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Is the Temple Collapsing: Montejo v. Louisiana and the Extent of the Right to Counsel in Criminal Proceedings

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IS THE TEMPLE COLLAPSING?: *MONTEJO V. LOUISIANA* AND THE EXTENT OF THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS

I. INTRODUCTION

The right to counsel for a criminal suspect rests on both the Fifth and Sixth Amendments. The Sixth Amendment explicitly provides that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."[1] The Fifth Amendment provides that no one "shall be compelled in any criminal case to be a witness against himself."[2] In *Miranda v. Arizona*,[3] the Supreme Court opined that custodial interrogation "operates on the individual to overcome free choice" and prevents the exercise of the Fifth Amendment privilege against self-incrimination.[4] Thus, an individual may have an attorney present during a custodial investigation because of the implications at a later trial, and the police "must make known to him that he is entitled to a lawyer."[5] In *Miranda*, the Court concluded that the Fifth Amendment requires police to give an individual advance notice of these rights.[6] If subsequently charged, an individual can utilize the Sixth Amendment, which provides the right to counsel during the proceedings.[7] Delineating the extent of and relationship between these protections, however, has proven to be a complex task for courts.

This Note analyzes the impact of the recent case of *Montejo v. Louisiana*[8] on this area of criminal procedure and focuses on its ramifications for South Carolina. Part II discusses the development of the Supreme Court's right-to-counsel jurisprudence and concludes with a discussion of *Montejo*. Next, Part III details South Carolina's case law in this area. Part IV focuses on the implications of *Montejo* and argues that the case, among others, represents a movement away from the core principles that the Court has traditionally protected. Part V examines *Montejo*'s impact on South Carolina and suggests why and how South Carolina should avoid reconsidering, and needlessly complicating, its right-to-counsel jurisprudence.

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1. U.S. CONST. amend. VI.
2. *Id.* amend. V.
3. 384 U.S. 436 (1966).
4. *Id.* at 474.
5. *Id.*
6. *See id.* at 479. The Court stated the following:

> [W]hen an individual is taken into custody . . . [h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 478–79.
7. *See* U.S. CONST. amend. VI.
8. 129 S. Ct. 2079 (2009).

II. THE DEVELOPMENT OF RIGHT TO COUNSEL PROTECTIONS

A. The Fifth Amendment

The debate over the extent of the right-to-counsel protections begins with *Miranda*. In *Miranda*, the Court stated that if an individual requests an attorney, "the interrogation must cease until an attorney is present."[9] But this general statement did not provide complete guidance for all aspects of custodial police questioning. In fact, ten years after the decision, again in Arizona, a new problem arose in *Edwards v. Arizona*.[10] In that case, police arrested a suspect, Edwards, and interviewed him for a time before he requested an attorney.[11] The police returned the next morning, initiated talks with Edwards, and informed him that "he had" to talk to the officers even though he had not yet spoken with an attorney as he had requested.[12] Edwards then confessed, but he later moved to suppress the confession, arguing that the police violated *Miranda* when they initiated interrogation after he invoked his right to counsel.[13] The Supreme Court held that the police's conduct "violated [Edwards's] rights under the Fifth and Fourteenth Amendments as construed in *Miranda*."[14] The Court clarified *Miranda* and held "that an accused, such as Edwards, 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 made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[15]

In *Edwards*, the dispositive issue was whether Edwards validly waived his Fifth Amendment right.[16] A valid waiver must be voluntary and must "constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege."[17] The Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further *police-initiated* custodial interrogation even if he has been advised of his rights."[18] Because Edwards made his statements to the police after requesting counsel and because the police initiated the contact, he did not validly waive his right to counsel, and the statement was inadmissible.[19]

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9. *Miranda*, 384 U.S. at 474.
10. 451 U.S. 477 (1981).
11. *See id.* at 478–79.
12. *See id.* at 479 (internal quotation marks omitted). This time, two detectives interrogated Edwards, not the officer who had interrogated him the day before. *See id.*
13. *See id.*
14. *Id.* at 480.
15. *Id.* at 484–85.
16. *See id.* at 482.
17. *Id.* (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
18. *Id.* at 484 (emphasis added).
19. *See id.* at 487.

In *Minnick v. Mississippi*[20] the Supreme Court offered further clarification of the rule announced in *Edwards*. In that case, the police arrested a suspect, Minnick, who then requested a lawyer.[21] Minnick consulted with his lawyer on several occasions before police initiated further interrogation.[22] During this subsequent interrogation, held outside the presence of his attorney, Minnick confessed.[23] Minnick never signed a rights waiver form even though the police offered him one.[24] Minnick was convicted of murder, but he argued that use of his confession violated his Fifth and Sixth Amendment right to counsel.[25] The Mississippi Supreme Court determined that once a suspect confers with counsel, it terminates the protections in *Edwards*.[26] The Supreme Court disagreed and noted that cases since *Edwards* have emphasized the necessity of counsel's presence.[27] The Court further clarified the issue by holding that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney."[28] The Court acknowledged that to hold otherwise could lead to a confusing situation in which the protections of *Edwards* passed "in and out of existence."[29] Other cases have clarified the scope of *Edwards*,[30] the standard for its invocation,[31] the meaning of custody,[32] and the meaning of interrogation.[33]

B. The Sixth Amendment

Once the judicial process begins, the Sixth Amendment protections apply. The one-time suspect, now a defendant, has the right to have counsel present at all "critical" stages of the criminal proceedings.[34] Central, of course, to this protection is the right to counsel during trial.[35] Such critical stages also include

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20. 498 U.S. 146 (1990).
21. *See id.* at 148–49.
22. *See id.* at 149.
23. *See id.*
24. *See id.* at 148–49.
25. *See id.* at 149.
26. *See id.* at 151.
27. *See id.* at 152–53.
28. *Id.* at 153.
29. *Id.* at 154.
30. *See* Arizona v. Roberson, 486 U.S. 675, 682 (1988) (holding that *Edwards*'s protections extend to all crimes, not just the one for which the suspect has been arrested or detained).
31. *See* Davis v. United States, 512 U.S. 452, 459 (1994) (holding that an invocation must be made "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney").
32. *See* Berkemer v. McCarty, 468 U.S. 420, 439–40 (1984) (holding that a traffic stop did not constitute custody).
33. *See* Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980) (holding that "express questioning or its functional equivalent" constitutes interrogation).
34. United States v. Wade, 388 U.S. 218, 227 (1967).
35. United States v. Cronic, 466 U.S. 648, 654 (1984) (citing United States v. Ash, 413 U.S. 300, 309 (1973)).

situations where, as at trial, the defendant is "'confronted with both the intricacies of the law and the advocacy of the public prosecutor'"[36]—such as interrogation.[37] The Court has held that if police officers interrogate a defendant without counsel present and obtain incriminating statements, then they violate the Sixth Amendment.[38] A defendant, however, may waive this right so long as the decision to waive is "voluntary, knowing, and intelligent."[39] A defendant need not have the assistance of counsel in order to waive this right.[40]

In *Michigan v. Jackson*,[41] the Court provided another layer of protection for defendants. In *Jackson*, the Court granted certiorari to the Michigan Supreme Court to review two cases that court had consolidated.[42] In both cases, police arrested and questioned a suspect about a particular crime.[43] Neither suspect confessed, and both were subsequently arraigned.[44] At their arraignments, both suspects requested the appointment of counsel.[45] But before they consulted with counsel, the police, in both cases, initiated another round of interrogations with the defendants.[46] This time, both defendants confessed.[47] Additionally, both suspects signed forms waiving their respective rights to counsel during these postarraignment custodial interrogations.[48]

At first blush, these facts would appear to fall squarely within the rule established in *Edwards*[49] and render the confession invalid. *Edwards*, however, rested upon the Fifth Amendment, and these cases fell within the ambit of the Sixth Amendment because the arraignments signaled the beginning of the judicial process.[50] The Michigan Supreme Court held that both statements should have been suppressed and reasoned that the *Edwards* rule "applie[d] by analogy."[51] The Supreme Court of the United States affirmed.[52] The Court noted that the right to counsel in this case rested on two sources: the Fifth and Sixth

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36. United States v. Gouveia, 467 U.S. 180, 188–89 (1984) (quoting *Ash*, 413 U.S. at 309).

