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Waiver after Request for Counsel--Sixth Amendment: Michigan v. Jackson, 106 S. Ct. 1404 (1986)

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SIXTH AMENDMENT—WAIVER AFTER REQUEST FOR COUNSEL

Michigan v. Jackson, 106 S. Ct. 1404 (1986).

I. INTRODUCTION

In its 1985 Term, the United States Supreme Court established a new test to determine the validity of a defendant's waiver of his sixth amendment right to the assistance of counsel.¹ In *Michigan v. Jackson*,² the Court, relying on *Edwards v. Arizona*,³ held that when a defendant asserts his right to counsel at an arraignment or similar proceeding, any subsequent waiver of this right during police interrogation must be preceded by communication initiated by the defendant.⁴

In applying the *Edwards* rule to sixth amendment waivers, the Court strengthened the sixth amendment waiver standard for defendants who have requested counsel. The sixth amendment guarantee, unlike its fifth amendment counterpart, does not hinge on such a request, however. As a result, the Court's holding leaves several issues unsettled. The Court, by limiting the application of *Jackson* to those defendants who request counsel, must still determine what protections are due to those who do not request a lawyer. Further, the Court must clearly define "initiation" in the sixth amendment context.⁵

After reviewing *Jackson*, this Note explores the history of the sixth amendment right, comparing it to the development of the fifth

¹ "In all criminal prosecutions, the accused shall have the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

² 106 S. Ct. 1404 (1986).

³ 451 U.S. 477 (1981). In *Edwards*, the Court held that if a suspect requests counsel during custodial interrogation, the police cannot continue to interrogate him unless the suspect initiates communication with the police and then validly waives his right to counsel. *Id.* at 484, 485. See also *Solem v. Stumes*, 465 U.S. 638 (1984). The right to counsel implicated in the *Edwards* scenario is based on the fifth amendment right against compelled self-incrimination as developed in *Miranda v. Arizona*, 384 U.S. 436 (1966). The right to counsel implicated in *Jackson*, however, is based on the sixth amendment. The distinction between these rights is explained below. See *infra* notes 60-83 and accompanying text.

⁴ *Jackson*, 106 S. Ct. at 1411.

⁵ The Court has defined "initiation" for the fifth amendment in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). See *infra* note 59 and text accompanying notes 143-147.

amendment right. A discussion of the sixth amendment waiver doctrine follows. Next, the Note discusses the shortcomings of the *Jackson* rule and suggests answers to unresolved questions. Finally, this Note argues that the rule enunciated in *Jackson* indicates that the Court has continued to emphasize the relinquishment aspect of the sixth amendment right, thereby ignoring whether a defendant fully comprehends the benefits of the right he is waiving.⁶

II. BACKGROUND

In the companion case to *Jackson*, the defendant, Rudy Bladel, was arrested and arraigned in connection with the murder of three Amtrak employees in Jackson, Michigan.⁷ At his arraignment, Bladel requested that counsel be appointed. Prior to meeting with counsel,⁸ though, two police officers re-questioned Bladel,⁹ at which time he again requested counsel.¹⁰ Without knowing that a lawyer had been appointed for him, however, Bladel agreed to the questioning, signed a waiver form and subsequently confessed to the murders.¹¹ The trial court admitted his confession despite Bladel's objection and convicted him of first degree murder.¹² On appeal, the Michigan Court of Appeals first affirmed the conviction,¹³ but after reconsideration, reversed and remanded.¹⁴ The Michigan Supreme Court granted appeal and considered the case with de-

⁶ There are two prongs to waiver of the sixth amendment: relinquishment and comprehension. *Brewer v. Williams*, 430 U.S. 387, 404 (1977). These concepts are explained more fully below. See *infra* text accompanying notes 102-23.

⁷ *People v. Bladel*, 421 Mich. 39, 44-45, 365 N.W.2d 56, 58-59 (1984).

⁸ A notice of appointment of counsel was promptly mailed to a law firm which did not receive it until several days later. Bladel was questioned in the interim by officers who apparently were not aware of Bladel's request. However, the detective in charge of the investigation was present at Bladel's arraignment and, hence, knew of the request. *Michigan v. Jackson*, 106 S. Ct. 1404, 1406 (1986).

⁹ The police, before questioning Bladel, read him his Miranda rights as delineated by the Court in *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the Court held that police must inform an accused that he has the right to remain silent, that any statement he makes may be used as evidence against him, that he has the right to counsel, and that one will be appointed for him if he is indigent. *Id.* at 444.

¹⁰ *Jackson*, 106 S. Ct. at 1406.

¹¹ *Id.*

¹² *Id.*

¹³ *People v. Bladel*, 106 Mich. App. 397, 403, 308 N.W.2d 230, 233 (1981).

¹⁴ *People v. Bladel*, 118 Mich. App. 498, 500, 325 N.W.2d 421, 422 (1982). The Michigan Court of Appeals reconsidered in light of the decision of the Michigan Supreme Court in *People v. Paintman*, 412 Mich. 518, 315 N.W.2d 418 (1982), holding that an accused's fifth and fourteenth amendments rights are violated by admission of inculpatory statements where the accused has requested counsel after arrest but nevertheless was interrogated. *Paintman*, 412 Mich. at 526, 315 N.W.2d at 420; cf. *Edwards*, 451 U.S. 477 (1981).

fendant Jackson.¹⁵

Jackson was arrested and arraigned as one of four participants in a woman's plan to kill her husband.¹⁶ During arraignment, Jackson, like Bladel, requested the assistance of counsel, but before meeting with counsel, two police officers re-questioned him¹⁷ to "confirm" his involvement in the murder.¹⁸ The officers informed Jackson of his *Miranda* rights, and he agreed to the questioning in the absence of counsel.¹⁹ The trial court admitted Jackson's post-arraignment confession into evidence and convicted him of second-degree murder.²⁰ The Court of Appeals upheld the conviction and held that the statements were properly admitted.²¹ The Michigan Supreme Court granted leave to appeal.²²

The Michigan Supreme Court held that the post-arraignment confessions should have been excluded because they were obtained in the absence of counsel and violated both defendants' sixth amendment rights.²³ The court also held that the *Edwards* rule for fifth amendment waivers during custodial interrogation²⁴ applied by analogy when an accused requests counsel before the arraigning magistrate.²⁵ Therefore, if an accused requests counsel at arraignment, police may not interrogate him further unless the accused initiates communication with the police and then makes a knowing, intelligent and voluntary waiver of both his fifth and sixth amendment rights.²⁶

III. THE OPINIONS OF THE COURT

A. THE MAJORITY

The Supreme Court, in an opinion written by Justice Stevens, affirmed the Michigan Supreme Court's decision. The Court first noted that the question in *Jackson* was not whether the defendants

¹⁵ *Jackson*, 106 S. Ct. at 1406.

