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Sixth Amendment--Waiver of the Sixth Amendment Right to Counsel at Post-Indictment Interrogation

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SIXTH AMENDMENT—WAIVER OF THE SIXTH AMENDMENT RIGHT TO COUNSEL AT POST-INDICTMENT INTERROGATION

Patterson v. Illinois, 108 S. Ct. 2389 (1988).

I. INTRODUCTION

In *Patterson v. Illinois*,[1] the United States Supreme Court held that the petitioner had consummated an effective waiver of his sixth amendment[2] right to have counsel present during post-indictment interrogation when that waiver was executed prior to making voluntary,[3] inculpatory statements at interviews initiated by law enforcement officials, in which petitioner neither had counsel nor had requested counsel.[4] In affirming the decision of the Illinois Supreme Court,[5] the *Patterson* majority reached a tripartite decision.

Firstly, the Court restated its decision in *Michigan v. Jackson*,[6] which held that, if a defendant asserts his or her right to be assisted by counsel, authorities are immediately barred from further post-indictment interrogation, unless the defendant subsequently "call[s] for such a meeting."[7] The *Patterson* Court then held that where a defendant elects not to exercise his or her sixth amendment right to counsel, the defendant's uncounseled, inculpatory statements are valid if the state can prove the existence of a "knowing and intelligent" waiver.[8]

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1 108 S. Ct. 2389 (1988).

2 The right to counsel clause of the sixth amendment provides 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.

3 *Patterson*, 108 S. Ct. at 2394 n.4 ("[W]e . . . require that any such waiver must be voluntary. Petitioner contested the voluntariness of his confession in trial and in the intermediate appellate courts, which rejected petitioner's claim that his confession was coerced. Petitioner . . . does not press this argument here. Thus, the voluntariness of petitioner's confessions is not before us.").

4 *Id.* at 2394 ("Petitioner . . . at no time sought to have counsel present.").

5 *People v. Thomas*, 116 Ill. 2d 290, 507 N.E.2d 843 (1987), *aff'd sub nom.* Patterson v. Illinois, 108 S. Ct. 2389 (1988).

6 475 U.S. 625 (1986).

7 *Patterson*, 108 S. Ct. at 2394; *Jackson*, 475 U.S. at 636.

8 *Patterson*, 108 S. Ct. at 2394.

Secondly, the *Patterson* Court defined a "knowing and intelligent" waiver when it held that:

> [a]s a general matter, . . . an accused who is admonished with the warnings prescribed by this Court in *Miranda v. Arizona*,[9] . . . has been sufficiently apprised of the nature of his sixth amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one.[10]

In short, the Court held that properly administered *Miranda* warnings are sufficient to support a sixth amendment waiver of an accused's right to counsel.

In its five to four decision, the majority noted that its holding was narrowly limited to waivers of counsel in *post-indictment questioning only*,[11] and specifically, in those situations in which an accused[12] has been *informed of his indictment*.[13] The Court also conceded that *Miranda* compliance would not suffice in all cases of a sixth amendment challenge to the conduct of post-indictment interrogation.[14] For instance, when law enforcement officials fail to tell the accused that his attorney is attempting to contact him, attachment of the accused's sixth amendment right to counsel would probably rebut an executed waiver.[15]

Thirdly, the Court held that police-initiated questioning can oc-

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9 384 U.S. 436 (1966). The *Miranda* Court held that "[p]rior to any questioning [a] person must be warned that he has a right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444.

10 *Patterson*, 108 S. Ct. at 2396-97 (footnote omitted).

11 *Id.* at 2395 n.5.

12 In this Note, the term "accused" will refer to a person who is protected by the sixth amendment right to counsel, which assumes that adversarial proceedings have begun. *See* Spano v. New York, 360 U.S. 315, 324-25 (1959)(Douglas, J., concurring)(distinguishing the appellations, "accused" and "suspect"). The word "suspect," on the other hand, will define a person whose right to counsel falls under the fifth amendment protection provided by *Miranda*.

13 *Patterson*, 108 S. Ct. at 2396-97 n.8 ("[W]e do not address the question of whether or not an accused must be told that he has been indicted before a post-indictment Sixth Amendment waiver will be valid. Nor do we even pass on the desirability of so informing the accused—a matter that [could] be reasonably debated.").

14 *Id.* at 2393 n.3.

15 *Id.* In the pre-indictment setting of Moran v. Burbine, 475 U.S. 412 (1986), police followed *Miranda* procedures in obtaining the suspect's written waivers of his fifth amendment rights prior to securing his confession. *Id.* at 415. The *Moran* Court held that the *Miranda* waiver would stand even though the police had not only failed to inform the suspect that his attorney had called to state her intention of representing him during questioning, but had also deceived counsel as to when the suspect would be interrogated. *Id.* at 432. The holding of the *Patterson* Court intimates that this waiver would not be valid once the defendant's sixth amendment right to counsel attaches because it is at this point that the attorney-client relationship is protected from any interference by law enforcement officials. *Patterson*, 108 S. Ct. at 2397 n.9.

cur after the sixth amendment right to counsel has attached.[16] In doing so, the majority rejected Patterson's argument that the attachment of the sixth amendment right to counsel should be equated to an invocation of the fifth amendment right to counsel.[17]

This Note examines the *Patterson* opinions and concludes that in its effort to define when post-indictment interrogation may take place without the assistance of counsel, the Court has reached a narrow holding which 1) erodes the sixth amendment right to counsel of indicted persons which safeguards the accused from the powers of the state's prosecutor once the adversary process has begun; 2) drastically understates the benefits of counsel during post-indictment interrogation to the accused; and 3) consequently, finds an "intelligent" waiver in circumstances in which the accused cannot be sufficiently apprised of the consequences of abandoning his right. This Note reasons that the fifth amendment formula for waiver, applied by *Patterson* to the sixth amendment context, is less desirable than the dissent's alternative, which is to allow post-indictment interrogation only when the defendant's counsel has either been notified or is present, or when the state has secured permission from the Court. This Note concludes that the constitutional principles and procedural waiver requirements forwarded by the holding of *Patterson v. Illinois* are contradictory to our adversary system of justice and should be reversed.

Furthermore, this Note concludes that the Court should have adopted the additional procedural requirement of informing the accused of his indictment before a valid waiver can be executed.

II. FACTS

In the early morning of August 21, 1983, seventeen-year-old Tyrone Patterson attended a party. The party roster included nine members of the Vice Lords street gang, with whom Patterson was affiliated, and thirty to forty members of a rival gang, the Black Mobsters.[18]

During the party, Patterson saw a fight break out between a guest and members of the Vice Lords. He attempted to verbally

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16 *Patterson*, 108 S. Ct. at 2394.

17 *Id.* Patterson's claim here rested on the holding of *Edwards v. Arizona*, 451 U.S. 477 (1981). The *Edwards* Court held that if a pre-indictment suspect, who is being questioned, invokes his fifth ammendment right to have counsel present, he cannot thereafter be interrogated again unless he initiates the meeting. *Id.* at 484.

18 Joint Appendix at 19, People v. Thomas, 116 Ill. 2d 290, 507 N.E.2d 843 (1987)(Nos. 63144, 63149)(Patterson was jointly tried with co-defendant David Thomas).

intervene, but failed when the guest engaged him in fisticuffs.[19] Coinciding with Patterson's rhubarb, another fight broke out between the Vice Lords and the Black Mobsters. At this point, Patterson and his friends—Juan McCune, David Thomas, and Carl Harmon; all members of the Vice Lords—ran away from the party. Two Black Mobsters chased them.[20]

Patterson and his friends ran to a place called the 1623 Club where they briefly confronted their two pursuers.[21] They then fled from this fight when four carloads of Black Mobsters approached.[22] After moving from one location to another, the four ended up at Thomas' home.[23]

While standing in front of the Thomas house, a former member of the Black Mobsters, James Jackson, drove up and called out, "What do you want?" Carl Harmon retorted, "What do you mean what do we want?"[24] He then walked over to the car, got in, removed the ignition key and began striking Jackson. Harmon dragged Jackson from the automobile and continued to severely beat him.[25] At one point, Jackson reached out and struck Patterson who retaliated several times with his fists and with the victim's own shoe, which had previously flown off.[26] The four then placed Jackson back into the car and drove him to a small park at the end of a nearby street.[27] Once there, Harmon threw the former Black Mobster from the automobile, repeatedly struck him, and then drowned him in a mud puddle. The four scattered from the scene, leaving the dead body face down in the water. The police discovered Jackson in this position later that morning.[28]

McCune, Thomas, and Patterson were separately arrested that afternoon on warrants obtained by police for charges stemming from the fight at the 1623 Club. McCune was taken into custody first.[29] During questioning, McCune waived his *Miranda* rights and confessed to his involvement in both the gang fights and the Jackson murder; his statement also implicated Patterson, Thomas, and

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19 *Id.*

20 *Id.* at 44.

21 *Patterson*, 108 S. Ct. at 2392; Joint Appendix at 20.

22 Joint Appendix at 21.

23 *Patterson*, 108 S. Ct. at 2392.

24 Joint Appendix at 22.

25 *Id.*

26 *Id.*

27 *Patterson*, 108 S. Ct. at 2392.

28 *Id.*

29 *Id.*

Harmon.[30]

Patterson was subsequently arrested a few hours later and was read his rights as required under *Miranda v. Arizona*.[31] Patterson stated that he understood his rights and volunteered a statement regarding the fight at the 1623 Club. Patterson asserted, however, that he did not know anything about Jackson's murder.[32] Patterson remained in police custody through the next day, while the State Attorney's office and police completed their investigation.[33]

On the morning of August 23, Patterson and the other suspects were removed from detention in the holding cells and brought to the detective bureau. Patterson was separated from the others and was informed by the arresting officer, Michael Gresham, that he had been indicted for the offenses of murder and armed violence.[34] Patterson then asked about the number of other indictments that had been handed down. Upon learning that only three of the four had been indicted, excluding Carl Harmon, Patterson asked: "[W]hy wasn't he indicted, he did everything."[35] He additionally stated that a female witness existed who could verify his version of the crime because Harmon had confessed to her.[36]

Officer Gresham immediately stopped the conversation and readvised Patterson of his *Miranda* rights by giving him a printed waiver form containing the *Miranda* warnings.[37] This was the first and only waiver form Patterson was given.[38] The waiver form was not reproduced in the Trial Record or the Joint Appendix; however, Patterson conceded that it apprised him of his *Miranda* rights.[39]

Officer Gresham read the *Miranda* waiver aloud to Patterson. Patterson read the form to himself in the presence of Gresham, initialed each warning individually in the designated boxes, and signed his name at the bottom. Gresham and his partner then co-signed

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30 *Id.*

31 384 U.S. 436 (1966). For a discussion of *Miranda*, see *supra* note 9.

32 *Patterson*, 108 S. Ct. at 2392.

33 *Id.*

34 *Id. See also* Joint Appendix at 6. Officer Gresham testified that the defendants were brought up from the lock-up together, but were informed of their indictments separately. *Id.* at 12.

35 *Patterson*, 108 S. Ct. at 2392.