37. *See* Massiah v. United States, 377 U.S. 201, 205–06 (1964) (holding that the Sixth Amendment protections applied where the defendant had been arraigned).

38. *See* Fellers v. United States, 540 U.S. 519, 523 (2004) (citing *Massiah*, 377 U.S. at 206).

39. Michigan v. Harvey, 494 U.S. 344, 348–49 (1990) (citing Patterson v. Illinois, 487 U.S. 285, 292 & n.4 (1988); Brewer v. Williams, 430 U.S. 387, 404 (1977)).

40. *See id.* at 352.

41. 475 U.S. 625 (1986), *overruled by* Montejo v. Louisiana, 129 S. Ct. 2079 (2009).

42. *See id.* at 628–29.

43. *See id.* at 627–28.

44. *See id.*

45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.* at 631.

49. *See* Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).

50. *See* United States v. Gouveia, 467 U.S. 180, 188 (1984) (citing Kirby v. Illinois, 406 U.S. 682, 688–89 (1972)).

51. People v. Bladel, 365 N.W.2d 56, 68–69 (Mich. 1984), *aff'd sub nom.* Michigan v. Jackson, 475 U.S. 625 (1986).

52. *Jackson*, 475 U.S. at 629.

Amendments.[53] In responding to the prosecution's argument that this differing legal basis should lead to a different result in these cases than it did in *Edwards*, the Court reasoned that "a postarraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation."[54]

The Court determined that the dispositive question was whether the defendants had validly waived the right to counsel prior to the confessions.[55] The Court, as it did in *Edwards*, held that a defendant could not validly waive his right to counsel after invoking it where the police initiated the questioning.[56] The assertion of the right to counsel, the Court reasoned, "is no less significant," nor is the "need for additional safeguards no less clear" in the Sixth Amendment context.[57] The Court expressly stated that the Sixth Amendment did not require a different result than *Edwards* commanded under the Fifth Amendment.[58] Even a written waiver would be "insufficient to justify police-initiated interrogations after the request for counsel."[59] Moreover, the Court held that the Sixth Amendment mandates that "we impute the State's knowledge from one state actor to another."[60] Thus, the police could not claim to have been uninformed of a defendant's assertion of his rights.[61] The Court ultimately held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."[62]

Then-Justice Rehnquist authored a strong dissent in *Jackson*.[63] Justice Rehnquist refused to accept the majority's "neat syllogism" in which it reasoned that the *Edwards* rule made sense in a Sixth Amendment context.[64] He reasoned that that the "prophylactic rule" in *Edwards* did not make sense in a Sixth Amendment context.[65] Justice Rehnquist noted that the Court in *Edwards* "did not confer a substantive constitutional right"; rather, it "created a protective umbrella" that augmented Fifth Amendment protections.[66] Thus, *Edwards*, Justice Rehnquist reasoned, merely provided a "second layer of protection" to

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53. *See id.*
54. *Id.* at 632.
55. *Id.* at 630.
56. *See id.* at 635 (citing Edwards v. Arizona, 451 U.S. 477, 484 (1981)).
57. *Id.* at 636.
58. *See id.* at 635.
59. *Id.*
60. *Id.* at 634.
61. *See id.*
62. *Id.* at 636.
63. *See id.* at 637 (Rehnquist, J., dissenting).
64. *Id.*
65. *Id.* at 638 (internal quotation marks omitted).
66. *Id.* (quoting Solem v. Stumes, 465 U.S. 638, 644 n.4 (1984)) (internal quotation marks omitted). *But see* Dickerson v. United States, 530 U.S. 428, 432 (2000) (holding that *Miranda* is constitutionally mandated, not a judicially created prophylactic rule).

the protection *Miranda* afforded.[67] He noted that the Fifth Amendment provides no right to counsel; rather, the right to counsel afforded by *Miranda* protects the privilege against self-incrimination.[68] One goal of *Miranda* was to prevent police from "badgering" suspects and forcing confessions.[69] Justice Rehnquist thus reduced the issue in *Jackson* to whether such a prophylactic rule was needed to protect the Sixth Amendment right to counsel—and he answered no.[70]

Justice Rehnquist argued that the majority tore the "*Edwards* rule loose from its analytical moorings" and that the rule they proffered "makes no sense at all except when linked to the Fifth Amendment's prohibition against compelled self-incrimination."[71] He noted that the majority rule requires the defendant to assert the right to counsel.[72] However, the Sixth Amendment right does not depend upon whether or not a request has been made.[73] As a result, the majority's rule places a great deal of weight "on the otherwise legally insignificant request" itself.[74] The rule requires the defendant to make "an explicit request" in order to benefit from its protections.[75] Accordingly, Justice Rehnquist criticized the majority's decision as lacking "a coherent, analytically sound basis" and concluded that he would not extend the *Edwards* prophylactic rule to the Sixth Amendment context.[76]

C. *Waivers*

An accused may waive any of these rights. Though *Edwards* established that when police initiate an interrogation in a custodial setting, a valid waiver cannot be established,[77] if the defendant initiates the contact, he may waive his rights.[78] The standard is that any waiver must be not only voluntary but also made knowingly and intelligently.[79] In *Brewer v. Williams*,[80] the Court held that the same standard applied when waiving the right to have an attorney present during a critical stage of the proceedings under the Sixth Amendment.[81]

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67. *Jackson*, 475 U.S. at 639.
68. *Id.* n.2.
69. *See id.* at 638 (internal quotation marks omitted).
70. *See id.* at 639.
71. *Id.* at 640.
72. *See id.*
73. *Id.* at 641.
74. *Id.* at 642.
75. *Id.*
76. *Id.*
77. Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).
78. *Id.*
79. Miranda v. Arizona, 384 U.S. 436, 475 (1966) (citing Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964)).
80. 430 U.S. 387 (1977).
81. *Id.* at 404 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 238–40 (1973); United States v. Wade, 388 U.S. 218, 237 (1967)).

In *Patterson v. Illinois*,[82] the Supreme Court addressed the question of the extent of the *Miranda* warning.[83] The Court found that the *Miranda* warning also "apprised [the defendant] of the nature of his Sixth Amendment rights."[84] Accordingly, any waiver of counsel would not only be "a knowing and intelligent one" but would suffice to waive the right to counsel under both the Fifth and Sixth Amendments.[85] The Court noted that this would not hold true in all situations.[86] For example, a waiver of the right to counsel where the police did not inform a suspect that an attorney was trying to contact him is still a valid waiver in a Fifth Amendment context, but the Court stated that the waiver would not be valid in the Sixth Amendment context.[87] The reverse, however, is not true: an invocation of the Sixth Amendment right to counsel does not invoke that right as it is understood under the Fifth Amendment.[88] This distinction is important because "[t]he Sixth Amendment right . . . is offense specific."[89] Thus, where a suspect requests counsel at an arraignment for a particular charge, he has invoked the protection of counsel only for that charge, and confessions regarding other crimes are not protected.[90]

D. Montejo v. Louisiana *and the Right to Counsel Reconsidered*

Justice Rehnquist intimated that the rule announced in *Jackson* could lead to difficulty where the defendant did not actually request counsel.[91] *Montejo v. Louisiana* came to the Supreme Court on just such facts.[92] Police arrested Jesse Montejo in connection with a robbery and a murder.[93] Montejo waived his *Miranda* rights, and police proceeded to interrogate him.[94] Police subsequently brought Montejo before a court for a preliminary hearing.[95] At the hearing, the court appointed the Office of Indigent Defender to represent Montejo.[96] Montejo, however, did not affirmatively demonstrate his desire for counsel.[97] Police

