THE CASE FOR GREATER TRANSPARENCY IN SIXTH AMENDMENT RIGHT TO PRETRIAL COUNSEL WARNINGS

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The U.S. Supreme Court has long had an ambivalent relationship with the Sixth Amendment right to counsel. On the one hand, it has unequivocally stated that the right accrues when a "critical stage" is reached in a prosecution,[1] a time when an individual is "faced with the prosecutorial forces of organized society" and is "immersed in the intricacies of substantive and procedural criminal law."[2] At a critical stage, an accused individual has a "right to rely on counsel as a 'medium' between [herself] and the State,"[3] to help level the adversarial playing field.[4] The prosecution therefore bears a

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1. United States v. Gouveia, 467 U.S. 180, 188 (1984); *see also* Kirby v. Illinois, 406 U.S. 682, 689–90 (1972) (plurality opinion) ("The initiation of judicial criminal proceedings is . . . the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified.").

2. Rothgery v. Gillespie Cty., 554 U.S. 191, 198 (2008) (quoting *Kirb*y, 406 U.S. at 689); *see also* Lafler v. Cooper, 566 U.S. 156, 165 (2012) (stating that the Sixth Amendment "applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice"); *Gouveia*, 467 U.S. at 189 (stating that the purpose of the pretrial Sixth Amendment right is to protect "the unaided layman at critical confrontations with his adversary").

3. Maine v. Moulton, 474 U.S. 159, 176 (1985) (noting that the Sixth Amendment's guarantee "includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused").

4. United States v. Ash, 413 U.S. 300, 309 (1973) (stating that the purpose of defense counsel is to "minimize the imbalance in the adversary system").

"heavy burden" of establishing that any waiver of the Sixth Amendment right to pretrial counsel is knowing, voluntary, and intelligent.[5]

In *Patterson v. Illinois*,[6] however, the Court downplayed the distinctiveness of the right, treating it as coterminous with the Fifth Amendment right to pretrial counsel identified in *Miranda v. Arizona*.[7] The *Patterson* Court held that *Miranda* warnings, which police must provide before they interrogate suspects who are in custody, convey sufficient information to enable accused individuals to knowingly waive their Sixth Amendment right to counsel.[8] To the five-member majority, advising individuals that they have a right to remain silent, that any statement provided can be used against them at trial, and that they have the right to the presence of an attorney during questioning, appointed if necessary,[9] "let[s] [individuals] know what a lawyer could 'do for [them]' during the postindictment questioning: namely, advise [them] to refrain from making any such statements."[10]

Patterson's suspect reasoning did not go unnoticed by Professor Arnold Loewy who, as he has so many times during his remarkable fifty-four-year academic career, held the Court to account. In a 2017 article, Professor Loewy recognized that "[this] is not all counsel could have done" for Patterson, who had been indicted for involvement in a suspected gang-related killing. [11]

> Upon being read the indictment, Patterson asked why a fellow gang member who did the actual killing was not indicted. Had Patterson been represented, his lawyer might have tried to negotiate a deal in exchange for Patterson's confession and his implication of the possibly primary killer. Such deals happen all the time—not on their own or even by the suspects themselves—but nearly always by counsel.[12]

Although authorities told Patterson that he had a right to counsel, "he did not know what counsel could do for him beyond telling him not to confess."[13] Without the guidance of counsel, Professor Loewy noted:

> Patterson gained no concessions from the state in exchange for his confession. . . . Whether he would have opted for counsel if he was aware

5. Brewer v. Williams, 430 U.S. 387, 403–04 (1977) (providing that waiver will not be "lightly presumed" and a reviewing court must indulge every reasonable presumption against waiver).

6. Patterson v. Illinois, 487 U.S. 285 (1988).

7. Miranda v. Arizona, 384 U.S. 436, 444–45 (1966).

8. *Id.* at 478–79.

9. *Id.*

10. *Patterson*, 487 U.S. at 294.

11. *See* Arnold H. Loewy, *Distinguishing Confessions Obtained in Violation of the Fifth Amendment from Those Obtained in Violation of the Sixth Amendment*, 50 TEX. TECH L. REV. 145, 150 (2017).

12. *Id.* (footnotes omitted).

13. *Id.*

> that an attorney could help him negotiate a deal with the state is something we will never know because the police never told him what an attorney could do in defending him.[14]

In the article's conclusion, Professor Loewy highlighted a key difference between the Fifth and Sixth Amendment right to pretrial counsel.[15] "The Fifth Amendment," the terms of which protect against compelled self-incrimination, "is concerned only with voluntariness. Wisdom is irrelevant."[16] The Sixth Amendment, on the other hand, governs "how the process is supposed to work when the parties' adversarial position has hardened."[17] The Court in *Patterson*, "[b]y relying on *Miranda*," however, wrongly focused on "coercion not ignorance."[18]

In the space remaining here, I will argue that the Court should overrule *Patterson*, building on Professor Loewy's recognition of the distinct knowledge deficits of individuals faced with the question of whether to waive their Sixth Amendment right to pretrial counsel. Part I will survey the Court's Sixth Amendment case law, starting with *Massiah v. United States* (decided two years before *Miranda*), which established the right.[19] Part II will examine case law on the reach of the right and the test for its waiver, focusing in particular on *Patterson*, which was recently reaffirmed by the Court in *Louisiana v. Montejo*.[20]

Part III will address why the Court was wrong in *Patterson* (and *Montejo*) in its blithe assessment of the adequacy of *Miranda* warnings on the Sixth Amendment right to pretrial counsel waiver question. Even if the *Patterson* Court was correct in concluding that knowing and intelligent waiver of the Sixth Amendment right to pretrial counsel is not "more difficult to waive" or "superior," it acknowledged that "a 'difference' [exists] between the Fifth Amendment and Sixth Amendment rights to counsel, and the 'policies' behind these constitutional guarantees."[21] That the Sixth (but not the Fifth) Amendment right is triggered only when a critical stage is reached in a prosecution is one obvious manifestation and embodiment of this

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14. *Id.* (footnotes omitted).
15. *Id.* at 152.
16. *Id*.
17. Loewy, *supra* note 11, at 152.
18. *Id.*
19. *See* Massiah v. United States, 377 U.S. 201 (1964); *infra* Part I (beginning an analysis of Sixth Amendment case law with *Massiah*).
20. *See* Louisiana v. Montejo, 556 U.S. 778, 786 (2009) (citing Patterson v. Illinois, 487 U.S. 285, 296 (1988)) ("[W]hen a defendant is read his [or her] *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick, even though the *Miranda* rights purportedly have their source in the *Fifth* Amendment.").
21. *Patterson*, 487 U.S. at 297, 299. *But see, e.g.*, State v. Rivas, 398 P.3d 299, 310 (N.M. 2017) (recognizing that the Sixth Amendment right is broader and "is integral to the protection of fundamental rights of criminal defendants and ensures fairness throughout the criminal proceeding").

difference;[22] there are many others.[23] Part IV will suggest a way to take account of these differences and better ensure that waivers of the Sixth Amendment right to pretrial counsel are actually knowing and intelligent, as Professor Loewy urged and the Constitution requires.

I. *MASSIAH* AND ITS PROGENY

In *Massiah v. United States*, the defendant was indicted for federal narcotics violations, retained counsel, pled not guilty, and was released on bail.[24] Massiah's codefendant agreed to surreptitiously audio record his meeting with Massiah, during which Massiah made incriminating statements.[25] The Court—eschewing reliance on its substantial body of due process case law[26]—for the first time invoked the Sixth Amendment right to counsel as a basis to regulate police securing of pretrial confessions.[27] In a 6–3 decision, the Court held:

> [T]he petitioner was denied the basic protections of [the Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel. . . . In this case, Massiah was more seriously imposed upon . . . because he did not even know that he was under interrogation by a government agent.[28]

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22. Moran v. Burbine, 475 U.S. 412, 428–29 (1986).