36 *Id.*

37 *Id.*

38 Joint Appendix at 9.

39 Apparently the warnings read to Patterson told him that he had the right to remain silent; that anything he might say could be used against him; that he had the right to have an attorney present during interrogation; and that, as an indigent, the state would provide him with a lawyer for interrogation if he so desired. *Patterson*, 108 S. Ct at 2392 n.1.

the form.[40] After this procedure Gresham told Patterson to continue telling him what he had started to say.[41] Patterson responded by issuing a lengthy account of the crime detailing his involvement as well as the role of each participant in the murder of Jackson.[42]

Later that day, Officer Gresham led Patterson to a private room in which Patterson confessed involvement in the murder for a second time during an interview with Assistant State's Attorney George Smith.[43] At the beginning of the interview, Smith introduced himself by name and presented Patterson with the previously executed *Miranda* waiver form bearing Patterson's initials and signature.[44] After showing Patterson the form, Smith inquired as to whether Patterson had read the waiver, had understood the rights enumerated on the form, had initialed each warning, and had signed the document. Patterson answered affirmatively.[45] Smith then read the complete form aloud and again questioned Patterson if he understood the rights just explained. Patterson indicated that he did, at which point Smith signed the waiver form.[46]

Following this discourse Smith reported to Patterson that he was an assistant State's Attorney working in the felony review unit. In addition, Smith stated that he was not his lawyer, but rather an attorney cooperating with police in the Jackson murder investigation.[47] Patterson proclaimed that he understood Smith's position and proceeded to give another inculpatory statement concerning the crime. According to Smith's testimony at trial, Patterson noted that the statement was delivered of his own free will, with no threats or promises being made to him, and that he was providing the statement voluntarily because it was the truth.[48]

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40 *Id.* at 2392.

41 Joint Appendix at 8.

42 *Patterson*, 108 S. Ct. at 2393. Patterson presented a different factual story at trial concerning the following: what Officer Gresham said when informing him of his indictment; when he was read his *Miranda* rights; and when he signed the waiver form. At the trial court hearing on the motion to suppress

> Patterson denied receiving any warnings about his right to counsel before he gave his statement. He testified that on August 23, Gresham told him that he had been indicted and that Harmon would testify. Gresham also indicated that if Patterson told him what he knew, it would go better for him. [Patterson also alleged that] [h]e did not sign the *Miranda* rights waiver form until after he gave his statement.

Joint Appendix at 29.

43 *Patterson*, 108 S. Ct. at 2393.

44 *Id.* at 2393.

45 *Id.*

46 *Id.*

47 Joint Appendix at 18.

48 *Id.* The facts of what took place between Smith and Patterson are based solely on Smith's testimony because the interview was not recorded manually or mechanically.

Prior to trial, Patterson moved to supress his statements to police claiming, in part, that they were taken in violation of certain constitutionally guaranteed rights.[49] The trial court denied Patterson's motions and the statements were used against him. On this evidence, the jury found Patterson guilty of murder and sentenced him to twenty-four years in prison.[50]

At the appellate levels,[51] Patterson argued that the trial court erred in admitting Patterson's uncounseled post-indictment statements to Officer Gresham and Smith because Patterson had not effected a waiver which sufficiently satisfied the "knowing and intelligent" minimum standard required by the United States Supreme Court.[52]

The United States Supreme Court has defined a waiver of the sixth amendment right to counsel as being valid only if it evidences "an intentional relinquishment or abandonment of a known right or privilege."[53] According to *Moran v. Burbine*,[54] this means that the accused must possess " 'a full awareness [of] both the nature of the right being abandoned and the consequences of the decision to abandon it.' "[55]

Patterson contended that neither the admonitions required by *Miranda* under the fifth amendment nor his knowledge of the fact that he had been indicted for Jackson's murder afforded him sufficient information to evince a knowing and intelligent waiver.[56] The crux of Patterson's proposition was that the State should have to satisfy a higher burden to establish a knowing and intelligent waiver of the sixth amendment right to counsel than is necessary to establish a waiver of the right to counsel guaranteed in *Miranda*.[57]

Although the Illinois Supreme Court found that Patterson's sixth amendment right to counsel had definitely attached at the time he gave his statements to law enforcement officials, that court rejected Patterson's argument.[58] The court premised its holding on a

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Furthermore, Smith's testimony could not be confirmed by Patterson because he did not testify at trial. *Id.* at 28.

49 *Patterson*, 108 S. Ct. at 2393.

50 *Id.*

51 People v. Patterson, 140 Ill. App. 3d 421, 488 N.E.2d 1283 (1986), *aff'd sub nom.* People v. Thomas, 116 Ill. 2d 290, 507 N.E.2d 843 (1987).

52 *Patterson*, 108 S. Ct. at 2393.

53 Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

54 475 U.S. 412 (1986).

55 *Patterson*, 108 S. Ct. at 2395 (quoting *Moran*, 475 U.S. at 421).

56 *Id.* at 2393.

57 *Id.*

58 *Id.*

prior Illinois Supreme Court decision, *People v. Owens*,[59] which had held that "*Miranda* warnings were sufficient to make a defendant aware of his Sixth Amendment right to counsel during post-indictment questioning."[60]

In the present case, the Illinois Supreme Court found that Patterson understood his constitutional rights prior to post-indictment interrogation because he was advised of his *Miranda* rights and he indicated that he understood them.[61] The court further found that Patterson was aware of the gravity of his situation because he knew that he had been indicted on the murder charge before he gave his statements to Gresham and Smith.[62] Therefore, the Illinois Supreme Court concluded that Patterson "knowingly and intelligently waived his sixth amendment right to counsel."[63]

The United States Supreme Court granted a petition for certiorari,[64] to decide the waiver issue which the lower courts had left unresolved and which the Court had not addressed in its previous decisions.[65]

III. SUPREME COURT OPINIONS

A. MAJORITY OPINION

In *Patterson v. Illinois*,[66] the United States Supreme Court upheld the decision of the Illinois Supreme Court, holding that Patterson had effectively waived his right to have counsel present at his post-indictment interrogations.[67] By rejecting Patterson's claim, which challenged the elicited, inculpatory admissions as sixth amendment violative, the Court sanctioned the admission of those statements as evidence to be used against him at his trial.[68] In writing for the ma-

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59 102 Ill. 2d 88, 464 N.E.2d 261 (1984), *cert. denied*, 469 U.S. 963 (1984).

60 *Patterson*, 108 S. Ct. at 2393; *Owens*, 102 Ill. 2d at 102-03, 464 N.E.2d at 267. The defendant's position in *Owens* was similar to Patterson's in that the defendant was apprised of his *Miranda* rights before questioning; he stated that he understood these rights; and he signed a form waiving them. *Thomas*, 116 Ill. 2d at 299-300, 507 N.E.2d at 846-47. The defendant in *Owens* was also judged to have known the severity of the situation facing him since he knew he was being held for questioning in connection with a murder. *Id.*

61 *Thomas*, 116 Ill. 2d at 299-300, 507 N.E.2d at 847.

62 *Id.*

63 *Patterson*, 108 S. Ct. at 2393.

64 108 S. Ct. 227 (1987).

65 *Patterson*, 108 U.S. at 2393.

66 108 S. Ct. 2389 (1988).

67 *Id.* at 2395.

68 *Id.* at 2399.

jority,[69] Justice White analogized Patterson's post-indictment position to that of a pre-indicted suspect, who has similarly declined counseled representation, and equated the function of counsel at post-indictment interrogation to an attorney's role at pre-indictment questioning.[70] The majority reasoned that the similarity of the two stages of interrogation supports the argument that, if *Miranda* warnings are adequate to evince a "knowing and intelligent" waiver in a fifth amendment setting, then they should be equally applicable to a sixth amendment context.[71]

Justice White began his opinion for the Court by asserting that the sixth amendment right to have counsel present at post-indictment interviews had undoubtedly attached by the time Patterson made his first statement to Officer Gresham.[72] The Supreme Court precedents,[73] the Court cited in support of this conclusion, made it clear to Justice White that:

> [w]hatever else it may mean, the right to counsel granted by the Sixth and Fourteenth amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—"whether by way of *formal charge*, preliminary hearing, *indictment*, *information*, or arraignment."[74]

The majority then pointed out that, although Patterson's sixth

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69 *Patterson*, 108 S. Ct. at 2391-99. Justice White delivered the opinion of the Court in which Chief Justice Rehnquist, Justices O'Connor, Scalia, and Kennedy joined.

70 *Id.* at 2391, 2397-99.

71 *Id.* at 2397-99.

72 *Id.* at 2393.

73 Michigan v. Jackson, 475 U.S. 625, 629-30 (1986)(post-arraignment confessions suppressed, based on sixth amendment right to counsel, where accused requested appointment of counsel, but police denied request and extracted confessions during interrogation); Brewer v. Williams, 430 U.S. 387, 398-401 (1977) (post-arraignment confessions suppressed as sixth amendment violative where statements deliberately elicited by officer during custodial transportation of accused after counsel was retained); Massiah v. United States, 377 U.S. 201, 205-07 (1964)(incriminating statements in violation of sixth amendment where confession deliberately elicited in bugged car of co-defendant informant in absence of attorney after sixth amendment right to counsel exercised by accused).

74 Brewer v. Williams, 430 U.S. 387, 398 (1977); Kirby v. Illinois, 406 U.S. 682, 689 (1972) (emphasis added). *Accord Patterson*, 108 S. Ct. at 2393. *See also* Michigan v. Jackson, 475 U.S. 625 (1986), in which the Court held that:

> [t]he question is not whether [the accused] had a right to counsel at their post-arraignment, custodial interrogations. The existence of that right is clear. It has two sources. The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations. Edwards [v. Arizona], 451 U.S. [477,] 482 [1981]; Miranda v. Arizona, 384 U.S. 436, 470 (1966). The Sixth Amendment guarantee of the assistance of counsel also provides the right to counsel at postarraignment interrogations. The arraignment signals "the initiation of adversary judicial proceedings" and thus attachment of the Sixth Amendment, U.S. v. Gouveia, 467 U.S. 180, 187, 188 (1984); thereafter, government efforts to elicit information from the accused, including interrogation, represent "critical stages" at which the Sixth Amendment applies. Maine v. Moulton, 474 U.S. 159 (1985); U.S.

amendment right to counsel had indeed attached, he did not exercise it.[75] In light of Patterson's failure to assert his sixth amendment rights, the majority evaluated the following issues: whether the law enforcement officials were barred from initiating a meeting with Patterson by virtue of the attachment of his sixth amendment rights, and, if not, whether Patterson validly waived his right to counsel at the post-indictment interrogations.[76]

Addressing the first issue, the majority dismissed Patterson's claim that, since his sixth amendment right had previously come into existence, the police should have been barred from questioning him.[77] Justice White said that Patterson's reasoning was faulty because interrogation restrictions, both in a fifth and sixth amendment context, arise only when the accused asserts his right to counsel.[78] This prerequisite, he concluded, was not met in Patterson's case.[79]

The majority recognized that if Patterson had "indicated he wanted the assistance of counsel, the authorities' interview with him would have been stopped, and further questioning would have been forbidden."[80] However, since Patterson gave no such indication,[81] the majority rejected his argument, and further supported its conclusion by analogizing Patterson to a pre-indictment interrogatee who similarly has an available right to counsel under the fifth amendment, but does not assert that right.[82]

In denying Patterson's claim, the Court said that Patterson's reliance on *Edwards v. Arizona*[83] was erroneous.[84] In *Edwards*, said the

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v. Henry, 447 U.S. 264 (1980); Brewer v. Williams, 430 U.S. 387 (1977); Massiah v. United States, 377 U.S. 201 (1964).

Jackson, 475 U.S. at 629-30.

75 *Patterson*, 108 S. Ct. at 2394. The Court noted that, had Patterson asserted his right to have counsel represent him by retaining counsel or accepting a lawyer by appointment, "a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client privilege [would have taken] effect," and changed the outcome of the case. *Id.* at 2393 n.3.

76 *Id.* at 2394-97.

77 *Id.* at 2394.

78 *Id.*

79 *Id.*

80 *Id.* This was the holding in both *Jackson*, 475 U.S. at 636, and *Edwards*, 451 U.S. at 484-85. *Edwards* first reached this holding in a fifth amendment situation. *Jackson* later "applied *Edwards* to the Sixth Amendment context." *Patterson*, 108 S. Ct. at 2394.