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82. 487 U.S. 285 (1988).
83. *See id.* at 293–94.
84. *Id.* at 296.
85. *Id.*
86. *See id.* n.9.
87. *See id.*
88. McNeil v. Wisconsin, 501 U.S. 171, 178 (1991).
89. *Id.* at 175. *Montejo* casts some doubt on this line of cases, *see* discussion *infra* Part IV.C, but at least one court has continued to follow these distinctions after *Montejo*. *See* Flores v. State, 299 S.W.3d 843, 852–53 (Tex. App. 2009).
90. *See McNeil*, 501 U.S. at 177. In *McNeil*, the suspect had "expressly waived his *Miranda* right to counsel." *Id.*
91. *See* Michigan v. Jackson, 475 U.S. 625, 642 (1986) (Rehnquist, J., dissenting), *overruled by* Montejo v. Louisiana, 129 S. Ct. 2079 (2009).
92. *See Montejo*, 129 S. Ct. at 2082.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *See id.* at 2087.

returned that same day to further question Montejo, who "wrote an inculpatory letter of apology."[98] The court later admitted the letter at trial, an admission that lead to Montejo's conviction and death sentence.[99] At trial, Montejo, citing *Michigan v. Jackson*, argued that the letter should not have been admitted, but the trial court admitted the letter, and the Louisiana Supreme Court affirmed.[100] The Louisiana Supreme Court reasoned that the rule in *Jackson* required an actual request for counsel.[101] Montejo made no such request and, as a result, did not invoke the protections of *Jackson*'s rule.[102] *Montejo* thus forced the Supreme Court to consider the "continued viability of the rule announced . . . in *Michigan v. Jackson*," which "forb[ade] police to initiate interrogation of a criminal defendant [after] he has requested counsel at an arraignment or similar proceeding."[103]

The Court first analyzed the Louisiana Supreme Court's interpretation of the rule announced in *Jackson*.[104] The Court acknowledged that the rule would work in states that required the defendant to make an affirmative request for counsel.[105] But where a state's laws require an automatic appointment of counsel,[106] as in Louisiana, the Louisiana Supreme Court's rule would be much more difficult to apply.[107] Such application would require either an intense factual analysis to determine if the defendant somehow invoked the right or a categorical determination that these defendants did not have an opportunity to invoke the right.[108] Additionally, Montejo failed to persuade the Court that *Jackson* applies automatically once a defendant is represented.[109]

The Court identified the issue in *Montejo* as whether a court "must *presume*" that a waiver of a defendant's right to counsel after invoking it is invalid.[110] It recognized that the defendant clearly had the right to counsel after the judicial process had begun[111] and that any waiver of that right must be "voluntary, knowing, and intelligent."[112] The Court emphasized that these tenets were not at

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98. *Id.* at 2082.

99. *See id.*

100. *See id.* at 2082–83 (citing State v. Montejo (*Montejo I*), 974 So. 2d 1238, 1261 (La. 2008)).

101. *Id.* at 2083 (citing *Montejo I*, 974 So. 2d at 1260–61 & n.68).

102. *See id.*

103. *Id.* at 2082 (citation omitted).

104. *See id.* at 2083.

105. *See id.* This rule would also function in South Carolina because a suspect typically makes an affirmative request. *See infra* notes 167–69 and accompanying text.

106. *See, e.g.*, KAN. STAT. ANN. § 22-4503(c) (2007) (requiring automatic appointment of counsel upon finding of indigency).

107. *See Montejo*, 129 S. Ct. at 2084.

108. *See id.*

109. *See id.* at 2085.

110. *Id.* (citing Michigan v. Jackson, 475 U.S. 625, 630, 633 (1986)).

111. *See id.* (citing United States v. Wade, 388 U.S. 218, 227–28 (1967); Powell v. Alabama, 287 U.S. 45, 57 (1932)).

112. *Id.* (citing Patterson v. Illinois, 487 U.S. 285, 292 n.4 (1988); Brewer v. Williams, 430 U.S. 387, 404 (1977); Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

issue and focused on the "prophylactic" rule announced in *Jackson*.[113] It analyzed *Jackson*'s presumption that any statement, including one accompanied by a waiver, is presumed invalid.[114] The Court identified the purpose of the rule as the prevention of police badgering.[115] This antibadgering rationale, the Court argued, explained "*Jackson*'s repeated citations of *Edwards*."[116] In *Jackson*, the Court wanted to prevent suspects from invoking their rights under *Miranda* only to have the police obtain a waiver involuntarily.[117]

The majority also reasoned that, absent an initial invocation, "[n]o reason exists to assume that a defendant like Montejo . . . would not be perfectly amenable to speaking with the police without having counsel present."[118] The *Edwards* and, by implication, *Jackson* rules prevent police from "badgering defendants into changing their minds" about their assertion of the right to counsel.[119] But a defendant who has not yet requested "counsel has not yet made up his mind in the first instance."[120] Montejo would have had the Court prevent all questioning, but the Court disagreed.[121] The Court drew on Justice Rehnquist's dissent in *Jackson*, in which Rehnquist reasoned, without contradiction from the majority, that the rule did not prohibit all police-initiated interrogations "'with or without a request for counsel.'"[122] Accordingly, it rejected Montejo's argument.[123]

The Court's line of reasoning, however, ran afoul of *Jackson* and necessitated a discussion of stare decisis and the retention of the rule announced in that case.[124] The Court could not simply eliminate the invocation requirement of *Jackson*, which would depart from that decision's rationale, and it was not willing to require an invocation because such a rule would be unworkable.[125] The Court next turned to a stare decisis examination to determine if the rule from *Jackson* had proven "unworkable"—a traditional ground for overturning a decision—as well as whether, for other reasons, the decision should be retained.[126] The Court quickly dismissed any reliance concerns regarding a

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113. *See id.*
114. *See id.* at 2085–86.
115. *Id.* at 2085 (citing Michigan v. Harvey, 494 U.S. 344, 350 (1990)).
116. *Id.* at 2086.
117. *See id.* (citing *Harvey*, 494 U.S. at 350).
118. *Id.* at 2086–87.
119. *Id.* at 2087.
120. *Id.*
121. *See id.*
122. *Id.* (quoting Michigan v. Jackson, 475 U.S. 625, 640 (1986) (Rehnquist, J., dissenting)) (internal quotation marks omitted).
123. *Id.* at 2091.
124. *See id.* at 2088.
125. *See id.* The Court rejected as unworkable the Louisiana Supreme Court's interpretation of the *Jackson* rule, which would have required a defendant to make an express invocation of the right to counsel. *See id.* at 2083–84.
126. *Id.* at 2088 (quoting Payne v. Tennessee, 501 U.S. 808, 827 (1991)) (internal quotation marks omitted).

criminal defendant, reasoning that a criminal who knew of *Jackson* protection would be savvy enough to work with police on his own.[127] Moreover, any police reliance on the rule would be moot because police could certainly still refrain from initiating contact with defendants after the defendant has invoked the right to counsel.[128]

