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A Trap for the Unwary: The Sixth Amendment Right to Counsel After *Montejo v. Louisiana*

I. INTRODUCTION

An injured pedestrian, the victim of a hit-and-run collision, is found bleeding on the side of the road. Based on the victim's description of the automobile, police arrest businessman Sherman McCoy, who is released on bail and formally indicted later that week. McCoy immediately hires a lawyer, who calls the local district attorney to alert him that he will be representing McCoy on the charges. Later that night, Detectives Martin and Goldberg visit McCoy at his home to "chat" about the case. Miranda warnings are not administered.¹

"The more you can tell us about where you were that night, the better deal we'll be able to arrange for you," Detective Martin tells McCoy. "You give us what we need, and who knows, maybe we only charge you with reckless operation."²

"I don't know," McCoy responds. "I think I should probably talk this over with my lawyer first."

"I can tell you exactly what your lawyer will say," Detective Martin explains. "Your lawyer is going to tell you not to make a deal with us. But your lawyer's not facing jail time, is he?" Detective Goldberg chimes in, explaining that McCoy's attorney stands to make a lot of money if the case goes to trial.³

Detective Martin then tells McCoy about all of the evidence that the police have gathered. "Look, we've got three witnesses who saw what happened; we've got skid marks that match the tires on your car; and we've got traffic cameras from five different angles that clearly show that you were the one driving the car that night," he explains. As it turns out, the detective is lying. Although the police know that McCoy's car was involved in the accident,

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1. For a discussion of the *Miranda* warnings, see *infra* Part II.B.

2. See Brief for Respondent at 7 n.5, *Michigan v. Jackson*, 475 U.S. 625 (1986) (No. 84-1531), 1985 WL 669649 ("If you want to go up on murder one, life imprisonment, that's up to you. Now we'll work a deal and plead to something less and get two years, get out, that's your business. It's your choice.").

3. See *id.* ("I'll tell you what an attorney is gonna tell ya, an attorney is gonna tell ya don't talk to police. I can tell you that right now. Don't talk to the police. But, the attorney doesn't go to jail, does he? . . . You know what the attorney does when you say that, the attorney knows that that's going to get a trial, even if he's appointed he gets paid by how much trial days.").

they have no evidence indicating that McCoy was behind the wheel.⁴

"This is an open and shut case," Detective Goldberg explains. "You're going to jail; everyone knows that. The only question is, do you let us help you out and offer you some kind of deal, or do you call up your attorney and help pad his wallet by letting this drag on at trial?"

Okay, McCoy thinks to himself, maybe if I give them just a little something to go on, they won't come down so hard on me. "I'll tell you what I know," McCoy responds. "I drove down that street around the time of the accident; that must be how the traffic cameras spotted me. But I never hit anyone with my car that night."

The detectives leave the McCoy residence shortly thereafter and head back to the office to tell their boss the good news. They've just gathered the last piece of evidence needed to convict Sherman McCoy.

Before 2009, both state and federal courts would have widely agreed that the actions of the police in the above fact pattern, for multiple reasons, constituted a violation of the defendant's Sixth Amendment right to counsel.⁵ However, after the United States Supreme Court's recent ruling in *Montejo v. Louisiana*,⁶ which overturned *Michigan v. Jackson* and its firmly established protections of the right to counsel,⁷ the Sixth Amendment no longer prohibits police from approaching a represented defendant for post-indictment interrogation in the absence of counsel.⁸ Furthermore, dicta in *Montejo* suggests that other elements of the above scenario, such as the detectives' failure to administer *Miranda* warnings and their use of false evidence, might also fall short of a Sixth Amendment violation.⁹

Thus, *Montejo* represents a dramatic shift in the Court's jurisprudence regarding the right to counsel. By eliminating most meaningful distinctions between the Fifth and Sixth Amendment rights to counsel, the Court has denigrated the right to a fair trial for criminal defendants, eliminated workable standards for law

4. See *State v. Montejo*, 974 So. 2d 1238, 1245 n.26 (La. 2008), vacated by *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009) ("After the detectives falsely claim[ed] that forensic analysis can determine when he was in the home . . . Montejo admitted that he entered the home and proceeded to relate his second version of the crime. Both detectives conceded at trial that they misled Montejo . . .").

5. See *infra* Part IV.B.

6. 129 S. Ct. 2079.

7. 475 U.S. 625, overruled by *Montejo*, 129 S. Ct. 2079.

8. See *infra* Part III.

9. See *infra* Part IV.

enforcement, and demonstrated a disturbingly activist disregard for *stare decisis*. This Comment argues that *Montejo* was poorly reasoned, will lead to alarming results, and should be limited by state constitutions. To reach this end, Part II analyzes the history of the Sixth Amendment right to counsel, the rationale behind the Sixth Amendment's guarantee, and the ways in which the Sixth Amendment's right to counsel differs from that of the Fifth Amendment. Part III introduces *Montejo*, detailing the Supreme Court's latest interpretation of the Sixth Amendment. Finally, Part IV discusses the implications of *Montejo* and analyzes a list of law enforcement tactics that courts might now find permissible in light of *Montejo*. In response to these observations, Part V proposes a solution for Louisiana and other states that wish to best protect the fundamental rights of their citizens.

II. BACKGROUND: SOURCES OF THE RIGHT TO COUNSEL

Because *Montejo* eliminated most meaningful distinctions between the Fifth and Sixth Amendment rights to counsel, it is appropriate to study the history of those rights, the differences between the two rights, and the ways the Court has recently disregarded those differences.

A. Sixth Amendment Right to Counsel

Traditionally, several factors have distinguished the right to counsel of the Sixth Amendment from that of the Fifth Amendment. Such factors include the rationale behind the Sixth Amendment right to counsel and the context in which the right applies.

1. Rationale Behind the Sixth Amendment Right to Counsel

The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."¹⁰ The Supreme Court

10. U.S. CONST. amend. VI. The full text of the Sixth Amendment provides: 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.

has traditionally recognized that the Sixth Amendment right to counsel serves two related goals: “(1) minimizing the imbalance of our adversary system between the accused and the government committed to prosecuting him, thereby (2) preserving the fairness and integrity of criminal trials.”¹¹ Because criminal defendants are inherently less capable of coping with the legal process than their governmental opponents, “the Framers afforded the accused an equalizing presence intended to prevent outcomes more dependent upon might than right.”¹² This equalizing presence promotes parity between the government and the accused.¹³ Such balance between parties is desirable in a free society because the “very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”¹⁴

Another significant theoretical basis of the Supreme Court’s Sixth Amendment right-to-counsel jurisprudence is the protection against deliberate governmental interference with the privacy of the attorney–client relationship.¹⁵ The Supreme Court elaborated on this concern in 1985, holding in *Maine v. Moulton*:

11. *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (“The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.”); *United States v. Wade*, 388 U.S. 218, 227 (1967) (explaining that the basic thesis of Sixth Amendment cases is that the help of a lawyer is essential to a fair trial and the maintenance of “our adversary theory of criminal justice”); *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932) (“The right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him.”); Meredith B. Halama, Note, *Loss of a Fundamental Right: The Sixth Amendment as a Mere “Prophylactic Rule,”* 1998 U. ILL. L. REV. 1207, 1209 (citing *Maine v. Moulton*, 474 U.S. 159, 168 (1985)) (“The right to the assistance of counsel . . . is indispensable to the fair administration of our adversarial system of criminal justice.”).

12. James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 981 (1986); see also Halama, *supra* note 11, at 1209.

13. Tomkovicz, *supra* note 12, at 980.

14. *United States v. Cronin*, 466 U.S. 648, 655 (1984) (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)).

15. ANDREW V. JEZIC ET AL., MARYLAND LAW OF CONFESSIONS § 20:3 (2009 ed. 2009), available at Westlaw MDCONF s 20:3. See also the American Bar Association’s *Model Rules of Professional Conduct*, which provides: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is

The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a “medium” between him and the State. . . . [T]his guarantee includes the State’s affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. . . . [K]nowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State’s obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity.¹⁶

Furthermore, the Court has noted that after the commencement of adversary criminal proceedings, “[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney–client relationship takes effect.”¹⁷ Thus, the Sixth Amendment serves not only to ensure a defendant’s right to a fair trial, but also to protect the integrity of the attorney–client relationship.

2. *When the Sixth Amendment Right to Counsel Applies*

Although a strict reading of the Sixth Amendment seems to protect only the right to assistance at trial,¹⁸ the Court has recognized over time that this guarantee encompasses a broader scope of protection and has thus extended the right to counsel to certain pretrial events.¹⁹ Such application of the Sixth Amendment is consistent with the modern criminal justice system.²⁰ When the Framers drafted the Sixth Amendment, they “had little need to be concerned with a right to counsel in pretrial proceedings because in their time such proceedings were insignificant. Trial was the

authorized to do so by law or court order.” MODEL RULES OF PROF’L CONDUCT R. 4.2 (2010). The comments to Rule 4.2 further provide that:

When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

Id. R. 4.2 cmt. 5.

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

17. *Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988).

18. U.S. CONST. amend. VI (referring to “criminal prosecutions”).

19. Halama, *supra* note 11, at 1210; *see also* Tomkovicz, *supra* note 12, at 982 n.32.

20. Halama, *supra* note 11, at 1210.

primary battleground.”²¹ Today, however, “law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused’s fate and reduce the trial itself to a mere formality.”²²

In the 1932 case *Powell v. Alabama*, the Supreme Court expanded the right to counsel to pretrial events for the first time, holding:

[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.²³

The Court’s modern jurisprudence dictates a two-step analysis to determine whether the protections of the Sixth Amendment apply to a defendant. First, the Court analyzes whether the right has “attached,”²⁴ asking whether the state has committed itself to prosecute, either “by way of formal charge, preliminary hearing, indictment, information or arraignment.”²⁵ Second, the Court analyzes whether the particular proceeding is a “critical stage,” asking whether it contains “procedures that would impair defense on the merits if the accused [were] required to proceed without counsel.”²⁶

In the 1964 case *Massiah v. United States*, the Supreme Court held that the right to counsel may apply outside of the courtroom during certain pretrial confrontations with the police.²⁷ In that case, the Court held that government agents violated the Sixth

21. Tomkovicz, *supra* note 12, at 982 (citing *United States v. Ash*, 413 U.S. 300, 310 (1973); *United States v. Wade*, 388 U.S. 218, 224 (1967)).

22. *Wade*, 388 U.S. at 224.

23. *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

24. See *Kirby v. Illinois*, 406 U.S. 682 (1972).

25. *Id.* at 689. In 2008, the Court clarified that the Sixth Amendment right to counsel may attach as early as “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction.” *Rothgery v. Gillespie Cnty., Tex.*, 128 S. Ct. 2578, 2592 (2008).

26. *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975); see, e.g., *Coleman v. Alabama*, 399 U.S. 1 (1970) (holding that a preliminary hearing constitutes a critical stage); *Wade*, 388 U.S. 218 (holding that a post-indictment lineup constitutes a critical stage); *White v. Maryland*, 373 U.S. 59 (1963) (holding that an initial appearance constitutes a critical stage).

27. *Massiah v. United States*, 377 U.S. 201 (1964).

Amendment right to counsel of an indicted defendant when they surreptitiously monitored his statements about the crime, which were “deliberately elicited” by a government agent and in the absence of counsel.²⁸

Because admitting such statements could reduce a defendant’s trial to “no more than an appeal from the interrogation,”²⁹ post-indictment “deliberate elicitation” constitutes a “critical stage” that requires the assistance of counsel.³⁰ Therefore, during interrogation, much like at trial, the Sixth Amendment entitles defendants to a lawyer’s assistance in “advising, speaking for, and shielding them, raising them to a level of knowledge, expertise, and strength comparable to that of the state.”³¹ This entitlement traditionally provided much broader protection than the Fifth Amendment right to counsel.³²

B. Fifth Amendment Right to Counsel

The Fifth Amendment makes no specific mention of the right to counsel.³³ However, in *Miranda v. Arizona*,³⁴ the Supreme Court held that during custodial interrogation, the Fifth Amendment right against compulsory self-incrimination calls for “a protective shield against the state.”³⁵ The Court concluded that an integral element of this protection is an entitlement to legal assistance.³⁶ This right to have counsel present during custodial interrogation is vital to the Fifth Amendment privilege against self-incrimination, the Court reasoned, because it ensures that an individual’s right to choose between speech and silence remains unfettered, and it mitigates the dangers of coercion.³⁷ Because the *Miranda* right is primarily an anti-compulsion safeguard,³⁸ it

28. *Id.* at 206.

