Montejo*'s Impact—Six Years Later*

by

Brandon Eckerle

Submitted in partial fulfillment of the requirements of the

King Scholar Program

Michigan State University College of Law

under the direction of

Professor Grosso

Spring, 2015

MONTEJO'S IMPACT—SIX YEARS LATER

Brandon Eckerle

INTRODUCTION

Imagine the following scenario. You were just arrested and taken to jail. You call your family attorney and inform her that you have been arrested for a crime. Your attorney shows up for the formal proceeding where you are formally charged with the crime. After a brief conversation with your attorney, you are taken back to your jail cell. The next morning a couple of officers take you out of your jail cell and say they would like to ask you a few questions. You are confused when the officers read you your rights and tell you that you have the right to an attorney and that one can be appointed if you cannot afford one. You already have an attorney, and she was in the courtroom with you just yesterday. After being assured that the officers just want to get your side of the story, and that if you cooperate, you could receive a deal, you decide to answer a few questions. These answers are used as critical evidence at trial, where you are convicted of the crime. After *Montejo v. Louisiana*,[1] this action by the officers would be constitutional as long as the court finds your waiver to be voluntary.

Prior to the *Montejo* decision, there is little doubt that the officers' conduct above was in violation of the Sixth Amendment right to counsel.[2] However, in *Montejo*, the Supreme Court overturned precedent and held that there is no presumption that a defendant's waiver of his Sixth Amendment right to counsel is invalid where, without the presence of his counsel, police initiate questioning of the defendant.[3] The Court stated that when a defendant is read the *Miranda*

[1] 556 U.S. 778 (2009).
[2] *See* Michigan v. Jackson, 475 U.S. 625, 636 (1986) (holding "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid").
[3] *See Montejo*, 556 U.S. at 792, 797.

warnings, and voluntarily waives them, "that typically does the trick" to waive the Sixth Amendment right to counsel as well.[4]

The practical impact of the *Montejo* decision is a collapsing of the Sixth Amendment right to counsel into the Fifth Amendment right to counsel.[5] The Court ignored the fundamental purposes of the right to counsel, and as a result, severely restricted the protections granted by the Sixth Amendment in the context of custodial interrogation. In its decision, the Court left it up to the states to determine whether they would follow its holding.[6] Out of the twenty-seven states that have discussed *Montejo*'s impact on their respective right to counsel jurisprudence, twenty-two have adopted the Supreme Court's holding and reasoning. Because I believe the Supreme Court's holding in *Montejo* is incorrect and greatly diminishes a defendant's right to rely on counsel, I propose that state legislatures pass laws restoring the important protections guaranteed by the Sixth Amendment right to counsel; specifically, that once a defendant's Sixth Amendment rights attach, police cannot initiate questioning without defense counsel present.

Part I examines the origin and meaning of the Sixth Amendment right to counsel. Part II discusses the Fifth Amendment right to counsel. Part III looks at three Supreme Court cases discussing waiver of the Sixth Amendment right to counsel. Part IV looks at the Supreme Court's holding and reasoning in *Montejo*. Finally, Part IV discusses how state courts have applied the *Montejo* decision and proposes a solution to restore defendants' right to rely on counsel.

---

[4] *Id.* at 786.
[5] *See* Eda Katharine Tinto, *Wavering on Waiver: Montejo v. Louisiana and the Sixth Amendment Right to Counsel*, 48 AM. CRIM. L. REV. 1335, 1369 (2011) ("In *Montejo*, the Supreme Court collapsed the Sixth Amendment right to counsel into the Fifth Amendment right to counsel. . . .").
[6] *Montejo*, 556 U.S. at 793.

I. THE SIXTH AMENDMENT RIGHT TO COUNSEL

A. The Right to Counsel in England and Colonial America

The Sixth Amendment states "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."[7] The origin of the Sixth Amendment right to counsel is tied to English jurisprudence.[8] In England, until the Glorious Revolution in 1688, an individual accused of a misdemeanor had the right to retain counsel, but an individual accused of a felony had no such right.[9] Following the Glorious Revolution, England passed the Treason Act in 1695, which extended the right to counsel to individuals accused of treason.[10] It was not until 1836 that an individual accused of a felony other than treason was entitled to counsel,[11] and not until 1903 that counsel would be appointed to the accused if he or she could not afford counsel.[12]

Not surprisingly, disapproval of the right to counsel was brought over to the American colonies.[13] In fact, colonial Virginia and Connecticut completely banned attorneys from the court system.[14] However, a shift in attitude resulted in the colonies because of the use of public prosecutors, which were not used in England.[15] Because of the prosecutors' "familiarity with procedural niceties, the 'idiosyncrasies' of juries, and the personnel of the court," the right to counsel was needed to level the playing field.[16] Delaware in 1701, and South Carolina in 1736

---

[7] U.S. CONST. amend. XI.
[8] ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE 3 (1992).
[9] Laurie S. Fulton, *The Right to Counsel Clause of the Sixth Amendment*, 26 AM. CRIM. L. REV. 1599, 1599 (1989).
[10] *Id.* at 1600.
[11] GARCIA, *supra* note 8, at 3.
[12] Fulton, supra note 9, at 1600.
[13] GARCIA, *supra* note 8, at 3
[14] Fulton, supra note 9, at 1601.
[15] GARCIA, *supra* note 8, at 4.
[16] *Id.*

were some of the first colonies to pass statutes providing the accused the right to counsel.[17] Over the next several decades, other states followed suit, including the right in the respective state constitutions or granting the right via statute.[18] Ultimately, the right to counsel was included in the federal Bill of Rights and passed both houses of Congress without much debate on September 25, 1789.[19]

B. Significant Developments in Sixth Amendment Jurisprudence

In the 1930's, the Supreme Court decided two seminal cases defining the scope the Sixth Amendment right to counsel. First, in *Powell v. Alabama*, the Court held that the failure by the trial court to appoint counsel to indigent defendants was in violation of due process under the fourteenth amendment.[20] In *Powell*, several African Americans were charged with rape committed on two white girls after there was a fight on a train between the defendants and several Caucasian boys.[21] The crime was alleged to have occurred on March 25, and the defendants were indicted and arraigned less than a week later.[22] The defendants did not retain their own counsel, and the record was silent as to whether counsel had been appointed to the defendants.[23] However, the record clearly showed that although attorneys may have been appointed to represent the defendants, the defendants did not receive effective representation

[17] Fulton, supra note 9, at 1603. The South Carolina statute only provided the right to counsel in murder, treason, felony, and capital cases. *Id.*
[18] *Id.* at 1603-04.
[19] *Id.* at 1604. For a thorough explanation of the origin of the sixth amendment in Colonial American by Supreme Court Justice George Sutherland, see Powell v. Alabama, 287 U.S. 45, 59-65 (1932).
[20] *Powell*, 287 U.S. at 71 ("[T]he failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.").
[21] *Id.* at 49-51.
[22] *Id.* at 49.
[23] *Id.*

during trial.[24] Each of the three trials lasted less than a day and the defendants were all found guilty and sentenced to death.[25]

The Court determined that the right to counsel is a "fundamental principal[] of liberty and justice [lying] at the base of all our civil and political institutions."[26] The court reasoned that in most cases the right to be heard would mean nothing without the right to be heard with counsel.[27] Even an "intelligent and educated layman" faces the risk of being wrongfully convicted due to his unfamiliarity with the law.[28] The Court noted that this risk is even greater for the indigent and uneducated.[29] Furthermore, the Court stated "[i]f in any case, civil of [sic] criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."[30] Finally, and not uncommon for the Court to do, it limited its holding to the particular facts and circumstances presented by the case.[31]

Second, in *Johnson v. Zerbst*, the Court expanded on its holding in *Powell* and held that the Sixth Amendment requires the assistance of counsel in all federal criminal prosecutions

---

[24] *See id.* at 53-55.
[25] *Id.* at 50.
[26] *Id.* at 67-68.
[27] *Id.* at 68-69.
[28] *Id.* at 69 (stating "[i]f charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence").
[29] *Id.*
[30] *Id.*
[31] *Id.* at 71 ("Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.").

unless the right is waived by the defendant.[32] In *Johnson*, the defendant was charged and convicted of possessing and uttering counterfeit money.[33] Counsel represented the defendant during the preliminary hearing, which occurred two months before the trial.[34] However, the defendant did not employ, and was not appointed counsel during the trial.[35] After his conviction, the defendant filed a petition for habeas corpus, which made it all the way up to the Supreme Court.[36]

Again the Court expressed its concern that the ordinary defendant will be at a severe disadvantage going up against "experienced and learned counsel" without representation of counsel.[37] The Court also addressed the issue of waiver.[38] The waiver of the right to counsel requires "an intentional relinquishment or abandonment of a known right or privilege."[39] Importantly, the Court said that waiver will not be presumed by the acquiescence in the loss of the right to counsel.[40] Therefore, *Johnson* creates a presumption against waiver of the Sixth Amendment right to counsel.[41]

