixth Amendment does not grant the right to have counsel present at a post-indictment photo display lineup).

23. *See* Maine v. Moulton, 474 U.S. 159, 176 (1985) (holding that the State violated the defendant's Sixth Amendment right to counsel when it arranged for an undercover informant to tape the defendant's statements in absence of his counsel); United States v. Henry, 447 U.S. 264, 274 (1980) (holding that the defendant's Sixth Amendment right to counsel was violated when a cellmate, at the direction of the government, deliberately elicited incriminating statements after the defendant was arraigned and in absence of counsel); Brewer v. Williams, 430 U.S. 387, 399, 405–06 (1977) (holding that the police interrogation of the defendant after arraignment and in absence of counsel violated the defendant's Sixth Amendment right to counsel); Massiah v. United States, 377 U.S. 201, 206 (1964) (holding that the defendant's Sixth Amendment rights were violated when federal agents deliberately elicited incriminating information from him after he had been indicted and in absence of counsel).

24. U.S. CONST. amend. V (providing that an individual shall not be "compelled in any criminal case to be a witness against himself"); *see also* Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding the Fifth Amendment privilege against self-incrimination applicable to states through the Fourteenth Amendment).

25. 384 U.S. 436 (1966).

larly acute in the context of custodial interrogation.[26] The Court held that certain procedural safeguards must therefore be in place in that setting to ensure that a suspect is given "a full opportunity to exercise the privilege against self-incrimination."[27] These "protective guidelines"[28] are intended to ensure that suspects in custody understand their right against self-incrimination prior to speaking to the police and are not badgered into making incriminating, involuntary statements.[29] The right to assistance from counsel during custodial interrogation is one such safeguard and a suspect must be made aware of this safeguard prior to speaking to the police.[30] Thus, the provision of counsel under the Fifth Amendment is required only if the suspect is faced with custodial interrogation and only if he requests such assistance, for it is in this limited context that the Fifth Amendment concerns of compulsory self-incrimination come into play.[31]

The Sixth Amendment's focus on the fairness and integrity of the entire adversarial process explains why the Sixth Amendment's right to counsel protects the defendant in stages of the proceedings (*e.g.*, a line-up, a psychological examination) that the Fifth Amendment does not.[32] Conversely, the focus of the Fifth Amendment on preventing involuntary statements and police badgering explains why the right to counsel of the Fifth Amendment is considered a

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26. *Id*. at 445–58; *see also* Dickerson v. United States, 530 U.S. 428, 434–35 (2000) (stating that *Miranda* recognized an increase in concern about coerced confessions as a result of modern custodial police interrogation).

27. *Miranda*, 384 U.S. at 467. Although the Court suggested a procedure by which a police officer could inform a suspect of his rights, it did not mandate this procedure as the exclusive method. *Id*. (encouraging Congress and States to find ways to protect individuals' rights in this context); *see also infra* notes 30 and 120 (discussing procedure of *Miranda*).

28. Michigan v. Tucker, 417 U.S. 433, 443 (1974) (referring to "a set of specific protective guidelines, now commonly known as the *Miranda* rules").

29. *See Miranda*, 384 U.S. at 466 (stating that the presence of counsel ensures that the police do not violate the defendant's rights during interrogation).

30. *See id.* at 469 ("[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.").

The *Miranda* Court suggested a formal waiver procedure for informing suspects of certain rights and the consequences of waiving those rights. *Id*. at 467–75. A suspect must be told that he has the right to remain silent, the right to have the assistance of a lawyer, and the right to have a lawyer appointed to him if he is indigent. *Id*. If the suspect invokes his right to remain silent or have a lawyer present, the interrogation must cease. *Id*. at 474. In the years following the *Miranda* decision, the reading of the *Miranda* rights and waiver has become a well-established procedure to ensure a voluntary and knowing waiver of a suspect's Fifth Amendment rights. *See Dickerson*, 530 U.S. at 443 ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.").

31. *See* Solem v. Stumes, 465 U.S. 638, 644 n.4 (1984) ("*Edwards* did not confer a substantive constitutional right that had not existed before; it created a protective umbrella serving to enhance a constitutional guarantee.") (internal citation omitted); *Tucker*, 417 U.S. at 444 (stating that *Miranda*'s procedural safeguards were not rights of themselves but rather "measures to insure that the right against compulsory self-incrimination was protected"); *see also* Michigan v. Jackson, 475 U.S. 625, 639 n.2 (1986) (Rehnquist, J., dissenting) ("Even under *Miranda*, the 'right to counsel' exists solely as a means of protecting the defendant's Fifth Amendment right not to be compelled to incriminate himself.").

32. *See Jackson*, 475 U.S. at 632 n.5 (holding that regardless of Fifth Amendment applicability, the defendant has a right to an attorney at critical stages under the Sixth Amendment).

"prophylactic"[33] tool that protects any suspect faced with custodial interrogation—and only custodial interrogation—regardless of whether that suspect has been charged with a crime.

B. Blurring the Right to Counsel in the Context of Police Interrogation

Following the *Miranda* decision, the Supreme Court issued a series of landmark decisions delineating the scope of the Fifth Amendment right to counsel once invoked by a suspect.[34] In *Edwards v. Arizona*,[35] the Court held that once an accused asks for counsel during custodial interrogation, the suspect may not be subject to further interrogation until counsel is present or the suspect himself initiates further communication with the police.[36] Several years later in *Minnick v. Mississippi*,[37] the Court further specified that the police may not reinitiate interrogation after invocation unless defense counsel is actually *present*, regardless of whether the accused had a previous opportunity to consult with his attorney.[38] The *Miranda-Edwards-Minnick* line of cases laid the groundwork for the general proposition that once a suspect invoked his Fifth Amendment right to counsel, custodial interrogation must cease.

The prohibition on post-invocation questioning by law enforcement also had its place in Sixth Amendment jurisprudence. In *Michigan v. Jackson*,[39] the Court considered post-arraignment custodial interrogation, recognizing that in this particular context, a defendant has the right to have counsel present during interrogation under both the Fifth and Sixth Amendments.[40] The defendant has the right to

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33. Tucker, 417 U.S. at 446–47; *see also* Maryland v. Shatzer, 130 S. Ct. 1213, 1220 (2010) ("We have frequently emphasized that the *Edwards* rule is not a constitutional mandate, but judicially prescribed prophylaxis."); *Solem*, 465 U.S. at 644 (characterizing *Edwards* as a prophylactic rule); Michigan v. Payne, 412 U.S. 47, 53 (1973) (referring to *Miranda* as a prophylactic rule). *See generally* Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1529 (2006) (describing prophylactic rules as rules to enforce constitutional values and as judicial rules necessary "to curb excessive unpredictability or manipulability" in implementing particular constitutional provisions).

Despite the Court's characterization of *Miranda* and *Edwards* as prophylactic rules, these rules are constitutionally based and protected. *See Dickerson*, 530 U.S. at 444, 440 n.5 (calling *Miranda* a "constitutional rule" and holding that Congress could not in effect overturn *Miranda* given *Miranda*'s "constitutional underpinnings").

34. The Court has also clarified what is permissible when law enforcement fails to give *Miranda* warnings as required. *See, e.g.*, Missouri v. Siebert, 542 U.S. 600, 604 (2004) (holding that giving *Miranda* warnings in the middle of a confession did not remove the taint of an initial un-*Mirandized* interrogation and confession); Oregon v. Elstad, 470 U.S. 298, 318 (1985) (holding that the failure to give *Miranda* warnings for a first confession does not presumptively taint a subsequent voluntary confession after *Miranda* warnings).

35. 451 U.S. 477 (1981).

36. *Id*. at 484–85; *see also* Michigan v. Harvey, 494 U.S. 344, 350 (1990) (stating that *Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.").

37. 498 U.S. 146 (1990).

38. *Id*. at 153.

39. 475 U.S. 625 (1986). *Jackson* is comprised of two consolidated cases, *Michigan v. Jackson* and *Michigan v. Bladel*. *Id.* at 625. At issue in the underlying cases was the admissibility of confessions obtained by the police after the defendants had been arraigned and had counsel appointed. *Id*. at 627–28, 630.

40. *Id*. at 632.

counsel under the Fifth Amendment because it is custodial interrogation, and has the same right under the Sixth Amendment because the interrogation occurs after arraignment and the appointment of counsel. The Court recognized that *Edwards* offered protection pursuant to the Fifth Amendment and reasoned that "the Sixth Amendment right to counsel at a postarraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation."[41] The Court concluded that there should therefore be an *Edwards*-type rule in the Sixth Amendment context as well.[42] The Court held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."[43] Consequently, until *Montejo v. Louisiana*,[44] the police were essentially prohibited under the Sixth Amendment from initiating interrogation after a defendant had been arraigned on criminal charges and a lawyer had been appointed.[45]

An unfortunate and unintentional result of *Jackson* was the blurring of the distinctions between the right to counsel of the Fifth Amendment and that of the Sixth Amendment. Though explicitly a Sixth Amendment decision, the *Jackson* opinion referenced the protection offered generally by the right to counsel of the Fifth Amendment and specifically by the *Edwards* rule.[46] As a result, following the *Jackson* decision, several members of the Court discussed the *Jackson* rule—the prohibition on police-initiated interrogation after a defendant asserts his Sixth Amendment right to counsel—from a Fifth Amendment perspective rather than a Sixth Amendment perspective.[47] In other words, some Justices grafted Fifth

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41. *Id*. The Court also reasoned that "the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before." *Id*. at 631.

42. *Id*. at 632.

43. *Id*. at 636.

44. 129 S. Ct. 2079 (2009); *see also infra* Part II (discussing *Montejo*).

45. In *Jackson*, the majority found that the two defendants asserted their Sixth Amendment right to counsel because each requested a lawyer in some way. *See Montejo*, 129 S. Ct. at 2095 (Stevens, J., dissenting) (citing facts of consolidated cases of *Michigan v. Jackson*). In the years following *Jackson*, courts often found a defendant to have "asserted" his Sixth Amendment right to counsel once he had secured a lawyer, regardless of whether the defendant actually asked out loud for counsel in court. *See id*. (citing Michigan v. Harvey, 494 U.S. 344, 352 (1990); Patterson v. Illinois, 487 U.S. 285, 290 n.3 (1988)); *see also* United States v. Harrison, 213 F.3d 1206, 1213 (9th Cir. 2000) (holding that defendant invoked his Sixth Amendment right to counsel when he retained counsel on charged case prior to indictment and government knew of that representation); United States v. Abdi, 142 F.3d 566, 569 (2d Cir. 1998) (discussing Sixth Amendment case law and noting that the government erroneously questioned defendant outside the presence of his counsel after he was arraigned and had retained counsel). *But see Montejo*, 129 S. Ct. at 2086 (rejecting dissent's position that *Jackson* protections were triggered once defendant was represented by counsel).

46. *See supra* text accompanying note 41; *see also* Sarma, *supra* note 14, at 462–63 (discussing how *Jackson* exemplifies confusion surrounding Fifth and Sixth Amendments given *Jackson*'s perceived reliance on Fifth Amendment jurisprudence).

47. *See* Texas v. Cobb, 532 U.S. 162, 174–75 (2001) (Kennedy, J., concurring) (questioning *Jackson*'s automatic presumption that a defendant would not want to speak with police without counsel in comparison with

Amendment notions of voluntariness and coercion onto the Sixth Amendment analysis, thereby ignoring traditional Sixth Amendment concerns, such as fairness in the adversarial process and the provision of counsel as an intermediary, which were the actual justifications for the *Jackson* rule.

Moreover, courts began to use the "prophylactic" language of the *Miranda-Edwards-Minnick* line of Fifth Amendment cases when discussing the Sixth Amendment right to counsel. Following the *Jackson* decision, courts saw only the Fifth Amendment comparison and similarly labeled the *Jackson* rule as a merely "prophylactic rule."[48] This label, used to suggest a lack of constitutional significance,[49] lent justification to the slow carving away of the *Jackson* protections.[50] Furthermore, disagreements over the use of the "prophylactic" label[51] masked the

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voluntary choice preserved under *Miranda* and *Edwards*); *Harvey*, 494 U.S. at 350 (stating that *Jackson* is based on "the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations"); Michigan v. Jackson, 475 U.S. 625, 640 (1986) (Rehnquist, J., dissenting) (stating that "the prophylactic rule set forth in *Edwards* makes no sense at all except when linked to the Fifth Amendment's prohibition against compelled self-incrimination").