29. Halama, *supra* note 11, at 1212 (quoting *Wade*, 388 U.S. at 226).

30. *Id.* (citing *Brewer v. Williams*, 430 U.S. 387, 401 (1977)); *see also* *United States v. Henry*, 447 U.S. 264 (1980).

31. Tomkovicz, *supra* note 12, at 988.

32. *Id.* at 993–94.

33. The Fifth Amendment provides in pertinent part: “No person . . . shall be compelled in any criminal case to be a witness against himself . . .” U.S. CONST. amend. V.

34. 384 U.S. 436 (1966).

35. Tomkovicz, *supra* note 12, at 988.

36. *Id.*

37. Halama, *supra* note 11, at 1213 (citing *Miranda*, 384 U.S. at 469–70).

38. Under *Miranda*, a suspect must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford

focuses only on whether the suspect felt coerced to waive his rights³⁹ and not upon deceptive police practices “occurring outside of the presence of the suspect and entirely unknown to him.”⁴⁰ Furthermore, the *Miranda* right applies only when the suspect is (1) in custody⁴¹ and (2) under interrogation.⁴²

C. Different Rights, Different Standards: Waiving the Right to Counsel

As previously discussed, the Supreme Court has traditionally recognized the distinctions between both the history and the rationale of the Fifth and Sixth Amendment rights to counsel. Given these distinctions, the Court has historically applied different standards when evaluating the validity of a Fifth or Sixth Amendment waiver. A court’s decision to admit or suppress a confession often hinges on the validity of this waiver.

1. Traditional Waiver of the Sixth Amendment Right to Counsel

The traditional standard for evaluating the validity of a Sixth Amendment waiver originated in the 1938 Supreme Court case *Johnson v. Zerbst*.⁴³ In that case, the Court rejected the State’s claim that the defendant waived his right to counsel at trial, noting that courts should “indulge every reasonable presumption against waiver of fundamental constitutional rights” and should not “presume acquiescence in the loss of fundamental rights.”⁴⁴ Thus, the Court defined a valid waiver as “an intentional relinquishment or abandonment of a known right.”⁴⁵ In the 1975 case *Faretta v. California*,⁴⁶ the Supreme Court elaborated on this standard. Citing *Zerbst*, the Court noted that in order for a defendant to validly waive his Sixth Amendment right to counsel at trial, the state must

an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda, 384 U.S. at 479.

39. Halama, *supra* note 11, at 1214.

40. Moran v. Burbine, 475 U.S. 412, 422, 424–28 (1986).

41. To determine whether a suspect is in custody, courts ask whether “a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation.” *Yarborough v. Alvarado*, 541 U.S. 652, 663 (2004).

42. See *Rhode Island v. Innis*, 446 U.S. 291, 303 (1980); *infra* note 236.

43. 304 U.S. 458 (1938).

44. *Id.* at 464 (internal quotation marks omitted).

45. *Id.*

46. 422 U.S. 806 (1975).

make the defendant “aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’”⁴⁷

Although *Faretta* involved a waiver at trial rather than interrogation, “[i]t makes sense to apply analogous requirements in pretrial *Massiah* contexts because the ultimate risks of forgoing counsel in those situations are similar in nature to those immediately encountered in *Faretta* settings.”⁴⁸ Indeed, the Supreme Court once noted that the strict *Zerbst–Faretta* standard “applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings.”⁴⁹

2. Traditional Waiver of the Fifth Amendment Right to Counsel

In *Miranda*, the Court purported to adopt the *Zerbst* standard for the Fifth Amendment, holding that a defendant can waive his *Miranda* rights, “provided the waiver is made voluntarily, knowingly and intelligently.”⁵⁰ However, in practice, the Court has employed a low standard for waiver; because the purpose of *Miranda* is to dispel the pressures of a police-dominated atmosphere, the Court has focused almost entirely on the voluntariness of the waiver.⁵¹ Unlike the traditional *Zerbst–Faretta* standard, the standard for a valid Fifth Amendment waiver does not require the state to provide a suspect with much information about the implications of his decision.⁵² The Supreme Court elaborated on this point in *Moran v. Burbine*, holding:

Once it is determined that a suspect’s decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State’s intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.⁵³

47. *Id.* at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). In the case, the Court found a valid waiver, noting that the defendant fully understood the judge’s warnings that such a waiver was a mistake and could lead to adverse consequences. *Id.*

48. Tomkovicz, *supra* note 12, at 1001 n.103.

49. *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 238–40 (1973); *United States v. Wade*, 388 U.S. 218, 237 (1967)).

50. *Miranda v. Arizona*, 384 U.S. 436, 444, 475 (1966).

51. Halama, *supra* note 11, at 1217.

52. *Id.*

53. *Moran v. Burbine*, 475 U.S. 412, 422–23 (1986).

Thus, while the Court maintains that a *Miranda* waiver must be knowing and intelligent, in reality the Court will uphold the validity of a waiver “as long as the warnings are given and the suspect exhibits no overt signs of a lack of capacity to understand them.”⁵⁴ Under this relaxed standard, the Court has found a valid waiver when the suspect was not aware of the crime under investigation,⁵⁵ when the suspect was unaware that police were thwarting the efforts of his attorney to contact him,⁵⁶ and when the suspect mistakenly believed that only written confessions could be used against him in court.⁵⁷

Although generally imposing relaxed standards for a valid Fifth Amendment waiver, the Supreme Court has created an absolute rule to prevent waiver in response to police-initiated interrogation once the accused actually invokes his right to counsel.⁵⁸ Under *Edwards v. Arizona*, once police administer a *Miranda* warning, if the suspect requests the assistance of counsel, interrogation must stop; any subsequent waiver made in response to police-initiated interrogation will be presumed invalid.⁵⁹ The Supreme Court extended the *Edwards* cut-off rule in *Minnick v. Mississippi*, holding that once a suspect invokes his right to counsel, he cannot validly waive that right unless he initiates contact or is assisted by his attorney.⁶⁰ Such protections are “designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights” and are consistent with the Fifth Amendment’s role in preventing compulsory self-incrimination.⁶¹

54. Mark Berger, *Compromise and Continuity: Miranda Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. PITT. L. REV. 1007, 1063 (1988).

55. *Colorado v. Spring*, 479 U.S. 564, 574, 577 (1987).

56. *Moran*, 475 U.S. at 424.

57. *Connecticut v. Barrett*, 479 U.S. 523, 530 (1987).

58. Halama, *supra* note 11, at 1218 (citing *Edwards v. Arizona*, 451 U.S. 477 (1981)).

59. *Edwards*, 451 U.S. at 484. The *Edwards* rule applies only when a defendant makes an “unambiguous or unequivocal request for counsel”; otherwise, “the officers have no obligation to stop questioning him.” *Davis v. United States*, 512 U.S. 452, 462 (1994) (holding that “maybe I should talk to a lawyer” does not constitute an *Edwards* invocation); see also *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010) (holding that the *Edwards* cut-off rule ceases to apply if there is a break in custody lasting 14 days or longer).

60. *Minnick v. Mississippi*, 498 U.S. 146 (1990).

61. *Michigan v. Harvey*, 494 U.S. 344, 350 (1990).

D. Recent Intertwinement of the Fifth and Sixth Amendments

The Fifth and Sixth Amendment rights to counsel were traditionally thought to promote different goals.⁶² The historical rationale was that the “Sixth Amendment exists to maintain the integrity of our adversarial system as a whole; the *Miranda* right exists solely to protect suspects from being compelled to waive their Fifth Amendment rights in custodial interrogations.”⁶³ Given these distinctions, the two rights traditionally arose at different times and carried different standards of waiver.⁶⁴ However, the Supreme Court “has, in recent years, largely ignored the differences between the Fifth and Sixth Amendment rights to counsel.”⁶⁵

1. Jackson: Confusing the Purpose of the Sixth Amendment

Ironically, the merging of the Fifth and Sixth Amendments began with a majority opinion by Justice Stevens that was intended to *promote* the protections of the right to counsel.⁶⁶ In the 1986 case *Michigan v. Jackson*, the Supreme Court established a cut-off rule that prevented the interrogation of defendants in certain Sixth Amendment scenarios.⁶⁷ Drawing an analogy to the Fifth Amendment case *Edwards*, the Court “based much of its opinion on the ‘additional safeguards [that] are necessary when the accused asks for counsel,’ rather than the importance of counsel once adversarial judicial proceedings have commenced.”⁶⁸

In *Jackson*, the defendant requested at his arraignment that the court appoint counsel to represent him.⁶⁹ But before the defendant’s court-appointed attorney could reach him, police interrogated the defendant and obtained a confession.⁷⁰ The Court concluded that this confession was obtained in violation of the defendant’s Sixth Amendment right to counsel, holding that “if police initiate interrogation *after a defendant’s assertion*, at an arraignment or similar proceeding, of his right to counsel, any

62. See *supra* Part II.A–B.

63. Halama, *supra* note 11, at 1214.

64. See *supra* Part II.C.

65. Halama, *supra* note 11, at 1223.

66. *Id.* at 1224.

67. *Michigan v. Jackson*, 475 U.S. 625, 636 (1986), *overruled by* *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009).

68. Halama, *supra* note 11, at 1224 (alteration in original) (emphasis added) (quoting *Jackson*, 475 U.S. at 636).

69. *Jackson*, 475 U.S. at 627.

70. *Id.*

waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."⁷¹ Although the Court noted that its decision did not hinge on Jackson's assertion,⁷² the crux of the opinion would later be read to rest on the fact that the defendant had invoked his Sixth Amendment right by formal request.⁷³ Therefore, while "the result of *Jackson* is logically sound, the Court's reliance on *Edwards* and invocation ultimately served to straightjacket Sixth Amendment waiver inquiries into Fifth Amendment jurisprudence."⁷⁴

2. Patterson: *Confusing the Waiver Standards*

In the 1988 case *Patterson v. Illinois*, the Supreme Court rejected the notion "that the Sixth Amendment is 'superior' to the Fifth or that it should be 'more difficult' to waive."⁷⁵ In that case, the defendant had been indicted but had not requested or been appointed counsel.⁷⁶ Police initiated contact with the defendant, obtained a *Miranda* waiver, and conducted an interrogation that resulted in the defendant's confession.⁷⁷ The Court held that although the defendant's Sixth Amendment rights had attached, waiver of his Fifth Amendment *Miranda* rights was sufficient to demonstrate a valid waiver of his Sixth Amendment right to counsel.⁷⁸ The Court reasoned that the *Miranda* warnings provided the defendant with the essential substance of his Sixth Amendment rights and that his waiver therefore qualified as "knowing and intelligent."⁷⁹ Although *Patterson* allowed for a valid waiver of the right to counsel during post-indictment interrogation, the decision remained consistent with *Jackson*, as *Patterson*'s holding appeared to be limited to Sixth Amendment scenarios in which a defendant had not requested or obtained an attorney.⁸⁰

71. *Id.* at 636 (emphasis added).

72. *See id.* at 633 n.6 (noting that, although the right to counsel does not turn on the defendant's request, this request is one "extremely important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation").

73. Halama, *supra* note 11, at 1225 (citing *Patterson v. Illinois*, 487 U.S. 285, 291 (1988)).

74. *Id.*; *see infra* note 110 (discussing lower courts' different interpretations of *Jackson*).

75. Halama, *supra* note 11, at 1221 (quoting *Patterson*, 487 U.S. at 297).

76. *Patterson*, 487 U.S. at 298-99.

77. *Id.* at 288.

78. *Id.* at 296-97.

79. *Id.* at 293-96.

80. *See id.* at 290 n.3.

Jackson and *Patterson* are two examples of the Supreme Court's recent intertwining of the Fifth and Sixth Amendment rights to counsel. *Jackson* established the notion that the protections of the Sixth Amendment right to counsel rely on some sort of invocation by the defendant, just as in Fifth Amendment contexts.⁸¹ *Patterson* expanded on this logic, holding that absent such invocation, a *Miranda* waiver constitutes a valid waiver of the Sixth Amendment right to counsel, just as in Fifth Amendment contexts.⁸² And in 2009, the Court took *Jackson* and *Patterson* one step further in *Montejo*, a case that further eliminated the distinctions between the Fifth and Sixth Amendment rights to counsel.