The Court next turned to an analysis of the reasoning undergirding the *Jackson* rule.[129] Because the *Jackson* holding was a prophylactic rule, the Court determined that the relevant analysis called for a weighing of the rule's benefits against its costs.[130] In this case, the costs—society's interest in punishing criminals—outweighed the benefits—the number of confessions suppressed because of coercive conduct by the police.[131] The Court reasoned that the benefit of the bright-line rule in *Jackson* was that it prevented any "badgering-induced involuntary waivers" from ever being erroneously admitted at trial.[132] A line of other cases, however, already provided several layers of protections designed to prevent just such an occurrence.[133] *Miranda*, the first layer, protected the right against self-incrimination by extending the right to counsel to the custodial setting.[134] *Edwards*, clarifying *Miranda*, required police to stop interrogation once a suspect invokes the right to counsel.[135] Finally, *Minnick* mandated that police may not interrogate a defendant until counsel is present, "'whether or not the accused has consulted with his attorney.'"[136] The Court concluded that "[t]hese three layers of prophylaxis are sufficient" to prevent badgering.[137]

The Court reasoned that the prophylaxis layers already in place would extend to cover a suspect after his arraignment.[138] Such coverage would render *Jackson* "superfluous."[139] Nor did the Court find the difference in Fifth and Sixth Amendment contexts compelling.[140] The prior line of cases protects the right to have counsel present during custodial interrogation, a right "guaranteed . . . by *two* sources of law."[141] Because any waiver must be made using the same procedure, the doctrines protecting the voluntariness of a waiver under the Fifth

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127. *See id.* at 2089.
128. *Id.*
129. *See id.*
130. *See id.* (citing Minnick v. Mississippi, 498 U.S. 146, 161 (1990) (Scalia, J., dissenting)). The Court has used a similar analysis in a line of recent cases dealing with the rights of a criminal defendant. *See infra* Part IV.B.
131. *Id.* (citing Moran v. Burbine, 475 U.S. 412, 426 (1986)).
132. *Id.*
133. *See id.* at 2089–90 (citing *Minnick*, 498 U.S. at 153; Edwards v. Arizona, 451 U.S. 477, 484 (1981); Miranda v. Arizona, 384 U.S. 436, 474 (1966)).
134. *See id.* at 2089 (citing *Miranda*, 384 U.S. at 474).
135. *See id.* at 2089–90 (citing *Edwards*, 451 U.S. at 484).
136. *See id.* at 2090 (quoting *Minnick*, 498 U.S. at 153).
137. *Id.*
138. *See id.*
139. *Id.*
140. *See id.*
141. *Id.*

Amendment would apply to a waiver of the Sixth Amendment right to counsel as well.[142] Thus, prior cases already served the underlying policy of *Jackson*, and accordingly, the Court determined that "[t]here is no need to take *Jackson*'s further step of requiring voluntariness on stilts."[143] Were the Court to leave the bright-line rule of *Jackson* intact in addition to the existing protections, the cost of "'letting guilty and possibly dangerous criminals go free'" because of the exclusionary rule would prove too high.[144] Thus, the Court overturned *Michigan v. Jackson* and removed its "fourth story of prophylaxis."[145] In conclusion, the Court quoted Justice Jackson's caveat that the "Court 'is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.'"[146]

The Court split five to four, with Justices Ginsburg, Breyer, and Souter joining Justice Stevens's dissent.[147] Justice Stevens's dissent centered on his differing perception of the rule in *Jackson*.[148] Rather than conceiving the rule solely as a protection against police badgering, Justice Stevens understood *Jackson* to protect the Sixth Amendment right to counsel.[149] He warned that the majority "flagrantly misrepresent[ed] *Jackson*'s underlying rationale" by reducing it solely to an antibadgering protection.[150] The *Jackson* opinion, Justice Stevens noted, did not even mention an antibadgering justification.[151] Instead, according to Justice Stevens, the opinion rested on Sixth Amendment cases discussing the right to counsel.[152] To Justice Stevens, the creation of the attorney–client relationship demanded "the full constitutional protection afforded by the Sixth Amendment."[153] Thus, the *Jackson* rule did more than simply prevent police badgering: it protected a defendant in any police-initiated interrogation and assured that any waiver of counsel would be valid.[154]

A proper focus on the Sixth Amendment context, Justice Stevens argued, demonstrated that the majority improperly overturned *Jackson*.[155] Though the majority dismissed *Jackson*'s reasoning using a cost–benefit analysis,[156] Justice

142. *Id.* (citing Patterson v. Illinois, 487 U.S. 285, 296 (1988)).
143. *Id.*
144. *Id.* (quoting Herring v. United States, 129 S. Ct. 695, 701 (2009)).
145. *Id.* at 2091–92.
146. *Id.* at 2092 (quoting Douglas v. City of Jeannette, 319 U.S. 157, 181 (1943) (Jackson, J., concurring in the result)).
147. *See id.* at 2094 (Stevens, J., dissenting).
148. *See id.* at 2096.
149. *See id.*
150. *Id.*
151. *Id.* Justice Stevens authored the *Jackson* opinion. *See* Michigan v. Jackson, 475 U.S. 625, 626 (1986), *overruled by* Montejo v. Louisiana, 129 S. Ct. 2079 (2009).
152. *Montejo*, 129 S. Ct. at 2096 (Stevens, J., dissenting) (citing *Jackson*, 475 U.S. at 631–32).
153. *Id.* at 2095.
154. *Id.* at 2096 n.2.
155. *Id.* at 2097.
156. *See id.* at 2089 (majority opinion) (citing Minnick v. Mississippi, 498 U.S. 146, 161 (1990) (Scalia, J., dissenting)).

Stevens argued that the majority misapplied the test based on its misunderstanding of *Jackson*'s purpose.[157] Moreover, he argued that the Sixth Amendment concerns constitute a much greater reliance interest that militated against overturning *Jackson*.[158] According to Justice Stevens, the public's interest in knowing that counsel may be relied upon deserved greater consideration than it received from the majority.[159] Justice Stevens "remain[ed] convinced that the warnings prescribed in *Miranda*, while sufficient to apprise a defendant of his Fifth Amendment right to remain silent, are inadequate to inform an unrepresented, indicted defendant of his Sixth Amendment right to have a lawyer present at all critical stages of a criminal prosecution."[160]

Justice Stevens was also not convinced that Montejo actually validly waived his rights.[161] He doubted that the *Miranda* warning was sufficient to apprise Montejo of his right to continue to have access to counsel—a right which Montejo must have clearly understood in order for his waiver to have been given knowingly and voluntarily.[162] Herein lay the major difference between the majority and the dissent. The majority assumed that the *Miranda* warning provided sufficient notice to a suspect to apprise him of his right to counsel at all stages of the proceeding, such that any waiver, even after an arraignment, would be made knowingly.[163] Accordingly, the Court felt that adequate safeguards existed in the prior cases.[164] Justice Stevens was not so sanguine and felt that the *Jackson* rule was necessary to ensure that defendants knew that they had the right to maintain a lawyer through the various stages of the process and, subsequently, to ensure the voluntariness of the waiver.[165] For him, the Sixth Amendment's purpose of "protec[ting] the unaided layman at critical confrontations with his adversary" required the continued application of the rule announced in *Jackson*.[166]

III. SOUTH CAROLINA'S PROTECTION OF THE RIGHT TO COUNSEL

South Carolina law provides that if a person is "financially unable to retain counsel" but is entitled to counsel under the U.S. Constitution, then counsel must

157. *See id.* at 2097 (Stevens, J., dissenting).
158. *See id.* at 2098.
159. *Id.*
160. *Id.* at 2100 (footnote omitted).
161. *See id.* at 2101.
162. *See id.*
163. *See id.* at 2090 (majority opinion) (citing Patterson v. Illinois, 487 U.S. 285, 296 (1988)).
164. *See id.* The Court, however, acknowledged that removing the additional layer of protection that *Jackson* provided "chang[ed] the legal landscape." *Id.* at 2091–92. Accordingly, the Court remanded Montejo's case so that the lower courts could determine if Montejo made his waiver knowingly and voluntarily. *Id.* at 2092.
165. *See id.* at 2100 (Stevens, J., dissenting).
166. *Id.* at 2096 (quoting Michigan v. Jackson, 475 U.S. 625, 631 (1986)) (internal quotation marks omitted).

be provided.[167] The appropriate judge must make the order to provide counsel, but a defendant may "voluntarily and intelligently" waive this right.[168] As a result, a defendant typically makes a request,[169] which means that in South Carolina a court could easily decide whether *Jackson* applied.

