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Don't Answer the Door: Montejo v. Louisiana Relaxes Police Restrictions for Questioning Non-Custodial Defendants

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NOTE

DON'T ANSWER THE DOOR: Montejo v. Louisiana RELAXES POLICE RESTRICTIONS FOR QUESTIONING NON-CUSTODIAL DEFENDANTS

Emily Bretz*

In 2009, the Supreme Court held in Montejo v. Louisiana that a defendant may validly waive his Sixth Amendment right to counsel during police interrogation, even if police initiate interrogation after the defendant's invocation of the right at the first formal proceeding. This Note asserts that Montejo significantly altered the Sixth Amendment protections available to represented defendants. By increasing defendants' exposure to law enforcement, the decision allows police to try to elicit incriminating statements and waivers of the right to counsel after the defendant has expressed a desire for counsel. In order to protect the defendant's constitutional guarantee of a right to counsel at all critical stages in his prosecution, it is essential to impose higher waiver standards for represented defendants. Thus, this Note argues that state and lower courts should adopt a rule that would render invalid any waiver of right to counsel given in response to police-initiated questioning, regardless of whether the questioning occurred in a custodial or non-custodial environment, provided the defendant who waived the right had already been formally charged and invoked his right to an attorney.

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INTRODUCTION

God asked Eve, "What is this you have done?" Eve, on behalf of everyone, replied, "The serpent tricked me, and I ate." And so, without the intervention of Miranda warnings, lawyers, or an appellate court, God concluded the first recorded interrogation and dispensed justice upon Satan and mankind.¹

So begins a recent article by John Bradley, district attorney for Williamson County, Texas. The article goes on to contrast God's approach with the rule-based interrogation methods used by mortal creatures. After the Supreme Court's ruling in Montejo v. Louisiana, however, these interrogation rules shifted considerably in favor of the prosecution.² Prior to Montejo, police could not approach and question defendants once they were formally charged with a crime, and any subsequent waiver of the Sixth Amendment right to counsel was deemed invalid.³ The Montejo decision effectively eliminated these protections.⁴ Thus, by allowing police increased opportunities

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². 129 S. Ct. 2079 (2009); Bradley, supra note 1.
⁴. Montejo, 129 S. Ct. at 2091.
to initiate interrogation and secure waivers from represented defendants, Montejo undermines the purpose of the Sixth Amendment, which serves to protect the defendant after his first formal judicial proceeding, once “the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified.”

On September 6, 2002, Jesse Montejo was arrested in connection with the robbery and murder of Lewis Ferrari. He was brought to the sheriff’s office where, after waiving his rights under Miranda v. Arizona, he was interrogated for nearly eight hours. Ultimately, Montejo admitted that he shot and killed Ferrari, who had unexpectedly returned home during the course of the burglary. On September 10, Montejo appeared in court for a mandatory preliminary hearing. He stood silent while, as a matter of course, the judge appointed him an attorney from the Office of the Indigent Defender. Shortly thereafter, two police detectives went to visit Montejo in jail. After securing another Miranda waiver from the defendant, they requested he accompany them, without his lawyer, on a search for the murder weapon. During this excursion, Montejo wrote a letter, with a pen and paper provided by the police, apologizing to the victim’s widow for his involvement in the murder. Upon his return to the prison, Montejo finally met his court-appointed attorney.

The trial court deemed Montejo’s waiver admissible, and he was found guilty and sentenced to death. Affirming, the Louisiana Supreme Court rejected Montejo’s claim that the letter should have been suppressed under

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6. Under Miranda, a suspect must be advised of the following rights before interrogation:

[T]he right to remain silent; that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

384 U.S. 436, 479 (1966). If a suspect “knowingly and intelligently waive[s] these rights,” police may proceed with questioning. Id. at 479.


8. Id.

9. Id. at 1259. In Louisiana, a judge automatically appoints counsel at the defendant’s first formal hearing. Montejo, 129 S. Ct. at 2094. However, the procedure through which counsel is appointed varies greatly between the states. In some states, appointment of counsel is automatic upon a finding of indigency, while other states require that the court inform the defendant of his right to counsel whereupon he must formally request counsel before any appointment is made. A third category of states allow appointment to be made either upon the defendant’s request or sua sponte by the court. Id.

10. The police reissued Miranda rights to Montejo because he had reentered police custody. Miranda warnings must be read any time police seek to interrogate custodial defendants. Miranda, 384 U.S. at 444.

11. Montejo, 974 So. 2d at 1249. At trial, Montejo testified that detectives prompted him to write the letter, and that much of its contents were suggested by one of the police officers. Id. at 1250 n.49.


13. Montejo, 974 So. 2d at 1241.
Michigan v. Jackson. Jackson held that “if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.” The Louisiana Supreme Court reasoned that the protections afforded by Jackson apply only in situations where defendants actively assert their right to counsel, not in those where the defendant simply stands mute while counsel is appointed, as was the case with Montejo. Thus, while Montejo’s “right to counsel had attached, he did not assert his right to counsel such that the prophylactic rule of Michigan v. Jackson would invalidate any waiver he would later make.” The U.S. Supreme Court granted certiorari to address whether a defendant must affirmatively accept appointment of counsel in order to validly invoke the right to counsel under Jackson. Three months after oral arguments, the Court foreshadowed a potential narrowing of the Sixth Amendment guarantee of counsel, when it asked the parties to brief the following question: should Jackson be overruled?

On May 26, 2009, the Court ruled in the affirmative. In making its determination, the Court considered the right to counsel under the Fifth Amendment (the right to be informed of one’s entitlement to an attorney during custodial interrogation) and under the Sixth Amendment (the right to actual assistance of counsel at all critical stages of the prosecution). Despite the different protections and purposes of these two amendments, the Court in Montejo ultimately decided that the waiver procedure for each right should be identical. Although the Court reversed the Louisiana Supreme Court’s holding that a defendant must affirmatively accept counsel, it further declared that Michigan v. Jackson should be overturned because it was “unworkable,” and because the decision’s marginal benefits were outweighed by its substantial costs. The reasoning in Montejo rested heavily on the

14. Id. at 1261.
16. Montejo, 974 So. 2d at 1261.
17. Id.
20. While the Fifth Amendment serves to protect a suspect’s right to an attorney during custodial interrogation, Miranda v. Arizona, 384 U.S. 436, 467–68 (1966), the Sixth Amendment guarantees counsel not only at trial, but at all pretrial stages where the presence of counsel is “necessary to preserve the defendant’s... right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself.” United States v. Wade, 388 U.S. 218, 227 (1967).
22. Id. at 2088, 2091. The majority held that the benefits of the Jackson rule were “dwarfed by its substantial costs”; very few confessions obtained coercively were ever erroneously admitted at trial, while the rule consistently hindered “society’s compelling interest in finding, convicting, and punishing those who violate the law.” Id. at 2089 (citing Moran v. Burbine, 475 U.S. 412, 426 (1986)).
argument that the protections afforded by the Fifth Amendment are sufficient to shield a defendant who does not wish to communicate with officials without counsel. Under Montijo, as long as the defendant is advised of his Miranda rights before any questioning begins, and knowingly and voluntarily waives his right to counsel, the police may initiate interrogation even if the defendant invoked counsel at his first judicial appearance.

Montijo rejected the suggestion of previous courts that Miranda warnings might not suffice to waive the Sixth Amendment right to counsel during interrogation if a formally charged defendant has already retained counsel. The Court found no justification for distinguishing between represented and unrepresented defendants. However, because the Court focused primarily on those defendants who do not invoke counsel, it gave short shrift to those who do express a desire for representation. Indeed, the decision is particularly troubling for defendants who invoke their Sixth Amendment rights in non-custodial environments. Police can approach those individuals, conduct an interrogation, and encourage a waiver, even after a defendant requested and retained a lawyer. Montijo thereby creates the potential for officers to infringe upon the defendant's Sixth Amendment right to counsel at a particular stage—interrogation—where having a lawyer is integral to "protect the fairness of the trial itself." A represented defendant who has been formally charged should know the consequences implicated should he surrender the right to counsel, consequences that can be readily explained by his attorney. While we may afford God more leniency in His casual disregard of Miranda warnings and waiver standards, we cannot allow police and prosecutors to do the same at the risk of infringing on the constitutional rights of defendants.

This Note argues that Montijo v. Louisiana improperly restricts the constitutional rights of criminal defendants by creating the possibility that police will conduct interrogations, without counsel present, of defendants in non-custodial environments after their Sixth Amendment rights have attached. In light of Montijo's holding, lower courts should adopt measures to heighten protections for criminal defendants, whether through state judiciaries interpreting their current constitutions to protect the attorney-defendant relationship or through circuit courts expanding upon federal constitutional provisions. Part I examines the right to counsel under both the Fifth and Sixth Amendments, and contends that while the cases that preceded Montijo

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23. Id. at 2090.
24. Id. at 2088.
27. See id. at 2086–87.
28. See id. at 2090.
blurred the line between these two separate privileges, Montejo goes one step further by effectively merging their protections, even in settings where the defendant invokes and then subsequently waives counsel. Part I also explains the Supreme Court’s conflation of the Fifth and Sixth Amendments’ constitutional safeguards and the Court’s rejection of separate waiver requirements for represented defendants. Part II asserts that the Miranda safeguards do very little to protect defendants in non-custodial environments against coercive police tactics because in such settings these defendants receive little to no constitutional protection. This Part then demonstrates how, by removing the presumption of invalidity for waivers following a defendant’s invocation of counsel, the Court in Montejo created a window through which police can exploit defendants to secure a waiver and elicit incriminating information. Part III argues that in order to uphold the original purposes of the Fifth and Sixth Amendments, represented defendants in non-custodial settings need a heightened waiver standard. Part III explores different trial strategies that defense attorneys can use to protect clients who have waived their rights. However, because such tactics may prove ineffective, Part III ultimately contends that lower courts should mandate a more stringent waiver standard to better safeguard the constitutional rights of represented defendants.

I. THE ROAD TO MONTEJO: THE BACKGROUND OF THE RIGHT TO COUNSEL AND WAIVER UNDER THE FIFTH AND SIXTH AMENDMENTS

Part I of this Note analyzes how the decision in Montejo v. Louisiana conflates constitutional doctrine and blurs the protections of the Fifth and Sixth Amendments. Section I.A examines the relevant legal background regarding the right to counsel and the requirements for waiving that right. Section I.B analyzes the current waiver standards, demonstrating their universal applicability in both Fifth and Sixth Amendment contexts. Section I.B then argues that in failing to acknowledge separate waiver requirements for represented defendants, the Court has ignored the underlying purposes of the separate right to counsel guarantees.

