

WHAT’S LEFT OF *MASSIAH*?

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I. INTRODUCTION

In *Montejo v. Louisiana*, the Supreme Court overruled *Michigan v. Jackson* and tore down an elaborate edifice of law as to the right of counsel of defendants for whom formal proceedings had begun, which had grown up following the 1964 decision in *Massiah v. United States*.¹ This Article will discuss *Montejo*; the structure it dismantled; and the questions it raised, some by the Court itself, as to the future of the right to counsel in the period between arraignment or indictment and trial.

Specifically, it will argue that the *Miranda* warnings are a totally inadequate means of ensuring that a person who has counsel is “knowingly, intelligently, and voluntarily” waiving that right.² This Article will also argue that *Montejo* is effectively overruling not just *Jackson* but a long line of precedents from the Warren, Burger, and Rehnquist Courts.³ Finally, it will argue that the Court’s requirement that assertion of *Miranda* rights must be unambiguous is inconsistent with the notion that the waiver of the right to counsel must be knowing and voluntary.⁴ How can you “knowingly” waive counsel when you do not know that you have one and when all you say in response to the *Miranda* warnings is “I thought I had a lawyer” or no response at all.⁵

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1. *Montejo v. Louisiana*, 556 U.S. 778 (2009); *Michigan v. Jackson*, 475 U.S. 625 (1986), *overruled by Montejo*, 556 U.S. 778; *Massiah v. United States*, 377 U.S. 201 (1964).

2. *Montejo*, 556 U.S. at 782.

3. *See id.*; *Jackson*, 475 U.S. 625; *Massiah*, 377 U.S. 201.

4. *See Montejo*, 556 U.S. at 797.

5. *See Berghuis v. Thompkins*, 130 S. Ct. 2250, 2264 (2010) (finding a waiver of *Miranda* rights when the suspect refused to waive, remained silent for two hours and forty-five minutes, and then finally answered a question).

II. THE *MONTEJO* DECISION

Montejo was arrested on September 6, 2002, and interrogated after being given *Miranda* warnings.⁶ The Supreme Court did not bother to mention that during this initial interrogation, he asserted his right to counsel on videotape and, thus, became an *Edwards* defendant as to whom interrogation should have ceased.⁷ The following colloquy ensued:

M: "I would like to answer no more questions unless I am in front of a lawyer."⁸

At this point the police told him that he was under arrest for first degree murder and turned toward the exit to his cell.⁹ When the defendant said, "[N]ow, I know that you aren't that bad a people and all," the police interrupted:

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

M: "No, come here, come here."

Police: "No, no, I can't."

M: "No, come here. . . ."

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

M: "I don't want no attorney."¹⁰

At this point the videotape cut off.¹¹ It resumed ten minutes later with the defendant allegedly "visibly upset."¹² The detectives claimed that they spent the ten minutes talking to their supervisor and confirming that the defendant wished to revoke his right to counsel.¹³ The district court found their testimony credible.¹⁴ Montejó was questioned further the next morning.¹⁵ The Louisiana Supreme Court found that he had admitted to the crime both before and after his *Edwards* assertion.¹⁶

6. *Montejo*, 556 U.S. at 781.

7. See *State v. Montejó (Montejó I)*, 974 So. 2d 1238, 1245 (La. 2008), *vacated and remanded by* 556 U.S. 778 (2009); *Edwards v. Arizona*, 451 U.S. 477 (1981). Even prior to this interrogation he had allegedly asked for an attorney and was told by other police that they "wouldn't really recommend that." CRAIG M. BRADLEY, *Interrogation in the Swamp*, in *CRIMINAL PROCEDURE: RECENT CASES ANALYZED* 149 (2d ed. 2010) (citing briefs by National Association of Defense Lawyers and the ACLU as well as the opinion below, *Montejó I*, 974 So. 2d at 1238).

8. *Montejó I*, 974 So. 2d at 1246.

9. *Id.*

10. *Id.* at 1246-47 (alterations in original).

11. *Id.* at 1247.

12. *Id.*; BRADLEY, *supra* note 7, at 149.

13. *Montejó I*, 974 So. 2d at 1247.

14. *Id.*

15. *Id.*

16. *Id.* at 1258. On remand from United States Supreme Court, the Louisiana Supreme Court, first, rejected his arguments because he raised them at trial rather than on the motion to suppress. *State v. Montejó (Montejó III)*, 40 So. 3d 952, 957 (La. 2010). Then, the court found that he did not request counsel or assert his right to silence after the 72-hour hearing. *Id.* at 957. Finally, it concluded that if there was any error, it was harmless because he had incriminated himself substantially both prior to his *Edwards* assertion and prior to writing the letter. *Id.* at 977, 979.

Three days later and, thus, too late according to *County of Riverside v. McLaughlin*,¹⁷ the defendant was given a “72-hour hearing” (i.e., arraignment) before a judge at which he was appointed a lawyer but apparently did not actually meet with one.¹⁸ Later that same day, the police asked Montejo to accompany them on a search for the murder weapon.¹⁹ According to the Supreme Court, “[a]fter some back-and-forth, the substance of which remains in dispute, Montejo was again read his *Miranda* rights and agreed to go along; during the excursion, he wrote an inculpatory letter of apology to the victim’s widow.”²⁰

Montejo alleged that the back-and-forth occurred after the warnings when he responded that he had a lawyer but the police denied it, saying that they had checked and that he did not have a lawyer appointed.²¹ The police claimed there was no such colloquy, and their version was upheld by the Louisiana courts.²² It is only the letter of apology, which was a minor part of the prosecution’s case, that was at issue in the United States Supreme Court.²³

Montejo claimed that the letter should be suppressed under *Michigan v. Jackson*.²⁴ *Jackson* held that “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.”²⁵ The Louisiana Supreme Court rejected Montejo’s argument on the ground that, unlike *Jackson*, Montejo never “asserted” his right to counsel at arraignment.²⁶ He, apparently, simply passively accepted the appointment of counsel.²⁷

The Supreme Court disagreed with the Louisiana Supreme Court on this point, holding that, under *Jackson*, it should make no difference whether an arraigned defendant had actually used the word “lawyer” or not.²⁸ “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. Interrogation by the State is such a stage.”²⁹

The central distinction that the Louisiana Supreme Court drew—“between defendants who ‘assert’ their right to counsel and those who do not—is exceedingly hazy when applied to States that appoint counsel absent request

17. *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 57-58 (1991) (requiring an initial appearance before a judge within forty-eight hours of arrest). It is unclear what the remedy is in an individual case for a violation of this 48-hour rule. See *Powell v. Nevada*, 511 U.S. 79, 85 (1994).