81 *Patterson*, 108 S. Ct. at 2394.

82 *Id.*

83 451 U.S. 477 (1981). In *Edwards*, police arrested Edwards, properly told him of his *Miranda* rights, questioned him and provided him with the phone number of a county attorney. *Id.* at 478-79. Edwards telephoned the attorney, but received no answer. At that point, he stated "I want an attorney before I make a deal." *Id.* at 479. The questioning was ended and Edwards was returned to his cell. The next morning, state officials confronted Edwards at the jail and told him that he had to speak with them.

majority, the Supreme Court rejected the validity of a fifth amendment waiver, holding that once a suspect has invoked his right to counsel, a waiver cannot exist unless the suspect later intiates a meeting with police.[85] Justice White distinguished *Edwards* from Patterson's case[86] by noting that the fifth amendment-violative questioning in *Edwards* hinged on the defendant's previously expressed desire to deal with law enforcement officials only through counsel;[87] a factor missing from Patterson's circumstances.[88]

Thus, even though indictment signals the attachment of an accused's sixth amendment right to have counsel present at post-indictment interviews, if he or she at no time seeks to exercise that right, law enforcement officials will not be barred from intiating a meeting with the accused.[89]

Justice White then added that the theory behind *Edwards* and its progeny was not formulated in order to *restrict* an accused from choosing to confront state officials with or without counsel, but rather to *preserve* "the integrity of an accused's right to communicate with police only through counsel."[90] Therefore, if Patterson "*knowingly and intelligently*" chose to face police without counsel, the majority said it could "see no reason why the uncounseled statements he then [made] must be excluded at his trial."[91]

The majority then considered Patterson's second claim that his sixth amendment rights were violated because he did not "knowingly and intelligently" waive his right to have counsel present at the post-indictment questioning.[92]

Justice White opened this portion of the opinion of the Court by briefly describing what constitutes a valid waiver of the sixth

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Edwards was willing to talk and subsequently implicated himself. *Id.* The Supreme Court overturned Edwards' conviction on the basis that the police's actions violated his fifth amendment right to have counsel present during custodial interrogation. *Id.* at 481-87. Patterson claimed that, like Edwards, he did not initiate the questioning. Joint Appendix at 29, Patterson v. Illinois, 108 S. Ct. 2389 (1988)(No. 86-7059). Furthermore, Patterson argued that his non-initiation, when coupled with, *inter alia*, the clear attachment of his sixth amendment right to counsel, should induce the Court, in the spirit of *Edwards*, to reverse his conviction and bar police from initiating communication with an accused after the adversarial criminal process has started. *Patterson*, 108 S. Ct. at 2394.

84 *Id.*
85 *Id.* (citing *Edwards*, 451 U.S. at 484-85).
86 *Id.* at 2394.
87 *Id.*
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.* at 2394-97.

amendment right to counsel.[93] Having reviewed the parameters set by Supreme Court precedents,[94] the majority surmised that:

> the key inquiry in a case such as this one must be: Was the accused, who waived his sixth amendment rights during post-indictment questioning, made sufficiently aware of his right to have counsel present during the questioning, and of the possible consequences of a decision to forgo the aid of counsel?[95]

Answering this "key inquiry" affirmatively, Justice White concluded that the *Miranda* warnings, given to Patterson prior to his statements, served the function of both making him sufficiently aware of his sixth amendment right to counsel and alerting him to the possible consequences of waiving this right.[96]

With respect to the "knowing" half of the standard, Patterson claimed that, because the *Miranda* warnings were designed by the Court to specifically inform a suspect of his fifth amendment right to counsel, they were insufficient to let him know of his *sixth* amendment right to counsel. The majority rejected this argument on the grounds that the wording of the *Miranda* warnings, given to Patterson by state officials, comprised the "sum and substance" of his sixth amendment rights.[97]

In a fifth amendment context, the Court said, *Miranda* requires that the suspect be told that he has a right to remain silent and a right to the presence of an attorney, retained or appointed.[98] The majority doubted that any augmentation of the language required by *Miranda* would have better or more completely communicated the existence of the accused's sixth amendment right to counsel in

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93 *Id.* at 2395.

94 *Id.* at 2393. In *Patterson*, the majority relied on Johnson v. Zerbst, 304 U.S. 458 (1938), a sixth amendment waiver case, in which the Court held that waivers of counsel must not only be voluntary, but also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege; a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the defendant. *Id.* at 467-68. *See also* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)(In upholding a conviction of defendant who conducted trial pro se, the Court held that accused may "waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open.").

At the time Patterson went to trial, procedural requirements for waiver of the *sixth* amendment right to counsel were much less defined than those pertaining to the fifth amendment waiver, which are comparatively uniform and clear. *See infra* notes 200-219 and accompanying text for historical commentary.

95 *Patterson*, 108 S. Ct. at 2395. *See infra* notes 200-219 and accompanying text for historical and definition commentary.

96 *Patterson*, 108 S. Ct. at 2395.

97 *Id.*

98 *Id.* (quoting *Miranda*, 384 U.S. at 471).

this case.[99] Thus, the Court held that Patterson's receipt of his fifth amendment warnings satisfied the "knowing" portion of the waiver inquiry in a sixth amendment setting.[100]

Turning to the "intelligent" component of the waiver standard, the majority again focused on the proffered *Miranda* warnings. More specifically, the Court concentrated on that segment of the warnings which dictate that an accused be told that, if he abandons his rights, whatever he says "can be used against him in a court of law."[101] Justice White held that this warning made Patterson sufficiently aware of the possible consequences of forsaking his sixth amendment right to an attorney.[102] The majority reasoned that the warning accomplishes this by apprising the accused of "the *ultimate adverse consequence* [he could suffer] by virtue of his choice to make uncounseled admissions to the authorities"[103]—that is, the use of his own words against him in subsequent criminal proceedings.

The Court buttressed its conclusion, that the current language in *Miranda* would suffice, by noting that Patterson's lawyer failed to articulate any modifying wordage which would have meaningfully increased Patterson's awareness of the consequences he faced by disposing of counsel.[104] The majority further pointed out that the accused's recognition of these consequences need not be a full and complete one.[105] The Court applied the constitutional minimum set out in *Oregon v. Elstad*,[106] which held that an extensive "appreciation of all of the consequences flowing from the waiver"[107] is not neces-

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99 *Id.* at 2395.

100 *Id.* at 2397.

101 *Miranda*, 384 U.S. at 468, 479.

102 *Patterson*, 108 S. Ct. at 2395.

103 *Id.* (emphasis added).

104 *Id.* at 2396 n.7.

105 *Id.* at 2396-97.

106 470 U.S. 298 (1985).

107 *Patterson*, 108 S. Ct. at 2396 (quoting *Elstad*, 470 U.S. at 316-17). In the fifth amendment setting of *Elstad*, the suspect was taken into custody at his home, was questioned by the arresting officers without the benefit of *Miranda* warnings, and subsequently gave a short incriminating statement. *Elstad*, 470 U.S. at 300. He was interrogated again at the police station, after being read his *Miranda* rights, and responded with a more detailed statement with greater inculpatory facts. *Id.* at 300-01. The Supreme Court upheld the validity of the second statement because the careful and thorough administration of the *Miranda* warnings served to inform the suspect of his rights prior to elicitation. *Id.* at 310-11.

The suspect argued that his waiver, made prior to the second statement, should be overruled. He reasoned that the waiver was less than fully informed because he had not been told that his first statement could not be used against him due to the *Miranda* violation. *Id.* at 316. The Supreme Court rejected this argument, holding that "[t]his Court has never embraced the theory that the defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." *Id.* The Court reasoned that the

sary for the State to meet its burden of proof.[108] Thus, the Court held that Patterson's receipt of his fifth amendment warnings also satisfied the "intelligent" portion of the waiver inquiry in a sixth amendment context.[109]

Patterson had argued that there existed post-waiver consequences, which only his lawyer could properly inform him about.[110] Commenting on the scope of information that an accused should receive prior to waiving his sixth amendment right to counsel, Patterson suggested that any warning must inform the accused of two basic factors: the benefits he could obtain by having the aid of counsel while making statements to state officials; and "the gravity of [his] situation."[111] The essence of Patterson's claim was that the fifth amendment *Miranda* warnings had failed in these respects, and therefore, his waiver was invalid.

Speaking first to the latter of these requirements, Justice White dispelled the necessity of this information in two ways. First, the majority reasoned that Patterson had surely been notified of the gravity of his situation when he learned that he had been indicted for the charge of murder.[112] Second, the Court emphasized that letting an accused know of his indictment status has not been determined to be a requirement of the waiver inquiry and must be further examined.[113] However, since this issue was mooted by the fact that Patterson had been so informed, the Court explicitly refrained from deciding "the question of whether or not an accused must be told that he has been indicted before a post-indictment Sixth Amendment waiver will be valid."[114] Nor would the Court "even pass on the desirability of so informing the accused—a matter that [could] reasonably be debated."[115]

In considering the former requirement suggested by Patterson that he be apprised of the beneficial protection counsel could provide during post-indictment questioning, the Court acknowledged that this was indeed a consequence of the waiver which must be

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police should not be expected to give the suspect legal advice as to the inadmissibility of his earlier statement because the suspect has a right to an attorney, whose job includes explaining the admissible status of unwarned statements. *Id.*

108 *Id.*

109 *Patterson*, 108 S. Ct. at 2397.

110 *Id.* at 2396.

111 *Id.*

112 *Id.*

113 *Id.* at 2396 n.8.

114 *Id.*

115 *Id.*

communicated,[116] but said that it had been accounted for by the language of *Miranda*.[117] Justice White stated that since fifth amendment admonitions made Patterson aware that his statements could be used against him in court, the warnings also sufficed to let Patterson know what benefits could accrue from having an attorney present at such statements.[118]

The Court's analysis here was predicated on the majority's perception that counsel's role during post-indictment interrogations is relatively simple and limited when compared with counsel's needed procedural expertise at later stages of criminal proceedings.[119] The Court reasoned that:

> [a]t trial, an accused needs an attorney to perform several varied functions—some of which are entirely beyond even the most intelligent layman. Yet during postindictment questioning, a lawyer's role is rather unidimensional: largely limited to advising his client as to what questions to answer and which ones to decline to answer.[120]

In other words, if Patterson knew that, following an executed waiver, any inculpatory statements made could be admitted as evidence against him, then he must have likewise known that the sole benefit of having counsel present—keeping him from making such statements—would also be waived.[121]

In his brief, Patterson rebutted the argument that *Miranda* warnings, which were designed to admonish a suspect of his fifth amendment right to counsel in a custodial setting, should be sufficient to waive the right to counsel guaranteed by the sixth amendment, which attaches after the adversarial process has begun.[122] Patterson's claim rested on the analysis that the difference in policies giving rise to these two distinct rights causes the sixth amendment right to counsel to be of a superior nature and, consequently, more difficult to waive than the fifth amendment guarantee.[123] The Court held that while there is a difference between fifth amendment and sixth amendment rights to counsel, as well as different policies behind such constitutional guarantees, the sixth amendment right to

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116 *Id.* at 2395-96. The Court never explicitly stated this point, but the Court's treatment of counsel's absence, as a consequence of an executed waiver, implies this conclusion.

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.* at 2396-97 n.6.

121 *Id.*

122 *Id.* at 2397 (quoting Brief for Petitioner at 23, Patterson v. Illinois, 108 S. Ct. 2389 (1988)(No. 86-7059)).