48. *See, e.g.*, Kansas v. Ventris, 129 S. Ct. 1841, 1845 (2009) (emphasizing "prophylactic rules" governing police conduct and Sixth Amendment right to counsel); *Harvey*, 494 U.S. at 346, 349, 351, 353 (repeatedly referring to *Jackson* as a "prophylactic rule" identical to the rules created by *Miranda* and *Edwards*); *Jackson*, 475 U.S. at 639 (Rehnquist, J., dissenting) (arguing that "same kind of prophylactic rule" as *Edwards* is not needed in context of the Sixth Amendment); United States v. Aguirre, 605 F.3d 351, 357 n.4 (6th Cir. 2010) (referring to *Jackson* rule as a "prophylactic Sixth Amendment rule"); United States v. Cain, 524 F.3d 477, 481–82 (4th Cir. 2008) (characterizing the *Edwards* reasoning as "an identical prophylactic rule in the Fifth Amendment context"); United States v. Yousef, 327 F.3d 56, 140 (2d Cir. 2003) (describing *Jackson*'s "prophylactic rule"); Owens v. Bowersox, 290 F.3d 960, 962 (8th Cir. 2002) (characterizing *Jackson* as a "prophylactic rule"); Bradford v. Whitley, 953 F.2d 1008, 1010 n.4 (5th Cir. 1992) (stating that both prophylactic rules of *Edwards* and *Jackson* are "rooted in *Miranda*"); United States v. Spencer, 955 F.2d 814, 818 (2d Cir. 1992) (referring to *Jackson* as a "prophylactic" rule); Fleming v. Kemp, 837 F.2d 940, 945 (11th Cir. 1988) (noting that *Jackson* establishes a "prophylactic rule"); Stephanski v. Superintendent of Upstate Corr. Facility, 433 F. Supp. 2d 273, 287 (W.D.N.Y. 2006) (referring to the *Jackson* "prophylactic rule"); United States v. Heatley, 32 F. Supp. 2d 131, 136 (S.D.N.Y. 1998) (discussing the "prophylactic rule" from *Jackson*); State v. Montejo, 974 So. 2d 1238, 1260 (La. 2008) (noting the announcement of the Sixth Amendment "prophylactic rule" in *Jackson*).

49. *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 30–31 (2004) (discussing how the term "prophylactic rules," as used by Justice Scalia and widely cited in scholarly literature, renders such rules illegitimate rather than "true" constitutional rules).

50. *See, e.g.*, McNeil v. Wisconsin, 501 U.S. 171, 175 (1991) (holding that invocation of Sixth Amendment right to counsel is "offense specific" and, therefore, so is *Jackson*); *Harvey*, 494 U.S. at 350–51 (holding that statements taken in violation of the "prophylactic rule" in *Jackson* can be used for impeachment purposes); Flamer v. Delaware, 68 F.3d 710, 723–24 (3d Cir. 1995) (stating that the *Jackson* rule is better described as a "prophylactic rule" rather than a watershed right and, thus, is not retroactive); Collins v. Zant, 892 F.2d 1502, 1512 (11th Cir. 1990) (holding that *Jackson* is not retroactive and citing to Justice Rehnquist's dissent in *Jackson* calling it a "prophylactic rule" that provides a "second layer of protection"); *see also* Montejo v. Louisiana, 129 S. Ct. 2079, 2089 (2009) (stating that when evaluating a "prophylactic" rule like *Jackson*, courts must weigh the benefits versus the costs of the rule); Minnick v. Mississippi, 498 U.S. 146, 161 (1990) (Scalia, J., dissenting) (stating that "[t]he value of any prophylactic rule" must be weighed against costs of such a rule).

51. *Compare Flamer,* 68 F.3d at 723 ("[T]he *Jackson* rule . . . is . . . more accurately described as a prophylactic rule . . . ."); *with Ventris*, 129 S. Ct. at 1848 (Stevens, J., dissenting) ("Placing the prophylactic label on a core Sixth Amendment right mischaracterizes the sweep of the constitutional guarantee."); *Harvey*, 494 U.S. at 355 (Stevens, J., dissenting) (arguing that the majority wrongly "couch[es] its conclusion in the language of 'prophylactic rules'").

deeper and ultimately more problematic debate over whether *Jackson* was grounded in the text of the Sixth Amendment or was merely borrowed from (and was therefore repetitive of) the judicially created protections offered by the Fifth Amendment.[52]

II. *MONTEJO*: THE ULTIMATE ANALYTICAL CONFUSION

The blurring of analytical distinctions between the rights to counsel of the Fifth and Sixth Amendments came to a head in *Montejo v. Louisiana*.[53] The Court disregarded the fundamental principles of the Sixth Amendment right to counsel and instead focused solely on concerns of coercion which underlie Fifth Amendment protections. In addition, the *Montejo* Court justified its failure to give credence to the Sixth Amendment goal of fairness in the adversarial process in part by unfounded assumptions regarding the role of defense counsel in today's criminal justice system.

A. The Case of Montejo v. Louisiana

The underlying facts of *Montejo* were in part as follows: After being charged with first-degree murder and appointed a lawyer, Mr. Montejo was taken back to the police station in the custody of the police.[54] Two detectives then asked Mr. Montejo to accompany them on a car ride so that he could show them where he had discarded the gun that was used in the murder.[55] Mr. Montejo eventually agreed to accompany the detectives.[56] Soon after, defense counsel came to speak with his client at the police station but the detectives and Mr. Montejo had already left.[57] During the car ride, Mr. Montejo wrote a letter of apology to the victim's spouse, thereby incriminating himself in the murder.[58]

Counsel for Mr. Montejo argued before the Supreme Court of the United States

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52. *Compare Harvey*, 494 U.S. at 349 (describing *Jackson* as merely "[t]ransposing the reasoning" of *Edwards* into the Sixth Amendment context and creating an "identical 'prophylactic rule'"), *with id.* at 359 (Stevens, J., dissenting) (arguing that *Jackson* was firmly rooted in the Sixth Amendment principle that a defendant has "the right to rely on counsel as a 'medium' between him and the State whenever the State attempts to deliberately elicit information from him") (internal citation omitted).

53. 129 S. Ct. 2079 (2009). Justice Scalia authored the majority opinion. *Id.* He was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. Justice Alito also filed a concurring opinion, which Justice Kennedy joined. *Id.* Justice Stephens wrote the dissent and was joined by Justices Souter and Ginsburg. Justice Breyer joined in part with the dissent and also filed a separate dissenting opinion. *Id.*; *see also infra* note 72 (discussing majority opinion and dissents).

54. *See* State v. Montejo, 974 So. 2d 1238, 1260 (La. 2008); Brief for Petitioner at 2, 10, Montejo v. Louisiana, 129 S. Ct. 2079 (2009) (No. 07-1529), 2008 WL 4948399.

55. *See* Brief for Petitioner, *supra* note 54, at 7–8.

56. *See Montejo*, 974 So. 2d at 1249.

57. *See* Brief for Petitioner, *supra* note 54, at 8.

58. *See Montejo*, 974 So. 2d at 1249. The detectives gave Mr. Montejo a pen and paper and suggested he write a letter of apology to the victim's spouse. *Id.* Mr. Montejo testified at trial that the detectives dictated most of the letter. *Id.* at 1250 n.49; *see also id.* (for text of letter).

that Mr. Montejo's Sixth Amendment right to counsel had attached at his arraignment and that the admission of the written letter violated his Sixth Amendment right to counsel and the rule set forth in *Jackson*.[59] The Court, in addressing this argument, decided to consider "the scope and continued viability of" the *Jackson* rule.[60] Justice Scalia, writing for the majority, posited that *Jackson* represented "a wholesale importation of the *Edwards* rule into the Sixth Amendment."[61] The rationale of protection against police coercion that underlies the *Edwards* rule was therefore, in the Court's opinion, also the justification for the *Jackson* rule in the context of the Sixth Amendment.[62] According to the majority, the purpose of the *Jackson* rule was, like that of the *Edwards* rule, to "preclude the State from badgering defendants into waiving their previously asserted rights."[63] Given these same purposes, the Court noted that if a defendant confessed after being badgered into waiving his right to counsel, that confession would be inadmissible under case law other than *Jackson*—namely, under *Miranda* and its progeny.[64]

The majority rejected an interpretation of *Jackson* as a general prohibition against police-initiated interrogation after arraignment.[65] The Court posited that, under such an interpretation, *Jackson* would essentially create the presumption that any waiver of the right to counsel after the appointment of counsel was *per se* involuntary.[66] The *Montejo* majority rejected this argument, stating that it is not appropriate to presume that a defendant is unwilling to speak with the police without counsel present simply because he has been charged with a crime and does

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59. Montejo v. Louisiana, 129 S. Ct. 2079, 2082–83 (2009).

60. *Id.* at 2082. The Louisiana Supreme Court held that the *Jackson* protections did not apply because Mr. Montejo failed to "assert" his Sixth Amendment right to counsel at arraignment and instead remained silent when he was appointed a lawyer. *Montejo*, 974 So. 2d at 1260–61. The United States Supreme Court disagreed. *Montejo*, 129 S. Ct. at 2083. Although the Court's majority agreed with the state court that, in theory, *Jackson* required some sort of "invocation" of the right to counsel in order to trigger its protections, the Court recognized that, in practice, requiring affirmative action on the part of a defendant would prove unworkable because procedures for the appointment of counsel varied throughout the country and many states did not alert defendants that some action on their part was required. *Id.* at 2083–84. However, the majority also disagreed with the position of Mr. Montejo—that *Jackson* stood for the proposition that once counsel is appointed, the police may not initiate any further interrogation of the defendant. *Id.* at 2085. The majority stated that *Jackson* always required some sort of invocation of the right to counsel. *Id.* at 2088. *But see id.* at 2095 (Stevens, J., dissenting) (agreeing with Montejo's interpretation of *Jackson*). Therefore, the Court decided to call for supplemental briefing from the parties and to address the question of whether *Jackson* should be overruled. *Id.* at 2088 (majority opinion).

61. *Id.* at 2086 (quoting Texas v. Cobb, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring)); *see supra* text accompanying notes 35–36 (discussing *Edwards* rule).

62. The Court stated that the "antibadgering rationale is the only way to make sense of" the *Jackson* case. *Montejo*, 129 S. Ct. at 2086.

63. *Id.* at 2089.

64. *Id.* at 2089–90.

65. Writing for the majority, Justice Scalia criticized this interpretation of *Jackson* as "entirely untethered from the original rationale of *Jackson*." *Id.* at 2085.

66. *Id.* at 2086.

in fact have a lawyer.[67] Rather, according to the Court, the police should be able to approach a defendant and ask him whether he would, in fact, knowingly and intelligently waive his Sixth Amendment right to counsel.[68]

With respect to ensuring that such a waiver is voluntary, Justice Scalia stated that the protections provided by the "three layers" of the *Miranda-Edwards-Minnick* cases are sufficient to ensure a defendant is not coerced or badgered into waiving his constitutional rights and speaking to the police.[69] The fact that the *Miranda-Edwards-Minnick* line of cases speaks to protecting a defendant's Fifth Amendment rights and not his Sixth Amendment rights was deemed by the Court to be "irrelevant."[70] The majority further concluded that the right to have counsel present during interrogation is protected by both amendments and therefore can be waived, under either amendment, via the formal waiver procedure of *Miranda*.[71] Given its determination that the concerns underlying *Jackson* are addressed by other measures, the Court held that the best policy would be to "remove *Michigan v. Jackson*'s fourth story of prophylaxis" and, consequently, overruled the decision.[72]

B. The Majority's Analysis

The essential difficulty with the Court's analysis in *Montejo* is that the majority misinterpreted the underlying rationale of *Jackson* and in so doing conflated the purposes of the right to counsel of the Sixth Amendment with those of the Fifth Amendment right to counsel. The majority incorrectly concluded that the only basis for the *Jackson* rule was the desire to prevent badgering by the police.[73] This view of *Jackson* ignores the historically recognized interests protected by the Sixth Amendment right to counsel which were discussed in the *Jackson* opinion itself. In *Jackson*, the majority specifically discussed the importance of the assistance of counsel once an individual has been formally charged with a crime.[74] The Court in *Jackson* reaffirmed the principle that the Sixth Amendment gives the defendant

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67. *Id.* at 2088.
68. *Id.* at 2087.
69. *Id.* at 2090.
70. *Id.*
71. *Id.*
72. *Id.* at 2092. In its analysis of whether to overrule *Jackson*, the Court considered the factors of stare decisis. *Id.* at 2088–91. Justice Alito concurred with the majority opinion, writing separately to point out a similar stare decisis analysis in an earlier decision in the term. *Id.* at 2092–94 (Alito, J., concurring). Justice Stevens, writing in dissent, argued that the majority misinterpreted the rationale of *Jackson* and undervalued the principles of stare decisis. *Id.* at 2094–98 (Stevens, J., dissenting). He was joined by Justices Souter and Ginsburg. *Id.* at 2094. Justice Breyer joined in the dissent save for a footnote stating he believed his decision was mandated by stare decisis. *Id.*
73. *See id.* at 2086 (majority opinion); *see also id.* at 2095 (Stevens, J., dissenting) (stating that the majority wrongly interpreted the rationale of *Jackson*).
74. *See* Michigan v. Jackson, 475 U.S. 625, 631 (1986).