18. *Montejo v. Louisiana*, 556 U.S. 778, 781 (2009). There was no transcript of this hearing, just a notation that the defendant had been appointed counsel. *Id.*

19. *Id.*

20. *Id.* at 782.

21. *Id.*; BRADLEY, *supra* note 7, at 56.

22. *State v. Montejo (Montejo III)*, 40 So. 3d 952, 957 (La. 2010).

23. *Id.* at 979-80.

24. *Id.* at 965.

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

26. *Montejo III*, 40 So. 3d at 955.

27. *Id.*

28. *Id.* at 956.

29. *Montejo*, 556 U.S. at 786 (citations omitted).

from the defendant. . . . Police who did not attend the hearing would have no way to know whether they could approach a particular defendant”³⁰

Thus, it seemed that Montejo had won. He had a lawyer, and the police interrogated him without going through the lawyer.³¹ But he did not win because of the issue of waiver.³² The Court went on to declare that the “right to counsel may be waived by [the] defendant so long as relinquishment of the right is voluntary, knowing, and intelligent. The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled.”³³ It is enough that the defendant be given the *Miranda* warnings and not assert his right to silence or counsel.³⁴ Thus, the Court overruled the presumption of *Jackson* that a Sixth Amendment defendant generally could not be asked to waive his right to counsel.³⁵

Of course, this “right” is no right. A person *always* has a right to counsel, whether or not he has been arrested or formal proceedings have begun.³⁶ If I am walking down the street, the police, without any level of suspicion, can ask me a few questions. And I can refuse to answer, citing rights to silence or counsel or giving no reason.³⁷ This right continues after arrest, but now I must be told about it.³⁸ It follows, as *Massiah* held, that after formal proceedings have begun, the Court’s specific recognition that now my Sixth Amendment rights have clicked in must mean something further: either that I cannot be interrogated without counsel being present or, at least, that I have to specifically waive this right.³⁹

Since *Edwards v. Arizona*—the case that requires interrogation to cease if the suspect asserts his right to counsel—has, at least if it is followed by police, solved the problem of police “badgering” of suspects under the Fifth Amendment; it will also suffice as to Sixth Amendment defendants, the Court asserted.⁴⁰ Thus, the fact that the defendant has a right to counsel under the Sixth Amendment counts for nothing—he can be warned and then interrogated like any other suspect. In fact, any other rule would “imprison a man in his privileges.”⁴¹

30. *Id.* at 784.

31. *See id.* at 782.

32. *See id.* at 786.

33. *Id.* (citations omitted).

34. *Id.* Thus, if the defendant does not say anything but simply responds to questions, he will be deemed to have made a “voluntary, knowing, and intelligent” waiver. *Id.*

35. *Id.*

36. *See Sixth Amendment—Attachment of Right to Counsel*, 122 HARV. L. REV. 306, 308-09 (2008).

37. *See Miranda v. Arizona*, 384 U.S. 436, 434-94 (1966).

38. *See id.* at 492.

39. *See Massiah v. United States*, 377 U.S. 201, 201-02, 205 (1964) (citing *Powell v. Alabama*, 287 U.S. 45 (1932)).

40. *Edwards v. Arizona*, 451 U.S. 477, 486-87 (1981).

41. *Montejo v. Louisiana*, 556 U.S. 778, 788 (2009) (quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 280 (1942)). This particular argument is wrong because nothing in *Jackson* would stop a defendant from talking to the police after consulting with counsel or initiating a conversation with police on his own. *See Michigan v. Jackson*, 475 U.S. 625 (1986), *overruled by Montejo*, 556 U.S. 778. It only would prohibit “police initiate[d] interrogation[s].” *Montejo*, 556 U.S. at 782 (quoting *Jackson*, 475 U.S. at 636).

The Court then pointed out that the defendant's proposed rule, that all police-initiated interrogation should be banned as to Sixth Amendment defendants, unless counsel has agreed to it, seems to have its roots in codes of legal ethics.⁴² These forbid *lawyers* from contacting the parties on the other side without going through counsel. But the Court held that these restrictions on lawyers do not restrict their agents, the police.⁴³

Finally, the Court turned to the bottom line of its decision: *warned, uncoerced, confessions are desirable and should be encouraged*.⁴⁴ Thus, the cost of preventing police interrogation of Sixth Amendment defendants would be high. Many otherwise valid confessions would be lost. On the other hand, the benefit of an expanded *Jackson* rule is low. The anti-badgering goal is already protected by the rule of *Edwards*.⁴⁵ Thus, Sixth Amendment defendants are simply entitled to the *Miranda* warnings prior to interrogation, nothing more.

Justice Stevens began his dissent by rewriting *Jackson*.⁴⁶ As noted above, *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."⁴⁷ The Court concluded that "the *assertion* of the right to counsel is a significant event and that additional safeguards are necessary when the accused asks for counsel."⁴⁸ As Justice Rehnquist pointed out in dissent, "the Court most assuredly does not hold that the *Edwards per se* rule prohibiting all police-initiated interrogations applies from the moment the defendant's Sixth Amendment right attaches, with or without a request for counsel by the defendant."⁴⁹

But Justice Stevens claimed that *Jackson* did establish such a per se rule: "If a defendant is entitled to protection from police-initiated interrogation under the Sixth Amendment when he merely *requests* a lawyer, he is even more obviously entitled to such protection when he has *secured* a lawyer."⁵⁰ The majority rightly deemed this argument "fanciful."⁵¹

In other words, according to Justice Stevens, the request, which was critical to the holding in *Jackson*, is no longer important.⁵² Also protected is the defendant who actually has a lawyer.⁵³ But this still leaves a third class of

42. *Montejo*, 556 U.S. at 790.

43. *Id.* at 789-90.

44. *Id.* at 796-98.

45. *Edwards*, 451 U.S. at 486-87.

46. *Montejo*, 556 U.S. at 801-04 (Stevens, J., dissenting).

47. See *Michigan v. Jackson*, 475 U.S. 625, 636 (1986) (emphasis added), *overruled by Montejo*, 556 U.S. 778; *supra* note 23 and accompanying text.

48. *Id.* (emphasis added) (citation omitted) (quoting *Edwards*, 451 U.S. at 484-85) (internal quotation marks omitted).

49. *Id.* at 640 (Rehnquist, J., dissenting) (emphasis omitted).

50. *Montejo*, 556 U.S. at 804 (Stevens, J., dissenting).

51. *Id.* at 788 (majority opinion).

52. *Id.* at 803-04 (Stevens, J., dissenting).