23. *See also, e.g.*, McNeil v. Wisconsin, 501 U.S. 171, 177 (1991) (noting that Sixth Amendment right is "offense specific" while the Fifth Amendment right is not). *Compare, e.g.*, United States v. Henry, 447 U.S. 264, 274 (1980) (deeming invalid, under the Sixth Amendment, the questioning of an accused party by police undercover agent), *with* Illinois v. Perkins, 496 U.S. 292, 297 (1990) (rejecting Fifth Amendment challenge under similar facts).

24. *Massiah*, 377 U.S. at 202.

25. *Id.* at 202–03.

26. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936) (holding that the Fourteenth Amendment was violated when police secured confessions as the result of beating and threatening defendants). Five years earlier, in *Spano v. New York*, Justices Douglas and Stewart urged suppression of a postindictment confession on right to counsel grounds but agreed with resolution of the case on more general due process grounds. Spano v. New York, 360 U.S. 315, 325–26 (1959) (Douglas, J., concurring); *id.* at 327 (Stewart, J., concurring). Using language that would echo in future Sixth Amendment pretrial right to counsel cases, Justice Douglas wrote:

> [H]ere we deal not with a suspect but with a man who has been formally charged with a crime. The question is whether after the indictment and before the trial the Government can interrogate the accused *in secret* when he asked for his lawyer and when his request was denied . . . .
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> . . . .
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> Depriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.

Id. at 324–25 (Douglas, J., concurring).

27. *See, e.g.*, H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1155 (1987) (characterizing *Massiah* as "a giant step in a wholly new direction").

28. *Massiah*, 377 U.S. at 206.

In *Brewer v. Williams*, the "Christian burial speech" case, authorities arrested and arraigned Williams regarding his suspected involvement in the abduction of a ten-year-old girl.[29] After receiving his *Miranda* warnings, Williams invoked his right to counsel.[30] While on a 160-mile trip from Davenport to Des Moines, Iowa in a patrol car, Williams and a detective, who was aware that Williams was a former mental institution patient and deeply religious, "embarked on a wide-ranging conversation covering a variety of topics, including the subject of religion."[31] Soon, the detective, addressing Williams as "Reverend," said:

> I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.[32]

When Williams asked why the detective thought they would be passing the area where the girl's body was located, the detective falsely stated that he knew the body was in the area of Mitchellville, which they would be passing.[33] During the car trip, Williams implicated himself in the crime and revealed the location of the girl's body—information the government used in its successful murder prosecution of Williams.[34]

The Supreme Court, on review of the lower courts' granting of habeas corpus relief, held that the facts recounted above were "constitutionally indistinguishable from those presented in *Massiah*" and that Williams was entitled to relief.[35] Although Massiah's statements were elicited surreptitiously, and Williams's statements were not, police violated Williams's Sixth Amendment right to counsel just the same.[36] "[T]he clear rule of *Massiah* is that once adversary proceedings have commenced against

29. Brewer v. Williams, 430 U.S. 387, 391–92 (1977).
30. *Id.*
31. *Id.* at 392.
32. *Id.* at 392–93.
33. *Id.* at 393.
34. *Id.* at 393–94.
35. *Id.* at 400.
36. *Id.*

an individual, he has a right to legal representation when the government interrogates him. It thus requires no wooden or technical application of the *Massiah* doctrine to conclude" that the Sixth Amendment was violated.[37]

The Court also held that Williams had not waived his Sixth Amendment right to counsel.[38] To establish waiver, it was "incumbent upon the State to prove 'an intentional relinquishment or abandonment'"[39] and that courts must "indulge in every reasonable presumption against waiver."[40] Applying the "strict standard,"[41] the Court held that the record contained considerable evidence indicating that Williams did not waive his right to counsel, including telling the detective that he would talk to police after seeing his lawyer upon arrival in Des Moines.[42]

The Court later reiterated its support of the Sixth Amendment right to pretrial counsel in *United States v. Henry*[43] and *Maine v. Moulton*[44] by invalidating surreptitious interrogations, and in *Fellers v. United States* by invalidating deliberate police elicitation of incriminating information from an accused individual after a critical stage is reached.[45] In *Michigan v. Jackson*,[46] the Court borrowed from its *Miranda* jurisprudence—its prior decision in *Edwards v. Arizona*[47] in particular—to bar incriminating statements made by two individuals who were arraigned on charges, requested appointment of counsel, and made the statements after being approached by police before consulting with counsel.[48] Concluding that "the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before," the Court deemed the statements inadmissible.[49]

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37. *Id.* at 401.

38. *Id.* at 405–06.

39. *Id.* at 404 (quoting Johnson v. Zerbst, 304 U.S 458, 464 (1938)).

40. *Id.* (citations omitted).

41. *Id.*

42. *Id.* at 404–05.

43. United States v. Henry, 447 U.S. 264, 270 (1980).

44. Maine v. Moulton, 474 U.S. 159, 180 (1985).

45. Fellers v. United States, 540 U.S. 519, 524–25 (2004). In *Fellers*, police went to Fellers's home to arrest him and related that an indictment described his involvement with others in a drug distribution conspiracy. *Id.* at 521. Fellers responded that he knew the others and that he had "used methamphetamine during his association with them." *Id.* Later, at the county jail, officers provided Fellers *Miranda* warnings, but he waived his rights and provided additional incriminating statements. *Id.* at 521–22. The Court unanimously held that the initial statement elicited by police was secured in violation of the Sixth Amendment, but remanded for determination whether the subsequent statements provided at the jail were subject to suppression as "fruits" of the initial unconstitutionally secured statement. *Id.* at 525.

46. Michigan v. Jackson, 475 U.S. 625, 636 (1986), *overruled by* Montejo v. Louisiana, 556 U.S. 778 (2009).

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

48. *Jackson*, 475 U.S. at 627–28.

49. *Id.* at 631.

> [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.

II. *PATTERSON* AND ITS PROGENY

What Justice Frankfurter noted of Fourth Amendment doctrine—that its "course . . . has not . . . run smooth"[50]—is true of the Court's treatment of the Sixth Amendment right to pretrial counsel. Although the right indisputably remains,[51] as I have demonstrated elsewhere,[52] the limits it imposes on police evidence gathering are considerably less robust than initially anticipated by members of the Court and legal commentators.[53]

A key reason for this is the Court's 1988 decision in *Patterson v. Illinois*, mentioned at the outset.[54] In *Patterson*, authorities arrested the defendant, an alleged member of the Chicago Vice Lords gang, for suspected involvement in the killing of a rival gang member.[55] The police provided the defendant *Miranda* warnings, and he agreed to talk, providing information about the fight but denying knowledge of a killing.[56] Authorities indicted the defendant the following day for murder.[57] After an officer told the defendant of the development, and the defendant learned that one of his fellow gang members had not been charged, the defendant asked: "[W]hy wasn't he indicted, he did everything."[58] The officer then interrupted the defendant, again provided *Miranda* warnings, and secured a waiver.[59] The defendant thereafter gave a lengthy statement concerning his involvement in the killing and later that day, after a prosecutor provided additional *Miranda* warnings, he provided a second inculpatory statement.[60] The trial court admitted both statements over the defendant's objection, and he was convicted of murder.[61]

In a five-member majority opinion, authored by Justice White, the Court rejected the defendant's argument that the waivers he provided based on *Miranda* warnings did not suffice as a knowing and intelligent waiver for

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> Indeed, after a formal accusation has been made—and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment—the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.

Id. at 632.

50. Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring).

51. *See Montejo*, 556 U.S. at 786.