"the right to rely on counsel as a 'medium' between him and the State."[75] Although the Court did refer to the Fifth Amendment protections during custodial interrogation, the *Jackson* Court did so as a means of comparison, stating that the Sixth Amendment right to counsel at a post-arraignment interrogation "requires *at least as much* protection" as the Fifth Amendment right to counsel provides in a custodial interrogation.[76]

The fact that the *Jackson* Court transposed a Fifth Amendment rule into the Sixth Amendment context does not automatically mean the justifications for *Edwards*—primarily the anti-badgering concern—also justified the *Jackson* rule. Rather, there are separate and distinct interests of the Sixth Amendment, those of leveling the playing field between the State and the defendant and the role of counsel as an intermediary, which justify a similar rule in Sixth Amendment jurisprudence. The *Montejo* majority, however, seized on *Jackson*'s reference to the Fifth Amendment and erroneously concluded that the rationale for providing counsel under both rights is the same. Moreover, the Court analyzed (and consequently rejected) *Jackson* from a Fifth Amendment perspective: the Court viewed the *Jackson* rule as an unnecessary and unwarranted presumption of an involuntary waiver. From a Sixth Amendment perspective, however, the *Jackson* presumption of an involuntary waiver is warranted based on the equitable principle of ensuring that a charged and represented defendant faces police questioning with his lawyer by his side.

The *Montejo* majority's misguided analysis of *Jackson* was also the erroneous lens through which it evaluated *Jackson*'s impact on the criminal justice system and the role of defense counsel within that system. The Court's conclusion that *Jackson* prohibited the police from obtaining voluntary confessions[77] was based in part on two assumptions: first, that defense counsel will always simply advise their clients not to speak to the police, and second, that there is no significant difference in the role of counsel in pre-arraignment versus post-arraignment interrogation.[78] Both assumptions are from the perspective of a lawyer's "Fifth Amendment role"—to protect his client against police badgering. However, upon consideration of broader Sixth Amendment concerns and an examination of the daily operation of today's criminal justice system, neither assumption is justified.

As a preliminary matter, it is questionable from a quantitative standpoint the extent to which the *Jackson* rule actually prevented the police from obtaining voluntary inculpatory statements. It is certainly true, in theory, that the *Jackson*

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75. *Id.* at 632 (quoting Maine v. Moulton, 474 U.S. 159, 176 (1985)); *see also Montejo*, 129 S. Ct. at 2096 (Stevens, J., dissenting) (arguing that *Jackson* was based firmly on Sixth Amendment principles).

76. *Jackson*, 475 U.S. at 632 (emphasis added).

77. *See Montejo*, 129 S. Ct. at 2090–91.

78. *See id.* at 2090 (reasoning that if *Miranda* and its progeny are sufficient "to protect the integrity of a suspect's voluntary choice not to speak outside his lawyer's presence before his arraignment, it is hard to see why it would not also suffice to protect that same choice after arraignment") (internal citation omitted).

rule prevented a certain number of voluntary confessions from being obtained by the police. However, this statement is not nuanced enough to be of any real help in understanding the costs and benefits of the *Jackson* rule. The more important questions are both quantitative and qualitative: how many confessions in actual practice are "lost;" whether that number of lost confessions is significant with respect to the systemic need for more confessions; and whether a rule enabling police to obtain those confessions is worth the costs to the other side—that is, a reduction in the protection of defendants' Sixth Amendment right to counsel and a possible increase in false confessions?[79]

Even under *Jackson*, a defendant could choose to speak with the police, with or without his lawyer's consent.[80] *Jackson* simply prohibited police-initiated conversation after a defendant had asserted his Sixth Amendment right to counsel.[81] Therefore, if a defendant wanted to confess to the police, he was free to do so. In addition, police have always been able to obtain confessions from suspects prior to counsel being appointed.[82] Furthermore, in the briefing to the Court leading up to the *Montejo* decision, several law enforcement groups, including judges, prosecutors, and the former director of the Federal Bureau of Investigation, informed the Court that their efforts to obtain confessions from suspects were not hampered by the *Jackson* rule.[83] The benefit of more confessions should also be weighed in part against the need for more confessions. As it is, the majority of defendants in the criminal courts plead guilty prior to trial.[84] Thus, the *Montejo* Court's critique of the restrictions *Jackson* placed on obtaining voluntary confessions may have been unjustified with respect to the numbers and was, at the very least, unsupported by

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79. *See infra* text accompanying note 181.

80. *See Jackson*, 475 U.S. at 640; *see also* Michigan v. Harvey, 494 U.S. 344, 352 (1990).

81. *See Jackson*, 474 U.S. at 636.

82. *See* Stephanos Bibas, *The Right to Remain Silent Helps Only the Guilty*, 88 IOWA L. REV. 421, 424–26 (2003) (citing studies which find that anywhere between 32 percent and 67 percent of questioned suspects incriminate themselves).

83. *See* Supplemental Brief of Larry D. Thompson, William Sessions, et al. as Amici Curiae Supporting Petitioner at 14, Montejo v. Louisiana, 129 S. Ct. 2079 (2009) (No. 07-1529), 2009 WL 1007118; *see also* Brief for the United States as Amicus Curiae in Support of Overruling *Michigan v. Jackson* at 12, Montejo v. Louisiana, 129 S. Ct. 2079 (2009) (No. 07-1529), 2009 WL 1019983 (arguing that *Jackson* should be overruled but noting that *Jackson* only occasionally prevented prosecutors from obtaining convictions and federal law enforcement practice would not likely change if *Jackson* were overruled).

84. *See* Brooks Holland, *A Relational Sixth Amendment During Interrogation*, 99 J. CRIM. L. & CRIMINOLOGY 381, 382 (2009). For example, in fiscal year 2009, of the defendants in federal district courts, 89 percent pled guilty. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2009, Table 5.24. (2009), *available at* http://www.albany.edu/sourcebook/pdf/t5242009.pdf. In 2004, in a survey of the 75 most populous counties, approximately two-thirds of felony defendants were convicted; 95 percent of those convicted were due to guilty pleas. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004, Bulletin, at 1 (Apr. 2008). Even assuming a systemic interest in increasing the number of guilty pleas, there is no evidence to suggest that whether a defendant pleads guilty is based solely on whether or not he confessed. Moreover, a defendant's guilty plea—the ultimate "confession"—is taken with the assistance of his lawyer in court. It follows, therefore, that lawyers are sometimes recommending that their clients plead guilty even if the police did not obtain a confession.

any critical look at empirical data.[85]

Underlying the Court's conclusion that the number of obtained confessions decreased post-*Jackson* are two unfounded assumptions about the role of defense counsel. First, the majority, or at the very least Justice Scalia, has the overly simplified view that once counsel is appointed, he will prevent his client from speaking to the police.[86] This statement is not necessarily true in today's criminal justice system. Defendants, particularly those in federal court, routinely speak to the government and respond to questioning by the police with the assistance of their lawyer.[87] In fact, they often have a real incentive to do so. For example, under federal law, there are explicit sentence reductions based on acceptance of responsibility and the provision of helpful information to the police.[88] Furthermore, evaluating the impact of the advice to remain silent solely on the basis of the number of confessions fails to consider whether, from the Sixth Amendment perspective of a more equitable adversarial process, such legal advice is well founded.

The second major assumption of the *Montejo* Court is that the role of counsel in post-arraignment interrogation is largely limited and that there is no difference between pre- and post-arraignment questioning from the defense attorney's perspective.[89] Again, this assumption is questionable upon a closer examination of criminal law practice. Once a suspect is charged with a crime, all the resources of the State are consolidated in order to convict the defendant.[90] The police are no longer simply investigating a crime; once a suspect is charged, both the prosecution and the police believe they have found the guilty individual and, consequently,

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85. The Court did not cite to any numerical evidence to support its conclusion.

86. *See* Minnick v. Mississippi, 498 U.S. 146, 162 (1990) (Scalia, J., dissenting) (stating that once defense counsel has spoken with defendant, "any lawyer worth his salt will tell the suspect in no uncertain terms" not to speak to the police) (internal citation omitted).

87. *See* Supplemental Brief of the Public Defender Service for the District of Columbia et al. as Amici Curiae Supporting Petitioner at 5–6, Montejo v. Louisiana, 129 S. Ct. 2079 (2009) (No. 07-1529) [hereinafter PDS Supp. Brief] (explaining why defense counsel often advise clients to speak with the police).

88. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2485 (2004) (noting that "[i]n exchange for substantially assisting the investigation or prosecution of others, defendants may earn sentences far lower than the Guidelines and even mandatory minima would otherwise provide"); Bibas, *supra* note 82, at 424 (discussing incentives for defendants to speak with the police); *see, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2010) (detailing acceptance of responsibility in sentencing guidelines).

89. Defense counsel's role during each phase is largely seen as simply telling his client not to speak. For instance, Justice Scalia has long held a limited view of defense counsel's role in post-arraignment (also referred to as pretrial or post-indictment) interrogations. *See Minnick*, 498 U.S. at 162 (Scalia, J., dissenting) (reiterating that defense counsel's job is to prevent his client from speaking); Patterson v. Illinois, 487 U.S. 285, 294 n.6 (1988) (describing counsel's role during post-indictment questioning as "rather unidimensional: largely limited to advising his client as to what questions to answer and which ones to decline to answer").

90. *See Patterson*, 487 U.S. at 303–04 (Stevens, J., dissenting) (explaining Supreme Court precedent affirming the importance of commencement of formal proceedings against a defendant); Kirby v. Illinois, 406 U.S. 682, 689 (1972) (stating that after arraignment, a defendant is "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law"); *see also* Rothgery v. Gillespie County, 554 U.S. 191, 207 (2008) (affirmatively citing *Kirby*, 406 U.S. at 689 for the same proposition).

are continuing to collect evidence—not to determine who committed the crime—but rather to prove that this individual committed the crime as charged.[91] Similarly, from the perspective of the defendant's attorney, there are strategic considerations during post-arraignment interrogations that are not relevant during earlier questioning. For instance, to prepare for post-arraignment questioning, defense counsel must consider whether there is legally sufficient evidence to support a conviction, what information the police may be seeking, and whether and how the interrogation may affect negotiations for a plea bargain.[92] Counsel also assists his client in determining what information he possesses that may be helpful to the police or could be considered mitigating evidence, versus what information should be withheld for strategic reasons. These are decisions that should be made with counsel in order to ensure that the defendant is not "misled by his lack of familiarity with the law or overpowered by his professional adversary."[93] Given the variety of decisions that must be made by the attorney and his client, defense counsel's role in post-arraignment questioning can hardly be considered "simple and limited."[94]

III. OPEN QUESTIONS POST-*MONTEJO*

Following *Montejo*, lower courts are faced with the Court's statement that the prophylactic rules of *Miranda* and its progeny are generally sufficient protection of a defendant's Fifth and Sixth Amendment rights to counsel.[95] The Court's suggestion, however, that the rules of *Miranda* and *Edwards* will provide clear

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91. *See Patterson*, 487 U.S. at 306 (Stevens, J., dissenting) (stating that after arraignment, police are no longer simply trying to solve a crime) (internal citations omitted); Sarma, *supra* note 14, at 462 n.42 (stating that confessions obtained after the Sixth Amendment right to counsel has attached serve "a proof-enhancing, rather than crime-solving, function"); *cf.* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 911 (2004) ("The purpose of interrogation is not to determine whether a suspect is guilty; rather, police are trained to interrogate only those suspects whose guilt they presume or believe they have already established.").

