A Fourth Prophylactic Test Guarding An Individual's Fifth and Sixth Amendment Rights To Counsel Goes Too Far: *Montejo v. Louisiana*

CONSTITUTIONAL LAW - RIGHT OF DEFENDANT TO COUNSEL - WAIVER OF RIGHT TO COUNSEL - The United States Supreme Court overruled *Michigan v. Jackson* explaining that defendant Montejo did not invoke his Sixth Amendment right to counsel at a preliminary hearing by standing silent while the court ordered the appointment of counsel for him.

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

I. THE *MONTEJO* DECISION

On September 6, 2002, Appellant Jesse Jay Montejo ("Montejo") was arrested for the robbery and murder of Lewis Ferrari ("Ferrari").[1] After his arrest, Montejo waived his *Miranda* rights, was questioned by police, and eventually admitted to murdering Ferrari.[2] On September 10, 2002, Montejo was taken to court for a Louisiana state law[3] mandated preliminary hearing.[4] There, Montejo stood silent while the judge formally charged him with first-degree murder, denied bond, and appointed counsel.[5] Later on September 10th, 2002, police detectives went to Montejo's cell and asked him if he would join them on a search for the murder weapon.[6] Shortly thereafter, Montejo was read his *Miranda* rights for a second time.[7] After waiving his *Miranda* rights, Montejo agreed to the search and joined detectives on the trip.[8] During the excursion, Montejo wrote a letter to the victim's widow, apologizing for what he had done to her husband.[9] At the completion of the search, Montejo met his court-appointed counsel for the first time.[10] During Montejo's trial, his apology letter was admitted into evidence despite defense counsel's objection.[11] Consequently, the jury found Montejo guilty of first-degree murder and sentenced him to death.[12]

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1. Montejo v. Louisiana, 129 S.Ct. 2079, 2082 (2009).
2. *Montejo*, 129 S.Ct. at 2082.
3. The Louisiana statute reads, "[t]he sheriff or law enforcement office having custody of an arrested person shall bring them promptly, and in any case within seventy-two hours from the time of the arrest, before a judge for the purpose of appointment of counsel." LA. CODE CRIM. PROC. ANN., art. 230.1(A) (West Supp. 2009).
4. *Montejo*, 129 S.Ct. at 2082.
5. *Id.*
6. *Id.*
7 *Id.*
8. *Id.*
9. *Montejo*, 129 S.Ct. at 2082.
10. *Id.* After meeting his counsel for the first time, Montejo's court-appointed attorney became livid with law enforcement officials for questioning his client before he and his client had a chance to talk. *Id.*
11. *Id.*
12. *Id.*

On appeal, Montejo's conviction and sentence were affirmed by the Louisiana Supreme Court.[13] Justice Victory, writing for the Louisiana Supreme Court, concluded that the Sixth Amendment protection established in *Michigan v. Jackson*[14], which deemed any subsequent waiver of a defendant's right to counsel invalid after he or she has already asserted or requested their right to counsel at an arraignment or similar proceeding, did not activate unless the defendant actually requested an attorney or otherwise asserted his constitutional right to counsel.[15] Here, however, the Louisiana Supreme Court concluded that Montejo simply stood silent at his preliminary hearing and thus, never actually requested an attorney or asserted his Sixth Amendment right to counsel.[16]

Justice Victory also determined that Montejo's apology letter was properly admitted by the trial court.[17] In resolving this issue, the court looked to a standard established in *Montoya v. Collins*[18], which required the defendant to knowingly, intelligently, and voluntarily waive his right to have counsel present during a police interrogation.[19] Ultimately, the Louisiana Supreme Court determined that because Montejo had been read his *Miranda* rights and subsequently waived them to the satisfaction of *Montoya* before his participation in the weapon search, the apology letter was correctly admitted and his guilty verdict should stand.[20]

Montejo then appealed to the United States Supreme Court who granted certiorari on two issues.[21] The first issue addressed was the extent and lasting use of the rule given by the Court in *Jackson* just twenty-three years earlier, which does not permit law enforcement to commence the questioning of a defendant once the defendant has asserted his Sixth Amendment right to counsel at an arraignment or similar court proceeding.[22] The second issue was whether Montejo should be given the chance to challenge that the apology letter be suppressed under a rule created by the Court in *Edwards v. Arizona*[23], which stipulates that police must stop questioning the defendant once he asserts his right to counsel being present during interrogation.[24]

Justice Scalia, writing for the majority, began his analysis by describing the Louisiana Supreme Court's construal of *Jackson*.[25] In effect, Justice Scalia stated that in order to activate *Jackson* protection under the Louisiana court's construal, the criminal defendant must affirmatively request counsel at the preliminary hearing.[26] If an actual request occurs, any subsequent waiver by the defendant of his or her *Miranda* right to counsel being present at police questioning is treated as invalid.[27] However, if the court appoints counsel and the defendant does not actually request counsel, then *Jackson* is not activated and police are free to initiate questioning of the defendant so long as he validly waives his *Miranda* right to having counsel

