

INTERROGATIONS AND THE GUIDING HAND OF COUNSEL: *MONTEJO*, *VENTRIS*, AND THE SIXTH AMENDMENT'S CONTINUED VITALITY

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INTRODUCTION

The Supreme Court recently heard arguments in two cases that implicate the Sixth Amendment right to counsel: *Montejo v. Louisiana*¹ and *Kansas v. Ventris*.² Although each case presented a relatively narrow Sixth Amendment right to counsel issue, the subtext of both oral arguments suggests that the Court is rethinking the scope of the Sixth Amendment core values themselves. Since holding that the Fifth Amendment provides for a right to counsel in custodial interrogations, the Court has conflated the Fifth Amendment³ prophylactic rule with the Sixth Amendment right to counsel.⁴ The resulting jurisprudential disorder has prompted several Justices to consider a wholesale collapse of the Sixth Amendment right to counsel at inter-

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¹ *Montejo v. Louisiana*, cert. granted, 129 S. Ct. 30 (2008) (No. 07-1529) (argued Jan. 13, 2009) (link), decision below at *State v. Montejo*, 974 So. 2d 1238 (La. 2008). The question presented in *Montejo* is: "When an indigent defendant's right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to 'accept' the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present?" *Montejo*, No. 07-1529 (U.S. Oct. 1, 2008), available at <http://www.supremecourtus.gov/qp/07-01529sp.pdf> (link).

² *Kansas v. Ventris*, cert. granted, 129 S. Ct. 29 (2008) (No. 07-1356) (argued Jan. 21, 2009) (link), decision below at *State v. Ventris*, 176 P.3d 920 (Kan. 2008). The question presented in *Ventris* is: "Whether a criminal defendant's 'voluntary statement obtained in the absence of a knowing and voluntary waiver of the [Sixth Amendment] right to counsel,' *Michigan v. Harvey*, 494 U.S. 344, 354 (1990), is admissible for impeachment purposes . . . ?" *Ventris*, No. 07-1356 (U.S. Oct. 1, 2008), available at <http://www.supremecourtus.gov/qp/07-01356qp.pdf> (link).

³ The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend V (link).

⁴ The Sixth Amendment includes the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend VI (link).

rogations into the Fifth Amendment *Miranda*⁵ framework.⁶ This short essay explains why the Court should resist the temptation to do so.

I. CONFUSING THE ISSUE: THE COURT'S CONFLATION OF THE FIFTH AND SIXTH AMENDMENTS

The Fifth Amendment right to counsel recognized in *Miranda* is a prophylactic guarantee designed to protect an individual's right against "compelled self-incrimination."⁷ The *Miranda/Edwards*⁸ rule requires the police to inform an individual in custody that she has the right to an attorney and the right to remain silent. It further provides that once an individual asks for counsel during a custodial interrogation, the police should not ask any more questions. In these ways, the *Miranda/Edwards* rule attempts to stop individuals from unwittingly waiving their Fifth Amendment rights—its goal is not only to prevent self-incrimination, but also to ensure the voluntariness of any self-incriminating statements. The rule is a judge-made shield positing that counsel at the interrogation stage is necessary to *protect* the constitutional right against self-incrimination.⁹

The Fifth Amendment *Miranda/Edwards* rule first infected the Court's Sixth Amendment analysis in *Michigan v. Jackson*.¹⁰ In *Jackson*, the Supreme Court held that once a defendant asserts her Sixth Amendment right to counsel at an arraignment or similar proceeding, any waiver of that right at a subsequent police-initiated interrogation is invalid.¹¹ *Jackson* exemplifies the confusion surrounding the Fifth and Sixth Amendments.¹² On one hand, the Court based its opinion on the parallel Fifth Amendment *Edwards*

⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966) (link).

⁶ Although the *Miranda* Rule has been described as "prophylactic," the Court has recognized that it is in fact a constitutional rule. See *Dickerson v. United States*, 530 U.S. 428, 432 (2000) ("*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress . . .").

⁷ *Michigan v. Jackson*, 475 U.S. 625, 638 (1986) (Rehnquist, J., dissenting) (link).

⁸ *Edwards v. Arizona*, 451 U.S. 477 (1981) (holding that once an accused expresses his desire to deal with the police only through counsel, he may not be subjected to further interrogation until counsel has been made available to him, unless the accused has himself initiated further communication) (link).

⁹ See *New York v. Quarles*, 467 U.S. 649, 654 (1984) (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)) ("*Miranda* [rights] therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the [suspect's] right against compulsory self-incrimination [is] protected.'") (link).