III. MONTEJO V. LOUISIANA: THE SUPREME COURT'S MOST RECENT DENIGRATION OF THE RIGHT TO COUNSEL

In *Montejo*, a 5–4 majority of the Supreme Court went out of its way to redefine the standards for waiving the Sixth Amendment right to counsel. However, such action was unwarranted, as indicated by a close analysis of the facts of *Montejo*, the holding of the Louisiana Supreme Court, and the reasoning of the United States Supreme Court.

A. Facts of the Case

On September 6, 2002, police arrested Jesse Jay Montejo for the murder of Lewis Ferrari.⁸³ The police brought Montejo before a judge on September 10 for his “72-hour hearing,” an initial appearance required by Louisiana law for the purpose of appointing counsel.⁸⁴ Although this hearing was not transcribed, the minute entry indicated that the court appointed an attorney to represent Montejo.⁸⁵ However, the record did not indicate whether Montejo said anything in response to the appointment of counsel, and the state later alleged that the defendant stood in “mute acquiescence” at the hearing.⁸⁶ Later that day, before Montejo had the chance to meet his attorney, the police approached the defendant at the prison and requested that he take a ride with them

81. See *supra* Part II.D.1.

82. See *supra* Part II.D.2.

83. *State v. Montejo*, 974 So. 2d 1238 (La. 2008), *vacated by* *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009).

84. *Id.* at 1258–59 (citing LA. CODE CRIM. PROC. ANN. art. 230.1 (Supp. 2010)).

85. *Id.*

86. *Id.* at 1259.

to help locate the murder weapon.⁸⁷ The police administered a *Miranda* warning, and Montejo agreed to accompany them on their trip.⁸⁸ During this trip, at the suggestion of the police, Montejo wrote an inculpatory letter of apology to the victim's widow.⁸⁹ At trial, the court admitted this letter over objections by the defense.⁹⁰ On March 9, 2005, a jury convicted Montejo of first-degree murder, and he was sentenced to death.⁹¹

B. Decision of the Louisiana Supreme Court

On appeal to the Louisiana Supreme Court, Montejo contended that the district court erred in admitting the letter of apology, arguing that police obtained the letter in violation of his Sixth Amendment right to counsel under *Jackson*.⁹² Montejo argued that because the court had appointed an attorney, *Jackson* barred the police from approaching him for questioning.⁹³ The Louisiana Supreme Court disagreed.⁹⁴ Citing one of its previous decisions, *State v. Carter*,⁹⁵ and a decision of the United States Fifth Circuit, *Montoya v. Collins*,⁹⁶ the Louisiana Supreme Court held that “[s]omething more than the mere mute acquiescence in the appointment of counsel is necessary to show the defendant has asserted his right to counsel [to] sufficiently trigger the enhanced protection provided by *Michigan v. Jackson*'s prophylactic rule.”⁹⁷ Because there was no indication that Montejo said anything at all when counsel was appointed, the Louisiana Supreme Court concluded that “although his right to counsel had attached, he did not assert his right to counsel such that the prophylactic rule of *Michigan v. Jackson* would invalidate any waiver he would later make.”⁹⁸ Therefore, the court reasoned, “the only remaining inquiry is whether his Sixth Amendment waiver was knowing, intelligent and voluntary.”⁹⁹ Montejo did not address this issue on

87. *Id.* at 1249.

88. *Id.* at 1261. At trial, Montejo testified that the police misled him by telling him that the court had not appointed him an attorney. *Id.* at 1261–62.

89. *Id.* at 1249.

90. *Id.* at 1258.

91. *Id.* at 1240–41.

92. *Id.* at 1258–59.

93. *Id.* at 1260–61.

94. *Id.*

95. 664 So. 2d 367, 383 (La. 1995).

96. 955 F.2d 279, 283 (5th Cir. 1992).

97. *Montejo*, 974 So. 2d at 1260–61 (alterations in original) (quoting *Carter*, 664 So. 2d at 383) (internal quotation marks omitted).

98. *Id.* at 1261.

99. *Id.*

appeal, and in a brief discussion, the Louisiana Supreme Court concluded that his signing of a *Miranda* waiver constituted a valid waiver of his Sixth Amendment right to counsel.¹⁰⁰ Therefore, the court affirmed Montejo's conviction.¹⁰¹

C. Decision of the United States Supreme Court

1. Oral Argument

On October 1, 2008, the United States Supreme Court granted certiorari to answer the following question: "When an indigent defendant's right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to 'accept' the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present?"¹⁰² Although both sides addressed only this narrow question in their briefs, at oral argument Justice Alito suggested that the Court examine a much larger issue—whether the Court should overturn *Jackson* altogether.¹⁰³ This suggestion arose entirely on the Court's own initiative, as not even the State questioned the validity of *Jackson*'s cut-off rule.¹⁰⁴ Nevertheless, on March 30, 2009, the Court directed the parties to file supplemental briefs to address whether *Jackson* should be overturned.¹⁰⁵

100. *Id.* at 1261–62 (citing *Patterson v. Illinois*, 487 U.S. 285, 292 (1988)).

101. *Id.* at 1265.

102. Supreme Court Docket, *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009) (No. 07-1529), available at <http://www.supremecourt.gov/qp/07-01529qp.pdf>.

103. Transcript of Oral Argument at 20, *Montejo*, 129 S. Ct. 2079 (No. 07-1529).

104. See generally Brief for Respondent, *Montejo*, 129 S. Ct. 2079 (No. 07-1529), 2008 WL 5328196.

105. Supreme Court Docket, *supra* note 102. Upon the Supreme Court's suggestion that *Jackson* be reexamined, the newly elected Obama administration, by way of Solicitor General Elena Kagan, filed an amicus brief on behalf of the United States, arguing for *Jackson* to be overturned. See Brief for the United States as Amicus Curiae in Support of Overruling *Michigan v. Jackson*, *Montejo*, 129 S. Ct. 2079 (No. 07-1529), 2009 WL 1019983 [hereinafter United States Amicus Brief]. The Obama administration's involvement in *Montejo* disappointed and surprised some civil liberties advocates who viewed the administration's stance in the case as inconsistent with much of Obama's campaign rhetoric and his background as a Constitutional Law professor. See, e.g., Matthew Rothschild, *Obama Needs to Do More than Swap Liberal Justices*, THE PROGRESSIVE, May 27, 2009, <http://www.progressive.org/wx052709.html> ("While everyone's talking about how the nomination of Sonia Sotomayor may affect the Supreme Court, we need to keep our eye on the current court—and on Obama's arguments in there. . . .

2. Decision of the Court

On May 26, 2009, the Court announced its 5–4 decision.¹⁰⁶ Writing for the majority, Justice Scalia began the Court’s analysis by noting the different approaches that states take in appointing counsel to indigent defendants.¹⁰⁷ In many states such as Michigan—the state “whose scheme produced the factual background for [the] Court’s decision in *Michigan v. Jackson*”—courts require that the defendant formally request counsel before appointment is made.¹⁰⁸ The Court noted, however, that “many States follow other practices. In some two dozen, the appointment of counsel is automatic upon a finding of indigency.”¹⁰⁹ The Court commented that nothing in *Jackson* indicated “whether [the Court was] then aware that not all States require that a defendant affirmatively request counsel before one is appointed.”¹¹⁰

Amazingly, Obama’s Justice Department argued in favor of the [*Montejo*] decision that Justice Scalia handed down. . . . Obama needs to do more than just swap one liberal justice for another. He needs to make sure that his Justice Department goes into the Supreme Court to uphold the Bill of Rights, not undermine it.”).

106. *Montejo*, 129 S. Ct. 2079. Justice Scalia wrote the majority opinion, which was joined in full by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. *Id.*

107. *Id.* at 2083.

108. *Id.*

109. *Id.* (citing Brief of Amici Curiae The National Legal Aid & Defender Ass’n & The Public Defender Service for the District of Columbia in Support of Petitioner at 29, *Montejo*, 129 S. Ct. 2079 (No. 07-1529), 2008 WL 5026649).

110. *Id.* at 2083–84. This was not a meaningful distinction under most states’ interpretations of *Jackson*. To find a valid *Jackson* invocation, only a “minority of courts require[d] a more exacting standard” such as the standard followed by the Louisiana Supreme Court in *Montejo*. JEZIC, *supra* note 15, § 20:15 (2008 ed. 2008). On the other hand, the majority of courts in “automatic appointment” states had adopted a much more workable standard, holding that *Jackson*’s cut-off rule could be triggered by something less than an express request for the appointment of counsel. *Id.*; *see, e.g.*, *United States v. Harrison*, 213 F.3d 1206, 1213 (9th Cir. 2000) (“[A] defendant invokes the Sixth Amendment right to counsel as a matter of law when (1) the defendant retains counsel on an ongoing basis to assist with a pending criminal investigation, (2) the government knows, or should know, that the defendant has ongoing legal representation relating to the subject of that investigation, and (3) the eventual indictment brings charges precisely anticipated by the scope of the pre-indictment investigation.”); *Fleming v. Kemp*, 837 F.2d 940, 947 (11th Cir. 1988) (holding that defendant’s statement at arraignment that he wanted to obtain his own attorney was an assertion of his right to counsel); *Wilson v. Murray*, 806 F.2d 1232 (4th Cir. 1986); *Bradford v. State*, 927 S.W.2d 329, 335 (Ark. 1996) (holding that appointment of a lawyer without defendant’s knowledge was an invocation of the right to counsel); *State v. Dagnall*, 612 N.W.2d 680, 695 (Wis. 2000)

The Court observed that under the approach of the Louisiana Supreme Court, these differences in states' laws would result in different applications of the *Jackson* rule.¹¹¹ In "appointment by request" states, defendants are required to assert their desire for an attorney before one will be appointed; therefore, in these states, any defendant who is represented by court-appointed counsel would have already invoked the *Jackson* cut-off rule.¹¹² On the other hand, in "automatic appointment" states, where defendants are not required to formally request counsel, it would be more difficult to determine whether a defendant has invoked *Jackson's* cut-off rule, a rule that would prevent police from approaching the defendant for interrogation.¹¹³ The Court noted that the approach of the Louisiana Supreme Court would make it much more difficult for defendants in "automatic appointment" states to invoke *Jackson's* cut-off rule.¹¹⁴ According to the Court, such a distinction would represent a "sort of hollow formalism [that] is out of place in a doctrine that purports to serve as a practical safeguard for defendants' rights."¹¹⁵

After rejecting the Louisiana Supreme Court's approach, the Court turned its attention to Montejo's proposal—eliminate the distinctions among the states by extending *Jackson's* cut-off rule not only to defendants who expressly *request* counsel, but also to defendants who *obtain* counsel through automatic appointment by the court or otherwise.¹¹⁶ The Court agreed that Montejo's approach, unlike that of the Louisiana Supreme Court, would provide a workable method of applying *Jackson* in both "appointment by request" states and "automatic appointment" states.¹¹⁷ However, the Court ultimately rejected this approach, concluding that such a rule was "entirely untethered from the original rationale of *Jackson*."¹¹⁸ The Court made this conclusion despite precedent from lower courts¹¹⁹ and the United States

(holding that if the authorities are aware that the defendant has obtained an attorney, the defendant may validly invoke the right to counsel without the need to tell the police that he has an attorney).

111. *Montejo*, 129 S. Ct. at 2083–84.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 2084.

116. Brief for Petitioner at 18, *Montejo*, 129 S. Ct. 2079 (No. 07-1529), 2008 WL 4948399 (citing *Michigan v. Harvey*, 494 U.S. 344, 352 (1990)).

117. *Montejo*, 129 S. Ct. at 2088.

118. *Id.* at 2085.

119. *See supra* note 110.

Supreme Court¹²⁰ that supported a broader interpretation of *Jackson*. The Court did not address these lower court holdings and dismissed the cases cited by *Montejo* as unhelpful dicta.¹²¹

120. See Brief for Petitioner, *supra* note 116, at 24–32. Citing *Patterson v. Illinois*, 487 U.S. 285 (1988), *Montejo* noted:

Patterson involved a defendant who had neither requested a lawyer nor had one appointed for him. The Court held that the police could interrogate a defendant under those circumstances provided that the defendant waived his right to an attorney under *Miranda*. This Court took pains to observe, however, that it was “a matter of some significance” that *Patterson* was not “an accused [who] has a lawyer.” For once an accused has a lawyer, “a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney–client relationship takes effect.”