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13. *Montejo*, 129 S.Ct. at 2082.
14. 106 S.Ct. 1404, 1407-08 (1986).
15. State of Louisiana v. Montejo, 974 So.2d 1238, 1260-61 (5th Cir. 2008).
16. *State of Louisiana v. Montejo*, 974 So.2d at 1260-61.
17. *Montejo*, 129 S.Ct. at 2082-83.
18. 955 F.2d 279, 282 (5th Cir. 1992).
19. *State of Louisiana v. Montejo*, 974 So.2d at 1261.
20. *Id.*
21. *Montejo*, 129 S.Ct. at 2083.
22. *Id.*
23. 101 S.Ct. 1880, 1884-85 (1981).
24. *Montejo*, 129 S.Ct. at 2083.
25. *Id.*
26. *Id.*
27. *Id.*

present during police questioning.[28]

Justice Scalia also declared that the Louisiana Supreme Court's interpretation of *Jackson* is problematic in states that automatically appoint counsel to the needy defendant with no demand for counsel required.[29] The majority explained that in such states, the defendant would not be given the opportunity to trigger *Jackson*, as the court does not give the defendant a chance to do so at a preliminary hearing or an arraignment.[30] Consequently, Justice Scalia asserted that this interpretation becomes arbitrary, as defendants in states that automatically appoint counsel have no chance to activate *Jackson*, whereas defendants in states that require the defendant to formally request counsel would, in a sense, activate *Jackson* by accident.[31]

After deeming the Louisiana Supreme Court's construal of *Jackson* undesirable, the Court refuted Montejo's argument for a different interpretation of *Jackson*.[32] In essence, Montejo's proposed interpretation suggested that once a defendant is represented by counsel, *Jackson* is triggered and law enforcement may not commence any sort of questioning.[33] However, the Court explained that Montejo's construal of *Jackson* would be completely inconsistent with the true rationale of the *Jackson* decision.[34]

The majority then proceeded to recite the correct rationale of the decision in *Jackson*.[35] Justice Scalia began the recitation by elaborating on the Court's opinion in *Edwards*.[36] There, the Court stated that the *Edwards* rule protects the defendant from being forced into waiving his *Miranda* rights by police officers and detectives.[37] Further, the Court believed that *Jackson* went a step beyond the *Edwards* rule by protecting the defendant from police badgering in regards to his or her Sixth Amendment[38] right to counsel.[39]

Further incorporated in the majority's discussion of the *Jackson* rationale are continual references to Justice Stevens' *Montejo* dissent.[40] Justice Scalia explained that the dissent construed *Jackson* to protect a defendant's right to the assistance of counsel and not to prevent police officer and detective badgering.[41] Conversely, the majority disagreed and explained that the anti-badgering justification is the only way to validate the *Jackson* opinion with the Court's true *Miranda* waiver jurisprudence.[42]

Justice Scalia also explained that when a defendant does not formally request counsel but is nonetheless appointed such, it should not be presumed that any subsequent waiver of the right

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28. *Id.* This may seem confusing at first look, however, if the *Jackson* protection has not been activated, the defendant can be approached by police and questioning may take place so as the defendant has been read his or her *Miranda* rights and a valid waiver of the right to having counsel present during police questioning has been made to the satisfaction of the standard reiterated in *Edwards*. *Edwards*, 101 S.Ct. at 1884-85.

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

30. *Id.*

31. *Id.*

32. *Id.* at 2085.

33. *Id.*

34. *Montejo*, 129 S.Ct. at 2085.

35. *Id.*

36. *Id.* at 2085-86.

37. *Id.* at 2086.

38. The Sixth Amendment to the United States Constitution reads in pertinent part, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]." U.S. CONST. amend. VI.

39. *Montejo*, 129 S.Ct. at 2086.

40. *Id.*

41. *Id.*

42. *Id.*

to counsel is unwilling.[43] Correspondingly, the majority advocated that *Edwards* and *Jackson* stand for the idea that police should not badger defendants into wavering their *Miranda* rights, as a defendant who does not ask for counsel has not necessarily decided if they would like to talk to police or not.[44] Ultimately, the Court explained that a presumption that a police interrogation was coerced simply because the defendant had already been appointed counsel makes little sense.[45]