¹⁶ *People v. Bladel*, 421 Mich. 39, 48, 365 N.W.2d 56, 60 (1984). Prior to arraignment, Jackson admitted to participation in the murder scheme. *Id.*, 365 N.W.2d at 60.

¹⁷ Unlike the officers in Bladel's case, these officers were present at Jackson's arraignment and thus knew of his request for counsel. *Id.* at 49, 365 N.W.2d at 61.

¹⁸ *Id.*, 365 N.W.2d at 61.

¹⁹ *Id.*, 365 N.W.2d at 61.

²⁰ *Id.*, 365 N.W.2d at 61.

²¹ *People v. Jackson*, 114 Mich. App. 649, 658-59, 319 N.W.2d 613, 616-17 (1982).

²² *Bladel*, 421 Mich. at 50, 365 N.W.2d at 61.

²³ *Id.* at 66, 365 N.W.2d at 69.

²⁴ See *supra* note 3.

²⁵ *Bladel*, 421 Mich. at 65, 66, 365 N.W.2d at 68, 69 (footnote omitted). The court, however, did not confront the situation in which the defendant fails to request counsel. *Id.* at 66 n.22, 365 N.W.2d at 69 n.22.

²⁶ See *id.* at 66, 365 N.W.2d at 69.

had a right to counsel at the post-arraignment interrogations, but whether they had validly waived their rights.²⁷ The majority then turned to *Edwards*, where the Court held that after an accused asserts his right to counsel at a custodial interrogation,²⁸ the interrogation must stop unless the accused initiates further communication with the police.²⁹ While *Edwards* was based on the fifth amendment right to counsel, because the defendant's request for counsel there was made during custodial interrogation, the requests for counsel in *Jackson* were made at arraignment, providing support for the Michigan court's decision to rely on the sixth amendment guarantee.³⁰ Hence, the question was really whether the Court should extend its fifth amendment *Edwards* rule to the sixth amendment. Justice Stevens, refuting the State's arguments, decided that such an extension was necessary to preserve the efficacy of the sixth amendment.³¹

The State first contended that *Edwards* should not be extended to the sixth amendment because of legal differences between the fifth and sixth amendment rights to counsel.³² Justice Stevens found these differences irrelevant since "the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before."³³ The initiation of adversary judicial proceedings, and the concurrent attachment of the sixth amendment right to counsel, indicates that the adverse positions of the defendant and the government have solidified.³⁴ Further, once

²⁷ *Michigan v. Jackson*, 106 S. Ct. 1404, 1407-08 (1986). The court realized that this right to counsel derived from both the fifth and sixth amendments. *Id.* The fifth amendment right to counsel, designed to protect against compelled self-incrimination, attaches when an accused requests counsel at a "custodial interrogation." *Edwards v. Arizona*, 451 U.S. 477, 482 (1981); *Miranda v. Arizona*, 384 U.S. 436, 469-70 (1966). The sixth amendment right, on the other hand, attaches at the outset of "adversary judicial proceedings" and no request is needed. *United States v. Gouveia*, 467 U.S. 180, 187 (1984); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

²⁸ "Custodial interrogation" usually refers to questioning of a suspect before formal charges have been made or before the initiation of adversary judicial proceedings. See *Miranda*, 384 U.S. at 444; *Kirby*, 406 U.S. at 687-90. Hence, the sixth amendment right to counsel has yet to attach and only the fifth amendment right is implicated. See *Kirby*, 406 U.S. at 689-90.

²⁹ *Edwards*, 451 U.S. at 484, 485.

³⁰ See *Jackson*, 106 S. Ct. at 1408. The Court, in a footnote, stated that the Michigan court held that only the sixth amendment applied to both *Jackson* and *Bladel* because their requests were made at arraignment and not at custodial interrogation. The Court noted that it expressed "no comment on the validity of the Michigan court's Fifth Amendment analysis." *Id.* at 1408 n.4.

³¹ *Id.* at 1411.

³² *Id.* at 1408.

³³ *Id.*

³⁴ *Id.* at 1408-09.

the defendant has been formally charged, he faces "the prosecutorial forces of organized society."³⁵ Since the "suspect" has now become an "accused" and is protected by the sixth amendment, police must refrain from using various investigatory techniques, such as electronic surveillance, that they could have used prior to arraignment.³⁶ The majority concluded that the protections afforded by the sixth amendment are at least as important as those guaranteed by the fifth amendment, making any legal difference between the two unimportant.³⁷

Justice Stevens also rejected the state's argument that factual differences between a request at a custodial interrogation and at an arraignment indicate that the *Edwards* rule should not be extended.³⁸ He noted that an accused who makes a request at the arraignment desires a lawyer's aid, not only at formal legal proceedings, but at all confrontations between the state and the accused.³⁹ The Court, therefore, refused to view each request narrowly, since most defendants are unaware of the differences between their fifth and sixth amendment rights.⁴⁰ Justice Stevens, however, noted that the sixth amendment right to counsel does not hinge on a request for counsel, but is simply viewed "as an extremely important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation."⁴¹

The State also emphasized another factual difference: while police obviously know of a request for counsel made during custodial interrogations, they might not be aware of a similar request made at arraignment.⁴² Thus, the State claimed, the *Edwards* rule would not work in the sixth amendment context. Justice Stevens disagreed because the sixth amendment "concerns the confrontation between the State and the individual," thereby imputing knowledge of a request made at arraignment to the police.⁴³ Further, *Edwards* created a simple, "bright-line" rule, and adopting it for sixth amendment

³⁵ *Id.* at 1408 (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)). The Court has commonly used this phrase to indicate that the sixth amendment right has attached and to emphasize the importance of that right in providing a guarantee to a fair trial.

³⁶ *Jackson*, 106 S. Ct. at 1409.

³⁷ *Id.*

³⁸ *Id.* at 1409-10.

³⁹ *Id.* at 1409.

⁴⁰ *Id.* at 1409, 1410 n.7 (quoting *People v. Bladel*, 421 Mich. 39, 63-64, 365 N.W.2d 56, 67 (1984)).

⁴¹ *Id.* at 1409 n.6.

⁴² *Id.* at 1410.