53. *Id.* at 804.

defendants, those who have been indicted or arraigned but have not yet requested or received a lawyer, who are unprotected and, thus, remain subject to police interrogation.

Jackson has always seemed a foolish decision. Why should the defendant's request for counsel *in court* (presumably to represent him at pre-trial and trial proceedings) affect police interrogations *out of court*? Unless the police happened to be present in court they would have no way of knowing what the defendant had said there. Nor was the defendant, or the judge who queried him, likely referring to police interrogations when he was asked about counsel. It certainly makes more sense to make such a request irrelevant, as both the majority and the dissent now agree. So, what Stevens says now is what *Jackson* should have said, not what it did say: *Once formal proceedings have begun, police-initiated interrogations are forbidden, absent permission of counsel.*⁵⁴ The reason for this failure is that in *Jackson*, Stevens needed Justice White's vote to have a majority opinion and White would not subscribe to the *per se* rule.⁵⁵

This is a perfectly sensible system that seems to be what Justice Stewart was aiming for in *Massiah*, where the notion of an out-of-court role for counsel originated, and what Justice Stevens was aiming for in *Jackson*—for defendants as to whom formal proceedings have begun, the police must either deal with counsel or wait until the defendant approaches them.⁵⁶ The Court, however, never quite got around to holding this; *Jackson* was the closest it came.

Yet for years, the Supreme Court has assumed Sixth Amendment defendants were entitled to special protection, at least those defendants who actually had counsel, despite the fact that the police would also not necessarily know about this.⁵⁷ In *Michigan v. Harvey*, the Court acknowledged that “once a defendant obtains or even requests counsel,” *Jackson* alters the waiver analysis.⁵⁸ In *Patterson v. Illinois*, the Court held that a simple *Miranda* waiver was sufficient to waive an arraigned defendant's right to counsel, but noted that the analysis would be different if the defendant actually *had* counsel: “Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect.”⁵⁹

As the quotation from *Patterson* indicates, *Jackson*, and the Sixth Amendment cases generally, were never anti-badgering cases, contrary to the *Montejo* majority's claim.⁶⁰ In fact, *Jackson* never mentions badgering as a

54. *See id.* at 802.

55. Interview with W.H.R., Clerk, United States Supreme Court. So I am informed by a Supreme Court clerk from the term that *Jackson* was decided. *Id.* Chief Justice Burger did not join the majority vote in *Jackson*, leaving Justice White as the critical fifth vote. *Montejo*, 556 U.S. at 778.

56. *Massiah v. United States*, 377 U.S. 201 (1964); *Michigan v. Jackson*, 475 U.S. 625 (1986), *overruled by Montejo*, 556 U.S. 778; *see discussion infra* Part IV.

57. *See, e.g., Michigan v. Harvey*, 494 U.S. 344, 352 (1990).

58. *Id.*

59. *Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988) (citing *Maine v. Moulton*, 474 U.S. 159, 176 (1985)).

60. *Montejo*, 556 U.S. at 803-04 (Stevens, J., dissenting).

concern.⁶¹ Rather, the right is to protect “the unaided layman at critical confrontations with his adversary.”⁶² What this aid would be is left unclear in the decisions recognizing it. There are no legal arguments to be made or witnesses to be cross-examined. What the lawyer can do is prevent interrogation, tell the police the defendant’s story off the record, point to other possible suspects, and possibly arrange for a lesser charge if the defendant cooperates. Finally, he can arrange a plea bargain.

Thus, *Jackson*, however foolish its actual holding, was consistent with the notion, oft repeated by the Court, that Sixth Amendment defendants are entitled to special consideration, at least if they actually have a lawyer, but inconsistent with the principle on which *Montejo* is based, that uncoerced and warned confessions are good and should be encouraged as to all suspects.⁶³

Stevens next pointed out, quite rightly, that “there is no sound basis for concluding that *Montejo* made a knowing and valid waiver of his Sixth Amendment right to counsel.”⁶⁴ Consider the *Miranda* warnings. The third warning is that you have a right to counsel.⁶⁵ The fourth is that if you cannot afford counsel one will be appointed for you.⁶⁶ To the defendant who already has counsel or who has been told by the court that he will have counsel, these warnings make no sense. His response is likely to be, “I thought I already had counsel,” as the defendant alleged in *Montejo*. How can he make a “voluntary and informed” waiver of the right to counsel in the face of these nonsensical warnings?⁶⁷ Because the invocation of the *Edwards* right must be “unambiguous,” the defendant’s likely response would not suffice as an invocation of his rights.⁶⁸ As *Patterson* observed, “there will be cases where a waiver which would be valid under *Miranda* will not suffice for Sixth Amendment purposes.”⁶⁹ And as Stevens correctly argued, “[t]his is such a case.”⁷⁰

61. *Id.* at 805.

62. *Michigan v. Jackson*, 475 U.S. 625, 631 (1986) (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984), *overruled by Montejo*, 556 U.S. 778).

63. *See id.*; *Montejo*, 556 U.S. at 796-98 (majority opinion).

64. *Montejo*, 556 U.S. at 810 (Stevens, J., dissenting).

65. *See Miranda v. Arizona*, 384 U.S. 436, 469, 471 (1966).

66. *See id.* at 472-73.

67. *See Montejo*, 556 U.S. at 786 (majority opinion). As Stevens pointed out, informing a defendant of the right to obtain counsel when that defendant “has *already* secured counsel is more likely to confound than enlighten.” *Id.* at 813 (Stevens, J., dissenting).

68. *See Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010). Leaving aside that the police then allegedly told *Montejo* that he did not have counsel, an allegation dismissed by the Louisiana courts. *See Montejo*, 556 U.S. at 782-73 (majority opinion).

69. *Patterson v. Illinois*, 487 U.S. 285, 297 n.9 (1988).

70. *Montejo*, 556 U.S. at 813 (Stevens, J., dissenting). Stevens further elaborated, the “*Miranda* warnings do not hint at the ways in which a lawyer might assist her client during conversations with the police.” *Id.* As James Tomkovicz put it, “[w]ithout full information concerning the right to counsel, an accused’s decision to forego that right cannot constitute the assertion of independence that is a prerequisite to a constitutionally acceptable waiver.” James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 1055 (1986).