52. *See* Wayne A. Logan, *False* Massiah: *The Sixth Amendment Revolution That Wasn't*, 50 TEX. TECH L. REV. 153, 156 (2017) (describing results of a study of over 1,800 decisions contained in the Westlaw database, decided between 1964 and 2009, highlighting the low rate of defendants' success in advancing *Massiah* claims).

53. *Id.* at 154–55 (noting concerns voiced over *Massiah*'s impact).

54. Patterson v. Illinois, 487 U.S. 285, 296 (1988).

55. *Id.* at 287–88.

56. *Id.*

57. *Id.* at 288.

58. *Id.*

59. *Id.*

60. *Id.* at 288–89.

61. *Id.* at 289.

Massiah Sixth Amendment purposes.[62] At the outset, the majority acknowledged that the murder indictment triggered *Massiah*[63] but emphasized the fact that he never invoked his Sixth Amendment right.[64] Had the defendant done so, Justice White reasoned, the prohibition of *Michigan v. Jackson* would have precluded police from initiating contact with the defendant, securing a waiver, and then obtaining an incriminating statement.[65]

The majority also rejected the defendant's "principal and more substantial claim"[66] regarding waiver: "Was the accused, who waived his Sixth Amendment rights during postindictment questioning, made sufficiently aware of his right to have counsel present during the questioning, and of the possible consequences of a decision to forgo the aid of counsel?"[67] Answering in the affirmative, the majority identified several ways in which *Miranda* warnings do dual duty. First:

> By telling petitioner that he had a right to consult with an attorney, to have a lawyer present while he was questioned, and even to have a lawyer appointed for him if he could not afford to retain one on his own, [agents] conveyed to petitioner the sum and substance of the rights that the Sixth Amendment provided him. . . . There is little more petitioner could have possibly been told in an effort to satisfy this portion of the waiver inquiry.[68]

Second:

> [T]he *Miranda* warnings also served to make petitioner aware of the consequences of a decision by him to waive his Sixth Amendment rights . . . . Petitioner knew that any statement that he made could be used against him in subsequent criminal proceedings. This is the ultimate adverse consequence petitioner could have suffered by virtue of his choice to make uncounseled admissions to the authorities. This warning also

62. *Id.* at 290–91. The Court omitted discussion of the "voluntary" requirement because Patterson did not contest the issue. *Id.* at 292 n.4.

63. *Id.* at 290.

64. *See id.* at 290–91 ("The fact that petitioner's Sixth Amendment right came into existence with his indictment, *i.*e., that he had such a right at the time of his questioning, does not distinguish him from the preindictment interrogatee whose right to counsel is in existence and available for his exercise while he is questioned.").

65. *See id.* at 291 (citation omitted) ("Had petitioner indicated he wanted the assistance of counsel, the authorities' interview with him would have stopped, and further questioning would have been forbidden (unless petitioner called for such a meeting). This was our holding in *Michigan v. Jackson*, which applied *Edwards* to the Sixth Amendment context."); *see also id.* at 290 n.3 (citation omitted) ("We note as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect. The State conceded as much at argument.").

66. *Id.* at 292.

67. *Id.* at 292–93.

68. *Id.* at 293.

> sufficed . . . to let petitioner know what a lawyer could "do for him" during the postindictment questioning: namely, advise petitioner to refrain from making any such statements. By knowing what could be done with any statements he might make, and therefore, what benefit could be obtained by having the aid of counsel while making such statements, petitioner was essentially informed of the possible consequences of going without counsel during questioning.[69]

In sum, in the majority's estimate, because the "sum and substance" of the value of an attorney in the post-critical stage is the same as that of an attorney in the pre-critical stage, *Miranda* warnings sufficed.[70] The majority's confidence in its assessment was fortified by the failure of Patterson's lawyer "to articulate with precision what additional information should have been provided to him before he would have been competent to waive his right to counsel."[71]

The majority concluded that:

> 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.[72]

Furthermore, although a "difference" exists between the Fifth (*Miranda*) and the Sixth Amendment (*Massiah*) right to counsel and their "policies,"[73] the majority reasoned that the Court had "never suggested that one right is 'superior' or 'greater' than the other, nor is there any support in our cases for the notion that because a Sixth Amendment right may be involved, it is more difficult to waive than the Fifth Amendment counterpart."[74]

> Instead, we have taken a more pragmatic approach to the waiver question—asking what purposes a lawyer can serve at the particular stage of the

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69. *Id.* at 293–94 (footnote omitted).
70. *Id.*
71. *Id.* at 294. The majority elaborated:
> All that petitioner's brief and reply brief suggest is petitioner should have been made aware of his "right under the Sixth Amendment to the broad protection of counsel"—a rather nebulous suggestion—and the "gravity of [his] situation." But surely this latter "requirement" (if it is one) was met when [police] informed petitioner that he had been formally charged with the murder . . . . Under close questioning on this same point at argument, petitioner likewise failed to suggest any meaningful additional information that he should have been, but was not, provided in advance of his decision to waive his right to counsel.

Id. (citations omitted).
72. *Id.* at 296 (citation omitted).
73. *Id.* at 297 (citations omitted).
74. *Id.* at 297–98.

> proceedings in question, and what assistance he could provide to an accused at that stage—to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized.[75]

Under this "pragmatic approach," the role of a lawyer pre- and post-critical stage is the same,[76] "rather unidimensional: largely limited to advising his client as to what questions to answer and which ones to decline to answer,"[77] making the *Miranda* warnings sufficient for each.

The Court relied on *Patterson* in its more recent decision in *Montejo v. Louisiana*.[78] Montejo was arrested based on his suspected robbery-killing of the owner of a dry cleaning business.[79] He waived his *Miranda* rights and provided incriminating statements to the police and was thereafter brought before a judge for a preliminary hearing, where he was automatically appointed counsel based on Louisiana law.[80] Later that same day, two detectives visited Montejo in detention and asked him to accompany them on a trip to locate the gun used in the murder (which Montejo had earlier said he had tossed into a lake).[81] Authorities then again provided Montejo with *Miranda* warnings, which he waived, and while accompanying the detectives on the excursion, he wrote an inculpatory letter to the murder victim's widow.[82]

> Only upon [his] return did Montejo finally meet with his court-appointed attorney, who [in the Court's words] was quite upset that the detectives had interrogated his client in his absence.

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75. *Id.* at 297.
> [W]e have defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel. An accused's waiver of his right to counsel is "knowing" when he is made aware of these basic facts.

Id.

76. *See id.* at 298 (footnotes omitted).
> Applying this approach, it is our view that whatever warnings suffice for *Miranda*'s purposes will also be sufficient in the context of postindictment questioning. The State's decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose that an attorney serves when the accused is questioned by authorities. With respect to this inquiry, we do not discern a substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at postindictment questioning.

Id. at 298–99.

77. *Id.* at 294 n.6.
78. Montejo v. Louisiana, 556 U.S. 778 (2009).
79. *Id.* at 781.
80. *Id.*
81. *Id.* at 781–82.
82. *Id.* at 782.