⁴³ *Id.*

waivers would not lead to confusion.⁴⁴

Finally, Justice Stevens refuted the State's contention that the defendants in *Jackson* had validly waived their rights. Instead, the Court decided to extend *Edwards* to the sixth amendment.⁴⁵ Thus, the Court held that when a request for counsel is made at an arraignment or similar proceeding, police may not begin any interrogation without counsel unless the accused first initiates the communication and then knowingly, intelligently and voluntarily waives his rights.⁴⁶ Applying this new rule to the facts, Justice Stevens found that the written waivers given in response to police-initiated interrogation were insufficient to establish a knowing, intelligent and voluntary waiver.⁴⁷

B. THE CONCURRENCE

Chief Justice Burger filed a concurring opinion, stating that he was compelled by the doctrine of stare decisis to follow the *Edwards* rule in *Jackson*.⁴⁸ Nevertheless, he argued that the prophylactic rules the Court has developed to protect the accused from self-incrimination have gone too far.⁴⁹ Quoting Justice Cardozo, Chief Justice Burger concluded that "more and more 'criminal[s]. . . go free because the constable has blundered.'"⁵⁰

C. THE DISSENT

Justice Rehnquist filed a dissenting opinion in which Justices Powell and O'Connor joined. Justice Rehnquist disagreed with the majority's reasoning that because sixth amendment rights are more important than fifth amendment rights, the rule of *Edwards* should apply to the sixth amendment.⁵¹ He contended that the purpose of *Edwards* and the fifth amendment right to counsel is to prevent the police from "badgering" a suspect into waiving his rights and involuntarily incriminating himself.⁵² Thus, Justice Rehnquist felt that the question in *Jackson* was not whether the sixth amendment right is more important than its fifth amendment counterpart, but whether

⁴⁴ *Id.*

⁴⁵ *Id.* at 1411.

⁴⁶ *Id.* Thus, this waiver rule is the same rule as that adopted in *Edwards*.

⁴⁷ *Id.* at 1410, 1411.

⁴⁸ *Id.* at 1411 (Burger, C.J., concurring).

⁴⁹ *Id.* (Burger, C.J., concurring). Chief Justice Burger did not state which prophylactic rules to which he referred.

⁵⁰ *Id.* at 1411 (Burger, C.J., concurring)(quoting *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926)).

⁵¹ *Id.* at 1412 (Rehnquist, J., dissenting).

⁵² *Id.* (Rehnquist, J., dissenting).

the prophylactic reasons for creating the *Edwards* rule are present in the sixth amendment context.⁵³ Answering this question in the negative, he concluded that the Court should not have extended *Edwards* to the sixth amendment.⁵⁴

He also argued that the majority, without explaining its decision, limited the "rule to those defendants foresighted enough or just plain lucky enough, to have made an explicit request for counsel which we have always understood to be completely unnecessary for Sixth Amendment purposes."⁵⁵ The majority's decision to limit *Jackson* to those who request counsel left the Court in "an analytical strait-jacket."⁵⁶ Because the sixth amendment serves different purposes than the fifth amendment, Justice Rehnquist would not have applied the "bright-line" rule of *Edwards* to sixth amendment waiver cases.⁵⁷

IV. ANALYSIS

In *Jackson*, the Court developed an important new standard of pre-trial waiver for the sixth amendment right to counsel. Once a defendant requests counsel, the police may not interrogate him in the absence of counsel unless he initiates communication with the police and then waives his right to counsel.⁵⁸ Since the application of the *Jackson* rule is limited to situations where a defendant requests counsel, however, the Court must still clarify the waiver standard where no such request is made. Further, it is not certain whether the post-*Edwards* ruling defining "initiation," i.e., *Oregon v. Bradshaw*,⁵⁹ will also apply in the sixth amendment context. As an aid to understanding *Jackson*, this analysis includes a review of the fifth and sixth amendments rights to counsel, a discussion of the development of the sixth amendment waiver doctrine, and an analysis of the shortcomings of the *Jackson* rule with suggested solutions to unresolved questions.

A. THE FIFTH AMENDMENT RIGHT TO COUNSEL

The Court has held that both the fifth and sixth amendments

⁵³ *Id.* at 1413 (Rehnquist, J., dissenting).

⁵⁴ *Id.* (Rehnquist, J., dissenting).

⁵⁵ *Id.* at 1414 (Rehnquist, J., dissenting).

⁵⁶ *Id.* (Rehnquist, J., dissenting).

⁵⁷ *Id.* (Rehnquist, J., dissenting).

⁵⁸ *Id.* at 1411.

⁵⁹ 462 U.S. 1039 (1983). In *Bradshaw*, the Court held that an accused initiates communication with the police when he "evinces a willingness and a desire for a generalized discussion about the investigation" and is not merely making a "necessary inquiry arising out of the incidents of the custodial relationship." *Id.* at 1045-46.

guarantee the right to counsel. Although the explicit language of the fifth amendment does not provide for the right to counsel,⁶⁰ the Court, in *Miranda v. Arizona*, held that such a right was necessary to protect an accused's fifth amendment guarantee against compelled self-incrimination during custodial interrogation.⁶¹ Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."⁶²

The Court strengthened *Miranda* in *Edwards* by creating a strict prophylactic rule. The Court held that once an accused has expressed a desire to deal with the police only through counsel, the police may not conduct further interrogation in the absence of counsel until the accused "initiates further communication, exchanges, or conversations with the police,"⁶³ and then validly waives his counsel rights.⁶⁴ The Court later defined interrogation as "express questioning" or words or actions by the police that "are reasonably likely to elicit an incriminating response from the suspect."⁶⁵ *Edwards* sets forth a "bright-line" rule, in the absence of which "the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down an accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance."⁶⁶

B. THE SIXTH AMENDMENT RIGHT TO COUNSEL

The language of the sixth amendment, in contrast to the fifth amendment, explicitly provides for the right to counsel, but limits that right to assistance during "criminal prosecutions."⁶⁷ This right

⁶⁰ The fifth amendment provides:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service or time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor 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; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

⁶¹ *Miranda v. Arizona*, 384 U.S. 436, 469-70 (1966).

⁶² *Id.* at 444; see also *supra* note 27.

⁶³ *Edwards v. Arizona*, 451 U.S. 477, 485 (1981).

⁶⁴ *Id.* at 484, 485. See also *Smith v. Illinois*, 469 U.S. 91, 98 (1984) ("Courts may admit [a defendant's] responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.").

⁶⁵ *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980).

⁶⁶ *Smith*, 469 U.S. at 98 (citations omitted).

⁶⁷ U.S. CONST. amend. VI.

is "indispensable to the fair administration of our adversarial system of criminal justice,"⁶⁸ because it ensures that the accused is provided with a spokesman or advisor⁶⁹ who is familiar with the "intricacies of the law."⁷⁰ Therefore, it serves different, and perhaps more important, purposes than the fifth amendment right.