The opinion then proceeded to proclaim that, because *Jackson* has been proven unworkable by the Court, grounds for overruling it existed.[46] Moreover, the Court explained that, under the standard set forth in *Pearson v. Callahan*[47], which stated that a decision may be overruled after three factors are analyzed to the court's satisfaction, *Jackson* may be overruled.[48] In support of the Court's determination, Justice Scalia asserted that *Jackson* was only twenty-three years old and that its abolishment would not disturb any sort of reliance on the rule, as defendants who are savvy enough to understand the protection of *Jackson* can clearly decide for themselves if they would like to talk to law enforcement officials.[49] Also in support, the majority advocated that the detriments of *Jackson* far outweigh its positives.[50] More specifically, the Court believed that the *Miranda* - *Edwards* - *Minnick*[51] line of cases were sufficient to protect an indigent defendant's Fifth (against self-incrimination, guarantee of due process)[52] and Sixth Amendment rights (assistance of counsel), while *Jackson* deterred police officers from questioning defendants and created the possibility that guilty and dangerous suspects may be released.[53]

Finally, Justice Scalia believed that while the Louisiana Supreme Court correctly denied Montejo's claim under *Jackson*, Montejo should still be able to argue that the apology letter be suppressed under the *Edwards* rule.[54] In essence, the Court believed that had Montejo exercised his Sixth Amendment right to counsel when police officers initiated questioning in regards to the search for the murder weapon, a scenario existed in which Montejo could be potentially successful in suppressing the apology letter under *Edwards*.[55] However, the Court explained, those determinations are for the Louisiana Supreme Court to make, as the United States Supreme Court is a court of final review.[56]

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43. *Id.* at 2087.
44. *Montejo*, 129 S.Ct. at 2087.
45. *Id.* at 2088.
46. *Id.*
47. 129 S.Ct. 808, 817-18 (2009).
48. *Montejo*, 129 S.Ct. at 2088-89. The three factors elicited from *Pearson* are "the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Id.* (citing *Pearson*, 129 S.Ct. at 816-17).
49. *Montejo*, 129 S.Ct. at 2089.
50. *Id.*
51. Minnick v. Mississippi, 111 S.Ct. 486, 493-94 (1990). *Minnick* explained that once a defendant has invoked his right to counsel, the interrogation must stop and no subsequent interrogation may take place until counsel is present, unless the defendant initiates contact regarding questioning with law enforcement. *Minnick*, 111 S.Ct. at 493-94.
52. The Fifth Amendment to the United States Constitution reads in pertinent part, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.
53. *Montejo*, 126 S.Ct. at 2090-91.
54. *Id.* at 2091.
55. *Id.*
56. *Id.* at 2092.

Justice Alito wrote a concurring opinion, in which Justice Kennedy joined.[57] In his concurrence, Justice Alito explained that previously in the 2008-09 term, the Court overruled *N. Y. v. Belton*.[58] There, the Court not only overruled *Belton* despite it having served as precedent for twenty-eight years, but did so in spite of the fact that it had not been weakened by later opinions, had been reaffirmed in more recent decisions, had demonstrated that it was completely effective, and had caused considerable law enforcement dependence.[59] Moreover, Justice Alito explained that the Court overruled *Belton* even though they had not been solicited to do so.[60] Finally, Justice Alito asserted that the dissent is now showing concern in light of the Court's effort to overturn *Jackson*, yet a few months prior, in the overruling of *Belton*, the dissenters made no such complaint.[61] Ultimately, Justice Alito concluded that the process of overturning *Belton* fully reinforced the decision by the majority in this case.[62]

Justice Stevens authored a dissenting opinion, which Justices Souter and Ginsburg joined and Justice Breyer joined in part.[63] Justice Stevens contended that the majority, through its own agenda and without any verification that the Sixth Amendment protections recognized in *Jackson* have brought about impairment to workings of the criminal justice system, discarded *Jackson* because it made little sense from a theoretical and doctrinal standpoint.[64] The dissent then asserted that the majority's supposition relied upon a misunderstanding of *Jackson's* true rationale and an underestimation of the doctrine of *stare decisis*.[65]

Accordingly, the dissent reasoned, like the majority, that the Louisiana Supreme Court's decision would prove to be an impracticable standard to follow in the future and would also be arbitrary between defendants in different states.[66] However, the dissent asserted that while both choices are not ideal, neither one is caused by *Jackson*.[67] In support of this premise, Justice Stevens explained that if a defendant is entitled to Sixth Amendment protection when he has requested an attorney, then the defendant is clearly entitled to the same protections when an attorney has been secured.[68] Moreover, Justice Stevens claimed that although the rules implemented by *Edwards* and *Jackson* are similar, *Jackson* did not depend upon the reasoning of *Edwards*, but rather it remained under the shelter provided to the attorney-client relationship by the Sixth Amendment.[69]

Justice Stevens also addressed the majority's overruling of *Jackson*. In doing so, the dissenters explained that although precedent is not absolutely set in stone, Justice Scalia