C. Sixth Amendment Incorporation to the States

Although *Powell* and *Johnson* described what rights were guaranteed by the Sixth Amendment, neither case discussed whether states were also required to furnish counsel to defendants in state criminal prosecutions.[42] In *Betts v. Brady*, the Supreme Court answered this

---

[32] 304 U.S. 458, 463 (1938).
[33] *Id.* at 459.
[34] *Id.* at 460.
[35] *Id.*
[36] *Id.* at 458-59.
[37] Id. at 462-63 ("That which is simple, orderly, and necessary to the lawyer-to the untrained layman-may appear intricate, complex, and mysterious.").
[38] *Id.* at 464.
[39] *Id.*
[40] *Id.*
[41] *See id.*
[42] *See* Powell v. Alabama, 287 U.S. 45 (1932); Johnson v. Zerbst, 304 U.S. 458 (1938).

question in the negative.[43] The Court found that in a great majority of states the right to counsel was a matter of legislative policy and "not a fundamental right, essential to a fair trial."[44] The Court was "unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the states, whatever may be their own views, to furnish counsel in every such case."[45] The Court believed that state courts should be left to decide under what circumstances counsel should be appointed to promote fairness and justice.[46] The opinion concluded with the Court saying that it did not agree that the Sixth Amendment "embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."[47]

Just over twenty years later, the Supreme Court overturned *Betts* in *Gideon v. Wainwright*.[48] The Court believed that the *Betts* decision was incorrect in concluding that the right to counsel was not "fundamental and essential to a fair trial."[49] Relying on the *Powell* and *Johnson* precedents, once again the Court expressed its opinion that a fair trial cannot occur unless counsel is provided to an indigent defendant.[50] Also influencing the Court's decision were twenty-two states, as friends of the Court, arguing that *Betts* be overturned. Thus, after the *Gideon* decision, the Sixth Amendment requires that all criminal defendants, whether in federal or state court, be provided the opportunity to obtain counsel, and if they cannot afford it, the court must appoint counsel.

---

[43] 316 U.S. 455, 471-72 (1942).
[44] *Id.* at 471.
[45] *Id.*
[46] *Id.* at 471-72.
[47] *Id.* at 473.
[48] 372 U.S. 335, 339 (1963).
[49] *Id.* at 342.
[50] *Id.* at 342-44 ("Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.").

D. The Right to Counsel in Police Interrogations

Massiah v. United States is one of the key Sixth Amendment right to counsel cases decided by the Supreme Court.[51] In *Massiah*, the defendant was indicted for violating federal narcotic laws.[52] After obtaining an attorney and pleading not guilty, he was released on bail.[53] While he was out on bail, his "friend" and co-defendant, cooperated with the government to obtain an incriminating statement from the defendant.[54] The friend allowed the government to place a hidden microphone in his vehicle, and without the defendant's knowledge, carried on a conversation with the defendant in which the defendant made several incriminating statements that were used against him at trial.[55]

The issue before the Court was whether the right to counsel applies only at trial, or attaches at some point earlier in the criminal proceedings.[56] The Court held that the defendant's Sixth Amendment rights were violated when his incriminating statements were used against him at trial, because they were deliberately elicited from him by the government after he was indicted and without his counsel present.[57] The Court quoted *Powell* to emphasize that "'during perhaps the most critical period of the proceedings[,] . . . from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation (are) vitally important, the defendants . . . (are) as much entitled to such aid (of counsel) during that period as at the trial itself.'"[58]

Massiah holds that the Sixth Amendment right to counsel is violated where police deliberately elicit information from the defendant once the defendant has been indicted, but what

[51] 377 U.S. 201 (1964).
[52] *Id.* at 201.
[53] *Id.*
[54] *Id.* at 202-03.
[55] *Id.*
[56] *Id.* at 203-04.
[57] *Id.* at 206.
[58] *Id.* at 205 (quoting Powell v. Alabama, 287 U.S. 45, 57 (1932).

about interrogation that takes place prior to indictment? The Supreme Court addressed this issue in *Escobedo v. Illinois*.[59] In *Escobedo*, the defendant was arrested and questioned by police regarding the murder of the defendant's brother-in-law.[60] The defendant had not been formally charged with any crime and was denied the opportunity to speak with his attorney after several requests.[61] During the interrogation, the defendant made incriminating statements, the admissibility of which were at issue.[62]

In holding that the defendant's Sixth Amendment right to counsel was violated, the Court stated that the fact that the interrogation here occurred prior to an indictment "should make no difference."[63] Of importance to the Court, at the time of the interrogation there was no general investigation of an unsolved crime; "petitioner had become the accused, and the purpose of the interrogation was 'to get' him to confess his guilt despite his constitutional right not to do so."[64] Therefore, the Sixth Amendment right to counsel attaches at the point the adversary system begins to operate—the moment "the process shifts from investigatory to accusatory" and the "purpose is to elicit a confession."[65]

II. THE FIFTH AMENDMENT RIGHT TO COUNSEL

If the Sixth Amendment already provides defendants with the right to counsel, why is there a need for a Fifth Amendment right to counsel? Furthermore, how is there a right to counsel guaranteed by the Fifth Amendment when the phrase "right to counsel" is found

---

[59] 378 U.S. 478 (1964).
[60] *Id.* at 479-80.
[61] *Id.* at 481.
[62] *Id.* at 483.
[63] *Id.* at 485.
[64] *Id.* It should be noted that the *Escobedo* decision is on unclear ground. The decision was decided prior to *Miranda*, which protects the right to counsel during custodial interrogation. Because *Miranda* protects the right to counsel during custodial interrogation before a defendant has been formally charged, *Escobedo* would likely not be upheld if it were to be challenged today.
[65] *Id.* at 492.

nowhere in the amendment?[66] The Supreme Court answered each of these questions in the landmark decision *Miranda v. Arizona*.[67]

A. *Miranda v. Arizona*

Escobedo v. Illinois held that the Sixth Amendment right to counsel attaches when police take a suspect into custody and interrogate him or her with the intent of eliciting a confession.[68] Just two years later, the Supreme Court held that the Fifth Amendment privilege against self-incrimination requires police to warn an individual, who is in custody, and before questioning, "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that *he has a right to the presence of an attorney*, either retained or appointed."[69] The two necessary elements for the Fifth Amendment right to counsel to apply are: (1) the suspect must be in custody,[70] and (2) be subjected to police interrogation.[71] The majority in *Miranda* believed that something more than a voluntariness test was needed to protect defendants' privilege against self-incrimination,[72] whereas the dissent believed the voluntariness

[66] The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

[67] 384 U.S. 436, 444 (1966).

[68] *See supra* notes 64-65 and accompanying text.

[69] *Miranda*, 384 U.S. at 444 (emphasis added).

[70] The Court defined custody to mean once the "person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444.

[71] The Court defined interrogation simply as "questioning initiated by law enforcement officers." *Id.* In a future case the Court expanded its definition of interrogation to include "express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

[72] *Miranda*, 384 U.S. at 467 ("We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination,

test was sufficient.[73] Of chief concern to the majority was the inherent coercion that exists anytime a defendant is taken into custody and interrogated by police.[74]

In order to neutralize this inherently coercive atmosphere, the Court thought it necessary to warn an individual of his right to have counsel present during custodial interrogation.[75] As the Court noted, "[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators."[76] Therefore, the Court believed that in order for the right to remain silent to mean anything, it is "indispensible" that the defendant be made aware of his right to have counsel present during interrogation.[77] The Court recognized other functions that the presence of counsel can serve during custodial interrogation including mitigating the risk of untrustworthiness and ensuring that the client's statement is accurately reported at trial.[78] Finally, the Court stated that the failure to ask for a lawyer does not constitute a waiver.[79] In order to waive the right to counsel during custodial interrogations, the individual must first be made aware of his right.[80]

---

the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.").

[73] *Id.* at 502-03 (Clark, J., dissenting). Prior to *Miranda*, the Court relied on the due process clause of the Fourteenth Amendment to determine whether a confession was voluntary. *See* Brown v. Mississippi, 297 U.S. 278 (1936). Even after *Miranda*, in order for a confession to be admissible in court, the prosecution must prove that the confession is voluntary and that police followed the procedural requirements laid out in *Miranda*. *See* Miranda, 384 U.S. 436.

[74] *Miranda*, 384 U.S. at 468.

[75] *Id.* at 469-70.

[76] *Id.* at 469.