In *Powell v. Alabama*,⁷¹ the Court hinted that to ensure the effectiveness of the sixth amendment and to guarantee due process, the right to counsel should include representation at pre-trial proceedings.⁷² The Court, in *United States v. Ash*,⁷³ found that this right extended back to "critical stages" of the proceedings⁷⁴ because the guarantee of "Assistance" would be less than meaningful if it were limited to the formal trial itself.⁷⁵ For example, in *United States v. Wade*⁷⁶ and *Gilbert v. California*,⁷⁷ the Court held that the presence of counsel at post-indictment pre-trial lineups was necessary to "preserve the defendant's basic right to a fair trial."⁷⁸

The Court abandoned this case-by-case analysis of when the right to counsel attaches by adopting a per se rule in *Kirby v. Illinois*.⁷⁹ *Kirby* held that the right to counsel attaches at the initiation of "adversary judicial proceedings."⁸⁰ The attachment of the sixth amendment signifies the change in the criminal justice system from

⁶⁸ *Maine v. Moulton*, 106 S. Ct. 477, 483 (1986).

⁶⁹ *United States v. Ash*, 413 U.S. 300, 312 (1973).

⁷⁰ *Id.* at 309.

⁷¹ 287 U.S. 45 (1932). In *Powell*, the defendants' trials began six days after arraignment but counsel were not appointed until the morning of the trials. The Court found that "during perhaps the most critical period of the proceedings against these defendants . . . when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense." *Id.* at 57.

⁷² *See id.* at 57.

⁷³ 413 U.S. 300 (1973).

⁷⁴ *See, e.g., Hamilton v. Alabama*, 368 U.S. 52, 54-55 (1961), where the Court found that preliminary arraignment is a critical stage of the proceeding.

⁷⁵ *Ash*, 413 U.S. at 310.

⁷⁶ 388 U.S. 218 (1967).

⁷⁷ 388 U.S. 263 (1967).

⁷⁸ *Wade*, 388 U.S. at 227 (1967); *see also Gilbert*, 388 U.S. at 272. On the other hand, in *Gilbert*, the Court also held that the uncounseled, pre-indictment taking of handwriting exemplars was not a critical stage of the proceedings because there was only a "minimal risk" of violating the right to a fair trial. *Id.* at 267. The Court distinguished handwriting samples from line-ups by stating that, unlike identifications made at pre-trial line-ups, the defendant "has the opportunity for a meaningful confrontation of the [State's] case at trial" by presenting, for example, his own handwriting experts. *Id.* In other words, since any evidence of guilt found in handwriting samples can easily be refuted at trial while line-up identifications cannot, the Court found that the protections of the sixth amendment were only necessary for the latter.

⁷⁹ 406 U.S. 608 (1972).

⁸⁰ *Id.* at 688.

inquisitorial and investigatorial to accusatorial and adversarial.⁸¹ In other words, after the sixth amendment attaches, the government "may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation."⁸² It is at this point that the right to counsel becomes necessary to guarantee the right to a fair trial. The Court has continued to rely on *Kirby*, applying it, for example, in *Jackson* to determine when the defendants' sixth amendment rights had attached.⁸³

C. VIOLATIONS OF THE SIXTH AMENDMENT

Once the sixth amendment has attached, the next question is whether the state violated the amendment's guarantee of counsel. Determining whether the state violated a defendant's rights often depends on whether the defendant waived his right to counsel. Waiver, however, is relevant only in certain situations. When police attempt to deliberately elicit information by surreptitious means, the issue of waiver is irrelevant because the defendant is unaware that he is speaking with the police. On the other hand, when the defendant wishes to proceed at trial *pro se* or when the police interrogate the defendant in the absence of counsel, waiver of the sixth

⁸¹ See *Michigan v. Jackson*, 106 S. Ct. 1404, 1409 (1986); *Moran v. Burbine*, 106 S. Ct. 1135, 1146 (1986) ("[The sixth amendment] becomes applicable only when the government's role shifts from investigation to accusation."); *Miller v. Fenton*, 106 S. Ct. 445, 453 (1985) ("[Our system] assures that a conviction will not be secured by inquisitorial means."); *Watts v. Indiana*, 338 U.S. 49, 54 (1949) ("Ours is the accusatorial as opposed to the inquisitorial system"). See also Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1 (1979). Professor Grano states that an attempt to violate the sixth amendment right runs contrary to "the constitutional mandate that the system proceed, after some point, only in an accusatorial manner." *Id.* at 35.

⁸² *Jackson*, 106 S. Ct. at 1409. The Court cited *United States v. Henry*, 447 U.S. 264 (1980) (surreptitious employment of a cellmate), *Maine v. Moulton*, 106 S. Ct. 477 (1986) (electronic surveillance of conversation with third party), and *Massiah v. United States*, 377 U.S. 201 (1964) (electronic surveillance of conversation with third party), to provide examples of techniques that police may not use after this point.

⁸³ *Jackson*, 106 S. Ct. at 1407, 1408. The Court has also used the *Kirby* analysis in other cases. In *United States v. Gouveia*, 467 U.S. 180, 190 (1984), the Court held that administrative segregation of prisoners suspected of murders did not trigger the initiation of adversary judicial proceedings, indicating that the sixth amendment right had yet to attach. The Court also found that adversary judicial proceedings had not begun in *Rhode Island v. Innis*, 446 U.S. 291, 300 n.4 (1980), where a post-arrest discussion between police officers resulting in an uncounseled confession did not implicate the prisoner's sixth amendment rights. On the other hand, the Court found that these proceedings had begun in *United States v. Henry*, 447 U.S. 264, 269 (1980), where the post-indictment use of a jailhouse informant violated the defendant's sixth amendment right to counsel.

amendment right to counsel is the vital issue.⁸⁴ While *Jackson* falls into this second category, a brief review of both categories is necessary to fully understand the new waiver rule.

1. Deliberate Elicitation

In *Massiah v. United States*,⁸⁵ the Court held that incriminating information "deliberately elicited" from the defendant in the absence of counsel must be excluded from evidence.⁸⁶ In *Massiah*, a co-defendant, acting as a undercover agent, arranged a meeting in his car with the defendant.⁸⁷ Unbeknownst to the defendant, the police had equipped the car with microphones.⁸⁸ Thus, the police were able to overhear the pair's conversation during which the defendant made incriminating statements.⁸⁹ Relying on his concurring opinion in *Spano v. New York*,⁹⁰ Justice Stewart, writing for the majority, concluded that allowing police to surreptitiously obtain incriminating information from the defendant in this manner undermined the purpose of the sixth amendment guarantee.⁹¹ The sixth amendment prohibits such deliberate elicitation of a defendant's statements.