South Carolina has incorporated the protections *Jackson* afforded criminal defendants. In *State v. Register*,[170] the South Carolina Supreme Court distinguished between the Fifth and Sixth Amendment rights, stating that the Sixth Amendment right does not automatically "attach simply because the defendant has been arrested."[171] Once attached, however, an invocation of the right triggers *Jackson* protections, and "any waiver of the defendant's right to counsel for that police initiated interrogation is invalid unless the defendant initiates the contact himself."[172]

In *State v. Anderson*,[173] the defendant invoked his right to counsel at the arraignment.[174] The defendant was at the scene of the shooting in question, and as a result, police later questioned him.[175] The defendant had gone to a restaurant, the site of the shooting, with the victim, but he did not want to admit that they went there for a drug transaction.[176] The police arrested the defendant for the murder.[177] The police again approached the defendant, who had invoked his right to counsel at the arraignment, and this time he admitted the drug arrangements.[178] The prosecution later used these statements against the defendant, but he objected, arguing that the police questioned him in violation of his Sixth Amendment right to counsel.[179]

The court found that this statement ran afoul of *Jackson*'s protections.[180] The court acknowledged that the United States Supreme Court had considered "this very issue" in *Jackson*, where it "was resolved in favor of the defendant."[181] Moreover, because *Jackson* required the imputation of any knowledge of the waiver from one state actor to another, the police knew or should have known

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167. S.C. CODE ANN. § 17-3-10 (2003); *see also id.* § 16-3-26 (requiring the appointment of two attorneys where a defendant has been charged with murder and the prosecution will seek the death penalty).

168. § 17-3-10.

169. *See, e.g.*, State v. Council, 335 S.C. 1, 14, 515 S.E.2d 508, 514 (1999) (explaining that counsel was appointed pursuant to appellant's request at the arraignment).

170. 323 S.C. 471, 476 S.E.2d 153 (1996).

171. *See id.* at 477, 476 S.E.2d at 157 (citing Hoffa v. United States, 385 U.S. 293, 309–10 (1966)).

172. *Council*, 335 S.C. at 15–16, 515 S.E.2d at 515 (citing Michigan v. Jackson, 475 U.S. 625, 636 (1986); State v. Howard, 296 S.C. 481, 493, 374 S.E.2d 284, 290 (1988)).

173. 357 S.C. 514, 593 S.E.2d 820 (Ct. App. 2004).

174. *Id.* at 518, 593 S.E.2d at 822.

175. *Id.* at 515, 518, 593 S.E.2d at 820–22.

176. *Id.*

177. *Id.* at 518, 593 S.E.2d at 822.

178. *See id.*

179. *Id.*

180. *Id.* at 520, 593 S.E.2d at 823.

181. *Id.* at 519, 593 S.E.2d at 822 (citing Michigan v. Jackson, 475 U.S. 625, 634 (1986)).

that the defendant had invoked his right to counsel and therefore should not be approached.[182] Accordingly, the court found that the officer's interrogation of the defendant violated the protections of the Sixth Amendment and that the statements should have been excluded from the trial.[183]

In a series of cases, the South Carolina Supreme Court has recognized the rule from *Jackson* but found that it did not apply. In *State v. Drayton*,[184] the court determined that the invocation of the right to counsel must be clear, and "when a reasonable inference may be drawn from the conduct or statements of the accused that he does not wish to be represented by an attorney . . . , questioning may be initiated."[185] As a result, the court found that when a suspect declined the services of the public defender and made only an "ambiguous" reference to securing private counsel at some later point, the protections of *Jackson* did not apply.[186] It also has found that *Jackson* does not extend to cover different offenses in different jurisdictions.[187]

The South Carolina Supreme Court has also distinguished the right to counsel in the contexts of the Fifth and Sixth Amendments. In *State v. George*,[188] the defendant confessed after waiving his right to counsel under *Miranda*.[189] The confession, however, came before an indictment and occurred in a custodial setting, not after the initiation of judicial proceedings.[190] Any Sixth Amendment protections, therefore, had not had attached.[191] Similarly, in *State v. Howard*[192] the suspect confessed to FBI agents before "a State apparatus . . . had been geared up to prosecute him."[193] According to the court, the Sixth Amendment right had not attached because the suspect "had not been arraigned nor subjected to other such similar proceedings."[194] Moreover, the court has repeatedly affirmed this conclusion that a confession in a custodial setting did not merit any Sixth Amendment protections.[195]

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182. *Id.* (citing *Jackson*, 475 U.S. at 634).

183. *Id.* at 520, 593 S.E.2d at 823.

184. 293 S.C. 417, 361 S.E.2d 329 (1987).

185. *Id.* at 427, 361 S.E.2d at 335.

186. *See id.*

187. State v. Howard, 295 S.C. 462, 469–70, 369 S.E.2d 132, 136 (1988) (allowing South Carolina agents to interrogate defendants who had previously retained counsel for different offenses in North Carolina).

188. 323 S.C. 496, 476 S.E.2d 903 (1996).

189. *Id.* at 509, 476 S.E.2d at 911.

190. *Id.*; *see also* Moran v. Burbine, 475 U.S. 412, 428 (1986) (holding that confession in custodial setting did not merit Sixth Amendment protection because adversarial proceedings had not yet begun).

191. *George*, 323 S.C. at 509, 476 S.E.2d at 911.

192. 296 S.C. 481, 374 S.E.2d 284 (1988).

193. *Id.* at 494, 374 S.E.2d at 291.

194. *Id.* at 493–94, 374 S.E.2d at 291.

195. *See* State v. McCray, 332 S.C. 536, 548, 506 S.E.2d 301, 307 (1998); *George*, 323 S.C. at 509, 476 S.E.2d at 911.

In *State v. Council*,[196] the court discussed the application of *Jackson*'s prophylactic rule.[197] In that case, the State initiated judicial proceedings against a defendant who had requested an attorney.[198] The defendant, however, later chose to talk to police and so indicated in a written statement.[199] The court determined that the Sixth Amendment protections had attached but that the defendant waived them because he, not the police, initiated the contact.[200] As a result, the defendant "knowingly and intelligently" waived the right to counsel, and the statement was admissible.[201]

South Carolina law follows the federal constitutional law regarding waivers as well. Though police often use express waivers, such waivers are not necessary to establish that a defendant waived the Fifth Amendment rights to silence and counsel.[202] In *State v. Cope*,[203] the court held that when a suspect waives the right to counsel by initiating contact with police, the accused waives the right under both the Fifth and Sixth Amendments.[204] In *Cope*, the accused argued that a bond hearing triggered his right to counsel under the Sixth Amendment.[205] However, the court did not reach this question, finding instead that the accused had waived any such right prior to the hearing when he waived his "constitutional rights" after being given his *Miranda* warnings.[206]

IV. THE BEGINNING OF THE COLLAPSE?: THE IMPLICATIONS OF *MONTEJO V. LOUISIANA*

A. Arguments Against the Overturning of Michigan v. Jackson

Though the reasoning in *Jackson* is somewhat opaque,[207] its protections were justified. In the Sixth Amendment custodial context, the concerns about coercion that *Miranda* addressed are present, but so are the additional concerns that Justice Stevens addressed in his dissent in *Montejo* regarding the unaided layman's reliance on his counsel.[208] While greeted with disdain at first, police

196. 335 S.C. 1, 515 S.E.2d 508 (1999).
197. *See id.* at 15–16, 515 S.E.2d at 515.
198. *See id.* at 14, 515 S.E.2d at 514.
199. *Id.* at 14, 515 S.E.2d at 515.
200. *Id.* at 16, 515 S.E.2d at 515.
201. *Id.*
202. State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998) (citing North Carolina v. Butler, 441 U.S. 369, 375–76 (1979)).
203. 385 S.C. 274, 684 S.E.2d 177 (Ct. App. 2009).
204. *Id.* at 292, 684 S.E.2d at 186.
205. *Id.* at 291, 684 S.E.2d at 186.
206. *Id.*
207. *See The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 182, 190 (2009) (acknowledging that *Jackson* was "ambiguous in places" and in tension with other Sixth Amendment cases).
208. *See* Montejo v. Louisiana, 129 S. Ct. 2079, 2096 (2009) (Stevens, J., dissenting) (citing Michigan v. Jackson, 475 U.S. 625, 631 (1986)); *see also* Brooks Holland, *A Relational Sixth*

and prosecutors both appreciated *Jackson*'s clear rule.[209] In its absence, courts may well have to adjudicate many claims regarding a statement's voluntariness.