[77] *Id.*

[78] *Id.* at 470. The dangers of untrustworthy statements being made by the suspect are mitigated because the presence of counsel during interrogation should prevent police from using coercive tactics, and if they do, the lawyer can testify to it at trial. *Id.*

[79] *Id.*

[80] *Id.* The Miranda decision was highly controversial when it was decided. ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE INVESTIGATION 493 (Vicki Been et.al eds., 2d ed. 2013). One of the primary criticisms of the decision was the negative impact it would have on law enforcement's ability to obtain confessions from defendants; some crimes cannot be solved without a confession. *See Miranda*, 384 U.S. at 516-17. Just two years after the Court issued its Miranda decision, Congress passed a statute providing that a confession is admissible in federal court even if Miranda warnings were not given, so long as it was voluntary. 18 U.S.C. § 3501 (2012). For the next thirty plus years, every Justice Department refused to rely on the statute due to the belief that it was unconstitutional. CHEMERINSKY & LEVENSON, *supra* note 80, at 493. Finally, in 2000 the Supreme Court addressed the constitutionality of the statute in Dickerson v. United States. 530 U.S. 428 (2000). The Court reaffirmed the

To summarize, the Fifth Amendment right to counsel is a judicially created constitutional rule arising from the Fifth Amendment privilege against self-incrimination.[81] While the Sixth Amendment right to counsel attaches as soon as formal criminal proceedings are initiated against the accused, the Fifth Amendment right to counsel is implicated only during custodial interrogation.[82] The *Miranda* decision was a procedural fix to a substantive problem; the Court was concerned that a voluntariness test was not sufficient on its own to deal with the inherent coercion that exists during custodial interrogation.[83]

B. Waiver of the Fifth Amendment Right to Counsel

The Court addressed what constitutes an effective waiver of the Fifth Amendment right to counsel in *Miranda v. Arizona*.[84] The Court stated that a "heavy burden" rests on the shoulders of the government to prove that a defendant "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[85] Although the language used in *Miranda* made it seem difficult for the government to prove waiver, over the next several decades, the Court strayed away from that language and greatly lessened the burden on the government when proving a valid waiver.[86] In more recent years, the Court has held that

---

Miranda decision and stated that because Miranda was a constitutional decision, it could not be overruled by an act of Congress. *Id.* at 432.

[81] *See supra* note 69 and accompanying text.

[82] *See supra* notes 70-71 and accompanying text.

[83] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

[84] *See id.* at 475.

[85] *Id.*

[86] *See, e.g.*, North Carolina v. Butler, 441 U.S. 369 (1979) (holding that the defendant waived his Fifth Amendment right to counsel where the defendant was read *Miranda* warnings and refused to sign a waiver form before making incriminating statements to police); Berghuis v. Thompkins 130 S. Ct. 2250 (2010) (holding that defendant waived his Fifth Amendment right to counsel where the defendant was read Miranda warnings, refused to sign a waiver form, and was essentially unresponsive during the first two hours and forty-five minutes of the interview before making incriminating statements).

an express waiver is not required and waiver can be implied from the circumstances of the custodial interrogation.[87]

A related issue the Court has addressed is how to treat a waiver after the defendant has asserted his or her Fifth Amendment right to counsel.[88] In *Edwards v. Arizona*, the Court held that once the accused has invoked his right to counsel during custodial interrogation, police cannot re-question the accused unless the accused initiates further communication or until counsel is made available to the accused.[89] In *Edwards*, the defendant was arrested and brought into the police station where he given his *Miranda* warnings.[90] The defendant agreed to answer questions, but shortly into the interrogation, he stopped and said he did not want to go any further until he spoke with an attorney.[91] The questioning ended and the defendant was taken back to his jail cell.[92] The next morning, a guard told the defendant that he had to meet with two officers despite not being able to communicate with his attorney.[93] During this second interrogation, the defendant made incriminating statements.[94]

In reaching its holding, the Court relied heavily on the language used in *Miranda*, specifically that once the defendant invokes his right to counsel, "'the interrogation must cease until an attorney is present.'"[95] The Court distinguished the invocation of the right to silence and the right to counsel, noting "the Court has strongly indicated that additional safeguards are

---

[87] *Berghuis*, 560 U.S. at 384. In *Berghuis*, the Court acknowledged that *Miranda's* impact has been lessened by subsequent cases. *Id.* at 383 ("Thus, '[i]f anything, our subsequent cases have reduced the impact of the Miranda rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief.'") (quoting Dickerson v. United States, 530 U.S. 428, 443-44 (2000)).
[88] *See infra* note 89 and accompanying text.
[89] 451 U.S. 477, 484-85 (1981).
[90] *Id.* at 478.
[91] *Id.* at 479.
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 485 (quoting Miranda v. Arizona, 384 U.S. 436, 474 (1966)).

necessary when the accused asks for counsel."[96] Although police can re-approach a defendant after the defendant asserts his or her right to silence, the Court believed additional safeguards are needed to protect the right to counsel.[97]

Nine years later, the Supreme Court affirmed and expanded upon its holding in *Edwards v. Arizona*.[98] In *Minnick v. Mississippi*, the Court held that once the right to counsel is invoked during custodial interrogation, the questioning must stop, and the government cannot re-initiate questioning without counsel present, even if the accused had the opportunity to consult with his or her attorney.[99] In *Minnick*, the defendant was arrested and read his rights and told the officers he would provide them a complete statement on Monday when his attorney would be present.[100] Over the weekend, the defendant was able to speak with his attorney on two or three occasions, but on Monday, when the defendant was questioned for a second time, his attorney was not present.[101] During this second interrogation, the defendant made incriminating statements.[102]

At the heart of this decision is the Court's interpretation of the *Edwards* holding and specifically what the *Edwards* Court meant by the phrase "'until counsel has been made available to him.'"[103] The Mississippi Supreme Court interpreted that phrase to mean that as long as the accused has the opportunity to consult with his or her attorney, police can re-approach the

---

[96] *Id.* at 484. The Court has held that once a suspect has invoked his right to silence, incriminating statements obtained during subsequent custodial interrogation are admissible so long as the suspect's "'right to cut off questioning'" is "'scrupulously honored.'" Michigan v. Mosley, 423 U.S. 96, 103 (1975). In *Mosley*, the defendant was brought in for questioning regarding a robbery and refused to answer any questions. *Id.* at 97. The defendant was taken back to his cell, and a couple hours later, another officer brought the defendant in for questioning regarding an unrelated homicide investigation. *Id.* at 97-98. After being read his *Miranda* warnings again, the defendant made statemetns implicating himself in the homicide. *Id.* at 98. Based on these facts, the Court found that the defendant's incriminating statements were admissible because his right to cut off questioning "'was fully respected in this case.'" *Id.* at 104-05.

[97] Edwards, 451 U.S. at 484-85.

[98] *See* Minnick v. Mississippi, 498 U.S. 146 (1990).

[99] *Id.* at 153.

[100] *Id.* at 148-49.

[101] *Id.* at 149.

[102] *Id.* at 151.

[103] *See id.* (quoting *Edwards*, 451 U.S. at 484-85).

accused for questioning.[104] The Supreme Court disagreed.[105] Relying on the *Miranda*, *Edwards*, and several post-*Edwards* decisions, the Court held that counsel must be present before police re-initiate custodial interrogation of the accused.[106] The Court concluded by quoting *Patterson v. Illinois*: "'[p]reserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny.'"[107]

III. WAIVER OF SIXTH AMENDMENT RIGHT TO COUNSEL

The Court first addressed the issue of waiver in the Sixth Amendment context in *Johnson v. Zerbst*, where it said that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights."[108] In *Faretta v. California*, the Court expanded on what is required for waiver to be valid, stating that the defendant must know the "dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'"[109] However, over the next several decades the Court seemed to abandon this language while confusing the Sixth Amendment right to counsel with the Fifth Amendment right to counsel.[110]

A. *Michigan v. Jackson*

In *Michigan v. Jackson*, the Supreme Court consolidated two cases with the same issue: whether the *Edwards* rule applies in the Sixth Amendment context as well.[111] In each case, the defendant was arraigned on murder charges and during arraignment requested the assistance of

---

[104] *Id.*
[105] *Id.* at 151-52.
[106] *Id.* at 152-53 (citing Edwards, 451 U.S. 477; Miranda v. Arizona, 384 U.S. at 466; Oregon v. Bradshaw, 462 U.S. 1039, 1043 (1983); Arizona v. Roberson 486 U.S. 675, 680 (1988); Shea v. Louisiana, 470 U.S. 51, 52 (1985); Patterson v. Illinois, 487 U.S. 285, 291 (1988)). In dicta, the Court has stated that once the accused has invoked his Fifth Amendment right to counsel, the accused has fourteen days to consult with his attorney and after fourteen days, police can re-approach the accused without counsel present. *See* Maryland v. Shatzer, 559 U.S. 98, 110 (2010).
[107] *Id.* at 153 (quoting *Patterson*, 487 U.S. at 291).
[108] Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (quoting Aetna Ins. Co v. Kennedy, 301 U.S. 389, 393 (1937)).
[109] 422 U.S. 806, 835 (1975) (quoting Adams v. United States, 317 U.S. 269, 279 (1942).
[110] Michael C. Mims, *A Trap for the Unwary: The Sixth Amendment Right to Counsel After Montejo v. Louisiana*, 71 LA. L. REV. 345, 355-57 (2010).
[111] 475 U.S. 625, 626 (1986).