123 *Id.*

counsel is not superior to the fifth amendment right.[124]

In supporting its conclusion on this point, the majority rejected Patterson's hierarchy-based analysis of the right to counsel and opted for a more "pragmatic approach."[125] The Court defined this "pragmatic approach" to the waiver question as one which "focuses more on the lawyer's role during such questioning, rather than the particular constitutional guarantee that gives rise to the right to counsel at that proceeding."[126]

The Court then examined what purposes a lawyer serves and what assistance he lends to a defendant during specific stages of the criminal proceedings.[127] After reviewing precedents,[128] in which the Court had decided the waiver question in a variety of stages in the criminal process, the Court held that the waiver inquiry depends on a "pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding," during which he may have to deal with legal problems or face his adversary, "and the dangers to the accused of proceeding without counsel. An accused's waiver of his right to counsel is 'knowing' when he is made aware of these basic facts."[129]

Applying its "pragmatic approach" to the present case, the Court compared counsel's role during questioning of a suspect in a fifth amendment context to the interrogation of an accused in a sixth amendment setting.[130] The majority held that the usefulness of counsel does not increase solely because the state has initiated the adversary process; an attorney's role at interrogation is analogously simple and limited in both the fifth and sixth amendment contexts.[131] Therefore, Justice White concluded:

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124 *Id.* at 2397.

125 *Id.*

126 *Id.* at 2397-98.

127 *Id.* at 2398.

128 *Id.* The majority viewed the waiver inquiry as establishing a spectrum of situations during the adversary process in which the validity of a waiver would be viewed in light of the attorney's role in providing the accused with " 'aid in coping with legal problems or assistance in meeting his adversary.' " *Id.* (quoting United States v. Ash, 413 U.S. 300, 313-20 (1973). *Compare Ash*, 413 U.S. at 313-20 (no sixth amendment right to counsel exists at a post-indictment photographic display identification procedure) *with* Faretta v. California, 422 U.S. 806, 835-36 (1975)(sixth amendment right to counsel is critical at trial and every effort must be employed by the Court to preserve it).

129 *Patterson*, 108 S. Ct. at 2398.

130 *Id.* at 2398 n.12.

131 *Id.* The majority held that:

> [t]he State's decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose that an attorney serves when the accused is questioned by authorities. . . . [W]e do not discern a substantial

> Because the role of counsel at questioning is relatively simple and limited, we see no problem in having a waiver procedure at that stage which is likewise simple and limited. So long as the accused is made aware of the "dangers and disadvantages of self-representation" during postindictment questioning, by use of the *Miranda* warnings, his waiver of his Sixth Amendment right to counsel at such questioning is "knowing and intelligent."[132]

Thus, the majority affirmed the Illinois Supreme Court's decision to uphold the trial court's evidenciary admission of Patterson's inculpatory statements.[133]

B. DISSENTING OPINIONS

1. Justice Blackmun's Dissent

Justices Blackmun and Stevens dissented from the majority in separate opinions.[134] Justice Blackmun concluded in his dissent[135] that "after formal adversary proceedings against a defendant have been commenced, the Sixth Amendment mandates that the defendant not be 'subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' "[136] Justice Blackmun also dissented from the majority's holding that counsel's function at post-indictment interrogation is equivalent to counsel's function at pre-indictment interrogation.[137] He found this holding to be unconstitutional in light of *Carnley v. Cochran*,[138] and emphasized that "the Sixth Amendment does not allow the prosecution to take undue advantage of any gap between the commencement of the adversary process and the time at which counsel is appointed for a defendant."[139]

2. Justice Stevens' Dissent

Justice Stevens, joined by Justices Brennan and Marshall, con-

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difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at post-indictment questioning.

Id. (footnote omitted).

132 *Id.* at 2398-99.

133 *Id.*

134 *Id.* at 2399 (Blackmun, J., dissenting), 2399-2405 (Stevens, J., dissenting).

135 *Id.* at 2399 (Blackmun, J., dissenting).

136 *Id.* (Blackmun, J., dissenting)(quoting Michigan v. Jackson, 475 U.S. 625, 626 (1986))(citations omitted).

137 *Patterson*, 108 S. Ct. at 2399 (Blackmun, J., dissenting).

138 Carnley v. Cochran, 369 U.S. 506, 513 (1962)(citations omitted). The *Carnley* Court indicated that "when the Constitution grants protection against criminal proceedings without the assistance of counsel, counsel must be furnished whether or not the accused requested appointment of counsel." *Id.* at 513 (citations omitted).

139 *Patterson*, 108 S. Ct. at 2399 (Blackmun, J., dissenting).

cluded that *Miranda* warnings are inadequate to apprise an accused of the information needed to execute a "knowing and intelligent" waiver of his sixth amendment right to have counsel present during post-indictment questioning.[140] Justice Stevens argued that the adequacy or effectiveness of *any* legal advice given to the accused, *Miranda* warnings included, is undermined by the adversarial position of the state official who gives such advice.[141] According to Justice Stevens, the initiation of adversary judicial proceedings makes all subsequent, government advice, in uncounseled, state-initiated interrogation, unethical and sixth amendment violative.[142]

Justice Stevens supported his dissenting opinion by pointing to Supreme Court precedents that critically emphasized the significance of legal representation once adversary judicial proceedings have begun.[143] The majority opinion, he stated, "backs away from the significance previously attributed to the initiation of formal proceedings" by reaching a decision "favorable to the interest in law enforcement unfettered by process concerns."[144] He further buttressed his argument with established procedural and social policy reasons, under which the majority holding would be characterized as promoting unethical and unfair trial practice.[145]

Justice Stevens began his dissenting opinion by stating that the majority's holding "condone[s] unethical forms of trial preparation by prosecutors or their investigators."[146] Comparing the criminal procedural guidelines forwarded by the majority to civil procedural guidelines, Justice Stevens found the majority's permission of state-initiated questioning of an accused to be lacking in ethical merit.[147] Justice Stevens based his conclusion on Rule 4.2 of the 1984 ABA Model Rules of Professional Conduct. That rule reads: " 'In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by the law to do so.' "[148] In civil litigation, said Justice Stevens, a breach of this rule would be a seri-

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140 *Id.* at 2402 (Stevens, J., dissenting).

141 *Id.* (Stevens, J., dissenting).

142 *Id.* at 2399-2404 (Stevens, J., dissenting).

143 *See* United States v. Gouveia, 467 U.S. 180 (1984); Kirby v. Illinois, 406 U.S. 682, 689 (1972); Massiah v. United States, 377 U.S. 201 (1964); Spano v. New York, 360 U.S. 315, 324 (1959)(Douglas, J., concurring); Powell v. Alabama, 287 U.S. 45, 66-71 (1932).

144 *Patterson*, 108 S. Ct. at 2402 (Stevens, J., dissenting).

145 *Id.* at 2403-2404 (Stevens, J., dissenting).

146 *Id.* at 2399 (Stevens, J., dissenting).

147 *Id.* at 2399 (Stevens, J., dissenting).

148 *Id.* at n.1 (quoting MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1984)).

ous infraction of professional ethics.[149] Therefore, according to Justice Stevens, Rule 4.2 and "notions of fairness that are at least as demanding" dictate that the same ethical rules should apply in criminal litigation; and, if they do not, "such a practice would not simply constitute a serious ethical violation, but would rise to the level of an impairment of the Sixth Amendment right to counsel."[150]

In defense of his contention, that the criminal procedural guidelines authorized by the majority undermine the inviolate spirit of the sixth amendment right to counsel, Justice Stevens cited *Maine v. Moulton*.[151] Re-establishing and defining the requisite protection of an accused's sixth amendment right to counsel, Justice Stevens relayed that the *Moulton* Court held:

> Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance. We have on several occasions been called upon to clarify the scope of the State's obligation in this regard, and have made clear that, at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.[152]

Justice Stevens then summarily stated, "I think it is clear that an *ex parte* communication between a prosecutor, or his or her agents, and a represented defendant—regardless of whether the accused has received *Miranda* warnings—can only be viewed as an attempt to 'circumven[t]' and 'dilut[e] the protection afforded by the right to counsel.' "[153] This statement and its supporting evidence not only define the previous Supreme Court dedication to upholding the constitutional principles involved, but also describe the precedentiary trend on which Justice Stevens builds the remainder of his dissent.

Because there clearly exist ethical principles, constitutional guarantees, and Supreme Court precedents which mandate that the sixth amendment right to counsel must be protected after the initiation of adversarial proceedings, Justice Stevens asked, "at what point . . . does it become impermissible for the prosecutor, or his or her agents, to conduct such private interviews[154] with the opposing

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149 *Id.* at 2399-2400 (Stevens, J., dissenting).

150 *Id.* at 2400 (Stevens, J., dissenting).

151 474 U.S. 159 (1985).

152 *Patterson*, 108 S. Ct. at 2400 n.2 (Stevens, J., dissenting)(quoting *Moulton*, 474 U.S. at 170-71 (footnote omitted)).

153 *Id.* (Stevens, J., dissenting)(quoting *Moulton*, 474 U.S. at 171).

154 Justice Stevens defined "private interview" as meaning "an interview initiated by

party?"[155] He then answered that "the Sixth Amendment right to counsel demands that a firm and unequivocal line be drawn at the point at which adversary proceedings commence."[156]

Justice Stevens first challenged that part of the majority's argument which equated "the purported waiver in this case with . . . that of an unindicted suspect."[157] Citing Supreme Court precedents that critically emphasized the importance of the initiation of adversary proceedings to the waiver inquiry,[158] Justice Stevens concluded that "in reaching a decision . . . favorable to the interest in law enforcement unfettered by process concerns, the Court backs away from the significance previously attributed to the initiation of formal proceedings."[159]

Further relying on these precedents, the dissent noted that important distinctions exist between a pre-indictment interrogatee and a post-indictment interrogatee.

> The return of an indictment, or like instrument substantially alters the relationship between the state and the accused. Only after a formal accusation has "the government . . . committed itself to prosecute, and only then [have] the adverse positions of government and defendant . . . solidified." . . . Moreover, the return of an indictment also presumably signals the government's conclusion that it has sufficient evidence to establish a prima facie case. As a result, any further interrogation can only be designed to buttress the government's case; authorities are no longer simply attempting "to solve a crime."[160]

"Given the significance of the initiation of formal proceedings and the concomitant shift in the relationship between the state and the accused," Justice Stevens concluded that it is "quite wrong to suggest that *Miranda* warnings—or for that matter, any warnings offered by an adverse party—provide a sufficient basis for permitting the

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the prosecutor, or his or her agents, without notice to the defendant's lawyer and without the permission of the court." *Id.* at 2400 (Stevens, J., dissenting).

155 *Id.* (Stevens, J., dissenting).

156 *Id.* at 2401 (Stevens, J., dissenting). The majority disagreed with this conclusion. Instead, the Court reasoned that, because counsel's function at post-indictment interrogation is equivalent to counsel's function at pre-indictment interrogation, the attachment of the accused's sixth amendment right to counsel "does not distinguish him from the pre-indictment interrogatee." *Id.* at 2394. Furthermore, the majority held, if the accused is in the same position as a pre-indictment interrogatee, then he can effectively waive his right to counsel; and the *Miranda* warnings are a sufficient vehicle for this waiver. *Id.* In disposing of the majority's argument here, Justice Stevens criticized each level of the reasoning.

157 *Id.* at 2402 (Stevens, J., dissenting).

158 *See* United States v. Gouveia, 467 U.S. 180 (1984); Kirby v. Illinois, 406 U.S. 682, 689 (1972); Massiah v. United States, 377 U.S. 201 (1964); Spano v. New York, 360 U.S. 315, 324 (1959)(Douglas, J., concurring); Powell v. Alabama, 287 U.S. 45, 66-71 (1932).

159 *Patterson*, 108 S. Ct. at 2402 (Stevens, J., dissenting).

