Wavering on Waiver: Montejo v. Louisiana and the Sixth Amendment Right to Counsel

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AND THE SIXTH AMENDMENT
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Eda Katharine Tinto

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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.

* 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. © Eda Katharine Tinto, 2011.
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. Arizona⁶ and its progeny.⁷

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).
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. By contrast, the Sixth Amendment right to counsel is in the text of the Amendment itself and protects all critical stages of criminal proceedings. 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. 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. 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

8. See infra Part IA (discussing Fifth Amendment right to counsel).
9. See infra Part IA (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 IA–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” 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. 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

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”).

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the Amendment, which provides for “the accused . . . to have the Assistance of Counsel for his defence.” The central purposes of this right are to protect the fundamental rights of criminal defendants and to ensure fairness in criminal proceedings. 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.” 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.

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. 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. 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. COLLOQUIY 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).


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”).


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.” Therefore, the Supreme Court has long recognized that the scope of the Sixth Amendment right to counsel includes all “critical” stages of the prosecution.

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. 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. In the seminal case of Miranda v. Arizona, the Supreme Court recognized that the risk of coerced self-incrimination is particu-
larly acute in the context of custodial interrogation. 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.” These “protective guidelines” 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. 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. 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.

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. 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

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).


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” 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. In Edwards v. Arizona, 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. Several years later in Minnick v. Mississippi, 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. 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, 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. The defendant has the right to


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. 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.

36. Id. at 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.
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.” The Court concluded that there should therefore be an *Edwards*-type rule in the Sixth Amendment context as well. 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.” Consequently, until *Montejo v. Louisiana*, 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.

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. 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. 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. 295, 300 (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” label51 masked the 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”).


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

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).


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.* The Court, in addressing this argument, decided to consider “the scope and continued viability of” the *Jackson* rule. Justice Scalia, writing for the majority, posited that *Jackson* represented “a wholesale importation of the *Edwards* rule into the Sixth Amendment.” 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. 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.”

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.

The majority rejected an interpretation of *Jackson* as a general prohibition against police-initiated interrogation after arraignment. 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. 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


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. 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.

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. 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.” 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.

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.

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. 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. The Court in Jackson reaffirmed the principle that the Sixth Amendment gives the defendant

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).
“the right to rely on counsel as a ‘medium’ between him and the State.”\textsuperscript{75} Although the Court did refer to the Fifth Amendment protections during custodial interrogation, the \textit{Jackson} Court did so as a means of comparison, stating that the Sixth Amendment right to counsel at a post-arraignment interrogation “requires \textit{at least as much} protection” as the Fifth Amendment right to counsel provides in a custodial interrogation.\textsuperscript{76}

The fact that the \textit{Jackson} Court transposed a Fifth Amendment rule into the Sixth Amendment context does not automatically mean the justifications for \textit{Edwards}—primarily the anti-badgering concern—also justified the \textit{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 \textit{Montejo} majority, however, seized on \textit{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) \textit{Jackson} from a Fifth Amendment perspective: the Court viewed the \textit{Jackson} rule as an unnecessary and unwarranted presumption of an involuntary waiver. From a Sixth Amendment perspective, however, the \textit{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 \textit{Montejo} majority’s misguided analysis of \textit{Jackson} was also the erroneous lens through which it evaluated \textit{Jackson}’s impact on the criminal justice system and the role of defense counsel within that system. The Court’s conclusion that \textit{Jackson} prohibited the police from obtaining voluntary confessions\textsuperscript{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.\textsuperscript{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 \textit{Jackson} rule actually prevented the police from obtaining voluntary inculpatory statements. It is certainly true, in theory, that the \textit{Jackson}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{75} Id. at 632 (quoting Maine v. Moulton, 474 U.S. 159, 176 (1985)); \textit{see also} \textit{Montejo}, 129 S. Ct. at 2096 (Stevens, J., dissenting) (arguing that \textit{Jackson} was based firmly on Sixth Amendment principles).
\item \textsuperscript{76} \textit{Jackson}, 475 U.S. at 632 (emphasis added).
\item \textsuperscript{77} \textit{See Montejo}, 129 S. Ct. at 2090–91.
\item \textsuperscript{78} \textit{See id.} at 2090 (reasoning that if \textit{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).
\end{itemize}
\end{footnotesize}
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

79. See infra text accompanying note 181.


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


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/f5242009.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.\footnote{The Court did not cite to any numerical evidence to support its conclusion.}

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.\footnote{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).} 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.\footnote{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).} 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.\footnote{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).} 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.\footnote{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”).} 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.\footnote{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).} 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,
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”).


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

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. DeLaurentis, 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).


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.

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

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.


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);

Electronic copy available at: https://ssrn.com/abstract=1949804
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.”\footnote{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 . . . .”).} \textit{Miranda} warnings are not required under the Fifth Amendment because the police conduct does not rise to the level of interrogation.\footnote{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 \textit{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 \textit{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 \textit{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-\textit{Montejo} argument that police did not “interrogate” defendant in pretrial detention without his counsel present and instead holding that \textit{Miranda} waiver was necessary prior to interrogating defendant in absence of his lawyer under both Fifth and Sixth Amendment analysis).} 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.\footnote{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).} 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.\footnote{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); \textit{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.”).} 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.\footnote{See, e.g., \textit{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).} 

Presumably, irrespective of \textit{Montejo}, this rule—that the police may not deliber-
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. 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.

