

CASENOTE

IF YOU WANT IT, YOU HAD BETTER ASK FOR IT: HOW *MONTEJO V. LOUISIANA* PERMITS LAW ENFORCEMENT TO SIDESTEP THE SIXTH AMENDMENT

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I. INTRODUCTION

In its 2009 term, the United States Supreme Court overruled *Michigan v. Jackson*¹ in the controversial 5-4 decision of *Montejo v. Louisiana*.² The *Montejo* decision alters the landscape of Sixth Amendment jurisprudence by conflating the Fifth and Sixth Amendment right to counsel in the custodial interrogation context. Prior to *Montejo*, the Sixth Amendment guaranteed the assistance of counsel to a represented defendant during custodial interrogation.³ As a result of *Montejo*, that Sixth Amendment guarantee is no longer absolute. The right to counsel during post-indictment interrogation is now conditioned upon a defendant's express request.⁴ Consequently, criminal defendants are left unprotected during adversarial encounters with law enforcement.

This Note explores the fundamental differences between the Sixth Amendment right to counsel and the Fifth Amendment right to counsel, and their respective waiver standards in the Court's jurisprudence. It examines the *Montejo* Court's decision to overrule *Jackson* by exploring the Court's interpretation of *Jackson's* underlying rationale. Finally, this Note discusses the practical effects of *Jackson's* overruling, and the shortcomings of the *Montejo* Court's conclusion that *Miranda* warnings⁵ adequately protect a defendant's Sixth Amendment right to counsel.

II. FACTS AND PROCEDURAL HISTORY

On September 6, 2002, Jesse Jay Montejo (Montejo) was arrested in connection with the robbery and murder of Lewis Ferrari (Ferrari).⁶ Police interviewed Montejo during the evening of September 6, 2002, and again in

1. *Michigan v. Jackson*, 475 U.S. 625 (1986) (holding that when a defendant invokes his Sixth Amendment right to counsel at an arraignment or similar proceeding, police may not initiate an uncounseled interrogation, and explaining that when police initiate uncounseled interrogation, *Jackson* forces the presumption that any subsequent waiver of the Sixth Amendment right to counsel was involuntary, and thus, invalid), *overruled by* *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009).

2. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2091 (2009).

3. For a discussion of the Sixth Amendment right to counsel, see discussion *infra* Part III.A.

4. For a discussion of the majority opinion and its effect on post-indictment interrogation, see discussion *infra* Parts IV.A, V.A-B.

5. See *Miranda v. Arizona*, 384 U.S. 436, 468-71 (1966) (stating that the Fifth Amendment privilege against compelled self-incrimination entitled an accused to be informed of the nature of his Fifth Amendment rights, and the consequences of waiving those rights. The *Miranda* Court determined that law enforcement must inform an accused of the right to remain silent, the right to have an attorney present during questioning, and the right to have counsel appointed in circumstances of indigency. The Court further held that law enforcement must warn an accused that, in waiving those rights, any incriminating statements would be admissible as evidence against them).

6. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2082 (2009).

the early morning of September 7.⁷ After waiving his rights numerous times, and changing his story significantly, Montejo eventually confessed to killing the victim and disposing of the murder weapon.⁸ Detectives testified that Montejo understood his rights, showed no visible signs of intoxication or mental defect, spoke voluntarily with detectives, and freely waived his right to counsel.⁹

A “seventy-two hour hearing” was held on September 10.¹⁰ The proceedings were not transcribed, but the scant record indicated that the judge appointed counsel to represent Montejo.¹¹ Montejo’s counsel was not present at the hearing.¹² Nor was counsel present later that same day when police approached Montejo and requested his assistance with locating the murder weapon.¹³

Following this conversation, the facts of which are in dispute, the police and Montejo set out to locate the murder weapon.¹⁴ Police *Mirandized* Montejo before leaving the jail, and he again executed a valid *Miranda* waiver.¹⁵ During the excursion, Montejo wrote an inculpatory letter to Ferrari’s widow, in which he expressed remorse for his crime.¹⁶ When Montejo returned to jail, his court-appointed counsel was waiting for him.¹⁷ The record neither clarifies when Montejo’s counsel was notified of the court’s appointment nor addresses why counsel was delayed in contacting Montejo.¹⁸

7. *State v. Montejo*, 06-1807, p. 6 (La. 1/16/08); 974 So. 2d 1238, 1244 (2008).

8. *Id.* at 1244-45.

9. *Id.* at 1245. For a discussion of a person’s right to counsel, see *infra* Part III.A-B.

10. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2082 (2009). Louisiana state law provides that “[t]he sheriff or law enforcement officer having custody of an arrested person shall bring him promptly, and in any case within seventy-two hours of the time of the arrest, before a judge for the purpose of appointment of counsel.” LA CODE CRIM. PROC. ANN. art. 230.1(A) (2003).

11. *Montejo*, 129 S. Ct. at 2082; see also Petition for Writ of Certiorari at 6-7, *Montejo*, 129 S. Ct. 2079 (No. 07-1529).

12. *Montejo*, 129 S. Ct. at 2082.

13. *Id.* *Montejo* and the police provide differing accounts of their conversation. *State v. Montejo*, 06-1807, p. 12-15 (La. 1/16/08); 974 So. 2d 1238, 1249-50 (2008). The police claimed to be unaware that counsel was appointed for Montejo, and that when asked, Montejo told them that an attorney had not contacted him. *Id.* at 1249 n.46. Montejo, on the other hand, claimed that when the police asked if counsel was appointed at the hearing, he responded in the affirmative. *Id.* at 1249 n.47. He alleged further that police told him he was mistaken, and that he had not, in fact, been appointed counsel. *Id.*

14. *Montejo*, 129 S. Ct. at 2082.

15. *Id.*

16. *Id.*

17. *Id.*

18. See generally *id.* at 2079; see also *State v. Montejo*, 06-1807, (La. 1/16/08); 974 So. 2d 1238 (2008).

At trial, the jury found Montejo guilty of first-degree murder and sentenced him to death.¹⁹ Montejo appealed the decision and the sentence arguing, among other assertions, that the inculpatory letter should have been excluded as evidence.²⁰ Montejo contended that the letter should be excluded because his Sixth Amendment right to counsel attached at the 72-hour hearing, and thus, the *Jackson* rule protected him from police-initiated interrogation.²¹ In addition, Montejo asserted that the State did not satisfy the burden of proving that he made a knowing, voluntary, and intelligent waiver of his Sixth Amendment rights, as elucidated by the Court's jurisprudence.²²

The Louisiana Supreme Court affirmed Montejo's conviction and his subsequent death sentence.²³ To address Montejo's assertion that the trial court should have excluded his letter pursuant to the *Jackson* rule, the court referred to its prior decision in *State v. Carter*.²⁴ In *Carter*, the court held that "something more than mere mute acquiescence in the appointment of counsel is necessary to show the defendant has asserted his right to counsel sufficiently to trigger" the *Jackson* rule.²⁵ Additionally, the court referred to *Montoya v. Collins*,²⁶ a Fifth Circuit decision establishing that the *Jackson* rule is activated by the defendant's "assertion . . . of the right to counsel."²⁷ The Louisiana Supreme court acknowledged that, in theory, Montejo's right to counsel had attached at the seventy-two hour hearing.²⁸

19. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2082 (2009); see also *State v. Montejo*, 06-1807, (La. 1/16/08); 974 So. 2d 1238, 1250 (2008).

20. *Montejo*, 974 So. 2d at 1258.

21. See *id.* at 1258-59. For a discussion of the Sixth Amendment right to counsel, see *infra* Part III.A. For a discussion of the *Jackson* rule, see *infra* Part III.C.

22. *Montejo*, 974 So. 2d at 1259.

23. *Id.* at 1265. In Louisiana, capital cases bypass intermediate appellate review and go directly to the Louisiana Supreme Court. See LA. CODE CRIM. PROC. ANN. art. 912.1(A) (2009).

24. *Montejo*, 974 So. 2d at 1259-60 (citing *State v. Carter*, 94-2859 (La. 11/27/95); 664 So. 2d 367). In *Carter*, the magistrate judge appointed counsel for the defendant at the indictment. *Carter*, 664 So. 2d at 370. The defendant did not expressly acknowledge the court's appointment of counsel. *Id.* at 383. Subsequent to the indictment, the arresting officer met with the defendant in jail and advised him of his rights. *Id.* at 370. The defendant waived his rights and made a statement. *Id.* Ultimately, the defendant sought to have that statement suppressed pursuant to the *Jackson* rule. *Id.*

25. *State v. Carter*, 94-2859 (La. 11/27/95); 664 So. 2d 367, 383. For a discussion of the *Jackson* rule, see *infra* Part III.C.

26. *Montoya v. Collins*, 955 F.2d 279 (5th Cir. 1992).

27. *Montoya*, 955 F.2d at 283. In *Montoya*, the defendant was arrested for murder. *Id.* at 281. The magistrate judge appointed counsel for Montoya at the indictment. *Id.* at 282. Subsequent to the hearing, police interrogated Montoya without counsel present. *Id.* at 281. Montoya executed a valid *Miranda* waiver. *Id.* The court held that the *Jackson* rule did not protect Montoya because he did not explicitly request counsel. *Id.* at 283.

28. *Montejo*, 974 So. 2d at 1260.

However, the court reasoned that Montejo was not entitled to the *Jackson* rule's protection because Montejo did not explicitly request or sufficiently "assert" his right to counsel.²⁹

Addressing Montejo's assertion that his waiver was invalid, the court relied on the United States Supreme Court decision in *Patterson v. Illinois*.³⁰ In *Patterson*, the Court held that *Miranda* warnings³¹ provide the defendant with the requisite awareness to satisfy the State's burden of proving that a waiver is knowing and intelligent.³² Accordingly, the Louisiana Supreme Court found that Montejo's waiver was knowing and intelligent because he had executed numerous *Miranda* waivers, and had been informed at the 72-hour hearing that counsel was appointed.³³ Having concluded that Montejo was not protected by the *Jackson* rule and that his waiver was knowing and intelligent, the court concluded that the letter was admissible as evidence against Montejo.³⁴ Thus, the Louisiana Supreme Court affirmed the sentence and the conviction.³⁵

On October 1, 2008, the United States Supreme Court granted Montejo's petition for writ of certiorari on the issue of "whether, after the right to counsel has attached and counsel has been appointed, the defendant must take affirmative steps to 'accept' the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation."³⁶ The Court also issued an order directing the parties to address the question whether *Michigan v. Jackson* should be overruled.³⁷ The order required that briefs be filed by April 14, 2009.³⁸

On May 26, 2009, the Supreme Court overruled *Michigan v. Jackson*, thereby discharging Sixth Amendment protection from the post-indictment

29. *State v. Montejo*, 06-1807, p. 28 (La. 1/16/08); 974 So. 2d 1238, 1261 (2008).