Thus, *Montejo* is right to overrule the *Jackson* decision but wrong to ignore the cases that have recognized that counsel can play not only a significant role in preventing ill-advised incrimination by the defendant but also a positive role in finding for the guilty party in cases in which the police have the wrong man, a role the Supreme Court never recognized in the “right to counsel” heyday.⁷¹ *Montejo* is even more wrong to believe that the *Miranda* warnings will suffice to ensure that a Sixth Amendment defendant has voluntarily and intelligently waived his right to counsel, possibly just by saying nothing and later answering police questions, or possibly by saying something such as “I thought I had a lawyer.”⁷²

The *Miranda* warnings have always been misleading when it comes to counsel. Contrary to the warning, the suspect does not have a right to counsel.⁷³ If he asks for counsel, the police have no obligation to provide one.⁷⁴ They only have to cease interrogation.⁷⁵ But at least the *Miranda* defendant is somewhat encouraged to ask for counsel and, thereby, cause interrogation to cease.⁷⁶ The defendant who already has a lawyer, on the other hand, is simply confused by the counsel warnings. This was even more so in *Montejo*’s case when his first attempt to ask for a lawyer was met with disapproval by police, causing him to withdraw it.⁷⁷

There is one aspect of *Montejo* that holds out hope for future defendants. The Court remanded this case to the Louisiana Supreme Court to determine two issues.⁷⁸ The first issue was whether *Montejo*, in his post-arraignment confrontation (not his previous post-arrest assertion of rights) with police had made an adequate assertion to become an *Edwards* defendant.⁷⁹ Second, the Court referenced *Moran v. Burbine* and remanded to give *Montejo* an opportunity “to press any claim he might have that his Sixth Amendment waiver was not knowing and voluntary, *e.g.*, his argument that the waiver was invalid because it was based on misrepresentations by police as to whether he had been appointed a lawyer.”⁸⁰

The Court’s reference to *Moran* is confusing. *Moran* had complained that he, an arrested defendant who had never asked for a lawyer, should have his

71. See Tomkovicz, *supra* note 70, at 980-82.

72. See *Berghuis*, 130 S. Ct. at 2260 (holding that a waiver is presumed unless the suspect unambiguously asserts his rights); *North Carolina v. Butler*, 441 U.S. 369, 375-76 (1979) (holding that a *Miranda* suspect need not directly waive his rights).

73. See *Miranda v. Arizona*, 384 U.S. 436, 474 (1966).

74. See *id.*

75. See *id.* at 473-74.

76. See *id.*

77. See *Montejo v. Louisiana*, 556 U.S. 778, 782-83 (2009).

78. See *id.* at 799.

79. See *id.* at 796-97. The Louisiana Supreme Court held, on remand, that he never raised the counsel matter with police, that the issue was not raised in a timely fashion before trial, and that in any event it was harmless error because the letter was a minor part of the prosecution’s case. See *supra* notes 18-23 and accompanying text.

80. *Montejo*, 556 U.S. at 798 (citing *Moran v. Burbine*, 475 U.S. 412, 428-29 (1986)). The Louisiana Supreme Court also rejected this claim on a similar ground to the first. See *State v. Montejo (Montejo III)*, 40 So. 3d 952, 957 (La. 2010).

confession suppressed because his sister had arranged for a lawyer to represent him (but he was not told of this), the lawyer was not allowed to see him, and the sister may have been deceived about whether he was about to be interrogated.⁸¹ The Court held that all of this was irrelevant.⁸² Moran could have asked for a lawyer, but because he did not, his confession was admissible.⁸³

However, in the cited pages, the *Moran* Court indicated that the result might have been different if Moran had been a *Sixth Amendment* defendant because formal proceedings had begun.⁸⁴ In that case, the Court said that it followed that “police may not interfere with the efforts of a defendant’s attorney to act as a ‘medium between [the suspect] and the State’ during the interrogation. The difficulty for respondent [in *Moran*] is that the [inculcating] interrogation . . . took place *before* the initiation of adversary judicial proceedings.”⁸⁵ It would seem to follow from this that if the police told Montejo, a *Sixth Amendment defendant*, that he did not have a lawyer, when he did, his waiver would be invalid. However, the police denied that such a conversation had ever occurred, and the Louisiana courts accepted this denial.⁸⁶

The Court then limited Montejo’s opportunities by holding the following:

[T]here is no reason categorically to distinguish an unrepresented defendant from a represented one. It is equally true for each that, as we held in *Patterson*, the *Miranda* warnings adequately inform him “of his right to have counsel present during the questioning” and make him “aware of the consequences of a decision by him to waive his Sixth Amendment rights.”⁸⁷

This is contrary to a long line of precedent, stretching through the Warren, Burger, and Rehnquist Courts, that a defendant against whom formal proceedings have begun, or at least a defendant who has counsel, is entitled to some sort of special consideration, though just what that was is murky.⁸⁸ Now the Court says that a defendant will not be allowed to argue that the *Miranda* warnings are insufficient for a Sixth Amendment defendant, even though, as demonstrated above, they are clearly not.⁸⁹ Perhaps the Court is suggesting that if counsel is trying to reach a Sixth Amendment defendant, counsel must be

81. *Moran*, 475 U.S. at 416-18.

82. *See id.* at 423-24, 427.

83. *See id.* at 421-22.

84. *See id.* at 428.

85. *Id.* (first alteration in original) (citations omitted) (quoting *Maine v. Moulton*, 474 U.S. 159, 176 (1985) (first quote); *United States v. Gouveia*, 467 U.S. 180, 192 (1984) (second quote)) (internal quotation marks omitted).

86. *See State v. Montejo (Montejo III)*, 40 So. 3d 952, 957, 969 (La. 2010).

87. *Montejo v. Louisiana*, 556 U.S. 778, 798 (2009) (quoting *Patterson v. Illinois*, 487 U.S. 285, 293 (1998)).

88. *See, e.g., Michigan v. Harvey*, 494 U.S. 344, 352 (1990) (stating that “analysis of the waiver issue changes” once a defendant “obtains or even requests counsel”); *Patterson*, 487 U.S. at 290 n.3 (“Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect.”).

89. *See Montejo*, 556 U.S. at 796-97; *Patterson*, 487 U.S. at 290; *Harvey*, 494 U.S. at 352.

permitted access and the interrogation cannot continue under these circumstances.

Of course, as noted, the *Miranda* warnings do *not* make clear the represented defendant's right to have counsel present during interrogation or the consequences of a decision to waive his Sixth Amendment rights.⁹⁰ *Montejo* and *Moran* suggest that if the police mislead the defendant about the fact that he has counsel, that might render the waiver invalid.⁹¹ This would give Sixth Amendment defendants *something*. Given the Court's general tolerance for lying to *Miranda* defendants,⁹² as well as *Moran*'s holding that an arrested defendant need not be informed that his lawyer is trying to reach him, ordinary *Miranda* defendants could apparently be lied to about the existence of an attorney. Perhaps the Court is suggesting that Sixth Amendment defendants who have attorneys cannot be so misinformed.