The *Massiah* analysis remained dormant for many years⁹² until the Court returned to the deliberate elicitation standard in *United States v. Henry*.⁹³ In *Henry*, the government placed an informant in the defendant's cell to obtain incriminating information.⁹⁴ The Court held that the state violated the defendant's sixth amendment right to counsel by attempting to deliberately elicit incriminating statements in the absence of counsel and intentionally creating "a

⁸⁴ See Note, *Proposed Requirements for Waiver of the Sixth Amendment Right To Counsel*, 82 COLUM. L. REV. 363, 381-91 (1982).

⁸⁵ 377 U.S. 201 (1964).

⁸⁶ *Id.* at 206.

⁸⁷ *Id.* at 203.

⁸⁸ *Id.* at 202-03.

⁸⁹ *Id.* at 203.

⁹⁰ 360 U.S. 315 (1959). In *Spano*, the Court held that a post-indictment confession obtained after an all night session of interrogation violated the defendant's sixth amendment right to counsel and thus had to be excluded from evidence. Justice Stewart stated that "the absence of counsel when this confession was elicited was alone enough to render it inadmissible under the [Sixth and] Fourteenth Amendment[s]." *Id.* at 326 (Stewart, J., concurring).

⁹¹ *Massiah*, 377 U.S. at 206.

⁹² In *Brewer v. Williams*, 430 U.S. 387 (1977), the Court purportedly used the deliberate elicitation standard set out in *Massiah* but confused commentators by calling the police's actions "tantamount to interrogation." *Id.* at 399 & n.6, 400. For a more complete explanation of *Williams* and the confusion it caused, see *infra* notes 110-113 and accompanying text.

⁹³ 447 U.S. 264 (1980).

⁹⁴ *Id.* at 266.

situation likely to induce [the accused] . . . to make incriminating statements.”⁹⁵ More recently, the Court, in *Maine v. Moulton*,⁹⁶ found illegal a state attempt to use a co-defendant to surreptitiously elicit incriminating statements.⁹⁷ *Moulton* clarified the *Massiah* standard by holding that any attempt by the state to deliberately elicit incriminating information from an accused or to knowingly exploit an opportunity to “confront the accused without counsel being present,” violates the sixth amendment.⁹⁸

“[T]he concept of knowing and voluntary waiver of Sixth Amendment rights . . . [did] not apply” in *Massiah*, *Henry* and *Moulton* because the defendants were in communication with “undisclosed undercover informant[s] acting for the Government,”⁹⁹ and thus, did not know to whom they were speaking. *Massiah* and its progeny are important because they indicate that once the sixth amendment attaches, the police, whether through coercive or non-coercive means, may not attempt to subvert in any manner a defendant’s right to have counsel act as a “medium”¹⁰⁰ between him and the state.¹⁰¹ While a violation of the fifth amendment right to counsel depends on the coerciveness of the state’s actions, the sixth amendment’s prohibition of deliberate elicitation indicates that the sixth amendment has a lower threshold for violation, and is at least as important as, if not more important than, the fifth amendment right.

2. Waiver of the Sixth Amendment Right

Realizing that the sixth amendment needed a waiver standard as strong as its fifth amendment counterpart, the *Jackson* majority extended the fifth amendment *Edwards* waiver rule to the sixth amendment.¹⁰² There are two basic situations in which sixth amendment waiver is an issue: (1) when a defendant desires to proceed at trial *pro se*, and (2) when the police interrogate a defendant in the absence of counsel. In the landmark decision *Johnson v. Zerbst*,¹⁰³ the Court defined a waiver as a knowing and intelligent

⁹⁵ *Id.* at 274.

⁹⁶ 106 S. Ct. 477 (1986).

⁹⁷ *Id.* at 489, 490.

⁹⁸ *Id.* at 487.

⁹⁹ *Henry*, 447 U.S. at 273.

¹⁰⁰ *Moulton*, 106 S. Ct. at 487.

¹⁰¹ See Kamisar, Brewer v. Williams, *Massiah*, and *Miranda*: *What is Interrogation? When does it Matter?*, in *POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY*, 139, 169-176 (1980).

¹⁰² *Jackson*, 106 S. Ct. at 1408, 1409.

¹⁰³ 304 U.S. 458 (1938).

relinquishment of a constitutional right.¹⁰⁴ Further, the Court stated that "the determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."¹⁰⁵ According to *Zerbst*, therefore, waiver of the sixth amendment right to counsel consists of two distinct elements: 1) comprehension of the right to counsel and 2) affirmative relinquishment of that right.¹⁰⁶

Applying the *Zerbst* waiver standard in *Faretta v. California*,¹⁰⁷ the Court determined that a defendant could waive his right to counsel in order to proceed *pro se* at trial.¹⁰⁸ In *Faretta*, the Court focused on the "comprehension" element of the *Zerbst* standard.¹⁰⁹ The Court held that for a defendant to represent himself at trial, "he should be made aware of the dangers and disadvantages of self-representation so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'"¹¹⁰ Further, the defendant has the burden of showing that he understands the right he is relinquishing.¹¹¹ Thus, the Court has developed a clear and fairly stringent comprehension standard for those who desire to proceed *pro se*.

The Court, however, has not looked at a defendant's comprehension of his right when the state attempts to show waiver during police interrogation. Instead, the Court has focused on the second prong of the *Zerbst* standard, "relinquishment."¹¹² When a defendant attempts to proceed *pro se* he clearly desires to relinquish his sixth amendment right. Relinquishment, on the other hand, is not as obvious when the police attempt to admit non-counseled confessions or other incriminating statements into evidence. The Court confronted such a situation in *Brewer v. Williams*.¹¹³

In *Williams*, the defendant, a religious man, was accused of killing a young girl. Although the police promised Williams' lawyers

¹⁰⁴ *Id.* at 464; accord *Von Moltke v. Gillies*, 332 U.S. 708, 723, 724 (1948)(plurality opinion of Black, J.).

¹⁰⁵ *Zerbst*, 304 U.S. at 464.

¹⁰⁶ *Brewer v. Williams*, 430 U.S. 387, 404 (1977); See Note, *Sixth Amendment Right To Counsel: Standards for Knowing and Intelligent Pretrial Waivers*, 60 B.U. L. REV. 738, 752 (1980).

¹⁰⁷ 422 U.S. 806 (1975).

¹⁰⁸ *Id.* at 835-37.

¹⁰⁹ *Id.* at 835; see also Note, *supra* note 106, at 750.

¹¹⁰ *Faretta*, 422 U.S. at 835 (quoting *Adams v. United States*, 317 U.S. 269, 279 (1942)).

¹¹¹ *Id.* at 835.

¹¹² See, e.g., *Brewer v. Williams*, 430 U.S. 387, 404-05; Note, *supra* note 106, at 752.