30. *Id.* at 1262 (citing *Patterson v. Illinois*, 487 U.S. 285 (1988)). In *Patterson*, the defendant, after he appeared without counsel at an indictment proceeding, spoke with police, executed a valid *Miranda* waiver, and made incriminatory statements. *Patterson*, 487 U.S. at 288. The *Patterson* Court concluded that *Miranda* warnings sufficiently apprise an unrepresented defendant of his Sixth Amendment rights and the consequences of waiving those rights. *Id.* at 296.

31. For a discussion of the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), see *infra* Part III.B.

32. *Patterson*, 487 U.S. at 296.

33. *Montejo*, 974 So. 2d at 1262.

34. *Id.* at 1260.

35. *Id.* at 1265.

36. *Montejo v. Louisiana*, 129 S. Ct. 30 (2009); see also *Petition for Writ of Certiorari, Montejo*, 129 S. Ct. 2079 (2009) (No. 07-1529).

37. Brief of Amicus Curiae the Criminal Justice Institute of Harvard Law School at 1 n.1, *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009) (No. 07-1529), 2009 WL 1028469.

38. *Id.*

custodial interrogation context.³⁹ The Court also held that a *Miranda* waiver acts as a valid waiver of the Sixth Amendment right to counsel.⁴⁰

III. BACKGROUND

A. THE SIXTH AMENDMENT RIGHT TO COUNSEL

1. THE PURPOSE OF THE SIXTH AMENDMENT RIGHT TO COUNSEL

The Sixth Amendment of the United States Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”⁴¹ The broad function of this guarantee is to preserve the integrity of the adversarial judicial system.⁴² Implicit is the State’s duty to acknowledge the importance of the attorney-client relationship.⁴³ Its basis lies in the “realistic recognition . . . that the average defendant does not have the professional legal skill to protect himself”⁴⁴ when faced with the “prosecutorial forces of organized society.”⁴⁵ Thus, the Sixth Amendment attempts to level the adversarial playing field, thereby promoting balance and fairness within the criminal justice system.

39. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2091 (2009).

40. *Id.* at 2085.

41. U.S. CONST. amend. VI. In full, 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 where in 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 defense.

Id.

42. *See Maine v. Moulton*, 474 U.S. 159, 168-69 (1985) (“The right to the assistance of counsel . . . is indispensable to the fair administration of our adversarial system of criminal justice.”); *see also 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.”).

43. *See Moulton*, 474 U.S. at 176 (noting that the Sixth Amendment’s guarantee “includes the State’s affirmative obligation not to act in a manner that circumvents the protections accorded the accused . . .”).

44. *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) (finding the trial court’s conviction of a defendant who had not received counsel’s assistance to be unacceptable in the absence of a valid waiver).

45. *Kirby v. Illinois*, 406 U.S. 682, 689-90 (1972) (explaining that the Sixth Amendment applies only after the commencement of adversarial judicial proceedings and did not extend to pre-arraignment encounters between a suspect and the state).

2. THE SIXTH AMENDMENT APPLIES TO ALL CRITICAL STAGES OF A PROSECUTION

The Supreme Court has found that the Sixth Amendment right to counsel applies not just at trial, but also to all “critical” stages of a prosecution.⁴⁶ These critical stages occur when “the accused is confronted, just as at trial, by the procedural system, or by his expert adversary, or both.”⁴⁷ As such, the Supreme Court has extended the Sixth Amendment’s application to certain *pretrial* stages “where the results of the confrontation ‘might well settle the accused’s fate and reduce the trial itself to a mere formality.’”⁴⁸ Based on this rationale, the Supreme Court has found that arraignments, post-indictment line-ups, preliminary hearings, and post-indictment interrogations are critical stages, during which the Sixth Amendment right to counsel is essential to preserving the integrity of the adversarial justice system.⁴⁹

B. THE FIFTH AMENDMENT RIGHT TO COUNSEL

In the watershed decision *Miranda v. Arizona*,⁵⁰ the Supreme Court created an independent right to counsel to combat the “inherently compelling pressures” of pre-indictment custodial interrogation.⁵¹ The *Miranda* Court articulated a series of procedural safeguards to protect a suspect’s Fifth Amendment right against compelled self-incrimination.⁵² A primary component is the *Miranda* warnings, which among other things, grant a suspect the option to request counsel’s presence during custodial interrogation.⁵³

The *Miranda* warnings, therefore, are not expressly protected by the Constitution.⁵⁴ Instead, the *Miranda* decision crafted a prophylactic rule

46. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2085 (2009); *see also* *United States v. Wade*, 388 U.S. 218, 227-28 (1967); *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

47. *United States v. Gouveia*, 467 U.S. 180, 189 (1984) (quoting *United States v. Ash*, 413 U.S. 300, 310 (1973)).

48. *Id.* (quoting *Wade*, 388 U.S. 218, 224 (1967)). In *Wade*, the Court explained that the presence of counsel at critical confrontations ensure that the defendant’s interests will be protected “consistently with our adversary theory of criminal prosecution.” *Wade*, 388 U.S. at 227-28.

49. *See* *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009) (post-indictment interrogation); *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearings); *United States v. Wade*, 388 U.S. 218 (1967) (post-indictment line-ups); *Powell v. Alabama*, 287 U.S. 45 (1932) (arraignments). *See also* *Brewer v. Williams*, 430 U.S. 387 (1977) (negotiations to surrender); *Massiah v. United States*, 377 U.S. 201 (1964) (post-indictment interrogation).

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

51. *Id.* at 467.

52. *Id.* at 468-71.

53. *Id.* at 471-72.

54. *See* *New York v. Quarles*, 467 U.S. 649, 654 (1984) (referring to *Miranda* warnings as a

designed to shield a suspect from police coercion, thus “permit[ting] a full opportunity to exercise the [Fifth Amendment] privilege against self-incrimination”⁵⁵ It applies in only pre-indictment circumstances, when a suspect is in custody and subjected to interrogation; it does not expand to protect the accused from police conduct that falls outside the scope of custodial interrogation.⁵⁶ Nor does *Miranda* “restrict deceptive or suggestive police tactics, manipulative interrogation strategies, hostile or overbearing questioning styles . . . or any of the inherently stressful conditions . . . that may lead the innocent to confess.”⁵⁷ Thus, the *Miranda* doctrine is finely tailored to prevent coerced waivers of the Fifth Amendment.

C. MICHIGAN V. JACKSON

In 1986, the Supreme Court’s decision in *Michigan v. Jackson*⁵⁸ blurred the lines between the distinct Fifth and Sixth Amendment rights to counsel by focusing its analysis on the effect of a defendant’s express request for counsel at an arraignment hearing.⁵⁹ In *Jackson*, the defendants each requested the appointment of counsel at their arraignment.⁶⁰ Before the defendants were able to consult with their lawyers, police initiated further interrogations and secured confessions subsequent to valid *Miranda* waivers.⁶¹

The trial court admitted their confessions as evidence at their respective trials.⁶² On appeal, the Michigan Supreme Court reversed,

judge-made measure designed to protect a suspect from compelled self-incrimination, rather than rights protected by the Constitution); *see also* *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (explaining that *Miranda* warnings “[are] not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected”).

55. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). Prophylactic rules are procedural safeguards, created by courts to *protect* the constitutional rights of the individual. *See* *Montejo v. Louisiana*, 129 S. Ct. 2079, 2089 (2009).

56. *Miranda*, 384 U.S. at 467-78. A person is “in custody” when his “freedom of action is curtailed in any significant way.” *Id.* at 467. Interrogation occurs “when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning” by police. *Id.* at 478. *See also* Meredith B. Halama, *Loss of a Fundamental Right: The Sixth Amendment as a Mere “Prophylactic Rule,”* 1998 U. ILL. L. REV. 1207, 1214 (1998).

57. Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 497-98 (2006).

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

59. *Id.* at 626.

60. *Id.* at 627-28.

61. *Id.*

62. *Id.*

holding that the defendants' confessions were obtained in violation of their Sixth Amendment right to counsel.⁶³ The *Jackson* Court affirmed the decision of the Michigan Supreme Court, and held that when a defendant requested counsel at an arraignment or similar proceeding, subsequent waivers were presumed invalid if secured in counsel's absence during police-initiated interrogation.⁶⁴

In crafting this presumption, the *Jackson* Court copied the structure of the *Edwards* rule, a Fifth Amendment prophylactic rule designed to safeguard a suspect's right to counsel.⁶⁵ The Court's rationale in *Jackson*, however, was entrenched in Sixth Amendment jurisprudence.⁶⁶ The *Jackson* Court considered *Edwards*' protective rule, while noting the fundamental differences in the scope of the Fifth and Sixth Amendment rights to counsel, and the purpose served by each.⁶⁷ In doing so, they ultimately concluded the Sixth Amendment right to counsel deserved "at least as much protection" as the *Miranda* right to counsel.⁶⁸

The *Jackson* holding had several practical consequences. It left certain Justices of the Supreme Court with the impression that, as a Sixth Amendment safeguard, the *Jackson* rule required an express request for counsel to trigger its protection.⁶⁹ This language contradicted longstanding Supreme Court jurisprudence, whereby the Sixth Amendment right to counsel did not hinge upon a request.⁷⁰ Furthermore, it led subsequent

63. *Michigan v. Jackson*, 475 U.S. 625, 628 (1986), *overruled by* *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009).

64. *Id.* at 636. That presumption was premised on a broad interpretation that a defendant's request for counsel at an arraignment or similar proceeding indicated a desire to deal with police through counsel at all critical stages. *Id.* at 640-41.

65. *See Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). The *Edwards* Court erected a barrier against waiver whereby once a suspect invoked his *Miranda* right to counsel, police were forbidden to continue interrogating, or initiate further interrogation, until counsel was present. *Id.*

66. *Jackson*, 475 U.S. at 631-32 (explaining that the Sixth Amendment's purpose is to protect "the unaided layman at critical confrontations with his adversary" by giving him "the right to rely on counsel as a medium between him and the State" and noting that after the initiation of adversary judicial proceedings, the Sixth Amendment provides a right to counsel at all critical stages, even when there is no interrogation and the Fifth Amendment is not applicable); *see also Maine v. Moulton*, 474 U.S. 159, 176 (1985); *United States v. Gouveia*, 467 U.S. 180, 189 (1984).