A. The Fifth and Sixth Amendments Protect Two Distinct Interests

1. The Purpose of the Fifth Amendment

In order to understand how Montejo merged the Fifth and Sixth Amendments’ right to counsel and the waiver procedures, it is first important to grasp the essential differences between the two rights. The Fifth Amendment guarantees that “[n]o person 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 . . . ." 32 Although this constitutional mandate does not explicitly guarantee a right to an attorney, the privilege has been interpreted into the Fifth Amendment by *Miranda v. Arizona* as a means of protecting a suspect against self-incrimination. 33 Because self-incrimination is a danger inherent in the coercive nature of custodial interrogations, 34 a suspect in such an environment must be clearly advised of his right to remain silent, his right to counsel, and his right to have an attorney appointed for him if he is indigent. 35 Thus, while the Fifth Amendment does not necessarily secure a lawyer for defendants in custodial settings, it does entitle them to request and consult an attorney. And, should defendants choose to exercise their rights, the Fifth Amendment shields defendants from interrogation without a lawyer present. 36 However, police are not required to cease interrogation unless a defendant clearly and unambiguously expresses his desire for counsel. 37

The Court expanded the Fifth Amendment privilege in *Edwards v. Arizona*, holding that where a suspect invokes his right to counsel during a custodial interrogation, questioning must immediately cease. 38 Police may not approach the suspect for subsequent interrogation until counsel is present, 39 unless the suspect himself initiates further communication with authorities. 40 Further, while the suspect is in custody, police-initiated waivers are also invalid; 41 it is presumed that a suspect who invokes counsel considers himself unable to deal with police pressures without legal assistance. 42 Therefore, once the suspect has requested a lawyer, "any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect." 43 This double layer of prophylaxis exists not as a constitutional bar, but a court-imposed rule to protect against self-incrimination, designed to counteract the coercive atmosphere created by the interplay of police custody and police interrogation. 44

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32. U.S. CONST. amend. V.
34. *Id.* at 467 ("[W]ithout 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.").
35. *Id.* at 473.
36. *Id.* at 474.
40. *Id.* at 150; see also *Edwards*, 451 U.S. at 485.
43. *Id.* at 681; see also *Michigan v. Mosley*, 423 U.S. 96, 111 (1975).
44. *See, e.g.*, Halama, supra note 31, at 1213–14; John S. Banas, III, Case Note, *Sixth Amendment—Waiver of the Sixth Amendment Right to Counsel at Post-Indictment Interrogation*, 79
2. The Purpose of the Sixth Amendment

Contrary to the Fifth Amendment right to counsel, the text of the Sixth Amendment expressly guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." The right serves a different purpose than its Fifth Amendment corollary. While the Fifth Amendment is primarily a safeguard against government coercion, the Sixth Amendment aims to protect the integrity of the adversarial process by minimizing the imbalance between the state, which has "committed itself to prosecute," and the defendant, who is "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." By insisting that counsel is available to serve as a "medium" between the accused and the state, the Sixth Amendment attempts to establish approximate parity between the two opposing forces.

Courts and commentators alike have noted that for all criminal defendants, whatever their status, counsel is "indispensable to the fair administration of our adversarial system of criminal justice." To ensure the effectiveness of the Sixth Amendment and guarantee due process, the right to counsel attaches at "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction." The right attaches at this point because it marks the point at which the suspect becomes the accused, and the state's role shifts from investigation to accusation in its effort to secure a conviction. The right to counsel extends beyond the trial itself to every

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45. U.S. Const. amend. VI.
48. See Halama, supra note 31, at 1209.
49. See Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938) (recognizing "the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with [the] power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel"); Powell v. Alabama, 287 U.S. 45, 69 (1932) (noting the importance of counsel for both "intelligent and educated lay[men]" and for "the ignorant and illiterate, or those of feeble intellect").
50. Moulton, 474 U.S. at 168–69; Brewer v. Williams, 430 U.S. 387, 398 (1977); see also United States v. Wade, 388 U.S. 218, 227 (1967) (asserting that a lawyer is essential for a fair trial); James J. Tomkovicz, Standards for Invocation and Waiver of Counsel in Confession Contexts, 71 Iowa L. Rev. 975, 981 (1986) (noting that counsel "is the sine qua non of fairness in our adversary system").
51. Rohrghery v. Gillespie County, Tex., 128 S. Ct. 2578, 2592 (2008); see also United States v. Gouveia, 467 U.S. 180, 188 (1984) (holding that the Sixth Amendment right to counsel does not attach until the initiation of adversarial judicial proceedings); Kirby, 406 U.S. at 689 (holding that the Sixth Amendment attaches at the first judicial criminal proceeding against the defendant, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment").
52. Halama, supra note 31, at 1210; see also Powell, 287 U.S. at 57 (noting that during one of "the most critical period[s] of the proceedings"—the time of arraignment until the beginning of trial—counsel is essential because at that time "consultation, thoroughgoing investigation and preparation [are] vitally important").
"critical stage" in the prosecution.\textsuperscript{53} Such critical stages have been defined as "proceedings between an individual and agents of the State . . . that amount to 'trial-like confrontations,' at which counsel would help the accused 'in coping with legal problems or . . . meeting his adversary.'\textsuperscript{54} Thus, not only does the Sixth Amendment right protect a defendant's right to counsel during trial, but also during critical confrontations with the government where the absence of counsel might unfairly prejudice the accused's defense at trial.\textsuperscript{55}

The Sixth Amendment right to counsel has also been interpreted to prohibit certain types of police questioning in the absence of counsel.\textsuperscript{56} And, unlike the Miranda rights, once proceedings have commenced, the Sixth Amendment protections against police investigatory techniques apply both inside and outside the context of custodial interrogation. For example, in United States v. Massiah, the defendant had been charged, had obtained a lawyer, and had been released on bail.\textsuperscript{37} He made incriminating statements to a codefendant who had agreed to work with the government in its investigation, and those statements were later used as evidence against the defendant at trial.\textsuperscript{58} In Massiah, the Supreme Court held that the prosecution, by orchestrating this meeting, obtaining the incriminating statements, and relying on them at trial, had violated the defendant's Sixth Amendment right to counsel.\textsuperscript{59} Once the right to counsel has attached, the Sixth Amendment renders inadmissible statements "deliberately elicited" from a defendant in the absence of counsel,\textsuperscript{60} unless there is an express waiver of the constitutional right.

Following the Massiah line of cases, the Court continued to reinforce its rule barring elicitation of incriminating statements from defendants outside the presence of counsel. Brewer v. Williams extended the Sixth Amendment protections to cover situations wherein police officers "deliberately and designedly set out to elicit information" from indicted defendants.\textsuperscript{61} Taking

\begin{itemize}
\item \textsuperscript{53} Rothgery, 128 S. Ct. at 2591–92; see also Hamilton v. Alabama, 368 U.S. 52, 53 (1961) (determining that arraignment was a critical stage of the proceedings and thereby triggered the right to counsel). Hamilton was one of the first cases to use the "critical stage" language.
\item \textsuperscript{54} Rothgery, 128 S. Ct. at 2591 n.16 (citing Wade, 388 U.S. at 226, and United States v. Ash, 413 U.S. 300, 312–13 (1973)); see also United States v. Hidalgo, 7 F.3d 1566, 1569 (11th Cir. 1993) (finding that a critical stage includes all instances in which the advice of counsel is necessary to ensure a defendant's right to a fair trial, or in which the absence of counsel could impair the preparation or presentation of a defense).
\item \textsuperscript{55} E.g., Coleman v. Alabama, 399 U.S. 1, 7 (1970); Wade, 388 U.S. at 226.
\item \textsuperscript{57} 377 U.S. at 201.
\item \textsuperscript{58} Id. at 202–03.
\item \textsuperscript{59} Id. at 206–07.
\item \textsuperscript{60} Id. at 206.
\item \textsuperscript{61} Brewer, 430 U.S. at 403–05.
\item \textsuperscript{62} Id. at 399.
\end{itemize}
advantage of a defendant's isolation from his attorney to obtain as much 
increditing information as possible is comparable to, "and perhaps more 
effective[] than," a formal interrogation of the accused. 63 Although at the 
post-indictment stage, the government may continue its investigation of a 
defendant's suspected criminal activities, 64 "once adversary proceedings 
have commenced against an individual, he has a right to legal representa-
tion" during interrogation. 65

It is crucial to recognize the difference between the Fifth and Sixth 
Amendment rights to counsel to understand how Montejo undermines the 
purpose of the Sixth Amendment and ultimately diminishes the ability of 
future defendants to rely upon its protections. In assuming that Fifth 
Amendment prophylaxes are adequate to protect the right to counsel once 
adversarial proceedings have begun, the Court in Montejo ignored the very 
reason why the Sixth Amendment is triggered at the defendant's first formal 
judicial appearance: at that point, the role of counsel is not to provide pro-
tection against the inherently compelling pressures of police custody, but 
rather to offer meaningful assistance in mounting a defense against the "pro-
secutorial forces of organized society" by providing aid at the critical stage 
of interrogation. 66 Montejo allows authorities to circumvent the assistance of 
counsel by providing only Fifth Amendment protections in Sixth Amend-
ment contexts: that is, only prohibiting interrogation when the defendant 
invokes his right to counsel during a custodial interrogation. 67 But the Sixth 
Amendment was designed to protect more than just these limited instances. 68

The rationale behind the Sixth Amendment, that which drove the Jackson 
rule and was disregarded in Montejo, is to protect the integrity of the attor-
ey-client relationship throughout all pretrial critical stages when the state 
might take advantage of the accused or where the defendant requires advice 
on how best to confront his adversary. 69

63. Id.
64. Massiah, 377 U.S. at 207.
68. Michigan v. Jackson, 475 U.S. 625, 632 n.5 (1986) ("[A]fter the initiation of adversary judicial proceedings, the Sixth Amendment provides a right to counsel at a 'critical stage' even when there is no interrogation and no Fifth Amendment applicability."). For example, the Sixth Amendment provides a right to counsel at a post-indictment lineup even though the Fifth Amendment is not implicated. United States v. Wade, 388 U.S. 218 (1967).
B. Waiver Standards

1. Waiver Requirements Under the Fifth and Sixth Amendments

Currently, the basic requirements for waivers of the right to counsel—under both the Fifth and Sixth Amendments—are governed by the test set forth in Johnson v. Zerbst.\textsuperscript{70} There, the Court articulated that an effective waiver requires an "intentional relinquishment or abandonment of a known right or privilege."\textsuperscript{71} Subsequent Court decisions bolstered the Zerbst standard, explaining that an effective waiver of the right to counsel hinged on whether the defendant knowingly, intelligently, and voluntarily surrendered that privilege.\textsuperscript{72} When the Miranda Court created a Fifth Amendment right to counsel, it adopted the Zerbst requirements of a voluntary, knowing, and intelligent waiver.\textsuperscript{73}

In a line of cases since Miranda, the Supreme Court has developed explicit procedural requirements for waiving the Fifth Amendment right to counsel. First, no effective waiver can be given if a suspect has not previously been informed of his right to an attorney.\textsuperscript{74} If a suspect requests the presence of a lawyer while in custody, police must cease interrogation, and any subsequent waiver during a police-initiated interaction will be deemed invalid.\textsuperscript{75} The suspect himself may contact law enforcement officials and waive his right to counsel, but the court must still examine whether "the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances."\textsuperscript{76}

Sixth Amendment waiver guidelines have traditionally been far more ambiguous than those requirements set by Miranda and its progeny.\textsuperscript{77} While the Zerbst standard set a clear (albeit broad) constitutional baseline for Sixth Amendment cases, it is rarely dispositive in resolving the validity of a

\textsuperscript{70} 304 U.S. 458 (1938).
\textsuperscript{71} Id. at 464.
\textsuperscript{72} Brewer v. Williams, 430 U.S. 387, 403–04 (1977); see also Pennsylvania v. Muniz, 496 U.S. 582, 589 (1990) (holding that a suspect's waiver of the right to counsel during interrogation must be given "voluntarily, knowingly and intelligently"). Since Brewer, however, many critics assert that this knowing and voluntary standard has become an empty requirement. See infra Section III.A.2.