Jackson's bright-line rule offered many benefits and did not lead to suppression of a large number of statements.[210] Those who supported the retention of *Jackson* understood it to extend beyond the prevention of police badgering.[211] *Jackson*, they suggested, protected the "critical role the attorney plays in protecting the defendant's interests,"[212] providing a "medium" between the defendant and the State.[213] Based on the existing line of cases, they argued that the Sixth Amendment prohibits all police-initiated interrogation.[214] This broader understanding of the rule in *Jackson* squares with Justice Stevens's analysis in his dissent in *Montejo*.[215]

Many law-enforcement officers and prosecutors also favored the retention of the bright-line rule in *Jackson*.[216] They argued that *Jackson* "provid[ed] an easily enforceable rule" whose "simplicity and clarity" aided police officers both in training and in practice.[217] Removing such an "embedded"[218] rule would force judges and police officers alike to suffer through the development of a new common law in that area.[219] In operation, a bright-line rule such as *Jackson*'s proves "inherently more workable" than waiting for a judge's after-the-fact determination regarding police actions.[220] Prosecutors can proceed more confidently because they can easily determine if a police investigation was proper.[221] Moreover, only rarely would a guilty defendant go free because of the application of the rule.[222]

Amendment During Interrogation, 99 J. CRIM. L. & CRIMINOLOGY 381, 384 (2009) ("Perhaps in no [other] pretrial context can this advice of counsel matter more than during an interrogation.").

209. *See* Supplemental Brief of Amici Curiae Larry D. Thompson, William Sessions et al., in Support of Petitioner at 3, *Montejo*, 129 S. Ct. 2079 (No. 07-1529).

210. Only one such case can be found in South Carolina's published cases. *See* State v. Anderson, 357 S.C. 514, 520, 593 S.E.2d 820, 823 (Ct. App. 2004).

211. *See* Brief for the National Ass'n of Criminal Defense Lawyers et al. as Amici Curiae in Support of Petitioner at 27, *Montejo*, 129 S. Ct. 2079 (No. 07-1529).

212. *Id.*

213. *Id.* at 25 (quoting Maine v. Moulton, 474 U.S. 159, 176 (1985)) (internal quotation marks omitted); *see also* Holland, *supra* note 208, at 425 ("[T]he Court should frame constitutional rules around the premise of the constitutional guarantee: that the State must 'honor' the attorney–client relationship . . . .").

214. *See* Brief for the National Ass'n of Criminal Defense Lawyers et al., *supra* note 211, at 25.

215. *See Montejo*, 129 S. Ct. at 2096 (Stevens, J., dissenting).

216. *See* Supplemental Brief of Amici Curiae Larry D. Thompson, William Sessions et al., *supra* note 209, at 5–6.

217. *Id.* at 3.

218. *Id.* at 4 (quoting Dickerson v. United States, 530 U.S. 428, 443 (2000)) (internal quotation marks omitted).

219. *Id.* at 3.

220. *Id.* at 6.

221. *Id.* at 16.

222. *Id.* at 6.

None of these arguments, however, swayed the Court in *Montejo*, and it overruled *Jackson*.[223] By the time Montejo's case reached the Supreme Court, the Court had moved to a narrower understanding of *Jackson* and similar cases. The Court identified *Jackson*'s purpose as solely to prevent police badgering.[224] With this understanding, the Court found it much easier to overturn the case. The antibadgering rationale weighed much less on the balancing scale the Court employed than a rule understood to protect the relationship between the uninformed suspect and his hopefully knowledgeable counsel, and the scales tipped in favor of rejecting the rule.[225]

B. Constitutional Principles and the Supreme Court's Balancing Approach

The Court has used a similar approach in other cases to rein in the protections afforded to criminal defendants. As shown in *Montejo*, the Court first identifies the underlying rationale of the precedent, typically in a narrow fashion.[226] Then the Court conducts a balancing test to determine if a given rule furthers this purpose.[227] For example, in *Herring v. United States*,[228] the Court identified the purpose of the exclusionary rule as deterring wrongful police conduct.[229] The Court then used a balancing test—weighing the possible deterrent effect against the social cost of letting a criminal go free—to determine if the rule should apply where police had negligently used an invalid warrant.[230] In this case, the police culpability was low, and enforcing the exclusionary rule, the Court reasoned, would not likely have a large deterrent effect in similar situations in the future.[231]

Justice Ginsburg dissented and would have applied the exclusionary rule and would not, as the majority did, "so constrict" the exclusionary rule.[232] She maintained "a more majestic conception" of the rule as preserving the respect and dignity of the judicial system as a whole.[233] Understood this way, enforcement of the rule would be necessary even where its deterrent effect was *de minimis* because of the implications for the judicial system in using such

223. Montejo v. Louisiana, 129 S. Ct. 2079, 2091 (2009).
224. *See id.* at 2086.
225. *See id.* at 2089–91.
226. *See id.* at 2086.
227. *See id.* at 2089–91.
228. 129 S. Ct. 695 (2009).
229. *See id.* at 700.
230. *See id.* at 700–01.
231. *See id.* at 701–02.
232. *Id.* at 705 (Ginsburg, J., dissenting).
233. *Id.* at 707 (quoting Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting)) (internal quotation marks omitted).

evidence.[234] This analysis is akin to Stevens's dissent in *Montejo*, where he offered a more fundamental purpose for the *Jackson* rule.[235]

Similarly, in *Hudson v. Michigan*[236] the Court held that the exclusionary rule did not apply where officers violated the knock-and-announce rule.[237] The Court found that the rule protected human life and limb, property, privacy, and dignity.[238] The rule did not protect against the unwanted discovery of evidence.[239] Thus, application of the rule in this situation would not further the purpose of the rule.[240] In his dissent, Justice Breyer pointed out that the practical effect of this ruling enabled the police to "ignore the Constitution's requirements."[241]

In one respect, these cases—*Herring*, *Hudson*, and *Montejo*—appear to undermine the amendments they seek to protect by constricting a particular protection. The Court, however, views protections such as the exclusionary rule, the knock-and-announce rule, and the prophylactic rules announced in *Edwards* and *Jackson* as just that—rules.[242] These rules are judicially created means to protect the underlying amendments. As Justice Jackson warned, when such rules become overextended, they are susceptible to collapse.[243] The current Court seems more than willing to push back on the layers of protection that have built up over the years where it feels the rules no longer serve their underlying purpose.