¹¹³ 430 U.S. 387 (1977).

that they would not question him, the detective in charge of the investigation pleaded with Williams to help the police locate the girl's body so that her parents could have "a Christian burial for this little girl who was snatched away from them on Christmas [E]ve and murdered."¹¹⁴ In response, Williams made several incriminating statements and disclosed where he buried the girl.¹¹⁵ The Court held that the detective's "Christian burial speech" was "tantamount to interrogation"¹¹⁶ and violated Williams' sixth amendment rights because, in his attempt to obtain a confession, the detective tried to circumvent Williams' lawyers.¹¹⁷ Unlike the other "deliberate elicitation" cases,¹¹⁸ however, Williams knew that the persons confronting him were government agents. So before the Court could find that the "Christian burial speech" violated Williams' sixth amendment right, it had to determine whether he had waived his right to counsel.

Relying on *Zerbst*, the Court first noted that the state has the burden to prove "relinquishment" and that "courts indulge in every reasonable presumption against waiver."¹¹⁹ The Court then found that Williams' incessant reliance on his lawyers, together with the lack of any affirmative indication that he desired to relinquish his right to counsel, showed that there was no waiver.¹²⁰ Because the police tried to elicit information from Williams without attempting to obtain a waiver of his right to counsel, the State failed to meet its burden.¹²¹ Unfortunately, though, the *Williams* Court did not provide a clear rule for sixth amendment waivers, but instead continued to rely on a case-by-case analysis of the issue. This lack of clarity

¹¹⁴ *Id.* at 392, 393.

¹¹⁵ *Id.* at 393.

¹¹⁶ *Id.* at 399 & n.6, 400. After *Williams*, it was not clear whether the Court had raised the sixth amendment standard from "deliberate elicitation" to "interrogation." See Kamisar, *supra* note 101, at 141-60, 168-75. For example, the Court stated that "the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government *interrogates* him." *Williams*, 430 U.S. at 401 (emphasis added). The clear rule of *Massiah*, though, is that once the sixth amendment attaches, a defendant has a right to counsel regardless of whether police interrogate him. *Massiah v. United States*, 377 U.S. 201, 206 (1964); Kamisar, *supra* note 101, at 168. The Court laid this confusion to rest two years later when it clearly returned to "deliberate elicitation" in *Henry*. See *supra* text accompanying notes 92-95.

¹¹⁷ *Williams*, 430 U.S. at 406.

¹¹⁸ See, e.g., *Maine v. Moulton*, 106 S. Ct 477 (1986); *United States v. Henry*, 447 U.S. 264 (1979); *McLeod v. Ohio*, 381 U.S. 356 (1965)(per curiam); *Massiah*, 377 U.S. 201 (1964).

¹¹⁹ *Williams*, 430 U.S. at 404 (citations omitted).

¹²⁰ *Id.* at 404.

¹²¹ *Id.* at 405.

became more evident after *Edwards* enunciated a straightforward rule for fifth amendment waivers.¹²²

In *Williams*, the defendant's comprehension of his right to counsel was never questioned by the Court,¹²³ which instead focused on the relinquishment prong of the waiver standard.¹²⁴ Similarly, the *Jackson* Court, apparently assuming that the defendants understood "the dangers and disadvantages"¹²⁵ of speaking to the police without counsel, focused on relinquishment.¹²⁶ Although it is highly unlikely the defendants in *Jackson* understood their rights in the *Faretta* sense, the Court's extension of *Edwards* to the sixth amendment provides clearer guidelines by which to judge a defendant's purported waiver during police interrogation. By holding that once asserted the right to counsel cannot be waived, unless the defendant initiates communication with the police, the Court has created a clear, precise, prophylactic rule which not only protects defendants' rights but is easily construable by both courts and the police.¹²⁷

Nonetheless, the Court, by emphasizing the defendant's request for counsel,¹²⁸ unnecessarily limits the application of its improved sixth amendment waiver standard. Hinging the application of *Edwards* on a request for counsel is logical in the fifth amendment context, because such a request is needed to invoke the fifth amendment right to counsel.¹²⁹ No request is needed, however, to invoke the sixth amendment right¹³⁰ which automatically attaches at the

¹²² See Note, *supra* note 84, at 364-65.

¹²³ "It is true that Williams had been informed of and appeared to understand his right to counsel." *Williams*, 430 U.S. at 404.

¹²⁴ See *supra* note 112.

¹²⁵ *Faretta v. California*, 422 U.S. 806, 835 (1975). See *infra* note 142 and accompanying text for an analysis of the Court's failure to discuss comprehension in *Jackson* and *Williams*.

¹²⁶ *Jackson*, 106 S. Ct. at 1410-11.

¹²⁷ Clear guidance to courts and police is considered one of *Miranda*'s major virtues. Note, *Proposed Requirements*, *supra* note 84, at 365 n.18 & n.20 (citing *Harryman v. Estelle*, 616 F.2d 870 (5th Cir.), *cert. denied*, 449 U.S. 860 (1980) and Schulhofer, Book Review, 79 MICH. L. REV. 865 (1981)).

¹²⁸ "It is obvious that, for the Court, the defendant's request for counsel is not merely 'an extremely important fact'; rather, it is the *only* fact that counts." *Jackson*, 106 S. Ct. at 1414 (Rehnquist, J., dissenting)(emphasis in original).

¹²⁹ *Edwards*, 451 U.S. at 484, 485. Also, the statement in *Carnley v. Cochran*, 369 U.S. 506 (1962), that "where assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request," *id.* at 513 (emphasis added), implies to the contrary that where the right is not a constitutional requisite, as in the fifth amendment, a request is required to invoke the right.

¹³⁰ Both the majority and dissenting opinions in *Jackson* note this. *Jackson*, 106 S. Ct. at 1409 n.6 ("[I]n construing respondents' request for counsel, we do not, of course, suggest that the right to counsel turns on such a request."); *id.* at 1414 (Rehnquist, J., dissenting)("[A] defendant's right to counsel does not depend at all on whether the defendant has requested counsel."); See also *Williams*, 430 U.S. at 404 ("[T]he right to

outset of adversary judicial proceedings.¹³¹ The Court, therefore, has limited the use of the *Jackson* rule by a factor which is seemingly irrelevant in the sixth amendment context. The Court explains its position by stating that "the defendant's request [is] an extremely important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation."¹³² The request, the Court feels, is a strong indication that the defendant does not wish to relinquish his sixth amendment right to counsel.¹³³ Therefore, the Court hinges the application of *Jackson* on this factor.