¹⁰ 475 U.S. 625 (majority opinion) (link).

¹¹ *Id.* at 636.

¹² Justice Rehnquist explained in his *Jackson* dissent that the majority's logic perplexed him. See *id.* at 637 (Rehnquist, J., dissenting) ("The Court's decision today rests on the following deceptively simple line of reasoning: *Edwards v. Arizona* . . . created a bright-line rule to protect a defendant's Fifth Amendment rights; Sixth Amendment rights are even more important than Fifth Amendment rights; therefore, we must also apply the *Edwards* rule to the Sixth Amendment. The Court prefers this neat syllogism to an effort to discuss or answer the only relevant question: Does the *Edwards* rule make sense in the context of the Sixth Amendment? I think it does not, and I therefore dissent from the Court's unjustified extension of the *Edwards* rule to the Sixth Amendment.").

decision,¹³ where the Court reaffirmed that “The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation.”¹⁴ On the other hand, it recognized that the Sixth Amendment right to counsel is broader than the Fifth Amendment prophylactic rule: “[T]he reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before.”¹⁵

Fifteen years later, in *Texas v. Cobb*,¹⁶ Justice Kennedy, joined by Justices Scalia and Thomas, authored a concurring opinion that questioned “the underlying theory of *Jackson*.”¹⁷ Kennedy conveyed the particular worry that *Jackson* rendered *all* statements made at a —post-attachment) police-initiated interrogation inadmissible, even where the defendant’s cooperation with police was voluntary.¹⁸ This attention to the scope of the Sixth Amendment right to counsel, and the voluntariness of a defendant’s post-attachment statement, reemerged a few weeks ago at the oral argument in *Montejo v. Louisiana*.¹⁹

In *Montejo*, the Court confronted a Louisiana Supreme Court decision holding that a defendant must affirmatively —and vocally) accept appointment of counsel in order to validly invoke the right to counsel under *Jackson*.²⁰ The Justices’ barrage of questions at the argument indicated to Court observers that “the Court might want to overturn *Jackson*.”²¹ In fact, nearly three months after the Court heard argument, it asked the parties to brief that exact question: should the Court overrule *Jackson*?²² At argument, several of the Justices appeared to suggest that all that was at stake was a ques-

¹³ See *id.* at 629 (majority opinion) (drawing on the framework set forth in *Edwards*).

¹⁴ *Edwards v. Arizona*, 451 U.S. 477, 485–86 (1981) (link).

¹⁵ *Jackson*, 475 U.S. at 631 (link).

¹⁶ 532 U.S. 162 (2001) (link).

¹⁷ *Id.* at 174 (Kennedy, J., concurring).

¹⁸ *Id.* at 175 (“The parallel rule announced in *Jackson* . . . supersedes the suspect’s voluntary choice to speak with investigators.”).

¹⁹ See Posting of Brian Sagona to SCOTUSblog, Argument Recap: *Montejo v. Louisiana*, <http://www.scotusblog.com/wp/argument-recap-montejo-v-louisiana> (Jan. 14, 2009, 17:45 EST) (“The argument opened with both Justice Scalia and the Chief Justice expressing concerns that *Jackson* might be overly broad, preventing a defendant from voluntarily waiving his Sixth Amendment rights once he or she obtained counsel.”) (link).

²⁰ *State v. Montejó*, 974 So. 2d 1238, 1260–61 (La. 2008), cert. granted sub nom. *Montejo v. Louisiana*, 128 S. Ct. 30 (2008) (No. 07-1529).

²¹ Posting of Brian Sagona, *supra* note 19; see Transcript of Oral Argument at 20, *Montejo*, No. 07-1529 (U.S. argued Jan. 13, 2009) (Alito, J.), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-1529.pdf (“Mr. Verrilli, do you think that *Michigan v. Jackson* is immune from being reexamined at this point?”) (link).

²² *Montejo*, No. 07-1529, 2009 WL 793514 (U.S. Mar. 27, 2009) (mem.) (order in pending case), available at <http://www.scotusblog.com/wp/wp-content/uploads/2009/03/montejo-order-3-27-09.pdf> (link).

tion of coercion or involuntariness.²³ However, as Justice Souter observed, the defendant *Montejo* understands *Jackson* to be broader than merely a “no-coercion rule.”²⁴ Indeed, there is more at stake in these cases.