counsel.[112] After arraignment, and without counsel present, officers in each case obtained incriminating statements from the defendants after they were read their *Miranda* warnings and waived them.[113] As a result of these incriminating statements, each of the defendants were convicted.[114]

The states raised three arguments as to why the *Edwards* rule should not apply in the Sixth Amendment context: there are legal differences in the claims, there are factual differences in the claims, and the defendants in each case signed a waiver form prior to the custodial interrogation.[115] Regarding the first argument, the states argued that *Edwards* was grounded in the Fifth Amendment right to counsel in custodial interrogation and its application to the Sixth Amendment is "unnecessary and inappropriate."[116] The Court disagreed and stated that the reasons for prohibiting the interrogation of uncounseled defendants after being formally charged are even stronger than before charges are filed.[117] The Sixth Amendment right to counsel guarantees "'at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State.'"[118] Finally, the Court stated that the Sixth Amendment right to counsel during post-arraignment interrogation requires "at least as much protection" as the Fifth Amendment right to counsel during custodial interrogations.[119]

Second, the states argued that there is a factual difference between requesting counsel at an arraignment and requesting counsel during custodial interrogations.[120] They argued that when a defendant requests counsel at an arraignment, the defendant only intends counsel to be present

[112] *Id.* at 626-29.
[113] *Id.*
[114] *Id.*
[115] *Id.* at 630-31.
[116] *Id.* at 631.
[117] *Id.*
[118] *Id.* at 632 (quoting Maine v. Moulton, 474 U.S. 159, 176 (1985)).
[119] *Id.*
[120] *Id.*

at formal legal proceedings.[121] The Court rejected this, citing *Johnson v. Zerbst*, which stated that the Court should interpret "every reasonable presumption against waiver of a fundamental constitutional right[]."[122] When a defendant requests counsel, it is presumed that the defendant requests the assistance of counsel at every "critical stage of the prosecution."[123]

The states also tried another factual argument that the interrogators often will not be aware of whether the defendant requested counsel at the arraignment.[124] The Court found this argument pretty weak especially in cases like this where the officers doing the interrogating were in the courtroom when the defendants requested the appointment of counsel.[125] Even where the interrogating officers are unaware of the defendant's retention of counsel, the Court stated that knowledge of one state actor is imputed to all other state actors.[126]

Finally, the states argued that each defendant validly waived his Sixth Amendment right to counsel because they each signed a waiver form after being read their constitutional rights.[127] Relying on the *Edwards* decision, the Court also rejected this argument.[128] Again the Court found no justification for requiring a lesser burden on the states for showing a waiver of Sixth Amendment rights compared to Fifth Amendment rights.[129]

The dissent and scholars criticized the *Jackson* decision for its reliance on *Edwards*, and language in the opinion suggesting that a defendant must invoke his or her Sixth Amendment

---

[121] *Id.* at 632-33.
[122] *Id.* at 633 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
[123] *Id.* The Court stressed the fact that a defendant does not have to request counsel for the right to counsel to attach. *Id.* at n.6. However, the Court did say when a defendant expressly requests the assistance of counsel, that fact will carry significant weight when the Court determines the validity of a subsequent waiver of the right. *Id.*
[124] *Id.* at 634.
[125] *Id.*
[126] *Id.*
[127] *Id.* at 635.
[128] *Id.*
[129] *Id.*

right to counsel.[130] One scholar argues that the Court's reliance on *Edwards* and its emphasis on the assertion of the right to counsel "ultimately served to straightjacket Sixth Amendment waiver inquiries into Fifth Amendment jurisprudence."[131] Similarly, another scholar argues that an "unfortunate and unintentional" result of *Jackson* was the blurring of the distinctions between the Fifth and Sixth Amendment.[132] Furthermore, after *Jackson*, courts began using the "prophylactic"[133] language of the Fifth Amendment line of cases in the Sixth Amendment context, which suggests a lack of constitutional significance.[134] Just two years later, in *Patterson v. Illinois*, the Court further blurred the lines between the Fifth and Sixth Amendment right to counsel.[135]

B. *Patterson v. Illinois*

In *Patterson v. Illinois*, the Court held that a defendant's waiver of the *Miranda* warnings during custodial interrogation was also sufficient to waive the Sixth Amendment right to counsel.[136] The defendant in *Patterson* was indicted and after indictment, was interrogated by officers.[137] At that point, the defendant had not obtained nor been appointed counsel.[138] After waiving his *Miranda* warnings, the defendant confessed to the crime.[139] The defendant argued

---

[130] *Id.* at 639-40 (Rehnquist, J., dissenting) (arguing that the rule laid out in Edwards makes no sense outside the context of the Fifth Amendment privilege against self-incrimination); *see* Mims, *supra* note 110, at 356.
[131] Mims, *supra* note 110, at 356 (quoting Meredith B. Halama, Note, *Loss of a Fundamental Right: The Sixth Amendment as a Mere "Prophylacitc Rule*," 1998 U. ILL. L. REV. 1207, 1209 (1998).
[132] Tinto, *supra* note 5, at 1343.
[133] "[A] prophylactic rule is a judicial work product somehow distinguishable from judicial interpretation of the Constitution." Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L.REV. 1, 30 (2004). "[I]t is that sort of extraconstitutional rule that overenforces what the Constitution, as judicially interpreted, would itself require; it 'expand[s]' or 'sweeps more broadly than' the constitutional constraints that do or would emerge from straightforward judicial interpretation." *Id.* A prophylactic rule can be violated without violating the constitution. *Id.* at 31.
[134] Tinto, *supra* note 5, at 1344.
[135] 487 U.S. 285 (1988).
[136] 487 U.S. 285, 300 (1988).
[137] *Id.* at 288.
[138] *Id.* at 290 n.3.
[139] *Id.* at 288.

that the *Miranda* warnings may be sufficient for the Fifth Amendment rights, but are not adequate to inform an individual of his or her Sixth Amendment rights.[140]

The defendant first argued that his Sixth Amendment rights attached at indictment and that police could not initiate interrogation without counsel present.[141] The Court rejected this argument by stating that *Jackson* "turned on the fact that the accused 'ha[d] asked for the help of a lawyer' in dealing with police."[142] Furthermore, the Court found that the defendant's argument could not be squared with the Court's reasoning in *Edwards*, a Fifth Amendment case.[143] If the defendant wanted the assistance of counsel, according to the Court, he had to express that desire.[144]

The defendant's principal argument was that *Miranda* warnings are not sufficient to waive the Sixth Amendment right to counsel.[145] The Court stated that the key to a waiver inquiry is whether "the accused, who waived his Sixth Amendment rights during post-indictment questioning, [was] made sufficiently aware of his right to have counsel present during the questioning, and of the possible consequences of a decision to forgo the aid of counsel." The *Miranda* warnings inform the defendant that he or she has the right to counsel and they also inform the defendant of the consequences of forgoing the aid of counsel: anything said can be used against the defendant.[146] However, in reality, the average defendant is not likely to understand the consequences of forgoing the aid of counsel simply by being told that anything he says will be used against him.

---

[140] *Id.* at 289.
[141] *Id.*at 290.
[142] *Id.* at 291 (quoting Michigan v. Jackson, 475 U.S. 625, 631(1986).
[143] *Id.*
[144] *See Id.*
[145] *Id.* at 292.
[146] *Id.* at 292-93.

The Court concluded by stating that although there are differences between the Fifth and Sixth Amendment rights to counsel, the Court has never held that the Sixth Amendment right is superior or should be more difficult to waive.[147] It is worth pointing out here that the Court did say, albeit in a footnote, that there are circumstances in which a waiver of the *Miranda* warnings will not be sufficient to waive the Sixth Amendment right to counsel.[148] Another important point made by the Court in a footnote is the importance of the fact that in this case the defendant had not yet retained, or accepted by appointment, counsel to represent him.[149] The Court recognized 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."[150] However, the Court completely ignored this footnote when it decided *Montejo v. Louisiana*.