D. UNRESOLVED ISSUES

The Court's failure to define what waiver standard applies to those defendants who are not "foresighted enough, or just plain lucky enough, to have made an explicit request for counsel"¹³⁴ belies the apparent clarity of *Jackson*. Further, the Court must determine whether its holding in *Oregon v. Bradshaw*,¹³⁵ defining "initiation" in the fifth amendment context, will apply to the sixth amendment rule. The Court must address these issues before its waiver doctrine will provide all defendants with effective and substantial protection of their sixth amendment rights.

1. Waiver When No Request For Counsel Is Made

The Court in *Jackson* may have placed itself "in an analytical strait-jacket"¹³⁶ by putting such a great emphasis on the accused's request for counsel. To extricate itself from this untenable position, the Court will have to determine what protections are due to a defendant who does not make a request.

The Court should not provide a defendant who fails to request counsel with fewer protections than one who does. As the Court stated, the request is important only "in considering the validity of a subsequent waiver in response to police-initiated interrogation."¹³⁷ Nonetheless, a defendant who has not requested counsel deserves

counsel does not depend on a request by the defendant."); *Carnley v. Cochran*, 369 U.S. 506, 513 (1962) ("[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.").

¹³¹ *Kirby*, 406 U.S. at 688. See *supra* text accompanying notes 79-83.

¹³² *Jackson*, 106 S. Ct. at 1409 n.6.

¹³³ *Id.*

¹³⁴ *Id.* at 1414 (Rehnquist, J., dissenting).

¹³⁵ 462 U.S. 1039 (1983). In *Bradshaw*, the Court defined initiation as any indication that an accused wanted a "generalized discussion about the investigation." *Id.* at 1045-46. See *supra* note 59 and *infra* text accompanying notes 143-47.

¹³⁶ *Jackson*, 106 S. Ct. at 1414 (Rehnquist, J., dissenting).

¹³⁷ *Id.* at 1409 n.6.

the same protections as one who does. Emphasizing the request is not equivalent to abandoning the basic tenet that a request is not needed to invoke the sixth amendment right. Hence, at a minimum, the Court should construct protections for these defendants with a relinquishment standard equivalent to those in *Jackson*. The confrontation between the state and the defendant is no less critical because of a failure to request counsel.

To shore up this weakness, the Court has three apparent options. First, the Court could find that signed waivers given after Miranda-type warnings are sufficient for a valid waiver. Second, the Court could create a stricter standard than *Jackson*, holding that the right to counsel can only be waived in front of a neutral judicial officer. Finally, the Court could exclude all statements given in response to police-initiated interrogations regardless of whether a request has been made or not.

Prior to *Jackson*, several circuits adopted, in various forms, the first option: requiring only a signed waiver in response to Miranda-type warnings.¹³⁸ While there may be some administrative advantages to this approach, because it permits police to proceed with interrogation with minimal delays, adopting the fifth amendment standard ignores the greater importance of the sixth amendment right.¹³⁹ Further, such warnings fall significantly short of satisfying the *Faretta* comprehension standard by failing to guarantee that the defendant fully understands the dangers and disadvantages of relinquishment. An additional reason to adopt a more stringent standard than the fifth amendment rule is that once the sixth amendment attaches, the government supposedly has "legally sufficient evidence of the defendant's guilt."¹⁴⁰ Therefore, a waiver

¹³⁸ The First Circuit found a valid waiver where the defendant was informed of the indictment in addition to Miranda warnings. *United States v. Payton*, 615 F.2d 922 (1st Cir. 1980), *cert. denied*, 446 U.S. 969 (1980). The Fifth and Sixth Circuits required only Miranda warnings and a willingness to talk. *Jordan v. Watkins*, 681 F.2d 1067 (5th Cir. 1982); *United States v. Woods*, 613 F.2d 629 (6th Cir. 1980), *cert. denied*, 446 U.S. 920 (1980). The Eighth Circuit found a waiver after Miranda warnings, previous invocation of the right to counsel and the opportunity to consult counsel during interrogation. *Fields v. Wyrick*, 706 F.2d 879 (8th Cir. 1983), *cert. denied*, 464 U.S. 1020 (1983). The Ninth Circuit held that waiver could be found after the defendant was given Miranda warnings and was informed that adversary judicial proceedings had begun. *United States v. Karr*, 742 F.2d 493 (9th Cir. 1984). Finally, the Eleventh Circuit found that Miranda warnings alone were sufficient. *Tinsley v. Purvis*, 731 F.2d 791 (11th Cir. 1984).

¹³⁹ See *Fields v. Wyrick*, 464 U.S. 1020, 1022 (Marshall, J., dissenting); *United States v. Mohabir*, 624 F.2d 1140, 1146-1149 (2d Cir. 1980).

¹⁴⁰ *People v. Waterman*, 9 N.Y.2d 561, 565, 175 N.E.2d 445, 447, 216 N.Y.S.2d 70, 74 (1961); *accord* *United States v. Mohabir*, 624 F.2d 1140, 1148 (2d Cir. 1980); Note, *supra* note 84, at 387 & n.162.

given in response to Miranda warnings is neither of great use to the government, nor does it properly protect a defendant's sixth amendment rights.

The second option, validating a waiver only in the presence of a neutral judicial officer, would provide greater protection for an accused who does not request counsel than for one who makes such a request. Therefore, such a rule would be inconsistent with *Jackson's* mandate of emphasizing the request. This standard, adopted by the second circuit prior to *Jackson* in *United States v. Mohabir*,¹⁴¹ would ensure that the *Faretta* comprehension standard is met before finding a waiver. A major drawback to this approach, though, is that it would increase delays in prosecution. In light of *Jackson*, where the Court chose to emphasize relinquishment rather than comprehension at the pre-trial stage, adopting this standard for one who does not request counsel would be illogical and inconsistent.

The final option, adopting the *Jackson* rule in all sixth amendment situations regardless of whether or not the defendant has requested counsel, would enable the Court to logically extricate itself from its self-imposed "strait-jacket." This standard would provide all defendants with equivalent sixth amendment protections and would be stricter than the *Edwards* standard because no request would be needed to invoke the rule. The Court could still maintain its emphasis on the request by ruling that a request would make it more difficult to find a subsequent waiver after defendant-initiated communication. This rule would also be in line with the no-request doctrine of the sixth amendment. Further, a single standard for every sixth amendment case would provide a clear, simple and easily applicable rule to both the police and the courts because all defendants, regardless of whether they requested counsel, would be treated similarly.

One failure of this option, and perhaps the major weakness of *Jackson*, is that by placing such a great emphasis on relinquishment, it tends to ignore the comprehension issue during police interrogation. The Court has not yet reconciled its seemingly different views on comprehension in pre-trial waivers given during police interrogation and in *pro se* waivers like that in *Faretta*.¹⁴² It is unclear why

¹⁴¹ 624 F.2d 1140 (2d Cir. 1980).