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57. *Id.*
58. 101 S.Ct. 2860 (1981).
59. *Montejo*, 129 S.Ct. at 2092 (Alito, J., concurring). The Court overruled *Belton* in Arizona v. Gant, 129 S.Ct. 1710, 1723 (2009). Justice Stevens wrote the majority opinion. *Gant*, 129 S.Ct. at 1713. Justice Scalia wrote a concurring opinion. *Id.* at 1724. Justice Breyer filed a dissenting opinion and Justice Alito wrote a dissenting opinion, in which Chief Justice Roberts and Justice Kennedy joined and Justice Breyer joined in part. *Id.* at 1725-32.
60. *Montejo*, 129 S.Ct. at 2092 (Alito, J., concurring).
61. *Id.*
62. *Id.*
63. *Montejo*, 129 S.Ct. at 2094 (Stevens, J., dissenting).
64. *Id.*
65. *Id.*
66. *Id.* at 2095.
67. *Id.*
68. *Montejo*, 129 S.Ct. at 2095 (Stevens, J., dissenting).
69. *Id.* at 2096.

exaggerated his reasons for overruling *Jackson*.[70] Similarly, Justice Stevens admonished Justice Scalia's faulty balancing test to determine if the costs of *Jackson* outweighed its benefits.[71] In effect, Justice Stevens asserted that *Jackson* not only benefitted law enforcement practices immensely, but also proved to be more workable since the Court's decision.[72] Finally, the dissenters declared that *Jackson* played a large role in the protection of one's Sixth Amendment right to counsel and that without this protection, a defendant may be deprived of his or her Sixth Amendment right to have a lawyer present at all the important stages of a criminal prosecution.[73] Also, Justice Breyer filed a separate dissenting opinion, in which he explained that while the principles of *stare decisis* are not rigid, they do force the Court to follow the principle in this case.[74]

II. THE HISTORY BEHIND THE *MONTEJO* DECISION

The recognition of an individual's Sixth Amendment right to counsel originated in the Supreme Court's decision in *Gideon v. Wainwright*.[75] There, Justice Black, writing for the majority, overruled the Court's ruling in *Betts v. Brady*.[76] In doing so, the majority concluded that any indigent individual brought into court as a defendant in a criminal proceeding is entitled to the assistance of counsel.[77] Moreover, the Court explained that the assistance of counsel is a fundamental right which preserves life and liberty and that through the due process clause of the Fourteenth Amendment[78], this right applies to all of the states.[79]

Just one year after *Wainwright*, the Court examined the issue once again in *Escobedo v. Illinois*.[80] In *Escobedo*, the Court addressed whether a denial by law enforcement officers to grant a defendant's request for a lawyer during police questioning is a violation of the Sixth and Fourteenth Amendments.[81] Justice Goldberg, writing for the majority, explained that an individual who has been arrested and is being interrogated by the police, but has not been warned of their right to remain silent and had their request for counsel denied, has ultimately incurred a violation of their Sixth and Fourteenth Amendment rights.[82] Furthermore, the majority explained that any statement made by the defendant after a request for counsel may not be used in a

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70. *Id.* at 2097.

71. *Id.* at 2098. The balancing test Justice Stevens discussed was the same test conducted by Justice Scalia when formulating the majority opinion. *Id.* at 2089. This test incorporated a weighing of *Jackson's* positives versus its negatives. *Montejo*, 129 S.Ct. at 2089.

72. *Id.* at 2098-99.

73. *Id.* at 2100.

74. *Id.* at 2101-02 (Breyer, J., dissenting).

75. 83 S.Ct. 792, 796 (1963).

76. *Wainwright*, 83 S.Ct. at 797. In Betts v. Brady, Justice Owen Roberts, writing for the Court, explained that, " . . . it is evident that the constitutional provisions to the effect that a defendant should be 'allowed' counsel or should have a right 'to be heard by himself and his counsel', . . . at his election, were intended to do away with the rules which denied representation, in whole or in part, by counsel in criminal prosecutions, but were not aimed to compel the state to provide counsel for a defendant." 62 S.Ct. 1252, 1258 (1942).

77. *Wainwright*, 83 S.Ct. at 796.

78. The due process clause of the Fourteenth Amendment of the United States Constitution reads in pertinent part, "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

79. *Wainwright*, 83 S.Ct. at 795-97.

80. 84 S.Ct. 1758 (1964).

81. *Escobedo*, 84 S.Ct. at 1759.