Brief for Petitioner, *supra* note 116, at 24 (alteration in original) (citation omitted) (quoting *Patterson*, 487 U.S. at 290 n.3). Citing *Moran v. Burbine*, 475 U.S. 412 (1986), *Montejo* noted:

In that case, a criminal suspect whose Sixth Amendment rights had not yet attached was interrogated while being kept ignorant of the fact that a lawyer his family had obtained to represent him was trying to reach him The Court held that such conduct was permissible because . . . [the suspect’s] Sixth Amendment right to counsel had not attached. But the Court could not have been clearer that such interrogation is impermissible once the Sixth Amendment right attaches, even with a *Miranda* waiver. For “once the right has attached, it follows that the police may not interfere with the efforts of a defendant’s attorney to act as a ‘medium’ between [the suspect] and the State during interrogation.”

Brief for Petitioner, *supra* note 116, at 27 (second alteration in original) (quoting *Moran*, 475 U.S. at 428). Citing *Michigan v. Harvey*, 494 U.S. 344 (1990), *Montejo* noted that in that case:

[T]he Court found that the protections of *Jackson* were triggered by the appointment of counsel at *Harvey*’s initial arraignment, and did not attribute any additional significance to a request for counsel. As the Court phrased it, “once a defendant obtains or even requests counsel . . . analysis of the waiver issue changes” and *Jackson* applies.

Brief for Petitioner, *supra* note 116, at 25 (quoting *Harvey*, 494 U.S. at 352).

121. *Montejo*, 129 S. Ct. at 2087–88. For the language of *Patterson*, see *supra* note 120. The Court labeled the above language of that case as non-probative dictum, reasoning that because the *Patterson* Court cited *Moulton* for the above assertion and because *Moulton*’s actual holding did not relate to a waiver issue, *Patterson*’s language could not have been intended to apply to waivers. The Court made this conclusion in spite of the fact that *Patterson* was a case explicitly relating to waivers and failed to explain what else *Patterson* could have been referring to when it referenced “a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney–client relationship.” *Patterson*, 487 U.S. at 290 n.3. For the language of *Moran*, see *supra* note 120. The Court similarly stated that the above language of that case did not advance *Montejo*’s argument because *Moran* involved the question of whether the Sixth Amendment had attached, “not the validity of a Sixth Amendment waiver.” *Montejo*, 129 S. Ct. 2079, 2087–88. However, in making this assertion, the *Montejo* Court ignored the fact that the only reason *Moran* discussed whether

In deciding that *Jackson* did not automatically apply to all represented defendants, the Court analyzed both the language and the history of the case.¹²² The Court noted that *Jackson*'s holding specifically referred to defendants who had requested counsel, as opposed to defendants who had been appointed counsel automatically by the court.¹²³ Further, the Court pointed out that the *Jackson* cut-off rule was expressly created as an analogy to the *Edwards* cut-off rule, which requires invocation by the suspect.¹²⁴ The Court explained that the logic behind *Edwards* and *Jackson* was the presumption that “suspects who assert their right to counsel are unlikely to waive that right voluntarily” in subsequent interactions with police.¹²⁵ Therefore, the Court reasoned, it would be inappropriate to apply the cut-off rule to all represented defendants because *Edwards* and *Jackson* were “meant to prevent police from badgering defendants into changing their minds about their rights, but a defendant who never asked for counsel has not yet made up his mind in the first instance.”¹²⁶

Therefore, favoring neither the approach of the Louisiana Supreme Court nor *Montejo*'s proposal, the Court addressed the option that Justice Alito suggested at oral argument—cure *Jackson*'s “practical deficiencies” by overturning the case altogether.¹²⁷ Disposing of *Jackson*'s cut-off rule would be an effective way to eliminate the “arbitrary and anomalous distinctions between defendants in different States,” the Court reasoned.¹²⁸

Having already declared that *Jackson* was “unworkable in more than half the States of the Union,” the Court addressed the strength of *Jackson*'s reasoning to determine whether overturning

the Sixth Amendment had attached was because the Court had already concluded that if it had attached, the waiver would have been invalid. *See supra* note 120. For the language of *Harvey*, see *supra* note 120. The *Montejo* Court concluded that the above language referring to *obtaining* a lawyer could not have meant what it said: “[E]lsewhere in the same opinion, we explained that *Jackson* applies ‘after a defendant requests assistance of counsel,’ ‘when a suspect charged with a crime requests counsel outside the context of interrogation,’ and to ‘suspects who assert their right to counsel.’ The accuracy of the ‘obtains’ language is thus questionable.” *Montejo*, 129 S. Ct. 2079, 2087–88 (citations omitted) (quoting *Harvey*, 494 U.S. at 349–50).

122. *Montejo*, 129 S. Ct. at 2085–88.

123. *Id.* at 2085.

124. *Id.*

125. *Id.* at 2086 (quoting *Harvey*, 494 U.S. at 350).

126. *Id.* at 2087.

127. *Id.*

128. *Id.* at 2083, 2088–89.

the case would be appropriate.¹²⁹ The Court noted that when it “creates a prophylactic rule in order to protect a constitutional right, the relevant ‘reasoning’ is the weighing of the rule’s benefits against its costs.”¹³⁰ Addressing the benefits of the *Jackson* rule, the Court began by stating what it perceived to be the purpose of the rule: “[T]o preclude the State from badgering defendants into waiving their previously asserted rights.”¹³¹

With this in mind, the Court posed a question: Without *Jackson*, how many badgering-induced confessions would be erroneously admitted at trial?¹³² “The answer is few if any. The principal reason is that the Court has already taken substantial other, overlapping measures toward the same end.”¹³³ The Court then described the “three layers of prophylaxis”¹³⁴ that work toward that end:

Under [*Miranda*] . . . any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right. Under [*Edwards*] . . . once such a defendant ‘has invoked his right to have counsel present,’ interrogation must stop. And under [*Minnick*] . . . no subsequent interrogation may take place until counsel is present¹³⁵

In the Court’s view, the *Miranda–Edwards–Minnick* line of cases provides sufficient protection of a defendant’s Sixth Amendment right to counsel, for “a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings.”¹³⁶ The Court conceded that the *Miranda–Edwards–Minnick* line of cases was based on the Fifth Amendment; however, it argued that this line of cases also provides sufficient protection against police badgering in Sixth Amendment contexts and that, therefore, “*Jackson* is simply superfluous.”¹³⁷ Thus, the Court concluded that “*Jackson* was policy driven, and if that policy

129. *Id.* at 2089.

130. *Id.* (citing *Minnick v. Mississippi*, 498 U.S. 146, 161 (1990) (Scalia, J., dissenting)).

131. *Id.* (citing *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991); *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)).

132. *Id.*

133. *Id.*

134. *Id.* at 2090.

135. *Id.* at 2089–90 (citations omitted) (quoting *Edwards v. Arizona*, 451 U.S. 477, 484 (1981)) (citing *Minnick*, 498 U.S. at 153; *Miranda v. Arizona*, 384 U.S. 436, 484 (1966)).

136. *Id.* at 2090.

137. *Id.*

is being adequately served through other means, there is no reason to retain its rule.”¹³⁸

The Court then addressed the costs of *Jackson*, first noting that the “principal cost of applying any exclusionary rule ‘is, of course, letting guilty and possibly dangerous criminals go free.’”¹³⁹ Furthermore, the Court reasoned, the rule often prevents police from even trying to obtain voluntary confessions, and “[w]ithout these confessions, crimes go unsolved and criminals unpunished.”¹⁴⁰ The Court concluded that these “are not negligible costs, and in our view the *Jackson* Court gave them too short shrift.”¹⁴¹ Finding that these substantial costs outweighed the marginal benefits of *Jackson*, the Court expressly declared that “*Michigan v. Jackson* should be and now is overruled.”¹⁴²

Having dispensed with *Jackson*, the Court remanded the case so that Montejo could pursue two alternative avenues of relief that the Louisiana Supreme Court did not originally address.¹⁴³ First, Montejo could argue that he invoked his right to counsel when the police approached him for questioning, meaning the cut-off rule of *Edwards* should have applied.¹⁴⁴ Second, Montejo could “press any claim he might have that his Sixth Amendment waiver was not knowing and voluntary, [e.g.,] his argument that the waiver was invalid because it was based on misrepresentations by police as to whether he had been appointed a lawyer.”¹⁴⁵ The Court concluded that those two matters “have heightened importance in light of our opinion today.”¹⁴⁶

138. *Id.*

139. *Id.* (quoting *Herring v. United States*, 129 S. Ct. 695, 701 (2009)).

140. *Id.* at 2091.

141. *Id.*

142. *Id.*

143. *Id.* at 2091–92 (“Montejo understandably did not pursue an *Edwards* objection, because *Jackson* served as the Sixth Amendment analogy to *Edwards* and offered broader protections.”).

144. *Id.*

145. *Id.* at 2092 (citing *Moran v. Burbine*, 475 U.S. 412, 428–29 (1986)); see *supra* note 88.

146. *Montejo*, 129 S. Ct. at 2092. On remand, the Louisiana Supreme Court held that Montejo was precluded from raising the above objections, explaining that “[a] new basis for an objection cannot be raised for the first time on appeal.” *State v. Montejo*, No. 2006-KA-1807, 2010 WL 2011552, at *23 (La. May 11, 2010) (citing LA. CODE CRIM. PROC. ANN. art. 841 (2008)). Additionally, the court held that even if the admission of the confession letter violated Montejo’s right to counsel, such error was harmless because the letter was cumulative of other properly admitted evidence. *Id.*

3. Dissenting Opinion¹⁴⁷

Justice Stevens—joined by Justices Souter, Ginsburg, and Breyer—began his dissent by declaring that the majority’s ruling “rests on a misinterpretation of *Jackson*’s rationale and a gross undervaluation of the rule of *stare decisis*.”¹⁴⁸ The dissent critiqued the majority’s reasons for overturning *Jackson*, arguing that the Court acted “on its own initiative . . . to correct a ‘theoretical and doctrinal’ problem of its own imagining.”¹⁴⁹ The dissent contended that *Jackson* was workable even in “automatic appointment” states, for if “a defendant is entitled to protection from police-initiated interrogation under the Sixth Amendment when he merely *requests* a lawyer, he is even more obviously entitled to such protection when he has *secured* a lawyer.”¹⁵⁰

The dissent claimed that the majority’s decision stemmed from its erroneous assumption “that *Jackson*’s protective rule was intended to ‘prevent police from badgering defendants into changing their minds about their rights,’” therefore leading the Court to conclude that *Jackson* provided protection that was already secured by Fifth Amendment jurisprudence.¹⁵¹ Rejecting this reasoning, the dissent noted that “*Jackson* relied primarily on cases discussing the broad protections guaranteed by the Sixth Amendment right to counsel—not its Fifth Amendment counterpart.”¹⁵² Further, the dissent noted that *Jackson* emphasized

147. Justice Alito agreed with the majority opinion in full, but wrote a separate concurrence, joined by Justice Kennedy, to criticize the dissent’s argument that stare decisis should have controlled the case. *Montejo*, 129 S. Ct. at 2092–94 (Alito, J., concurring). Justice Alito claimed that the Supreme Court showed an equally offensive disregard for stare decisis in a recent decision that bolstered the Fourth Amendment rights of criminal defendants. See *Arizona v. Gant*, 129 S. Ct. 1710, 1719 (2009) (rejecting a broad interpretation of *New York v. Belton*, 453 U.S. 454 (1981), and holding that police are authorized to search a vehicle incident to a recent occupant’s arrest “only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search”). Justice Alito thus concluded that the “treatment of *stare decisis* in *Gant* fully supports the decision in the present case.” *Montejo*, 129 S. Ct. at 2094 (Alito, J., concurring).

148. *Montejo*, 129 S. Ct. at 2094 (Stevens, J., dissenting).

149. *Id.* at 2095 (quoting *id.* at 2085 (majority opinion)).

150. *Id.* (Stevens, J., dissenting). The dissent claimed that this argument was consistent with the Court’s earlier interpretations of *Jackson*. *Id.* (citing *Michigan v. Harvey*, 494 U.S. 344, 352 (1990); *Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988)). See *supra* note 120 for the relevant language of *Harvey* and *Patterson*.

151. *Montejo*, 129 S. Ct. at 2096 (Stevens, J., dissenting) (quoting *id.* at 2087 (majority opinion)).

152. *Id.* (Stevens, J., dissenting).