¹⁴² In *Jackson*, the Court only discussed comprehension in the context of the defendants' invocation of his right to counsel, not waiver. *Jackson*, 106 S. Ct. at 1409, 1410 n.7 ("When an accused requests an attorney before a police officer or a magistrate, he does not know what constitutional right he is invoking."). In *Williams*, the issue is barely discussed at all. *Brewer v. Williams*, 430 U.S. 387, 404 (1977) ("It is true that Williams had been informed of and appeared to understand his right to counsel.").

one who desires to be his own counsel at trial has a greater burden to show comprehension than do the police who are trying to validate a waiver so that they can admit incriminating evidence. The Court's emphasis on relinquishment by creating a tough, per se standard in *Jackson*, though, may have obviated the need to consider comprehension at all in these situations. Regardless, in light of *Jackson*, the Court should eliminate the request requirement so that all defendants' sixth amendment rights are protected equally.

2. Definition of Initiation

The Court must also determine whether its ruling in *Oregon v. Bradshaw*,¹⁴³ defining initiation under *Edwards*, will also apply to *Jackson*. In *Bradshaw*, the Court held that the accused had initiated communication with the police when, after requesting counsel and invoking *Edwards*, he asked the police "Well, what is going to happen to me now?"¹⁴⁴ The Court found this simple question satisfied the first prong of *Edwards* because it "evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of incidents of the custodial relationship."¹⁴⁵

Justice Marshall in dissent felt that this bare inquiry alone did not meet the first prong, stating instead that the *Edwards* Court meant to define initiation to include only invitations to further interrogation by the police in the absence of counsel.¹⁴⁶ Such an invitation can only be found when an accused "reopens the dialogue about the subject matter of the criminal investigation."¹⁴⁷ In Justice Marshall's view, the accused's question in *Bradshaw* only evinced a desire to find out where he was being taken and did not relate to the criminal investigation.¹⁴⁸

The definition of initiation is crucial to the strength of the waiver standard. A low threshold, like *Bradshaw*, will undercut the effectiveness of *Jackson* by providing little protection for the unwary prisoner. For example, lower courts, in applying the *Bradshaw* standard, have sometimes glossed over the requirement of initiation to find a valid waiver.¹⁴⁹ On the other hand, a strict definition of initia-

¹⁴³ 462 U.S. 1039 (1983). See *supra* note 59.

¹⁴⁴ *Id.* at 1042.

¹⁴⁵ *Id.* at 1045-1046.

¹⁴⁶ *Id.* at 1053 (Marshall, J., dissenting).

¹⁴⁷ *Id.* at 1054 (Marshall, J., dissenting).

¹⁴⁸ *Id.* at 1055 (Marshall, J., dissenting).

¹⁴⁹ See, e.g., *Lamp v. Farrier*, 763 F.2d 994, 998 (8th Cir. 1985) (initiation by accused found when police ask what the lawyer said, followed by defendant asking whether he was under arrest and what the charge was); *United States v. Obregon*, 748 F.2d 1371,

tion, such as that proposed by Justice Marshall, will enhance a defendant's right and make it more difficult to find a waiver. The question arises then, whether, in light of the heightened importance of the sixth amendment, as opposed to the fifth amendment the Court should adopt a stricter rule to apply in *Jackson* situations.

The Court should adopt Justice Marshall's definition to provide greater protection for the more important sixth amendment right. The major drawback to this approach is that it might create confusion for both lower courts and police because it involves the use of two different standards in somewhat similar situations. Because the Court should make its rules as simple and clear as possible, multiple standards will only make it more difficult for police to know the constitutional limits for each type of interrogation. Nonetheless, because a fair trial depends on the sixth amendment right to counsel and because the police must respect that right,¹⁵⁰ the benefits of a stricter sixth amendment initiation definition outweigh any potential burdens.

V. CONCLUSION

The Court in *Jackson* developed a strong sixth amendment waiver standard but limited its applicability to those defendants who make a request for counsel. The per se rule taken from *Edwards*, ordering the police to halt interrogation once counsel is requested,

1380-81 (10th Cir. 1984)(accused's asking what would happen to him if he told agent what she wanted to know *after* police began interrogation is initiation); *United States v. Kroesser*, 731 F.2d 1509, 1520 (11th Cir. 1984)(expression of regret of involving co-defendant in crime sufficed for initiation); *United States v. Bentley*, 726 F.2d 1124, 1127 (6th Cir. 1984)(court ignored question of initiation and instead viewed waiver as the only issue). Further, one court refused to find initiation when police began the conversation, but nevertheless showed hostility towards the initiation requirement. *United States v. Renda*, 567 F. Supp. 487, 489-90 (E.D. Va. 1983)(Judge Warriner expressed dislike of per se rule).

On the other hand, several courts have encountered situations in which the defendants' "initiation" would appear to satisfy both the majority rule in *Bradshaw* and the Marshall standard. *Willie v. Maggio*, 737 F.2d 1372, 1383-84 (5th Cir. 1984)(asking jailor to speak with police); *United States v. Morrow*, 731 F.2d 233, 234-35 (4th Cir. 1984)(asking what search of girlfriend's apartment revealed); *United States v. Montgomery*, 714 F.2d 201, 202-03 (1st Cir. 1983) (asking whether he was being charged with possession of each gun); *Elbert v. Cunningham*, 616 F. Supp. 433, 435-36 (D.N.H. 1985)(asking with what he was charged); *United States v. Gazzara*, 587 F. Supp. 311, 325 (S.D.N.Y. 1984)(asking what agents wanted to know). In addition, in *United States v. Cherry*, 733 F.2d 1124, 1131-32 (5th Cir. 1984)(government asking question and accused's responding), the court found that the accused did not initiate the communication.

¹⁵⁰ See *Maine v. Moulton*, 106 S. Ct. 477, 484-85 (1986)("The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance [of counsel]").

should prevent future violations of the sixth amendment rights of defendants who request counsel. The Court's reliance on the request for counsel as the critical factor in determining waivers, however, is misplaced in the sixth amendment context. As a result, the Court should extend the *Jackson* rule to those defendants who fail to request counsel. The Court must also clearly define "initiation" for the sixth amendment rule, preferably adopting Justice Marshall's standard in *Oregon v. Bradshaw*. *Jackson* indicates that the Court, when judging waiver during custodial interrogation, will continue to rely solely on a determination of whether a defendant has relinquished his sixth amendment right and will continue to ignore the question of whether a defendant in a custodial environment truly comprehends the right he is waiving. Hence, the Court must confront the two unresolved issues before *Jackson*'s per se rule will effectively protect all defendants' right to counsel.

THOMAS ECHIKSON