If one accepts the Court's view that obtaining uncoerced, warned confessions is a virtue of a higher order than the Sixth Amendment defendant's right to counsel, the Court could at least require that Sixth Amendment defendants receive a sensible *Miranda* warning. This would be along the lines of, "You have the right to talk to your counsel before answering any questions," instead of the current misleading third and fourth warnings.⁹³ Doubtless this would result in few invocations of rights, as the current warnings do, but it would at least do what the Court insists the current warnings do—lead to a more or less voluntary and informed waiver.⁹⁴

One might suppose that a Sixth Amendment defendant would not have to be in custody before being entitled to the warnings. Unlike a *Miranda* defendant, whose right to the warnings does not apply unless it is a "custodial" interrogation, a Sixth Amendment defendant already has the right to counsel.⁹⁵ But after an unconvincing discussion about why such a defendant does not need to be warned, the Court rejected a warning requirement for Sixth Amendment defendants who are not in custody, despite the fact that the warnings were key to ensuring that the waiver of counsel was knowing and intelligent.⁹⁶

90. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (noting that the required warning includes the statement that the defendant "has a right to the presence of an attorney").

91. See *Moran v. Burbine*, 475 U.S. 412, 424-25 (1986); *Montejo*, 556 U.S. at 798 (Kennedy, J., concurring).

92. See *Moran*, 475 U.S. at 424-25; *Frazier v. Cupp*, 394 U.S. 731, 737-38 (1969) (admitting a confession in a pre-*Miranda* case although the police had falsely told the defendant that a suspected accomplice confessed). See generally KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 701-11 (12th ed. 2008) (discussing the trickery or deception police may employ after a suspect has waived his rights).

93. See *Miranda*, 384 U.S. at 444.

94. See Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1009-10 (finding that 80% of suspects do not assert their rights and that those who do are most likely to be the ones with criminal records who were already aware of their *Miranda* rights).

95. See *Massiah v. United States*, 377 U.S. 201, 205 (1964); *Miranda*, 384 U.S. at 444.

96. *Montejo*, 556 U.S. at 787.

[Sixth Amendment interrogations] are the *least* likely to pose a risk of coerced waivers. When a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering. And noninterrogative interactions with the State do not involve the

Are there any other claims that a defendant might now make under *Montejo*? Certainly a defendant who asserted his right to counsel (whether a Fifth or Sixth Amendment defendant) during interrogation, as *Montejo* clearly did at his pre-arraignment interrogation, should not be allowed to be talked out of it by police complaining that he violated their “trust” by doing so.⁹⁷ And this should have made *Montejo* an *Edwards* defendant for the next fourteen days, barring the use of the letter regardless of his right to counsel attaching at arraignment.⁹⁸

May police deceive an indicted defendant’s attorney? *Moran v. Burbine* reasoned that while it was okay to deceive a Fifth Amendment defendant’s attorney, once a defendant’s Sixth Amendment rights have attached, “the police may not interfere with the efforts of a defendant’s attorney to act as a ‘medium between [the suspect] and the State’ during the interrogation.”⁹⁹ But as Michael Mims has previously reasoned, given that *Montejo* is based on the notion that the Sixth Amendment’s role at interrogation is the same as the Fifth’s, guarding against compulsion, there would be no reason either to inform the attorney that his client was in custody or to inform the client that his attorney was trying to reach him.¹⁰⁰ But, as argued above, the Court should at least draw the line at deception of the defendant as a matter of Due Process, if not as an aspect of the right to counsel.

Montejo did seem to establish a clear rule about *Edwards* defendants that applies to *Montejo*’s first interrogation, when he unquestionably made a clear and “unequivocal election of the right.”¹⁰¹ That is, that *Montejo*’s subsequent waiver, in the face of police protests that they were disappointed in him, was “invalid.”¹⁰² This rule that once the right to counsel is clearly asserted it cannot be waived (absent initiation by the suspect) would apply equally to Fifth and Sixth Amendment defendants and would further the Court’s desired goal of preventing badgering.¹⁰³ The Court’s decision to ignore *Montejo*’s first

“inherently compelling pressures” that one might reasonably fear could lead to involuntary waivers.

Id. at 795 (quoting *Miranda*, 384 U.S. at 467). Because the defendant is not in custody, it is unclear whether police must follow the *Edwards* rule. See Jonathon Witmer-Rich, *Interrogation and the Roberts Court*, 63 FLA. L. REV. 1189, 1230 (2011). That is, if he asserts the right to counsel, questioning must cease. *Id.* at 1233-34 (arguing that because the Court is unconcerned about the “badgering” of non-custodial suspects, assertion of the right to counsel in noncustodial situations would not prevent the police from coming back and trying again).

97. See *Montejo*, 556 U.S. at 781-82.

98. See *Maryland v. Shatzer*, 130 S. Ct. 1213, 1223 (2010).

99. *Moran v. Burbine*, 475 U.S. 412, 428 (1986) (alteration in original) (quoting *Maine v. Moulton*, 474 U.S. 159, 176 (1985)) (internal quotation marks omitted).

100. Michael Mims, Comment, *A Trap for the Unwary: The Sixth Amendment Right to Counsel After Montejo v. Louisiana*, 71 LA. L. REV. 345, 376 (2011).

101. *Montejo*, 556 U.S. at 797 (quoting *Texas v. Cobb*, 532 U.S. 162, 176 (2001)). Though, as noted, the Court ignored this in its opinion. See *id.*

102. *Id.* at 796-98. “Even if *Montejo* subsequently agreed to waive his rights, that waiver would have been invalid had it followed an ‘unequivocal election of the right.’” *Id.* at 797. But there the Court was talking about the letter, before which he apparently did not unequivocally assert his rights, not his original interrogation by the police when he did. See *id.* at 796-98.

103. See *Kansas v. Ventris*, 556 U.S. 586, 590 (2009).

assertion of his right to counsel, however, casts doubt on whether it is willing to enforce even this straightforward rule.