> At trial, the letter of apology was admitted over defense objection. The jury convicted Montejo of first-degree murder, and he was sentenced to death.[83]

The issue on appeal was whether the letter, obtained by the police after the case against Montejo had reached a critical stage (a preliminary hearing, where he was appointed counsel), was subject to suppression based on *Michigan v. Jackson*.[84] In *Jackson*, as discussed above,[85] the Court held that a waiver of counsel by an individual whose Sixth Amendment right had been triggered is presumptively invalid.[86] In a 5–4 decision, with Justice Scalia writing for the majority, the *Montejo* Court overruled *Jackson*.[87] After acknowledging at the outset that the continued existence of the Sixth Amendment right to counsel itself was not in question,[88] the majority held that the *Jackson* Court wrongly imported the "prophylactic rule" of *Edwards v. Arizona*—originating in the *Miranda* (Fifth Amendment) context and designed to protect against "badgering" of individuals who have invoked their right to counsel—into the *Massiah* (Sixth Amendment) context.[89] Over a vigorous dissent by Justice Stevens (the author of *Jackson*) who contended that *Jackson* was intended to "safeguard a defendant's right to rely on the assistance of counsel,"[90] the *Montejo* majority reasoned that "[t]he antibadgering rationale is the only way to make sense of *Jackson*'s repeated citations of *Edwards*."[91]

The majority then pivoted to a broader assessment of the "workability" of *Jackson*,[92] reasoning that because states differ on whether counsel is automatically appointed or must be affirmatively requested, police should be able to initiate contact with individuals at the post-critical stage, seemingly regardless of whether they have invoked their right to counsel or have

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83. *Id.*

84. *Id.* at 783 (citing Michigan v. Jackson, 475 U.S. 625 (1986)).

85. *See supra* notes 46–49 and accompanying text (discussing *Jackson*).

86. *Jackson*, 475 U.S. at 630.

87. *Montejo*, 556 U.S. at 797.

88. *See id.* at 786 (citations omitted):

> It is worth emphasizing first what is *not* in dispute or at stake here. Under our precedents, once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings.
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> Our precedents also place beyond doubt that the Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent.

Id.

89. *Id.* at 787.

90. *Id.* at 805–06 (Stevens, J., dissenting) (footnote omitted).

91. *Id.* at 788 (majority opinion); *see also id.* (citations omitted) ("Citing *Edwards*, the [*Jackson*] Court held that any subsequent waiver would thus be 'insufficient to justify police-initiated interrogation.' In other words, we presume such waivers involuntary 'based on the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily' in subsequent interactions with police.").

92. *Id.* at 792.

retained counsel.[93] Prohibiting police-initiated contact was especially untenable with individuals like Montejo, the majority reasoned, because he had never signaled his desire for a lawyer; one was automatically appointed under Louisiana law.[94]

Finally, the majority concluded that the anti-badgering benefits of *Jackson* were "marginal," and "dwarfed by its substantial costs (viz., hindering 'society's compelling interest in finding, convicting, and punishing those who violate the law."[95] The benefits of *Jackson* are marginal because there exist "substantial other, overlapping measures toward the same end,"[96] based on *Miranda* and its progeny:

> Under *Miranda*'s prophylactic protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right. Under *Edwards*'s prophylactic protection of the *Miranda* right, once such a defendant "has invoked his right to have counsel present," interrogation must stop. And . . . no subsequent interrogation may take place until counsel is present, "whether or not the accused has consulted with his attorney."[97]

Justice Scalia, responding to counsel's rejoinder that *Miranda*'s protections apply only when an individual is in police "custody," reasoned that "those uncovered situations are the *least* likely to pose a risk of coerced waivers. When a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering."[98]

The Court remanded Montejo's case for determination of whether he invoked his Fifth Amendment right to counsel before police approached him and requested that he write the letter of apology, which would be prohibited by *Edwards v. Arizona*.[99] Remand was also appropriate so that Montejo could:

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93. *Id.* at 786–92.

94. *Id*. at 789.

95. *See id.* at 793 (citations omitted) ("[T]he marginal benefits of *Jackson* (viz., the number of confessions obtained coercively that are suppressed by its bright-line rule and would otherwise have been admitted) are dwarfed by substantial costs . . . .").

96. *Id.* at 794.

97. *Id.* at 793–95 (citation omitted):

> These three layers of prophylaxis are sufficient. . . . [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. If that regime suffices to protect the integrity of "a suspect's voluntary choice not to speak outside his lawyer's presence" before his arraignment, it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached. And if so, then *Jackson* is simply superfluous.

Id. at 793.

98. *Id.* at 795.

99. *Id.* at 798.

> [P]ress any claim he might have that his Sixth Amendment waiver was not knowing and voluntary, *e.g.*, his argument that the waiver was invalid because it was based on misrepresentations by police as to whether he had been appointed a lawyer. These matters have heightened importance in light of our opinion today.[100]

In short, in order to secure and use the inculpatory letter provided by Montejo after his Sixth Amendment right to counsel had attached, all police needed to do was provide *Miranda* warnings and obtain a waiver as required by *Patterson*: "when a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick, even though the *Miranda* rights purportedly have their source in the *Fifth* Amendment."[101]

According to the *Montejo* Court. whether the Fifth or Sixth Amendment right to pretrial counsel is at issue "is irrelevant" because both are designed to "protect the right to have counsel during custodial interrogation. . . . Since the right under both [the Fifth and Sixth Amendment] is waived using the same procedure, doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver."[102] With *Jackson* no longer creating a presumption of involuntariness, again, police need only provide *Miranda* warnings, which *Patterson* held satisfied the "knowing" and "intelligent" requirements for Fifth and Sixth Amendment waivers alike.[103]

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100. *Id.* (citation omitted). In *Moran v. Burbine*, the Court held that police, for purposes of assessing whether a *Miranda* waiver is "knowing" and "intelligent," need not apprise a defendant that his sister had retained a lawyer who had tried to contact him. Moran v. Burbine, 475 U.S. 412, 426–27 (1986). *Burbine*, decided two years before *Patterson*, involved facts in which no critical stage was reached and the Court expressly refused to address whether a waiver of the Fifth Amendment right to counsel waives the Sixth Amendment right. *Id.* at 428 n.2. The *Montejo* Court's "*e.g.*," and "*cf.*" references to *Burbine* are therefore curious. *Montejo*, 556 U.S. at 798. One way to illuminate the matter is found in *Patterson*'s footnotes, where the Court, by way of example, singled out two exceptions to its broader holding that *Miranda* warnings satisfy the *Massiah* waiver: First, the scenario in *Burbine*—"where a suspect was not told that his lawyer was trying to reach him during questioning; in the Sixth Amendment context, this waiver would not be valid." Patterson v. Illinois, 487 U.S. 285, 296 n.9 (1988). The second exception involves surreptitious questioning by a police agent of a charged defendant, based on *United States v. Henry*. *Id.*; United States v. Henry, 447 U.S. 264 (1980).

101. *Montejo*, 556 U.S. at 786; *see also id.* at 786–87 (quoting *Patterson*, 487 U.S. at 296) ("As a general matter . . . an accused who is admonished with the warnings prescribed by this Court in *Miranda* . . . has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one.").

102. *Id.* at 795 (citation omitted).

103. *See supra* notes 54–77 and accompanying text (discussing *Patterson's* holding that *Miranda* warnings provide sufficient information to satisfy *Massiah* waiver requirements).

III. THE NEED FOR GREATER TRANSPARENCY

Thirty years after the Court's decision, the time is ripe for reconsideration of *Patterson*. For reasons discussed in this part, the *Patterson* Court's "pragmatic assessment of the usefulness of counsel to the accused" and the need for a distinct Sixth Amendment warning[104] was unduly cramped and unjustified in 1988, and it is even more so today.