67. *Jackson*, 475 U.S. at 631. For a discussion of the Fifth and Sixth Amendments, *see supra* Part III.A-B.

68. *Jackson*, 475 U.S. at 632 (identifying an indictment as the initiation of adversarial criminal proceedings, at which time the Sixth Amendment is triggered and the reasons for prohibiting an interrogation of an uncounseled defendant, who has requested counsel, become readily apparent).

69. *Id.* at 642 (Rehnquist, J., dissenting). Both Justice Powell and Justice O'Connor joined in Justice Rehnquist's dissenting opinion. *Id.* at 637.

70. *See id.* at 641 (Rehnquist, J., dissenting); *see also Brewer v. Williams*, 430 U.S. 387, 404 (1977) ("[T]he right to counsel does not depend upon a request by the defendant."); *Carnley v. Cochran*, 369 U.S. 506, 513 (1962) ("[W]here the assistance of counsel is a constitutional

Justices to interpret the *Jackson* rule as a preventive measure to dissuade police from coercing Sixth Amendment waivers during interrogations.⁷¹ Such an interpretation conflated the purpose of the Fifth Amendment right to counsel with the Sixth Amendment right to counsel in the custodial interrogation context, thus rendering the *Jackson* rule superfluous and redundant.⁷² An inevitable consequence was the erosion of the Sixth Amendment's stringent waiver standard.⁷³

D. WAIVER OF THE SIXTH AMENDMENT RIGHT TO COUNSEL

Traditionally, courts have indulged “‘every reasonable presumption against waiver’ of fundamental constitutional rights.”⁷⁴ In *Johnson v. Zerbst*, the Court applied that presumption to the Sixth Amendment.⁷⁵ The *Zerbst* Court found that a defendant is unlikely to waive his Sixth Amendment right to counsel freely and voluntarily.⁷⁶ Because a waiver is the “‘intentional relinquishment or abandonment of a ‘known’ right,”⁷⁷ the Court determined that a defendant's waiver must be knowing and intelligent.⁷⁸

The *Zerbst* threshold of a “knowing and voluntary waiver” depends upon the facts and circumstances of each case.⁷⁹ In the Sixth Amendment context, however, the Court was very rigid in its application.⁸⁰ Over time, the Court reaffirmed the *Zerbst* threshold and applied it to critical stages

requisite, the right to be furnished counsel does not depend on a request.”).

71. See *Montejo v. Louisiana*, 129 S. Ct. 2079, 2086 (2009); *Texas v. Cobb*, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring) (explaining that the *Jackson* rule represented “a wholesale importation of the *Edwards* rule into the Sixth Amendment”); see also *Michigan v. Jackson*, 475 U.S. 625, 637-40 (1986) (Rehnquist, J., dissenting) (noting that the majority's presumption is illogical in the Sixth Amendment context, since police do not commonly deny defendants of their Sixth Amendment right to counsel), *overruled by* *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009).

72. See *Montejo*, 129 S. Ct. at 2089-90.

73. See *Patterson v. Illinois*, 487 U.S. 285, 296 (1988) (holding that an unrepresented defendant's *Miranda* waiver can simultaneously waive his Sixth Amendment right to counsel).

74. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)). See also *Hodges v. Easton*, 106 U.S. 408, 412 (1882).

75. *Zerbst*, 304 U.S. at 464.

76. *Id.* (stating that the Court does not “presume acquiescence in the loss of fundamental rights.” (quoting *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292, 307 (1937))).

77. *Id.*

78. *Id.* at 464-65. The *Zerbst* Court found that a knowing and intelligent waiver is one in which a defendant comprehends their legal and constitutional rights, as well as the consequences of waiving those rights. *Id.* at 465.

79. *Id.* at 464.

80. See *Brewer v. Williams*, 430 U.S. 387, 404-05 (1977) (explaining that a knowing and intelligent waiver requires more than mere comprehension, but relinquishment of a known right); see also *Brady v. United States*, 397 U.S. 742, 748 (1970).

occurring post-indictment, including custodial interrogation.⁸¹

In the last two decades, however, the Court has deconstructed the notion that the Sixth Amendment waiver standard must be unique and precise.⁸² While the words “knowing” and “intelligent” are still used in relation to waiver of constitutional rights, the Sixth Amendment waiver analysis no longer retains the sophistication of the *Zerbst* standard.⁸³ Neither the Court nor the Constitution requires a *specific* understanding of the Sixth Amendment right to counsel and the consequences of waiver.⁸⁴ A *general* awareness of both is sufficient to satisfy the constitutional minimum.⁸⁵ The Supreme Court illustrated this concept in *Patterson v. Illinois*, holding that a valid *Miranda* waiver may, in some circumstances, simultaneously suffice as a waiver of Sixth Amendment rights.⁸⁶

E. WAIVER OF FIFTH AMENDMENT RIGHT TO COUNSEL

The rationale behind the *Miranda* right to counsel compelled a different “knowing and intelligent” standard from the one prescribed by the Sixth Amendment. Since *Miranda* does not, in itself, represent a constitutional right, a lower waiver threshold fulfills the validity analysis.⁸⁷

In practice, *Miranda* warnings satisfy the knowing and intelligent prongs of a valid waiver of the Fifth Amendment right to counsel.⁸⁸ The Court has held that these warnings are the method by which a suspect is made aware of his rights and the consequences of waiver.⁸⁹ As such, law enforcement is under no obligation to provide any additional information.⁹⁰ The Supreme Court has found that the use of such information influences only the wisdom of a *Miranda* waiver, but does not affect its voluntary and

81. See *Brewer v. Williams*, 430 U.S. 387, 404-05 (1977); *Camley v. Cochran*, 369 U.S. 506, 514-16 (1962).

82. See, e.g., *United States v. Ruiz*, 536 U.S. 622, 629-30 (2002) (implying that the *Zerbst* standard applies to a defendant’s waiver of his right to remain silent, his right to a jury trial, and his right to counsel).

83. See *Montejo v. Louisiana*, 129 S. Ct. 2079, 2085 (2009) (stating that it is “beyond doubt” that a Sixth Amendment waiver must be voluntary, knowing and intelligent); see also *Patterson v. Illinois*, 487 U.S. 285, 292 (1988).

84. See *Ruiz*, 536 U.S. at 629-30.

85. See *Iowa v. Tovar*, 541 U.S. 77, 92 (2004); *Ruiz*, 536 U.S. at 629-30; *Patterson*, 487 U.S. at 294.

86. See *Patterson*, 487 U.S. at 296 (holding that a suspect’s awareness and subsequent voluntary waiver of his rights meets the requisite standard).

87. See *Tovar*, 541 U.S. at 92; *Ruiz*, 536 U.S. at 629-30; *Patterson*, 487 U.S. at 294.

88. *Montejo*, 129 S. Ct. at 2085; see also *Patterson*, 487 U.S. at 296.

89. *Patterson*, 487 U.S. at 296.

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

knowing nature.⁹¹ Thus, if *Miranda* warnings are read, so long as the waiver is uncoerced, the “analysis is complete and the waiver is valid as a matter of law.”⁹²

IV. THE COURT’S OPINION

A. MAJORITY OPINION

1. THE LOUISIANA SUPREME COURT’S INTERPRETATION OF *JACKSON* IS UNWORKABLE

In *Montejo*, the Supreme Court confronted the task of sifting through the fluid jurisprudential interpretations of the Fifth and Sixth Amendment rights to counsel. In a 5-4 decision, the Court overruled *Michigan v. Jackson*, and held that Montejo validly waived his Sixth Amendment right to counsel.⁹³

Writing for the majority, Justice Scalia denounced Louisiana’s interpretation of the *Jackson* rule, which required a defendant to request counsel, or otherwise “assert” his Sixth Amendment right, in order to activate *Jackson*’s protection.⁹⁴ The flaw in this reading, the Court explained, was that procedures for counsel’s appointment to indigent defendants varied from state to state.⁹⁵

While some states require that a defendant formally request counsel at arraignment,⁹⁶ others automatically appoint counsel upon a finding of indigency.⁹⁶ In jurisdictions requiring a request, the Court recognized the “assertion” as clear and unequivocal, and the triggering of *Jackson* a reflexive consequence.⁹⁷ In states that automatically appoint counsel,⁹⁸

91. *Colorado v. Spring*, 479 U.S. 564, 577 (1987); see also *Moran v. Burbine*, 475 U.S. 412, 422-23 (1985); *Oregon v. Elstad*, 470 U.S. 298, 316-17 (1985).

92. *Moran*, 475 U.S. at 422-23. The Court has also found that a valid *Miranda* waiver can be implied through a defendant’s conduct. See *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (holding that an express written or oral statement of waiver is not necessary to establish a valid waiver).

93. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2090-91 (2009).

94. *Id.* at 2083. The Louisiana Supreme Court’s use of the Fifth Circuit decision in *Montoya v. Collins* implied that its rule also permits “affirmative acceptance” of counsel to trigger *Jackson*’s protections. See *State v. Montejo*, 06-1807, p. 28-29 (La. 1/16/08); 974 So. 2d 1238, 1261.

95. *Montejo*, 129 S. Ct. at 2083.

96. *Id.* Louisiana, for example, automatically appoints counsel upon a finding of indigency. LA. CODE CRIM. PROC. ANN. art. 512 (2003).

97. *Montejo*, 129 S. Ct. at 2083.

98. *Id.* at 2084.

such an “assertion” is less obvious.⁹⁹ The Court considered the threshold for what may logically be considered an assertion, and found there was no clear explanation.¹⁰⁰

The Court then questioned the concept of “affirmative acceptance.”¹⁰¹ Since an indigent defendant has no right to choose his counsel,¹⁰² the Court refused to expect anything more than mere silence in the face of appointment.¹⁰³

The Court decided the judicial application of Louisiana’s rule would lead to either of two results.¹⁰⁴ On the one hand, it could force courts to review, case-by-case, whether a particular defendant has “somehow invoked his right to counsel.”¹⁰⁵ This approach was impractical due to the hurried nature of preliminary hearings¹⁰⁶ and the sheer volume of indigent defendants.¹⁰⁷ On the other hand, the Court observed that the rule could introduce “arbitrary distinctions” between defendants, resulting in the categorical denial of *Jackson’s* protections in states where counsel was appointed automatically.¹⁰⁸

2. MONTEJO’S INTERPRETATION OF THE *JACKSON* RULE IS FLAWED IN THEORY

While the Court disapproved of Louisiana’s application of the *Jackson* rule, they were equally disenchanted with Montejo’s interpretation. The Court reasoned that Montejo’s rule, whereby *Jackson’s* protections are triggered once a defendant is represented by counsel, was “entirely

99. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2084 (2009).