A few days after the argument in *Montejo*, the petitioner in *Kansas v. Ventris*²⁵ argued that “any voluntary statement by [a] defendant should be admissible for impeachment . . . even if the statement was made in the absence of counsel.”²⁶ The Justices again pressed on the scope of the Sixth Amendment. Justice Scalia suggested that the Court’s holding might turn on when the Sixth Amendment violation occurs—either it occurs at the time the statement is taken or at the time the statement is introduced at trial.²⁷ The temporal question is critical because the Court’s answer will signal whether it supports a broad or narrow understanding of the Sixth Amendment right to counsel.²⁸ If, as we argue below, the Sixth Amendment violation occurs when the State approaches a post-attachment accused without her counsel present, then the *Jackson* rule is not prophylactic but instead delineates the scope of the Sixth’s Amendment’s core values.

II. DEFINING THE SCOPE OF THE SIXTH AMENDMENT RIGHT TO COUNSEL AND UNTANGLING IT FROM THE FIFTH AMENDMENT *MIRANDA* RIGHT

If the Sixth Amendment merely protects against involuntary or compelled statements, then the move toward a voluntariness rule would make sense—even the defendant *Ventris* concedes that the statement he gave while in custody was not coerced.²⁹ But the Sixth Amendment also protects the adversarial process; thus, a police officer’s surreptitious recording of a defendant after the adversarial process had been initiated is akin to “taking a

²³ See, e.g., Transcript of Oral Argument at 4, *Montejo*, No. 07-1529 (Scalia, J.) (“I thought that the rationale of *Jackson* was that the confession is simply deemed to be coerced if the defendant has expressed . . . his desire to have counsel present or even to be represented by counsel.”); *id.* at 24 (Scalia, J.) (“You have to assume that his voluntary relinquishment of [his Sixth Amendment right] is somehow coerced. . . . You can’t get around the coercion aspect of . . . this matter.”); *id.* at 25 (Roberts, C.J.) (“[T]here are protections against the actual coercion, which it seems to me you’re arguing. As I understood Justice Scalia’s question, he says: Don’t you have to assume that there is coercion even in the mild case, not the most extreme one, but the mildest one?”) (link).

²⁴ *Id.* at 23 (Souter, J.).

²⁵ *Kansas v. Ventris*, cert. granted, 129 S. Ct. 29 (2008) (No. 07-1356) (argued Jan. 21, 2009).

²⁶ Posting of Eliza Presson to SCOTUSblog, Oral Argument Recap: *Kansas v. Ventris*, <http://www.scotusblog.com/wp/oral-argument-recap-kansas-v-ventris/#more-8611> (Jan. 30, 2009, 11:15 EST) (link).

²⁷ See Transcript of Oral Argument at 4, *Ventris*, No. 07-1356 (U.S. argued Jan. 21, 2009) (Scalia, J.), available at http://www.supremecourt.us/oral_arguments/argument_transcripts/07-1356.pdf (“When does . . . the Sixth Amendment violation occur?”) (link); *id.* at 22 (Scalia, J.) (“So you say that . . . the Sixth Amendment violation occurs before trial?”).

²⁸ If the Court views the Sixth Amendment right to counsel expansively, it will find a violation at the time the statement is taken, rather than when the statement is introduced at trial.

²⁹ Transcript of Oral Argument at 33, *Ventris*, No. 07-1356 (statement of attorney for Respondent) (conceding that “there is no claim that the statement was involuntary”) (link).

pretrial deposition . . . [where] one side isn't represented."³⁰ In that instance, any use of such statement, even if limited to rebuttal purposes, involves the court in the constitutional transgression.³¹

Although it would be much easier for the government to secure convictions if voluntariness became the sole harbinger of admissibility, the Constitution's Framers specifically provided for the right to counsel when "the government has committed itself to prosecute" and a defendant "finds himself faced with the prosecutorial forces of organized society."³² The Supreme Court has long recognized that the Sixth Amendment right to counsel is more than just a "trial right," and that it provides protection at all critical stages of a prosecution.³³ There are three reasons the Court should resist the temptation to equate the Fifth and Sixth Amendment rights and why it should not permit admission of all "voluntary" statements made during interrogation: —1) the Sixth Amendment's textual commitment to the right to counsel supports categorical protections throughout all stages of prosecution; —2) the goal of the Sixth Amendment right to counsel is broader than the Fifth Amendment right against self-incrimination; and —3) policy considerations suggest different results in the Fifth and Sixth Amendment contexts.