A. The Miranda *Litany Fails to Adequately Inform*

The *Patterson* Court both understated and misstated the distinct role that counsel potentially plays in the post-critical stage context. *Miranda* warnings do not provide the "sum and substance" of the import of counsel and what the detainee forfeits when waiver occurs.[105] This is because the post-critical stage role of counsel is not "rather unidimensional: largely limited to advising his client as to what questions to answer and which ones to decline to answer."[106]

Counsel certainly provide an important advisory and gatekeeping function regarding confessions, but once a critical stage is reached, the government by definition believes it has sufficient inculpatory information for prosecution.[107] Indeed, as Professor Loewy observed:

> [A] post-indicted defendant has nothing to gain by talking to the police without a lawyer. Even if he persuades the police that he is the finest person they ever saw, they are not required to release him. So, having nothing to gain, his discussions with the police have to be lose-lose from his perspective. But, if he has an attorney present, the odds are evened, and it might even be wise for him to talk with the police or a district attorney.[108]

In short, at the post-critical stage, authorities should advise individuals of the strategic value counsel can play in deciding whether and how to cooperate with law enforcement, which counsel can possibly use in brokering an advantageous plea with the government.[109] In his *Patterson* dissent, joined by Justices Brennan and Marshall, Justice Stevens catalogued the potential benefits of counsel in the post-critical stage, which *Miranda* warnings elide, including:

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104. *Patterson*, 475 U.S. at 298.

105. *Id.* at 293.

106. *Id.* at 294 n.6; *see also id.* at 294 (the *Miranda* warnings "sufficed . . . to let petitioner know what a lawyer could 'do for him' during the postindictment questioning: namely advise petitioner to refrain from making any [incriminating] statements").

107. *See* Loewy, *supra* note 11, at 151 (explaining that when a defendant is indicted, then the government believes it has sufficient evidence for trial).

108. *Id.* (footnotes omitted).

109. *Id.* at 150.

> [E]xamin[ing] the indictment for legal sufficiency before submitting his or her client to interrogation or that a lawyer is likely to be considerably more skillful at negotiating a plea bargain and that such negotiations may be most fruitful prior to any interrogation. . . . [T]he [*Miranda*] warnings do not even go so far as to explain to the accused the nature of the charges pending against him—advice that a court would insist upon before allowing a defendant to enter a guilty plea with or without the presence of an attorney.[110]

At a minimum, Justice Stevens wrote, "the accused must be told of the 'dangers and disadvantages of self-representation.'"[111]

Twenty-one years later, Justice Stevens, in a dissent in *Montejo v. Louisiana* joined by Justices Souter, Ginsburg, and Breyer, elaborated on the "dubious decision in *Patterson*," writing that the:

> *Miranda* warnings do not hint at the ways in which a lawyer might assist her client . . . [and] are inadequate to inform an unrepresented, indicted defendant of his Sixth Amendment right to have a lawyer present at all critical stages of a criminal prosecution. The inadequacy of those warnings is even more obvious in the case of a *represented* defendant.[112]

More specifically, a lawyer, in the post-critical stage can:

> [P]rovide her client with advice regarding the legal and practical options available to him; the potential consequences, both good and bad, of choosing to discuss his case with police; the likely effect of such a conversation on the resolution of the charges against him; and an informed assessment of the best course of action under the circumstances.[113]

Although not noted by either the majority or the dissent, the facts of *Montejo* itself highlight the important role counsel could have played. During the interrogation police suggested that if Montejo spoke with them, the court might convict him of manslaughter (not murder).[114] Police also tried to manipulate Montejo by telling him that he could protect his younger brother from possible criminal liability.[115]

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110. *Patterson*, 487 U.S. at 308 (Stevens, J., dissenting) (citation omitted); *see also id.* at 310 (emphasizing that for a defendant, help from "someone to explain why he is being held, the nature of the charges against him, and the extent of his legal rights, may be of such importance as to overcome what is perhaps obvious to most, that the prosecutor is a foe and not a friend").

111. *Id.* at 308.

112. Montejo v. Louisiana, 556 U.S. 778, 813 (2009) (Stevens, J., dissenting).

113. *Id.* at 806 n.2.

114. State v. Montejo, 974 So. 2d 1238, 1251 n.50 (La. 2008), *rev'd*, Montejo v. Louisiana, 556 U.S. 778 (2009).

115. *Id.*; *see also, e.g.*, *In re* Darryl P., 63 A.3d 1142, 1189 (Md. 2013) (reasoning that had counsel been present they "would not merely have sat in on [any] custodial interrogation. Counsel would have insisted that no interrogation even take place. Counsel's role would have been more than that contemplated

By insisting in *Patterson* that the role of counsel pre- and post-critical stage is the same—telling a client to be quiet because any statement provided can and will be used by the government[116]—the Court understandably, but wrongly, concluded that *Miranda* warnings suffice for a knowing and intelligent waiver of Sixth Amendment rights. As the Court has stated on many occasions, when a critical stage is reached is a matter of constitutional significance: it is a time when the process evolves from an investigative to prosecutorial–adversarial stage, when a suspect becomes an accused.[117] The role of counsel at that point is not "simple and limited,"[118] and providing *Miranda* warnings, as Justice Scalia put it in *Montejo*, does not "do[] the trick."[119]

B. The Miranda *Litany Itself Is Ineffectual*

Second, by tying Fifth Amendment waiver law to the Sixth Amendment, the latter has been infused with shortcomings of the former. Even assuming arguendo that *Patterson* was correct in concluding that conveying counsel-related aspects of *Miranda* suffices to apprise an individual of the nature of the right and the consequences of foregoing it, postcritical stage,[120] the Court's subsequent decisions allowing for the watering down of the *Miranda* litany regarding counsel raise serious concern. Police need only provide the gist of *Miranda* warnings.[121] In *Duckworth v. Egan*, for instance, the Court approved a *Miranda* warning that stated, "*[w]e have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.*"[122]

More recently, in *Florida v. Powell*, the Court condoned a warning providing that a suspect had "the right to talk to a lawyer before answering any of [the officers'] questions," and containing a catch-all provision stating that "[y]ou have the right to use any of these rights at any time you want during this interview."[123] The Court held that the warning reasonably conveyed that the arrestee had a right to consult with counsel "during" interrogation,[124] despite the absence of *Miranda*'s warning that he had a right to "*the presence of an attorney*,"[125] and the *Miranda* Court's command that

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by *Miranda*. The appellant was not informed about any of these aspects of his right to counsel and any ostensible waiver of them was correspondingly not knowledgeable.").

116. *Patterson*, 487 U.S. at 293–94.

117. Rothgery v. Gillespie Cty., 554 U.S. 191, 233–34 (2008).

118. *Patterson*, 487 U.S. at 300.

119. *Montejo*, 556 U.S. at 786.

120. *See supra* notes 6–18 and accompanying text (explaining the holding of *Patterson*).

121. *See* California v. Prysock, 453 U.S. 355 (1981) (per curiam).

122. Duckworth v. Egan, 492 U.S. 195, 198 (1989).

123. Florida v. Powell, 559 U.S. 50, 54 (2010).

124. *Id.* at 62.

125. Miranda v. Arizona, 384 U.S. 436, 479 (1966) (emphasis added). The *Miranda* Court stated that "the right to have counsel present at [an] interrogation is indispensable to the protection of the Fifth

warnings be "clear and unequivocal."[126] As noted by Katharine Tinto, these elisions are especially problematic in the *Massiah* context, with its unambiguous reliance on the Sixth Amendment right to have counsel present during post-critical stage questioning.[127]

Worse yet, it is accepted that suspects often do not understand *Miranda* warnings,[128] with age, mental illness, and cognitive deficiencies making comprehension even less likely.[129] The Court has held that all individuals, regardless of mental capability, infirmity, or experience with the justice system, must assert their desire to have counsel present with unequivocal clarity,[130] a standard the Court itself has conceded can disadvantage citizens who lack "linguistic skills" to "clearly articulate their right to counsel."[131] Moreover, a waiver of *Miranda* Fifth Amendment rights (and it seems, under *Patterson*, also Sixth Amendment rights) will be presumed simply on the basis that an individual, properly advised, provides a statement.[132]

Amendment privilege." *Id.* at 469; *see also id.* at 470 ("[T]he need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning.").