92. *See* PDS Supp. Brief, *supra* note 87, at 3–9 (explaining that the role of counsel is to communicate with the client, investigate the case, assess evidence against the client, and subsequently discuss strategic and legal issues with the client in communicating with the prosecution or police); *see also Montejo v. Louisiana*, 129 S. Ct. 2079, 2096 n.2 (2009) (Stevens, J., dissenting) (noting ways in which a lawyer aids a defendant with regards to police questioning); *Patterson*, 487 U.S. at 308 (Stevens, J., dissenting) (noting that "at least minimal advice is necessary").

93. United States v. Ash, 413 U.S. 300, 317 (1973).

94. *Patterson*, 487 U.S. at 299. A responding argument is that *Montejo* does not prohibit a defense attorney from discussing these considerations and strategies prior to any police-initiated interrogation. *See* Texas v. Cobb, 532 U.S. 162, 171 n.2 (2001) (arguing in the context of *Miranda* that defendants still have the opportunity to meet with counsel and discuss waiver of Fifth Amendment rights). While this may be true in the ideal criminal justice system, in the reality of criminal courts today, indigent defendants may go without such communication from their attorneys for a significant amount of time. *See infra* text accompanying notes 175–79 for a discussion on the limitations of indigent defense practice.

95. *See Montejo*, 129 S. Ct. at 2085 ("[W]hen a defendant is read his *Miranda* rights . . . that typically does the trick, even though the *Miranda* rights purportedly have their source in the Fifth Amendment . . . .") (emphasis removed).

guidelines for evaluating the validity of a defendant's waiver of his right to counsel under the Sixth Amendment is limited in its vision.[96] *Miranda*'s formal waiver requirement only applies in the narrow factual circumstance of custodial interrogation.[97] This begs the question, what procedures or principles should guide the waiver of the Sixth Amendment right to counsel in situations that fall outside the confines of *Miranda*? As a result of *Montejo* and the Court's rejection of *Jackson*, there are numerous open questions surrounding a defendant's waiver of his Sixth Amendment right to counsel. In this Part, I organize these emerging issues in Sixth Amendment waiver jurisprudence into three general questions: First, whether a formal waiver is needed in order to waive one's Sixth Amendment right to counsel; second, if a formal waiver is required, is the language of the *Miranda* warnings adequate to support a knowing and voluntary Sixth Amendment waiver; and third, what police conduct will violate a defendant's Sixth Amendment right to counsel and render a waiver involuntary?

A. Is a Formal Waiver Needed for the Sixth Amendment Right to Counsel?

It is well established in Sixth Amendment jurisprudence that a defendant may waive his right to counsel by giving a "knowing and intelligent" waiver.[98] In *Montejo*, the Court stated that the formal waiver procedure of *Miranda* would satisfy this standard.[99] Questions first arise, however, in situations in which the protections of *Miranda* do not apply. Is a formal waiver needed if the police wish to conduct a post-arraignment interrogation of a defendant who is not in custody? Is a formal waiver needed if police officers initiate a conversation with a defendant outside the presence of his counsel, but their actions do not rise to the level of

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96. The idea that *Miranda*, *Edwards*, and *Minnick* provide clear guidelines to lower courts in the context of the Fifth Amendment is questionable in and of itself. Even after *Montejo*, the Court continues to change the boundaries of these rules. *See, e.g.*, Maryland v. Shatzer, 130 S. Ct. 1213, 1223–24 (2010) (holding for the first time that invocation of *Edwards* protection ends after fourteen-day break in custody); Berghuis v. Thompkins, 130 S. Ct. 2250, 2264 (2010) (holding for the first time that a suspect must clearly invoke right to remain silent under *Miranda*). In addition, litigation will continue on whether a defendant actually invoked his rights under *Miranda* and *Edwards*. *Compare* Davis v. United States, 512 U.S. 452, 462 (1994) (affirming lower court's holding that the statement "[m]aybe I should talk to a lawyer" was not a sufficiently clear request for counsel), *and* Obershaw v. Lanman, 453 F.3d 56, 64–65 (1st Cir. 2006) (noting that the question "[c]an I talk to a lawyer first?" was not a clear request for counsel), *with* United States v. DeLaurentiis, 629 F. Supp. 2d 68, 73–75 (D. Me. 2009) (holding that defendant's repeated request to speak to her uncle, an attorney, was an unequivocal request for counsel).

97. *See* Stansbury v. California, 511 U.S. 318, 322 (1994) (citing Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam)); Rhode Island v. Innis, 446 U.S. 291, 300 (1980).

98. *Patterson*, 487 U.S. at 292; Brewer v. Williams, 430 U.S. 387, 403–04 (1977); Schneckloth v. Bustamonte, 412 U.S. 218, 238–39 (1973); *see* United States v. Wade, 388 U.S. 218, 237 (1967) (requiring the presence of counsel at a lineup "absent an 'intelligent waiver'"); Carnley v. Cochran, 369 U.S. 506, 513 (1962) (requiring petitioner to "intelligently and understandingly waive the assistance of counsel"); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (defining waiver of constitutional right as "intentional relinquishment or abandonment of a known right or privilege"); C. Allen Parker, Jr., Note, *Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel*, 82 COLUM. L. REV. 363, 365–70 (1982) (reviewing case law on waiver of Sixth Amendment right to counsel).

99. *See Montejo*, 129 S. Ct. at 2090.

"interrogation?"[100]

With respect to the former question, lower courts will now have to determine whether a formal waiver of a defendant's Sixth Amendment right to counsel is necessary before police can initiate interrogation of an *out-of-custody* defendant outside his counsel's presence. Consider the following hypothetical: A defendant is charged with a crime, appointed a lawyer, and released on bail. A few days later, while waiting in the courthouse for his preliminary hearing to commence, the defendant is approached by the arresting police officer. The officer begins to ask him questions about his alleged co-conspirator and the circumstances of the crime. In order to lawfully conduct such interrogation, does the officer first have to read the defendant some sort of "Sixth Amendment waiver of rights" and explicitly ask him to waive his Sixth Amendment right to counsel? In this situation, a police officer is not required to give the *Miranda* warnings.[101] Yet, under the Sixth Amendment, must the defendant be informed of his rights and the consequences of waiving them prior to police interrogation?

Considering past Sixth Amendment jurisprudence, lower courts should answer these questions affirmatively and hold that a formal reading of rights is still needed. Traditional Sixth Amendment jurisprudence, in requiring an explicit waiver, has focused on whether a defendant was aware he was speaking with a government agent in the absence of his counsel.[102] This case law has never attached significance to whether or not the defendant was in custody.[103] Therefore, lower courts should hold that once the Sixth Amendment right to counsel has attached, there must be evidence on the record that a defendant was informed of his Sixth Amendment right to counsel regardless of whether the defendant was in a custodial setting. Even the *Montejo* Court noted the need to review claims that a waiver of one's right to counsel was coerced,[104] thereby suggesting that a defendant must first be informed of his rights prior to a court being able to determine whether he was in fact coerced to give them up.

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100. *See infra* note 110 (defining legal term).

101. *See supra* note 97 (noting that *Miranda*'s formal waiver requirement only applies in the narrow factual circumstance of custodial interrogation).

102. Consider the seminal case of *Massiah v. United States*, 377 U.S. 201 (1964). In *Massiah*, the defendant was indicted and released on bail. *Id.* at 202. Without the defendant's knowledge, a co-conspirator decided to cooperate with authorities and agreed to tape his conversations with the defendant. *Id.* at 202–03. The Supreme Court held that the use of these taped statements at trial, which were taken without the defendant's knowledge and in the absence of his counsel, violated his Sixth Amendment right to counsel. *Id.* at 206; *see also* Maine v. Moulton, 474 U.S. 159, 177 (1985) (noting that police denied the defendant "the opportunity to consult with counsel and thus denied him the assistance of counsel guaranteed by the Sixth Amendment" by concealing the identity of a government agent); United States v. Henry, 447 U.S. 264, 273 (1980) (stating that the concept of Sixth Amendment waiver does not apply in the context where defendant did not know he was speaking with a government agent).

103. *See supra* note 102; *see also Henry*, 447 U.S. at 273 n.11 ("This is not to read a 'custody' requirement . . . into this branch of the Sixth Amendment.").

104. *See Montejo*, 129 S. Ct. at 2089.

On the other hand, Justice Scalia's language in *Montejo* implies that a formal waiver may be unnecessary in non-custodial situations. Justice Scalia reasoned that in such situations, a defendant is not likely to be coerced because he "need only shut his door or walk away to avoid police badgering."[105] This suggests that no formal waiver is necessary, given the absence of police coercion.[106] If under *Miranda*, a defendant is not required to be informed of his Fifth Amendment rights in non-custodial situations, under the *Montejo* reasoning, it is a logical extension to conclude that in non-custodial situations a defendant need not be informed of his Sixth Amendment rights either. Arguably, post-*Montejo*, if an out-of-custody defendant merely responds to police-initiated questions, this behavior may be deemed to be a "waiver," because the defendant was in no way coerced to speak to the police without his lawyer present.[107] This does raise the broader question of whether courts will allow an implicit waiver of a defendant's Sixth Amendment right to counsel. However, if lower courts focus solely on the Fifth Amendment perspective as the *Montejo* Court does, under this jurisprudence, a waiver can be clearly "inferred from the actions and words of the person interrogated."[108] As a result, out-of-custody defendants may be in the position of implicitly waiving their Sixth Amendment rights without ever having been advised of their rights or having the assistance of their appointed counsel in making that decision.[109]

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105. *Id.* at 2090.

106. This argument assumes that the *Montejo* Court is correct in stating that the anti-badgering rationale was the sole rationale of *Jackson* and that the main concern of both the Fifth and Sixth Amendments' right to counsel during police interrogation is to provide protection against coerced waivers.

107. In *Brewer v. Williams,* 430 U.S. 387 (1977), the police deliberately sought incriminating information from a represented defendant during a car ride between the courthouse and the jail. *Id.* at 392 (stating that the detective gave what is referred to as "the 'Christian burial speech'"). Although in *Brewer*, the defendant was in custody, the issue in the case was whether the defendant knowingly waived his Sixth Amendment right to counsel. *Id* at 404. The Court noted that the police made no effort to tell the defendant that he had a right to the presence of a lawyer or to determine whether the defendant wanted to give up that right. *Id.* at 405. Therefore, the Court held that there was no valid waiver of his Sixth Amendment right to counsel. *Id.* Following *Montejo*, it is not clear that courts will require police to make such an inquiry in a non-custodial setting. If the defendant in *Brewer* had not been in custody when speaking with the police, the *Brewer* result would now likely be different.

108. Berghuis v. Thompkins, 130 S. Ct. 2250, 2258 (2010) (citing North Carolina v. Butler, 441 U.S. 369, 373 (1979)). Traditionally, courts have desired a more explicit waiver in the context of the Sixth Amendment right to counsel. *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2475–77 (1996) (discussing the historically high standard of explicit Sixth Amendment waivers); *see, e.g.*, Faretta v. California, 422 U.S. 806, 835 (1975) (holding that defendant has right to waive his Sixth Amendment right to counsel and represent himself but must "be made aware of the dangers and disadvantages of self-representation").

109. This result is particularly problematic in the practice of indigent defense. *See infra* text accompanying notes 175–79 (discussing indigent defense). It is also problematic to the extent that police may purposefully try to speak to defendants in non-custodial situations in order to be outside the reach of *Miranda*. *See* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 124–25 (2008) (discussing techniques police use to avoid "custodial" requirement of *Miranda* such as telling suspects they are free to leave); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, *in* THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 222, 228 (Richard A. Leo & George C. Thomas III, eds., 1998) (stating that some anecdotal evidence suggests police shift to "noncustodial 'interviews'" to avoid *Miranda* requirements);

Lower courts will also have to determine whether a formal waiver is necessary in situations in which the police question a defendant but do not undertake what is legally considered to be "interrogation."[110] *Miranda* warnings are not required under the Fifth Amendment because the police conduct does not rise to the level of interrogation.[111] It does not follow, however, that all non-interrogative police conduct is constitutional under the Sixth Amendment. Under previous Sixth Amendment case law, the police are prohibited from the "deliberate elicitation" of information from a represented defendant without a waiver of his right to counsel or his counsel's consent.[112] Police conduct which would be deemed "deliberate elicitation" under the Sixth Amendment does not necessarily rise to the level of "interrogation" for purposes of the Fifth Amendment.[113] Therefore, there are situations in which the police may not "interrogate" a defendant, and thus the Fifth Amendment is not implicated, yet their actions still violate the Sixth Amendment.[114]

Presumably, irrespective of *Montejo*, this rule—that the police may not deliber-

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Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1542–43 (2008) (quoting law enforcement training manuals that advise law enforcement to avoid *Miranda* and remove custodial nature of interrogation by telling suspect he is free to leave if he wants).