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. 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.

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).  
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.”).  
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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\(^{120}\) 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).


\(^{124}\) 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”).

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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

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.” 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.

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. 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.

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. 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. Even the Patterson Court recognized that

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. 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. 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. For example, in the recent case of *Florida v. Powell*, the Supreme Court considered the wording of the modified *Miranda* warnings used by the Tampa Police Department. At issue in the case was whether the *Miranda* warnings as given sufficiently informed suspects of their right to have counsel present during interrogation. 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*. Similarly, in the earlier cases of *California v. Prysock* and *Duckworth v. Eagan*, 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.

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

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. 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


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. DeLaurentis, 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.\textsuperscript{151} The Court has previously held that such conduct does not invalidate a 
\textit{Miranda} waiver with respect to the Fifth Amendment.\textsuperscript{152} In \textit{Moran v. Burbine},\textsuperscript{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.\textsuperscript{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 \textit{Montejo} decision, the question arises 
whether this same police conduct will invalidate a waiver of the Sixth Amendment 
right to counsel.\textsuperscript{155}

Take for example the factual scenario in \textit{Montejo} itself. As mentioned previ-
onously, Mr. Montejo was approached by two detectives after his Sixth Amendment 
right to counsel had attached and when his appointed counsel was not present.\textsuperscript{156} 
The conversation that took place between the detectives and Mr. Montejo regard-
ing 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.\textsuperscript{157} Mr. Montejo testified that Detective Hall then replied 
that he was mistaken and that he in fact did not have a lawyer.\textsuperscript{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 \textit{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.\textsuperscript{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.

\textsuperscript{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 
estation lobby. See infra note 152 (discussing the facts of \textit{Moran v. Burbine}, 475 U.S. 412 (1986)).

\textsuperscript{152} \textit{Moran}, 475 U.S. at 419–20. In \textit{Moran}, after the defendant waived his \textit{Miranda} rights, he was interrogated 
for several hours and eventually confessed. \textit{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. \textit{Id.} at 417. The lawyer was told by an 
officer that the police would not be interrogating the defendant. \textit{Id.} This statement turned out not to be true. \textit{Id.} at 
417–18. At issue in the case, in part, was whether the defendant’s waiver of his \textit{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. \textit{Id.} at 420. 
The Court held that the \textit{Miranda} waiver was valid. \textit{Id.} at 423.

\textsuperscript{153} 475 U.S. 412 (1986).

\textsuperscript{154} \textit{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.”).

\textsuperscript{155} The Court in \textit{Moran} did not address the question of whether the waiver of \textit{Miranda} rights was also a 
waiver of the defendant’s Sixth Amendment rights. \textit{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. \textit{Id.} at 432.

\textsuperscript{156} See supra text accompanying notes 54–58 (reciting the facts of \textit{Montejo}).

\textsuperscript{157} See State v. Montejo, 974 So. 2d 1238, 1249 n.47 (La. 2008).

\textsuperscript{158} See \textit{id}.

\textsuperscript{159} See \textit{id.} at 1249.
Montejo claimed that the police purposefully did not tell him that a lawyer had been appointed to him. 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. The Court simply stated that “[t]hese matters have heightened importance in light of our opinion today.”

Under traditional Sixth Amendment jurisprudence, the police conduct alleged by Mr. Montejo violates a defendant’s Sixth Amendment right to counsel. It is well established that under the Sixth Amendment, the police may not purposefully circumvent the defendant’s right to counsel. 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. 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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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).
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. 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. 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.

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. 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


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. 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.

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. The criminal justice system may witness, post-Montejo, a “race” between the police and defense counsel to speak to defendants first. As mentioned above, it is a common assumption that defense attorneys simply tell their clients not to speak to the police. 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.

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).


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.


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, 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.


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.\(^\text{180}\)

IV. RESTORING THE SIXTH AMENDMENT RIGHT TO COUNSEL

This Article posits that \textit{Montejo} incorrectly overturned \textit{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 \textit{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.\(^\text{181}\) 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 \textit{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 \textit{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.\(^\text{182}\)

\(^{180}\) 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 \textit{Patterson}:

\begin{quote}
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.
\end{quote}

\textit{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 \textit{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 \textit{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?” Although the Court recently held that the protections of Edwards are not indefinite, there are many areas of the application and scope of the Edwards rule that remain unchallenged and contain new unanswered questions. 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 defendant’s right to counsel for that police-initiated interrogation is invalid.” Michigan v. Jackson, 475 U.S. 625, 636 (1986).


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. 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. 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. Courts must determine whether the Sixth Amendment right to counsel can be asserted by counsel or the defendant at arraignment or whether courts will establish different rules than those that guide the invocation of the right to counsel under *Miranda*.

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.