“that the purpose of the Sixth Amendment is to ‘protec[t] the unaided layman at critical confrontations with his adversary,’ by giving him ‘the right to rely on counsel as a “medium” between him[self] and the State.’”¹⁵³ The dissent concluded that “although the rules adopted in *Edwards* and *Jackson* are similar, *Jackson* did not rely on the reasoning of *Edwards* but remained firmly rooted in the unique protections afforded to the attorney–client relationship by the Sixth Amendment.”¹⁵⁴

After pointing out the above rationales of *Jackson*, the dissent argued that “[o]nce *Jackson* is placed in its proper Sixth Amendment context, the majority’s justifications for overruling the decision crumble.”¹⁵⁵ With this in mind, the dissent addressed the majority’s stare decisis analysis.¹⁵⁶ Regarding the reasoning of *Jackson*, the dissent rejected the majority’s balancing test, arguing that it depended entirely on the Court’s “misunderstanding of *Jackson* as a rule designed to prevent police badgering.”¹⁵⁷

Next, the dissent addressed workability, noting that the majority reframed the relevant inquiry, “asking not whether the *Jackson* rule as applied for the past quarter century has proved easily administrable, but instead whether the Louisiana Supreme Court’s cramped interpretation of that rule is practically workable.”¹⁵⁸ If the majority had asked the former question, the dissent argued, it would have found “that *Jackson*’s bright-line rule has provided law enforcement officers with clear guidance, allowed prosecutors to quickly and easily assess whether confessions will be admissible in court, and assisted judges in determining whether a defendant’s Sixth Amendment rights have been violated by police interrogation.”¹⁵⁹

153. *Id.* (alterations in original) (quoting *Michigan v. Jackson*, 475 U.S. 625, 631–32 (1985), *overruled by Montejo*, 129 S. Ct. 2079) (internal quotation marks omitted).

154. *Id.*

155. *Id.* at 2097.

156. *Id.* at 2097–98.

157. *Id.* at 2097.

158. *Id.*; *see also supra* note 110 (discussing lower courts’ different interpretations of *Jackson*).

159. *Montejo*, 129 S. Ct. at 2098 (Stevens, J., dissenting) (citing Supplemental Brief of Amici Curiae Larry D. Thompson, William Sessions, et al., in Support of Petitioner, *Montejo*, 129 S. Ct. 2079 (No. 07-1529), 2009 WL 1007118 [hereinafter Thompson Brief]). The dissent also commented that “[f]urther supporting the workability of the *Jackson* rule is the fact that it aligns with the professional standards and norms that already govern the behavior of police and prosecutors.” *Id.* at 2098 n.4 (citing MODEL RULES OF PROF’L CONDUCT R. 4.2 (2010)). For the text of Rule 4.2, *see supra* note 15.

The dissent then critiqued the majority's position that Montejo's signing of a *Miranda* waiver constituted a valid waiver of his Sixth Amendment right to counsel.¹⁶⁰ Although the dissent disagreed with *Patterson*'s holding,¹⁶¹ it noted that even in *Patterson*, the Court recognized that "because the Sixth Amendment's protection of the attorney-client relationship . . . extends beyond *Miranda*'s protection of the Fifth Amendment right to counsel . . . there will be cases where a waiver which would be valid under *Miranda* will not suffice for Sixth Amendment purposes."¹⁶² *Montejo* is such a case, the dissent reasoned, for given Montejo's "status as a *represented* criminal defendant, the *Miranda* warnings given to him by police were insufficient to permit him to make a knowing waiver of his Sixth Amendment rights."¹⁶³ The dissent argued that when a defendant has already been appointed counsel, informing him that he has the right to the appointment of counsel "is more likely to confound than enlighten."¹⁶⁴ The dissent noted that "it is imperative that a defendant possess 'a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it' before his waiver is deemed valid."¹⁶⁵ Therefore, the dissent reasoned, because "the administration of *Miranda* warnings was insufficient to ensure Montejo understood the Sixth Amendment right he was being asked to surrender, the record in this case provides no basis for concluding that Montejo validly waived his right to counsel, even in the absence of *Jackson*'s enhanced protections."¹⁶⁶

160. *Montejo*, 129 S. Ct. at 2100 (Stevens, J., dissenting).

161. *Id.* Regarding *Patterson*'s holding, Justice Stevens reasoned that because

Miranda warnings do not hint at the ways in which a lawyer might assist her client during conversations with the police, I remain convinced that the warnings prescribed in *Miranda* . . . are inadequate to inform an unrepresented, indicted defendant of his Sixth Amendment right to have a lawyer present at all critical stages of a criminal prosecution.

Id.

162. *Id.* (quoting *Patterson v. Illinois*, 487 U.S. 285, 297 n.9 (1988)) (internal quotation marks omitted).

163. *Id.* at 2100 n.6.

164. *Id.* at 2101.

165. *Id.* (citation omitted) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)) (citing *Iowa v. Tovar*, 541 U.S. 77, 81 (2004); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

166. *Id.*

IV. ANALYSIS: THE SIXTH AMENDMENT RIGHT TO COUNSEL AFTER
MONTEJO

The *Montejo* Court overturned *Jackson* and held that the Sixth Amendment does not prevent police from approaching a defendant for interrogation, even when that defendant has secured court-appointed counsel.¹⁶⁷ As the dissent in *Montejo* noted, this decision resulted from the Court's misunderstanding of "*Jackson's* underlying rationale and the constitutional interests the decision sought to protect."¹⁶⁸ As discussed below, the Court's decision undermines the protections of the Sixth Amendment right to counsel, legitimizes several forms of police conduct that were previously thought to be unconstitutional, and jeopardizes the future validity of other fundamental pieces of Sixth Amendment jurisprudence.

A. Montejo Undermines the Protections of the Sixth Amendment Right to Counsel

The most unsettling element of the Court's ruling in *Montejo* is its complete disregard for the traditional rationale behind the Sixth Amendment.¹⁶⁹ Unlike the Fifth Amendment right to counsel recognized in *Miranda*, the primary function of the Sixth Amendment right to counsel is to ensure a defendant's right to a fair trial by putting him on a level playing field with the prosecutor.¹⁷⁰ This rationale is not necessarily more important than the Fifth Amendment anti-compulsion rationale, but it is more complex; therefore, waiving the right to counsel in a Sixth Amendment setting should require a greater standard of knowledge from the defendant.¹⁷¹ The Supreme Court has recognized this greater knowledge requirement for defendants who wish to waive the right to counsel in a trial setting.¹⁷² It makes sense to apply analogous requirements in post-indictment interrogation contexts "because the ultimate risks of forgoing counsel in those situations

167. See *supra* Part III.

168. *Montejo*, 129 S. Ct. at 2096 (Stevens, J., dissenting).

169. See *supra* Part II.A.1.

170. See *supra* Part II.A.1.

171. Tomkovicz, *supra* note 12, at 1056 n.306 ("Because of the difference in the character of the sixth amendment guarantee and the consequent different significance of a decision to forgo sixth amendment counsel, a defendant must possess greater knowledge to make a valid sixth amendment decision.").

172. See *supra* Part II.A.1.

are similar in nature to those immediately encountered in [trial] settings.”¹⁷³

Instead, under *Montejo*, police need only obtain a valid *Miranda* waiver to conduct a post-indictment interrogation of a defendant.¹⁷⁴ As the dissent in *Montejo* noted, because the *Miranda* warnings were crafted as a safeguard against self-incrimination, although they apprise defendants of their right to remain silent, they “do not hint at the ways in which a lawyer might assist her client during conversations with the police.”¹⁷⁵ This is especially important in Sixth Amendment contexts because “[w]ithout full information concerning the right to counsel, an accused’s decision to forgo that right cannot constitute the assertion of independence that is a prerequisite to a constitutionally acceptable waiver, that is, it is not a true choice to stand against the state without equalization.”¹⁷⁶

Furthermore, with regard to the actual language of the *Miranda* warnings, informing a defendant of his right to obtain court-appointed counsel when that defendant “has *already* secured counsel is more likely to confound than enlighten.”¹⁷⁷ Thus, the importance of complying with a *Miranda* warning might not seem clear to a defendant who is under the impression that he is already being represented and believes “that counsel, once secured, may be reasonably relied upon as a medium between the accused and the power of the State.”¹⁷⁸

Additionally, the *Montejo* Court exaggerated the protections of *Miranda*, alleging that “a defendant who does not want to speak to the police without counsel present *need only say as much*.”¹⁷⁹ Such a view ignores the realities of modern police interrogation.¹⁸⁰

173. Tomkovicz, *supra* note 12, at 1001 n.103; *see also* Patterson v. Illinois, 487 U.S. 285, 308 n.5 (1988) (Stevens, J., dissenting) (“Respondent, and the United States as *amicus curiae*, argue that the comprehensive inquiry required by *Faretta v. California* should not be extended to pretrial waivers because the role of counsel . . . is more important at trial. I reject the premise that a lawyer’s skills are more likely to sit idle at a pretrial interrogation than at trial. Both events require considerable experience and expertise and I would be reluctant to rank one over the other.” (citation omitted)).

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

175. *Id.* at 2100 (Stevens, J., dissenting).

176. Tomkovicz, *supra* note 12, at 1055.

177. *Montejo*, 129 S. Ct. at 2101 (Stevens, J., dissenting).

178. *Id.* at 2098.

179. *Id.* at 2090 (majority opinion) (emphasis added).

180. For example, in *Montejo*, during a pre-indictment interrogation, the police repeatedly lied to *Montejo* about finding DNA evidence linking him to the crime. Then, in response to demands for the location of the murder weapon,

Empirical studies consistently show that about 80% of suspects waive their right to counsel after police administer *Miranda* warnings.¹⁸¹ Common police tactics used to obtain such waivers

Montejo invoked his right to counsel but quickly retracted his request as follows:

Montejo: "I would like to answer no more questions unless I am in front of a lawyer."

Captain Hall: "Good enough." (exits)

Montejo: "Now, . . ."

Detective Morse: "You are under arrest for first degree murder."

Montejo: ". . . now, I know you aren't that bad a people and all . . ." (both detectives stand and turn toward exit)

Detective Major: (interrupting) "Dude, you don't want to talk to us no more, you want a lawyer, right? I trusted you and you let me down."

Montejo: "No, come here, come here."

Detective Major: "No, no, I can't."

Montejo: "No, come here . . ."

Detective Major: "No, you've asked for an attorney, and you are getting your charge. And the shame of it is . . ."

Montejo: "I don't want no attorney."

State v. Montejo, 974 So. 2d 1238, 1246–48 (La. 2008), vacated by *Montejo*, 129 S. Ct. 2079. The police then consulted with a supervisor to confirm that they could legally interrogate Montejo since he revoked his request. They then re-administered *Miranda* warnings. Shortly after signing the *Miranda* waivers, Montejo, appearing tearful, lowered his head and said "What am I doing?" *Id.* In the above example, although Montejo was clearly given the right to cut off questioning by requesting a lawyer, the police waited until his request to place him under arrest for first-degree murder. Not surprisingly, this move by the police sent a clear message, as shortly after making his request, Montejo completely changed his mind to the point that he began "to literally beg" the police to resume questioning. *Id.* Clearly, this is one example that the Court's assertion—that "a defendant who does not want to speak to the police without counsel present need only say as much"—is a gross oversimplification of the realities of interrogation. For further reading on the realities of police interrogation, see Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 301 (1996) (conducting an empirical study on 182 personally observed interrogations and concluding that "the gap in our knowledge between legal ideals and empirical realities remains as wide as ever in the study of American police interrogation").

181. See Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 859 (1996); Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-*

include lying about the existence of incriminating evidence, minimizing the seriousness of the offense, and insisting that speaking with the police is in the suspect's best interests.¹⁸² Despite the deceptive nature of these practices, courts have generally admitted confessions obtained through such tactics, absent a showing of true coercion, such as the use of threats or violence.¹⁸³ Although it can be argued that such deceptive behavior is appropriate in the pre-indictment investigative stage, it should be considered unacceptable in a Sixth Amendment setting when the law should be most concerned with preserving the integrity of our adversarial system.¹⁸⁴ Because "sixth amendment counsel waiver engenders undeniable risks of an unfair trial," "it is necessary to ensure that an alleged waiver of sixth amendment protection truly is a choice to exercise the freedom to control one's destiny."¹⁸⁵ A *Miranda* waiver, especially when given in response to deceptive police practices, does not meet this standard and should therefore

Report Survey of Police Practices and Beliefs, 31 LAW & HUM. BEHAV. 381, 389 (2007); Leo, *supra* note 180, at 276.