100. *Id.* The Court asked:

How to categorize a defendant who merely asks, prior to appointment, whether he will be appointed counsel? Or who inquires, after the fact, whether he has been? What treatment for one who thanks the court after the appointment is made? And if the court asks a defendant whether he would object to appointment, will a quick shake of his head count as an assertion of his right?

Id.

101. *Id.*

102. *Id.* (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006)).

103. *Montejo*, 129 S. Ct. at 2084.

104. *Id.*

105. *Id.*

106. *Id.* The Court explained that “preliminary hearings are often rushed, and are frequently not recorded or transcribed.” *Id.* Moreover, the Court noted that sometimes, a defendant is not present at preliminary hearings, thereby nullifying an opportunity to assert his right to counsel. *Id.*

107. *Id.* The Court concluded that it would be impossible for the judicial system to monitor each defendant’s reaction to the appointment of counsel. *Id.*

108. *Id.* The Court concluded that such “hollow formalism [was] out of place” in a doctrine designed to act as a practical safeguard for defendant’s Sixth Amendment rights. *Id.*

untethered” from the decision’s original rationale.¹⁰⁹ The Court also dismissed the dissent’s likeminded contention that *Jackson’s* protections did not hinge upon a defendant’s request for counsel.¹¹⁰ Justice Scalia condemned this broad application of *Jackson* as an attempt to shield a defendant from waiving his Sixth Amendment rights by “imprison[ing] a man in his privileges and call[ing] it the Constitution.”¹¹¹ Montejo’s version of the *Jackson* rule, the Court explained, effectively barred police from initiating post-indictment interrogation.¹¹² If unable to secure a valid Sixth Amendment waiver at the arraignment, police would be forbidden to speak with a defendant until counsel was present.¹¹³

Based on this framework, the Court found an “initial election” was necessary to trigger the *Jackson* rule.¹¹⁴ Without an express request for counsel, no basis existed to presume a defendant was unwilling to speak with police in counsel’s absence.¹¹⁵ Hence, if the presumption was absent, a defendant was not afforded any enhanced protection from waiving his Sixth Amendment right to counsel.¹¹⁶ Justice Scalia concluded that Montejo’s version of the *Jackson* rule was therefore “untenable as a theoretical and doctrinal matter.”¹¹⁷

3. A STARE DECISIS ANALYSIS SHOWS THAT THE JACKSON RULE IS UNNECESSARY

After concluding that the *Jackson* rule did not apply to *Montejo*, Justice Scalia turned his attention to addressing the rule’s continued vitality in the Court’s jurisprudence.¹¹⁸ The Court determined that the *Montejo* case

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

110. *Id.* at 2086.

111. *Id.* (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942)). The Court denounced Montejo’s argument as having its “theoretical roots” in legal ethics. *Id.* at 2087. But since the “Constitution does not codify the ABA’s Model Rules,” the Court noted that the ethical guidelines imposed on lawyers were exclusive, and did not shackle police to standards of similar conduct. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 2086-87 (citing *Patterson v. Illinois*, 487 U.S. 285, 291 (1988)).

115. *Montejo*, 129 S. Ct. at 2086-87. Justice Scalia determined that the *Jackson* opinion itself unambiguously articulated that *Jackson’s* presumption was activated by a request for counsel. *Id.*

116. *Id.* at 2087-88. Montejo cited precedent, which he argued lent support to his contention that *Jackson’s* protection did not require an express request for counsel. *Id.* (citing *Michigan v. Harvey*, 494 U.S. 344 (1990); *Patterson v. Illinois*, 487 U.S. 285 (1988)). The Court noted that neither case clarified whether a different waiver analysis was applied to those who have a lawyer than those that have requested counsel. *Montejo*, 129 S. Ct. at 2088.

117. *Id.* at 2085.

118. *Id.* at 2088.

illustrated flaws in the *Jackson* Court's rationale.¹¹⁹ In light of the invocation requirement, the *Jackson* rule proved itself unworkable in more than half the states.¹²⁰ The Court opined that stare decisis does not bind it to expand the holding of precedent in order to salve its inadequacies.¹²¹ As such, the Court moved to consider whether to overrule *Jackson*.¹²² In so doing, the Court identified the relevant factors for consideration: the rule's workability, its antiquity, its reliance interests, and the *Jackson* Court's reasoning behind its decision.¹²³

The Court's interpretation of the *Jackson* rule mirrored that of the Louisiana Supreme Court.¹²⁴ Rather than embarking on a separate or redundant examination, the Court relied on their prior analysis of Louisiana's application to illustrate the rule's practical deficiencies.¹²⁵

In considering the rule's antiquity, the Court found that the *Jackson* rule was "only two decades old," and was thus young enough that it would not guide the choices of criminal defendants.¹²⁶ The Court then acknowledged that while police and prosecutors were trained to abide by *Jackson's* contours, that fact was not a sufficient reason to retain the *Jackson* rule as a constitutional requirement.¹²⁷ Justice Scalia elaborated that if law enforcement wished to honor the *Jackson* rule's boundaries, they were free to do so.¹²⁸

Lastly, the Court explored the strength of *Jackson's* reasoning by subjecting the rule to a cost-benefit analysis.¹²⁹ To identify the benefits of the rule, the Court examined its achievements in light of its purpose.¹³⁰ Justice Scalia explained earlier in the opinion that the *Jackson* rule acted to

119. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088 (2009).

120. *Id.*

121. *Id.* (recognizing that eliminating the invocation requirement would enable a uniform application of the rule, but would run counter to the *Jackson* Court's rationale).

122. *Id.*

123. *Id.* at 2088-89.

124. *See id.* at 2088.

125. *See Montejo*, 129 S. Ct. at 2088-89. By accepting the Louisiana Supreme Court's interpretation as the *Jackson* opinion's resultant rule, the Court denounced the rule's workability earlier in the opinion. *Id.*

126. *Id.* at 2089 (stating that "[a]ny criminal defendant learned enough to order his affairs based on the rule announced in *Jackson* would also be perfectly capable of interacting with the police on his own").

127. *Id.*

128. *Id.*

129. *Id.* (explaining that the value of any prophylactic rule must be examined "not only on the basis of what is gained, but also on the basis of what is lost." (quoting *Minnick v. Mississippi*, 498 U.S. 146 (1990) (Scalia, J., dissenting))).

130. *Id.*

prevent police from coercing involuntary waivers.¹³¹ Involuntary waivers, however, are invalid apart from *Jackson*, due to the Fifth Amendment's "overlapping measures" designed to protect the same interest.¹³² The Court implied that it did not matter whether an interrogatory encounter occurs before or after arraignment.¹³³ The focus in both scenarios is to protect a defendant's voluntary waiver of his rights during custodial interrogation.¹³⁴ As a result, the Court concluded that "doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure voluntariness of the Sixth Amendment waiver."¹³⁵

Continuing the cost-benefit analysis, the Court identified *Jackson*'s costs to the criminal justice system.¹³⁶ The Court found that the rule invalidated otherwise voluntary confessions, and at the same time, deterred law enforcement from interrogating defendants for fear of violating the Sixth Amendment right to counsel.¹³⁷ Justice Scalia declared the ability to obtain uncoerced confessions as essential to the truth-seeking process; for, without them, "crimes go unsolved and criminals unpunished."¹³⁸

The Court rejected Montejo's concerns that the Fifth Amendment regime would create administration issues by conflating the Fifth and Sixth Amendment waiver standards, thus burdening courts with questions of invocation at preliminary hearings.¹³⁹ The Court clarified that the Fifth Amendment's protective rules may be invoked only during custodial

131. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2089 (2009). Earlier in the opinion, the Court stated the *Jackson* rule represented a "wholesale importation of the Edwards rule into the Sixth Amendment." *Id.* at 2086 (quoting *Texas v. Cobb*, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring)).

132. *Montejo*, 129 S. Ct. at 2089; *see also* *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that a suspect subject to custodial interrogation must be advised of his right to have a lawyer present if he so requests); *Edwards v. Arizona*, 451 U.S. 477 (1981) (declaring that once a subject has invoked his *Miranda* right to counsel, interrogation must stop); *Minnick*, 498 U.S. 146 (extending *Edwards* so that no subsequent interrogation may take place until counsel is present).

133. *Montejo*, 129 S. Ct. at 2090 (declaring that the Fifth Amendment's protective rules are sufficient to equally protect the integrity of one's "voluntary choice not to speak outside his lawyer's presence" both before and after the Sixth Amendment right to counsel has attached (quoting *Texas v. Cobb*, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring))).

134. *Id.*

135. *Montejo*, 129 S. Ct. at 2090 (rejecting the dissent's contention that a represented defendant deserved a higher standard of waiver than an unrepresented defendant and reiterating that *Miranda* warnings adequately protect the Sixth Amendment right to counsel, regardless of whether counsel has been secured).

136. *Id.*

137. *Id.* at 2090-91.

138. *Id.* at 2091. The Court chided the *Jackson* Court for neglecting to afford these costs the proper weight in their calculus. *Id.*

139. *Id.* (noting that *Miranda* and *Edwards* provide clear and unequivocal guidelines to law enforcement).

interrogation, and not at preliminary hearings.¹⁴⁰ Montejo's concerns of confusion were, therefore, unwarranted.¹⁴¹

The Court vacated the judgment of the Louisiana Supreme Court, but found the rejection of Montejo's *Jackson* claim proper because he failed to invoke his Sixth Amendment right to counsel.¹⁴² However, in light of their decision to overrule *Jackson*, the Court remanded for further proceedings so that Montejo could pursue an *Edwards* defense or, in the alternative, contend that his waiver was not knowing and voluntary.¹⁴³

B. CONCURRING OPINION

Justice Alito, joined by Justice Kennedy, concurred with the majority's rejection of stare decisis in overruling *Michigan v. Jackson*.¹⁴⁴ The concurrence analogized the *Montejo* decision to the Court's recent decision in *Arizona v. Gant*,¹⁴⁵ which established that stare decisis does not require adherence to a particular doctrine if the precedent was "badly reasoned and produce[d] erroneous . . . results."¹⁴⁶

Using a broad overview of the majority's analysis to frame the concurrence, Justice Alito equated the dissent's concerns with the *Gant* dissent, noting that the bright-line qualities of both rules were essentially the same.¹⁴⁷ Justice Alito explained that both rules provided law enforcement clear guidance, allowed prosecutors to quickly and easily assess whether evidence would be admissible in court, and assisted judges in determining whether a defendant's rights had been violated.¹⁴⁸ If the reliance interests in *Gant* could be cast aside, the concurrence implied, so could those in *Jackson*.¹⁴⁹

140. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2091 (2009) (stating that a defendant "can invoke his *Miranda* rights anticipatorily, in a context other than custodial interrogation" (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 182 (1991))).