82. *Id.* at 1765.

criminal trial.[83] In essence, the *Escobedo* Court concluded that when our adversarial system is set in motion, the defendant's fundamental rights to life and liberty are activated and any request for counsel made by the defendant must be granted.[84]

While *Wainwright* recognized an individual's Sixth Amendment right to counsel and *Escobedo* broadened this protection, the United States Supreme Court determined that the protection of one's Sixth Amendment right to counsel may involve the Fifth Amendment as well.[85] In *Miranda v. Arizona*, defendant Miranda kidnapped and raped an eighteen year old girl.[86] During police questioning, Miranda confessed to forcing the victim in his car and raping her.[87] At trial, Miranda was found guilty on one count of kidnapping and one count of rape.[88] On appeal to the Arizona Supreme Court, Miranda argued, *inter alia*, that his confession should not have been admitted into evidence at trial because an attorney was not present when he made the confession.[89] However, the Arizona Supreme Court disagreed and affirmed his guilty verdict on the basis that the confession had been correctly admitted under the standard set in *Escobedo*[90]

After granting certiorari, the United States Supreme Court addressed the admissibility of statements given to police during an interrogation by an individual who has been taken into custody or has otherwise been deprived of his freedom of action in any way.[91] The Court also analyzed the necessity for protocol that will guarantee that the individual is afforded proper protections under the Fifth Amendment from self-incrimination.[92] Chief Justice Warren, writing for the majority, explained that the need for a uniform protocol that protects an individual's right against self-incrimination is essential.[93] In doing so, the majority created a series of statements that law enforcement must verbalize to an individual prior to interrogation.[94] The majority also explained that the Sixth Amendment right to having counsel present at an interrogation is essential to the protection provided by the Fifth Amendment against self-incrimination, as the two work together in fully advising the defendant of his right to remain silent.[95] In effect, the majority in *Miranda* determined that to fully protect an individual from self-incrimination, law

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83. *Id.*
84. *Id.* at 1766.
85. Miranda v. Arizona, 86 S.Ct. 1602 (1966).
86. State v. Miranda, 401 P.2d 721, 722 (Ariz. 1965).
87. *State v. Miranda*, 401 P.2d at 723.
88. *Id.* at 722.
89. *Id.* at 725-26.
90. *Id.* at 731-33.
91. *Miranda*, 86 S.Ct. at 1611-12.
92. *Id.* at 1612.
93. *Id.*
94. *Id.* As prescribed by the Court, the series of required statements must include that the "person . . . be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* The Court also explained that "[t]he defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Id.* Similarly, "if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him." *Id.* Also, "[t]he mere fact that he may have answered some questions or volunteered some statement on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." *Id.*
95. *Miranda*, 86 S.Ct. at 1625.

enforcement must unequivocally explain the rights of that individual to the individual before the interrogation process begins.[96] Furthermore, any statement made by the individual to law enforcement without having previously been advised of his or her *Miranda* rights, will be deemed inadmissible at trial.[97]

After the *Miranda* majority incorporated one's Fifth Amendment right against self-incrimination with one's Sixth Amendment right to the assistance of counsel in the form of a *Miranda* warning, the United States Supreme Court focused solely on the waiver of one's Sixth Amendment right to the assistance of counsel in *Edwards v. Arizona*.[98] In *Edwards*, the defendant was arrested and subsequently interrogated after being read his rights.[99] During the interrogation, defendant Edwards gave a statement and later asked police if he could make a deal.[100] The police advised Edwards that no deal could be made and Edwards countered that he wanted an attorney before making a deal.[101] Sometime the next day, two different detectives, unaware of Edwards' request for counsel, approached him.[102] After being read his rights once again, Edwards gave a statement to the two detectives regarding his involvement in a crime.[103] On appeal to the Arizona Supreme Court, Edwards argued that he had exercised his *Miranda* rights, that he did not waive those rights, and that the statement he made was not done intelligently and therefore, was involuntary.[104] However, the Arizona Supreme Court affirmed the trial court's decision[105] and Edwards appealed to the United States Supreme Court.[106]

In *Edwards*, Justice White, writing for the majority, addressed whether the Fifth, Sixth, and Fourteenth Amendments require the suppression of a post-arrest statement that was given to law enforcement after the suspect had requested counsel before further questioning.[107] The majority explained that a waiver of one's right to counsel not only has to be voluntarily, but also knowingly and intelligently.[108] Moreover, a court's determination of this depends upon the facts of each case, including the background and experience of the accused.[109] Justice White further elaborated that when an individual has invoked his right to counsel during police questioning, a valid waiver of that right cannot be given simply by responding to further police initiated questioning even if the police have re-read the individual his rights.[110] Furthermore, the majority determined that once an individual invokes their Sixth Amendment right to counsel, he or she is

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96. *Id.* at 1637.

97. *Miranda* rights, as they are commonly known, are simply those rights which are specifically elicited in the required series of statements to the individual by law enforcement before the interrogation process may begin. *Id.* at 1611-12.

98. Similarly, a *Miranda* warning, as it has been commonly called, is a required warning of the rights to remain silent and to the assistance of counsel to an individual by law enforcement before the interrogation process may begin. *Edwards*, 101 S.Ct. at 1881.

99. State v. Edwards, 594 P.2d 72, 75 (Ariz. 1979).

100. *State v. Edwards*, 594 P.2d at 75.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 76.

105. *State v. Edwards*, 594 P.2d at 78.

106. *Edwards*, 101 S.Ct. at 1880.

107. *Id.* at 1881.