126. *Id.* at 467–68. One might ask why police departments, presumably risk-averse when it comes to possible suppression of confessions when deviating from the *Miranda* litany, would be creative. *See Powell*, 559 U.S. at 63–64 (downplaying the likelihood that police will run "litigation risk[s]" and be "tempted to end-run *Miranda* by amending their warnings to introduce ambiguity"). It is fair to infer that the Tampa Police Department was motivated to devise a printed form with the alternative litany challenged in *Powell* because it believed that it could gain tactical advantage by doing so. *See also* Richard Rogers et al., *The Language of* Miranda *Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAV. 124, 125, 132 (2008) (expanding on police inventiveness and discussing the study of *Miranda* warnings used nationally and noting their "extraordinary heterogeneity"); *see generally* Myeonki Kim, *When and Why Suspects Fail to Recognize the Adversary Role of an Interrogator in America: The Problem and Solution*, 52 GONZ. L. REV. 507 (2017) (discussing the adversarial nature of police interrogation).

127. *See* Eda Katharine Tinto, *Wavering on Waiver:* Montejo v. Louisiana *and the Sixth Amendment Right to Counsel*, 48 AM. CRIM. L. REV. 1335, 1361 (2011).

128. *See* Richard Rogers et al., *Development and Initial Validation of the* Miranda *Vocabulary Scale*, 33 LAW & HUM. BEHAV. 381 (2009); Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1590–92 (2008).

129. *See* Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL'Y 395, 408–10 (2013); Andrew Guthrie Ferguson, *The Dialogue Approach to* Miranda *Warnings and Waiver*, 49 AM. CRIM. L. REV. 1437, 1453–67 (2012).

130. *See* Davis v. United States, 512 U.S. 452, 462 (1994) (holding that suspects must clearly and unambiguously ask for an attorney and that the statement "[m]aybe I should talk to a lawyer" did not suffice); *see also, e.g.*, Burket v. Angelone, 208 F.3d 172, 197–98 (4th Cir. 2000) (holding that "I think I need a lawyer" was not an unambiguous request for counsel); United States v. Scarpa, 897 F.2d 63, 68–69 (2d Cir. 1990) (holding that the defendant did not request counsel when he said he "was going to get a lawyer").

131. *Davis*, 512 U.S. at 460.

132. *See* Berghuis v. Thompkins, 560 U.S. 370, 384 (2010); Jonathan Witmer-Rich, *Interrogation and the Roberts Court*, 63 FLA. L. REV. 1189, 1233 (2011) (concluding that "there is every reason to think that the Court will apply the *Thompkins* rule equally in the Sixth Amendment context").

It is also well-known that police manipulate *Miranda* warnings[133] and downplay their importance,[134] to maximize likelihood of waiver,[135] and they are quite skilled at securing waivers.[136] Part of their toolkit is "softening up" the individual by discussing charges, alleged facts and legal consequences[137]—matters usually the province of counsel. The Supreme Court, moreover, has made clear that police need not educate suspects by providing anything more than *Miranda* warnings to satisfy the knowing and intelligent waiver requirements of *Miranda*.[138] Altogether, as Charles Weisselberg recently observed, *Miranda* functions less as a protection for individuals against police overreach than as a procedural inoculant for police.[139]

In short, as with the Fifth Amendment, it is the individual who lacks the knowledge and nerve to "only shut his door or walk away," as the *Montejo* Court put it, who needs the advice the most.[140]

C. Post-Patterson *Developments Have Heightened the Need for Greater Transparency*

The Supreme Court has often signaled its awareness of the need for constitutional protections to evolve with systemic changes, including relative to the pretrial phase. With respect to the pretrial right to counsel in particular, the Court in *United States v. Ash* noted that "extension of the right to counsel to events before trial has resulted from changing patterns of criminal

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133. *See, e.g.*, Jerome H. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, 11 CRIM. JUST. ETHICS, 3, 5–6 (1992) (finding, based on interviews with police, that police "*consciously* recite the [*Miranda*] warnings in a manner intended to heighten the likelihood of eliciting a waiver"—i.e., "in a flat, perfunctory tone of voice to communicate that the warnings are merely a bureaucratic ritual"); Weisselberg, *supra* note 128, at 1564 (discussing departures from the standardized *Miranda* warnings, which the Court has allowed).

134. *See, e.g.*, Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 662–63 (1996).

135. *See* Robert P. Mosteller, *Police Deception Before* Miranda *Warnings: The Case for Per Se Prohibition of an Entirely Unjustified Practice at the Most Critical Moment*, 39 TEX. TECH L. REV. 1239, 1261–62 (2007); Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After Fifty Years of* Miranda *Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 B.U. L. REV. 1157 (2017); Joshua I. Rodriguez, Note, *Interrogate First,* Miranda *Warnings Later: A Critical Analysis of the Supreme Court's Approach to Delayed* Miranda *Warning*s, 40 FORDHAM URB. L.J. 1091 (2013).

136. Michael D. Cicchini, *The New* Miranda *Warning*, 65 SMU L. Rev. 911, 925–28 (2012); Janet C. Hoeffel, Miranda*'s First Principles*, 50 TEX. TECH L. REV. 113, 129–38 (2017).

137. Weisselberg, *supra* note 128, at 1548, 1554–62.

138. *See* Colorado v. Spring, 479 U.S. 564, 576–77 (1987); Oregon v. Elstad, 470 U.S. 298, 316 (1985).

139. *See* Missouri v. Seibert, 542 U.S. 600, 609 (2004) (noting the reality that providing *Miranda* warnings and securing a waiver "has generally produced a virtual ticket of admissibility"); Charles D. Weisselberg, *Exporting and Importing* Miranda, 97 B.U. L. REV. 1235, 1236 (2017) (footnote omitted) ("[W]hen used as directed, *Miranda* now functions mostly as a 'safe harbor' for police. If officers comply with its formalisms and obtain a statement, law enforcement can typically avoid a more searching inquiry into the voluntariness of the statement, and there is rarely a barrier to admissibility.").

140. Montejo v. Louisiana, 556 U.S. 778, 795 (2009).

procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself."[141] At these post-critical, pretrial stages an accused requires "aid in coping with legal problems or assistance in meeting his adversary."[142]

The Court's awareness of the critical importance of pretrial developments is evidenced in *Lafler v. Cooper*[143] and *Missouri v. Frye*,[144] cases decided in 2012, the Court recognized the key role played by legal counsel in plea bargaining by extending coverage of the Sixth Amendment right to effective assistance of counsel to plea negotiations.[145] In *Lafler*, the Court noted that the modern criminal justice system is "a system of pleas,"[146] but it is more accurate to say, as Bruce Green put it, "a system of waivers."[147] Given this reality, even more than at the time of *Patterson*—decided over thirty years ago—it is imperative that defendants be provided with the knowledge necessary to make knowing and intelligent decisions regarding whether it is in their best interests to waive counsel and go it alone.[148] The importance of such knowledge is heightened by the unregulated nature of the precritical stage.[149] And even more problematic, courts have held that authorities need not inform a suspect that a critical stage has been reached in

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141. United States v. Ash, 413 U.S. 300, 310 (1973) ("At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both."); *see Montejo*, 556 U.S. at 795.

142. *Ash*, 413 U.S. at 313.

143. Lafler v. Cooper, 566 U.S. 156, 162 (2012).

144. Missouri v. Frye, 566 U.S. 134, 140 (2012).

145. *See* Turner v. United States, 885 F.3d 949, 953 (6th Cir. 2018) (en banc) (citations omitted).

> Six years ago, in [*Frye* and *Lafler*], the Supreme Court extended the Sixth Amendment right to counsel to a new critical stage: plea negotiations. It did so because plea negotiations have become "central to the administration of the criminal justice system" and because they frequently determine "who goes to jail and for how long," making them potentially "the only stage when legal aid and advice would help" many criminal defendants.