141. *Montejo*, 129 S. Ct. at 2091.

142. *Id.* at 2091-92.

143. *Id.* at 2092.

144. *Id.* at 2092-94 (Alito, J., concurring).

145. *Arizona v. Gant*, 129 S. Ct. 1710 (2009).

146. *Montejo*, 129 S. Ct. at 2092-94 (Alito, J. concurring) (citing *Gant*, 129 S. Ct. 1710). In *Gant*, the Court examined whether, under *New York v. Belton*, police may conduct a warrantless search of a car if its recently arrested occupant poses no threat to officer safety or preservation of evidence. *Gant*, 129 S. Ct. at 1718. The *Gant* Court held that the doctrine of stare decisis did not require adherence to a broad reading of the *Belton* rule; the safety and evidentiary interests that supported the search in *Belton* were not present in *Gant*. *Id.* at 1722. See also *New York v. Belton*, 453 U.S. 454 (1981).

147. *Montejo*, 129 S. Ct. at 2093 (Alito, J., concurring).

148. *Id.* (Alito, J., concurring).

149. *Id.* (Alito, J., concurring).

The concurrence then rejected the dissent's contention that the antiquity of the rule tilted the balance towards retention.¹⁵⁰ Justice Alito pointed out the *Gant* Court's dismissal of a rule five years older than *Jackson* with "similar bright-line qualities."¹⁵¹

Justice Alito hinted at his agreement with the majority that *Jackson* was poorly reasoned only insofar as the *Gant* decision was poorly reasoned; the implication being that the *Montejo* Court should not ascribe greater reverence to the principle of stare decisis in addressing *Jackson*, a rule with similar concerns and qualities as that addressed in *Gant*.¹⁵²

C. DISSENTING OPINION

1. THE LOUISIANA SUPREME COURT WAS WRONG, BUT FOR A DIFFERENT REASON

Justice Stevens, writing for the dissent, was joined by Justices Souter, Ginsburg, and Breyer.¹⁵³ After a brief recapitulation of the Sixth Amendment's scope and the *Jackson* holding, Justice Stevens lauded the majority's conclusion that the Louisiana Supreme Court's decision could not stand.¹⁵⁴ Unlike the majority, however, the dissent's conclusion was based on an altogether different interpretation of the *Jackson* opinion.¹⁵⁵

The dissent argued the *Jackson* rule's protection was not restricted to defendants who expressly request counsel.¹⁵⁶ The dissent contended that the *method* by which counsel was appointed was constitutionally insignificant as state law determined *Jackson*'s trigger.¹⁵⁷ In their view, the request merely served as evidence that "the appointment of counsel had been effectuated."¹⁵⁸ The argument implied that the rule extended to all represented defendants, because the *existence* of a valid-attorney-client relationship, rather than an express request for counsel, afforded a

150. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2093 (2009) (Alito, J., concurring).

151. *Id.* (Alito, J., concurring).

152. *Id.* at 2093-94 (Alito, J., concurring) (stating that the "treatment of stare decisis in *Gant* fully supports the decision in the present case").

153. *Id.* at 2094-101 (Stevens, J., dissenting). Justice Breyer filed a separate dissenting opinion, explaining that he would have followed stare decisis in both *Montejo* and *Gant*. *Id.* at 2101-02 (Breyer, J., dissenting).

154. *Id.* at 2094 (Stevens, J., dissenting).

155. *Id.* at 2094-95 (Stevens, J., dissenting).

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

157. *Id.* (Stevens, J., dissenting) (emphasis added).

158. *Id.* (Stevens, J., dissenting). In Louisiana, state law dictates that counsel's appointment to indigent defendants is a function of the court, and does not require a request for counsel. See LA. CODE CRIM. PROC. ANN. art. 512 (2003).

defendant the full protection of the Sixth Amendment.¹⁵⁹

2. THE *JACKSON* RULE WAS NOT DESIGNED TO PREVENT POLICE COERCION

The dissent noted that the Court unanimously granted certiorari on an altogether different question from whether or not *Michigan v. Jackson* should be overruled.¹⁶⁰ Under this question, the dissent opined that the Court should have reversed the Louisiana Supreme Court's decision.¹⁶¹ As a result, Justice Stevens chided the majority for acting on its own initiative to address *Jackson's* deficiencies.¹⁶² They contended those deficiencies were a product of the majority's misplaced assumption that the rule was intended to prevent police from "badgering" defendants into waiving their Sixth Amendment right to counsel.¹⁶³ Such an assumption, the dissent asserted, "flagrantly misrepresent[ed]" the rule's underlying rationale and the constitutional interests it was designed to protect.¹⁶⁴

The dissent recognized that the *Jackson* decision¹⁶⁵ was "patterned" after *Edwards v. Arizona*.¹⁶⁶ *Edwards* protects a suspect from police coercion during pre-indictment custodial interrogation; *Jackson* seeks to guarantee Sixth Amendment protection of the attorney-client relationship.¹⁶⁷ Justice Stevens elucidated this key distinction by first noting the absence of any anti-badgering rationale from the *Jackson* opinion.¹⁶⁸ He noted the *Jackson* Court's emphasis on the effect of formalized accusations, as the point when a mere suspect becomes a defendant "within the meaning of the Sixth Amendment."¹⁶⁹ An indicted defendant, the *Jackson* Court concluded, is entitled to "at least as much protection" during interrogation as the *Edwards* prophylactic affords

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

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

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

162. *Id.* (accusing the majority of overruling *Jackson* to correct "a theoretical and doctrinal problem of its own imagining") (Stevens, J., dissenting).

163. *Id.* at 2096 (Stevens, J., dissenting) (citing *Michigan v. Jackson*, 475 U.S. 625 (1986), overruled by *Montejo*, 129 S. Ct. 2079).

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

165. *Jackson*, 475 U.S. 625.

166. *Edwards v. Arizona*, 451 U.S. 477 (1981).

167. Compare *id.* at 484-85 with *Jackson*, 475 U.S. at 631.

168. *Montejo*, 129 S. Ct. at 2096 (Stevens, J., dissenting) (citing *Michigan v. Jackson*, 475 U.S. 625 (1986)). See generally *Jackson*, 475 U.S. 625 (1986).

169. *Montejo*, 129 S. Ct. at 2096 (Stevens, J., dissenting) (citing *Jackson*, 475 U.S. 625). Formal accusations are made at an arraignment or indictment proceeding. See *Jackson*, 475 U.S. at 632.

unindicted suspects.¹⁷⁰

3. A PROPER STARE DECISIS ANALYSIS DOES NOT WARRANT THE COURT'S OVERRULING OF *JACKSON*

The dissent alleged the majority's stare decisis analysis lost credibility once *Jackson* was placed in the proper Sixth Amendment context.¹⁷¹ Justice Stevens maintained the majority's analysis was tainted by their insistence that *Jackson* was designed to prevent police badgering.¹⁷² Justice Stevens concluded that the majority's misinterpretation caused it to exaggerate the considerations favoring *Jackson's* dismissal.¹⁷³

Justice Stevens dismissed the majority's workability inquiry as myopic, stating the relevant inquiry was "whether the *Jackson* rule ha[d] . . . proved easily administrable" within the criminal justice system.¹⁷⁴ The dissent insisted it was apparent that *Jackson's* bright-line rule had "done more to advance effective law enforcement than to undermine it."¹⁷⁵ Furthermore, they pointed out that *Jackson's* contours aligned with professional standards governing conduct of police and prosecutors when contacting represented defendants.¹⁷⁶ In stark contrast to the majority, the dissent claimed there was substantial evidence to support a conclusion of the rule's workability.¹⁷⁷

Justice Stevens further accused the Court of minimizing the "valid considerations favoring retention" of the rule.¹⁷⁸ Specifically, the dissent

170. *Michigan v. Jackson*, 475 U.S. 625, 632 (1986), *overruled by* *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009). *See also* *Montejo*, 129 S. Ct. at 2096 (Stevens, J., dissenting) (citing *Jackson*, 475 U.S. at 632).

171. *Montejo*, 129 S. Ct. at 2097 (Stevens, J., dissenting) (alleging that even if the Court's interpretation were accurate, they failed to illustrate how the *Jackson* rule's costs were any different from other protections afforded by the Sixth Amendment right to counsel, and thus warranted dismissal).

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

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

174. *Id.* (Stevens, J., dissenting). The majority, instead, identified the Louisiana Supreme Court's interpretation as accurate and asked if it was workable, which, of course, it was not. *Id.* at 2088.

175. *Id.* at 2097 (Stevens, J., dissenting). The dissent cited a supplemental brief submitted by amici Larry D. Thompson et al. on behalf of lawyers and judges which urged the retention of *Jackson* due to its benefits to law enforcement. *Id.* at 2098 (Stevens, J., dissenting) (citing Supplemental Brief of Amici Curiae for Larry D. Thompson, William Sessions et al., in Support of Petitioner, *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009) (No. 07-1529), 2009 WL 1007118).

176. *Id.* at 2098 n.4 (Stevens, J., dissenting).

177. *Montejo*, 129 S. Ct. at 2098 (Stevens, J., dissenting).

178. *Id.* at 2097 (Stevens, J., dissenting). The dissent faulted the majority for concluding that *Jackson's* "youth" supported its abandonment. *Id.* at 2098 (Stevens, J., dissenting). Instead, the dissent maintained that the rule's age *combined* with its bright-line qualities supported its

noted that the majority's analysis solely addressed the reliance interests of criminal defendants and law enforcement.¹⁷⁹ The dissent disagreed with such a provincial application, and found the majority's blatant rejection of relevant, well grounded, and administrable precedent would diminish the public's confidence in the integrity of the criminal justice system.¹⁸⁰

C. SIXTH AMENDMENT JURISPRUDENCE DICTATES THAT POLICE VIOLATED MONTEJO'S RIGHT TO COUNSEL

Regardless of stare decisis concerns and *Jackson's* protective rule, Justice Stevens contended that the actions taken by the police violated Montejo's Sixth Amendment right to counsel.¹⁸¹ Pre-*Jackson* jurisprudence made clear that the intentional circumvention of a defendant's right to have counsel notified of and present during critical confrontations was a violation of the Sixth Amendment.¹⁸² After a valid attorney-client relationship is established, the dissent argued, a defendant could not subsequently waive his Sixth Amendment right to counsel by executing a valid *Miranda* waiver.¹⁸³

The dissent noted that the majority's rationale behind its holding that Montejo's waiver was valid is derived from the Supreme Court's holding in *Patterson v. Illinois*.¹⁸⁴ In *Patterson*, the Court held that *Miranda* warnings were sufficient to inform an accused of the nature of his Sixth Amendment rights and the consequences of abandoning those rights.¹⁸⁵ The dissent maintained that the facts of *Patterson* are distinguishable from *Montejo*.¹⁸⁶ *Patterson*, the dissent observed, dealt with the effect of *Miranda* waivers on an unrepresented defendant, while *Montejo* dealt with a defendant who was

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

179. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2098 (2009) (Stevens, J., dissenting).