If one understands these amendments to protect core principles, then the rules-based approach used in these cases threatens to undermine the strength of these amendments. Those who argue that the Constitution protects core principles understand the amendments to protect "abstract moral principles."[244] Courts should interpret cases involving these principles in light of "past legal and political practice."[245] Thus, constitutional law could be understood to develop in a common law fashion where precedent forms a "common ground"—a

234. *Id.*
235. *See* Montejo v. Louisiana, 129 S. Ct. 2079, 2096 (2009).
236. 547 U.S. 586 (2006).
237. *See id.* at 594.
238. *See id.*
239. *Id.*
240. *Id.*
241. *Id.* at 609 (Breyer, J., dissenting).
242. The Court has expressly held that *Miranda* is constitutionally mandated and not a judicially created prophylactic rule that Congress could overrule. *See* Dickerson v. United States, 530 U.S. 428, 432 (2000). *See generally* Steven D. Clymer, *Are Police Free to Disregard* Miranda, 112 YALE L.J. 447, 450 (2002) ("*Miranda* is best understood as a constitutional rule of admissibility."); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988) ("'[P]rophylactic' rules are not exceptional measures of questionable legitimacy but are a central and necessary feature of constitutional law.").
243. *See* Douglas v. City of Jeannette, 319 U.S. 157, 181 (1943) (Jackson, J., concurring in the result).
244. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 7 (1996).
245. *Id.* at 9.

consensus on major issues—that is "readily accepted . . . among people who otherwise disagree."[246]

A hard case, such as *Montejo*, becomes a "pivotal case[] testing fundamental principles, not a[] borderline case[] calling for some more or less arbitrary line."[247] A court should interpret a case such as *Montejo* in light of these past decisions that have identified and upheld the principle of protecting the criminal defendant by conferring, among other protections, the right to the assistance of counsel. The case should be considered within the "seamless web"[248] of cases that have developed around this core principle. So considered, *Montejo* would be yet another case where a court must consider the interaction between the police and the unaided laymen. Rather than asking the narrow question about the rules' benefits vis-á-vis their costs, as the Court did,[249] the Court should have considered the case against the backdrop of constitutional cases that have protected a defendant in such a situation.

Montejo falls into this line of cases with major implications for criminal defendants. The Court in *Montejo* worried that the protections afforded to defendants had become overextended,[250] and it trimmed them back. In the process, however, it weakened one of the major principles of the criminal justice system—a defendant's right to counsel.

C. The Current Status of the Law

The opinion in *Montejo* leaves this area of the law in some confusion. Clearly, after *Montejo*, a suspect who has been arraigned no longer has *Jackson*'s added protection from police-initiated contact. The ruling in *Montejo*, however, leaves the defendant in a rather odd position and would allow the police, in some situations, to approach the defendant. The situation will vary depending upon whether the suspect remains in custody and whether the suspect has waived his *Miranda* rights.

If a suspect remains in custody and has not waived his *Miranda* rights, the Fifth Amendment right to counsel may still protect the suspect. The protections would apply, even after arraignment, so long as the defendant remained in custody.[251] The Court acknowledged this protection when it remanded *Montejo* for a determination of whether Montejo had validly waived his *Edwards* right.[252] Thus, a defendant who has been arraigned or indicted and who is facing judicial

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246. David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1725 (2003).

247. RONALD DWORKIN, LAW'S EMPIRE 43 (1986).

248. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 115 (1977).

249. *See* Montejo v. Louisiana, 129 S. Ct. 2079, 2089–91 (2009).

250. *See id.* at 2090.

251. *But see* Maryland v. Shatzer, 130 S. Ct. 1213, 1223 (2010) (addressing the issue of the extent of *Edwards* and establishing a fourteen-day limitation).

252. *See Montejo*, 129 S. Ct. at 2092.

proceedings as understood by the Sixth Amendment would have to look to the Fifth Amendment, at least in these circumstances, for protection.

The extent of this protection, however, remains unclear, and the Supreme Court may grant certiorari on a case to clarify this increasingly complex area of law. As clarified in *McNeil v. Wisconsin*,[253] the protections under *Jackson* were offense specific,[254] while the *Miranda-Edwards* protections were not.[255] Would the more robust protection of the *Miranda* line of cases now protect a defendant rather than the crime-specific protections that existed prior to *Montejo*? Would *McNeil* still apply, or is it no longer viable because the Court overturned *Jackson*?[256] In other words, the Court should delineate the precise contours—whether the protections are offense specific or cover all crimes—of *Miranda-Edwards* as applied in the Sixth Amendment context.

If the defendant is released from custody, the *Miranda-Edwards* line of cases would not apply.[257] *Jackson* would have prevented police-initiated interrogation in this context, but in *Montejo*, the Court dismissed concerns in this area because it is the "*least* likely to pose a risk of coerced waivers."[258] The Court reasoned that the defendant in such a situation is in "control" and could simply "shut his door or walk away to avoid police badgering."[259] But the police could, according to *Montejo*, approach a defendant in just such a situation.[260] Presumably, if police officers obtain a statement from a defendant, they must garner the statement voluntarily for it to be admissible.[261] The opinion did not elaborate in this area and leaves several questions. How would the police ensure that a criminal defendant's statement obtained in such a situation is voluntary? Would the police need to provide a warning (not necessarily *Miranda*) of some type? Would the prosecution have to litigate such a situation under the old voluntariness standard?

If the suspect has waived his *Miranda* rights, he has only the protection of counsel afforded by the Sixth Amendment. Police may approach the defendant to

253. 501 U.S. 171 (1991).

254. *Id.* at 175.

255. *See* Arizona v. Roberson, 486 U.S. 675, 682 (1988) (noting that *Miranda*'s protections extend to all crimes, not just the crime for which a suspect has been arrested or detained).

256. One court that has treated this issue since *Montejo* still followed *McNeil* and allowed the introduction of statements regarding a second crime where the defendant had invoked his Sixth Amendment right to counsel but had waived his *Miranda* rights. *See* Flores v. State, 299 S.W.3d 843, 852–53 (Tex. App. 2009) (refusing to allow an invocation of the Sixth Amendment offense-specific right to counsel to constitute an invocation of the Fifth Amendment right that protects a suspect during interrogation).

257. *Montejo*, 129 S. Ct. at 2090.

258. *Id.*

259. *Id.*

260. *See id.*

261. Because any such statement would constitute a waiver of a constitutional right, it would have to be voluntary to be valid. *See supra* Part II.C.

ask him if he would like to speak with them.[262] Post-*Montejo*, this dictates that police officers need demonstrate only that a waiver was made voluntarily, knowingly, and intelligently in order for that statement to be admissible.[263] In this respect, the situation would be similar to a case where the defendant has invoked *Miranda* but has been released from custody. A problem could arise, however, where the defendant waives *Miranda* and is then arraigned and provided with counsel. If police initiate contact with the accused at some later time, the defendant may likely be relying on his counsel once again, and he may not fully comprehend the ramifications of any ensuing conversation. Interrogation in these circumstances may implicate similar concerns to *Miranda* regarding coercion, but it also raises new concerns stemming from the suspect's reliance on his counsel.

The facts of *Hughen v. State*[264] demonstrate the confusion in this area of law after *Montejo*. The defendant was involved in a "violent altercation" that led to police investigation.[265] The police arrested and then arraigned the defendant, at which point he requested counsel.[266] Only three hours later, and before counsel arrived, the police initiated an interview with the defendant.[267] The police read him his *Miranda* rights and then asked him if he understood them and if he would like to have a lawyer present.[268] The police gave the defendant a waiver form, which he initialed, but he asked, "This ain't waiving my right for an attorney, is it?"[269] The police responded that it was not waiving that right and that they would be talking about only what had happened during the altercation.[270] The defendant subsequently answered questions about the altercation that the prosecution later used against him.[271] The defendant appealed on the grounds that the police violated his Fifth and Sixth Amendment rights.[272]

The Texas appellate court found that the Sixth Amendment right had indeed attached because the State had begun "adversarial judicial proceedings against him."[273] The defendant argued that *Jackson* prevented such police-initiated interrogations, but the court addressed the case after *Montejo* and found the defendant's argument based on *Jackson* without merit.[274] Thus, the court

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262. In this scenario, the defendant should not be surprised to be approached by police because the defendant has already waived his *Miranda* rights. Practically, however, police may be reluctant to approach such a defendant because he has obtained counsel. It remains to be seen whether police officers will exploit a defendant in such a situation.