C. *Montejo v. Louisiana*

In *Montejo v. Louisiana*,[151] the Court continued its "denigration"[152] of the right to counsel and further blurred the "analytical distinctions" between the Fifth and Sixth Amendments.[153] *Montejo* provided the Court with a very similar fact pattern as the consolidated cases in *Jackson*. In *Montejo*, the defendant was appointed defense counsel after being brought before a judge during the preliminary hearing.[154] Later the same day, the defendant, without counsel present, was asked by officers to accompany them on a search for the weapon used by the defendant to commit the murder.[155] After being read his *Miranda* rights, the defendant agreed to go along.[156] During the trip, the defendant wrote an incriminating letter to the victim's widow, apologizing

---

[147] *Id.* at 297-98.
[148] *Id.* at 296 n.9.
[149] *Id.* at 290 n.3.
[150] *Id.*
[151] 556 U.S. 778 (2009).
[152] Mims, *supra* note 110, at 357.
[153] Tinto, supra note 5, at 1345.
[154] *Id.* at 781.
[155] *Id.* at 781-82.
[156] *Id.* at 782.

for the crime.[157] Understandingly, the defendant's appointed lawyer was not very happy when the defendant returned.[158]

The Louisiana Supreme Court held that the *Jackson* rule only applies if the defendant affirmatively asserts his Sixth Amendment right to counsel during the preliminary hearing.[159] However, if the court appoints defense counsel without any request by the defendant, police can interrogate the defendant without counsel present as long as the defendant validly waives his rights.[160] The United States Supreme Court found this approach to be unworkable because in almost half of the states, the court automatically appoints counsel if the defendant is found to be indigent.[161] For defendants that are automatically appointed counsel, there would be no need to request an attorney, putting these defendants at a disadvantage under the Louisiana approach.[162]

After discussing what was not at issue,[163] the Court addressed the only issue before it: whether courts must presume that a waiver is invalid if police initiate interrogation after the defendant's Sixth Amendment rights have attached.[164] The defendant argued *Jackson's* ruling required that once represented by counsel, a defendant could never by asked by the state to consent to questioning.[165] The Court disagreed.[166] The Court described the *Jackson* rule's

---

[157] *Id.*
[158] *Id.*
[159] *Id.* at 783.
[160] *Id.*
[161] *Id.* at 783-84.
[162] *Id.* at 784-85.
[163] Justice Scalia starts his opinion with what is not at issue in the case. *Id.* at 786. "[O]nce the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Id.* (quoting United States v. Wade, 388 U.S. 218, 227-228 (1967); Powell v. Alabama, 287 U.S. 45, 57 (1932)). Interrogation is one of those "critical" stages. *Id.* (citing Massiah v. United States, 377 U.S. 201, 204-05 (1964)). The Sixth Amendment right to counsel can be waived as long as such waiver is voluntary, knowing, and intelligent. *Id.* (citing Patterson v. Illinois, 487 U.S. 285, 292 n.4 (1988)). Finally, even though the *Miranda* warnings are grounded in the Fifth Amendment, the waiver of counsel after being read the *Miranda* warnings normally is sufficient to waive the Sixth Amendment right to counsel as well. *Id.* at 786-87 (quoting *Patterson*, 487 U.S. at 296.).
[164] *Id.* at 787.
[165] *Id.* at 789.
[166] *Id.*

purpose as preventing police badgering.[167] The assumption is that once a defendant invokes his or her right to counsel, that defendant is unlikely to voluntarily waive that right during subsequent interactions with the government.[168] The Court seemed to place significant weight on the fact that counsel in this case was appointed by the trial court without any action taken by the defendant.[169] As the Court noted, "a defendant who never asked for counsel has not yet made up his mind in the first instance." Therefore, in the Court's opinion, the anti-badgering rational from *Edwards* and *Jackson* did not apply to a case like this.[170]

The defendant also argued, based on the Model Rules of Professional Conduct, that once the state knows an individual is represented by counsel, the state cannot communicate with that individual directly, but must communicate through the individual's attorney.[171] First, the constitution makes no mention of the Model Rules, and second, the Court found the defendant's argument broader and narrower than the Model Rules.[172] While the Model Rules apply only to lawyers, the defendant's argument would apply the same rule to all state actors, including police officers, who are not lawyers.[173] The defendant's argument was narrower than the Model Rules because the state actors could speak directly to the defendant if the defendant initiated the communication, whereas under the Model Rules, a lawyer would be sanctioned regardless of who initiated the communication.[174] The Court concluded its discussion of this argument by stating that "[t]he upshot is that even on *Jackson*'s own terms, it would be completely unjustified

[167] *Id.* at 787. Interestingly, and as pointed out by Justice Stevens in dissent, the *Jackson* decision never mentions the anti-badgering rationale adopted by the majority in this decision. *Id.* at 805 (Stevens, J., Dissenting).
[168] *Id.* at 788 (citing Michigan v. Harvey, 494 U.S. 344, 350 (1990)).
[169] *Id.* at 789.
[170] *Id.*
[171] *Id.* at 790.
[172] *Id.*
[173] *Id.*
[174] *Id.* at 790-91.

to presume that a defendant's consent to police-initiated interrogation was involuntary or coerced simply because he had previously been appointed a lawyer."[175]

Next, the Court considered whether it was time to overturn *Jackson* by considering its workability, antiquity, reliance, and strength of reasoning.[176] First, the Court found the *Jackson* rule to be "unworkable in more than half the States of the Union."[177] The Court then made quick work of the antiquity and reliance factors by simply stating that the *Jackson* decision was only two decades old, and that although police and prosecutors have been trained to apply the *Jackson* rule, that is not enough to retain a constitutional rule.[178] Importantly, the Court provided that states could continue to follow the *Jackson* rule if they so wish.[179]

The Court spent a large portion of its opinion discussing the strength of *Jackson*'s reasoning by comparing the rule's benefits to its costs.[180] The Court found the benefits of the *Jackson* rule to be "marginal," and its costs to be "substantial."[181] According to the Court, few coerced confessions would be erroneously introduced into evidence without the *Jackson* rule because the three layers of prophylaxis provided by *Miranda*, *Edwards*, and *Minnick* are sufficient.[182] *Miranda* requires an individual to be warned of his or her right to an attorney before

[175] *Id.* at 792.
[176] *Id.* at 792-93.
[177] *Id.* at 792. The theory underlying the *Jackson* rule was that the defendant must invoke the right to counsel in order to receive the protections of the rule. *Id.* However, because almost half of the states at the time of the decision had automatic appointment of counsel for indigent defendants, it would not be possible for defendants in these states to affirmatively request counsel. *Id.* at 784-85. J*ackson*'s rule, therefore, would be unworkable in these states. *Id.* at 792.
[178] *Id.* at 793.
[179] *Id.*
[180] *Id.*
[181] *Id.* The benefits of the *Jackson* rule include the number of coerced confessions that are excluded that would otherwise have been admitted into evidence, as well as providing courts with an easy, bright-line test to apply. *Id.* The costs include hindering the government's ability to convict those who violate the law by invalidating an otherwise voluntary confession and by preventing police officers from even trying to elicit confessions in the first place. *Id.* at 793, 796.
[182] *Id.* at 794.

custodial interrogation can take place.[183] *Edwards* held that once the accused asserts his right to speak to an attorney, the custodial interrogation must stop.[184] Finally, *Minnick* says that once the Fifth Amendment right to counsel has been asserted, no further custodial interrogation can take place until defense counsel is present.[185] Therefore, if this line of cases sufficiently protect an individual's right to counsel before arraignment or other formal proceedings are brought against the individual, the Court concluded the same line of cases would protect the individual after arraignment when Sixth Amendment rights attach.[186] Based on this reasoning, the Court found *Jackson* to be "superfluous" and overruled it.[187]

As in the *Jackson* and *Patterson* cases, the *Montejo* decision has been criticized by scholars for ignoring the fundamental principals of the Sixth Amendment and "straightjacket[ing]" Sixth Amendment waiver issues into Fifth Amendment jurisprudence.[188] According to a Harvard Law Review article, *Jackson* should have been upheld even in situations where counsel is appointed rather than requested by the defendant.[189] *Jackson* should not have been viewed as primarily concerned with police badgering, but instead "[with] traditional Sixth Amendment precedent emphasizing the inequality between the 'unaided layman' and the

[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.* at 795.
[187] *Id.* at 795, 797 ("In sum, when the marginal benefits of the *Jackson* rule are weighed against its substantial costs to the truth-seeking process and the criminal justice system, we readily conclude that the rule does not 'pay its way.'" (quoting United States v. Leon, 468 U.S. 897, 907-908 n.6 1984)).
[188] *See* Mims, *supra* note 110, at 356 (arguing that *Jackson*'s reasoning "served to straightjacket Sixth Amendment waiver inquiries into Fifth Amendment jurisprudence"); *see also* Tinto, *supra* note 5, at 1345 ("The Court disregarded the fundamental principals of the Sixth Amendment right to counsel and instead focused solely on concerns which underlie Fifth Amendment protections."); Geoffrey M. Sweeney, *If You Want It, You Had Better Ask for It: How* Montejo v. Louisiana *Permits Law Enforcement to Sidestep the Sixth Amendment*, 55 Loy. L. Rev. 619, 641-42 (2009) ("The *Montejo* Court transposed Jackson's trigger onto the Sixth 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.").
[189] *The Supreme Court 2008 Term*, 123 HARV. L. REV. 182, 191 (2009) [hereinafter HARVARD LAW REVIEW].