Id. In *Turner*, the Sixth Circuit, following the majority view of the circuits and strictly construing the "offense-specific" limit of the Sixth Amendment, held that the dual sovereignty doctrine applies in the Sixth Amendment context, so when a defendant is jointly prosecuted by state and federal authorities, the right to counsel does not attach in each prosecution until after separate formal charging documents are filed. *Id.* at 952, 971.

146. *Lafler*, 566 U.S. at 170.

147. Bruce A. Green, *The Right to Plea Bargain with Competent Counsel After* Cooper *and* Frye*: Is the Supreme Court Making the Ordinary Criminal Process "Too Long, Too Expensive, and Unpredictable . . . in Pursuit of Perfect Justice"?*, 51 DUQ. L. REV. 735, 741 (2013).

148. *See supra* notes 11–14 and accompanying text (criticizing the Court's holding in *Patterson*). Again, as Professor Loewy noted, the facts of *Patterson* itself attest to why and how counsel can assist with respect to pretrial plea negotiation. *Id.*; *see also* Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 832–33 (2002) (discussing judicial rationales supporting plea bargains, and centering on the quid pro quo benefits secured by the government and criminal defendants).

149. *Turner*, 885 F.3d at 951.

their case,[150] i.e., that the suspect actually has a Sixth Amendment right to waive counsel.[151]

IV. THE WAY FORWARD

As the preceding discussion makes clear, *Patterson*—in addition to being wrong when decided in 1988—has become even more problematic over time. Before proceeding to a suggested alternative to the *Miranda* litany in the Sixth Amendment context, it is necessary to clarify the conditions under which an individual, post-critical stage, is even entitled to a warning.

After *Montejo,* individuals in custody will get *Miranda* warnings (as *Miranda* requires) but an individual not in custody, in the words of the *Montejo* majority, is expected to "shut his door or walk away."[152] Although some uncertainty exists whether *Patterson* and *Montejo*—cases involving custodial interrogations in which individuals were approached at a post-critical stage and asked to waive their rights[153]—apply in noncustodial situations, this appears to be the case.[154] This assumes major practical importance given the acknowledged desire of police in recent years to avoid custodial situations (and hence the need to provide *Miranda* warnings)[155] and their demonstrated skill in doing so.[156] In short, unless the *Montejo* Court

150. *See* United States v. Chadwick, 999 F.2d 1282, 1286 (8th Cir. 1993) ("[L]aw enforcement officers need not inform an accused that he has been indicted before seeking a waiver of his right to counsel."); *see, e.g.*, United States v. Muca, 945 F.2d 88, 91 (4th Cir. 1991); Riddick v. Edmiston, 894 F.2d 586, 590–91 (3d Cir. 1990); Norman v. Ducharme, 871 F.2d 1483, 1486–87 (9th Cir. 1989); Hayes v. Commonwealth, 25 S.W.3d 463, 466 (Ky. 2000); State v. Palmer, 431 S.E.2d 172, 175 (N.C. 1993); Sadler v. State, 846 P.2d 377, 385 (Okla. Crim. App. 1993).

151. *See* Patterson v. Illinois, 487 U.S. 285, 296 (1988). The *Patterson* majority expressly avoided addressing whether the advisement should be required. *Id.* at 295 n.8 (citations omitted) ("Because, in this case, petitioner concedes that he was so informed we do not address the question whether or not an accused must be told that he has been indicted before a postindictment Sixth Amendment waiver will be valid. Nor do we even pass on the desirability of so informing the accused—a matter that can be reasonably debated.").

152. Montejo v. Louisiana, 556 U.S. 778, 795 (2009); *see also id.* at 794 ("[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.").

153. *Patterson*, 487 U.S. at 298–99; *Montejo*, 556 U.S. at 795. In *In re Darryl P.*, the court reasoned that *Montejo* and *Patterson* applied (are "coterminous") only in custodial, post-critical stage situations (as in *Montejo* and *Patterson* themselves). *In re* Darryl P., 63 A.3d 1142, 1186–87 (Md. Ct. Spec. App. 2013); *see also id.* at 1187 ("The *Patterson* holding was thus silent on the effect of a *Miranda* waiver on the right to counsel beyond the narrow context of custodial interrogation . . . .").

154. *See* Missouri v. Jinkerson, 554 S.W.3d 559, 564 (Mo. Ct. App. 2018); Forster v. Alaska, 236 P.3d 1157, 1165 (Alaska Ct. App. 2010); Craig Bradley, *What's Left of* Massiah*?*, 45 TEX. TECH L. REV. 247, 265 (2012); Witmer-Rich, *supra* note 132, at 1229–30.

155. *See, e.g.*, Devallis Rutledge, *Non-Custodial Stationhouse Interrogations*, POLICE (Jan. 1, 2009) http://www.policemag.com/Channel/Patrol/Articles/2009/01/Non-Custodial-Stationhouse-Interrogations.aspx (discussing desirability of avoiding custodial status and techniques to avoid it).

156. Keysor v. Commonwealth, 486 S.W.3d 273, 281 (Ky. 2016). As the Kentucky Supreme Court recently recognized:

> [W]aivers executed without consulting counsel are easily induced. Away from the watchful eye and pragmatic advice of counsel, police are left with an easy opportunity to

intended to reverse *Massiah*, which the majority expressly disavowed,[157] some form of warning is needed in noncustodial, post-critical stage situations.[158]

Montejo also rejected the suggestion in *Patterson*[159] that a different waiver analysis should apply to individuals who have retained counsel.[160] With an individual in the latter situation, *Patterson*/*Montejo* will result in one, or perhaps two, things. First, confusion. This is especially true for a person not experienced in the ways of the criminal justice system, who is in custody and gets a *Miranda* warning regarding availability of counsel. They will rightly think: "Didn't I already get a lawyer?"[161] Even more problematic is the situation faced by an individual who is not in custody (and the Fifth Amendment/*Miranda* right is therefore not triggered), who again is expected to simply "shut his door or walk away."[162]

In short, in custodial and noncustodial situations alike, and regardless of whether counsel has been appointed or retained, a Sixth Amendment-based waiver litany is needed. Such a warning, as doctrine provides, is of course needed only when police or an agent acting on their behalf seek to "deliberately elicit[]" information from the individual.[163]

As a threshold matter, a basic structural issue exists over what person or entity should provide the warning. One can certainly question, as the

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> adeptly place a wedge between the accused and his lawyer. For example, the police may entice an unsuspecting defendant with favors his attorney cannot obtain, like alluring assurances of better outcomes and offers of leniency in exchange for cooperative waivers.

Id.

157. *Montejo*, 556 U.S. at 791.

158. *Id.* Of course, it could be the case that a warning is required only in an instance of surreptitious questioning by a government agent—not a uniformed officer or detective—such as in *Massiah* itself. *See* Massiah v. United States, 377 U.S. 201, 202–03 (1964).

159. *See Patterson*, 487 U.S. at 290 n.3 (citations omitted).

> We note as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect. The State conceded as much at argument.

Id.; Michigan v. Harvey, 494 U.S. 344, 352 (1990) (stating that "analysis of the waiver issue changes" when a defendant "obtains or even requests counsel").

160. *See Montejo*, 556 U.S. at 789 (rejecting the argument that "no *represented* defendant can ever be approached by the State and asked to consent to interrogation"). *But see id.* at 789–90 (acknowledging that it would be "reasonable to presume from a defendant's *request* for counsel that any subsequent waiver of the right was coerced," whereas when a "lawyer was merely 'secured' on the defendant's behalf" such a presumption would not be triggered).

161. *See id.* at 813 (Stevens, J., dissenting) ("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."). Justice Stevens added, "These conflicting statements would be confusing to anyone, but would be especially baffling to defendants with mental disabilities or other impairments." *Id.* at 813 n.8.