\textsuperscript{73} Miranda v. Arizona, 384 U.S. 436, 475 (1966). Since the Fifth Amendment right to counsel did not exist prior to the 1966 Miranda decision, courts had no reason to analyze waivers in such contexts. In contrast, because of the Sixth Amendment's explicit guarantee of the right to counsel, the Supreme Court faced the question of waiving that constitutional privilege much earlier. Even though Zerbst involved a waiver of the Sixth Amendment right to counsel, the Miranda court still elected to adopt an identical standard for Fifth Amendment waivers.

\textsuperscript{74} Id. at 471. But a suspect can validly waive his rights during a police-initiated custodial interrogation as long as he is first informed of his rights and then fails to invoke counsel. Michigan v. Mosley, 423 U.S. 96, 104–05 (1975).
\textsuperscript{76} Id. at 486 n.9. However, the court will only perform a totality-of-the-circumstances test if the waiver is deemed involuntary—for example, if there is official objective coercion. See infra Section III.A.2.

\textsuperscript{77} Banas, supra note 44, at 821–23.
waiver\textsuperscript{78}: courts are still obligated to perform a case-by-case analysis, looking at all "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."\textsuperscript{79} Moreover, waivers in the \textit{Zerbst} case dealt with relinquishment of the right to assistance of counsel at trial, not during interrogation. Finally, following \textit{Zerbst}, much of Sixth Amendment doctrine evolved in contexts of surreptitious police questioning, where the issue of waiver was irrelevant,\textsuperscript{80} since defendants were not aware they were speaking with the police agents, they had no occasion to waive their right to counsel.\textsuperscript{81} In these cases the Supreme Court found violations of the Sixth Amendment because the state "deliberately elicited" inculpatory statements from the unwitting defendant in the absence of counsel.\textsuperscript{82} The deliberate elicitation analysis includes situations where the government, through its own overt agent, acts with the purpose of eliciting incriminating information from the accused.\textsuperscript{83} Waiver was generally not an issue in these cases, and thus, confusion regarding Sixth Amendment waiver standards persisted.

\textbf{2. Merging the Waiver Analyses}

In \textit{Montejo}, the Court decided that if a defendant was issued \textit{Miranda} warnings, originally designed to protect his Fifth Amendment rights, he could validly waive his Sixth Amendment right to have counsel present during post-arraignment questioning.\textsuperscript{84} In practice, this allows police on the street to approach a defendant released on bail, secure a waiver, and begin questioning, regardless of whether the defendant has counsel. A defendant in custody has more protection, but only if he invoked his right to counsel during interrogation; if not, he too can be reapproached for questioning.\textsuperscript{85} Under

\begin{itemize}
  \item \textsuperscript{78} C. Allen Parker, Jr., Note, \textit{Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel}, 82 COLUM. L. REV. 363, 364–66 (1982).
  \item \textsuperscript{79} Johnson v. \textit{Zerbst}, 304 U.S. 458, 464 (1938).
  \item \textsuperscript{81} Echikson, \textit{supra} note 44, at 784.
  \item \textsuperscript{82} See \textit{Maine v. Moulton}, 474 U.S. 159, 176 (1985) (finding a violation of the Sixth Amendment where the state knowingly attempted to circumvent the defendant's right to counsel by using a codefendant to deliberately elicit inculpatory statements from the accused); \textit{Henry}, 447 U.S. at 274 (holding that the government violated the defendant's right to counsel by intentionally and surreptitiously creating a situation where he was likely to make inculminating statements); \textit{Massiah}, 377 U.S. at 206 (finding that inculminating information "deliberately elicited" from the defendant after he had been indicted and in the absence of counsel must be excluded from evidence).
  \item \textsuperscript{83} See \textit{Brewer v. Williams}, 430 U.S. 387, 403 (1977) (finding waiver of counsel invalid where the state had "specific intent to elicit inculminating statements" and could not show that defendant knowingly and intelligently relinquished his right).
  \item \textsuperscript{84} \textit{Montejo v. Louisiana}, 129 S. Ct. 2079, 2085–86 (2009).
  \item \textsuperscript{85} Even if that defendant did invoke counsel during custodial interrogation, once released from custody, police may reinitiate contact fourteen days later. \textit{Maryland v. Shatzer}, 130 S. Ct. 1213, 1222–23 (2010); \textit{see also infra} text accompanying notes 162–164.
\end{itemize}
the initial *Jackson* rule, these waivers would have been deemed invalid, and any subsequent statements obtained rendered inadmissible.86

*Montejo* is just the latest in a string of cases that conflate the Fifth and Sixth Amendment rights to counsel.87 Some scholars argue that the confusion between the two rights began in *Miranda v. Arizona*,88 where the Court, in efforts to protect against police coercion, held that individuals must be informed of their right to counsel prior to custodial interrogation.89 In *Michigan v. Jackson*, the Court held that the *Edwards* bar on custodial interrogations should also apply in post-arraignment settings due to the heightened importance of guaranteeing counsel once a defendant has been formally charged.90 Accordingly, if a defendant requested an attorney at his arraignment, any Sixth Amendment waiver obtained during a subsequent police-initiated custodial interrogation should be deemed invalid.91 However, while *Jackson* granted increased protections to all defendants at the commencement of adversarial proceedings, the Court based much of its opinion on the determination that “additional safeguards are necessary when the accused asks for counsel.”92 This holding allowed future Court decisions to rest on the notion that the Sixth Amendment privilege is only available to the defendant when he explicitly and affirmatively invokes counsel,93 despite the fact that no such request is needed to invoke that right.94

In *Patterson v. Illinois*, the Court shifted its waiver analysis, finding that waivers of the Sixth Amendment right to counsel occurring after a defendant had been charged were not per se invalid.95 In *Patterson*, the defendant did not have an attorney appointed, nor did he request one.96 He waived his right

87. Sarma et al., supra note 19, at 456.
88. See Jeremy M. Miller, Law and Disorder: The High Court’s Hasty Decision in *Miranda Leaves a Tangled Mess*, 10 CHAP. L. REV. 713, 714–15 (2007). Miller maintains that the *Miranda* Court should have relied upon “the Sixth Amendment right to counsel,” finding it to “attach[] when the suspect is placed in jail or even arrested” instead of creating “a non-existent aspect of the Fifth Amendment Self-Incrimination Clause.” *Id.* By doing so, Miller argues, the Court laid the groundwork for a bewildering right-to-counsel jurisprudence that is “riddled with exceptions.” *Id.* at 716.
90. *Jackson*, 475 U.S. at 632. (“[T]he Sixth Amendment right to counsel at a postarraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation.”). See supra Section I.A.2 for a discussion of the development and importance of the Sixth Amendment.
91. *Jackson*, 475 U.S. at 636.
93. Halama, supra note 31, at 1225. Admittedly, the Court in *Jackson* did try to prevent such an outcome, by affirming that “[t]he right to counsel does not depend upon a request by the defendant.” *Jackson*, 475 U.S. at 633 n.6 (citing *Brewer v. Williams*, 430 U.S. 387, 404 (1977)). Future courts, however, gave short shrift to this declaration.
94. *Brewer*, 430 U.S. at 404; *Carnley v. Cochran*, 369 U.S. 506, 513 (1962) (“[T]he right to be furnished counsel does not depend on a defendant’s request.”).
95. 487 U.S. 285 (1988); see also *Banas*, supra note 44, at 823.
to counsel during post-indictment interrogation, and then made voluntary, inculpatory statements at interviews initiated by law enforcement officials. Distinguishing the case from Jackson, where the accused requested a lawyer, the Patterson Court found that even though the defendant’s right to counsel had attached, he failed to exercise his right to an attorney because he did not explicitly assert his desire for counsel; therefore, his waiver was valid. The Court analogized the situation to a pre-indictment interrogation, where the suspect has a constitutional privilege, but does not rely upon it. As in Fifth Amendment context, authorities are only barred from interrogation when the defendant actively invokes his right to counsel, thereby triggering Sixth Amendment protections.

The Court’s holding in Patterson, however, was limited to situations where the defendant has been told of his indictment but has not requested, nor obtained, counsel. Moreover, the Court was clear to stress the point that the protections of Jackson were still in effect. Finally, although the Court did find that for purposes of post-indictment interrogations, Miranda warnings are generally sufficient to establish a knowing and intelligent waiver of the Sixth Amendment right to counsel, it further qualified its holding. Because the Sixth Amendment serves as an important safeguard of the attorney-client relationship and its protections extend beyond those 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.” Thus, the Patterson Court suggested that in certain situations—particularly when the defendant was represented or the police sought to engage in surreptitious questioning—Miranda warnings would not be adequate to alert a defendant to the rights he was surrendering, nor could they uniformly establish an effective waiver of the right to counsel.

97. Id. at 288.
98. Id. at 290–91.
99. Id. at 291.
100. Id.; see also Moran v. Burbine 475 U.S. 412, 420–21 (1986) (holding that a defendant who did not request counsel may validly waive his right to counsel at a pre-indictment proceeding, despite the fact that a lawyer had been retained for him).
101. Patterson, 487 U.S. at 291.
102. Id. at 293 n.5 (“Moreover, even within this limited context, we note that petitioner’s waiver was binding on him only so long as he wished it to be. Under [Michigan v. Jackson], at any time during the questioning petitioner could have changed his mind, elected to have the assistance of counsel, and immediately dissolve the effectiveness of his waiver with respect to any subsequent statements. . . . Our decision today does nothing to change this rule.”) (internal citations omitted).
103. Id. at 296 (“As a general matter, then, 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.”) (internal citations omitted).
104. Id. at 297 n.9.
105. Id. at 296–97 n.9 (“[N]ot all Sixth Amendment challenges to the conduct of postindictment questioning will fail whenever the challenged practice would pass constitutional muster under Miranda. For example, we have permitted a Miranda waiver to stand where a suspect was not told that his lawyer was trying to reach him during questioning; in the Sixth Amendment context, this
3. Montejo and Its Implications for Sixth Amendment Waivers

Although the Court in Patterson left the door open for a more extensive definition of Sixth Amendment waiver standards, the unequivocal Montejo reaction was to turn the lock and hide the key. Despite Jackson's clear intent to bolster "the right to rely on counsel as a 'medium' between [the defendant] and the State" at all critical confrontations following the initiation of formal charges, and despite the fact that the word "badger" never appears in the Jackson majority opinion, the Montejo Court held that the Jackson rule served only to protect against police badgering a defendant into waiving his Sixth Amendment right to counsel. Relying on this logic, Montejo held that because the Miranda warnings protect against badgering and police compulsion, in cases involving waivers of the right to counsel, a waiver of Miranda rights will typically suffice to waive the Sixth Amendment right during interrogation. Therefore, due to the protections provided by Miranda and its progeny, the Jackson rule was unnecessary. As noted, however, the Miranda warnings do not suggest to a defendant the implications of what he is giving up. Moreover, even assuming that protection against badgering was the basis for the Jackson rule, allowing police to secure waivers with Miranda warnings alone does not fully protect against police compulsion. Particularly, represented defendants in non-custodial environments have little protection against police who can navigate around the purpose of the Sixth Amendment, utilizing the Montejo loophole to convince a defendant to waive his constitutional right.

II. The Effects of Montejo on Represented Defendants in Non-Custodial Environments

Part II asserts that the Court's failure in Montejo to fully distinguish between the Fifth and Sixth Amendments will impair the rights of non-custodial defendants who have requested counsel. First, Section II.A highlights the differences between custodial and non-custodial questioning waiver would not be valid. Likewise a surreptitious conversation between an undercover police officer and an unindicted suspect would not give rise to any Miranda violation as long as the 'interrogation' was not in a custodial setting; however, once the accused is indicted, such questioning would be prohibited."