'prosecutorial forces of organized society.'"[190] Furthermore, the article argued that after formal proceedings have been initiated, "the decision of what and how much to say to police can be part of a complicated legal and strategic decision."[191] As summarized by Justice Stevens in his dissent in *Montejo*, "[t]he assistance offered by counsel protects a defendant from surrendering his rights with an insufficient appreciation of what those rights are and how the decision to respond to interrogation might advance or compromise his exercise of those rights throughout the course of criminal proceedings."[192] The majority in *Montejo* placed little to no significance on these benefits provided by counsel.

Another criticism of *Montejo* is its departure from the long established principal that the right to counsel automatically attaches once the state or federal government initiates formal proceedings against the defendant.[193] After *Montejo*, in order to gain the protections of the Sixth Amendment, a defendant must now actively participate.[194] Furthermore, *Montejo* has downgraded the Sixth Amendment to a "prophylactic rule rather than a textually mandated guarantee."[195] Considering that the right to counsel is expressly stated in the Sixth Amendment, it seems illogical to treat the Sixth Amendment right to counsel equal to the court created "prophylactic rules" laid out in *Miranda*.

A final criticism of *Montejo* is whether *Miranda* warnings are sufficient to inform a defendant of his or her right to counsel. The *Montejo* decision holds that if a defendant wants an attorney, the defendant only needs to say so when provided the *Miranda* warnings.[196] However,

---

[190] *Id.* (quoting United States v. Gouveia, 467 U.S. 180, 189 (1984); Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion)).
[191] *Id.*
[192] Montejo v. Louisiana, 556 U.S. 778, 806 n.2 (2009) (Stevens, J., dissenting).
[193] *See* Sweeney, *supra* note 188, at 641-42 ("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.
[194] *Id.*
[195] *Id.* at 642.
[196] Montejo v. Louisiana, 556 U.S. 778, 794 (2009).

this view taken by the Court ignores reality.[197] Studies have shown that about eighty percent of defendants waive their right to counsel when *Miranda* warnings are provided.[198] This could be attributed to deceptive police practices[199] or the "'subtle compulsion'" resulting from the inequality created once formal proceedings are initiated against a defendant.[200] Due to the fact that so many defendants waive their *Miranda* warnings, and counsel is not present to keep the police interrogation tactics in check, it does not seem sufficient to condition the Sixth Amendment right to counsel on whether a defendant waives his or her *Miranda* warnings.

Furthermore, although the *Miranda* warnings are sufficient to warn a suspect of his or her right to counsel during the investigatory stage, they are not sufficient once the criminal process "shifts from investigatory to accusatory."[201] Once the government focuses its resources on an individual by charging the individual with a crime, a greater right to counsel arises. The purpose of the Sixth Amendment right to counsel is to provide a defendant with a medium between the defendant and the state.[202] No longer is the right to counsel concerned with preventing coerced confessions;[203] the moment the defendant is charged, the right to counsel focuses on providing the defendant a fair trial. Because *Miranda*'s focus is on preventing coerced confessions, the warnings are not sufficient to warn a defendant of the consequences of waiving the Sixth Amendment right to counsel.

---

[197] Mims, *supra* note 110, at 370.
[198] *Id.* at 371.
[199] *Id.* (discussing common police tactics including, "lying about the existence of incriminating evidence, minimizing the seriousness of the offense, and insisting that speaking with the police is in the suspect's best interests").
[200] Harvard Law Review, *supra* note 189, at 191.
[201] Escobedo v. Illinois, 378 U.S. 478, 492 (1964).
[202] Maine v. Moulton, 474 U.S. 159, 176 (1985).
[203] Miranda dealt with the right to counsel for an individual during custodial interrogation *before* the individual was formally charged.

IV. *MONTEJO*'S IMPACT ON THE STATES

Due to the uncertainty regarding the Sixth Amendment right to counsel after *Montejo*, this Part looks at how states have applied the *Montejo* decision. After looking at the states' application of *Montejo*, I propose a solution to allow states to better protect individuals' right to counsel.

A. States' Application of *Montejo v. Louisiana*

The Supreme Court in *Montejo* advised states that they were free to grant defendants greater protections if they wished.[204] States have always been able to grant their citizens broader protections than those granted by the Constitution.[205] As former Supreme Court Justice William J. Brennan Jr. said, "[i]t is simply that the decisions of the [United States Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law."[206] Therefore, states are free to prohibit police-initiated interrogations of charged defendants without defense counsel present without running afoul of the Constitution.

1. *Following the Supreme Court's Lead*

Unsurprisingly, the vast majority of state courts to discuss *Montejo*'s impact on Sixth Amendment waiver have followed the Supreme Court's lead. In fact, out of the twenty-seven states, twenty-two of them agreed that even where a defendant has retained or been appointed counsel, police can approach the defendant post-indictment without counsel present and

---

[204] *Montejo*, 556 U.S. at 793.

[205] *See, e.g.*, PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) (recognizing "the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution"); California v. Ramos, 463 U.S. 992 (1983) (providing "[i]t is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires").

[206] William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 502 (1977).

interrogate the defendant as long as the defendant validly waives his or her *Miranda* warnings.[207] Out of the twenty-two states that have announced how they will apply *Montejo*, very few of them provided much discussion of the issue addressed in *Montejo*. For the most part, the state courts did not discuss whether the Supreme Court's analysis and reasoning was sound; they simply stated that because the Supreme Court has overturned *Jackson*, they will too.

---

[207] *See, e.g.*, Ex parte Cooper, 43 So. 3d 547, 551 (Ala. 2009) ("Thus, a court must no longer presume a waiver of a right to counsel executed after the right to counsel has attached is invalid. A defendant must invoke his or her right to counsel . . . ."); Forster v. State, 236 P.3d 1157, 1169 (2010) (holding that the defendant's waiver of *Miranda* warnings are also sufficient to waive his Sixth Amendment right to counsel); State v. Roberts, No. 1 CA-CR 11-0101, 2011 WL 6034762 (Ariz. Ct. App. 2011); Vance v. State, 383 S.W.3d 325, 338 (Ark. 2011) (stating that a valid waiver of the Fifth Amendment right to counsel is also valid regarding the Sixth Amendment right to counsel); People v. Pineda, No. B222913, 2011 WL 6145098, at *11 (Cal. Dist. Ct. App. 2011) ("[T]he United States Supreme Court's decision in *Montejo* . . . conclusively establishes that Pineda waived his Sixth Amendment right to counsel when he was advised of and voluntarily, knowingly, and intelligently waived his Miranda rights."); People v. Luna-Solis, 298 P.3d 927, 932 (Colo. 2013) ("Further, the Sixth Amendment right is not superior to or greater than the right to counsel rooted in the Fifth Amendment privilege against self-incrimination in any manner that would make the former more difficult to waive than the latter. When a defendant is read his *Miranda* rights, which include the right to have counsel present during interrogation, and agrees to waive those rights, that waiver will typically satisfy the Sixth as well as the Fifth Amendment.") (citation omitted); Dixon v. State, 751 S.E. 2d 69, 72 (2013) (stating that the fact that counsel was appointed to represent the defendant did not provide defendant relief under the Sixth Amendment where he subsequently waived his Miranda warnings); State v. Camacho, 856 N.W.2d 381 (Iowa Ct. App. 2014) (citing to *Montejo* for the proposition that when a defendant waives his *Miranda* warnings, that is often enough to waive his Sixth Amendment rights as well); Miller v. Commonwealth, No. 2010-CA-0011325, 2012 WL 1886486 (Ky. Ct. App. 2012) (citing to *Montejo* regarding waiver of 6th Amendment right to counsel); State v. Winfrey, No. 2012 KA 0940, 2013 WL 595671 (La. Ct. App. 2013) (relying on Supreme Court's abandonment of *Michigan v. Jackson*); Commonwealth v. Tlasek, 930 N.E.2d 170, 172-73 (Mass. App. Ct. 2010) ("We discern no error in the motion judge's conclusion that this was a valid *Miranda* waiver, and *Montejo* therefore compels us to conclude that the defendant waived his Sixth Amendment right to counsel when he agreed to speak with the Canton police."); People v. Crockran, 808 N.W. 2d 499 (Mich. Ct. App. 2011) (citing to *Montejo* and discussing how waiver of Miranda warnings were sufficient to waive Sixth Amendment right to counsel); State v. Ware, 856 N.W.2d 719 (Minn. Ct. App. 2014) (describing how the state precedent is consistent with *Montejo*); Smith v. State, 106 So.3d 877 (Miss. Ct. App. 2013) (noting that under *Montejo*, post-hearing waivers are no longer presumed involuntary when the questioning is initiated by police); State v. Beasley, 416 S.W.3d 357 (Mo. Ct. App. 2013) (discussing how *Montejo* had overturned Jackson, and the state court precedents that had relied on Jackson); State v. Brooks, 854 N.W.2d 804 (Neb. Ct. App. 2014) (relying on *Montejo* when stating that a waiver of Miranda warnings normally does the trick for 6th amendment as well); Perez v. State, No. 57478, 2012 WL 1448289 , at *1 (Nev. 2012) (citing *Montejo* for the proposition that "a valid waiver of *Miranda* rights will also be considered the knowing and intelligent waiver of Sixth Amendment right to counsel"); State v. Yoder, No. 2011-CA-00027, 2011 WL 4499312 (Ohio Ct. App. 2011) (refusing the defendant's request to not follow *Montejo* when interpreting the Ohio constitution); Commonwealth v. Hill, 42 A.3d 1085 (Pa. Super. Ct. 2012) (stating that a waiver of *Miranda* warnings may constitute a waiver of the 5th and 6th Amendment rights to counsel); State v. Reid, 758 S.E.2d 904 (S.C. 2014) (relying on *Montejo* to hold no violation of 6th amendment right to counsel); State v. March, 395 S.W. 3d 738 (Tenn. Crim. App. 2010) (providing a detailed discussion of *Montejo* and applicable state opinions before denying claim of Sixth Amendment violation); Pecina v. State, 361 S.W.3d 68 (Tex. Crim. App. 2012) (accepting the Supreme Court's reasoning in *Montejo*).