According to the Constitution, "In *all* criminal prosecutions, the accused *shall . . . have* the Assistance of Counsel for his defence."³⁴ Thus, the Sixth Amendment right to counsel is a textually mandated categorical requirement.³⁵ By contrast, the Fifth Amendment right against self-incrimination centers on the concept of state coercion and compulsion: "No person shall . . . be *compelled . . . to be a witness against himself . . .*"³⁶ Unlike the Sixth Amendment, the Fifth Amendment explicitly imports an idea of voluntariness into its guarantee. We argue—in accordance with

³⁰ *Id.* at 10 (Ginsburg, J.).

³¹ *See id.* at 21–22 (Scalia, J.). In attempting to ascertain whether the use of statements made in absence of counsel for impeachment purposes is permissible under the Sixth Amendment, Justice Scalia said, "I am still a little hung up on—on whether we would be allowing a constitutional violation. . . . [The Sixth Amendment's] root purpose is that counsel is guaranteed at trial. And here we're saying it's okay not to have counsel at trial so long as it's refuting a lie by the defendant."

³² *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2583 (2008) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)).

³³ *See Powell v. Alabama*, 287 U.S. 45, 57 (1932) (recognizing defendants' right to counsel "during perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important . . .") (link).

³⁴ U.S. CONST. amend. VI (emphasis added) (link).

³⁵ *See Jeffrey L. Fisher, Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1528–30 (2006) (link).

³⁶ U.S. CONST. amend V (emphasis added) (link).

long-standing rules of constitutional interpretation)³⁷ that this distinction is a purposeful one.

Assistance of counsel preserves the integrity of the criminal justice system and safeguards the defendant's right to a fair trial³⁸ because the effective assistance of a lawyer can diminish the disparities in strength and bargaining power between the powerful state and the simple accused. The structural disparities that exist in the post-attachment/pretrial time gap can eviscerate the possibility of a fair trial even before attorneys make opening statements. Accordingly, once the right to counsel attaches,³⁹ the guiding hand of counsel must protect the accused at every critical stage of the prosecution.⁴⁰

Instrumentally, the distinct purposes of counsel across the Fifth and Sixth Amendments is best illustrated by framing the Fifth Amendment right as the right to "counsel as protector," and the Sixth Amendment right as the right to "counsel as strategist." In the Fifth Amendment context, the right to counsel gives the suspect an opportunity to defend against attempts by the state to bully and badger the suspect into confessing. In the Sixth Amendment context, however, counsel must weigh the costs and benefits of each move the defendant makes—at every critical stage—and she must strategically manage the flow of information between the state and the accused.⁴¹ Of course, the role of counsel as strategist sometimes encompasses the protector role. But preventing self-incrimination is not the Sixth Amendment right's main purpose. Rather, its primary purpose is to level the playing field and provide information parity throughout the adversarial process.

The distinction between the state's role during the investigative process and its role at the prosecutorial stage further bolsters the case to construe *Jackson* as protecting a core right independent of self-incrimination. In the

³⁷ See, e.g., *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570–71 (1840) ("In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.") (link).

³⁸ As U.S. Assistant Solicitor General Saharsky, arguing in support of the Petitioner, observed: "The purpose of the right to counsel is to provide an adversary process to ensure that the defendant gets a fair trial." Transcript of Oral Argument at 15, *Kansas v. Ventris*, No. 07-1356 (U.S. argued Jan. 21, 2009), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-1356.pdf (link).

³⁹ The time of attachment is critical; "[o]nly when the state formally commits to prosecution do the dangers posed by adversarial inequality—overreaching, overpowering, deception, and the like—arise." James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 984 (1986).

⁴⁰ See *United States v. Wade*, 388 U.S. 218, 226 (1967) (stating that "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution . . . where counsel's absence might derogate from the accused's right to a fair trial.") (link).

⁴¹ For example, *how* a defendant should cooperate with the state might depend on what the accused can bargain for in return. At the very least, the accused must know which portion of the information she holds might later be used to make her look guilty or to undermine the defense theory at trial. These considerations arise precisely because plea-bargaining has become the dominant way to resolve criminal cases.

pre-attachment interrogation context, the state might interrogate numerous suspects in order to determine who committed a crime. Given that only one person—or a finite number of people that is often less than the number of people under suspicion) committed the crime, it follows that only one person under investigation holds relevant self-incriminating information. The right against self-incrimination protected in the Fifth Amendment is therefore not triggered in every interrogation.⁴² Post-indictment, on the other hand, the state takes a concrete adversarial position against one person—or finite group), and marshals its vast resources in its effort to convict. The defendant's counsel must be prepared to be a medium between the accused and the state, and to assure the latter's best position.⁴³ If the state could exploit its structural advantages⁴⁴ to pressure or manipulate the defendant into acting against his best interest during the prosecutorial stage—and outside the presence of counsel), the right to a fair trial would mean nothing.