107. Montejo v. Louisiana, 129 S. Ct. 2079, 2086 (2009). This issue was a serious source of contention between the majority and dissent. While Justice Scalia declined to recognize the historical rationale for Sixth Amendment protections and the different purposes of the two amendments, the point was discussed at great length by the dissent. Id. at 2096–97 (Stevens, J., dissenting).

108. See id. at 2085–86 (majority opinion).

109. Id. at 2089–90.

110. See Patterson, 487 U.S. at 310 (Stevens, J., dissenting).

111. See infra Section II.A.

112. Throughout this Note I will refer to "non-custodial defendants." This terminology is a short-hand reference to defendants who face police encounters in non-custodial settings.
and discuss the original rationale for heightened protections in custodial interrogation. Section II.B illustrates that, as a result of the increased protections for defendants in custody, police have become adroit in the realm of non-custodial investigation, developing coercive techniques that pose concerns about the voluntariness of a defendant’s waiver. Section II.C then demonstrates how, in a post-Montejo world, police are able to use such coercive tactics on represented defendants. Montejo’s holding creates the risk that police will adopt strategies that might violate defendants’ constitutional rights and the guarantee of the right to counsel during interrogation.

A. Montejo and the Relevance of Custodial Interrogation

The protections eroded by the Montejo decision were necessary to prevent police from interrogating defendants in non-custodial situations. The holding allows police to question defendants outside of custody even if they invoke their right to an attorney. Whereas under Miranda suspects who had not yet been formally charged always had less protection in non-custodial settings, Montejo extends the custody line past a defendant’s first judicial appearance, continuing to grant fewer protections to those outside of custody even after attachment of the Sixth Amendment right to counsel. The original justifications for distinguishing between custodial and non-custodial situations do not warrant the diminished protections authorized by Montejo. The tactics used by police to secure waivers and obtain incriminating information are identical in both Fifth and Sixth Amendment settings, and such tactics can significantly undermine the defendant’s relationship with his attorney.

Traditionally, interrogations have been understood to be necessarily custodial—a notion initially promulgated by Miranda. There, the Court defined interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” The Court found that such police interrogations were inherently intimidating and involved distinct pressures designed to compel statements and confessions in a manner violative of a suspect’s right against self-incrimination. But, while Miranda did strive to diminish the coercive nature of “police-dominated” interrogations by demanding enhanced procedural safeguards, the Court assumed that only interrogations in custody contain inherently compelling pressures. As a

113. Montejo, 129 S. Ct. at 2090.
115. Id.
116. Id. at 444, 458, 467.
117. Id. at 444–45.
118. Charles D. Weisselberg, Mourning Miranda, 96 CALIF. L. REV. 1519, 1547 (2009). Weisselberg explains that the Miranda Court “assumed that the element of ‘custody’ would effectively separate interrogations that contain inherently compelling pressures from those that do not.” Id. After conducting a comprehensive study of several police departments, he found that in order to
result, it suggested that \textit{Miranda}'s prophylactic protections applied only to custodial defendants.\footnote{Miranda, 384 U.S. at 468.}

Because \textit{Miranda} referred specifically to custodial interrogations, only defendants in police custody are entitled to its protections,\footnote{Id. at 471 (finding that a suspect must be informed of his right to counsel before he can validly waive his rights).} and to the related rights guaranteed by \textit{Edwards v. Arizona}.\footnote{451 U.S. 477, 484–85 (1981) ("[A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication . . . ."). See supra Section I.B.1.} Subsequent Court holdings have clung to this notion, refusing to grant defendants constitutional protections when facing questioning in non-custodial environments.\footnote{Beheler, 463 U.S. at 1123; Oregon v. Mathiason, 429 U.S. 492, 494–95 (1977).} Additionally, the Supreme Court has explicitly acknowledged that it is insignificant if defendants face coercion in non-custodial situations.\footnote{Beheler, 463 U.S. at 1125 ("\textit{Miranda} warnings are not required 'simply because the questioning takes place in the station house or because the questioned person is one whom the police suspect."). Mathiason, 429 U.S. at 495 ("[A] noncustodial situation is not converted to one in which \textit{Miranda} applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.").")} Instead of focusing on \textit{Miranda}'s concern for compelling police pressures that might violate a defendant's constitutional rights, the Court has explained that the only relevant \textit{Miranda} consideration is whether there has been a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.\footnote{Beheler, 463 U.S. at 1125 (quoting Mathiason, 429 U.S. at 495).} If no such restriction is found, officers are granted substantial freedom in their investigatory techniques.

\textbf{B. Deceptive Police Techniques and the Focus on Non-Custodial Questioning}

\textit{Montejo}'s effect of weakening defendant rights in non-custodial environments becomes more meaningful as police often focus on non-custodial interrogations. Due to the protections automatically triggered when a suspect invokes counsel during a custodial interrogation,\footnote{Beheler, 463 U.S. at 1125 ("\textit{Miranda} warnings are not required 'simply because the questioning takes place in the station house or because the questioned person is one whom the police suspect."). Mathiason, 429 U.S. at 495 ("[A] noncustodial situation is not converted to one in which \textit{Miranda} applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.").")} and the failure of the Court to provide similar protections to defendants outside of custody, police have made significant efforts to conduct questioning in ostensibly
“non-custodial” settings. A significant body of evidence, including multiple studies of police departments, the comments of academic scholars and even recommendations from a widely accepted officer interrogation manual, suggest that since Miranda, police have intentionally focused their efforts on securing inculpatory statements from defendants in non-custodial interrogations. They do so because a suspect may be less likely to realize that he should seek the assistance of counsel, and more likely to inadvertently reveal incriminating evidence. A recently published police manual explains to officers the importance of avoiding “unnecessary” Miranda warnings in order to secure the maximum number of admissible confessions. It advises:

Because warnings are only required prior to custodial interrogation, one way to minimize the adverse impact of Miranda on investigations is to try to conduct interrogations whenever possible in non-custodial settings (such

126. Richard A. Leo, From coercion to deception: the changing nature of police interrogation in America, 18 CRIME L. & SOC. CHANGE 35, 43-44 (1992). However, non-custodial scenarios are not always easy to identify. While the traditional assumption of non-custodial is at home or on the street, a lack of custody has also been found when the suspect is questioned in his car or at the police station. See, e.g., Berkemer v. McCarty, 468 U.S. 420 (1984); Beheler, 463 U.S. 1121. Indeed, a prisoner rereleased into the general prison population has also been deemed not to be in custody. See Maryland v. Shatzer, 130 S. Ct. 1213, 1224 (2010); infra notes 162-164 and accompanying text.

127. See, e.g., Jerome H. Skolnick & Richard A. Leo, The Ethics of Deceptive Interrogation 11 CRIM. JUST. ETHICS, Winter/Spring 1992, at 3, 5 ("[P]olice will question suspects in a 'non-custodial' setting ... so as to circumvent the necessity of rendering warnings. This is the most fundamental, and perhaps the most overlooked, deceptive stratagem police employ."); Weisselberg, supra note 118, at 1542-43 (quoting a police manual instructing its officers that if "the subject appears to be uncooperative and not likely to waive, consider taking the coerciveness (i.e., the 'custody') out of the interrogation by simply informing him that he is not under arrest ... and interview the subject without a Miranda admonishment and waiver.").

128. See, e.g., Mark Berger, Compromise and Continuity: Miranda Waivers, Confession Admissibility, and the Retention of Interrogation Protocols, 49 U. PITT. L. REV. 1007, 1020 (1988) (stating that police will be able to undertake interrogation "in a non-custodial environment in order to avoid having to administer warnings and secure waivers"); Irene Merker Rosenberg & Yale L. Rosenberg, A Modest Proposal for the Abolition of Custodial Confessions, 68 N.C. L. REV. 69, 112 (1990) (suggesting that police circumvent Miranda by conducting coercive non-custodial interviews in suspects' homes); see also Yale Kamisar, "Custodial Interrogation" Within the Meaning of Miranda, in CRIMINAL LAW AND THE CONSTITUTION—SOURCES AND COMMENTS 335, 341 (John W. Reed et al. eds., 1968) ("I think it is quite legitimate to read Miranda as encouraging the police to engage more extensively in pre-arrest, pre-custody, pre-restraint questioning.").

129. FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 506-07 (4th ed. 2004) (The Supreme Court's decision in Mathiason "is an excellent illustration of the advisability of arranging, whenever feasible, for an interrogation opportunity based upon a consensual situation. A suspect who has willingly consented to come to or be taken to the place of interrogation ... is not in custody . . .").


131. See Weisselberg, supra note 118, at 1547 (finding that minimization techniques—those in which the interrogator justifies or downplays the significance of the crime—used in non-custodial environments may create sufficient compelling pressures to induce the defendant to confess). But see Cassel & Hayman, supra note 130, at 883-84 (finding that police were somewhat less successful in non-custodial interviews, but also noting that police effectively used telephone calls to question non-custodial defendants).
as at the suspect’s home or on the street, without arrest-like restraints). 

It is also possible to interrogate an un-arrested suspect at the police station without warnings, if the situation is handled properly.

Both courts and scholars have recognized the ability of officers to transform questioning scenarios and employ softly coercive techniques that create, in non-custodial settings, the very compelling pressures that Miranda sought to eliminate. Because interrogations are conventionally seen as custodial, law-enforcement officers have shied away from the phrase “interrogation” when referring to their questioning, adopting instead the less-threatening term “interview,” regardless of when or where the questioning takes place. This reflects a conscious effort by law enforcement to reduce the perception of intimidation associated with questioning, despite the fact that questioning techniques are virtually indistinguishable in the two situations. Thus, merely by engaging in some semantic manipulation, police can transform what might otherwise be considered an “interrogation” into an “interview,” thereby “removing police questioning from the realm of judicial control.”


E.g., Beckwith v. United States, 425 U.S. 341, 347–48 (1976) (“[A non-custodial interrogation may] be characterized as one where ‘the behavior of ... law enforcement officials was such as to overbear petitioner’s will to resist and bring about confessions not freely self-determined . . . .'”) (citing Rogers v. Richmond, 365 U.S. 534, 544 (1961)). Cf. State v. Haddock, 897 P.2d 152, 162 (Kan. 1995) (finding an interview non-custodial that took place at a police station where the defendant asked if the officer thought he needed a lawyer and the officer responded that he did not at that point).

E.g., Weisselberg, supra note 118, at 1545–47. Weisselberg studied police departments in California and concluded that the label of “custody” does not always identify interrogations that contain compelling pressures; rather, questioning in technically non-custodial settings, when coupled with different interrogation techniques, may actually be coercive. Cf. George C. Thomas III, The End of the Road For Miranda v. Arizona?: On the History and Future of Rules For Police Interrogation, 37 AM. CRIM. L. REV. 1, 15, 18 (2000). While a broad reading of Miranda suggests that “every statement is compelled if made in response to custodial police interrogation,” id. at 14, a statement still can be compelled if given involuntarily, regardless of where it was made.

In academic scholarship, the term “interview” tends to refer to a non-accusatory process, the purpose of which is to gather information, while an “interrogation” is by nature accusatory and custodial, involves persuasion, and the suspect is believed to be guilty. INBAU, supra note 129, at 4–5.