110. *See* Rhode Island v. Innis, 446 U.S. 291, 301 (1980) ("[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response . . . .").

111. *See id.* at 300 ("[T]he special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation."); United States v. Payne, 954 F.2d 199, 203 (4th Cir. 1992) (finding no *Miranda* violation because law enforcement officer's statement regarding inculpatory evidence was not "interrogation"); Endress v. Dugger, 880 F.2d 1244, 1249 (11th Cir. 1989) (finding officer's statements to defendant did not rise to level of "interrogation" and, consequently, no *Miranda* violation); United States v. Calisto, 838 F.2d 711, 717–18 (3d Cir. 1988) (finding officer's statement to defendant was not "interrogation" and therefore *Miranda* warnings were not required); *see also* Adams v. State, 995 A.2d 763, 776 (Md. Ct. Spec. App. 2010) (declining to follow State's post-*Montejo* argument that police did not "interrogate" defendant in pretrial detention without his counsel present and instead holding that *Miranda* waiver was necessary prior to interrogating defendant in absence of his lawyer under both Fifth and Sixth Amendment analysis).

112. Fellers v. United States, 540 U.S. 519, 524 (2004) (citing United States v. Henry, 447 U.S. 264, 270 (1980); Brewer v. Williams, 430 U.S. 387, 399 (1977)); Massiah v. United States, 377 U.S. 201, 206 (1964).

113. *Fellers*, 540 U.S. at 524 ("We have consistently applied the deliberate-elicitation standard in subsequent Sixth Amendment cases, and we have expressly distinguished this standard from the Fifth Amendment custodial-interrogation standard.") (internal citations omitted); *Innis*, 446 U.S. at 300 n.4 ("The definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct.").

114. *See, e.g.*, *Fellers*, 540 U.S. at 524–25 (holding that lower court erred in concluding that absence of "interrogation" foreclosed petitioner's claim that his statements should have been suppressed). In *Fellers*, the defendant was indicted for conspiracy to distribute methamphetamine. *Id.* at 521. When the police went to the defendant's house to arrest him, the defendant answered his front door and invited the officers into his living room. *Id.* The officers advised the defendant that he was indicted with a crime and that they wanted to talk to him about his involvement. *Id.* The defendant then made incriminating statements. *Id.* At issue in the case was whether these statements made by the defendant at his home were obtained in violation of his Sixth Amendment right to counsel. *Id.* at 522–23. The Court held that the deliberate elicitation of statements from a represented defendant

ately elicit information without a formal waiver or the consent of counsel—will still stand. After all, *Montejo* does not address this line of cases and the *Montejo* Court focused generally on assessing the voluntariness of a formal waiver.[115] However, if one argues that the Court in *Montejo* is solely concerned with the prevention of a *coerced* waiver, this fear of coercion is not present in situations in which the defendant is not being interrogated. Consequently, there would be no need for a formal explanation of a defendant's rights or the ramifications of waiving those rights.[116]

To take this argument further, if the Sixth Amendment's right to counsel is understood, in the wake of *Montejo*, to be concerned solely with the coercive aspects of government action, lower courts might now conclude that the police may approach defendants and ask them to participate in other non-interrogative aspects of pretrial proceedings, such as line-ups or psychological examinations, without explicitly asking them to waive their rights or, at the very least, asking them to proceed in the absence of counsel.[117] Again, if fear of coercive interrogation is the only danger that the right to counsel is deemed to protect against, this fear does not exist in situations that do not rise to the level of interrogation. Thus, courts may find that a recitation and explanation of the Sixth Amendment right to counsel is not a necessary predicate to a voluntary, knowing, and intelligent waiver in situations that do not involve police interrogation.[118]

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without a waiver of his right to counsel or the presence of his counsel violated the Sixth Amendment. *Id.* at 524–25; *see also supra* note 107 (discussing *Brewer*).

115. *Cf.* Hall v. State, 303 S.W.3d 336, 344 (Tex. Ct. App. 2009) (finding Sixth Amendment waiver analysis unnecessary as defendant initiated conversation with police and finding no evidence that police "deliberately elicited" incriminating information).

116. Following the line of reasoning discussed above, the result in *Fellers* may well be different if decided today. *See supra* note 114 (presenting facts of *Fellers*). This could also be said with respect to the line of cases involving the State's use of informants to elicit information from a defendant. *See supra* note 102 (discussing facts of *Massiah*). If the cellmate/informant merely conversed with the defendant prior to the defendant making admissions, would the admission of those statements violate his Sixth Amendment rights? Following the reasoning of the *Montejo* Court, in those situations there is no fear of coercion by the police because the defendant is not even aware that he is actually speaking to the police—in his mind, he is chatting with a cellmate. Does it then follow that the defendant voluntarily waived his rights simply because he freely spoke with the informant and was not being interrogated? *See Indigent Defense Update, in* CRIM. PRAC. GUIDE 6, at *4 (No. 3, 2009) (stating that "[i]f voluntariness is all that is required, then cases like *Henry* and *Moulton* . . . should arguably come out the other way").

117. Stated from another perspective, if *Montejo* holds that a defendant can waive his right to have the assistance of counsel during the "critical stage" of pretrial interrogation, what is to prevent the prosecution from arguing that the police may now ask a defendant to waive his lawyer's presence for other "critical stages" as well? *See* Supplemental Brief for the States of New Mexico, Alabama et al. as Amici Curiae Supporting Respondent at 19, Montejo v. Louisiana, 129 S. Ct. 2079 (2009) (No. 07-1529), 2009 WL 1007122 (positing that "overruling *Jackson* would simply allow police to ask the defendant to participate in the lineup without counsel present"); *see also Indigent Defense Update*, *supra* note 116, at *4 ("Overruling *Jackson* implies that the police will be free to seek uncounseled waivers of counsel at all pre-trial critical stages.").

118. *See* Lisa A. Baker, *Supreme Court Cases 2008–2009 Term*, 78 FBI L. ENFORCEMENT BULL. (Oct. 1, 2009), http://www2.fbi.gov/publications/leb/2009/october2009/cases_feature.htm (interpreting the *Montejo* Court as

B. What Language Should Comprise a Waiver of the Sixth Amendment Right to Counsel?

By suggesting that the formal waiver procedure of *Miranda* is the proper mechanism by which a defendant can generally waive his Sixth Amendment right to counsel,[119] the *Montejo* Court implicitly concludes that the language of the *Miranda* warnings[120] adequately informs a defendant of the scope and nature of his right to counsel under the Sixth Amendment as well as the consequences of waiving that right. Although the facts of *Montejo* involved custodial interrogation,[121] it is likely that courts will find the language of the *Miranda* warnings sufficient to produce a valid Sixth Amendment waiver in situations beyond this narrow factual circumstance.[122]

A preview of this conclusion is seen in the Court's decision in *Patterson v. Illinois*.[123] In *Patterson*, the Court held that, on the facts before it, the language of the *Miranda* warnings produced a valid waiver of the Sixth Amendment right to counsel during post-arraignment interrogation.[124] The Court framed the question as follows: "Was the accused, who waived his Sixth Amendment rights during postindictment questioning, made sufficiently aware of his right to have counsel

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"not concerned about the circumstances when the Fifth Amendment no longer applies" as there is no fear of police coercion).

119. Montejo v. Louisiana, 129 S. Ct. 2079, 2090 (2009).

120. The basic boilerplate language is as follows: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford one, one will be appointed to you free of charge." LEO, *supra* note 109, at 123.

The Los Angeles County Sheriff's Department uses the following language for its *Miranda* warnings: "You have the right to remain silent. Anything you say may be used against you in court. You have the right to an attorney during questioning. If you cannot afford an attorney, one will be appointed for you, before any questioning." *Admonition and Waiver of Rights Form*, (L.A. Cnty. Sheriff's Dep't, L.A., Cal.) (on file with author). After each sentence, the written waiver form asks, "Do you understand?" *Id.* The suspect signs his initials after each statement and question and signs and dates the entire form. *Id.*

121. *See Montejo*, 129 S. Ct. at 2082.

122. Of course, all of the arguments against the sufficiency of the language of the *Miranda* warnings in the context of the Sixth Amendment also apply even in the factual setting of custodial interrogation. Simply because the *Miranda* warnings are sufficient to produce a knowing and voluntary waiver of the Fifth Amendment right in that setting does not mean a *Miranda* waiver is always sufficient to produce a valid waiver of the Sixth Amendment right. *See Montejo*, 129 S. Ct. at 2100–01 (Stevens, J., dissenting) (arguing that the *Miranda* warnings are insufficient as a Sixth Amendment waiver). *But see infra* note 127 (discussing lower court cases post-*Montejo*).

123. 487 U.S. 285 (1988).

124. *Id.* at 293. The *Patterson* case did not directly overrule *Jackson* because of the procedural posture of the defendant in the case. At the point in the criminal proceedings in which the defendant waived his rights via the *Miranda* formal waiver, he had been arraigned but had not yet had counsel appointed. *Id.* at 288, 290 n.3. This uncommon factual scenario led to a difference in opinion among the Justices as to whether the *Jackson* rule applied to these facts. *Compare id.* at 290–91 (majority opinion) (stating that *Jackson* did not apply because defendant never asserted his Sixth Amendment right to counsel), *with id.* at 300 (Blackmun, J., dissenting) (arguing that *Jackson* applied), *and id.* at 302 (Stevens, J., dissenting) (same). However, given the *Montejo* opinion, this factual difference is no longer relevant. *See Montejo*, 129 S. Ct. at 2092 (stating "there is no reason categorically to distinguish an unrepresented defendant from a represented one").

present during the questioning, and of the possible consequences of a decision to forgo the aid of counsel?"[125] The *Patterson* Court held that, with respect to a defendant who was given and understood the *Miranda* warnings, the answer to the above question was yes.[126] Given the *Patterson* case and the language of *Montejo*, it is likely that many lower courts will apply what could easily be viewed as a "blanket rule"—that the language of the boilerplate *Miranda* warnings is sufficient to produce a valid waiver of the Sixth Amendment right to counsel, regardless of the factual context.[127]

One reason lower courts may accept the use of the *Miranda* warnings in place of a formal Sixth Amendment waiver is that the Court has never articulated a similarly compact and "user-friendly" waiver in its Sixth Amendment jurisprudence. Despite the well-established principle that there must be an "intentional relinquishment" of one's Sixth Amendment right to counsel,[128] the Supreme Court has, prior to *Montejo*, provided little guidance as to what is required of the State in order to establish a knowing and intelligent waiver in the context of the Sixth Amendment.[129] The clearest example of a knowing and intelligent Sixth Amendment waiver is the formal waiver procedure required when a defendant elects to proceed *pro se* during court proceedings, as established in *Faretta v. California.*[130] Before a defendant can waive his Sixth Amendment right to counsel and represent himself, a court must inform him of the "dangers and disadvantages" of proceeding without a lawyer.[131] Such information must be tailored to reflect "case-specific factors, including the defendant's education or sophistication, the complex or

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125. *Patterson*, 487 U.S. at 292–93.

126. *Id.* at 293.

127. Although no court has ruled definitively that *Miranda* warnings will always suffice for a Sixth Amendment right to counsel waiver, several lower courts have suggested that position in cases in which the defendant was interrogated after being arraigned and while in custody. *See, e.g.*, United States v. Gilbert, No. 02:08-cr-0094, 2009 WL 1935845, at *8 (W.D. Pa. June 2, 2009) (noting that although defendant was interrogated without an attorney present after being charged in state court and indicted by federal grand jury, he was read his *Miranda* rights and validly waived them); People v. Vickery, 229 P.3d 278, 281–82 (Colo. 2010) (en banc) (holding that *Miranda* waiver was valid for waiving Sixth Amendment right to counsel even if police switched subjects of interrogation to charges for which he was represented); State v. Rose, No. W2008-02214-CCA-R3-CD, 2010 WL 2219596, slip op. at *13 (Tenn. Crim. App. May 20, 2010) (finding that defendant validly waived his Sixth Amendment right to counsel when he waived his *Miranda* rights); People v. Fields, No. 284190, 2009 WL 2170661, at *3 (Mich. Ct. App. July 21, 2009) (citing *Montejo* for proposition that analysis for waiver of Fifth Amendment right to counsel and Sixth Amendment right to counsel is the same); Hughen v. State, 297 S.W.3d 330, 335 (Tex. Crim. App. 2009) (holding that *Miranda* waiver was sufficient to validly waive Sixth Amendment right to have counsel present during interrogation); State v. Forbush, 779 N.W.2d 476, 480 (Wis. Ct. App. 2009) (interpreting Wisconsin Constitution in accord with *Montejo* and holding that Sixth Amendment right to counsel can be waived via *Miranda* warnings).