180. *Id.* at 2098-99 (Stevens, J., dissenting). The dissent's reverence for stare decisis compelled them to distinguish their analysis in this case from that performed by the majority in *Arizona v. Gant*. See *id.* at 2099 n.5 (Stevens, J., dissenting). The dissent clarified that in *Gant*, the majority did not overrule *Belton*, but merely affirmed a narrow interpretation of the *Belton* rule, unlike in this case, where the majority "flatly overrule[d] *Jackson*." *Id.* (Stevens, J., dissenting).

181. *Id.* at 2099 (Stevens, J., dissenting).

182. *Id.* (Stevens, J., dissenting) (noting that the "realities of modern criminal prosecution" more often require counsel's assistance outside the courtroom, thereby suggesting the Sixth Amendment's expanded scope was necessary to prevent the trial itself from becoming a mere formality).

183. *Id.* at 2100-01 (Stevens, J., dissenting).

184. *Id.* at 2100 (Stevens, J., dissenting). See generally *Patterson v. Illinois*, 487 U.S. 285 (1988).

185. *Patterson*, 487 U.S. at 296. See also *Montejo*, 129 S. Ct. at 2100 (Stevens, J., dissenting) (citing *Patterson*, 487 U.S. at 296).

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

appointed counsel.¹⁸⁷ Justice Stevens noted that *Patterson's* limited application was apparent in the language of the opinion itself.¹⁸⁸ In this case, the establishment of a valid attorney-client relationship activated Montejo's Sixth Amendment's right to counsel, thus nullifying the *Miranda* waiver's effect.¹⁸⁹

To further combat the Court's assumption of a valid waiver, the dissent stressed that *Miranda* warnings do not clarify the type of assistance that counsel provides at post-indictment interrogation.¹⁹⁰ Therefore, it cannot be ensured that a waiver is both *knowing* and *voluntary*.¹⁹¹ In the dissent's view, *Miranda* warnings apprise a defendant of only his Fifth Amendment rights.¹⁹² *Miranda* warnings do not adequately inform him of his Sixth Amendment right to have counsel present at all critical stages, or the consequences of waiving those rights.¹⁹³

For these reasons, the dissent determined that there was no basis for assuming Montejo's post-indictment *Miranda* waiver worked as a valid waiver of his Sixth Amendment right to counsel.¹⁹⁴ They concluded that the police violated Montejo's Sixth Amendment right to counsel, regardless of *Jackson's* protective rule, because, as a represented defendant, his waiver was not knowing and voluntary.¹⁹⁵

V. ANALYSIS: THE LEGAL EFFECTS OF THE *MONTEJO* DECISION

A. THE SIXTH AMENDMENT AS A PROPHYLACTIC RULE

The *Montejo* Court transposed *Jackson's* trigger onto the Sixth

187. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2099-101 (2009) (Stevens, J., dissenting).

188. *Id.* at 2100 (Stevens, J., dissenting); *see generally* *Patterson v. Illinois*, 487 U.S. 285 (1988). The *Patterson* Court noted that the Sixth Amendment's protection of the attorney-client relationship "extends beyond" *Miranda's* protection of the Fifth Amendment right to counsel. *Patterson*, 487 U.S. at 297 n.9. Specifically, the Court acknowledged that under certain circumstances, a valid *Miranda* waiver will "not suffice" as a waiver of one's Sixth Amendment rights. *Id.* Justice Stevens' dissent in *Montejo* contended that this was an example of such a case. *Montejo*, 129 S. Ct. at 2100 (Stevens, J., dissenting).

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

190. *Id.* at 2100-01 (Stevens, J., dissenting). The dissent's contention pertained to both represented and unrepresented defendants. *See id.* (Stevens, J., dissenting). The dissent stressed that the inadequacies of such a rule are "even more obvious in the case of a *represented* defendant." *Id.* (Stevens, J., dissenting).

191. *Id.* at 2101 (Stevens, J., dissenting).

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

193. *Id.* at 2100-01 (Stevens, J., dissenting).

194. *Id.* at 2101 (Stevens, J., dissenting).

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

Amendment. The point at which the Sixth Amendment attaches is now a mere formality, and the right to counsel's assistance is no longer inherent upon attachment. This restriction downgrades the Sixth Amendment to a prophylactic rule rather than a textually mandated guarantee.¹⁹⁶

Prophylactic rules are procedural safeguards, created by courts to protect an individual's constitutional rights.¹⁹⁷ This decision renders a defendant's access to Sixth Amendment rights contingent upon his active participation. The Sixth Amendment's protection, however, in both practice and theory, should never be conditional.¹⁹⁸ Such a measure limits its protective scope and opens the door to further manipulation by the courts.¹⁹⁹ The result is the increased likelihood of unfair trials, whereby a defendant's ignorance of his legal and constitutional rights deprives him of counsel's "guiding hand" during critical confrontations with law enforcement.²⁰⁰

B. EQUATING THE SIXTH AMENDMENT RIGHT TO COUNSEL WITH THE *MIRANDA* RIGHT TO COUNSEL

1. IS POST-INDICTMENT INTERROGATION A CRITICAL STAGE?

If post-indictment interrogation remains a critical stage under the Sixth Amendment, a defendant should not be required to request counsel in order to trigger its protection.²⁰¹ This decision leaves no discernible

196. See Bidish J. Sarma et al., *Interrogations and the Guiding Hand of Counsel: Montejo, Ventris, and the Sixth Amendment's Continued Vitality*, 103 NW. U. L. REV. COLLOQUY 456 (2009) (discussing the fundamental difference between the Fifth Amendment and Sixth Amendment right to counsel). For a discussion of the Sixth Amendment, see *supra* Part III.A.

197. See Halama, *supra* note 57, at 1214; see also *New York v. Quarles*, 467 U.S. 649, 654 (1984) (explaining that *Miranda* warnings are measures to protect a constitutional right); *Solem v. Stumes*, 465 U.S. 638, 644 (1984) (characterizing *Edwards* as a prophylactic rule of *Miranda*).

198. See *Strickland v. Washington*, 466 U.S. 668, 684 (1984) (stating that the Sixth Amendment right to counsel "is needed in order to protect the fundamental right to a fair trial"); *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972) ("The assistance of counsel is often a requisite to the very existence of a fair trial."); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("The right of one charged with [a] crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.").

199. See Halama, *supra* note 57, at 1229.

200. See *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (explaining that "[t]he purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his . . . ignorance of his legal and constitutional rights, and the guaranty would be nullified . . . [if] an accused's ignorant failure to claim his rights removes the protection of the Constitution"); see also *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

201. See, e.g., *Michigan v. Jackson*, 475 U.S. 625, 633 (1986) (noting that the right to counsel does not require an express request), *overruled by Montejo v. Louisiana*, 129 S. Ct. 2079 (2009); *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (noting that the right to counsel does not require an express request).

difference between the Fifth and Sixth Amendment right to counsel in the interrogation context. The Court failed to elucidate how these two distinct rights vary, if at all, in such a circumstance. As a result, the Sixth Amendment's guarantee of counsel's participation at all critical stages is stripped of both force and function.²⁰²

The *Montejo* Court affirmed that post-indictment interrogation is a critical stage under the Sixth Amendment, but declares it worthy of only Fifth Amendment protections.²⁰³ Such a holding suggests that some critical stages are "more critical" than others.²⁰⁴ A legal commentator points out that this logic implies that "a higher standard of waiver should apply at one critical stage (trial) than at another (interrogation)."²⁰⁵ This decision contradicts the holdings of numerous prior Court decisions, thus undermining the significance of the "critical stages" label.²⁰⁶

The Court's decision suggests they have embraced the "spectrum approach" posited by the *Patterson* Court.²⁰⁷ As there are many critical stages in the Court's jurisprudence, the adoption of this approach would lead to a customized waiver standard for each.²⁰⁸

202. See *Patterson v. Illinois*, 487 U.S. 285, 296 n.9 (1988) (stating 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"); *Moran v. Burbine*, 475 U.S. 412, 424 (1986) (holding that a *Miranda* waiver was valid where the suspect was not told that his lawyer was trying to reach him during questioning). Under the reasoning of the *Patterson* and *Moran* Courts, the waiver in *Montejo* would likely not be valid. See generally *Patterson*, 487 U.S. 285; *Moran*, 475 U.S. 412.

203. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2085-90 (2009).

204. See Halama, *supra* note 57, at 1230 (discussing the *Patterson* Court's methodology); see also *Patterson*, 487 U.S. 285. The *Patterson* Court failed to recognize the equality of all critical stages. *Patterson*, 487 U.S. at 299-300. The Court found that counsel's role at post-indictment interrogation was no different than at pre-indictment interrogation, thus there was no reason to demand a higher standard of waiver. *Id.* at 298-99.

205. See Halama, *supra* note 57, at 1230.

206. See, e.g., *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (remarking that the same waiver standard applies equally at all critical stages of pretrial proceedings). The *Montejo* decision implies that police will be free to seek uncounseled waivers at other critical stages as well. See generally *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009); see also Opening Supplemental Brief of Petitioner, at 12, *Montejo*, 129 S. Ct. 2079 (No. 07-1529), 2009 WL 1007120 (advancing a similar observation).

207. See *Patterson*, 487 U.S. at 298 (stating that identification of the proper Sixth Amendment waiver standard requires the Court to determine the right to counsel's scope "by a pragmatic assessment of the usefulness of counsel to the accused at a particular proceeding, and the dangers to the accused of proceeding without counsel. An accused's waiver of his right is 'knowing' when he is made aware of these basic facts").