See David E. Zulawski & Douglas E. Wicklander, Practical aspects of Interview and Interrogation 4–5 (2d ed. 2002) (explaining that in practice, the terms “interview” and “interrogation” are often used interchangeably); see also Real Police Magazine, Thread: interview vs. interrogation, http://www.realpolice.net/forums/ask-cop-112/29044-interview-vs-interrogation.html (last visited Aug. 19, 2010). This posting site, though admittedly informal, does represent at least the possibility that police affirmatively try to question suspects in less restrictive environments.

Leo, supra note 126, at 44; see also Skolnick & Leo, supra note 127, at 5.
eventually issued. One common method is known as the "minimization" technique, wherein an officer will justify or minimize the gravity of the offense, causing the suspect to wrongly infer he will be treated leniently and confess. Alternatively, police often rely on "maximization"—a strategy designed to increase the suspect's anxiety and foster a sense of hopelessness. Officers may exaggerate the strength of the evidence against the defendant or inflate the magnitude of his charges.

C. Use of Coercive Techniques Once the Sixth Amendment Right to Counsel Has Attached

Proponents of the new Montejo rule may respond that concerns about coercive police tactics are unwarranted after the attachment of a defendant's Sixth Amendment right to counsel due to the protections guaranteed by Miranda. When police seek to question defendants after their first formal appearance, Miranda warnings, followed by an effective waiver of counsel, are mandatory. Even when warnings are given to defendants, however, techniques used by officers in non-custodial settings could be effective manipulation tools in custodial settings as well; these techniques may be used not only to gain information, but also to secure waivers of the right to counsel. Police can manipulate the reading of warnings themselves, or

138. See Leo, supra note 126, at 53–54 (concluding that "the use of force and duress to elicit confessions has given way to psychologically sophisticated tricks, ploys, and stratagems," the latter of which still entail "morally troubling social costs").


140. See Feld, supra note 139, at 274–77; see also Kassin & Gudjonsson, supra note 139, at 43.

141. See, e.g., Walker v. Goord, 427 F. Supp. 2d 272, 276–77 (W.D.N.Y. 2006) (a confession was held to be voluntary where the officer told the suspect that the victim had uttered a dying declaration naming the suspect as the killer, and that several other witnesses saw the suspect flee the scene of the crime, even though the officer later admitted his statements regarding the dying declaration and other eyewitness were untrue); see also Richard J. Ofshe & Richard A. Leo, The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions, 16 STUD. L., POL., & SOC'Y 189, 192 (1997).


143. See United States v. Miller, 984 F.2d 1028, 1031–32 (9th Cir. 1993) (finding a voluntary waiver where, prior to questioning, a non-custodial suspect spoke with an agent who was also a Mormon priest). The agent-priest reminded the suspect about potential spiritual ramifications, the belief in the need to repent, and the fact that "this belief stipulated the need . . . for confession . . . including a candid account of all that had taken place, so that an assessment could be made of the harm done." Id.; see also Thomas, supra note 134, at 18–19 ("Judges seem to assume that once a suspect knows his rights and chooses to talk to the police, any subsequent statement must be voluntary. But the pressure and trickery that can follow a waiver make this assumption doubtful.").

144. In their interviews with police and investigators, Skolnick and Leo find that police "consciously recite the [Miranda] warnings in a manner intended to heighten the likelihood of eliciting a
engage in a combination of practices known together as “softening up” the accused. The latter method may include understating the importance of Miranda warnings; seeking to persuade suspects to waive by explaining “that there are two sides to every story and that [officers] will only be able to hear the suspect’s side of the story if he waives his rights and chooses to speak to them,” and “describing the evidence against [defendants] and making their situations appear hopeless” before issuing warnings or obtaining a waiver. By illustrating the possible consequences of refusing to speak with police, officers can influence a defendant’s decision to waive his rights, especially if there are only vague limits on law enforcement in Sixth Amendment contexts.

Indeed, one of the most troubling aspects of Montejo is that it grants police additional opportunities to conduct the tactics mentioned above, even on non-custodial defendants who have explicitly requested counsel. Though police or prosecutors may suggest that a represented defendant might simply change his mind about waiving counsel, such claims are suspect since represented defendants “who assert their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations.”

A represented defendant should not be barred from waiving his rights or prevented from confessing, if he so chooses. However, he should be entitled to make that choice with the assistance of his attorney, who can guide him on what to say to police officers and to the court, and how best to secure an waiver”—i.e., “in a flat, perfunctory tone of voice to communicate that the warnings are merely a bureaucratic ritual.” Skolnick & Leo, supra note 127, at 5; see also Weisselberg, supra note 118, at 1564.


146. Leo, supra note 145, at 662–63.

147. Id. at 664.

148. Weisselberg, supra note 118, at 1548. Weisselberg describes “softening up” in the context of Fifth Amendment violations, explaining that it can happen in one of two ways: 1) the officer asks questions, receives incriminating statements, and then issues warnings, only to have the defendant subsequently confess; and 2) the officer may discuss the case at length with the defendant, detailing the charges and possible consequences (either in a deceptive manner or not) and then give warnings. Id. at 1554–62. The second technique is particularly relevant in the Sixth Amendment context.

149. See, e.g., Frazier v. Cupp, 394 U.S. 731, 737–39 (1969); United States v. Miller, 984 F.2d 1028, 1031 (9th Cir. 1993); cf. Ofshe & Leo, supra note 141, at 192 (finding that, while not overtly coercive, the indirect interrogation method of “communicating benefits or harms is little more than a method for eliciting confessions by circumventing well established legal protections”).

150. It is true that many states still discourage police from initiating interaction with represented defendants without first speaking to counsel. For example, the Rules of Professional Conduct endorsed by the American Bar Association generally prohibit prosecutors from making direct contact with represented defendants, and police officers have been trained to refrain from approaching represented defendants absent direction from prosecutors. Montejo v. Louisiana, 129 S. Ct. 2079, 2098 n.4 (2009) (Stevens, J., dissenting). However, this does not mean that such police practice is universally accepted. Additionally, Montejo allows police to increasingly push the boundaries of Sixth Amendment limitations.

advantageous bargain.152 Once a defendant invokes his right to counsel, police should not be able to continue their manipulation of interrogative settings in the absence of a lawyer because of the greater risk for constitutional violations of that right.153 And, although police may purport to be able to make offers in the best interest of defendants, it is doubtful that, once adversarial proceedings have commenced, one could “wear the hat of an effective adviser to a criminal defendant while at the same time wearing the hat of a law enforcement authority.”154

Ideally, police would always respect the first invocation of counsel, and refrain from repeatedly requesting that a defendant reconsider his waiver decision. But, realistically, once state forces are committed to the prosecution of one individual, if there is a possibility for police to accumulate additional incriminatory evidence and bolster a case against the accused, it may be in their best interest to reinitiate contact, particularly if the prosecution is not confident in the trial outcome.155 This is made evident by a recent law enforcement magazine demonstrating that police can and will take advantage of this new opportunity for questioning:

Under the Montejo ruling, it will now be possible for law enforcement officers to attempt to obtain a waiver and an admissible statement from a defendant without running afoul of the Sixth Amendment, even after he has been indicted or has made his first court appearance on the case and has an attorney, or has asked for one. The court imposed no time limit on this new opportunity for questioning, which could presumably occur even during pretrial proceedings or the trial itself.156

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152. E.g., United States v. Satterfield, 417 F. Supp. 293, 296 (S.D.N.Y.), aff’d, 558 F.2d 655 (2d Cir. 1976) (explaining that after indictment, a defendant “cannot make any arrangement with agents or prosecutor that is not subject to ultimate approval by the court, and counsel is obviously important to advise him on what terms such approval is likely to be forthcoming and how best to obtain it”).

153. The Montejo Court suggests as much, explaining that the decision applies to “defendant[s] like Montejo, who ha[ve] done nothing at all to express” their desire for counsel, nor demonstrated any unwillingness to speak without an attorney, as opposed to those defendants who have indicated their desire for a lawyer. Montejo, 129 S. Ct. at 2086-87. The majority further asserts that the Fifth and Sixth Amendment guarantees are “meant to prevent police from badgering defendants into changing their minds about their rights” once they have decided a lawyer should be present; thus, it would seem that if a defendant did invoke counsel, he should not be drawn into an interrogation, nor should he have to continuously reassert his rights. Id. at 2087. The Court acknowledges that it may be “reasonable to presume from a defendant’s request for counsel that any subsequent waiver of the right was coerced”; it is only when “a lawyer was merely ‘secured’ on the defendant’s behalf” that such a presumption cannot be entertained. Id.

154. Patterson v. Illinois, 487 U.S. 285, 310 (1988) (Stevens, J., dissenting) (“[T]he adversary posture of the parties, which is not fully solidified until formal charges are brought, will inevitably tend to color the advice offered.”).

155. Cf. Kirby v. Illinois, 406 U.S. 682, 689–91 (1972) (explaining that following the “initiation of judicial criminal proceedings,” once “the government has committed itself to prosecute” and “the adverse positions of government and defendant have solidified,” his primary protections are the “explicit guarantees of the Sixth Amendment”).

By limiting its holding to custodial situations, the *Montejo* majority created a loophole through which police may approach (and reapproach) represented defendants in efforts to secure a waiver. The Court briefly acknowledged this possibility, but quickly dismissed any concerns: “uncovered situations are the least likely to pose a risk of coerced waivers. When a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering.” *Montejo* thereby suggests that it is the defendant’s responsibility to avoid being badgered, contrary to prior precedent placing an affirmative obligation on police officers to abstain from harassing the accused. The Court in *Montejo* was convinced that badgering is not a concern due to the prophylactic protections secured by *Miranda* and its progeny. These cases, however, involve custodial interrogations, and thus offer little guidance as to permissible police behavior in non-custodial settings. *Montejo* disregards the fact that compelling pressures can still exist in non-custodial situations. Since, prior to *Montejo*, police were forbidden from contacting any represented defendants, what police actions would constitute badgering in Sixth Amendment contexts remains unclear. Lower courts will likely be inconsistent in their definitions of badgering, creating a distinct possibility that defendants in some jurisdictions will be subjected to a much more visible police presence and their coercive tactics, and thus feel a pressure to waive their rights.

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158. *See*, e.g., Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983) (reaffirming that the prophylactic rule of *Edwards*—prohibiting police from approaching a defendant once he has invoked counsel—is “designed to protect an accused in police custody from being badgered by police officers”); Arizona v. Roberson, 486 U.S. 675, 686 (1988) (finding that the *Edwards* rule against police badgering prohibited an officer from reinitiating contact even to pursue a separate investigation because “to a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling”). Further, as the Court clarified in *Smith v. Illinois*, 469 U.S. 91, 98–99 (1984), the *Edwards* prohibition was extended to prevent any “‘badger[ing]’ or ‘overreaching’—explicit or subtle, deliberate or unintentional” that “might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel’s assistance.”

159. As the majority explained:

Under the *Miranda-Edwards-Minnick* line of cases . . . a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but ‘badgering’ by later requests is prohibited.” *Montejo*, 129 S. Ct. at 2090. *Miranda* and *Edwards* did not explicitly consider police “badgering,” but the Court has since held that the protections of *Edwards*—prohibiting re-interrogation of an accused in custody if he has clearly invoked his right to counsel—are “designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.


160. *See supra* Section II.B.