128. Johnson v. Zerbst, 304 U.S. 458, 464 (1938); *see also supra* note 98 (detailing case law on "knowing and intelligent" waiver requirement).

129. *See* Parker, *supra* note 98, at 366–70 (reviewing Supreme Court waiver jurisprudence and resulting confusion over standards of waiver in lower courts).

130. 422 U.S. 806, 835 (1975).

131. *Id.*

easily grasped nature of the charge, and the stage of the proceeding."[132] However, the more extensive language used in a formal waiver under *Faretta* has not been transported outside the factual context of self-representation during court proceedings.[133]

The use of the exact language of the *Miranda* warnings to inform a defendant of his Sixth Amendment right to counsel is troubling in many respects. First, the actual words of the *Miranda* warnings were created in light of Fifth Amendment concerns and specifically addressed suspects facing custodial interrogation. Consider the situation in which a defendant has been arraigned *and* has an appointed lawyer and compare two hypothetical statements made by a police officer to this defendant: First, the traditional *Miranda* warning, "You have the right to a lawyer; if you cannot afford one, one will be given to you" versus a statement more focused on the factual distinction that a particular lawyer has been appointed: "You have the right to a lawyer. In fact, you have a lawyer appointed to you. Do you want to talk to her or to me?" It is not difficult to imagine that the exact language used ("*a* lawyer" versus "*your* lawyer") would have a very different impact on whether the defendant would choose to speak to the police without consulting his lawyer.[134] Moreover, the *Miranda* warnings tell a defendant nothing about how his lawyer may aid him during interrogation and in crafting strategies for trial or a plea bargain, or even that he is in fact charged with a crime.[135]

Second, regardless of what a court may ultimately decide regarding the validity of the waiver, the use of the *Miranda* warnings in the Sixth Amendment context will cause an increase in litigation and uncertainty for police, attorneys, and courts, given that the validity of any resulting waiver will largely be a factual determination.[136] Individual defendants will argue that under the particular facts of their cases, the *Miranda* warnings were not sufficient to establish a "knowing and intelligent" Sixth Amendment waiver.[137] Even the *Patterson* Court recognized that

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132. Iowa v. Tovar, 541 U.S. 77, 88 (2004).

133. *But cf.* Patterson v. Illinois, 487 U.S. 285, 299 (1988) (stating that inquiry for Sixth Amendment waiver of counsel at trial is more searching than waiver of counsel during interrogation because risks are less substantial and more obvious during interrogation).

134. *See Indigent Defense Update*, *supra* note 116, at *4 (discussing how *Miranda* language is misleading in Sixth Amendment context as the defendant actually does have counsel appointed); *see also supra* note 120 (detailing basic language of *Miranda* warnings).

135. *See* 1 MCCORMICK ON EVID. § 154 (6th ed. 2009) (stating *Montejo* Court has left open the possibility that Sixth Amendment right to counsel waiver may require that defendant be informed or know from some source that "the matter has progressed beyond general police investigation to adversary judicial proceedings").

136. *See* Supplemental Brief of Larry D. Thompson, *supra* note 83, at 7–11 (arguing on behalf of a group of judges and those in law enforcement that, without bright-line rule of *Jackson*, courts will be forced to conduct post-hoc determinations of voluntariness of confessions).

137. For example, in *Patterson*, Justice Stevens disagreed with the majority's conclusion that there was a valid waiver, arguing that even in the particular factual scenario before it (indicted but not appointed counsel), the *Miranda* warnings did not provide sufficient information in order to produce a knowing and intelligent waiver of the Sixth Amendment right to counsel. *Patterson*, 487 U.S. at 306–08 (Stevens, J., dissenting). In *Montejo* itself, the Louisiana Supreme Court held that the *Miranda* warnings were sufficient to produce a valid Sixth Amendment

determining whether a waiver is knowing and intelligent is a fact-specific question.[138] In contrast to the limited factual scenario of *Miranda*—custodial interrogation—there are a myriad of situations in which the police could ask a defendant to waive his Sixth Amendment right to have his counsel present.[139] Therefore, despite the suggestions of *Montejo* and *Patterson*, the language of the boilerplate *Miranda* warnings is not sufficient to automatically establish a knowing and intelligent Sixth Amendment waiver.

In addition, despite theoretical arguments that the boilerplate *Miranda* warnings may suffice for a Sixth Amendment waiver, in practice, *Miranda* warnings are often not given verbatim and are modified and changed by the law enforcement officials who give them.[140] For example, in the recent case of *Florida v. Powell,*[141] the Supreme Court considered the wording of the modified *Miranda* warnings used by the Tampa Police Department.[142] At issue in the case was whether the *Miranda* warnings as given sufficiently informed suspects of their right to have counsel present during interrogation.[143] In holding that the warning as given was acceptable, the Court reiterated that the warnings need only "reasonably convey" a suspect's rights in order to satisfy the Fifth Amendment and the requirements of *Miranda*.[144] Similarly, in the earlier cases of *California v. Prysock,*[145] and *Duckworth v. Eagan*,[146] the Supreme Court declined to hold that particular language must be used to inform suspects of their Fifth Amendment right to have counsel present during interrogation.[147]

Some modifications to the language of the *Miranda* warnings, although sanc-

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waiver. *See* State v. Montejo, 974 So. 2d 1238, 1262 (La. 2008). Yet Justice Stevens argued that the giving of the *Miranda* warnings was insufficient to apprise Mr. Montejo of his right to counsel under the Sixth Amendment, and therefore, any resulting waiver was not knowing and intelligent. *See* Montejo v. Louisiana, 129 S. Ct. 2079, 2100–01 (2009) (Stevens, J., dissenting).

138. *Patterson*, 487 U.S. at 296 n.9 ("This does not mean, of course, that all Sixth Amendment challenges to the conduct of postindictment questioning will fail whenever the challenged practice would pass constitutional muster under *Miranda*."). Justice Stevens made the same point in his dissent: "Part of the difficulty in fashioning a proper boilerplate set of warnings is that, unlike in the Fifth Amendment context, the information that must be imparted to the accused will vary from case to case as the facts, legal issues, and parties differ." *Id.* at 307 n.4 (Stevens, J., dissenting).

139. *See supra* note 22 (listing some "critical stages" in which defendant has a Sixth Amendment right to counsel).

140. *See* Richard Rogers et al., *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAV. 124, 125, 132 (2008) (documenting results of study of *Miranda* warnings used nationally and reporting "extraordinary heterogeneity").

141. 130 S. Ct. 1195 (2010).

142. *Id.* at 1200. The language was in part as follows: "You have the right to talk to a lawyer before answering any of our questions . . . . You have the right to use any of these rights at any time you want during this interview." *Id.* (quoting *Consent and Release Form 310* (Tampa Police Dep't, Tampa, Fla.)).

143. *Id.* at 1203. This differs from the erroneous perception that a defendant only had the right to consult with an attorney prior to an interrogation. *Id.* at 1205.

144. *Id.* at 1204–05.

145. 453 U.S. 355 (1981) (per curiam).

146. 492 U.S. 195 (1989).

147. *Id.* at 202; *Prysock,* 453 U.S. at 359; *see also Powell*, 130 S. Ct. at 1204.

tioned under Fifth Amendment law, are not acceptable from the standpoint of a Sixth Amendment analysis. Ensuring a general understanding of the right to have counsel present during police questioning may satisfy Fifth Amendment concerns with preventing coercion, yet fail to assuage Sixth Amendment concerns regarding the fairness of the adversarial process. For example, in *Duckworth*, the Supreme Court approved *Miranda* warnings to which the police added that the suspect had the right to have a lawyer appointed "if and when you go to court."[148] While such language may be acceptable for a suspect who has not yet been charged with a crime, these words would be actively misleading in the context in which a Sixth Amendment waiver would be sought. At a minimum, evaluating the sufficiency of variations of the *Miranda* warnings is an essentially factual determination that courts will now need to conduct on a case-by-case basis from a Sixth Amendment perspective, as well as from the traditional Fifth Amendment perspective.[149]

C. What Police Conduct Will Invalidate a Waiver of the Sixth Amendment Right to Counsel?

As a consequence of *Montejo*, courts will now have to evaluate the constitutional propriety of certain law enforcement tactics from a Sixth Amendment standpoint as opposed to a purely Fifth Amendment-based analysis. As discussed above, post-*Montejo*, the focus of the courts' inquiry will be whether a defendant's waiver of his Sixth Amendment right to counsel was knowing, intelligent, and voluntary. As a result, in addition to questions regarding the need for, and the language of, a formal waiver of the Sixth Amendment right to counsel, courts must also now decide whether particular police conduct affects the validity of any resulting Sixth Amendment waiver.[150] There are three areas of police practices which should be re-examined following *Montejo*: the giving of information, or misinformation, to the defendant or his lawyer regarding the status of his representation; deception regarding the state of the evidence; and police conduct in approaching a defendant in the first place.

The first category of police practices that must be analyzed from a Sixth Amendment perspective includes the factual scenarios in which the police deliberately fail to inform a defendant about his counsel's existence or efforts to speak to

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148. *Duckworth*, 492 U.S. at 198, 203.

149. *See, e.g.*, *Powell*, 130 S. Ct. at 1210–11 (Stevens, J., dissenting) (arguing that modified *Miranda* warning used by Tampa Police Department did not accurately convey the right to counsel under the Fifth Amendment); People v. Lloyd, No. B213027, 2010 WL 3586434, at *6–8 (Cal. Ct. App. Sept. 16, 2010) (finding that *Miranda* waiver did not sufficiently inform defendant of Sixth Amendment right to have counsel present at a line-up due to deputies' additional statements regarding procedure of line-up).

150. *See* Supplemental Brief of Larry D. Thompson, *supra* note 83, at 6–11 (arguing that without *Jackson*, there would be no clear guidance to law enforcement); *see also* United States v. DeLaurentiis, 629 F. Supp. 2d 68, 75–76 (D. Me. 2009) (finding that DEA agents' threats to "tell the judge" if defendant did not cooperate with them rendered resulting statements and Fifth Amendment right to counsel waiver involuntary).

his client.[151] The Court has previously held that such conduct does not invalidate a *Miranda* waiver with respect to the Fifth Amendment.[152] In *Moran v. Burbine*,[153] the Court stated that "[e]vents occurring outside of the presence of the suspect and entirely unknown to him" do not impact whether a waiver is knowing, voluntary, and intelligent.[154] In other words, as long as the waiver is not coerced, and as long as the police conduct does not deprive the defendant of any basic knowledge required for a valid waiver—the awareness of one's rights and consequences of waiving them—then such police conduct does not invalidate a waiver with respect to the Fifth Amendment. Following the *Montejo* decision, the question arises whether this same police conduct will invalidate a waiver of the Sixth Amendment right to counsel.[155]

Take for example the factual scenario in *Montejo* itself. As mentioned previously, Mr. Montejo was approached by two detectives after his Sixth Amendment right to counsel had attached and when his appointed counsel was not present.[156] The conversation that took place between the detectives and Mr. Montejo regarding whether Mr. Montejo had a lawyer remains in dispute. At trial, Mr. Montejo testified that when Detective Hall asked him if he had a lawyer, Mr. Montejo responded affirmatively.[157] Mr. Montejo testified that Detective Hall then replied that he was mistaken and that he in fact did not have a lawyer.[158] However, Detective Hall testified at trial that he was unaware that counsel had already been appointed to represent Mr. Montejo and that after Mr. Montejo waived his *Miranda* rights and agreed to go on the car ride, he again asked Mr. Montejo whether he was represented by counsel and Mr. Montejo replied that he was not.[159]

In contesting the admission of his inculpatory statements on the grounds that they were elicited in violation of his Sixth Amendment right to counsel, Mr.

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151. Police conduct in this category also includes, for example, telling a lawyer that they will not interrogate his client when in fact they do so or failing to tell a client that his lawyer is downstairs waiting for him in the station lobby. *See infra* note 152 (discussing the facts of *Moran v. Burbine*, 475 U.S. 412 (1986)).