160 *Id.* (Stevens, J., dissenting)(citations omitted).

undoubtedly prejudicial—and, in my view, unfair—practice of permitting trained law enforcement personnel and prosecuting attorneys to communicate with as-of-yet unrepresented criminal defendants."[161]

Justice Stevens next criticized that part of the majority's argument which held that *Miranda* warnings are sufficient to clearly apprise the accused "of the consequences of abandoning [his sixth amendment] rights,"[162] or more specifically, "what a lawyer could 'do for him' during the post-indictment questioning."[163] Justice Stevens challenged this ruling in two ways. First, he gave several examples of necessary and beneficial representation that the *Miranda* warnings do not express—such as, "examin[ing] the indictment for legal sufficiency before submitting [the accused] to interrogation;" "skillfull[y] negotiating a plea bargain" and informing the accused "that such negotiations may be most fruitful if initiated prior to any interrogation;" and the most rudimentary of all, "explain[ing] to the accused the nature of the charges pending against him."[164] Second, Justice Stevens noted that the simple and cursory language of *Miranda* cannot be universally applied because of the individuality of each adversarial criminal proceeding. "[U]nlike the Fifth Amendment context, the information that must be imparted to the accused will vary from case to case as the facts, legal issues, and parties differ."[165]

Thus, Justice Stevens rebutted the majority's contention that *Miranda* warnings will suffice in this sixth amendment context.[166] However, in Justice Stevens' view, the failure of the *Miranda* warnings to satisfy this burden does not obviate the need for at least some case-particular advice from a judicial officer which lets the

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161 *Patterson*, 108 S. Ct. at 2404 (Stevens, J., dissenting).

162 *Id.* at 2397.

163 *Id.* at 2395.

164 *Id.* at 2403 (Stevens, J., dissenting).

165 *Id.* at 2403 n.4. (Stevens, J., dissenting). The majority either vacated this argument or failed to consider it because their holding clearly indicates a belief (a) that some universal boilerplate formula exists for sixth amendment *Miranda* warnings, and (b) that an adversarial party can effectively communicate it to an accused. This is evidenced by the majority's reliance on Patterson's failure to articulate with precision any additional information for the *Miranda* warnings which would more clearly advise an accused of the benefits he is abandoning through waiver. Justice Stevens pointedly disagreed with this belief when he stated that each criminal proceeding is different, and therefore, each set of warnings given to an accused must be case-particular. *Id.* (Stevens, J., dissenting).

In addition, Justice Stevens noted that the requirements for waiver, as defined in Supreme Court precedents, set a high threshold of sufficiency which cannot be overcome by warnings offered by an opposing party, no matter how detailed the content. *Id.* at 2403-04 (Stevens, J., dissenting).

166 *Id.*(Stevens, J., dissenting).

accused know of the "dangers and disadvantages of self-representation."[167]

Concentrating on the fact that some form of case-particular advice must be imparted to the accused prior to the execution of a valid waiver, Justice Stevens continued on to argue that it would be unethical for the prosecutor, or his or her agents, to provide such advice.[168] Justice Stevens premised this argument on a number of policy reasons. First, he agreed with the Second Circuit decision in *United States v. Mohabir*[169] which, relying on the ABA Code of Professional Responsibility,[170] held that:

> there are strong policy reasons, grounded in ethical considerations, for not adopting the . . . alternative of having the prosecutor give further warnings to the defendant. The government itself points out that a prosecutor "is, in many senses an adversary of the defendant, and, as such, is counseled not to give him legal advice."[171]

Second, Justice Stevens recognized that "the offering of legal advice may lead an accused to underestimate the prosecuting authorities' true adversary posture."[172] Third, he noted that the adversary positioning of the parties will make the prosecutor's advice tainted and awry, regardless of the prosecutor's efforts to be unbiased, because his job is to represent the state, not the accused.[173] Lastly, Justice Stevens pointed out that the prosecutor's conflict of interest and the resulting disadvantageous position of the defendant, portrays to the public a "perception of unfairness and unethical conduct" within the judicial system.[174] According to Justice Stevens, this portrayal

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167 *Id.* at 2403 (Stevens, J., dissenting).

168 *Id.* at 2403-04 (Stevens, J., dissenting).

169 624 F.2d 1140 (1980).

170 Disciplinary Rule 7-104(A) provides:

> During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so. (2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A) (1980). *See also* United States v. Henry, 447 U.S. 264, 275 n.14 (1980)(similarly relying on DR 7-104(A)).

171 *Patterson*, 108 S. Ct. at 2403-04 n.6 (Stevens, J., dissenting)(quoting *Mohabir*, 624 F.2d at 1152). *See also* Oregon v. Elstad, 470 U.S. 298 316-17 (1985)(The Court rejected defendant's waiver challenge, holding that police are not equipped to give advice in place of defendant's counsel.).

172 *Patterson*, 108 S. Ct. at 2404 (Stevens, J., dissenting). According to Justice Stevens, this would be especially true in situations like that of *Patterson*, in which a minor is locked in a jail for 48 hours and subsequently questioned by the police. *Id.* (Stevens, J., dissenting).

173 *Id.* (Stevens, J., dissenting).

174 *Id.* (Stevens, J., dissenting). *But see* J. POLLOCK-BYRNE, ETHICS IN CRIME & JUSTICE:

goes against the courts' interest of "ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them."[175] The dissent concluded that the policy reasons discussed above should prevent the formation of a valid waiver when that waiver depends upon the giving of legal advice by a prosecutor—an accused's adversary.[176]

In summary, Justice Stevens prefers the "easily identifiable" rule of forcing law enforcement officials to refrain from interrogating an accused once adversary proceedings are initiated, unless they either notify the accused's lawyer or receive authorization from the court.[177] This, according to the dissent, is the clear mandate of the sixth amendment right to counsel.[178]

IV. Discussion and Analysis

A. The Right to Counsel: Differences in the Underlying Policies and the Times of Attachment

The constitutional guarantee of the right to counsel is granted by both the fifth[179] and sixth amendments.[180] However, the policies that give rise to these guarantees and the times at which these rights attach are separate and distinct.

The fifth amendment right to counsel was judicially created under the holding of *Miranda v. Arizona*.[181] The *Miranda* Court expressly was aware of the impact on the suspect's mind of the interplay between police interrogation and police custody—each reinforcing the pressures and anxieties produced by the other.[182] It was this impact, the Court said, that makes "custodial police interro-

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Dilemmas & Decisions (1989). Discussing the ethics of police using deception during investigations and interrogations, the author stated that "[m]any people see nothing wrong—certainly nothing illegal—in using any methods necessary to catch criminals. *Id.* at 93. The author concluded that "[i]t is unlikely that [deceptive] investigative techniques will ever be eliminated; perhaps they should not be, since they are effective in catching a number of people who should be punished. Even if one has doubts about the ethics of these practices, it is entirely possible that there is no other way to accomplish the task at hand." *Id.* at 95.

175 *Patterson*, 108 S. Ct. at 2404 (Stevens, J., dissenting).

176 *Id.* (Stevens, J., dissenting).

177 *Id.* at 2405 (Stevens, J., dissenting).

178 *Id.* at 2401 (Stevens, J., dissenting).

179 "No person shall . . . be compelled in any criminal case to be a witness against himself . . ." U.S. Const. amend. V.

180 *See supra* note 2 for the relevant text of the sixth amendment.

181 384 U.S. 436 (1966).

182 *Id.* at 445-58.

gation" so devastating.[183] In order to counteract this impact and to protect the suspect's right against compelled self-incrimination, the Court adopted a number of prophylactic procedural requirements to be applied during the "custodial interrogation" process.[184] One of these procedural requirements, mandated by *Miranda*, was the duty of the state to inform a suspect of his right to have counsel present during "custodial interrogation."[185]

In contrast to the "custodial" scope of the fifth amendment right to counsel, the sixth amendment right was intially intended to preserve the accused's privilege to secure *representation of counsel at trial*.[186] This construction of sixth amendment attachment remained until 1932, when the Supreme Court in *Powell v. Alabama*[187] established the constitutional principle that the right to counsel attaches in *pre-trial* proceedings. In *Powell*, the Court held that:

> 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, the defendants . . . [are] as much entitled to such aid [of counsel] during that period as at the trial itself.[188]

The *Powell* opinion strongly suggested that in all but the most exceptional cases, appointment of counsel is necessary to ensure a fair trial.[189] *Powell*'s language emphatically stressed the inability of even an "intelligent and educated layman" to properly represent himself, and concluded that there was a need for "the guiding hand of counsel at every step of the proceedings."[190]

In *Spano v. New York*,[191] in concurring opinions by Justices Stewart and Douglas, the *Powell* rule was extended to include post-indictment interrogation.[192] In cases following *Spano*, the *Powell* rule was

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183 *Id.* at 457-58.

184 *Id.* at 479. "Custodial" interrogation is questioning which begins once the suspect "has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444.

185 *Id.* at 473.

186 *See supra* note 2 for the relevant text of the sixth amendment.

187 287 U.S. 45 (1932).

188 *Id.* at 57.

189 *Id.*

190 *Id.* at 69.

191 360 U.S. 315 (1959).

192 Spano v. New York, 360 U.S. 315 (1959). In his concurring opinion, Justice Douglas affirmatively stated that a Constitution which guarantees a defendant the aid of counsel at trial must provide no less to an indicted defendant who is being questioned by law enforcement officials in a completely extrajudicial proceeding. *Id.* at 326 (Douglas, J., concurring). To provide less than this, he said, might deny a defendant "effective representation by counsel at the only stage when legal aid and advice would help him." *Id.* (Douglas, J. concurring).

In 1977, this extension reached majority status in *Massiah v. United States*, 377 U.S.

further expanded to provide counsel to an accused at "critical stages" of the criminal proceeding.[193] Finally, in 1972, *Kirby v. Illinois*,[194] concretely qualified the attachment of an accused's sixth amendment right to counsel as being triggered at or after the initiation of adversarial proceedings[195]—which the Court defined as the implementation of a "formal charge, preliminary hearing, indictment, information, or arraignment."[196]

Thus, the fifth and sixth amendment rights to counsel differ in the policies giving rise to each. The fifth amendment protects a suspect from compulsory self-incrimination. In contrast, the sixth amendment protects an accused's privilege to deal with post-indictment adversaries through counsel.

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201 (1977), in which the Court held in a six to three decision that the sixth amendment right to counsel attaches when the defendant is indicted; thereby prohibiting state extraction of incriminating statements without the presence of counsel, absent a valid waiver. *Id.* at 205-07. In *Massiah*, the defendant had been indicted and had retained a lawyer prior to engaging in an incriminating conversation with an informant who was bugged by the police. *Id.* at 202-03.

193 For instance an arraignment is a "critical stage" of the trial when the state fails to provide the defendant with the assistance of counsel. Hamilton v. Alabama, 368 U.S. 52, 55 (1961)(The prosecution challenged the defendant's late entry of an insanity plea as being irretrievably lost, but the Supreme Court, ruling in favor of the defendant, concluded that, whether defendant would have actually raised the insanity defense or not "can never be known" because only counsel present at the time "could have enabled the accused to know all the defenses available to him and to plead intelligently.").

See also Massiah v. United States, 377 U.S. 201 (1977)(post-indictment questioning is a "critical stage"); United States v. Wade, 388 U.S. 218 (1967)(post-indictment line-up is a critical prosecutive stage at which accused is entitled to aid of counsel); Gilbert v. California, 388 U.S. 263 (1967)(identification line-up is a "critical stage" because assistance of counsel is necessary to preserve integrity of accused's right to trial); Escobedo v. Illinois, 378 U.S. 478 (1964)(Court overreached *Powell* rule to include pre-indictment contact between the state and suspect as a "critical stage"); White v. Maryland, 373 U.S. 59 (1963)(preliminary hearing is a "critical stage").

194 406 U.S. 682 (1972)(plurality opinion).