182. See Kassir et al., *supra* note 181, at 386–87; Leo, *supra* note 180, at 278; see also Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 808–16 (2006) (noting that the most widely used police interrogation manual, FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (Jones & Bartlett Publishers 4th ed. 2004), "makes it clear that employing trickery and deceit is essential to an interrogator's strategy for eliciting a confession").

183. See, e.g., *Frazier v. Cupp*, 394 U.S. 731 (1969); see also Gohara, *supra* note 182, at 801–02 (listing several examples of ways that lower courts "have applied and expanded on the Supreme Court's tolerance of deceptive police practices to induce confessions").

184. Some commentators have called for reform of police interrogation tactics in light of recent discoveries of the numbers of defendants who have been convicted based on false confessions. See, e.g., Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004) (analyzing 125 proven false confessions); Gohara, *supra* note 182; Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) (analyzing 60 proven false confessions). This Comment does not conclude that such false confessions are a common result of police practices or that they alone provide sufficient reason for limiting the strategies of law enforcement. Rather, this Comment maintains that the existence of any false confessions, no matter how great in number, should give courts reason to pause and conduct greater examination of the appropriateness of modern police interrogation tactics and of courts' willingness to subject defendants to such tactics without the aid of counsel.

185. Tomkovicz, *supra* note 12, at 1055.

be considered insufficient to indicate a valid Sixth Amendment waiver.

One of the most troubling aspects of *Montejo* is the fact that the Court made these severe departures from traditional Sixth Amendment rationale to correct a “problem of its own imagining.”¹⁸⁶ The Court’s chief justification for overturning *Jackson* was its belief that the precedent was unworkable in the nation’s “automatic appointment” states.¹⁸⁷ However, the Court provided no evidence that any court other than the Louisiana Supreme Court in *Montejo* and the Fifth Circuit in *Montoya* had actually adopted such a narrow and unworkable interpretation of *Jackson*.¹⁸⁸ In fact, only a “minority of courts require[d] a more exacting standard of invocation” such as the standard of the Louisiana Supreme Court in *Montejo*.¹⁸⁹ On the other hand, the majority of courts in “automatic appointment” states had adopted a more workable standard, holding that something less than an express request for the appointment of counsel could trigger *Jackson*’s cut-off rule.¹⁹⁰ The holdings of these courts are consistent with the Supreme Court’s pre-*Montejo* precedent.¹⁹¹ Nevertheless, the *Montejo* Court, without analyzing lower courts’ actual applications of *Jackson* or giving weight to the claims of the many law enforcement amici who defended the workability of *Jackson*,¹⁹² declared the case’s cut-off rule to be unworkable.¹⁹³ Such a view of *Jackson* ignores the reality that most courts have applied the case in ways that are workable in both “appointment by request” states and “automatic appointment” states.¹⁹⁴

B. What’s Next? Problematic Sixth Amendment Scenarios After Montejo

Montejo makes it clear that a court’s appointment of counsel, in response to the defendant’s request or otherwise, will not prevent a defendant from giving a valid Sixth Amendment waiver in response to police-initiated interrogation. However, much of

186. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2095 (2009) (Stevens, J., dissenting).

187. See *supra* Part III.

188. See *Montejo*, 129 S. Ct. 2079.

189. JEZIC, *supra* note 15, § 20:15 (2008 ed. 2008); see *supra* note 110.

190. See *supra* note 110.

191. See *supra* note 120 (discussing relevant language in *Patterson*, *Moran*, and *Harvey*).

192. See Thompson Brief, *supra* note 159.

193. *Montejo*, 129 S. Ct. at 2088.

194. See *supra* note 110.

Montejo's language suggests that the Supreme Court would not limit this holding to the particular facts of that case. Additional examples of police conduct that might now be considered permissible in light of *Montejo* are discussed below.

Scenario 1. Montejo on remand: May police lie to a represented defendant by telling him that he has not been appointed counsel?

The likely answer is yes. The Louisiana Supreme Court was faced with this issue on remand, where *Montejo*'s claim included "his argument that the waiver was invalid because it was based on misrepresentations by police as to whether he had been appointed a lawyer."¹⁹⁵

After the Court ruled that *Montejo* would be able to pursue this avenue of relief, without explanation it cited the portion of *Moran*¹⁹⁶ which noted "that once the [Sixth Amendment] right *has* attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a "medium" between [the suspect] and the State' during the interrogation."¹⁹⁷ The implications of the Court's citation to *Moran* are unclear. Advocates and commentators have often relied on the above language from *Moran* as reinforcing the idea that police conduct that is permissible in the *Miranda* context will not always be permissible in the Sixth Amendment context.¹⁹⁸ However, after *Montejo*, this view no longer seems to hold water, for the *Montejo* Court unequivocally stated that "doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver."¹⁹⁹

This statement undoubtedly implies that police *will* be allowed to lie to an indicted defendant about whether he has been appointed counsel. After all, the principal holding of *Moran* was that police deception would not affect the voluntariness of a Fifth Amendment waiver as long as "a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to

195. *Montejo*, 129 S. Ct. at 2092; *see supra* note 88. However, on remand, the Louisiana Supreme Court held that *Montejo* was precluded from raising this objection. *See supra* note 146.

196. *Montejo*, 129 S. Ct. at 2092 (citing *Moran v. Burbine*, 475 U.S. 412, 428-29 (1986)).

197. *Moran*, 475 U.S. at 428-29 (second alteration in original) (quoting *Maine v. Moulton*, 474 U.S. 159, 176 (1985)).

198. *See, e.g., supra* note 120 (discussing petitioner's arguments in *Montejo*).

199. *Montejo*, 129 S. Ct. at 2090.

use his statements to secure a conviction.”²⁰⁰ In other words, “as long as the warnings are given and the suspect exhibits no overt signs of a lack of capacity to understand them, his waiver will be upheld,” and police will be given wide leeway to employ questionable interrogation tactics.²⁰¹ These standards apparently now apply to the Sixth Amendment as well.²⁰² Therefore, in future cases, courts will likely admit a confession that was obtained subsequent to a *Miranda* waiver even when the police lied to the defendant about whether he had been appointed counsel.

Scenario 2. Moran revisited: May police deceive an indicted defendant’s attorney?

Again, the likely answer is yes. Lying to the defendant’s attorney was one of the elements of police misconduct analyzed in *Moran*.²⁰³ In that case, the police deceptively told the suspect’s attorney that there was no need to come to the police station because the police would not be questioning the suspect until the next day.²⁰⁴ One hour later, the police administered a *Miranda* warning, interrogated the suspect, and obtained a confession.²⁰⁵ Because the suspect had not yet been indicted, his Sixth Amendment right to counsel had not yet attached.²⁰⁶ Therefore, the Supreme Court analyzed the suspect’s waiver on Fifth Amendment grounds and found that “[e]vents occurring outside of the presence of the suspect and entirely unknown to him” did not prevent the suspect from giving a knowing and voluntary waiver.²⁰⁷ However, as discussed in the previous fact pattern, the *Moran* Court suggested that if the suspect had been indicted, the result would have been different; for once a defendant’s Sixth Amendment rights attach, the Court reasoned, “the police may not interfere with the efforts of a defendant’s attorney to act as a “medium” between [the suspect] and the State’ during the interrogation.”²⁰⁸

After *Montejo*, this no longer seems to be true. As previously discussed, the *Montejo* majority seems to view the Sixth

200. *Moran*, 475 U.S. at 422–23. For the full quote from *Moran*, see *supra* text accompanying note 53.

201. *Berger*, *supra* note 54, at 1063.

202. See *supra* text accompanying note 199.

203. *Moran*, 475 U.S. at 415.

204. *Id.*

205. *Id.* at 417–18.

206. *Id.* at 428–32.

207. *Id.* at 422.

208. *Id.* at 428 (alteration in original) (quoting *Maine v. Moulton*, 474 U.S. 159, 176 (1985)).

Amendment's role at interrogation purely as an anti-compulsion safeguard,²⁰⁹ therefore, it is difficult to imagine the rationale upon which the Court would rely in finding a Sixth Amendment violation when police interfere with an attorney's efforts to reach his client. As the Court reasoned in *Moran*, such actions have no effect on the voluntariness of a defendant's Fifth Amendment waiver.²¹⁰ Thus, if the Court truly believes that "doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver,"²¹¹ it seems likely that because *Moran*-type deception of a defendant's attorney does not affect the validity of a Fifth Amendment waiver, courts will also find that such deception does not affect the validity of a Sixth Amendment waiver.

Scenario 3. State v. Forbush: May police approach an indicted defendant for interrogation when they are aware that he has personally retained counsel?

Based on the language of *Montejo* and a ruling from the Court of Appeals of Wisconsin, the answer seems to be yes.²¹² In this scenario, courts will likely allow the police to initiate interrogation of an indicted defendant in the absence of counsel—provided that the defendant gives a valid *Miranda* waiver—even when the police know that the defendant has personally retained an attorney. Before *Montejo*, most courts would have likely considered this a violation of the Sixth Amendment based on the holdings of many state courts²¹³ and dicta of the Supreme Court.²¹⁴ After *Montejo*, this is no longer the case. The rationale of *Montejo* suggests that police are not prohibited from approaching a defendant for the purpose of interrogation when that defendant retains an attorney, even if that attorney notifies the police that he will be representing the defendant. *Montejo* suggests that there is only one way for a defendant to invoke a cut-off rule to prevent police from approaching him for interrogation: the defendant must invoke his *Miranda-Edwards* right "when he is first approached [by police]

209. See *supra* Part IV.A.

210. See *supra* text accompanying notes 200–02.

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

212. *State v. Forbush*, 779 N.W.2d 476 (Wis. Ct. App. 2009), *appeal docketed*, No. 2008 AP 3007-CR (Wis. Mar. 16, 2010).

213. See *supra* note 110.

214. See *Maine v. Moulton*, 474 U.S. 159, 171 (1985) ("[P]olice have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."); see also *supra* note 120.

and given the *Miranda* warnings.”²¹⁵ Therefore, according to the Court, “it should be clear” that the theory “that no *represented* defendant can ever be approached by the State and asked to consent to interrogation . . . is off the mark.”²¹⁶

Shortly after the Supreme Court decided *Montejo*, the Court of Appeals of Wisconsin addressed this issue in *Forbush*.²¹⁷ In that case, before police interrogated Forbush, the defendant’s lawyer called the district attorney to alert him that he was representing Forbush.²¹⁸ The court held that even in such a scenario, in light of *Montejo*, the Sixth Amendment does not prevent police from approaching an indicted defendant for interrogation.²¹⁹ This result is consistent with the language of *Montejo*.²²⁰

Scenario 4. Huguen v. Texas: May police approach an indicted defendant for interrogation when the defendant has invoked his right to counsel in response to court-administered Miranda warnings?

According to the language of *Montejo* and a ruling from the Court of Criminal Appeals of Texas, the answer appears to be yes.²²¹ The *Montejo* Court noted that *Jackson*’s cut-off rule

215. *Montejo*, 129 S. Ct. at 2090. Notably, even for defendants who expressly request an attorney, the protections of the *Edwards* cut-off rule may only be temporary. See *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010) (holding that the *Edwards* cut-off rule ceases to apply if there is a break in custody lasting 14 days or longer).

216. *Id.* at 2086.

217. *Forbush*, 779 N.W.2d 476.

218. *Id.* at 477.

219. *Id.* at 479. As of September 30, 2010, *Forbush* is pending on appeal before the Wisconsin Supreme Court. In his brief and at oral argument, the defendant urged the Wisconsin Supreme Court to adhere to earlier state precedent rather than follow *Montejo*:

Judge: “I just want to clarify something. If we just applied the United States Supreme Court decision, you lose?”

Attorney for the defendant: “I believe that is correct—”

Judge: “Ok, just, straight out—”

Attorney for the defendant: “Yes.”

Judge: “You had a gulp, but, you lose. That’s why you’re putting [your argument] on the state constitution.”

Attorney for the defendant: “Yes.”

Oral Argument at 12:28, *Forbush*, No. 2008 AP 3007-CR, available at <http://www.wicourts.gov/opinions/soralarguments.htm> (search “2008AP3007” under “Docket number”); see also *State v. Dagnall*, 612 N.W.2d 680 (Wis. 2000).