108. *Edwards*, 101 S.Ct. at 1884 (citing Johnson v. Zerbst, 58 S.Ct. 1019, 1023 (1938)).

109. *Id.*

110. *Edwards*, 101 S.Ct. at 1885.

not subject to more questioning by law enforcement until counsel has at least met with the individual, unless that individual initiates further communication with law enforcement.[111]

Just one year after *Edwards*, the Court addressed a similar issue in *Michigan v. Jackson*.[112] There, defendant Jackson was arrested on July 30, 1979 as a potential suspect for murder.[113] On July 31, Jackson gave police three separate statements regarding the murder.[114] On August 1, after failing a polygraph examination, Jackson gave yet another statement to police; this time admitting to shooting the victim.[115] Later that afternoon, Jackson was arraigned.[116] At his arraignment, Jackson requested counsel be appointed for him.[117] On August 2, after being read his *Miranda* rights, Jackson made another statement to police.[118] Prior to trial, the trial court determined that all of the statements made by Jackson were admissible.[119] Consequently, Jackson was found guilty of second-degree murder and conspiracy to commit second-degree murder.[120] On appeal to the Michigan Supreme Court, Jackson argued, *inter alia*, that his post-arraignment confession should not have been admitted, as counsel had been appointed to him at his arraignment.[121] The Michigan Supreme Court agreed, asserting that one's Sixth Amendment right to counsel is activated at the time of arraignment, when, in this case, the defendant requested counsel at the arraignment.[122] The State of Michigan appealed and the United States Supreme Court granted certiorari.[123]

In *Jackson*, the Court addressed whether a defendant can legitimately waive his Sixth Amendment right to counsel at a post-arraignment police questioning session that had been commenced by law enforcement.[124] Justice Stevens, writing for the majority, affirmed the Michigan Supreme Court's decision, agreeing that the post-arraignment statements should not have been admitted.[125] In doing so, the majority refuted the State's numerous Fifth and Sixth Amendment arguments.[126] First, the State argued that the *Edwards* rule pertains to one's Fifth Amendment right to counsel at police questioning and that its relevance to one's Sixth Amendment right to the assistance of counsel was unclear.[127] Therefore, the State suggested, the application of the *Edwards* rule in this case was inappropriate.[128] The Court, however, refuted this argument by explaining that once the suspect becomes an adversary of the judicial process (post-arraignment), he or she deserves at least as much protection as the Fifth Amendment provides for the suspect under *Edwards*.[129]

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111. *Id.*
112. *Jackson*, 106 S.Ct. at 1405-06.
113. People v. Bladel, 365 N.W.2d 56, 60 (Mich. 1984). The *Jackson* case and the *Bladel* case were consolidated when it went before the Michigan Supreme Court, as the issues in each were identical. *Id.* at 58.
114. *Id.* at 60.
115. *Id.*
116. *Id.*
117. *People v. Bladel*, 365 N.W.2d at 60-61.
118. *Id.* at 61.
119. *Id.*
120. *Id.*
121. *Id.*
122. *People v. Bladel*, 365 N.W.2d at 70.
123. *Jackson*, 106 S.Ct. at 1407.
124. *Id.* at 1408.
125. *Id.* at 1411.
126. *Id.* at 1408-10.
127. *Id.* at 1408.
128. *Jackson*, 106 S.Ct. at 1408.
129. *Id.* at 1408-09.

Second, the State argued that, factually, one's request for counsel during police questioning is different the one's request for an attorney at an arraignment.[130] The difference being that a defendant may not intend their request for counsel to include the assistance of counsel during post-arraignment questioning.[131] Justice Stevens refuted this argument as well, asserting that when determining if a valid waiver has occurred, the Court must assume that a defendant would request for the services of counsel at every stage where counsel may be needed.[132]

Third, the State claimed that Jackson had, in fact, made a suitable waiver by signing a post-arraignment statement after being previously warned of his *Miranda* rights.[133] However, Justice Stevens refuted this argument by asserting that just as written waivers are invalid during police-initiated Fifth Amendment (against self-incrimination) scenarios, written waivers are also invalid under police-initiated Sixth Amendment (requesting for the assistance of counsel) scenarios.[134] Ultimately, the majority concluded that when a defendant requests for assistance of counsel on a Sixth Amendment basis at an arraignment, any subsequent waiver of that right by the defendant is invalid when law enforcement initiated the further questioning.[135]

Justice Rehnquist wrote a dissenting opinion in *Jackson* that was joined by Justices Powell and O'Connor.[136] There, Justice Rehnquist suggested that the *Edwards* rule makes little sense in the context of the Sixth Amendment (in trying to request for an attorney).[137] He explained that the real purpose of the *Edwards* rule is to prevent law enforcement from badgering a defendant into giving a confession of guilt.[138] Consequently, Justice Rehnquist asked if that same protection is needed in Sixth Amendment scenarios, when the defendant would be triggering his right to the assistance of counsel in a courtroom and not in front of badgering law enforcement in a police station.[139] After rejecting this rationale, the dissenters also asserted that the *Edwards* rule can be arbitrary, because under a Fifth Amendment setting, a defendant is undoubtedly triggering his right to counsel; whereas, in a Sixth Amendment or potential arraignment setting, some defendants are simply more fortunate that they invoked their right to the assistance of counsel by accident.[140]