162. *Id.* at 795.

163. Brewer v. Williams, 430 U.S. 387, 400 (1977).

Miranda dissent did,[164] and Justice Stevens did in *Patterson*,[165] the reasonableness of relying on police—whose job is to secure confessions and evidence—to reliably inform criminal suspects of their rights, and to respect their invocation of rights. Such an expectation is even more dubious when the investigatory phase passes into the adversarial stage; when police, part of the prosecutorial apparatus, yet who typically lack formal legal training, are expected to advise individuals of the benefits of counsel and the adverse consequences of waiver. One option would be to provide counsel with the power to make the decision to waive, which some states eschewing *Patterson* have done on the basis of their own constitutions.[166] The Supreme Court, however, has expressly held that counsel need not be afforded to make the waiver decision itself,[167] and the option presents the obvious challenge of having counsel at the ready for that purpose, whether at the police stationhouse or on the street. Another option would be for a court to provide the advisement whenever the critical stage is reached—another strategy used by states.[168]

Requiring a neutral judge to oversee the waiver process has obvious appeal. However, there remains the problem of what precisely they would say to ensure that an individual "knows what he is doing and his choice is made with eyes [wide] open."[169]

With regard to the content of an improved litany, several things come to mind. To begin, an individual should be advised that their case has reached a critical stage, the beginning of the formal adversarial process. In *Patterson*, the defendant was told that he had been indicted,[170] and so was the defendant in *Fellers v. United States*,[171] which suggests that doing so is not unduly burdensome to police. However, as noted, the *Patterson* Court expressly demurred on whether such notice is required,[172] and as a practical matter, indictments (while used in the federal system for all but less serious offenses) are not utilized in most states (rather, an information or other charging instruments are used).[173] Moreover, using legal terms like "indictment" and

164. *See* Miranda v. Arizona, 384 U.S. 436, 504 (1966) (Harlan, J., dissenting).

165. *See* Patterson v. Illinois, 487 U.S. 285, 307 (Stevens, J., dissenting) (asserting that "[w]arnings offered by an opposing party, whether detailed or cursory, simply cannot satisfy" the standard for a valid Sixth Amendment waiver).

166. People v. Grice, 794 N.E.2d 9, 10–13 (N.Y. 2003).

167. *Montejo*, 556 U.S. at 786.

168. State v. Sanchez, 609 A.2d 400, 408 (N.J. 1992).

169. Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942) (citing Johnson v. Zerbst, 304 U.S. 468, 469 (1938)).

170. *Patterson*, 487 U.S. at 288.

171. Fellers v. United States, 540 U.S. 519, 521–23 (2004).

172. *Patterson*, 487 U.S. at 259 n.8.

173. *See* NEIL P. COHEN ET AL., CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS 193–266 (2019).

"information" risk having little effect on individuals unschooled in the law,[174] and the terms are—like the elements of crimes themselves—"intricacies" best left to counsel.[175]

As a consequence, defendants should instead be told that a critical stage in their case has been reached, by charge, indictment, or whatever procedural development satisfies the requirement in the jurisdiction. Doing so will at least to some extent alert defendants to the significance of their waiver decision.[176] One approach would be stating that:

> Formal judicial proceedings have now been brought against you for the crime of X. The initiation of these proceedings means that the state feels that it has sufficient evidence to convict you of crime X and that you will now be prosecuted at trial by the state for this violation. Do you understand?[177]

To this could be added specific mention that the defendant has a right to counsel as a result of a critical stage being reached, which would alleviate the problem of an individual being asked to waive a right that they do not even know exists. With respect to more substantive content, harkening back to the earlier discussion, as Professor Loewy wrote, the defendant should be advised that counsel can help negotiate a plea with the government in

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174. Jonathan A. Damon, *"Far from a Mere Formalism": The Importance of Informing an Accused of Her Indictment After* Patterson v. Illinois *and* Michigan v. Harvey, 23 COLUM. HUM. RTS. L. REV. 93, 129 (1991).

175. Rothgery v. Gillespie Cty., 554 U.S. 191, 233–34 (2008) (Thomas, J., dissenting) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

176. Eve Brensike Primus, *Disentangling* Miranda *and* Massiah*: How to Revive the Sixth Amendment Right to Counsel as a Tool for Regulating Confession Law*, 97 B.U. L. REV. 1085, 1118 (2017). As Professor Primus has noted:

> Suspects should be told that they have been formally charged with a specific crime, which means that the state has concluded that there is enough evidence to officially accuse them of having committed that crime and put them on trial for the offense. That language communicates the change in circumstances in a way that suspects can understand.

Id.

Furthermore, provision of charge-related information is needed in the *Massiah,* not so much the *Miranda*, context:

> The Supreme Court has held in the *Miranda* context that the suspect need not be aware of the crimes about which he could be questioned, because knowledge of the substantive offenses is irrelevant to the question of compulsion. In the Sixth Amendment context, however, knowledge of the substantive offense is relevant to the kind of assistance that counsel might be able to provide. A suspect facing a misdemeanor jaywalking offense will understand the role that an attorney could play for him and his need for expert assistance differently from a suspect who is facing prosecution for a complex conspiracy. In order to knowingly and intelligently waive his Sixth Amendment right to counsel, the suspect must know that the right has attached and for what offense.

Id. at 118–19 (footnote omitted).

177. Damon, *supra* note 174, at 129.

exchange for information provided, and can help review and provide advice on how best to respond to charges.[178]

The foregoing is by no means intended to serve as an exhaustive account of all the important substantive assistance counsel can provide post critical stage, but it is a start and fills the vacuum long left by Patterson's counsel, which the Court made a point of emphasizing.[179] It will also go a long way toward providing an actual knowledge foundation for what the Supreme Court over time has effectively regarded as the "rugged individual," who knows his rights and sticks up for his right to not acquiesce to governmental pressure.[180]

V. CONCLUSION

The central thrust of the argument here is that individuals—eligible for the constitutional protection afforded by the Sixth Amendment at the pretrial critical stage of a criminal case—should have fuller knowledge of what counsel can do for them and the consequences of their decision to waive their right to counsel. The argument aligns with the broader goals of transparency and citizen knowledge voiced by Professor Loewy in articles over the course of his highly productive and influential scholarly career.[181] As he put it: "An uncoerced confession ignorantly made by a defendant who had no idea of his best course of action is not only not an unmitigated good, but is positively harmful to the system."[182]

178. *See supra* notes 11–14 and accompanying text (stating that *Patterson* was not aware of the benefits that came from representation).

179. Patterson v. Illinois, 487 U.S. 285, 297 nn.7–8 (1988).

180. Scott E. Sundby, *The Rugged Individual's Guide to the Fourth Amendment: How the Court's Idealized Citizen Shapes, Influences, and Excludes the Exercise of Constitutional Rights*, 65 UCLA L. REV. 690, 694 (2018).

181. *See* Loewy, *supra* note 11; Arnold H. Loewy, *Knowing "Consent" Means "Knowing Consent": The Underappreciated Wisdom of Justice Marshall's* Schneckloth v. Bustamonte *Dissent*, 79 MISS. L. J. 97 (2009); Arnold H. Loewy, *Police, Citizens, the Constitution, and Ignorance: The Systematic Value of Citizen Ignorance in Solving Crime*, 39 TEX. TECH L. REV. 1077 (2007).

182. Loewy, *supra* note 11, at 152.

> It seems clear that an uncoerced confession of an indicted defendant is not an unmitigated good. It requires compromising the adversarial process, which can never be a good thing. The fact that the defendant gave the statement in a manner that the Court would classify voluntary does not mean that it would have been given if the defendant had an opportunity to carefully weigh his options.

Id. at 151.