220. See *supra* text accompanying notes 215–16.

221. *Huguen v. State*, 297 S.W.3d 330 (Tex. Crim. App. 2009).

prevented police from initiating interrogation after defendants request court-appointed counsel “despite doubt that defendants ‘actually inten[d] their request for counsel to encompass representation during any further questioning.’”²²² But what about a scenario in which there is no doubt that a defendant’s request for counsel encompassed representation during questioning? Some states mandate that *Miranda* warnings be administered by the court at a defendant’s initial appearance.²²³ In such a scenario, when a court informs the defendant of his right to be assisted by counsel during interrogation, and the defendant requests the appointment of counsel expressly for that purpose, will the defendant’s request constitute an *Edwards* invocation? Based on the dicta of *Montejo*, the answer seems to be no.

The Court noted that it has “never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than ‘custodial interrogation’ What matters for *Miranda* and *Edwards* is what happens when the defendant is approached for interrogation . . . not what happened at any preliminary hearing.”²²⁴ Such an approach seems inconsistent with traditional Sixth Amendment waiver jurisprudence, in which the Court has held that judges should “indulge every reasonable presumption against waiver of fundamental constitutional rights.”²²⁵ Thus, it seems illogical to find a valid waiver of the right to counsel from a defendant who has previously expressed to a court his desire to enjoy the assistance of counsel at interrogation. If the Court maintains that a defendant can only invoke the *Edwards* cut-off rule after the police administer a *Miranda* warning, it seems that the Court is really saying that no matter what intentions the defendant has expressed to a court, police will always be allowed one free shot to obtain a *Miranda* waiver.

Such an approach seems inconsistent not only with Sixth Amendment rationale, but also with the rationale behind the *Miranda* decision. The Court crafted the *Miranda* warnings to protect suspects from being compelled to incriminate themselves while immersed in a police-dominated environment.²²⁶ Therefore, it would seem sensible to allow a defendant to decide whether or not to invoke his *Miranda* right to counsel while he stands before a

222. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2086 (2009) (alteration in original) (quoting *Michigan v. Jackson*, 475 U.S. 625, 632–33 (1986), *overruled by Montejo*, 129 S. Ct. 2079).

223. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 15.17 (West Supp. 2010).

224. *Montejo*, 129 S. Ct. at 2091 (internal quotation marks omitted).

225. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (internal quotation marks omitted).

226. See *supra* discussion Part II.B.

neutral magistrate, in an environment where he can rationally weigh his options without the pressures of police interrogation tactics. The Court of Criminal Appeals of Texas recently addressed this issue and held that after *Montejo*, a defendant's request to a court for the assistance of counsel during interrogation will not constitute an *Edwards* invocation.²²⁷ Although this result is inconsistent with the traditional high standards for the waiver of the Sixth Amendment right to counsel, the decision nevertheless seems consistent with the language of *Montejo*.²²⁸

Scenario 5. May police interrogate an indicted defendant in a non-custodial setting without administering Miranda warnings?

In another dramatic shift in Sixth Amendment jurisprudence, the answer seems to be yes. This possibility was first raised by *Montejo* in his brief:

227. *Hughen v. State*, 297 S.W.3d 330 (Tex. Crim. App. 2009). *But see Pecina v. State*, No. 2-05-456-CR, 2010 WL 2825663 (Tex. App. July 15, 2010). The facts of *Pecina* closely resemble those of *Hughen*. Pursuant to Texas law, a magistrate recited the *Miranda* warnings to *Pecina* at his arraignment, and *Pecina* requested an attorney. *Id.* at *2. However, unlike in *Hughen*, *Pecina*'s arraignment did not occur in a courtroom; rather, because *Pecina* had suffered a serious knife wound, a magistrate conducted the arraignment in *Pecina*'s hospital room. *Id.* Police officers accompanied the magistrate on this visit and waited outside the hospital room as the magistrate conducted the arraignment. *Id.* Once *Pecina* requested counsel and the proceeding concluded, the magistrate exited the room and the police entered. *Id.* at *3. They recited the *Miranda* rights to *Pecina*; *Pecina* signed a *Miranda* waiver and confessed to committing the crime. *Id.* The Court of Appeals of Texas suppressed this confession. The court held that the magistrate was acting on behalf of the police officers; therefore, the court reasoned, *Pecina*'s request to the magistrate for an attorney constituted an *Edwards* invocation, barring the police from initiating interrogation. *Id.* at *9–12. However, the court's holding is a questionable interpretation of *Montejo*. *See id.* at *16–20 (Holman, J., dissenting). As the *Pecina* dissent points out, the magistrate recited the *Miranda* rights to the defendant as part of a preliminary hearing under Texas Code of Criminal Procedure article 15.17. *Pecina*, 2010 WL 2825663, at *16–20. *Montejo* suggests that such a request to a magistrate does not constitute an *Edwards* invocation. *See Montejo*, 129 S. Ct. at 2091 (“We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than ‘custodial interrogation’ What matters for *Miranda* and *Edwards* is what happens when the defendant is approached for interrogation . . . not what happened at any preliminary hearing.” (internal quotation marks omitted)). As of September 30, 2010, the Texas Court of Criminal Appeals is considering a Petition for Discretionary Review of *Pecina*, which the State filed on September 15, 2010. *See Case Management*, 2D CT. APPEALS, <http://www.2ndcoa.courts.state.tx.us/opinions/case.asp?FilingID=19823> (last visited Sept. 30, 2010).

228. *See supra* text accompanying note 224.

The fact that *Miranda-Edwards* applies only to custodial interrogations may cause further confusion. Under *Jackson*, the police may not show up at the home of a counseled defendant to question him after the Sixth Amendment right has attached, even if that questioning were found to be non-custodial. If *Jackson* were replaced by *Miranda*, it is not clear whether the police would even need to give a *Miranda* warning absent a custodial interrogation.²²⁹

The *Montejo* Court, after explaining why *Miranda-Edwards* would be sufficient to protect a defendant's Sixth Amendment right to counsel, addressed *Montejo's* concern:

Montejo also correctly observes that the *Miranda-Edwards* regime is narrower than *Jackson* in one respect: The former applies only in the context of custodial interrogation. If the defendant is not in custody then those decisions do not apply; nor do they govern other, noninterrogative types of interactions between the defendant and the State (like pretrial lineups). However, those uncovered situations are the *least* likely to pose a risk of coerced waivers. When a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering. And noninterrogative interactions with the State do not involve the "inherently compelling pressures" that one might reasonably fear could lead to involuntary waivers.²³⁰

The Court made this observation and moved on to another issue without any further explanation.²³¹ Although the implications of the Court's above observation are not completely clear, it certainly seems that the Court is indeed saying that absent both custody and interrogation, *Miranda* warnings will not be required, even in the Sixth Amendment setting. Such a rule would be problematic because without a *Miranda* warning, an indicted defendant's decision to speak to the police—who intend to elicit responses relating to a formal charge—does not meet even the relaxed *Patterson* standard of a knowing and voluntary Sixth Amendment waiver.²³² Without any indication of a knowing and voluntary waiver by the defendant, how can the Court justify its above assertion?

229. Opening Supplemental Brief for Petitioner at 11 n.4, *Montejo*, 129 S. Ct. 2079 (No. 07-1529), 2009 WL 1007120.

230. *Montejo*, 129 S. Ct. at 2090 (citation omitted) (citing *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)).

231. *Id.*

232. *See supra* Part II.D.2.

The only logical answer seems to once again lie with the Court's ever-increasing trend of viewing the right to counsel as simply an anti-coercion safeguard.²³³ Notably, in the above passage, the Court justifies its position by arguing that scenarios that do not include both custody and interrogation pose a low risk of the following dangers: "coerced waivers," "police badgering," and "involuntary waivers."²³⁴ But in this list, the Court fails to include the most obvious danger—a waiver that is not "knowing." It seems unreasonable to conclude that this omission by the Court was by accident; for if the Court had acknowledged the requirement that a waiver be "knowing," it would be impossible for the Court to justify the assertion that a defendant can give a valid Sixth Amendment waiver absent the reading of *Miranda* warnings. After all, if an indicted defendant is not even given the knowledge that is conveyed by the *Miranda* warning, there is no possible way a court could presume that the defendant "at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction."²³⁵

Ultimately, the implications of the above passage of the *Montejo* opinion are not quite clear. Although the Court has given little guidance, it appears that the Court will acknowledge a valid Sixth Amendment waiver, in at least some circumstances, without a showing that *Miranda* warnings were given or that the defendant's waiver was "knowing." Non-custodial interrogation appears to be one such instance.²³⁶

233. See *supra* Part IV.A. See generally Halama, *supra* note 11.

234. *Montejo*, 129 S. Ct. at 2090.

235. *Moran v. Burbine*, 475 U.S. 412, 422–23 (1986).

236. With the Court requiring both custody and interrogation for the *Miranda* protections to apply in the Sixth Amendment setting, another question arises: after *Montejo*, what constitutes interrogation? Traditionally, in Sixth Amendment contexts, interrogation occurred when the police "deliberately elicited" a statement from a defendant. See *Massiah v. United States*, 377 U.S. 201 (1964). This differs from interrogation under the Fifth Amendment, which is defined as "words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 303 (1980). For a discussion of these distinctions, see Yale Kamisar, Brewer v. Williams, Massiah, and Miranda: *What Is "Interrogation"?* *When Does It Matter?*, 67 GEO. L.J. 1 (1978); Welsh S. White, *Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry*, 78 MICH. L. REV. 1209 (1980).

Scenario 6. May police disregard Massiah by surreptitiously interrogating an indicted defendant?

Although the answer currently appears to be no, the rationale of *Montejo* presents legitimate reason for concern. As previously discussed, by overruling a 23-year-old precedent without a suggestion from either party or any evidence that the precedent had become unworkable, the *Montejo* Court displayed an alarming level of judicial activism.²³⁷ Given the Court's disregard for stare decisis and its shifting view of the purpose of the Sixth Amendment right to counsel,²³⁸ it seems reasonable to question whether other fundamental Sixth Amendment holdings are also in danger. Although the *Montejo* Court emphasized that the holding of the Sixth Amendment case *Massiah v. United States*²³⁹ was not in doubt,²⁴⁰ the Court's current view of the Sixth Amendment right to counsel as purely a safeguard against police badgering presents legitimate reason for concern.

Massiah involved the surreptitious surveillance of an indicted defendant.²⁴¹ In that case, the defendant made incriminating statements to a government informant in the absence of counsel.²⁴² The Court found a Sixth Amendment violation, holding that the police "deliberately elicited" the statement from Massiah, and ruled that such action constituted a critical stage during which the Sixth Amendment applies.²⁴³ Because the defendant was unaware that he was being monitored, there was no possibility for him to make a knowing and voluntary waiver, and therefore the government's actions constituted a Sixth Amendment violation.²⁴⁴

However, the police action in *Massiah* in no way constituted badgering or coercion and, therefore, did not affect the voluntariness of the defendant's statements.²⁴⁵ Given the *Montejo* Court's merging of Fifth and Sixth Amendment doctrines and its view of the Sixth Amendment right to counsel as purely a safeguard against police badgering and involuntary waivers, it

237. See *supra* text accompanying notes 186–94.

238. See *supra* Part IV.A.

239. 377 U.S. 201 (1964).

240. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2085 (2009).

241. *Massiah*, 377 U.S. 201.

242. *Id.* at 203.

243. *Id.* at 206.

244. *Id.*

245. *Id.*

seems reasonable to question whether *Massiah* would still be decided the same way today.²⁴⁶

In future cases involving the surreptitious interrogation of an indicted defendant, the Court could continue its trend of merging Sixth Amendment principles with *Miranda* doctrine by applying the rationale of the 1990 case *Illinois v. Perkins*.²⁴⁷ In *Perkins*, an incarcerated suspect whose Sixth Amendment rights had not yet attached was questioned by an undercover police officer who did not administer *Miranda* warnings.²⁴⁸ The Court ruled that the questioning did not constitute a Fifth Amendment violation because the “essential ingredients of a ‘police-dominated atmosphere’ and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate.”²⁴⁹ The Court further clarified that “*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect’s misplaced trust in one he supposes to be a fellow prisoner.”²⁵⁰

Applying such rationale in the Sixth Amendment context would directly conflict with *Massiah* and the fundamental notion that a Sixth Amendment waiver must not only be voluntary, but also knowing and intelligent. But if the Court continues to view the Sixth Amendment right to counsel merely as a safeguard against police badgering, the rationale of *Perkins* would seem applicable even in Sixth Amendment contexts. Although the Court has not yet expressed a willingness to make this extreme departure from Sixth Amendment jurisprudence, the rationale employed in *Montejo* presents legitimate reason for concern.