208. For an illustrative list of Sixth Amendment critical stages, see *supra* note 50.

The Sixth Amendment right to counsel would be subject to a series of individual waiver standards, each presiding over its own critical stage. This approach would lead to varying interpretations among various state and federal courts. The Supreme Court would thus be forced to reevaluate each critical stage to establish proper bright-line standards that would achieve “certainty of . . . application.”²⁰⁹ The practical effect of this approach will be to impede the autonomy of law enforcement by amplifying their reliance on prosecutors for guidance. Police will need to be re-trained to understand the subtle distinctions of each standard. The overall success of such a measure will thus depend upon the complexity of each rule and the learning curve for implementation. If either is great, the increased risk of Sixth Amendment challenges is certain to eclipse any value of the Supreme Court’s pragmatism for weighing counsel’s significance during prosecution.

Furthermore, any success of such an approach would be tenuous. It would leave the protective scope of the Sixth Amendment right to counsel vulnerable to continued reinterpretation by future courts, resulting in “unsettled and unpredictable criminal procedure.”²¹⁰

Over time, the Sixth Amendment’s purpose resulted in an expansion of circumstances where the right to counsel’s participation was guaranteed.²¹¹ The integrity of the adversarial judicial system both required and depended on such measures.²¹² The *Montejo* Court shirks this longstanding rationale. Rather than focusing on the Sixth Amendment’s core function, the *Montejo* Court emphasizes a defendant’s free choice to speak with law enforcement.²¹³ This myopia disregards completely the broad function of labeling certain stages as “critical,” thereby minimizing the importance of counsel’s post-indictment role.

209. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2084 (2009) (citing *Minnick v. Mississippi*, 498 U.S. 146 (1990)). The Court implied that bright-line qualities are crucial in rules that govern law enforcement. *Id.* Waiver standards are such rules, for without the valid waiver of a constitutional right, the police are hamstrung from engaging in certain conduct. *Id.* at 2099-100 (Stevens, J., dissenting).

210. Jennelle London Joset, *May It Please the Constitution: Judicial Activism and Its Effect on Criminal Procedure*, 79 MARQ. L. REV. 1021, 1037 (1996) (discussing how the Supreme Court consistently reinterprets the Constitution according to the Justices’ own agendas or revise it to achieve certain results).

211. *See Montejo v. Louisiana*, 129 S. Ct. 2079 (2009) (post-indictment interrogation); *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearings); *United States v. Wade*, 388 U.S. 218 (1967) (post-indictment line-ups); *Powell v. Alabama*, 287 U.S. 45, (1932) (arraignments). *See also Brewer v. Williams*, 430 U.S. 387 (1977) (negotiations to surrender); *Massiah v. United States*, 377 U.S. 201 (1964) (post-indictment interrogation).

212. *See supra* note 50, and accompanying text.

213. *Montejo*, 129 S. Ct. at 2086-87.

2. DIMINISHING THE IMPORTANCE OF THE ATTORNEY-CLIENT RELATIONSHIP

i. Limited Access to Counsel Reduces the Frequency of Plea Negotiations

The *Montejo* decision permits law enforcement to circumvent a defendant's right to counsel's assistance during post-indictment interrogation. The modern climate of today's criminal justice system illustrates the detrimental effect of permitting uncounseled waivers of the Sixth Amendment. For example, the vast majority of criminal cases are resolved by negotiated guilty pleas.²¹⁴ These are, in fact, adversarial negotiations rather than adjudications. In order to be most effective, counsel should be present.²¹⁵ Post-indictment encounters are a highly effective tool for expediting pleas and collecting additional information.²¹⁶ Counsel's participation guarantees that a defendant better understands his predicament and the potential benefits of cooperating with the government.²¹⁷ This clarity benefits both defendant and the State by facilitating the efficient administration of criminal justice.²¹⁸

Under *Montejo*, the appointment of counsel at indictment is reduced to a procedural formality, devoid of any real meaning. Although an attorney-client relationship may exist in theory, a defendant cannot fully realize the benefit unless he invokes his right to counsel. *Montejo* allows a defendant to execute a valid *Miranda* waiver and thus dissolve the newly established attorney-client relationship.²¹⁹ *Montejo*'s reduced waiver threshold is sure to reduce the frequency of counseled plea negotiations and, consequently, burden prosecutors with untruthful or unwilling defendants. Thus, more

214. See Stephanos Bibas, Response, *The Right to Remain Silent Helps Only the Guilty*, 88 IOWA L. REV. 421, 422 (2003) (highlighting that only six percent of felony criminal defendants actually go to trial).

215. See Brief of Amicus Curiae the Criminal Justice Institute of Harvard Law School, *supra* note 38, at 10 (explaining that counsel's participation ensures that admissions are complete, factually accurate, and provided in context).

216. Opening Supplemental Brief of Petitioner, *supra* note 207, at 7.

217. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2485 (2004) (explaining that "[t]he Federal Sentencing Guidelines have put a huge premium on another plea-bargaining technique: cooperating with the government. This venerable tactic has become much more important in recent years as one of the few ways around sentencing guidelines and mandatory minima"); Margaret Etienne, *An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CAL. L. REV. 425, 483 (2004) (stating that "[defense lawyers] try to help their clients through the complex maze of a criminal case, the facts, and the consequences of all the possible options they might have").

218. See Opening Supplemental Brief of Petitioner, *supra* note 207, at 7; see also Brief of Amicus Curiae the Criminal Justice Institute of Harvard Law School, *supra* note 38, at 10.

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

cases will go to trial and the judicial system will be saddled with cases that, prior to this decision, would likely have been resolved through counseled plea agreements.

ii. This Decision is Troublesome for Vulnerable Defendants

Unfortunately, the classes of defendants likely to be the most affected by *Montejo* are the mentally retarded, mentally ill and juveniles.²²⁰ The procedural consequences of the *Montejo* decision place vulnerable defendants at peril.²²¹ The appointment of indigent counsel is determined by state law, and occurs either by request or by judicial appointment.²²² In either case, a vulnerable defendant will enter a post-indictment interrogation scenario under the impression that counsel has been appointed. Under this decision, even if counsel is expressly requested at the indictment, subsequent custodial interrogations are outside the realm of Sixth Amendment protection. *Miranda* now governs all such encounters, which means a defendant must, once again, invoke his right to counsel. Procedurally, this “double-invocation” requirement is likely to confound vulnerable defendants, leaving many unprotected in confrontations with law enforcement.²²³ As such, appellate courts will likely be confronted with cases in which vulnerable defendants allege that a *Miranda* waiver did not amount to a “knowing” waiver of their Sixth Amendment rights.

a. *Miranda Does Not Protect Vulnerable Defendants From Confessing Falsely*

A “knowing” waiver of constitutional rights requires that a defendant

220. See Brief for The National Ass'n of Criminal Defense Lawyers et al., as Amici Curiae in Support of Petitioner at 7-8, *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009) (No. 07-1529), 2009 WL 1007119 [hereinafter Brief for the National Ass'n of Criminal Defense Lawyers, et al.]. For the purposes of this Note, the term “vulnerable defendants” will be used to refer to defendants who are mentally retarded, mentally ill, or juveniles. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 39 (4th ed. 2000) (“The essential feature of Mental Retardation is significantly subaverage general intellectual function . . . that is accompanied by significant limitations in adaptive functioning”); see also BLACK'S LAW DICTIONARY 1007 (8th ed. 2004) (1891) (defining “mental illness” as “[a] disorder in thought or mood so substantial that it impairs judgment, behavior, perceptions of reality, or the ability to cope with the ordinary demands of life”); *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (stating that “a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults. . . . These qualities often result in impetuous and ill-considered actions and decisions”).

221. See Brief for The National Ass'n of Criminal Defense Lawyers et al., *supra* note 221, at 7-8.

222. See *Montejo v. Louisiana*, 129 S. Ct. 2079, 2083 (2009).

223. *Id.* at 2101 (Stevens, J., dissenting) (citing Brief for The National Ass'n of Criminal Defense Lawyers et al., *supra* note 221).

be aware of the nature of his rights and the consequences of a waiver.²²⁴ But even when a *Miranda* waiver is knowing, there is no guarantee that subsequent statements are accurate or truthful. Instead, the value of confessions is based upon the assumption that a person would not confess unless guilty.²²⁵ As a result, police, prosecutors, judges, and juries often view confession evidence as dispositive of a defendant's guilt.²²⁶ The Court has found that confessions are "probably the most probative and damaging evidence" against a defendant, which means that they are also the most prejudicial.²²⁷ As such, one would hope that law enforcement would seek to employ only reliable confessions as evidence.

The *Miranda* doctrine, however, is not concerned with a confession's reliability.²²⁸ A *Miranda* waiver merely serves as a conduit to a custodial interrogation that may result in confession.²²⁹ Vulnerable defendants are likely to fall prey to deceptive or suggestive tactics without the assistance of counsel.²³⁰ These individuals suffer inherent psychological and cognitive disadvantages.²³¹ Their responses can be guided by law enforcement. The

224. See *Brewer v. Williams*, 430 U.S. 387, 404-05 (1977); *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938).

225. Eugene R. Milhizer, *Confessions After Connelly: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1, 4 (2008).

226. See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 922 (2004). Drizin and Leo explain that

Once police obtain a confession, they typically close the investigation . . . and make no effort to pursue other possible leads . . . When there is a confession, prosecutors tend to charge the defendant . . . and are far less likely to initiate or accept a plea bargain to a reduced charge . . . Defense attorneys are more likely to pressure their clients who have confessed to waive their constitutional right to a trial and accept a guilty plea to a lesser charge. Judges are conditioned to disbelieve claims of innocence and almost never suppress confessions . . . [T]he jury will treat the confession as more probative of the defendant's guilt than virtually any other type of evidence . . .

Id.

227. See *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (White, J., dissenting) (quoting *Bruton v. United States*, 391 U.S. 123, 139-40 (1968)); see also Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOLOGIST 221, 221 (1997).

228. *Colorado v. Connelly*, 479 U.S. 157, 168 (1986) (stating that "the voluntariness determination has nothing to do with the reliability of jury verdicts").

229. See Milhizer, *supra* note 226, at 27.

230. See Drizin & Leo, *supra* note 227, at 944-45, 971, 973-74; see also Brief for The National Ass'n of Criminal Defense Lawyers et al., *supra* note 221, at 11; see also Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 123 (1997) ("It is common for mentally retarded suspects to succumb to coercive attempts to elicit confessions.").