161. It is important to note that while *Montejo* does increase access of police and prosecutors to represented defendants, a recent memorandum from a local prosecutor’s office indicates that they may be reticent to engage in such behavior. *See* Email from Timothy McMorrow, Assistant Prosecuting Attorney, Kent County Prosecutor’s Office, to Janice Kittel Mann, Assistant Prosecuting
Furthermore, the exposure of defendants to questioning in non-custodial situations is exacerbated by a recent decision that weakened the very protections that the *Montejo* majority relied upon as sufficient to safeguard represented defendants. In *Maryland v. Shatzer*, the Court held that even when a custodial defendant invokes his *Edwards* right to counsel, which originally barred any further police interrogation, police may reapproach that defendant for questioning fourteen days after he is released from custody.\(^1\) And, while release from custody may mean the defendant is out on bail, it can also mean that he merely returned to the general prison population—a setting that *Shatzer* deemed non-custodial.\(^2\) Together, the holdings of *Shatzer* and *Montejo* suggest that if police attempt to engage in custodial interrogation with a defendant post-arraignment, and if that defendant invokes his right to counsel, police can merely release that defendant and then reapproach him fourteen days later. Although such tactics would hopefully render any waiver involuntary, it does not preclude the possibility that upon further questioning, a defendant might feel his access to counsel had been denied and waive his rights, particularly if in the interim fourteen-day period he had returned to his prison cell and lacked the opportunity to seek advice from his attorney, family, or friends.\(^3\)

**D. Montejo’s Implications for Vulnerable Defendants**

*Montejo* creates the risk that police, in attempting to secure a waiver, might engage in constitutionally questionable conduct, and the decision thus poses a danger to all represented defendants. However, it presents potentially more serious concerns about the guarantee of counsel during interrogation for less sophisticated defendants. The Supreme Court has noted the essential value of counsel for mentally retarded, illiterate, uneducated, and juvenile defendants.\(^4\) But, as noted by numerous studies,

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\(^2\) *Id.* at 1224–25.
\(^3\) *Id.* at 1232, 1234 (Stevens, J., concurring).
\(^4\) *See Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002) (“Mentally retarded defendants may be less able to give meaningful assistance to their counsel and . . . in the aggregate face a special risk of wrongful execution.”)).
\(^6\) *Von Moltke v. Gillies*, 332 U.S. 708, 720 (1948) (plurality opinion) (“This Court has been particularly solicitious to see that [the Sixth Amendment] right was carefully preserved where the accused was ignorant and uneducated . . . ”).
\(^7\) *See Powell v. Alabama*, 287 U.S. 45, 57, 68–69 (1932). There, the Court emphasized the importance of counsel to those with special needs:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his
mentally handicapped and adolescent defendants have serious difficulties comprehending the right to counsel during interrogation. The fact that, post-
Montejo, represented defendants have to repeatedly reassert their desire to have an attorney present during interrogation is confusing and counterintuitive, not only for the average defendant, but especially for those who are more vulnerable. For example, at the initial court proceeding, a defendant might invoke counsel and have an attorney appointed. Then, despite that request, police could initiate interrogation and read Miranda warnings that again inform the defendant of his right to have counsel appointed, notwithstanding the fact that he had already retained counsel. These conflicting scenarios "would be confusing to anyone, but would be especially baffling to defendants with mental disabilities or other impairments."

Finally, because juvenile, mentally impaired, and vulnerable defendants all "share characteristics that make them highly suggestible and disposed to defer to authority figures," they may waive their rights at the suggestion of police, thinking that cooperation with law enforcement will be beneficial to their case, without fully realizing the consequences of surrendering counsel. Therefore, in order to sufficiently protect vulnerable defendants and to prevent "exploitation by the State of an opportunity to confront the accused without counsel being present," it is necessary to adopt measures prohibiting defense, even though he ha[d] 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. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Id. See generally Brief for The National Association of Criminal Defense Lawyers et al. as Amici Curiae on the Supplemental Question Supporting Petitioner, Montejo v. Louisiana, 129 S.Ct. 2079 (2009) (No. 07-1529) [hereinafter NACDL Brief] (arguing that vulnerable defendants, including juveniles, are in special need of the assistance of counsel).

169. NACDL Brief, supra note 168, at 8–10. The brief discusses several important studies involving the right to counsel. In the first experiment, a test was designed to measure mentally disabled subjects on their understanding of their right to an attorney; the average for that group was 35 percent. Morgan Cloud et al., Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects, 69 U. Chi. L. Rev. 495, 556–57 (2002). The other studies found that, among juvenile suspects, the least understood of the Miranda rights was the right to counsel during questioning. Thomas Grisso, Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis, 68 Calif. L. Rev. 1134, 1154 (1980). Additionally, a waiver or acknowledgement of the Miranda rights may only “reflect compliance with authority rather than an actual subjective appreciation of the meaning of the warning.” Barry C. Feld, Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice, 91 Minn. L. Rev. 26, 44, 78 (2006).

170. The Montejo dissent details the inadequacy of Miranda warnings in informing already represented defendants as to what rights they are actually giving up:

While it can be argued that informing an indicted but unrepresented defendant of his right to counsel at least alerts him to the fact that he is entitled to obtain something he does not already possess, providing that same warning to a defendant who has already secured counsel is more likely to confound than enlighten.

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

171. NACDL Brief, supra note 168, at 7–8.

172. Id. at 8.

173. Id. at 7–8.
or severely limiting the ability of represented defendants to waive their right to counsel following the initiation of formal charges.\textsuperscript{174}

III. HOW TO UPHOLD THE CONSTITUTIONAL GUARANTEE OF THE RIGHT TO COUNSEL

Part III analyzes different opportunities to better safeguard the right to counsel for non-custodial represented defendants. Section III.A suggests different strategies available to defense attorneys to increase their clients' protections: first, they may attempt to alter the current conception of custodial interrogation; and second, they can dispute the validity of the represented defendants' waiver. However, Section III.A ultimately recognizes that such tactics may prove ineffective. Therefore, because such strategies will not fully protect the Sixth Amendment right to counsel, Section III.B concludes that state and federal judiciaries should adopt a new rule that will successfully shield represented non-custodial defendants from the pressure to waive their right to counsel.

A. Strategies for Defense Counsel

1. Arguing that the Interrogation Took Place in Custody

While this solution is insufficient to wholly remedy the problems caused by \textit{Montejo}, in some cases, defense attorneys seeking to increase the protections available to a non-custodial client may rely on \textit{Miranda} protections and attempt to expand the definition of custodial environment. As discussed at length in Part II, the prophylactic rights guaranteeing counsel are generally more accessible to custodial defendants; thus, there is great incentive for the defense to persuade the court of the existence of custody. If an attorney could establish that the defendant was in a custodial environment and police either failed to issue warnings or interrogated the defendant after he had invoked counsel (the more likely scenario), any information procured from the defendant would be inadmissible because the officer had initiated contact with a custodial defendant, and his waiver would be invalid.\textsuperscript{175}

Convincing the court that a defendant was interrogated while in custody may be feasible since the presence of custody requires a fact-specific, case-by-case analysis. First, courts should examine the objective circumstances surrounding the interrogation, as opposed to "the subjective views harbored by either the interrogating officers or the person being questioned."\textsuperscript{176} Second, courts must consider whether a reasonable person in those circumstances would have felt that he was not "at liberty to terminate the


\textsuperscript{175} \textit{Montejo}, 129 S. Ct. at 2081 ("Under \textit{Miranda}, any suspect subject to custodial interrogation must be advised of his right to have a lawyer present. \textit{Under Edwards}, once such a defendant 'has invoked his [\textit{Miranda}] right,' interrogation must stop. And under \textit{Minnick v. Mississippi}, no subsequent interrogation may take place until counsel is present.") (citations omitted).

\textsuperscript{176} Stansbury v. California, 511 U.S. 318, 323 (1994) (per curiam).
interrogation and leave” the situation.\(^{177}\) The Supreme Court requires a factual ad hoc analysis for each case, considering how a reasonable person “would gauge the breadth of his or her ‘freedom of action.’”\(^{178}\)

Beyond this intensive factual inquiry, there is also significant divergence between federal and state courts in their definitions of custody. Jurisdictions consider a variety of factors as relevant in the custody determination, including 1) the number and nature of the interrogator(s)—for example, if the officer is in uniform, carrying a visible weapon, or is known and trusted by the suspect;\(^ {179}\) 2) the nature of the suspect—his age, intelligence, knowledge, sophistication, and mental and physical condition may be relevant;\(^ {180}\) 3) the time and place of the interrogation; 4) the nature of the interrogation—including the duration, number of questions asked, tone of questions, formality of answers (spontaneous oral or signed written statement), whether the defendant was isolated, and whether the defendant was confronted with unfavorable evidence;\(^ {181}\) and 5) the progress of the investigation at the time of the interrogation.\(^ {182}\) Additionally, some lower courts have performed an even more extensive analysis, accounting for the subjective views of the defendant and law enforcement officials.\(^ {183}\) Therefore, depending on the


\(^{178}\) Stansbury, 511 U.S. at 325.

\(^{179}\) People v. Cleburn, 782 P.2d 784, 786 (Colo. 1989) (considering the presence of two armed law enforcement officers and reliance upon the friendly relationship between the officer and defendant to subtly coerce a waiver as pointing in favor of custody).

\(^{180}\) People v. Vasquez, 913 N.E.2d 60, 65 (Ill. App. Ct. 2009) (considering the age, intelligence, and mental makeup of the accused).

\(^{181}\) Cleburn, 782 P.2d at 786 (considering the fact that officers initiate the interaction and the length of the communication as determinative factors in the custody determination).

\(^{182}\) See, e.g., United States v. Grey Water, 395 F. Supp. 2d 850, 853 (D. N.D. 2005), quoting the Eighth Circuit, which identified six factors used to determine when, under the totality of the circumstances, a suspect is in custody:

1. whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest;
2. whether the suspect possessed unrestrained freedom of movement during questioning;
3. whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questioning;
4. whether strong arm tactics or deceptive stratagems were employed during questioning;
5. whether the atmosphere of the questioning was police dominated; or
6. whether the suspect was placed under arrest at the termination of the questioning.

See also People v. Fletcher, 768 N.E.2d 72, 81 (Ill. App. Ct. 2002) (considering “the location, time, length, mood, and mode of the interrogation, the number of police officers present, the presence or absence of the family and friends of the accused, any indicia of formal arrest, and the age, intelligence, and mental makeup of the accused” in making a custody determination).

\(^{183}\) E.g., United States v. Washington, 462 F.3d 1124, 1132 (9th Cir. 2006) (holding that the subjective intent of the police was relevant, if not dispositive, in assessing custodial interrogation); People v. Calhoun, 889 N.E.2d 795, 801 (Ill. App. Ct. 2008) (“[T]he inquiry should focus on what the defendant thought and believed” about the situation, as well as the subjective intent of the officers.); Curtis v. State, 754 S.W.2d 460, 463 (Tex. Ct. App. 1988) (considering, in determining whether the suspect was in custody for purposes of Miranda, “1) whether probable cause to arrest
jurisdiction, defense lawyers may have a wide range of arguments available to convince the court that the questioning of their client constituted custodial interrogation.

Although it is to a defendant's advantage if his attorney can manage to convince the court that the interrogation was custodial, judicial outcomes are often unpredictable because of the diversity in considerable factors. This hazy standard of custody will only create more disparities between different jurisdictions. Furthermore, it will increase the amount of litigation in lower courts as defendants have great incentive to challenge police-initiated interactions on the theory that they were effectively deprived of their liberty or freedom of movement, forcing the courts to undergo laborious fact-intensive reviews and to reevaluate their conceptions of custody.