2. *Going Against the Grain*

The five states that decided not to follow *Montejo*[208] did so for three different reasons: relying upon precedent to retain consistency and stability; relying upon state statute to provide greater rights to counsel; and holding that the Supreme Court flat out got *Montejo* wrong for failing to account for the distinctions between the Fifth and Sixth Amendment right to counsel.

a. Relying on Precedent Instead of *Montejo*

Florida,[209] West Virginia,[210] and Wisconsin[211] declined to follow *Montejo*, choosing instead to follow state precedent. In *Williams v. State*, the Florida District Court of Appeal found the *Montejo* decision to be "well reasoned" and "logically persuasive," but nonetheless decided that it would follow state precedent that had relied on the United States Supreme Court's decision in *Jackson*.[212] At the conclusion of its opinion, the court asked the Florida Supreme Court for guidance as to whether the state will adopt the Supreme Court's holding in *Montejo*.[213] However, five years later, the Florida Supreme Court has yet to address the issue and it is also worth pointing out that the Florida Supreme Court did not overturn the lower court's decision to apply Florida precedent that contradicts *Montejo*.

In *State v. Bevel*, the West Virginia Supreme Court provided a more in-depth discussion of the *Montejo* decision.[214] Although the court did not criticize the Supreme Court's holding or reasoning, the court did recognize that West Virginia has the power to impose higher standards

---

[208] *See* Williams v. State, 38 So. 3d 188 (Fla. Dist. Ct. App. 2010); State v. Lawson, 297 P.3d 1164 (Kan. 2013); *In re* Darryl P., 63 A.3d 1142, 1182 (Md. Ct. Spec. App. 2013); State v. Bevel, 745 S.E. 2d 237 (W. Va. 2013); State v. Forbush, 796 N.W. 2d 741, 750 (Wis. 2011).
[209] *See Williams*, 38 So. 3d at 192-93.
[210] *See Bevel*, 745 S.E. 2d at 246.
[211] *See Forbush*, 796 N.W. 2d at 753-57 (providing an in-depth discussion of Wisconsin precedent regarding the right to counsel and ultimately holding that *Montejo* did not sanction the interrogation that had occurred).
[212] *Williams*, 38 So. 3d at 192.
[213] *Id.* at 194.
[214] *Bevel*, 745 S.E. 2d at 246-47.

on police than those required by the federal government.[215] Finding the state precedent, which relied on *Michigan v. Jackson*, to be "well-reasoned" and that a "[w]holesale adoption of *Montejo* would only produce instability," the West Virginia Supreme Court decided to continue to apply state precedent relying on *Jackson*.[216]

Wisconsin takes an unique approach when deciding issues of waiver of the Sixth Amendment right to counsel, and its reasoning actually goes against many of the arguments made in this Note. In *State v. Forbush*, the Wisconsin Supreme Court discussed the impact *Montejo* would have on its state precedents.[217] Relying heavily on the Wisconsin Supreme Court's previous holding in *State v. Dagnall*,[218] the court held that *Montejo* had no impact on a case like this where the defendant invoked his right to counsel by "retaining and receiving the services of an attorney.[219] According to the court, *Montejo* did nothing to disturb the Supreme Court's holding in *Edwards* providing that once the right to counsel is invoked, all questioning must stop until counsel is present.[220] Thus, since the defendant had retained an attorney prior to his initial hearing where he was formally charged, any subsequent questioning without counsel present was in violation of *Edwards*.[221]

Although the Wisconsin Supreme Court's holding is correct, its reasoning and state precedent requiring the invocation of the right to counsel is wrong. The Wisconsin Supreme Court has more severely confused the distinctions between the Fifth and Sixth Amendment rights to counsel than the United States Supreme Court. The cases the court cites to for support for the proposition that a defendant must invoke his right to counsel all regard the Fifth Amendment

---

[215] *Id.* at 246.
[216] *Id.*
[217] 796 N.W. 2d 741, 750 (Wis. 2011).
[218] 612 N.W. 2d 680 (Wis. 2000).
[219] *Forbush*, 796 N.W. 2d at 757 (In sum, I affirm the reasoning of Dagnall as controlling on the issue of the right to counsel for a defendant who has affirmatively invoked his right to counsel for pending charges.).
[220] *Id.*
[221] *Id.*

right to counsel.[222] Therefore, although Wisconsin reached the correct result, it has fallen into the same trap the Supreme Court has fallen victim to; combining the Fifth and Sixth Amendment rights to counsel into one right while ignoring the important distinctions between them.

b. Avoid Constitutional Issues by Relying on State Statute

Kansas is unique among the states in that it not only has a state constitutional right to counsel, but also has a state statute stating that "[a] defendant charged by the state of Kansas in a complaint, information or indictment with any felony is entitled to have the assistance of counsel at every stage of the proceedings against such defendant."[223] In *State v. Lawson*, the Kansas Supreme Court discussed how it would apply the three different sources of law—*Montejo*, § 10 of the Kansas Constitution Bill of Rights, and the state statute—to determine whether a waiver of the right to counsel is valid.[224] Although the court recognized that it is free to "interpret [its] state law in a manner that will 'impose greater restrictions on police activity than those the [United States Supreme Court] holds to be necessary upon federal constitutional standards,'"[225] it recognized that Kansas has followed the United State Supreme Court's interpretation of constitutional rights for the past fifty years.[226] In order to avoid having to decide state or federal constitutional issues, the court decided to base its decision on Kan. Stat. Ann. § 22-4503.[227]

The first issue the court had to decide was what the legislature meant by the phrase "every stage of the proceedings."[228] The State argued that the right to counsel guaranteed under

---

[222] *See id.* at 757 (relying on *Edwards*, a Fifth Amendment case); *see* also *id.* at 748 (citing to McNeil v. Wisconsin, 501 U.S. 171, 175-79 (1991) for support that a defendant must invoke his right to counsel despite the fact that *McNeil* dealt with the invocation of the Fifth Amendment right to counsel).
[223] Kan. Stat. Ann. § 22-4503 (West).
[224] 297 P.3d 1164, 1167-74 (Kan. 2013).
[225] *Id.* at 1169 (quoting State v. Morris, 880 P.2d 1244 (1994)).
[226] *Id.*
[227] *Id.* at 1171.
[228] *Id.*

the statute only referred to in-court proceedings.[229] The defendant obviously argued that the legislature intended a very broad interpretation of "proceedings."[230] Ironically, the court looked to *Montejo* to resolve this issue.[231] In *Montejo*, the Supreme Court included "'interrogation by the State'" as one of the "'critical stages of the criminal proceedings.'"[232] Although a state can broaden rights guaranteed by the United States Constitution, a state is not able to narrow or limit those rights.[233] Because the polygraph test and interview at issue in this case was a critical stage of the criminal proceedings under the Sixth Amendment, the court found them to be within the criminal proceedings for purposes of Kan. Stat. Ann. § 22-4503.