195 *Id.* at 689 (plurality opinion). The *Kirby* test, initially only resting on the result of a plurality opinion, was strengthened eight years later, when it won majority support in United States v. Henry, 447 U.S. 264 (1980).

196 *Kirby*, 406 U.S. at 689 (plurality opinion). *In decisively answering the question of when the sixth amendment right to counsel attaches,* the *Kirby* Court emphasized the importance of the formal charge:

> The intiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencment of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable. *See Powell*, 287 U.S. at 66-71 ; *Massiah*, 377 U.S. [at 205]; *Spano*, 360 U.S. [at] 324 (Douglas, J. concurring)."

Kirby, 406 U.S. at 689-690 (plurality opinion)(footnotes omitted).

These rights to counsel also differ in when they attach during the criminal process. During "custodial interrogation" fifth amendment rights attach.[197] Conversely, during "every stage of the adversarial proceedings" sixth amendment rights attach.[198] These differences in policy and attachment have been underscored in Supreme Court cases prior to *Patterson* and in *Patterson* itself: "[O]ur cases have recognized a difference between the Fifth Amendment and Sixth Amendment rights to counsel," as well as a difference in "the policies behind these Constitutional guarantees."[199]

B. THE RIGHT TO COUNSEL: PRE-*PATTERSON* WAIVER REQUIREMENTS AND PRECEDENTIAL MEASUREMENTS OF SIXTH AMENDMENT VIOLATIONS

In considering assertions of waiver of the right to counsel, the Supreme Court has provided clear procedural requirements for the fifth amendment privilege. First, a waiver can exist only if the suspect has been told of his *Miranda* right to counsel.[200] Second, if authorities have given the *Miranda* warnings and if the suspect does not invoke his fifth amendment right to counsel, then a waiver can be valid during police-initiated custodial interrogation.[201] Lastly, if the suspect does request the presence of an attorney, then state officials are subsequently barred from interrogating him or her,[202] unless the suspect intiates a meeting with the state at a later time.[203]

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197 *Miranda*, 384 U.S. at 478.

198 *Powell*, 287 U.S. at 66-71.

199 *Patterson*, 108 S. Ct. at 2397 (citations omitted).

200 Miranda v. Arizona, 384 U.S. 436 (1966). Of course, a waiver of the fifth amendment right to counsel must also be voluntary. Brown v. Mississippi, 297 U.S. 278, 287 (1936)(use of confession in state court barred when suspect was brutally whipped and tortured in order to obtain the statement). Prior to *Miranda*, the Supreme Court, under the voluntariness test, undertook a continuing re-evaluation of the facts of each case. The voluntariness test required "examination of all of the attendant circumstances" surrounding each confession. Haynes v. Washington, 373 U.S. 503, 513 (1963). After *Miranda*, the voluntariness test was no longer the single standard with which to judge confessional validity, but rather a requirement which must be satisfied.

201 Michigan v. Mosley, 423 U.S. 96, 104-05 (1975).

202 In Rhode Island v. Innis, 446 U.S. 291 (1980), the Supreme Court stated that the scope of interrogation that is prohibited by invocation of the fifth amendment right to counsel goes beyond mere questioning:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected either to express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any *words or actions* on the part of the police (other than those normally attendant to arrest and custody) that *the police should know are reasonably likely to elicit an incriminating response* from the suspect.

Innis, 446 U.S. at 300-01 (emphasis added).

203 "[A]n accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been

By comparison, the procedural requirements for waiver of the sixth amendment right to counsel, prior to *Patterson*, have been far less well defined. Nevertheless, the pre-*Patterson* Supreme Court cases, which addressed the waiver question, established a trend of strictly applying the broad, albeit unclear, procedural requirements. Therefore, if a court was to err, it would err in favor of protecting the accused's right to counsel.[204]

The first test of a waiver, stated in the 1938 Supreme Court case of *Johnson v. Zerbst*,[205] was defined as being applicable to those fundamental constitutional rights which are intended to protect a fair trial and the reliability of the truth-determining process.[206] The sixth amendment right to have counsel certainly falls within this subset. The waiver standard, set by *Johnson*, was general in scope: a valid waiver must be based on "an intentional relinquishment or abandonment of a known right or privilege."[207] Regardless of its generality, it is a strict standard that is evaluated (a) under "every reasonable presumption against waiver,"[208] and (b) within the particular facts surrounding the assertion of waiver.[209] *Johnson*, however, dealt only with a situation in which the accused was denied representation of counsel at trial, and consequently, did not provide much in the way of specifics for an assertion of waiver at the post-indictment questioning stage.

Applying the *Johnson* test to an accused's choice to proceed pro se at trial, against the warnings of the judge, the Court in *Faretta v. California*[210] held that a sixth amendment waiver of counsel at trial will be invalid unless the judge communicates "the dangers and disadvantages of self-representation, so that the record will establish that '[the accused] knows what he is doing and his choice is made

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made available to him, unless the accused himself initiates further communication." Edwards v. Arizona, 451 U.S. 477, 484-85 (1981). Therefore, a two-step analysis must be used. It must be determined (i) whether the defendant "initiated" the further conversation and, if so, (ii) whether he thereafter waived his right to counsel. Oregon v. Bradshaw, 462 U.S. 1039, 1043-46 (1983).

204 *See* Michigan v. Jackson, 475 U.S. 625, 633 (1986)("Doubts must be resolved in favor of protecting the Constitutional claim."); Johnson v. Zerbst, 304 U.S. 458, 464 (1938)(Courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights.").

205 304 U.S. 458 (1938).

206 *Id.* at 464.

207 *Id.*

208 *Id. See also* Brewer v. Williams, 430 U.S. 387, 404 (1977)(Court expressly put the burden of proof on the state in an assertion of sixth amendment waiver case).

209 *Johnson*, 304 U.S. at 464.

210 422 U.S. 806 (1975).

with eyes open.' "[211] This strengthened *Johnson* standard, described in *Faretta*, was buttressed further by *Brewer v. Williams*,[212] which unequivocally established that the burden of persuasion rests heavily on the state when trying to prove that an accused "knowingly and intelligently" waived his sixth amendment right to have counsel present at post-indictment interrogation.[213] Thus, prior to *Patterson*, even though the procedural requirements for waiver at the post-indictment stage were somewhat unclear in scope,[214] they were strictly applied on a case-by-case basis in order to fully protect the accused's rights during the adversarial process.

Furthermore, the Supreme Court parameters of what constituted a *violation* of the sixth amendment right to counsel were very broad, emphasizing, prior to *Patterson*, an air of extreme restrictiveness on the investigatory conduct of state officials during post-indictment questioning. At the time *Patterson* reached the Supreme Court, a sixth amendment violation was defined as being a "deliberate elicitation," by the state, of an accused's inculpatory statement, in the absence of an executed waiver.[215]

In *Massiah v. United States*,[216] and the subsequent revival of that case's holding in *Brewer v. Williams*,[217] sixth amendment violations were further described in such a way as to promote greater protections for the accused as well as to extend restrictions on the state's conduct in interrogational settings. In *Massiah*, the Court found a violation of the right to counsel when the police, with the aid of a

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211 *Id.* at 835 (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)).

212 430 U.S. 387 (1977).

213 *Id.* at 403.

214 Prior to *Patterson*, the holding in *Brewer* encompassed the most recent requirement for waiver. In *Brewer*, the Supreme Court decided the question of sixth amendment waiver by focusing on the state's investigatory conduct. *Brewer*, 430 U.S. at 404-05. *Brewer* rejected a sixth amendment waiver, holding that the state's "deliberate elicitation" of Williams' incriminating statements, in the absence of his counsel, violated his sixth amendment rights; and therefore, waiver was deemed impossible. *Id.*

Yet, the Supreme Court's focus on "deliberate elicitation" failed to provide any meaningful foundation for clear requirements to the waiver inquiry because the Court never found waiver in a case involving "deliberate elicitation." *Id.* Thus, the composition of clear procedural requirements for sixth amendment waiver cases had been primarily left to the circuit and state courts, which invented varied and contradictory standards.

215 United States v. Henry, 447 U.S. 270, 74 (1980). The Supreme Court defined "deliberate elicitation" very broadly, holding that a sixth amendment violation occurs any time a law enforcement official intentionally causes a situation that *he should have known was likely to induce incriminating statements* by the accused without the assistance of counsel. *Id.*

216 377 U.S. 201 (1984).

217 430 U.S. 387 (1977).

cooperating and bugged codefendant, "deliberately elicited" uncounseled incriminating statements from the accused in the accused's automobile.[218] Likewise, in *Williams*, a confession-provoking speech, orated by a police officer while transporting the accused to another county, was held to have violated the accused's right to counsel because the detective "deliberately and designedly set out to elicit information from Williams," after he had repeatedly requested counsel's assistance.[219] These cases have found violations of the accused's sixth amendment right to counsel when the accused was neither in custody, nor being interrogated, nor was even aware that the police were eliciting information from him.

C. *PATTERSON*'S DISREGARD FOR THE "PRESUMPTION AGAINST WAIVER" PRECEDENT

These Supreme Court cases portray a willingness to find violations of the sixth amendment right to counsel beyond the post-indictment interrogational setting of *Patterson*. Concomitantly, these cases also evince a high threshold for the establishment of valid waivers, in which the state bears a heavy burden of proof. Thus, pre-*Patterson* decisions—in the spirit of *Powell* and its progeny—stressed protection of the accused's right to counsel; and, consequently, did not strive to rationalize an easing of the restraints on state investigatory conduct. An example of this is the holding of *People v. Settles*,[220] which held:

> [N]o knowing and intelligent waiver of counsel may be said to have occurred without the essential presence of counsel. True, a defendant would be appreciably less inclined to waive counsel when sufficiently apprised of the effects of that waiver by an attorney. . . . That is not the point. At the time when legal advice is most critically needed, [the New York Constitution] strikes the balance in favor of the defendant by placing a buffer, in the form of an attorney, between himself and the coercive power of the State.[221]

In contrast, the Court in *Patterson* disregarded the "strong presumption against waiver" trend[222] which emphasized the critical differences in policy and attachment of the two constitutional guarantees, and maintained a low threshold for sixth amendment violations.[223] Instead, *Patterson* has promoted an easing of the restraints on state investigatory conduct at post-indictment

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218 *Massiah*, 377 U.S. at 201-07.
219 *Brewer*, 430 U.S. at 387-414.
220 46 N.Y.2d 154, 385 N.E.2d 612, 412 N.Y.S.2d 874 (1978).
221 *Id.* at 164, 385 N.E.2d at 617, 412 N.Y.S.2d at 880.
222 Patterson v. Illinois, 108 S. Ct. 2389, 2402 (Stevens, J., dissenting).
223 *Id.* at 2401-02 (Stevens, J., dissenting).

interrogation.[224]

D. THE FIFTH AMENDMENT FORMULA FOR WAIVER IN *PATTERSON* VERSUS THE DISSENT'S PROCEDURAL REQUIREMENT OF NOTIFYING COUNSEL PRIOR TO INTERROGATION

In order to ensure protection of Patterson's sixth amendment right to have counsel present at interrogation, the Court could have established either of two principles. It could have adopted the fifth amendment formula[225] or it could have instituted the dissent's procedural requirement of demanding that an accused's counsel be notified prior to or be present at post-indictment interrogation.[226] Although the majority opted for the former standard, the latter of these procedural formulas is more desirable for a number of reasons.

It may be conceded that *Miranda* warnings do effectively inform the accused that he has a right to counsel. However, it cannot be convincingly argued that these warnings sufficiently apprise the accused of "the dangers and disadvantages of self-representation"[227] so that his waiver is "made with eyes open."[228] Justice White argues the contrary, premising his argument on the unidimensionality of counsel's role at interrogation—"largely limited to advising his client as to what questions to answer and which ones to decline to answer."[229]

Justice Stevens appropriately characterized this argument as an understatement of "what a lawyer can do for" the accused.[230] As Justice Stevens pointed out, an attorney, by virtue of his or her presumably greater knowledge of available substantive and procedural defenses, provides benefits necessary to ensure a fair trial.[231] As a

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224 *Id.* at 2396-97.