2. Disputing the Validity of a Waiver

In order to better protect a represented defendant's Sixth Amendment right to counsel, defense attorneys could also argue that their client's waiver was neither knowing nor voluntary because he was not sufficiently aware of the assistance his lawyer could provide him during interrogation. Although the Montejo majority noted that a Sixth Amendment waiver following Miranda warnings was valid regardless of representation, attorneys could advocate a higher standard for the warnings read to represented defendants before they waive. Such a standard would extend beyond the prescribed conditions of Miranda and better inform defendants of the right they are surrendering. Certain jurisdictions have adopted this approach, holding that prior to a Sixth Amendment waiver, a defendant requires more than just a reading of the Miranda warnings to guarantee that he understands "the nature and the importance of the . . . right he [is] giving up." The fact that

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185. Such a warning could follow the procedures established to ensure a higher standard of waiver in United States v. Mohabir, 624 F.2d 1140 (2d Cir. 1980). In Mohabir, the court explained that while Miranda waivers could be express or implied, "a valid waiver of the Sixth Amendment right to have counsel present during post-indictment interrogation must be preceded by a federal judicial officer's explanation of the content and significance of this right." Id. at 1153. Additionally, for those individuals arrested after indictment, a judicial officer must present the indictment to the defendant, explain its significance, inform the defendant of his right to counsel, and describe the potential consequences of making un-counseled statements to authorities. Id.

186. Mohabir, 624 F.2d at 1151. In Callabrass, the Court required that in order for a defendant to waive his Sixth Amendment right to counsel, he should receive:

in addition to the usual Miranda warnings . . . explanations along the following general lines:

that a criminal indictment has been filed, with explanation of the significance of that fact; that the results of the defendant's case could be seriously affected by any statements he makes at this time; that defendants customarily obtain the advice of lawyers in these circumstances, and that a lawyer would be better able to understand and advise the defendant as to the desirability and the dangers of making statements and answering questions. The explanations necessary may of course vary depending on the age, experience and emotional condition of the defendant, as well as other factors.

the Supreme Court has declined to impose such a standard does not prevent lower courts from mandating more stringent waiver criteria for represented defendants.

Still, even if lower courts adopted a heightened waiver standard, the general limits placed on both the voluntary and knowing prongs have substantially altered the ability of criminal defendants and their attorneys to contest the admissibility of any information given to a state official. First, a defendant’s waiver will not be deemed involuntary unless his statement was coerced; that is, there must be a direct causative link between the police conduct and the statement of the criminal suspect. Equally difficult to establish is the failure of a defendant to make a knowing and intelligent waiver. While a defendant must have some awareness of the rights he is abandoning, it need not necessarily be a full “informedness.” In general, a suspect is considered aware of his rights as soon as he receives Miranda warnings.

Furthermore, courts assess the voluntariness and intelligence of a waiver by weighing “the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.” Often, in examining a waiver, the judge will “make no inquiry whatsoever into the defendant’s background, the defendant’s educational history, the defendant’s mental or physical condition, or the defendant’s prior dealings with attorneys.” And, even if lower courts do consider such factors, valid waivers

187. Patterson v. Illinois, 487 U.S. 285, 296 n.11 (1988) (“[R]eflect[ing] Mohabir’s holding that some ‘additional’ warnings or discussions with an accused are required” and that any waiver “can only properly be made before a neutral . . . judicial officer”) (internal citations omitted).

188. See Halama, supra note 31, at 1235–37.

189. See Halama, supra note 31, at 1217; Tomkovicz, supra note 50, at 1045. Additionally, the Court’s requirement that a defendant must have a full awareness has typically carried little weight. See Oregon v. Elstad, 470 U.S. 298, 316 (1985) (“This Court has never embraced the theory that a defendant’s ignorance of the full consequences of his decisions vitiates their voluntariness.”).

190. Colorado v. Connelly, 479 U.S. 157, 167 (1986) (holding that “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment”). However, “failure to give the prescribed warnings . . . generally requires exclusion of any statements obtained” as they will be deemed involuntary. Missouri v. Seibert, 542 U.S. 600, 608 (2004).

191. Connelly, 479 U.S. at 164.

192. Jennifer Diana, Note, Apples and Oranges and Olives? Oh my!: Fellers, the Sixth Amendment, and the Fruit of the Poisonous Tree Doctrine, 71 BROOK. L. REV. 985, 995–96 (2005); see also Moran v. Burbine, 475 U.S. 412, 422 (1986) (finding that police are not required to “supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights”).


are often found where the suspect has limited intelligence and education,\textsuperscript{196} is experiencing abnormal physical or mental conditions,\textsuperscript{197} or is suffering from drug or alcohol addiction.\textsuperscript{198} Moreover, while the burden rests with the state to prove a voluntary and knowing waiver, the prosecution may fulfill its obligation without evidence of express relinquishment by the defendant.\textsuperscript{199}

These hurdles pose a difficult challenge for defense attorneys attempting to demonstrate the invalidity of a waiver. Indeed, the Supreme Court has noted that demonstrating at trial that police provided \textit{Miranda} warnings and secured a waiver from a defendant "has generally produced a virtual ticket of admissibility" for statements made to law enforcement officials.\textsuperscript{200} Furthermore, because lower courts consider a plethora of different factors in examining the totality of the circumstances, the same potential problems triggered by defense attorneys’ custody arguments are present here: courts will face difficult, case-based factual analyses and increased litigation will further clog the system.

\begin{itemize}
\item \textsuperscript{196} See, e.g., Rice v. Cooper, 148 F.3d 747, 749–52 (7th Cir. 1998) (finding valid waiver even though defendant was illiterate, had a mild mental handicap, and initially had difficulty understanding \textit{Miranda} warnings); United States v. Male Juvenile, 121 F.3d 34, 40 (2d Cir. 1997) (finding valid waiver by defendant with a learning disability); United States v. Bautista-Avila, 6 F.3d 1360, 1365–66 (9th Cir. 1993) (finding valid waiver by Mexican defendant with a sixth-grade education because he was read his \textit{Miranda} rights in Spanish); Moore v. Dugger, 856 F.2d 129, 132, 134–35 (11th Cir. 1988) (finding valid waiver by a mentally handicapped defendant with below-average IQ and intellectual capacity of an eleven-year-old because he appeared calm, responsive, and able to understand questions). But see United States v. Garibay, 143 F.3d 534, 538–39 (9th Cir. 1998) (finding a waiver invalid where a defendant was borderline retarded and had language difficulties because no steps were taken to ensure the waiver was knowing and intelligent).
\item \textsuperscript{197} See, e.g., Seymour v. Walker, 224 F.3d 542, 554 (6th Cir. 2000) (valid waiver even though the defendant was questioned in a hospital’s intensive care unit following a suicide attempt); United States v. Guay, 108 F.3d 545, 550 (4th Cir. 1997) (valid waiver after suspect suffered a car accident and a broken shoulder because he was not under the influence of judgment-impairing medication); Campaneria v. Reid, 891 F.2d 1014, 1020 (2d Cir. 1989) (valid waiver despite the fact defendant had undergone recent surgery, ingested pain medication, and claimed to have pain and dizziness); United States v. Hack, 782 F.2d 862, 866 (10th Cir. 1986) (waiver valid despite gunshot wound to defendant’s mouth).
\item \textsuperscript{198} See, e.g., Grayson v. Thompson, 257 F.3d 1194, 1230 (11th Cir. 2001) (finding valid waiver despite the defendant’s intoxication and alcohol withdrawal because he did not show symptoms); United States v. Smith, 218 F.3d 777, 781–82 (7th Cir. 2000) (finding valid waiver despite the fact that defendant ingested cocaine and sleeping pills forty-five minutes prior to her arrest because she did not appear intoxicated and law enforcement officials were not aware of her drug use); United States v. Palmer, 203 F.3d 55, 60–61 (1st Cir. 2000) (finding valid waiver despite the defendant’s heroin withdrawal and use of antidepressants); United States v. Garcia Abrego, 141 F.3d 142, 171–72 (5th Cir. 1998) (finding valid waiver despite the fact that the defendant had ingested a large dose of Valium because he was a habitual user who could have developed a tolerance).
\item \textsuperscript{199} North Carolina v. Butler, 441 U.S. 369, 372–73 (1979) ("[A]n express written or oral statement of waiver . . . is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. . . . [I]n at least some cases, waiver can be clearly inferred from the actions and words of the person interrogated.").
\item \textsuperscript{200} Missouri v. Seibert, 542 U.S. 600, 609 (2004). The Court has also noted that "cases in which a defendant can make a colorable argument that a self-incriminating statement was ‘compelled’ despite the fact that the law enforcement authorities adhered to the dictates of \textit{Miranda} are rare." Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984).
\end{itemize}
B. What the Lower Courts Should Do to Protect the Attorney-Client Relationship

Since defense attorneys may not always be successful in disputing a waiver's validity, or in demonstrating after the fact that their client was entitled to counsel, state or federal courts should take measures to grant a more thorough right to counsel to represented defendants. To adequately protect the attorney-client relationship and guarantee counsel during interrogation, judiciaries should adopt an approach that would, following the initiation of formal charges, prohibit police-initiated questioning of all defendants who have invoked their right to an attorney. 201 The rule would bar police questioning in the absence of counsel only once formal proceedings had commenced and a defendant requested counsel. The defendant's custodial status would be irrelevant. This rule would protect defendants from coercive police techniques when they have expressly indicated their desire to deal with the police only through the assistance of counsel. 202

State courts may be able to draw such a right from their state constitutions, adopting substantive or procedural waiver requirements that must be completed to effectuate a valid Sixth Amendment waiver. Additionally, federal circuit courts can draw broader protections from the U.S. Constitution, expanding upon any gaps left in Supreme Court jurisprudence. Not only would these lower court initiatives more adequately preserve the fundamental guarantee of the right to counsel, but they would also prevent police from engaging in any constitutionally questionable conduct and protect vulnerable defendants otherwise in danger of unintentionally surrendering their rights to an attorney and a fair prosecution.