152. *Moran*, 475 U.S. at 419–20. In *Moran*, after the defendant waived his *Miranda* rights, he was interrogated for several hours and eventually confessed. *Id* at 417–18. Meanwhile, his lawyer was calling the police station and informing the police that she would be his counsel for any interrogation. *Id.* at 417. The lawyer was told by an officer that the police would not be interrogating the defendant. *Id.* This statement turned out not to be true. *Id.* at 417–18. At issue in the case, in part, was whether the defendant's waiver of his *Miranda* rights was invalid under the Fifth Amendment due to the failure of the police to inform him of his attorney's efforts to reach him. *Id.* at 420. The Court held that the *Miranda* waiver was valid. *Id.* at 423.

153. 475 U.S. 412 (1986).

154. *Id.* at 422 ("Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right.").

155. The Court in *Moran* did not address the question of whether the waiver of *Miranda* rights was also a waiver of the defendant's Sixth Amendment rights. *Moran*, 475 U.S. at 428 n.2. The Court held that the Sixth Amendment was not violated because, at the time of the interrogation, the defendant had not yet been arraigned or indicted, and therefore, his Sixth Amendment rights had not yet attached. *Id.* at 432.

156. *See supra* text accompanying notes 54–58 (reciting the facts of *Montejo*).

157. *See* State v. Montejo, 974 So. 2d 1238, 1249 n.47 (La. 2008).

158. *See id.*

159. *See id.* at 1249.

Montejo claimed that the police purposefully did not tell him that a lawyer had been appointed to him.[160] The *Montejo* majority declined to address whether such misrepresentations would invalidate the *Miranda* waiver for purposes of the Sixth Amendment and instead found that question appropriate to address on remand in the lower court.[161] The Court simply stated that "[t]hese matters have heightened importance in light of our opinion today."[162]

Under traditional Sixth Amendment jurisprudence, the police conduct alleged by Mr. Montejo violates a defendant's Sixth Amendment right to counsel.[163] It is well established that under the Sixth Amendment, the police may not purposefully circumvent the defendant's right to counsel.[164] Therefore, police conduct which purposefully misleads either the defendant or his lawyer about the status of the interrogation or counsel's ability to be present at the interrogation is unconstitutionally interfering with a defendant's Sixth Amendment rights. Deliberately misguiding a defendant about the status of his representation violates the fundamental Sixth Amendment principles of providing counsel as a medium and ensuring a fair adversarial process. The *Montejo* opinion, however, lends support to the argument that such police behavior will not invalidate an otherwise valid waiver even in the Sixth Amendment context. Given the *Montejo* Court's emphasis on the antibadgering rationale, arguably, as long as the police conduct does not coerce the defendant into waiving his *Miranda* rights, his waiver would be considered valid.[165] Like in *Moran*, the Court may agree that regardless of any omissions made by the police, the *Miranda* warnings provide sufficient information regarding the defendant's Sixth Amendment rights and the consequences of waiving these rights to support a voluntary and knowing waiver.

The second aspect of police officer behavior courts will have to reexamine is the propriety of deception tactics during questioning. Under current Fifth Amendment case law, the police are generally allowed to use various types of deceptive

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160. Montejo v. Louisiana, 129 S. Ct. 2079, 2092 (2009).

161. *Id.*

162. *Id.* On remand, however, the Louisiana Supreme Court held that Mr. Montejo should have raised this argument at the trial court in his motion to suppress, and thus, he was procedurally barred from raising this argument on remand. *See* State v. Montejo, 40 So. 3d 952, 957 (La. 2010), *cert. denied*, 131 S. Ct. 656 (2010).

163. Consider the similar police conduct alleged in *Moran v. Burbine*, 475 U.S. 412 (1986). *See supra* note 152. In *Patterson v. Illinois*, the Court addressed the facts of *Moran*, and stated that although the defendant's waiver in *Moran* was valid under the Fifth Amendment, the same waiver would not be valid in the Sixth Amendment context. 487 U.S. 285, 296 n.9 (1988).

164. *See* Maine v. Moulton, 474 U.S. 159, 176 (1985); United States v. Henry, 447 U.S. 264, 270 (1980).

165. Even if the Court continues to hold that the police may not purposefully circumvent a person's right to counsel, there remain factual questions regarding how far the police could go to encourage a represented defendant to waive his right to have his counsel present. Could the police say something like, "I can help you more than your lawyer can. Have you even spoken to your lawyer yet? And here I am, trying to help you, let's just talk now." In the context of indigent defense, when public defenders are overworked and facing high caseloads, such tactics may be very persuasive. *See infra* text accompanying notes 175–79 (discussing indigent defense implications).

practices as interrogative techniques.[166] Such tactics include creating false evidence, lying about the state of the evidence, overstating the strength of the prosecution's case, and misleading a defendant regarding the issues and rules of the criminal justice system.[167] As long as the *Miranda* waiver is found to be uncoerced and these deceptions do not rise to the level of creating an "involuntary" confession, courts have generally found such tactics to be constitutionally permissible.[168]

Although the police may use such tactics during custodial interrogation under *Miranda*, these techniques are also used in situations *after* there has been a valid *Miranda* waiver and in non-custodial and non-interrogative settings. Now that represented defendants may face such investigative techniques without their counsel being present (either because they waived their *Miranda* rights or *Miranda* warnings were not required), courts will be faced with the question of whether such tactics violate a defendant's Sixth Amendment right to counsel.

From a Sixth Amendment perspective, these deceptive techniques should be found to violate a defendant's right to counsel and, in addition, support the requirement of, and the rewording of, a formal waiver preceding such tactics.[169] If counsel were present during police questioning, a defense lawyer would aid the defendant in clarifying any questions about the state of the evidence or the strength of the prosecution's case. Moreover, counsel would know whether evidence had been falsified or the police were correctly stating the laws of criminal culpability and punishment. Therefore, in assessing whether a waiver of the Sixth Amendment

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166. *See* Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?,* 99 MICH. L. REV. 1168, 1174–77 (2001) (reviewing case law and finding it generally supportive of the use of police deception during interrogation).

167. *See* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 427–28 (4th ed. 2001); Irina Khasin, *Honesty Is the Best Policy: A Case for the Limitation of Deceptive Police Interrogation Practices in the United States*, 42 VAND. J. TRANSNAT'L L. 1029, 1037–44 (2009); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 427–32 (1996).

168. *See* Khasin, *supra* note 167, at 1047–50; Magid, *supra* note 166, at 1174–77. Even if police conduct does not violate the Fifth or Sixth Amendment, extreme coercive conduct resulting in an "involuntary" statement may still violate the Due Process Clause of the Fourteenth Amendment. *See* Colorado v. Connelly, 479 U.S. 157, 163 (1986); Brown v. Mississippi, 297 U.S. 278, 286 (1936). *But see* Tracey L. Meares, *What's Wrong with* Gideon, 70 U. CHI. L. REV. 215, 228 (2003) (stating that "[t]here have been extremely few reversals of convictions based on involuntariness by federal courts"); *see, e.g.*, People v. Reed, No. 283851, 2009 WL 2477622, at *1–2 (Mich. Ct. App. Aug. 13, 2009) (finding that neither defendant's initial reluctance to waive rights nor police officer's statement that defendant had a choice between finding out what was going on or talking to a lawyer invalidated subsequent voluntary waiver under Due Process Clause).

169. Take, for example, the police conduct in *Michigan v. Harvey*, 494 U.S. 344 (1990). The defendant gave a statement to the police prior to being charged with a crime. *Id.* at 346. After he was arraigned and given counsel, he told the police that he wanted to give a second statement but was not sure whether he should talk to his lawyer. *Id.* The officer told the defendant in part that he did not need to speak to his attorney because "his lawyer was going to get a copy of the statement anyway." *Id.* The defendant then signed a *Miranda* waiver of rights form, stated that he understood his rights, and gave a second statement. *Id.* While the State in *Harvey* conceded that the taking of this second statement violated the *Jackson* rule, now that *Jackson* is overruled, courts will be faced with evaluating similar factual scenarios from a Sixth Amendment perspective. *Id.* at 349. Does this police conduct result in an involuntary, or unknowing, waiver of the right to counsel under the Sixth Amendment?

right to counsel is "knowing and intelligent," courts should consider whether a defendant knew that his lawyer could help him in these ways, as well as whether a defendant knew that the police were permitted to use deceptive tactics, something his lawyer would surely have told him. Stated differently, if a defendant waives his right to have counsel present during an interrogation, he will possibly face the use of deceptive practices by the police. Thus, facing these tactics alone is a consequence of waiving his right to have counsel present. Therefore, a valid and knowing waiver includes informing the defendant that the police have the right to deceive him. Given that the underlying goals of the Sixth Amendment right to counsel are to ensure the fairness of the adversarial process and to have counsel as a medium between the defendant and the State, then surely it violates these principles to allow the police to make false statements about the evidence to a represented defendant outside the presence of his counsel.[170] However, if constitutional concerns arise only when police conduct rises to the level of causing involuntary statements, it is possible that courts may find that these deceptive practices pass constitutional muster under the Sixth Amendment.[171]

With respect to the third category of police conduct, courts will now be faced with evaluating the propriety of police conduct in finding opportunities to speak to a defendant without his counsel present.[172] The criminal justice system may witness, post-*Montejo*, a "race" between the police and defense counsel to speak to defendants first.[173] As mentioned above, it is a common assumption that defense attorneys simply tell their clients not to speak to the police.[174] Given that defendants are now able to waive their right to counsel without their counsel actually being present, it is possible that the police will purposefully rush to speak to defendants before their counsel have had an opportunity to speak to them. *Montejo*, albeit unwittingly, created an incentive for the police to try to speak to a defendant before his counsel has had an opportunity to give legal advice.

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170. Police tactics involving deception would still be allowed, according to this argument, during interrogations in the pre-charge, investigative portion of the case because the Sixth Amendment right to counsel has not yet attached and therefore concerns for fairness in the adversarial process are not yet present. *See supra* text accompanying notes 15–18 and 90–94 (discussing foundations of the Sixth Amendment right to counsel and importance of post-arraignment interrogation).

171. The Court has repeatedly held that a defendant does not need to be informed of every consequence of waiving his rights in order to have a voluntary, "knowing" waiver. *See* Colorado v. Spring, 479 U.S. 564, 574 (1987) ("The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege.") (citing Moran v. Burbine, 475 U.S. 412, 422 (1986)); Connecticut v. Barrett, 479 U.S. 523, 530 (1987) (Brennan, J., concurring) ("[W]e have never 'embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness.'") (quoting Oregon v. Elstad, 470 U.S. 298, 316 (1985)).

172. While this conduct may not directly affect the validity of any resulting waiver, such conduct does raise questions of whether the police are "purposefully circumventing" a defendant's right to counsel, as well as broader concerns regarding the purpose of the right to counsel under the Sixth Amendment. *See supra* note 164. In addition, this conduct is not addressed by the *Miranda–Edwards–Minnick* line of cases.

173. *See* PDS Supp. Brief, *supra* note 87, at 17; *Indigent Defense Update*, *supra* note 116, at *5.

174. *See supra* note 86.

Providing such motivation is particularly problematic for the practice of indigent defense. Due to mental or developmental disabilities, English as a second language, limited education, and issues of mental illness and substance abuse, indigent defendants may not fully comprehend the *Miranda* warnings or understand their right to counsel in ways other defendants are able to.[175] Such defendants are critically in need of the assistance of counsel given their limitations, yet they are the ones who are more likely to waive their rights without their lawyers being present.[176] Thus, encouraging the police to speak to such defendants without their counsel present unfairly takes advantage of their vulnerabilities.[177] Compounding this problem is the fact that public defender offices are notoriously overworked and understaffed.[178] In some jurisdictions, clients do not speak with their attorneys until several days, if not weeks, after counsel is appointed.[179] As a consequence, vulnerable defendants are not only in great need of a lawyer's assistance, they are also the least likely to receive such assistance in a timely fashion. Therefore, the police have an even greater opportunity to attempt to interrogate an indigent defendant without the assistance of his lawyer, and in fact,

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175. *See* Richard A. Leo & K. Alexa Koenig, *The Gatehouses and Mansions: Fifty Years Later*, 6 ANN. REV. L. & SOC. SCI. 323, 330–35 (2010) (presenting empirical studies that conclude that these categories of individuals often do not understand the meaning of *Miranda* warnings); *see also* Brief for the National Association of Criminal Defense Lawyers et al. as Amici Curiae on the Supplemental Question at 9–11, Montejo v. Louisiana, 129 S. Ct. 2074 (2009) (No. 07-1529) [hereinafter NACDL Supp. Brief] (presenting empirical evidence that vulnerable defendants are less able to understand their rights in absence of counsel).