225 *See supra* notes 200-203 and accompanying text.

226 *Patterson*, 108 S. Ct. at 2400-01 (Stevens, J., dissenting). For the sake of comparison, this Note does not extensively discuss the state's other option of obtaining a judicial grant to interrogate the accused in the absence of counsel.

227 *Faretta*, 422 U.S. at 835.

228 Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942).

229 *Patterson*, 108 S. Ct. at 2395 n.6, 2397-99.

230 *Id.* at 2403 (Stevens, J., dissenting).

231 *Id.* (Stevens, J., dissenting). *See also* Powell v. Alabama, 287 U.S. 45, 66-71 (1932), in which the Court held:

> [t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. . . . Left without the aid of counsel he may be put on trial without a proper charge. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. *He requires the guiding hand of counsel at every*

consequence of waived representation, counsel would not be present: (1) to "examine the indictment for legal sufficiency;"[232] (2) to determine the prudence of cooperating or remaining silent by being more able to analyze the strengths and weaknesses of the evidence against the accused, given the specified facts about the accused's age, and the nature and circumstances of the offense;[233] (3) to determine whether plea-bargaining "negotiations may be most fruitful if initiated prior to any interrogation;"[234] (4) to skillfully negotiate such a plea-bargain;[235] and (5) "to explain to the accused the nature of the charges pending against him."[236] The words, "anything [you] might say can be used against [you],"[237] simply do not make the accused aware of the attorney benefits listed here,[238] which are part and parcel "of the 'dangers and disadvantages of self-representation' during questioning."[239]

The majority circumvented the need to inform the accused of the above listed advantages,[240] by stating that such information is unnecessary and not part of the constitutional minimum required under *Oregon v. Elstad*.[241] This is a questionable application of *Elstad*. In *Elstad*, the defendant made two inculpatory statements to police, the first of which was not preceded by an issuance of his *Miranda* warnings.[242] In an appeal to suppress his highly inculpatory second statement, the defendant argued that he was unable to give a fully informed waiver of his rights the second time around because he was unaware that his initial, unwarned statement could not be used against him.[243] The Court based its rejection of this argument

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step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id. at 66-71 (emphasis added).

232 *Patterson*, 108 S. Ct. at 2403 (Stevens, J., dissenting).

233 *See* Project, *Interrogation in New Haven, The Impact of Miranda*, 76 YALE L.J. 1519, 1604 (1967)[hereinafter Yale Interrogation Study].

234 *Patterson*, 108 S. Ct. at 2403 (Stevens, J., dissenting).

235 *Id.* (Stevens, J., dissenting).

236 *Id.* (Stevens, J., dissenting).

237 *Miranda*, 384 U.S. at 479.

238 *See* Wasserman, *Sixth Amendment Right to Counsel: Standards for Knowing and Intelligent Pretrial Waivers*, 60 B.U.L. REV. 738, 763 (1980)(The state's burden simply "is not met by the mere showing that the accused was given *Miranda* warnings, with or without the additional warning as to the existence of a pending indictment."). *But see* Comment, *Constitutional Law—Right to Counsel*, 49 GEO. WASH. L. REV. 399, 409 (1981).

239 *Patterson*, 108 S. Ct. at 2402-03. (Stevens, J., dissenting)(quoting *Faretta*, 422 U.S. at 835).

240 *Id.* at 2396.

241 470 U.S. 298 (1985). *See supra* note 107 for a discussion of *Elstad*'s facts and holding.

242 *Id.* at 300-01.

243 *Id.*

on the fact that "[t]he standard *Miranda* warnings explicitly inform[ed] the suspect of his right to consult a lawyer before speaking."[244] The Court reasoned that "[p]olice officers are ill-equipped to pinch-hit for counsel, construing the murky and difficult questions of when 'custody' begins or whether a given unwarned statement will ultimately be held inadmissible."[245]

Elstad's reasoning indicates that the Supreme Court has granted the defendant a right to counsel in *Miranda* so that "the murky and difficult questions"[246] surrounding interrogation can be properly addressed by a defending lawyer and not by the police. Consequently, *Elstad* concludes that, because it is the lawyer's job to explain the legalities of a waiver to the accused, the state has no duty to communicate "a full and complete appreciation of all of the consequences flowing"[247] from a defendant's waiver. Thus, the very case *Patterson* employs to support its argument is based on inapposite reasoning. *Patterson* used *Elstad* to prove that it is sufficient for the state to inform the accused of only two waiver-consequences: that his words may be used against him; and that he will dispose of counsel's only beneficial function—keeping him from making inculpatory statements.[248] In contrast, *Elstad* emphasized the importance of the right to counsel, as well as the unique and necessary functions counsel performs for the defendant.[249] In fact, *Elstad*'s reasoning supports Justice Stevens' dissenting opinion that counsel's presence at post-indictment interrogation is needed to provide the accused with necessary information and advice.[250]

In addition to its faulty application of *Elstad*, the *Patterson* Court also failed to take into account—during its "pragmatic approach"[251]—the full practical merits of requiring accused's counsel to be present at post-indictment questioning. Removing defending counsel from certain post-indictment interrogations is disadvantageous to the state because any benefits that would result from defending counsel's presence are eclipsed. For instance, if the accused's counsel is present at post-indictment questioning, the inherent ethical dangers arising from the interplay of a prosecutor and

244 *Id.* at 316.
245 *Id.*
246 *Id.*
247 *Patterson*, 108 S. Ct. at 2396 (quoting *Elstad*, 470 U.S. at 316-17).
248 *Id.* at 2396.
249 *Elstad*, 470 U.S. at 316-17.
250 The majority failed to cite any other case in support of its conclusion, nor did the majority give any textual explanation of its interpretation beyond citing the desired quotation. *Patterson*, 108 S. Ct. at 2396.
251 *Id.* at 2397-99.

the accused, underscored by Justice Stevens,[252] would be eradicated.

The state would further benefit from defending counsel's role as a witness of record at each interrogation. If communication is undocumented and if there is a significant discrepancy between each party's version of the relevant facts as to what was said or done during interrogation, as was the case in *Patterson*,[253] the defending counsel's attendance would remove the necessity of a "judgment call" by the trier of fact.[254] Likewise, the defending attorney's presence would remove the question of whether the accused offered his or her statement voluntarily;[255] voluntariness being a necessary prerequisite.[256]

Furthermore, requiring the notification or presence of an accused's attorney during post-indictment questioning may also serve to expedite the criminal process. When an accused erroneously assesses his or her situation and concludes that remaining silent is the best alternative, at least one study has shown that counsel, believing otherwise, would urge an accused to cooperate in a number of circumstances.[257]

It might be argued by the majority that, regardless of these advantages, mandatory notification or attendance would hinder most criminal cases. Presumably this argument would be based on the importance of interrogation as a needed step toward achieving a conviction, most likely resulting from admissions or confessions. Although there is some merit to this contention, studies have shown that the outcome of a case is generally not contingent on or determined by the fruits of interrogation.[258] Nevertheless, it is significant

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252 *Id.* at 2399-2404 (Stevens, J., dissenting). *See supra* notes 140-178 and accompanying text.

253 *See supra* notes 42 and 48, and accompanying text.

254 *Cf. Miranda*, 384 U.S. at 470 (In a fifth amendment context, the Court held that "[t]he presence of a lawyer can . . . help guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.")(citations omitted).

255 *Cf. Id.* (Finding the state's investigatory conduct fifth amendment violative, the Court held that "[w]ith a lawyer present [at interrogation] the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in Court.").

256 *Patterson*, 108 S. Ct. at 2394 n.4; *See supra* note 200.

257 *See* Yale Interrogation Study, *supra* note 220, at 1602-03.

258 *Id.* at 1588. The Yale Study indicates that:

> [t]aking all assumptions and reservations into account, it appears that interrogations may be even less necessary than our figures indicate. In almost every case . . . the police had adequate evidence to convict the suspect without any interrogation. Interrogation usually just cemented a cold case or served to identify accomplices.
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> This finding is probably explained by the fact that the police were unable to arrest even a single person for crimes where no witnesses were available. Signifi-

that the formula offered by the dissent does not erase the opportunity for law enforcement officials to secure a confession, or similarly incriminating statements, if the officials deem it necessary to prosecution. This elicitation can still take place during pre-indictment stages or in the presence of counsel at post-indictment questioning.[259] In contrast, the disadvantage of the majority's rule is that protection of an accused's sixth amendment right to counsel—critically emphasized in *Powell* and its progeny—must take a backseat to "law enforcement unfettered by process concerns."[260] This result is entirely unnecessary if the dissent's position is forwarded.[261]

In addition, *Patterson* dealt with prosecutorial interrogation, occurring *after* indictment. Because the filing of an indictment "presumably signals the government's conclusion that it has sufficient evidence to establish a prima facie case,"[262] then "authorities are no longer trying 'to solve a crime.' "[263] Therefore, the need to elicit

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cantly, the evidence obtained by the President's Commission indicates that this is true of other cities as well.

Id. (footnotes omitted).

259 In addition, interrogation is only one of the vehicles open to the police in order to elicit necessary information. "Several comparative studies of clearance rates imply that investigative alternatives to interrogation are not only available but are successfully resorted to by law enforcement agencies when judicial rulings restrict or inhibit the use of interrogations and confessions." *Id.* at 1580 n.161.

260 *Patterson*, 108 S. Ct. at 2402 (Stevens, J., dissenting).

261 It might be argued that the dissent's formula would provide an incentive for law enforcement officials to delay the filing of formal charges in order to maintain the opportunity to interrogate the defendant in the absence of counsel. This would be a clear disadvantage of the dissent's formula were it not for the existence of statutes of limitations which often define clear timetables within which the suspect must be charged. Furthermore, when these timetables are abused, the holding of United States v. Marion, 404 U.S. 307 (1972), is clearly applicable:

> [T]he Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to [defendant]'s rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused. *Cf.* Brady v. Maryland, 373 U.S. 83 (1963); Napue v. Illinois, 360 U.S. 264 (1959).

Marion, 404 U.S. at 324.

262 *Patterson*, 108 S. Ct. at 2402 (Stevens, J., dissenting).

263 *Id.* (Stevens, J., dissenting)(quoting United States v. Mohabir, 624 F.2d 1140, 1148 (2d Cir. 1980)). *But see* Brief for the United States as Amicus Curiae Supporting Respondent at 20 n.9, Patterson v. Illinois, 108 S. Ct. 2389 (1988)(No. 86-7059), which states that the suggestion

> that the government's interest in obtaining such evidence is reduced because any questioning of the defendant by the government can only be for the purpose of buttressing a prima facie case . . . rests upon an unrealistic view of the criminal justice process. While in some instances the government's case is complete at the time of indictment, there are many instances in which charges must be brought after probable cause is established but before the investigation is complete. Even when the prosecution believes that it has sufficient evidence to warrant a conviction, the vagaries of the jury system are such that the prospect of a conviction does not ap-

incriminating evidence or a confession, "to buttress the government's case" after indictment, is suspect as an erroneous reason to remove the presence of an accused's counsel at post-indictment questioning.[264]

Moreover, as Justice Stevens points out in his dissenting opinion, there are policy reasons of "unequaled strength" which mandate that an accused's attorney should be either notified or present during post-indictment prosecutorial interrogation;[265] not the least of which is the fundamentally altered relationship between the state and the defendant once formal charges have been filed.