The implementation of this rule is certainly plausible, as some states have demonstrated a willingness to increase criminal defendant protections above the constitutional floor. Indeed, certain jurisdictions have embraced approaches similar to those mentioned above, interpreting their constitutions to provide increased protections for represented defendants. The Supreme Court of Illinois has held that its state constitution mandates a higher standard than the protections offered by federal law, ensuring counsel for defendants in traditional Sixth Amendment contexts. 203 Police cannot refuse an attorney access to a defendant and "there can be no knowing waiver of the right to counsel if the suspect has not been informed that the attorney was present and seeking to consult with him." 204 The New Jersey Supreme Court held that the right of a defendant to his attorney is not predicated on the suspect making a specific request for representation. 205 When an attorney

201. Unlike the Jackson rule, this solution would not apply to all defendants, but rather to those who have expressed a desire for counsel.
204. Id. at 930 (citing People v. Smith, 442 N.E.2d 1325, 1329 (Ill. 1982)).
is available to the defendant, no custodial interrogation is permitted until the two have had the opportunity to confer.206

Perhaps the state that goes the farthest in protecting the Sixth Amendment right to counsel is New York, with its judicial mandate of an "indelible right to counsel." The New York Constitution provides that:

In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her. . . . nor shall he or she be compelled in any criminal case to be a witness against himself or herself.207

Courts in New York have interpreted this provision to mean that interrogation of a suspect is forbidden unless the suspect affirmatively waives his right to counsel in the presence of an attorney.208 This "indelible" right to counsel attaches "when a criminal action is formally commenced by the filing of an accusatory instrument" regardless of whether he is questioned in or out of custody.209 The right can also arise prior to a formal charge, either when the suspect requests to speak to an attorney or if an attorney is retained to represent the suspect for the matter under investigation.210 However, following formal initiation of charges, the ban on interrogation does not hinge on the defendant's invocation of counsel, nor on a request from the attorney that police respect defendant's rights.211 Once an attorney is involved in the case, law enforcement officials may not question the de-

206. Id.
208. E.g., People v. Grice, 794 N.E.2d 9, 10 (N.Y. 2003) ("The indelible right to counsel arises from the provision of the State Constitution that guarantees due process of law, the right to effective assistance of counsel and the privilege against compulsory self-incrimination," (citations omitted)); People v. Bing, 558 N.E.2d 1011, 1015 (N.Y. 1990) ("[B]y resting the right [to counsel] upon this State's constitutional provisions guaranteeing the privilege against self-incrimination, the right to assistance of counsel and due process of law we have provided protection to accuseds far more expansive than the Federal counterpart." (citations omitted)); People v. Settles, 385 N.E.2d 612, 617 (N.Y. 1978) ("[The state is] forbidden to seek an uncounseled waiver of an indicted defendant's right to counsel."); see also Yale Kamisar, Brewer v. Williams, Massiah, and Miranda: What is Interrogation? When does it Matter?, 67 Geo. L.J. 1, 88 (1978) (explaining that the state may not question a client in the absence of counsel regarding "matters encompassed by the representation." (citing People v. Ramos, 357 N.E.2d 955, 963–64 (N.Y. 1976) (Jasen, J., dissenting))); Ofer Raban, The Embarassing Saga of New York's Derivative Right to Counsel: The Right to Counsel of Defendants Suspected of Two Unrelated Crimes, 80 St. John's L. Rev. 389, 390 (2006) (explaining that courts likely make right-to-counsel determinations based on the clustering together of these phrases in Article I, section 6).
210. Id. at 10–11 (finding that the indelible right can be triggered before a suspect faces prosecution when he requests, in custody, to speak to an attorney, or "when an attorney who is retained to represent the suspect enters the matter under investigation").
fendant without counsel unless the attorney has been present for the defendant's valid waiver.212

Despite the possibility of bolstering the constitutional guarantee of the right to counsel, many states and federal courts have refused to provide defendants with increased protections as described above, and several have declined to adopt a rule mirroring New York's indelible right to counsel.213 Critics believe that the New York rule creates artificial barriers for police investigation214 and "place[s] an unfair burden on law enforcement authorities."215 Even academics favoring the rule have noted its uniquely zealous role in securing expansive defendant rights.216 But, much of the criticism of New York's indelible right results from the state's protection of suspects before the commencement of formal proceedings.217 Indeed, because it would impose a significant handicap on investigatory efforts and inflict a "substantial cost to society's legitimate and substantial interest in securing admissions of guilt," the Supreme Court has held that, prior to a formal charge, any confession following an otherwise valid waiver should not be suppressed because police failed to inform the suspect of his attorney's efforts to reach him.218

Clearly, the current doctrine on waivers following the attachment of the Sixth Amendment right to counsel is divided among the state and circuit courts. But, jurisdictions that are hesitant to adopt a rule that extends as far as New York's "indelible right" can adopt the rule that strikes a balance between law enforcement needs and the rights of criminal defendants. A rule as proposed in the beginning of Section III.B—one that only prohibits interrogation of represented defendants in the absence of counsel after the initiation of formal charges—would mitigate many critics' concerns about the ability of police to obtain and successfully admit at trial confessions secured from suspects in the absence of counsel; the rule would still allow police to interrogate potential suspects and unrepresented defendants.219

216. See Holland, supra note 212, at 431 (noting that the indelible right to counsel rule is "an aggressive constitutionalization of the attorney-client relationship under state law").
217. E.g., Debra M. Zverins, Note, The Expanding Right to Counsel in New York, 10 FORDHAM URB. L.J. 351, 353 (1982) (arguing that the New York rule imposes "onerous burdens on police departments which impede effective law enforcement;" "sacrifice[s] the effective operation of the criminal justice system by restricting the ability of the police to obtain confessions from criminal suspects in the absence of counsel;" and hinders "police efforts to control crime").
Additionally, because it would be limited to defendants who ask for counsel, it would appease opponents of the former Jackson rule who are wary of granting protection to those defendants who have “done nothing at all to express [their] intentions with respect to [their] Sixth Amendment rights” and might be “perfectly amenable to speaking with the police without having counsel present.” Though it may be necessary to grant increased flexibility to law enforcement in their pre-indictment investigation, once an indictment has been filed or a defendant arraigned, “any further interrogation can only be designed to buttress the government’s case.” Indeed, the initiation of formal proceedings “presumably signals the government’s conclusion that it has sufficient evidence to establish a prima facie case.” Thus, after the first formal state interaction, represented defendants should be free from any police-initiated interrogation without counsel.

In jurisdictions where appointment of counsel is automatic, however, a defendant may not have the opportunity to clearly invoke his right to counsel. Thus, courts there should take affirmative measures to ensure that the defendant does indeed intend to exercise his Sixth Amendment right to counsel. Arguably, jurisdictions that have adopted the automatic appointment approach have already recognized the importance of counsel, and accordingly “place[d] the burden on courts, not indigent defendants, to ensure that defendants are represented absent a valid waiver.” Montejo effectively subverts the policies that led to these regional decisions to enact automatic appointment of counsel. In those jurisdictions, what was intended to provide additional protection to defendants beyond the federal constitutional floor has become a procedure that actually diminishes defendants’ protections (when they do not affirmatively assert that they want counsel) by granting the police further opportunities to elicit a waiver.

Still, to address the issue that “a defendant who never asked for counsel has not yet made up his mind in the first instance,” courts should clarify at the first formal proceeding whether the defendant desires counsel before the automatic appointment is triggered. At that time, courts would ask the defendant whether he desires representation. By allowing evidence procured before the Sixth Amendment right takes effect, a modified New York rule would attempt to strike a compromise between the two objectives.

222. Id.; see also Banas, supra note 44, at 828–29 (quoting Patterson, 487 U.S. at 306).
223. See Montejo, 129 S. Ct. at 2082–84. The Court notes that in states such as Louisiana, where counsel is automatically appointed within seventy-two hours of arrest, defendants often “have no opportunity to invoke their rights and trigger Jackson.” Id. at 2084.
224. Brief of The National Legal Aid & Defender Ass’n et al. as Amici Curiae Supporting Petitioner at 2–3, Montejo v. Louisiana, 129 S. Ct. 2079 (2009); see also id. ("[T]he vast majority of jurisdictions encourage representation of indigent defendants, recognizing that representation by counsel is beneficial to indigent defendants and the criminal justice system as a whole, both in terms of fairness and efficiency.").
225. See Montejo, 129 S. Ct. at 2086 ("When a court appoints counsel for an indigent defendant in the absence of any request on his part, there is no basis for a presumption that any subsequent waiver of the right to counsel will be involuntary.").
226. Id. at 2087.
fendant specifically if he wants to be represented. A negative response would be construed as a valid Sixth Amendment waiver, and police could freely reapproach to continue interrogation. Conversely, an affirmative response would erect a barrier between the police and the now-represented defendant. This limited measure would not impose a significant burden on the courts or the prosecution, nor would it spark subsequent fact-intensive reviews about whether the defendant’s conduct manifested an acceptance of the appointment of counsel. Rather, this rule would offer unambiguous evidence of whether the defendant did or did not wish to invoke his right to an attorney. Alternatively, if judges did not inquire about the defendant’s desire for counsel at the first formal proceeding, the protections of the rule could still be triggered if the defendant subsequently invoked his Sixth Amendment right to an attorney, whether during an interrogation, a post-indictment, pretrial lineup, or any future interaction with the State.

Lower courts seeking to modify the rule could allow defendants to waive counsel after the initiation of formal proceedings, but there should be a presumption of invalidity in cases where the defendant is represented, particularly where he has invoked his right at an earlier interaction with law enforcement. Courts could also permit defense attorneys to file and serve notices declaring that their clients have not and will not waive their rights. But regardless of what measures are taken by state and federal courts, increased protections are necessary in order to “breathe[] life into the requirement that a waiver of a constitutional right must be competent, intelligent and voluntary.”

CONCLUSION

By increasing the abilities of police to approach, interrogate, and induce waivers at any stage in criminal proceedings, Montejo v. Louisiana puts all defendants at risk. The decision, which conflates the waiver requirements of the Fifth and Sixth Amendment rights to counsel, is particularly troubling


228. Contra Montejo, 129 S. Ct. at 2084. The Court maintains that determination of “whether a defendant has somehow invoked his right to counsel” demands an analysis of “his conduct at the preliminary hearing—his statements and gestures—and the totality of the circumstances.” Id. It concludes that “for a court to adjudicate that question ex post would be a fact-intensive and burdensome task” particularly because “preliminary hearings are often rushed, and are frequently not recorded or transcribed.” Id.

229. See Michigan v. Mosley, 423 U.S. 96, 110 n.1 (1975) (White, J., concurring) (“[T]he accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities’ insistence to make a statement without counsel’s presence may properly be viewed with skepticism.”).

230. The Montejo Court noted in dicta that Miranda rights cannot be asserted “anticipatorily.” See Montejo, 129 S. Ct. at 2091 (relying on the Miranda and Edwards proposition that a suspect must invoke his rights during custodial interrogation). However, these cases involved the Fifth Amendment right to counsel. Once formal proceedings have begun and a defendant has counsel, his attorney should be able to prevent waiver of that right.

for represented defendants in non-custodial settings. These defendants have expressed their desire for counsel, but after the Court's ruling in Montejo, that desire may go unheeded. Defendants will be increasingly exposed to police pressure to waive their right to an attorney, and may relinquish their constitutional privilege without a full awareness of the consequences of their action. Thus, states should use their individual constitutions, or federal courts should interpret more broadly the U.S. Constitution, to grant increased protections to defendants who have invoked counsel, securing the presence of a lawyer for any situation post-arraignment that involves police questioning.

As a culture, we are fascinated with lawyers. We love them; we love to hate them; we are avidly fixated on portraying them in film, television, and literature—be they the protagonist with an unflagging moral compass or legal counsel to an evil corporation that profits at the expense of poor, sick plaintiffs. But despite our ambivalence toward the profession, few would maintain that attorneys are unnecessary or irrelevant to any legal proceeding. In fact, given our belief in the importance of lawyers, many would probably be surprised to discover that most offenders never even meet with an attorney. According to multiple studies, approximately 80 percent of criminal suspects waive their right to counsel. Given the vast amount of waivers, it is of the utmost importance to protect the relationship between attorneys and their clients when a defendant actually makes an explicit request for counsel. When a defendant waives his constitutional right to counsel, it must be plainly apparent that he is doing so knowingly and voluntarily. Criminal defendants are deprived of a great many rights as a result of their status in society. While some of these deprivations are justifiable, we cannot take away a defendant's choice to fully exercise a constitutional guarantee to counsel.

232. See, e.g., Steven Lubet, Reconstructing Atticus Finch, 97 MICH. L. REV. 1339, 1339 (1999) (maintaining that "no real-life lawyer has done more for the self-image or public perception of the legal profession" than Atticus Finch).

233. See, e.g., MICHAEL CLAYTON (Warner Bros. 2007) (portraying the character of Karen Crowder, played by Tilda Swinton).

234. See Cassell & Hayman, supra note 130, at 859; Leo, supra note 130, at 275–76.