C. Implications of Above Scenarios

The *Montejo* Court’s cursory treatment of the role of the right to counsel has clearly “left lower courts with no reminder of the importance and intended function of the Sixth Amendment.”²⁵¹ Without the guidance of *Jackson*’s bright-line rule, “lower courts have been left to chip away at the Sixth Amendment even further

246. See also *United States v. Henry*, 447 U.S. 264 (1980), another surreptitious interrogation case that, like *Massiah*, could be in danger of being reexamined in light of *Montejo*.

247. 496 U.S. 292 (1990).

248. *Id.* at 294–95.

249. *Id.* at 296.

250. *Id.* at 297.

251. Halama, *supra* note 11, at 1223.

than the Supreme Court has been willing to permit.²⁵² After *Montejo*, courts are left with essentially two options.

First, courts can conduct a wholesale importation of *Miranda* jurisprudence into the Sixth Amendment; implementing the Fifth Amendment standards to which prosecutors and defense attorneys are already accustomed would provide relatively predictable results. However, this option would belittle the importance of the Sixth Amendment, ensuring only that waivers of the right to counsel are not coerced instead of protecting the Sixth Amendment's true purpose.²⁵³ A wholesale importation could also lead to the undermining of fundamental Sixth Amendment cases such as *Massiah*.

As a second option, courts could follow *Montejo* by allowing police to approach indicted defendants for interrogation, while at the same time requiring law enforcement to meet a higher burden of proving a knowing and voluntary waiver by defendants. Implementing requirements similar to the *Zerbst-Faretta* standard²⁵⁴ would help to preserve the sanctity of the right to counsel; however, analysis of such a waiver standard would undoubtedly be complex and could prove difficult to implement into the everyday practice of law enforcement.²⁵⁵

Both of the above options pose serious problems. On the one hand, a wholesale importation of *Miranda* jurisprudence would undermine the protections of the Sixth Amendment, as indicated by the results of *Forbush* and *Hughen* and the problematic scenarios detailed above.²⁵⁶ On the other hand, implementation of a more protective *Zerbst-Faretta* standard could prove to be unworkable in everyday law enforcement. To solve this dilemma, states should amend their constitutions to establish bright-line standards that both protect the sanctity of the right to counsel and also provide clear guidance to law enforcement.

V. PROPOSED SOLUTION FOR LOUISIANA: AMEND THE DECLARATION OF RIGHTS

The Declaration of Rights of the Louisiana Constitution currently provides, in pertinent part: "At each stage of the proceedings, every person is entitled to assistance of counsel of his

252. *Id.*

253. *See supra* Part II.A.1.

254. *See supra* Part II.C.1.

255. *See Tomkovicz, supra* note 12, at 1054–59; *infra* text accompanying notes 265–67.

256. *See supra* Part IV.B.

choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment.”²⁵⁷ To better protect the Sixth Amendment right to counsel, Louisiana could add the following provision:

Once such protection has attached, and a defendant has either been appointed counsel by the court, or has otherwise secured representation for the offense at hand, law enforcement shall not initiate contact with the defendant for the purposes of interrogation or other deliberate elicitation until counsel is present, and a defendant’s waiver of the right to counsel in response to any such contact initiated by law enforcement will be presumed invalid unless counsel is present.

This proposed amendment would have the effect of codifying the *Montejo* dissent’s interpretation of *Jackson*—“that no *represented* defendant can ever be approached by the State and asked to consent to interrogation.”²⁵⁸ Thus, this amendment would require that law enforcement officials communicate directly with a defendant’s attorney, as opposed to the represented defendant himself, in order to initiate discussion about the charges at hand. Such a requirement would effectively solve the problems posed by *Montejo*. In each of the six scenarios detailed above, the amendment would prevent police from communicating with the defendant, unless such communication was initiated by the defendant or his attorney. This represents a return to the fundamental Sixth Amendment rationale that a criminal defendant “requires the guiding hand of counsel at every step in the proceedings against him”²⁵⁹ and that counsel “operates to assure that the accused’s interests will be protected consistently with our adversary theory of criminal prosecution.”²⁶⁰ It would also more closely align the powers of law enforcement with the *Model Rules of Professional Conduct*, which were adopted by the American Bar Association to protect the integrity of the attorney–client relationship and to prevent overreaching by a party’s opponent.²⁶¹

257. LA. CONST. art. I, § 13.

258. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2086 (2009).

259. *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932).

260. *United States v. Wade*, 388 U.S. 218, 227 (1967).

261. See MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 1 (2010). See *supra* note 15 for the full text of Rule 4.2. Before *Montejo*, it was generally true that there existed only “a narrow area where an offense by a prosecutor is not great enough to violate the constitutional rights of the defendant, but still constitutes an unethical practice by the prosecutor.” Neil Salon, *Prosecutors and Model Rule 4.2: An Examination of Appropriate Remedies*, 12 GEO. J. LEGAL ETHICS

Although the proposed amendment is based in part on *Jackson's* cut-off rule, it would not result in the workability dilemmas that concerned the *Montejo* Court. Since the amendment is written to apply to all represented defendants, its protections would apply equally to defendants in "appointment by request" states and "automatic appointment" states. And because this rule is a bright-line standard, it would not only protect the sanctity of the right to counsel but also provide clear guidance to law enforcement.

However, as the *Montejo* Court pointed out, the "value of any prophylactic rule . . . must be assessed not only on the basis of what is gained, but also on the basis of what is lost."²⁶² Critics of broadening the protections of the right to counsel claim that doing so would frustrate the states' "compelling interest in finding, convicting, and punishing those who violate the law."²⁶³ However, the proposed amendment would not significantly hinder the efforts of law enforcement. Many former prosecutors have conceded as much; when the Supreme Court directed the parties in *Montejo* to file supplemental briefs addressing whether *Jackson* should be overturned, a group of lawyers and judges with extensive experience in law enforcement filed an amici brief on behalf of *Montejo*.²⁶⁴ In this brief, they "argue[d] persuasively that *Jackson's* bright-line rule has provided law enforcement officers with clear guidance, allowed prosecutors to quickly and easily assess whether confessions will be admissible in court, and assisted judges in determining whether a defendant's Sixth Amendment rights have been violated by police interrogation."²⁶⁵ Such an approach is consistent with the Court's often-expressed view that "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific

393, 396-97 (1999). Today, ethical "no contact" rules lie directly at odds with *Montejo*.

262. *Montejo*, 129 S. Ct. at 2089 (quoting *Minnick v. Mississippi*, 498 U.S. 146, 161 (1990) (Scalia, J., dissenting)) (internal quotation marks omitted).

263. *Id.* (quoting *Moran v. Burbine*, 475 U.S. 412, 426 (1986)) (internal quotation marks omitted).

264. See Thompson Brief, *supra* note 159, which was signed by 19 amici who had previously held positions such as judges, prosecutors, attorneys general, and other law enforcement executives at the state and federal level; notably, this list included William Sessions, former Director of the Federal Bureau of Investigation.

265. *Montejo*, 129 S. Ct. at 2098 (Stevens, J., dissenting) (citing Thompson Brief, *supra* note 159).

circumstances they confront.”²⁶⁶ The Court has noted that, where possible, the lawfulness of a police officer’s actions should not depend on a “highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions,”²⁶⁷ but on a “straightforward rule, easily applied, and predictably enforced.”²⁶⁸

Obviously, even accepting the above benefits, bright-line rules are not appropriate if they significantly frustrate legitimate law enforcement techniques; however, this would not likely be the case if the above proposal is adopted. Although the law enforcement amici in *Montejo* “acknowledge[d] that ‘*Jackson* reduces opportunities to interrogate defendants’ and ‘may require exclusion of evidence that could support a criminal conviction,’ they maintain that ‘it is a rare case where this rule lets a guilty defendant go free.’”²⁶⁹

Even the Solicitor General, in its amicus brief on behalf of Louisiana, admitted that the *Jackson* rule “only occasionally prevents federal prosecutors from obtaining appropriate convictions.”²⁷⁰ Further, the Solicitor General conceded that the overruling of *Jackson* “likely would not significantly alter the manner in which federal law enforcement agents investigate indicted defendants. Nor has the *Jackson* rule resulted in the suppression of significant numbers of statements in federal prosecutions in the past.”²⁷¹

Thus, the proposed amendment would not only provide for greater protection of a defendant’s right to counsel, but also make for more workable and efficient law enforcement. Maintaining a bright-line rule in this area of the law will also prevent the consequences that could result when lower courts and law enforcement test the new Sixth Amendment standards.²⁷²

266. *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979); see also *Maryland v. Shatzer*, 130 S. Ct. 1213, 1222–23 (2010) (holding that the *Edwards* cut-off rule ceases to apply if there is a break in custody lasting 14 days or longer and explaining that “law enforcement officers need to know, with certainty and beforehand, when renewed interrogation is lawful”).

267. *Oliver v. United States*, 466 U.S. 170, 181 (1984) (quoting *New York v. Belton*, 453 U.S. 454, 458 (1981)) (internal quotation marks omitted).

268. *Belton*, 453 U.S. at 459.

269. *Montejo*, 129 S. Ct. at 2098 (Stevens, J., dissenting) (quoting Thompson Brief, *supra* note 159).

270. United States Amicus Brief, *supra* note 105, at 3.

271. *Id.* at 12.

272. See *supra* Part IV.B; see also WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2.9(g) (2009), Westlaw 1 CRIMPROC s 2.9(g) (“[C]ommentators find implicit in the Warren Court rulings an additional concern that state judges were insensitive to constitutional claims Per se prohibitions were viewed as

VI. CONCLUSION

Sherman McCoy sits idly in the courtroom of Judge Myron Kovitsky, praying that his attorney can remedy his foolish decision to speak to the police.

"Detective Martin, when you and Detective Goldberg questioned my client, you were aware that he had retained a lawyer, isn't that right?" McCoy's attorney asks.

"Look, we didn't make McCoy say anything," Martin replies. "We were just doing some good old-fashioned police work, the only kind we know."²⁷³

These cops knew exactly what they were doing, *Judge Kovitsky thinks to himself*, but am I really going to let a criminal run free because of it?

Montejo has left judges without clear standards for evaluating a defendant's Sixth Amendment rights.²⁷⁴ *Montejo's* holding not only overturned a constitutional safeguard that was both valuable to defendants and workable for law enforcement, but also displayed a complete disregard for the traditional rationale behind the Sixth Amendment.²⁷⁵ The Court's drastic importation of Fifth Amendment rationale into Sixth Amendment contexts might ensure that confessions are given voluntarily, but it does not protect the broader goal of the Sixth Amendment—minimizing the imbalance in our adversary system to ensure that defendants receive fair trials.²⁷⁶

The *Montejo* Court's distortion of these principles has resulted in a blurring of the line between legitimate law enforcement efforts and illegitimate police deception, as illustrated by the case of Sherman McCoy in the aforementioned scenario. When lower courts and law enforcement are faced with such facts, they will be tempted, in light of *Montejo*, to "chip away at the Sixth Amendment even further than the Supreme Court has been willing

responsive to . . . these difficulties. They produced clear standards that were readily comprehensible, and provided less room for manipulation by judges disposed to evasion . . .").

273. See Nick Lamberto, *Leaming's "Speech": "I'd Do It Again,"* DES MOINES REG., Apr. 7, 1977, at B1, where Captain Leaming said of *Brewer v. Williams*, 430 U.S. 387 (1977), "Shucks, I was just being a good old-fashioned cop, the only kind I know how to be," reminiscing on his "Christian burial speech." See Kamisar, *supra* note 236, at 1.

274. See *supra* Part IV.C.

275. See *supra* Part IV.

276. See *supra* Part IV.A.

to permit.”²⁷⁷ To prevent further denigration of the right to counsel, states should amend their constitutions to include bright-line protections similar to those of *Jackson*. This would provide for greater protection of a defendant’s right to counsel, ensure a more workable and efficient system of law enforcement, and help to defend the integrity of our adversarial system of justice. Without such action, a defendant’s trust in the attorney–client relationship will be misplaced, and the Sixth Amendment right to counsel will truly become “a trap for the unwary.”²⁷⁸

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277. Halama, *supra* note 11, at 1223.

278. Brief for Petitioner, *supra* note 116, at 32.

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