Coupled with Justice Stevens' policy concerns, is Justice Blackmun's view that "the Sixth Amendment does not allow the prosecution to take undue advantage of any gap between the commencement of the adversary process and the time at which counsel is appointed for a defendant."[266] This concern of Justice Blackmun extends beyond the mere disadvantage suffered by Patterson in this case. Forcing the state to prove itself in an arena which is defined by adversarial forces, is at the base of our judicial system's truth-determining process. The purpose of the sixth amendment is to assure that in any "criminal prosecutio[n],"[267] the accused shall not be left to his own devices in facing the " 'prosecutorial forces of organized society.' "[268] By its very terms, it becomes applicable only when the government's role shifts from investigation to accusation. For it is only then that the assistance of one versed in the "intricacies of . . . law,"[269] is needed to assure that

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proach certainty until the government's evidence crosses the line between a strong case and an overwhelming one. For that reason, the investigative process often continues after the commencement of adversary proceedings as the prosecution seeks to present the strongest possible case at trial.

Id. at 20.

264 *Patterson*, 108 S. Ct. at 2402 (Stevens, J., dissenting). *See also* Jurek v. Estelle, 623 F.2d 929, 939-40 (5th Cir. 1980)(defendant's voluntary first confession properly admitted at trial, but defendant's second confession improperly admitted because involuntary and induced by "prosecutorial drive for death penalty" after crime had been solved). Furthermore, the probability of eliciting a confession after an indictment has been filed is minimal. In 1963, the United States Attorney for the District of Columbia, Dean Acheson, affirmatively testified as to the unlikely success of eliciting a confession in the post-indictment stage. According to Acheson, a high percentage of confessions occur within three hours after arrest, if they are to occur at all. *Hearings on H.R. 7525 and S. 486 Before the Senate Commission on the District of Columbia*, 88th Cong., 1st Sess. 443 (1963).

265 *Patterson*, 108 S. Ct. at 2404 (Stevens, J., dissenting); *See supra* notes 140-178 and accompanying text.

266 *Patterson*, 108 S. Ct. at 2399 (Blackmun, J., dissenting).

267 U.S. CONST. amend. VI.

268 Maine v. Moulton, 474 U.S. 159, 170 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)).

269 *Id.*

the prosecution's case encounters "*the crucible of meaningful adversarial testing*."[270]

The strength of the dissenting opinions, in conjunction with the rationale proffered in this Note, lead to the conclusion that Patterson did not "knowingly and intelligently" waive his sixth amendment right to have counsel present at post-indictment questioning, regardless of the majority's attempt to narrowly carve out an exception to the "presumption against waiver" previously established by the Court.[271] In summary, the rationale of the majority's holding in *Patterson v. Illinois* is erroneous because it fails to follow the underlying principles of precedent, and runs counter to the substantive, procedural, ethical and policy concerns of our adversary system.

E. THE EFFECTS OF *PATTERSON* ON SIXTH AMENDMENT WAIVERS WHERE THE DEFENDANT IS NOT TOLD OF HIS INDICTMENT

In reaching its decision, the *Patterson* Court expressly declined to rule on the issue of "whether or not an accused must be told that he has been indicted before a postindictment Sixth Amendment waiver will be valid."[272] This Note, although recognizing that the reasoning in *Patterson* may lead a subsequent Court to answer this question negatively, concludes that, if an accused must be made aware of the consequences he or she faces by waiving his or her right to counsel, then informing the accused of the indictment is necessary.

The majority maintains that *Miranda* warnings apprise the accused of the "ultimate adverse consequence"—that anything he or she might say can be used against him or her at trial.[273] This is not enough, however, to make the accused sufficiently aware of the "dangers and disadvantages of self-representation"[274] so that the accused's waiver will be "made with eyes open."[275] One inadequacy of the *Miranda* warnings is that they do not inform an accused that criminal litigation is impending. This omission might cause the accused to underestimate the strength of the government's case against him or her and, concomitantly, the prudence of requesting counsel's aid. Even though the accused may be aware of the ultimate adverse consequence of his or her waiver, by virtue of the *Mi-*

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270 United States v. Cronic, 466 U.S. 648, 656 (1984)(emphasis added).

271 The Court's holding was narrowly limited to post-indictees, in an interrogational setting, who have been informed of their charge. *Patterson*, 108 S. Ct. at 2397 n.8.

272 *Id.*

273 *Id.* at 2395-96.

274 *Faretta*, 422 U.S. at 835.

275 Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942).

randa warnings, the accused's eyes are not open to the fact that this ultimate adverse consequence is forthcoming—a fact that would be communicated by informing him or her of the indictment.

In evaluating the benefits or necessity of counsel at the interrogational stage, or at any post-indictment stage, an accused certainly needs to be aware that the government has secured enough evidence to establish a prima facie case[276] and that the "prosecutorial forces of organized society"[277] have been mobilized against him or her. Therefore, only by additionally informing the accused that formal charges have been filed, and consequently, that the "the government has committed itself to prosecute,"[278] can the accused properly assess the benefits of counsel "with eyes open."[279]

A decision which had made "knowledge of indictment" a procedural requirement for a valid sixth amendment waiver would have been more consistent with the holdings of *Powell* and its progeny which have critically emphasized the filing of formal charges as a major alteration in the relationship between the defendant and the state in the criminal process.[280] Likewise, such a decision would be in keeping with the reasoning of lower courts that have upheld the efficacy of the fifth amendment formula.[281] Those courts, like the Illinois Supreme Court in *Patterson*,[282] interpreted the sixth amendment right to counsel as requiring that the accused, in addition to the *Miranda* warnings, must be made aware "of the gravity of his situation" before a valid waiver can be properly executed.[283] According to these courts, one is aware of the gravity of the situation when one has been told of his or her indictment.[284]

Moreover, the execution of this added procedural requirement would not be cumbersome upon law enforcement officials, who

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276 *Patterson*, 108 S. Ct. at 2402.

277 *Kirby*, 406 U.S. at 689.

278 *Id.*

279 *Faretta*, 422 U.S. at 835.

280 *See supra* notes 174-183 and accompanying text for examples of holdings of *Powell* and its progeny.

281 *Patterson*, 108 S. Ct. at 2396 n.8 ("[T]hose lower court cases which have suggested that something beyond *Miranda* warnings is—or may be—required before a Sixth Amendment waiver can be considered "knowing and intelligent" have . . . occasional[ly] suggest[ed] that, in addition . . . an accused should be informed that he has been indicted.").

282 People v. Thomas, 116 Ill. 2d 290, 507 N.E.2d 843 (1987), *aff'd sub nom.* Patterson v. Illinois, 108 S. Ct. 2389 (1988).

283 *Thomas*, 116 Ill. 2d at 299-300, 507 N.E.2d at 846-47.

284 *See, e.g.*, United States v. Mohabir, 624 F.2d 1140, 1150 (2d Cir. 1980); United States v. Payton, 615 F.2d 922, 924-25 (1st Cir.), *cert. denied*, 446 U.S. 969 (1980); People v. Owens, 102 Ill. 2d 88, 464 N.E.2d 261 (1984); *Thomas*, 116 Ill. 2d at 299-300, 507 N.E.2d at 846-47.

would merely have to precede the warnings they must normally administer with a statement concerning the accused's indictment.[285] In Patterson's case, Officer Gresham disposed of this requirement by simply informing Patterson "that a Grand Jury indictment had just been handed down"[286] and that he had been charged with the offense of "murder and armed violence."[287]

Furthermore, the lesson in *Wheat v. United States*[288] is particularly applicable to this issue. In *Wheat*, the Supreme Court held that the "courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them."[289] Witholding pertinent information from an accused about his or her status—in effect keeping the accused guessing about information that could be easily conveyed—and calling upon him or her to make critical decisions without the benefit of this knowledge will certainly be viewed by the public as unfair. One can imagine the effect on a jury that would result from the following examination at trial: Question: "Why didn't you tell the defendant that he had been indicted and was now facing the mobilized prosecutorial forces of the state so that he could properly evaluate the benefits of counsel given all the relevant facts?" Answer: "Because he didn't ask me."

The danger of *Patterson* is that a strict and myopic application of the majority's reasoning might obviate the need for such indictment-knowledge. In *Patterson*, the majority reasoned that the virtual identity between a post-indictment defendant who fails to exercise his or her sixth amendment right to counsel, and a preindictee who has also declined to request representation, as well as the similarity

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285 *But see* Brewer v. Williams, 430 U.S. 387 (White, J., dissenting) which stated that:

> [t]here is absolutely no reason to require an additional question to *the already cumbersome Miranda* litany just because the majority finds another case—Massiah v. United States—providing exactly the same right to counsel as that involved in *Miranda*. . . . If an intentional relinquishment of the right to counsel under *Miranda* is established by proof that the accused was informed of his right and then voluntarily answered questions in counsel's absence, then similar proof establishes an intentional relinquishment of the *Massiah* right to counsel.

Id. at 436 n.5 (White, J., dissenting) (emphasis added). It is significant to note, however, that the Court in *Brewer* did not specifically address the question at issue here because the defendant had already been arrested, *arraigned*, committed to jail and was free on bail when the state's investigatory conduct was challenged as sixth amendment violative. *Id.* at 391.

286 Joint Appendix at 6, People v. Thomas, 116 Ill. 2d 290, 507 N.E.2d 843 (1980)(Nos. 63144, 63149).

287 *Id.*

288 108 S. Ct. 1692 (1988).

289 *Id.* at 1697. *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)("The public conscience must be satisfied that fairness dominates the administration of justice.").

of a lawyer's function in the two contexts, supports the conclusion that the fifth amendment formula should suffice to establish a knowing and intelligent waiver of the two rights.[290] In doing so, the *Patterson* majority distanced itself from the precedents which underscored the important differences between the fifth and sixth amendment rights to counsel. Further, even though the Court was not addressing the issue of whether indictment-knowledge is necessary, it did hold that there is little else, if anything, which could be added to the *Miranda* warnings in order to more clearly apprise the accused of the consequences of his or her waiver.[291]

In light of these identities, drawn by the majority from the fifth and sixth amendment settings, and the Court's unwillingness to augment the *Miranda* warnings, it is conceivable that the Court would refuse to make a partial retreat from this reasoning and hold, in a later case, that an accused does not have to be additionally informed that formal charges have been filed against him or her.

V. CONCLUSION

In *Patterson v. Illinois*, the Supreme Court significantly withdrew from prior cases which have emphasized the need to protect an accused's right to counsel at every stage of the adversary proceeding. The Court held that the sixth amendment right to counsel is not violated by the occurrence of uncounseled, state-initiated, post-indictment interrogation, provided that it is preceded by a "knowing and intelligent" waiver by the accused.[292] According to the Court, a valid waiver in this context is evidenced by proper state administration of the accused's *Miranda* warnings.

The Court's holding is erroneous because it is premised on two individually faulty equations formulated by the majority: an analogy between counsel's function at pre-indictment questioning and counsel's function at post-indictment interrogation; and, an analogy between Patterson—a post-indictment accused—and a pre-indictment suspect. These equivalencies, established by the majority, are erroneous for a number of reasons, not the least of which are the substantive, procedural, and policy-oriented differences which divide the fifth and sixth amendment stages of the criminal process.

The effect of the Supreme Court's holding in *Patterson v. Illinois* is disturbing. The Court's determination to find a waiver, and its application of the fifth amendment formula for waiver to a sixth

290 *Patterson*, 108 S. Ct. at 2389-99.
291 *Id.* at 2395-96.
292 *Id.* at 2396-97.

amendment context, will have the unfortunate effect of increasing the chance that a post-indictee's right to counsel will be compromised at other critical stages of the adversary process. The only comforting factor—if it can be called that—is the narrow application of this holding, which restricts the scope of *Patterson* to situations in which the accused is in a post-indictment, interrogational setting, and has been told of his or her indictment.

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