After determining that the state statute applied, the court next considered whether the statutory right to counsel could be waived through a waiver of Fifth Amendment *Miranda* warnings.[234] The court made an interesting comparison between the waiver of counsel during an in-court proceeding compared to waiver during an out-of-court interview.[235] As the court noted, an uncounseled confession to a judge during a plea hearing would not be valid unless the court gave appropriate warnings and assured itself that the waiver was knowingly and intelligently made.[236] The defendant's waiver would then be made part of the record.[237] The court decided it "should not require anything less for an out-of-court, in-the-police-station confession to a law enforcement officer where the waiver of the defendant's statutory entitlement to the assistance of existing counsel is required."[238] Once the statutory right to counsel has attached, the uncounseled

---

[229] *Id.*
[230] *Id.*
[231] *Id.* at 1172.
[232] *Id.* (quoting Montejo v. Louisiana, 556 U.S. 778, 786 (2009)).
[233] *Id.*
[234] *Id.*
[235] *Id.* at 1173.
[236] *Id.*
[237] *Id.*
[238] *Id.*

waiver of that right is not valid unless it is in writing put in the court record.[239] Clearly, the waiver of *Miranda* warnings does not meet this requirement.[240]

c. Criticizing Montejo for Failing to Adequately Protect the Right to Counsel

Maryland is the only state that has addressed the weaknesses of the *Montejo* decision. In *In re Darryl P.*, the Maryland Court of Special Appeals discusses the difference between waiving the "Fifth Amendment-based prophylactic right to counsel dealt with in *Miranda* and *Edwards*," and the waiver of the Sixth Amendment right to counsel.[241] The court acknowledge that there had been "no serious focus" on the rights guaranteed by the Sixth Amendment beyond custodial interrogation in the Supreme Court's decisions in *Jackson*, *Patterson*, and *Montejo*.[242] As the court correctly points out, the right to have counsel act as a medium between the defendant and the state "clearly is something above and beyond the Fifth Amendment-based prophylactic right to have counsel during the limited period of custodial interrogation."[243]

Because the Sixth Amendment provides something more than the Fifth Amendment right to counsel, the court reasoned that the waiver of Sixth Amendment rights requires more than the waiver of *Miranda* warnings issued during custodial interrogation.[244] The court concluded its discussion of the distinctions between the Fifth and Sixth Amendment right to counsel by accusing the Supreme Court of being "[o]bsessed with *Edwards v. Arizona*" while failing to recognize the differences between the two rights to counsel.[245] After a lengthy discussion of valid waivers of the Fifth and Sixth Amendments' right to counsel, the court held:

> [T]hat the appellant had a Sixth Amendment right to counsel during the early morning hours of May 6 that went beyond the mere Fifth Amendment-based right to the presence of a lawyer during

---

[239] *Id.*
[240] *Id.*
[241] 63 A.3d 1142, 1182 (Md. Ct. Spec. App. 2013).
[242] *Id.*
[243] *Id.*
[244] *Id.*
[245] *Id.*

> custodial interrogation. That lesser right to a lawyer during custodial interrogation may well have been waived pursuant to the relaxed waiver standard of *Berghuis v. Thompkins*, but the extended or incremental right to have "counsel as a medium between himself and the State" was, we hold, not voluntarily and knowledgeably waived.[246]

B. Solution to Bring Back the Sixth Amendment Right to Counsel

In recent years, the United States Supreme Court has ignored the foundations of the Fifth and Sixth Amendments' right to counsel. From its inception, the Sixth Amendment right to counsel's main purpose has been to provide a "medium" between the defendant and the state in an attempt to level the playing field.[247] The Fifth Amendment on the other hand, is concerned with the voluntariness of confessions during custodial interrogations.[248] In other words, the Sixth Amendment right to counsel seeks to promote a fair trial, whereas the Fifth Amendment prophylactic right to counsel seeks to ensure confessions are voluntary.

In *Montejo v. Louisiana*, the Court held that a waiver of the Fifth Amendment right to counsel would normally do the "trick" in order to waive the Sixth Amendment right to counsel as well.[249] However, the *Miranda* warnings were designed to prevent coerced confessions by seeking to neutralize the inherent coercion that arises during custodial interrogation. Once the criminal process "shifts from investigatory to accusatory,"[250] the right to counsel is no longer concerned with preventing coerced confessions; its purpose is to provide the defendant a fair trial. The *Miranda* warnings, while being adequate to warn an individual of his or her rights during the investigatory stage, are insufficient to warn the accused of his or her rights once the government has decided to focus all of its resources on convicting the accused.

---

[246] *Id.* at 1189.
[247] *See* Maine v. Moulton, 474 U.S. 159, 176 (1985) ("The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State."); *supra* note 16 and accompanying text (providing that the right to counsel was necessary in this country due to the prosecutorial system of justice adopted by the colonies).
[248] *See* Miranda v. Arizona, 384 U.S. 436 (1966).
[249] Montejo v. Louisiana, 556 U.S. 778, 786 (2009).
[250] Escobedo v. Illinois, 378 U.S. 478, 492 (1964).

First, up to eighty percent of suspects waive their right to counsel when provided *Miranda* warnings.[251] I think it is a safe assumption that if a suspect or defendant truly understood the dangers of not having counsel present during an interrogation, especially after formal charges have been brought against the suspect, more than twenty percent would invoke the right. Second, if *Miranda* warnings do anything, they confuse a defendant that has already retained or been appointed counsel. If the defendant has counsel at the arraignment, hearing that he or she has the right to counsel and that counsel can be appointed if needed would cause confusion and cast doubt on the fact that he or she actually has an attorney.

Third, the Sixth Amendment right to counsel has historically been interpreted to automatically attach once formal proceedings are brought against the defendant.[252] *Montejo*, however, requires that a defendant affirmatively invoke his or her right to counsel in order to receive the protections provided by the Sixth Amendment. Finally, and as pointed out by the Kansas Supreme Court,[253] when a defendant waives his right to counsel at trial, he must be "be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'"[254] It seems logical to require the same warnings and for a waiver to be made part of the court record when a defendant waives the right to counsel out-of-court. The waiver of counsel during a post-indictment, out-of-court interrogation can be just as damaging for a defendant as the waiver of counsel at trial. Trial means very little if the state already has a confession.

---

[251] Mims, *supra* note 110, at 371.
[252] *See Montejo*, 556 U.S. at 786.
[253] *See* State v. Lawson 297 P.3d 1164, 1173 (Kan. 2013) (discussing what is required in order for a defendant to waive counsel in an in-court proceeding and holding that the same requirements should apply to out-of-court waiver of counsel).
[254] Faretta v. California, 422 U.S. 806, 835 (1975).

For these reasons, I propose that states take a similar approach to Kansas and pass legislation codifying the rule from *Michigan v. Jackson* that any post-indictment waiver of the right to counsel is presumed invalid unless the defendant initiates the communication with the state.[255] By prohibiting police from interrogating a defendant who has already been charged with a crime and has retained counsel, states will help "level the playing field" between the defendant and the state, and help preserve the true purpose of the Sixth Amendment right to counsel. As pointed out by the Wisconsin Supreme Court, by the time the state has decided to prosecute an individual, the investigation is normally complete.[256] Therefore, prohibiting the state from interviewing the defendant without counsel present, and after the defendant has been charged, would place a minimal burden on the state.

CONCLUSION

Over the past thirty years, the United States Supreme Court has consolidated the Sixth Amendment right to counsel into the Fifth Amendment right to counsel. Once described as a "fundamental principal[] of liberty and justice"[257] necessary to preserve the attorney-client relationship[258] and to provide a "medium" between the defendant and the state,[259] the Sixth Amendment right to counsel has been transformed into an inquiry of whether a confession is given voluntarily, at least in the context of custodial interrogations. Although state courts have had the opportunity to restore the protections of the Sixth Amendment right to counsel, twenty-two of the twenty-seven states to consider the *Montejo* decision have failed to do so. Therefore, it

---

[255] Kansas did not pass the statute in response to the Supreme Court's decision in *Montejo*. The statute was already on the books. However, the Kansas Supreme Court interpreted the statute to provide greater protections to defendants than the Sixth Amendment provides post-*Montejo*. I propose the other states pass legislation that uses clear language codifying the *Jackson* rule.
[256] State v. Forbush, 796 N.W. 2d 741, 756 (2011).
[257] Powell v. Alabama, 287 U.S. 45, 67-68 (1932).
[258] *See* Patterson v. Illinois, 487 U.S. 285, 290 n.3 (1988).
[259] *See* Maine v. Moulton, 474 U.S. 159, 176 (1985) ("The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State.").

is necessary for state legislatures to pass laws in their respective states prohibiting police-initiated interrogations of charged defendants without defense counsel present. If the Sixth Amendment right to counsel is to mean anything, the conduct of the police in the hypothetical at the beginning of this Note must be prohibited.