III. HOW OTHER COUNTRIES DO IT

When one looks to the largest countries of Western Europe and Canada, one finds that the commencement of formal proceedings is usually a meaningful event. In Canada, however, post-charge interrogations are treated the same as pre-charge interrogations.¹⁰⁴ But this includes a much more meaningful right to counsel than in the United States.¹⁰⁵ Prior to interrogation, the defendant must be told not only that he has a right to counsel but also that duty counsel is available to speak to him right then in the police station.¹⁰⁶ After consulting with counsel, however, interrogation may resume in the absence of counsel.¹⁰⁷

In England, “[w]hen the suspect has been charged with an offence, questioning must stop.”¹⁰⁸ In France, if the defendant is formally charged with a felony, he “must have the opportunity to be heard, with counsel present.”¹⁰⁹ Likewise, in Italy, “once an individual becomes a defendant [i.e., formal proceedings have been initiated] neither the police nor the public prosecutor may question or interrogate him except during court proceedings”¹¹⁰ In Germany, however, formal proceedings or actual counsel do not affect police interrogation.¹¹¹

IV. THE SIXTH AMENDMENT STRUCTURE

A complicated structure, differentiating between suspects who have merely been arrested and defendants as to whom formal proceedings have begun, was initiated in *Massiah v. United States* in 1964, two years before *Miranda*.¹¹² In that case, the defendant had been indicted for possession of narcotics aboard a United States vessel and had a lawyer.¹¹³ Federal agents arranged for his co-defendant, Colson, to engage in conversation about the case

104. Kent Roach, *Canada*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 76-78 (Craig Bradley ed., 2d ed. 2007).

105. *Id.*

106. *Id.* at 76.

107. *Id.*

108. David J. Feldman, *England and Wales*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY*, *supra* note 104, at 170.

109. Richard S. Frase, *France*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY*, *supra* note 104, at 217.

110. Rachel A. Van Cleave, *Italy*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY*, *supra* note 104, at 327.

111. Thomas Weigend, *Germany*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY*, *supra* note 104, at 260.

112. *Massiah v. United States*, 377 U.S. 201, 205-06 (1964).

113. *Id.* at 202-03.

in a car with Massiah.¹¹⁴ The car was bugged, and an agent testified about the conversation at Massiah's trial.¹¹⁵

The Supreme Court, per Justice Stewart, reversed the conviction, holding that "the petitioner was denied the basic protections of [the Sixth Amendment] 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."¹¹⁶

In fact, Massiah "was more seriously imposed upon . . . because he did not even know that he was under interrogation by a federal agent."¹¹⁷ Dissenting Justice White, joined by Justices Clark and Harlan, argued, similarly to the majority in *Montejo*, that "relevant, reliable and highly probative" evidence, which was not compelled, should not be suppressed.¹¹⁸

Although *Massiah* was also cited by the Court soon after as the basis for overturning the conviction of a suspect as to whom formal proceedings had not begun but who had counsel and asserted his right to counsel prior to interrogation by police, it was largely ignored in the ensuing years after *Miranda* held that all suspects, regardless of whether formal proceedings had begun, must be warned, *inter alia*, of the right to counsel prior to custodial interrogation.¹¹⁹

Massiah was resurrected in 1977 in *Brewer v. Williams*, again written by Justice Stewart, when the Court struck down the confession of a suspect who was questioned by police, even though he had been indicted and had counsel.¹²⁰ The Court rejected the argument that, by talking to police, Williams had waived his right to counsel, reaffirming the lower court's holding that "it is the government which bears a heavy burden" of establishing waiver.¹²¹ This was so despite the fact that Williams had been given the *Miranda* warnings prior to interrogation.¹²²

Thus, the *Massiah* rule seemed clear: neither the police nor their agents could question a defendant as to whom formal proceedings had begun, and his mere cooperation with police after receiving *Miranda* warnings would not serve as a waiver.¹²³

Massiah was relied on, again, three years later in *United States v. Henry*, in an opinion written by Chief Justice Burger.¹²⁴ In *this case*, a defendant, who

114. *Id.*

115. *Id.*

116. *Id.* at 206.

117. *Id.* (alteration in original) (quoting *United States v. Massiah*, 307 F.2d 62, 72-73 (2d Cir. 1962)).

118. *Id.* at 208, 210 (White, J., dissenting).

119. *Escobedo v. Illinois*, 378 U.S. 478, 497-99 (1965).

120. *Brewer v. Williams*, 430 U.S. 387, 438-41 (1977).

121. *Id.* at 402 (quoting *Williams v. Brewer*, 375 F. Supp. 170, 182 (S.D. Iowa 1974)).

122. *Id.* at 391. Williams also said that he would only cooperate with police after he saw his lawyer, but this pre-*Edwards* Fifth Amendment assertion of rights was not the basis of the Court's decision. *Id.*

123. *Massiah*, 377 U.S. at 208-10 (White, J., dissenting); see also *infra* note 137 (discussing police seeking a waiver).

124. See *United States v. Henry*, 447 U.S. 264, 270 (1980).

had been indicted and had a lawyer, spoke to a paid informer about the crime while in jail and made incriminating statements.¹²⁵ Although the informer was instructed “not to initiate any conversation with or question Henry regarding” the crime, (and the Court assumed that he had followed this instruction), Henry did disclose incriminating details.¹²⁶ The Court, finding that the informant was not a “passive listener,” held that he “deliberately elicited” information about the crime and that this evidence should have been excluded under *Massiah*.¹²⁷

In *Maine v. Moulton*, decided in 1985, the Court went a step further, holding that, while it was permissible for police to use an informant/co-defendant to deliberately elicit information from an indicted defendant to investigate a future crime (the killing of a witness in the indicted crime) to the extent that the informant obtained information about the a pending crime, it could not be used.¹²⁸ The State argued that because the defendant, rather than the informant (also named Colson), had set up the conversation, there should be a different result, but this argument was rejected.¹²⁹

Then, in April 1986, came *Michigan v. Jackson*, which held that assertion of the right to counsel at arraignment meant that the defendant should be treated like an *Edwards* defendant in the sense that the police could not interrogate him in the absence of counsel.¹³⁰ But why should such an assertion matter? If he has been arraigned, he is a Sixth Amendment defendant who the police cannot interrogate anyway. And the Court made its opinion clear that “[i]n construing respondents’ request for counsel, we do not, of course, suggest that the right to counsel turns on such a request.”¹³¹

The Republican Court finally woke up to the fact that it gave indicted defendants more than it wanted to and essentially took back *Henry* in June 1986 in *Kuhlmann v. Wilson*.¹³² There, an informant was put in a cell with Wilson that overlooked the crime scene.¹³³ Wilson initiated discussion of the crime, telling the informant the story he told police.¹³⁴ But the informant told him his story “didn’t sound too good.”¹³⁵ After a few days passed and his brother told Wilson that his family believed he committed murder, Wilson confessed to the informant.¹³⁶ The Court approved of this, holding that the informant had not

125. *See id.* at 265-66.

126. *See id.* at 266, 271 n.8 (“[T]he agent only instructed [the informant] not to question Henry or to initiate conversations regarding the bank robbery charges. Under these instructions, [the informant] remained free to discharge his task of eliciting the statements in myriad less direct ways.”).