After the Court extended the *Edwards* rule to protect an individual's right to the assistance of counsel in Sixth Amendment settings, the Court examined another aspect of *Edwards* in *Minnick v. Mississippi*.[141] There, defendant Minnick was arrested in connection to two murders.[142] The day after his arrest, two Federal Bureau of Investigation ("FBI") agents came to his jail cell to interview him.[143] Minnick refused to be interviewed, but was told that he had no choice.[144] Minnick was then read his rights and refused to sign a waiver of those

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130. *Id.* at 1409.
131. *Id.*
132. *Id.*
133. *Jackson*, 106 S.Ct. at 1409.
134. *Jackson*, 106 S.Ct. at 1410-11 (Rehnquist, J., dissenting).
135. *Id.* at 1411.
136. *Id.*
137. *Id.* at 1412.
138. *Id.* at 1412-13.
139. *Jackson*, 106 S.Ct. at 1413 (Rehnquist, J., dissenting).
140. *Id.* at 1414.
141. *Minnick*, 111 S.Ct. at 488.
142. Minnick v. State, 551 So.2d 77, 81 (Miss. 1989).
143. *Minnick*, 111 S.Ct. at 488.
144. *Id.*

rights.[145] After giving the agents some information, Minnick explained that he would give them even more information if they came back in a few days after he retained a lawyer.[146] Shortly after the interview, Minnick met with his lawyer.[147] Two days later, law enforcement returned for questioning.[148] Once again, Minnick was told that he had no choice but to be questioned.[149] The Deputy Sheriff read Minnick his rights and again he refused to sign a waiver of them.[150] Minnick then proceeded to give the Deputy Sheriff a complete description of the crime.[151] At trial, Minnick tried to suppress all of the statements he had given to law enforcement.[152] The trial court suppressed the statements to the FBI agents but admitted the statements to the Deputy Sheriff.[153] Consequently, Minnick was convicted on two counts of capital murder and sentenced to death.[154] On appeal to the Mississippi Supreme Court, Minnick argued that the statements made to the Deputy Sherriff should have been suppressed under the *Edwards* rule as it applied in a Fifth and Sixth Amendment setting.[155] However, the Mississippi Supreme Court disagreed and affirmed his conviction.[156] Minnick appealed his conviction to the United States Supreme Court and they subsequently granted certiorari.[157]

In *Minnick*, the Court addressed whether an individual's *Edwards* protection ends once the individual has consulted with his or her attorney.[158] Justice Kennedy, writing for the majority, explained, without even reaching the Sixth Amendment issue, that one's Fifth Amendment protection elicited in *Edwards* does not cease once the individual meets with an attorney.[159] In effect, the *Edwards* rule bars any police-initiated interrogation once the individual has made a request for counsel, unless the accused has counsel present at the time of police questioning.[160] Furthermore, Justice Kennedy asserted that the *Edwards* rule does not eliminate the possibility that the suspect may still waive his right to counsel after he exercised that right, so as the suspect initiates the discussions with law enforcement.[161] In support of these premises, the majority cited the *Miranda* decision where the Court explained that the presence of counsel during interrogation would be an ample protective mechanism to force the police interrogation process to conform to Fifth Amendment requirements.[162] Moreover, the presence of an attorney will guarantee that the statements given by the suspect are not a product of law enforcement coercion.[163] Ultimately, Justice Kennedy concluded that when counsel is requested by the

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145. *Id.*
146. *Id.*
147. *Id.*
148. *Minnick*, 111 S.Ct. at 488.
149. *Id.*
150. *Minnick v. State*, 551 So.2d at 81.
151. *Id.*
152. *Minnick*, 111 S.Ct. at 489.
153. *Id.*
154. *Id.*
155. *Minnick v. State*, 551 So.2d at 83.
156. *Id.* at 83, 85.
157. *Minnick*, 111 S.Ct. at 489.
158. *Id.* at 488.
159. *Id.* at 489.
160. *Id.* at 491.
161. *Id.* at 492.
162. *Minnick*, 111 S.Ct. at 490 (citing *Miranda*, 86 S.Ct. at 1623).
163. *Id.* As previously stated, the Court in *Minnick* believed that the primary purpose of the *Edwards* rule was to prevent law enforcement from trying to coerce the suspect into waiving his or her previously asserted *Miranda* rights. *Id.* at 491. Therefore, the requirement of counsel being present during future police-initiated

suspect, the police-interrogation process must end, and law enforcement may not re-initiate questioning without the presence of counsel, whether or not the suspect has met with his or her attorney for any length of time.[164]