Allocating the burden of requesting a lawyer to the accused in the pre-attachment interrogation context therefore makes good sense: the underlying right against compulsory self-incrimination does not automatically apply, and the state's crime-solving interest is at its peak. Post-attachment, however, requiring the defendant to affirmatively request counsel undermines core Sixth Amendment values. When the state approaches the post-attachment accused, its attempt to persuade him to make any decision without an attorney—including his decision to waive the right to counsel) necessarily undercuts his right to depend on counsel to guide him through every decision important to his defense. Accordingly, the Fifth Amendment approach does not reflect the different role that counsel plays in the Sixth Amendment context.

CONCLUSION

In *Jackson*, the Court did not fully emphasize the unique values animating the Sixth Amendment right to counsel. The perceived reliance on Fifth Amendment jurisprudence in that opinion has led some members of the Court to suggest that Fifth and Sixth Amendment protections during interrogation are the same, and that both should be waivable outside the presence of counsel. In reevaluating its holding in *Jackson*, however, the Court must resist the great temptation to further conflate its Fifth and Sixth

⁴² Moreover, the state has a more urgent interest in pre-attachment than post-attachment interrogation. Once enough evidence exists to narrow the investigative funnel to the prosecution of a single person, the state's interest substantively changes. Post-attachment confessions serve a proof-enhancing, rather than crime-solving, function.

⁴³ *Maine v. Moulton*, 474 U.S. 159, 176 (1985) (stating that the "Sixth Amendment guarantees the accused . . . the right to rely on counsel as a 'medium' between him and the State") (link).

⁴⁴ The state has round-the-clock access to the defendant as well as vastly superior resources.

Amendment cases. Those Justices who want police-initiated interrogations to be valid whenever police obtain a waiver threaten to do just that.⁴⁵

Justice Kennedy's concurrence in *Cobb* underscored that the majority rule in *Jackson* eliminated the defendant's "choice to speak with investigators after a *Miranda* warning."⁴⁶ And the notion that all voluntary statements should be admissible is, initially, an appealing one—an admissibility rule based on voluntariness speaks to a fundamental respect for agency and personal autonomy. Practically, however, problems with such a rule would abound. First, nothing in the *Jackson* rule prevents a defendant from electing to initiate communication with the police. More fundamentally, once "the government has committed itself to prosecute" and the "defendant finds himself faced with the prosecutorial forces of organized society, [] immersed in the intricacies of substantive and procedural criminal law,"⁴⁷ one must wonder how much autonomy an unrepresented defendant can possibly enjoy. There may be legitimate reasons to admit into evidence voluntary statements made by the defendant before the Sixth Amendment right attaches—the state is seeking to solve a crime, the constitutional values at stake are limited—to the right against self-incrimination), and the state has not yet committed itself to depriving the individual of life, liberty, or property. But these reasons do not apply to voluntary statements made after the state has committed itself to prosecution.

The Court should reject application of the voluntariness test to the Sixth Amendment, and be wary of the underlying autonomy rationale driving its consideration. Instead, the Court should recognize a critical difference between the Fifth and Sixth Amendments: unlike the Fifth Amendment, the Sixth Amendment's text categorically guarantees the right to counsel, and therefore the right is not constrained by an assessment of voluntariness. This difference counsels an alternative approach to *Jackson*'s inevitable reexamination: rather than curtail the right to counsel by making it easier to waive, the Court should fulfill the right's guarantee by eschewing invocation requirements and disallowing the introduction of statements for impeachment purposes. The Court should articulate a rationale that severs the jurisprudence from its reliance on the Fifth Amendment concerns with voluntariness, and that restores an independent constitutional fidelity to the Sixth Amendment right to counsel.

⁴⁵ These Justices support the claim made in Kennedy's *Cobb* concurrence that "[t]here is little justification for not applying the same [Fifth Amendment] course of reasoning with equal force to the court-made preventative rule announced in *Jackson*; for *Jackson*, after all, was a wholesale importation of the *Edwards* rule into the Sixth Amendment." *Texas v. Cobb*, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring) (link).

⁴⁶ *Id.* at 176.

⁴⁷ *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2583 (2008) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)).