231. See Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 532-34 (2002) (detailing the results of a study which illustrated the severe discrepancy in comprehension of *Miranda* warnings between the mentally disabled and a control group); see also Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134, 1154 (1980) (discussing that a study of juveniles' understanding of their *Miranda* rights found that the least understood of the

Court has acknowledged that “custodial police interrogation, by its very nature, isolates and pressures the individual,” and that “these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed.”²³² The truth of this statement is even more apparent in cases involving vulnerable defendants. Counsel’s assistance is imperative to ensure that any information procured through the interrogation of juveniles and the mentally infirm is more likely to be accurate and truthful. The real risk of wrongful convictions requires the requisite level of protection.²³³

VI. ANALYSIS OF THE COURT’S OPINION

A. THE COURT MISTAKENLY EXTENDED *PATTERSON* TO APPLY TO REPRESENTED DEFENDANTS

1. BY ALL MEANS, VIOLATE THE SIXTH AMENDMENT

The Court cited *Patterson* as support for the premise that *Miranda* warnings adequately substitute for counsel’s guidance.²³⁴ The *Patterson* Court, however, acknowledged the importance of an existing attorney-client relationship, thus limiting their holding to unrepresented defendants.²³⁵ The *Montejo* Court neglected that concern by extending the *Patterson* holding to apply to represented defendants as well.²³⁶ Police are now free to approach any defendant—without notice to counsel—before he can activate his Sixth Amendment right to counsel. In fact, they *must* approach first; otherwise, a defendant is altogether deprived of the opportunity to invoke that right.

Miranda rights was the right to have counsel present during questioning).

232. *Corley v. United States*, 129 S. Ct. 1558, 1570 (2009) (quoting *Dickerson v. United States*, 530 U.S. 428, 435 (2000)); see also *Drizin & Leo*, *supra* note 227, at 906-07.

233. See Brief for The National Ass’n of Criminal Defense Lawyers et al., *supra* note 221, at 12-13.

234. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2085 (2009) (citing *Patterson v. Illinois*, 487 U.S. 285, 296 (1988)). The *Patterson* Court found that *Miranda* warnings sufficiently apprise a defendant of the nature of his Sixth Amendment rights, and the consequences of abandoning those rights. *Patterson*, 487 U.S. at 296 (“As a general matter . . . an accused who is admonished with the warnings prescribed by this Court in *Miranda* . . . has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one.”).

235. See *Patterson*, 487 U.S. at 290 n.3 (noting that the defendant had not “retained, or accepted by appointment, a lawyer to represent him at the time he was questioned . . . “and that “[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”); see also *Montejo*, 129 S. Ct. 2079, 2100 (Stevens, J., dissenting).

236. See *Montejo*, 129 S. Ct. at 2092 (asserting that when determining a knowing and voluntary waiver, “there is no reason categorically to distinguish an unrepresented defendant from a represented one”).

In deciding this case, the Court ignored these Sixth Amendment concerns.²³⁷ Rather than stating a *Miranda* waiver *could be* sufficient to waive Sixth Amendment rights, as the *Patterson* decision would suggest, the majority states that it *is* sufficient.²³⁸ As a result, a *Miranda* waiver acts as a presumptively valid waiver of the Sixth Amendment right to counsel, regardless of an existing attorney-client relationship. This rationale clearly contradicts the decision it cites for support. Had the Court acknowledged the *Patterson* limitation in its analysis, it would have found that police intentionally disregarded Montejo's existing attorney-client relationship, thus violating his Sixth Amendment rights.²³⁹

2. *MIRANDA* WARNINGS DO NOT PROTECT AN EXISTING ATTORNEY-CLIENT RELATIONSHIP

The Fifth Amendment right to counsel and the Sixth Amendment right to counsel serve distinct interests. Therefore, it is illogical to presume that *Miranda* warnings equally safeguard both during post-indictment custodial encounters. While *Miranda* serves to protect one from making incriminatory statements, the Sixth Amendment serves a broader purpose. *Miranda* warnings are narrowly tailored to inform an individual of certain rights as they pertain to a specific set of circumstances.²⁴⁰ The Sixth Amendment, on the other hand, is meant to protect the integrity of the adversarial judicial system in totality.²⁴¹ A *Miranda* waiver denies one counsel during individual interrogation sessions. A Sixth Amendment waiver denies a formally accused defendant his right to counsel's participation in the entire adversarial judicial process. How the specificity of *Miranda's* purpose could be expanded into the realm of the Sixth Amendment is perplexing. In this scenario, police stand between the accused and their Sixth Amendment right to counsel. It is unethical, improper, and potentially misleading for law enforcement to inform an accused of his rights.²⁴² The *Jackson* rule guaranteed counsel's

237. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2100 (2009) (Stevens, J., dissenting).

238. *Id.* at 2090 (stating that "the right under both sources is waived using the same procedure," so "doctrines ensuring voluntariness of the Fifth amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver"); see also *Patterson v. Illinois*, 487 U.S. 285, 297 n.9 (1988) (remarking 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").

239. See *Montejo*, 129 S. Ct. at 2099-101 (Stevens, J., dissenting) (stating that the Sixth Amendment entitles a defendant to have counsel notified of, and present during, critical confrontations with law enforcement).

240. For an explanation of the Fifth Amendment right to counsel, see *supra* Part III.B.

241. For an explanation of the Sixth Amendment right to counsel, see *supra* Part III.A.

242. See *Patterson*, 487 U.S. at 309-10 (Stevens, J., dissenting). Justice Stevens noted the

participation in post-indictment interrogations, thereby placing the rights of the accused in the hands of a friend, rather than a foe.

B. THE *MONTEJO* COURT'S *JACKSON* ANALYSIS IS UNSOUND

The *Montejo* Court's rationale in overruling *Jackson* is flawed. It relied heavily on the notion that the *Jackson* rule was designed to prevent police coercion. This conclusion, however, is ill-conceived. As noted by Justice Stevens in his dissent, the *Jackson* Court reaffirmed the Sixth Amendment's purpose to "protect[t] the unaided layman at critical confrontations with his adversary" by giving him "the right to rely on counsel as a 'medium' between him and the state."²⁴³ Thus, in reality, *Jackson* reinforced the basic tenet of the Sixth Amendment right to a fair trial by ensuring counsel's participation in *all* critical stages under the Sixth Amendment.²⁴⁴

The majority found that the *Jackson* rule impeded a defendant's voluntary choice to speak with police by invalidating Sixth Amendment waivers secured during police-initiated interrogation. *Jackson*, however, did not prevent a defendant from *initiating* contact with police and affecting a valid waiver of his Sixth Amendment rights.²⁴⁵ A defendant's free will always remains intact.²⁴⁶ The attorney's role is only that of an advisor.²⁴⁷ A defendant retains the autonomy to disregard his lawyer's advice and voluntarily speak with police. *Jackson* did not alter that fact, and the Court's opinion failed to address this reality. Delivering the "unaided layman" to the waiting jaws of his adversary does not preserve a

"ethical constraints that prevent a prosecutor from giving legal advice to an uncounseled adversary," especially Miranda warnings, which are "themselves are a species of legal advice that is improper when given by the prosecutor after indictment." *Id.* at 309 (Stevens, J., dissenting). He also commented that the parties' adversarial posture compromises the extent to which a defendant understands their Sixth Amendment right to counsel and the consequences of waiver. *Id.* at 309-10 (Stevens, J., dissenting).

243. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2096 (2009) (Stevens, J., dissenting) (citing *Michigan v. Jackson*, 475 U.S. 625, 631 (1986), *overruled by Montejo*, 129 S. Ct. 2079). The dissent elucidated that the reasoning behind the *Jackson* rule underscored the fundamental differences between a suspect and a defendant for the purposes of protecting the Sixth Amendment right to counsel. *See id.*

244. *Michigan v. Jackson*, 475 U.S. 625, 631-32 (1986), *overruled by Montejo v. Louisiana*, 129 S. Ct. 2079 (2009).

245. *See id.* Nor does the *Edwards* rule restrict a suspect from initiating contact. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1980). For the Court to harp on *Jackson* as a carbon copy of *Edwards*, but never discuss this key feature of the *Jackson* rule, is anomalous.

246. *See* Brief of Amici Curiae for National Legal Aid & Defender Association et al. in Support of Petitioner at 11-12, *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009) (No. 07-1529).

247. *United States v. Ash*, 413 U.S. 300, 312 (1973) (stating that counsel is an "advisor to the accused").

defendant's "free choice."²⁴⁸ Such an arrangement presumes guilt rather than innocence.

As further support for its decision to overrule *Jackson*, the Court cited *Jackson's* invocation requirement as leading to "arbitrary and anomalous distinctions between defendants."²⁴⁹ Yet, they retained that exact trigger as a necessity to activate the Sixth Amendment right to counsel in the custodial interrogation context. The *Jackson* rule itself did not cause problems for the administration of criminal justice.²⁵⁰ The invocation requirement, as elucidated by the Louisiana Supreme Court, and subsequently by the *Montejo* Court, raised red flags. The dismissal of an easily administrable bright-line rule in favor of retaining a function that is sure to generate confusion and disparity can hardly be viewed as a cogent and disciplined conclusion.²⁵¹

VII. CONCLUSION

The Sixth Amendment right to counsel must now be invoked during post-indictment interrogation to trigger the protection of the Sixth Amendment. That protection, however, is no longer grounded in the Sixth Amendment. The whole interrogatory process has been boiled down into a Fifth Amendment procedure, complete with prophylactic rules and procedural safeguards, neither of which has any place in Sixth Amendment jurisprudence. Instead, Sixth Amendment jurisprudence has illustrated that the right to counsel exists to level the playing field.

The *Montejo* decision places a defendant at the feet of his adversary, yet it does so under the assumption that the adversaries are equals. It is unfair and unjust to presume that a criminal defendant is aware of counsel's value during post-indictment questioning. The State, on the other hand, is well aware. The scales of justice remain imbalanced so long as the Sixth Amendment is treated as a prophylactic rule, rather than a fundamental right.

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248. See Brief of Amici Curiae for National Legal Aid & Defender Association et al. in Support of Petitioner at 12, *Montejo*, 129 S. Ct. 2079 (2009) (No. 07-1529).

249. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2083 (2009).

250. See Supplemental Brief of Amici Curiae for Larry D. Thompson, William Sessions et al., in Support of Petitioner, *supra* note 176, at 6-12; Brief for the United States as Amicus Curiae in Support of Overruling *Michigan v. Jackson* at 12, *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009) (No. 07-1529), 2009 WL 1019983.

251. See *Montejo*, 129 S. Ct. at 2101 (Stevens, J., dissenting) (explaining that the provision of *Miranda* warnings to a defendant who was appointed counsel at indictment is confusing to the defendant).