III. AN ANALYSIS OF THE *MONTEJO* DECISION

There is no doubt that one's Fifth Amendment right free of self-incrimination is firmly entwined with the Sixth Amendment right to the assistance of counsel. These two rights fit perfectly together in preserving an individual's rights when interacting with the State throughout the adversarial process. Furthermore, the Court had created a four-level prophylaxis against potential invasions of those particular rights.[165] As Justice Scalia explained for the majority in *Montejo*, the primary purpose of the *Miranda - Edwards - Jackson - Minnick* line of cases was to prevent law enforcement from badgering a suspect into waiving his or her previously invoked *Miranda* rights.[166] However, a more important purpose of this line of cases is the protection of an individual's rights at every critical stage of the prosecution.[167] Justice Stevens, in writing the dissent in *Montejo*, expressed analogous ideas.[168] For example, he contended that if a defendant is allowed protection from law enforcement initiated questioning when he or she requests an attorney, he or she is even more entitled to that same protection when he or she has obtained an attorney.[169] Moreover, once an attorney-client relationship is formed through the appointment of counsel, the means by which that relationship was formed proves immaterial, as a legitimate attorney-client relationship supplies a defendant with complete protection given by the Sixth Amendment.[170] While not controlling of the Court, the logic used by the dissenters strikes a chord with the expectations of most Americans in regard to their constitutional rights. More importantly, Justice Stevens and his fellow dissenters offered a premise that is consistent with the continual protection of the constitutional claim[171]: the protection of an individual's rights at every critical stage of the prosecution.

Nevertheless, Justice Scalia appropriately focuses on the lack of practicable workability presented by the Court's decision in *Jackson*.[172] There, he suggests *Jackson* proves unworkable because some states require indigent defendants to verbally trigger his or her Sixth Amendment

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interrogation after the suspect has invoked his or her *Miranda* rights seems to eliminate the possibility of police coercion occurring. *Id.*

164. *Minnick*, 111 S.Ct. at 491.

165. *Montejo*, 129 S.Ct. at 2089-90.

166. *Id.* at 2085.

167. The Court elicited the "at all 'critical' stages of the prosecution" type of language in the famous case of Powell v. Alabama, 53 S.Ct. 55, 57 (1932) and reapplied that language again in U.S. v. Wade, 87 S.Ct. 1926, 1932 (1967). *Id.*

168. *Montejo*, 129 S.Ct. at 2094-2101 (Stevens, J., dissenting).

169. *Id.* at 2095. The dissent also recognizes that this premise has been used by the majority before on more than one occasion. *Id.* The Court used this premise in Patterson v. Illinois, 108 S.Ct. 2389, 2393 n. 3 (1988) and again in Michigan v. Harvey, 110 S.Ct. 1176, 1181 (1990).

170. *Montejo*, 129 S.Ct. at 2095 (Stevens, J., dissenting).

171. In *Montejo*, the majority stated that "doubts must be resolved in favor of protecting the constitutional claim." 129 S.Ct. at 2086 (citing *Jackson*, 106 S.Ct. at 1409). This statement reaffirms the theory that when in doubt, one's rights should be protected to the fullest and fairest extent possible. *Id.* The exact language of *Jackson* is more revealing: "[d]oubts must be resolved in favor of protecting the constitutional claim. This settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel . . . ." *Jackson*, 106 S.Ct. at 1409.

172. *Montejo*, 129 S.Ct. at 2083-84.

right to counsel, whereas, other states simply grant indigent defendants counsel without any sort of verbal request by that defendant.[173] Thus, some defendants are unjustly benefitting by having their Sixth Amendment right automatically invoked by the court, when in fact they had no intention to activate this right.[174] While this premise does seem arbitrary[175] and illogical, it does not justify the complete dismissal of the rule set forth in *Jackson*. Instead of destroying the *Jackson* rule completely, the Court could have, as they often do, preserved the rule to some degree. In effect, the Court had the opportunity to preserve enough of the rule in order for Congress to easily create legislation that would likely produce uniformity in regards to an indigent defendant's appointment of counsel. Ultimately, had the Court provided such direction, a more fair protection of one's Sixth Amendment rights might have been achieved. Instead, it appears that the *Montejo* decision will likely cause movement by Congress and State legislatures in the opposite direction; a far cry from giving American citizens the benefit of the doubt. Consequently, as Justice Stevens explained in the *Montejo* dissent, one's fundamental Sixth Amendment right to presence of counsel during all critical stages of the prosecution has been dishonored.[176]

Gregory Dapper

173. *Id.*
174. *Id.* at 2084.
175. *Id.*
176. *Montejo*, 129 S.Ct. at 2095-96 (Stevens, J., dissenting).