127. *See id.* at 271.

128. *See Maine v. Moulton*, 474 U.S. 159, 179-80 (1985).

129. *See id.* at 175.

130. *See Michigan v. Jackson*, 475 U.S. 625, 632-33 (1986), *overruled by* *Montejo v. Louisiana*, 556 U.S. 778 (2009).

131. *See id.* at 633 n.6 (citing *Brewer v. Williams*, 430 U.S. 387, 404 (1977)).

132. *See Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (holding that the listener did not deliberately elicit incriminating information).

133. *Id.* at 439.

134. *Id.*

135. *Id.* at 439-40.

136. *See id.*

“deliberately elicited” incriminating information, contrary to the finding of the Court of Appeals, which found that “slowly, but surely, [the informant’s] ongoing verbal intercourse with [respondent] served to exacerbate [respondent’s] already troubled state of mind.”¹³⁷ The Supreme Court emphasized that “the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation.”¹³⁸ The distinction of *Henry* was far from obvious because in neither *Kuhlmann* nor *Henry* did the informants perform the equivalent of a police interrogation.¹³⁹

The cutback continued in *Patterson v. Illinois*.¹⁴⁰ There, the Court rejected the assertion in *Jackson* that waiver of Sixth Amendment rights was essentially impossible.¹⁴¹ It held that simply giving an indicted defendant the *Miranda* warnings and letting him answer questions was a valid waiver of the defendant’s Sixth Amendment rights.¹⁴² However, the Court, for the first time, drew a line between defendants as to whom formal proceedings had begun and defendants who actually *had* counsel:

[Not] all Sixth Amendment challenges to the conduct of postindictment questioning will fail whenever the challenged practice would pass constitutional muster under *Miranda*. . . .

Thus, because the Sixth Amendment’s protection of the attorney-client relationship—“the right to rely on counsel as a ‘medium’ between [the accused] and the State”—extends beyond *Miranda*’s protection of the Fifth Amendment right to counsel, there will be cases where a waiver which would be valid under *Miranda* will not suffice for Sixth Amendment purposes.¹⁴³

In *Michigan v. Harvey* in 1990, the Court held that a defendant may be impeached by statements taken in violation of his Sixth Amendment rights.¹⁴⁴

137. *Id.* at 460 (second and third alterations in original) (quoting *Wilson v. Henderson*, 742 F.2d 741, 745 (2d Cir. 1984)).

138. *Id.* at 459.

139. *See id.*; *United States v. Henry*, 447 U.S. 264, 271 (1980).

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

141. *See id.* *Jackson* held that “we should ‘indulge every reasonable presumption against waiver of fundamental constitutional rights. . . .’ [T]he State . . . has the burden of establishing valid waiver. Doubts must be resolved in favor of protecting the constitutional claim.” *Michigan v. Jackson*, 475 U.S. 625, 633 (1986) (citations omitted) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)), *overruled by* *Montejo v. Louisiana*, 556 U.S. 778 (2009). In *McNeil v. Wisconsin*, the Court, per Justice Scalia, acknowledged that *Jackson* held that “any subsequent waiver during a police-initiated custodial interview is ineffective.” *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991).

142. *See Patterson*, 487 U.S. at 296 n.9.

143. *Id.* (third alteration in original) (citations omitted) (quoting *Maine v. Moulton*, 474 U.S. 159, 176 (1985)). The Court’s distinction between represented and unrepresented defendants makes sense when the *Miranda* warnings are considered. Telling an unrepresented defendant that he has a right to counsel and that if he cannot afford counsel one will be appointed for him, makes sense to the unrepresented defendant and does invite him to ask for counsel, unlike its confusing effect on the defendant who already has counsel.

144. *Michigan v. Harvey*, 494 U.S. 344, 345-46 (1990). The Court further stated, confusingly, that “once a defendant obtains or even requests counsel . . . the waiver issue changes.” *Id.* at 352; *accord* *Montejo*, 556 U.S. at 791 (writing off this language as inconsistent with other parts of *Harvey*).

And in *McNeil v. Wisconsin*, the Court held that the Sixth Amendment was “offense specific.”¹⁴⁵ Thus, the fact that the defendant has qualified for Sixth Amendment protection in one case does not preclude the police from questioning him about a different case.¹⁴⁶

Thus, the Court, prior to *Montejo*, created an incredibly complex structure of rights for Sixth Amendment defendants, as opposed to ordinary suspects or, perhaps, only for such suspects who actually had counsel. The relatively straightforward *Massiah* rule (you cannot question indicted or arraigned suspects) has been replaced by a set of rules so complex that I do not even expect my students, much less police, to understand or remember them. Consequently, I provided my students with a chart, which they can take into the exam, that summarizes these differences, though not all assertions in the chart were necessarily firmly established.¹⁴⁷

It would seem that the Court would do away with this last vestige of a Sixth Amendment pretrial right as soon as it got the chance. But, oddly, days before it decided *Montejo*, the Court passed up this opportunity in *Kansas v. Ventris*.¹⁴⁸

In *Ventris*, the Court was faced with a statement to a jailhouse informant, which the State held could not be used at trial, even to impeach the defendant’s testimony.¹⁴⁹ Because the State conceded that use of this statement in the prosecution’s case-in-chief was a *Massiah* violation, the Court assumed *arguendo* that this was so, rather than deciding this issue.¹⁵⁰ It simply held that the defendant could be impeached with a confession that could not be used in the case-in-chief.¹⁵¹ It could have used this opportunity to overrule *Massiah*.

Further, in *Montejo*, the Court’s reference to *Moran v. Burbine* in its remand order (discussed earlier) may suggest that if Sixth Amendment defendants have lawyers who are trying to reach them, they should be notified.¹⁵² Or, at least, the police cannot lie if defendant asks if he has counsel.¹⁵³

There could be a different standard of waiver for Sixth and Fifth Amendment defendants, requiring that waivers by Sixth Amendment defendants be express, not implied. But because *Montejo*’s waiver was not express, it would seem that the holding in this case has foreclosed that option.¹⁵⁴

145. *McNeil*, 501 U.S. at 175.

146. *See id.*

147. *See infra* Appendix.

148. *Kansas v. Ventris*, 556 U.S. 586, 590 (2009).

149. *Id.* at 586.

150. *Id.* at 590.

151. *Id.*

152. *See Montejo v. Louisiana*, 556 U.S. 778, 798 (2009).

153. *See id.*

154. *See id.* at 798-99.