176. *See* Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing With the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 468 (1999) (citing statistic that 80 percent of custodial suspects waive their *Miranda* rights); *see also* NACDL Supp. Brief, *supra* note 175, at 17 n.11 (presenting evidence of high percentage of indigent defendants who suffer from mental illness); Brief for the National Legal Aid & Public Defender Ass'n et al. as Amici Curiae Supporting Petitioner at 5–6, Montejo v. Louisiana, 129 S. Ct. 2074 (2009) (No. 07-1529) (discussing how indigent defendants are in particular need of assistance of counsel due to lack of education, learning disabilities, and mental impairments).

177. Moreover, interrogators who take advantage of defendants' vulnerabilities risk an increase in false confessions and wrongful convictions. *See* NACDL Supp. Brief, *supra* note 175, at 11–16; Drizin & Leo, *supra* note 91, at 919. These problematic implications are compounded when one considers the fact that police officers often use investigative techniques that encourage defendants to waive their *Miranda* rights. *See* INBAU ET AL., *supra* note 167, at 236 (recommending an approach for police officers to take in interrogation which minimizes the risk of suspects invoking their *Miranda* rights); LEO, *supra* note 109, at 125–30; Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 658–65 (1996) (discussing strategies used by police to encourage waiver of *Miranda* rights). *See generally* Leo & White, *supra* note 176.

178. *See* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1096 (2006).

179. *See* NACDL Supp. Brief, *supra* note 175, at 16 (citing Dept. of Justice study which found that 34 percent of pretrial detainees with appointed lawyers had not met with their attorneys more than two weeks after detention); Backus & Marcus, *supra* note 178, at 1053–54 (stating that defendants represented by appointed counsel "often spend weeks or months without meeting their attorneys"); *see also* Brief for the Louisiana Public Defenders Ass'n as Amici Curiae Supporting Petitioner at 5, Montejo v. Louisiana, 129 S. Ct. 2074 (2009) (No. 07-1529) (detailing practices in Louisiana in which defendants are arraigned via video conference from jail and no defense attorney is present at the jail).

may race for the chance to do so.[180]

IV. RESTORING THE SIXTH AMENDMENT RIGHT TO COUNSEL

This Article posits that *Montejo* incorrectly overturned *Jackson* in part due to the misguided assumption that there is no constitutionally significant difference between the Fifth and Sixth Amendment rights to counsel. Moreover, the *Montejo* Court implicitly valued the goal of unhampered police interrogation over the goal of ensuring fairness in the adversarial process. To some extent, there will always be a tradeoff between a robust right to counsel and law enforcement's ability to obtain confessions. However, it is important to take a more nuanced view of the actual effects of police actions and the real-world costs of a shrinking right to counsel. One consequence of allowing more opportunities for police interrogation in the absence of counsel is the potential for an increase in the number of false confessions. False confessions obtained during police interrogation without counsel present are a leading cause of wrongful convictions in the United States.[181] The risk of increased false confessions should temper any shift in favor of law enforcement that fails to consider the effects of reducing the rights of criminal defendants and restricting the role of defense counsel. This Part therefore suggests, in light of *Montejo*, several ways in which lower courts could both reaffirm the protections afforded by the Sixth Amendment right to counsel and strengthen the new boundaries of this right.

One possibility is for courts to fashion a *Jackson*-type rule justified only on the fundamental purposes of the Sixth Amendment. For example, one such rule could be: at the point of attachment of the Sixth Amendment right to counsel, the police may no longer initiate interrogation of a defendant in the absence of his counsel.[182]

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180. In addition, there is arguably nothing to prevent the police from asking a defendant to waive his Sixth Amendment right to have counsel present every chance an officer gets. As Justice Stevens stated in dissent in *Patterson*:

> It is true, of course, that the interest in effective law enforcement would benefit from an opportunity to engage in incommunicado questioning of defendants who, for reasons beyond their control, have not been able to receive the legal advice from counsel to which they are constitutionally entitled. But the Court's singleminded concentration on that interest might also lead to the toleration of similar practices at any stage of the trial.

Patterson v. Illinois, 487 U.S. 285, 311 (1988) (Stevens, J., dissenting). Consider the following hypothetical: A preliminary hearing is conducted and after the hearing is over, counsel leaves the court. Could the police officer go to the holding cell and ask the defendant to waive his Sixth Amendment right to counsel and discuss the evidence presented at the hearing?

181. Drizin & Leo, *supra* note 91, at 906–07 (noting based on a number of studies that the proportion of wrongful conviction cases involving false confession is likely between 14 and 25 percent, making false conviction a leading cause of wrongful convictions of the innocent in America); *see also* LEO, *supra* note 109, at 196. Law enforcement's use of "improper, coercive interrogation techniques" is the primary psychological cause of most false confessions. Drizin & Leo, *supra* note 91, at 918.

182. Compare the above language to the language and focus of the actual *Jackson* rule: "[I]f police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any

By avoiding any reference to *Edwards* or the Fifth Amendment right to counsel in the crafting of a future rule, the goal would be to avoid the "prophylactic" label and to encourage greater judicial deference to a substantive constitutional right. The proposed rule would be grounded solely in the broad Sixth Amendment principles of ensuring a fair adversarial process and supporting the involvement of counsel at all critical stages of criminal proceedings. Arguably, this proposed rule would not be prohibited under a narrow reading of *Montejo*. Under such a reading, *Montejo* overruled *Jackson* because the Court considered the *Jackson* rule to be a mandatory presumption of an involuntary waiver and the Court held that such an automatic presumption was unnecessary. By contrast, the proposed rule would not address the issue of the voluntariness of waivers and instead would be grounded solely in notions of a fair trial.

In addition, given the Court's ruling that the Sixth Amendment right to counsel is sufficiently protected under the *Miranda-Edwards-Minnick* regime, it is critical to ensure that this Fifth Amendment jurisprudence remains robust. As Justice Stevens recently asked, "[W]ill *Edwards* serve the role that the Court placed on it in *Montejo?*"[183] Although the Court recently held that the protections of *Edwards* are not indefinite,[184] there are many areas of the application and scope of the *Edwards* rule that remain unchallenged and contain new unanswered questions.[185] Thus, courts must scrutinize the application of *Miranda*, *Edwards*, and their progeny on Fifth Amendment, as well as Sixth Amendment, grounds.

Finally, courts should reaffirm the traditional broad scope of the Sixth Amendment right to counsel. As discussed above, it is now necessary to determine the requirements of a Sixth Amendment waiver outside the confines of *Miranda* and *Edwards.* Lower courts should first call for the requirement of a formal and explicit waiver of the Sixth Amendment right to counsel in non-custodial settings and before the police or their agents deliberately elicit information from a represented

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waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." Michigan v. Jackson, 475 U.S. 625, 636 (1986).

183. Maryland v. Shatzer, 130 S. Ct. 1213, 1233 n.14 (2010) (Stevens, J., dissenting). A cynical reader could conclude that, given that Justice Stevens asks this question in a dissent, his answer would be a resounding "no."

184. The Court held in *Shatzer* that after a break in custody of at least fourteen days, the police may again approach and initiate interrogation of a suspect who had previously invoked his *Edwards* rights. *Id.* at 1222–23.

185. For example, as a result of the Supreme Court's new "break in custody" rule, there are additional questions about this rule's scope. *See supra* note 184. These questions include whether pre-trial detention is considered "custody," the effect of being charged with a new crime but still imprisoned for a past crime, and the various levels of incarceration impacting the definition of whether one is "in custody." *See* Fields v. Howes, 617 F.3d 813, 821–23 (6th Cir. 2010), *cert. granted*, 79 U.S.L.W. 3300 (U.S. Jan. 24, 2011) (No. 10-680) (discussing definition of "custody" for *Miranda* purposes as applied to prison inmates in light of *Shatzer*). In another recent case, the Court held that remaining silent is not an invocation of one's right to remain silent under *Miranda*. *See* Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010). Given the recent cases of *Montejo*, *Shatzer*, and *Thompkins*, it appears that the current Supreme Court is in favor of expanding law enforcement's ability to interrogate suspects and of limiting any and all presumptions towards an invocation of a suspect's rights.

defendant.[186] Second, courts must craft wording that goes beyond the language of the *Miranda* warnings and specifically addresses the role of defense counsel in various settings, including their role during post-arraignment interrogation.[187] Courts should require this additional Sixth Amendment language for valid waivers in factual situations in which the Sixth Amendment right has attached but *Miranda* does not apply. In addition, courts must add language regarding the Sixth Amendment right to counsel to the *Miranda* warnings in order to address the concern that the current *Miranda* warnings do not adequately inform a defendant of his Sixth Amendment rights. Third, given that the *Montejo* Court rejected *Jackson*'s presumption of the invocation of the right to counsel, courts must address the question of the manner in which a defendant can invoke his Sixth Amendment right to have counsel present during police questioning.[188] Courts must determine whether the Sixth Amendment right to counsel can be asserted by counsel or the defendant at arraignment[189] or whether courts will establish different rules than those that guide the invocation of the right to counsel under *Miranda*.[190]

V. CONCLUSION

In *Montejo*, the Supreme Court collapsed the Sixth Amendment right to counsel into the Fifth Amendment right to counsel, thus justifying the overruling of *Michigan v. Jackson*. The Court erroneously focused on principles underlying Fifth Amendment jurisprudence and ignored the fundamental Sixth Amendment notions of the importance of the assistance of counsel and fairness in the

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186. In other words, courts must assert the continuing validity of the *Massiah* line of cases and the principle that the State may not knowingly circumvent a defendant's right to counsel. *See supra* note 102. *But see* Kansas v. Ventris, 129 S. Ct. 1841, 1847 (2009) (holding that statements taken in violation of *Massiah* and the Sixth Amendment are admissible for impeachment purposes).

187. Courts may find guidance in pre-*Jackson* case law that suggested that a Sixth Amendment waiver should be judged by stricter standards than a Fifth Amendment waiver. *See, e.g.*, United States v. Satterfield, 558 F.2d 655, 657 (2d Cir. 1976), *abrogated by* United States v. Charria, 919 F.2d 842 (2d Cir. 1990) (abrogating *Satterfield* on the basis of *Patterson v. Illinois*, 487 U.S. 285, 298 (1987), which noted that the Supreme Court never held either right to be more difficult to waive); State v. Wyer, 320 S.E.2d 92, 104–05 (W. Va. 1984), *overruled by* State v. Barrow, 359 S.E.2d 844, 846–47 (W. Va. 1987) (overruling *Wyer* to the extent that the *Jackson* standard for Sixth Amendment waiver was more strict); *see also* Tomkovicz, *supra* note 16, at 1047 n.272, 1060.

188. This is also true in determining how a defendant invokes his Sixth Amendment right in factual situations outside the confines of *Miranda*.

189. The National Association of Criminal Defense Lawyers has suggested that defense counsel have their clients sign a formal "Assertion of Rights" form at their initial appearance in court as a routine part of criminal defense practice, thereby informing the court and the prosecutor of their client's intent to assert his Sixth Amendment right to counsel at *all* subsequent proceedings and events. *See* David L. McColgin, Montejo *and the Supreme Court's Limits on the Sixth Amendment Right to Counsel*, THE CHAMPION, Apr. 2010, at 16. There is, however, language in *Montejo* to suggest that such an assertion would not render a later *Miranda* waiver involuntary. *See* Montejo v. Louisiana, 129 S. Ct. 2079, 2091 (2009) (stating that *Miranda* rights cannot be invoked anticipatorily).

190. *See* Davis v. United States, 512 U.S. 452, 459 (1994) (holding that invocation of right to counsel under *Miranda* and *Edwards* must be made "unambiguously").

adversarial process. As a result, conduct that has previously been found to violate the Sixth Amendment but not the Fifth Amendment, and conduct that is outside the confines of *Miranda* and its progeny, will now come under increased constitutional scrutiny. In addition, courts must now analyze issues, previously only considered on Fifth Amendment grounds, from a Sixth Amendment perspective as well. Lower courts left to interpret *Montejo* should insist that the answers to these new questions are grounded in the traditional principles of the Sixth Amendment right to counsel and reaffirm the analytical distinction between the rights to counsel of the Fifth and Sixth Amendments.