I do not necessarily disagree with the bottom line of *Montejo*. It is clear that investigation may continue after formal proceedings have begun, and there is no obvious reason why the defendant should be free from interrogation during that period.¹⁵⁵ Certainly arraignments, typically occurring within twenty-four hours of arrest, should in no way mark the end of the investigation and, hence, of the police desire to question defendants. Arguably, the indictment (or information) does represent the end of the investigation and could be a point at which police are no longer allowed to approach defendants. Thus, the “formal proceedings have begun” test of *Massiah* never made much sense.

But there should at least be, as the Court claims there was here, reason to believe that the waiver was “voluntary, knowing, and intelligent.”¹⁵⁶ How can a waiver of a lawyer be voluntary, knowing, and intelligent by someone who does not even know that he has a lawyer?

Montejo's impact can be limited in those states, or cases, in which defendants meet with lawyers at arraignment or immediately thereafter. The lawyer can sternly and repeatedly warn the defendant not to speak to the police under any circumstances unless the lawyer is present. But in cases where the defendant either is not appointed a lawyer at arraignment or, as in *Montejo*'s case, does not know that he has one, the largely meaningless *Miranda* warnings do not meet the voluntary, knowing, and intelligent standard. If words have meaning, the Court should at least require giving the defendant meaningful warnings, not misleading him about the status of counsel and requiring an explicit waiver, rather than just taking his subsequent cooperation as an implicit waiver.¹⁵⁷

155. Sherry F. Colb, *Why the Supreme Court Should Overrule the Massiah Doctrine and Permit Miranda Alone to Govern Interrogations*, FINDLAW (May 9, 2001), <http://www.writ.news.findlaw.com/colb/20010509.html>.

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

157. See *supra* Part II. To make it easier, I would require this only when the suspect actually has counsel and after formal proceedings have begun.

APPENDIX

RIGHT TO COUNSEL**SIXTH AMENDMENT (*MASSIAH*) DEFENDANT**

1. Attaches when formal proceedings have begun (regardless of custody).¹⁵⁸
2. Self-executing (need not be asserted).¹⁵⁹
3. Waivable by ordinary *Miranda* standards whether or not defendant initiates, but if defendant actually has counsel, it is not waivable.¹⁶⁰
4. Violated by “deliberate elicitation” (informers no good but “listeners,” human or electric, okay).¹⁶¹
5. Crime specific.¹⁶²
6. A *Massiah* Sixth Amendment defendant who asks for counsel, even in court, also becomes an *Edwards* Fifth Amendment defendant.¹⁶³
7. Must be warned—*Miranda* warnings—regardless of custody.¹⁶⁴
8. May be “Fruit of the Poisonous Tree” consequences.¹⁶⁵
9. Defendant must be told if his lawyer is trying to reach him during questioning.¹⁶⁶
10. Does not expire until proceedings are complete.¹⁶⁷

FIFTH AMENDMENT (*EDWARDS*) DEFENDANT

1. Attaches during custodial interrogation.¹⁶⁸
2. Must be asserted.¹⁶⁹
3. Not waivable unless defendant initiates.¹⁷⁰
4. Violated by interrogation or its functional equivalent—informants okay¹⁷¹—otherwise interrogation is the same as deliberate elicitation.¹⁷²
5. Extends to all crimes (not crime specific).¹⁷³

158. *Massiah v. United States*, 377 U.S. 201, 205 (1964).

159. *Id.*

160. *Patterson v. Illinois*, 487 U.S. 285, 293-94 (1988).

161. *United States v. Henry*, 447 U.S. 264, 270-71 (1980); *see also Kuhlmann v. Wilson*, 477 U.S. 436, 474-75 (1986) (holding that the human listener did not deliberately elicit incriminating information).

162. *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991); *Maine v. Moulton*, 474 U.S. 159, 174-76 (1985).

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

164. *Patterson*, 487 U.S. at 292-93.

165. *But see Nix v. Williams*, 467 U.S. 431, 441-42 (1984).

166. *Patterson*, 487 U.S. at 296 n.9.

167. *Texas v. Cobb*, 532 U.S. 162, 167-68 (2001).

168. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966).

169. *Edwards*, 451 U.S. at 484-85.

170. *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-47 (1983).

171. *Illinois v. Perkins*, 496 U.S. 292, 296-97 (1990).

172. *Rhode Island v. Innis*, 446 U.S. 291, 299-301 (1980).

173. *Arizona v. Roberson*, 486 U.S. 675, 687-88 (1988).

6. An *Edwards* defendant who is arraigned and/or has counsel remains an *Edwards* defendant.¹⁷⁴
7. Probably has to be rewarned if he initiates.¹⁷⁵
8. No “Fruit of the Poisonous Tree” consequences unless intentional.¹⁷⁶
9. Ordinary suspect need not be told that he has a counsel or that counsel is asking to see him.¹⁷⁷ (Unclear as to *Edwards* defendants).
10. Expires after fourteen days.¹⁷⁸

What is left of this complex structure after *Montejo*?

1. The right to counsel still attaches when formal proceedings have begun, but if it has no consequences, this right is meaningless. *Everyone* has a right to counsel and can, of course, assert it to resist police questioning at any time. Oddly, *Massiah* itself was not overruled in *Montejo*; so this right, which has largely been stripped of meaning by *Montejo*, still forbids use of informants against defendants as to whom formal proceedings have begun.¹⁷⁹
- 2-10. Otherwise, the right is no longer self-executing and, in no meaningful sense but one (informants), does it continue to exist. *Montejo* holds that no warning is required as to non-custodial interrogation, which may have been a backhanded way of overruling *Massiah* without mentioning that case.¹⁸⁰ That is, police or informants can interrogate a Sixth Amendment defendant who is not in custody without giving him any warnings, flatly contrary to *Massiah*.¹⁸¹ *Massiah* would seem to continue to apply, however, to jailhouse informants who “deliberately elicit,” because by definition, they do not give *Miranda* warnings.¹⁸²

174. *Minnick v. Mississippi*, 498 U.S. 146, 149-50 (1990).

175. *See Bradshaw*, 462 U.S. at 1045-46.

176. *Missouri v. Seibert*, 542 U.S. 600, 607 (2004).

177. *Moran v. Burbine*, 475 U.S. 412, 421-22 (1986).

178. *Maryland v. Shatzer*, 130 S. Ct. 1213, 1223 (2010). Obviously, this post-*Montejo* case was added more recently.

179. *Montejo v. Louisiana*, 556 U.S. 778, 791 (2009).

180. *Id.* at 786-87.

181. *Id.*

182. *Id.*; *Massiah v. United States*, 377 U.S. 201, 203-04 (1964).