263. *See supra* Part II.C.

264. 297 S.W.3d 330 (Tex. Crim. App. 2009).

265. *Id.* at 331.

266. *Id.* at 331–32.

267. *Id.* at 332.

268. *Id.*

269. *Id.* (internal quotation marks omitted).

270. *Id.*

271. *Id.* at 332–33.

272. *Id.* at 333.

273. *Id.* at 335.

274. *Id.*

affirmed the judgment of the lower court because "the Sixth Amendment does not bar police-initiated interrogation of an accused who has previously asserted his right to counsel."[275]

The *Hughen* court's interpretation of *Montejo*, however, leaves a defendant with a vitiated Sixth Amendment right—and little protection. Justice Scalia argued that the Court should overturn *Jackson* because it was redundant.[276] But unless the defendant's invocation of the right to counsel at the arraignment constitutes an invocation of the right under both amendments, the defendant will be subject to exactly the kind of coercion that *Edwards* and *Miranda* sought to avoid. Instead of getting two layers of protection, as Justice Scalia reasoned, the defendant would receive neither. For example, if a defendant waived his *Miranda* rights and was later arraigned, he would not have a chance to reinvoke the *Miranda* right until police read him those rights again. Practically, this means that the police could get at least one chance to approach a defendant after he has secured counsel. This scenario, as *Hughen* demonstrates, enables police to sidestep *Edwards*.

In *Hughen*, the defendant's invocation of the right to counsel should have triggered the right under both amendments, and most importantly, it should have triggered *Edwards*'s protection.[277] The Texas court's interpretation makes the Sixth Amendment right dependent upon the *Miranda* warning. In other words, it prevents an invocation of the right to counsel unless and until a suspect is read his *Miranda* warning. Such an interpretation leaves the Sixth Amendment with little force against police-initiated interrogation. In this scenario, the defendant invoked the right to counsel at the arraignment, and as a result, any statements stemming from the subsequent police-initiated interrogation should not have been admissible. Otherwise, the Court's assertion in *Montejo* that "sufficient" protections exist outside *Jackson* to protect a defendant offers little substance.[278]

The *Hughen* court's interpretation of *Montejo* severely weakens the constitutional right to counsel. The police officers in *Hughen* eluded not only his request for counsel but also the holding of *Edwards* when they waited until after arraignment to initiate their interview. The Texas court's holding creates a

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275. *Id.*

276. *See* Montejo v. Louisiana, 129 S. Ct. 2079, 2090 (2009).

277. The Court has held that "[t]o invoke the Sixth Amendment interest is, as a matter of *fact*, *not* to invoke the *Miranda-Edwards* interest." McNeil v. Wisconsin, 501 U.S. 171, 178 (1991). In *McNeil*, however, the issue turned on whether a defendant could use an invocation of the Sixth Amendment to prevent the introduction of statements regarding a *different* crime than the one for which he invoked the Sixth Amendment right to counsel. *Id.* at 174–75. The Court did not address the issue of whether an invocation of the Sixth Amendment right should trigger the *Miranda-Edwards* protections regarding the *same* offense. The Court did not need to consider this scenario because *Jackson* clearly governed such a scenario. *See id.* at 175 (acknowledging that *Jackson*'s protections, including the "invalidat[ion of] subsequent waivers in police-initiated interviews," were offense specific). Because *Montejo* overturned *Jackson*, it no longer provides clear guidance in such a situation. *McNeil*, however, does not, nor should it, govern such a scenario.

278. *See Montejo*, 129 S. Ct. at 2090.

loophole that police may exploit at the defendant's expense. If one understands the invocation of the right to counsel to trigger the protection of both amendments, however, this loophole would be avoided. Moreover, such an interpretation would square with the majority's assertion in *Montejo* that adequate protections exist to protect a defendant.

D. Continuing Developments

The Supreme Court recently released its decision on another case with implications for the right to counsel—*Maryland v. Shatzer*.[279] The case required the Supreme Court to determine "whether a break in custody ends the presumption of involuntariness established in *Edwards*."[280] In *Shatzer*, the police received reports in August 2003 concerning sexual abuse regarding an inmate stemming from events before his incarceration.[281] Police officers attempted to question him, but he did not want to talk without an attorney.[282] In March 2006, the police conducted a follow-up investigation and sent another detective to question the defendant.[283] This time, the defendant, though initially surprised to find that the investigation was ongoing, waived his *Miranda* rights and eventually made incriminating statements.[284]

The Attorney General of Maryland argued that this case required the same balancing test of the rule's costs and benefits used in *Montejo*.[285] The proposed indefinite extension of *Edwards*, propounded by Shatzer, would prove impractical and would require police to keep track of "every suspect who has ever asserted his Fifth Amendment right to counsel."[286] The rule in *Edwards*, the attorney general argued, was an "antibadgering provision."[287] In its amicus brief, the United States also focused on this underlying rationale of the *Miranda-Edwards* line of cases.[288] The United States argued that such a purpose would not be furthered in this situation because there was a break in custody.[289] This break, it argued, should terminate the *Edwards* presumption.[290] Here, the break occurred when the State placed the defendant back into the general prison

279. 130 S. Ct. 1213 (2010).
280. *Id.* at 1217 (citing Edwards v. Arizona, 451 U.S. 477 (1981)).
281. *See id.*
282. *Id.*
283. *Id.* at 1217–18.
284. *See id.* at 1218.
285. Reply Brief for Petitioner at 1, *Shatzer*, 130 S. Ct. 1213 (2010) (No. 08-680) (citing Montejo v. Louisiana, 129 S. Ct. 2079, 2089 (2009)).
286. *Id.* at 2.
287. *Id.* at 4.
288. Brief for the United States as Amicus Curiae Supporting Petitioner at 7–11, *Shatzer*, 130 S. Ct. 1213 (2010) (No. 08-680).
289. *Id.* at 11.
290. *Id.*

population.[291] Though the defendant was still in custody, he was not subject to the same coercive pressures identified in *Miranda*.[292]

The Court determined that a break in custody terminates *Edwards*'s presumption, and that such a break occurs after fourteen days.[293] The Court went on to hold that incarceration does not constitute *Miranda* custody and that release into a general population constitutes a break in custody.[294] The Court determined that the *Edwards* rule existed to prevent police from applying "continu[ing] pressure" to coerce a suspect into confessing.[295] The Court reasoned that this risk is diminished where a suspect has "returned to his normal life for some time."[296] At this point, the Court surmised, a suspect would not be isolated, could seek advice from others, and would know that investigative custody is not indefinite.[297] As a result, the Court established a fourteen-day limitation, concluding that length "provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody."[298]

The Court analyzed *Shatzer* using the same cost–benefit balancing test used in *Herring*, *Hudson*, and *Montejo*.[299] The Court determined that because *Edwards* was a judicially prescribed prophylaxis, it would "appl[y] only where its benefits outweigh its costs."[300] In this case, the passage of time meant that "extending the *Edwards* rule yields diminished benefits."[301] The Court concluded that after fourteen days, such a waiver is the "most unlikely to be compelled" and application of the rule would run the risk of excluding valid confessions.[302] The Court concluded that at that point suspects would have "regain[ed] the degree of control they had over their lives prior to the interrogation."[303]

Justice Stevens concurred in the judgment, agreeing that in this circumstance—a two-and-a-half year delay—*Edwards*'s protections did not apply.[304] He however, did not agree with the Court's fourteen day break-in-custody rule, which he deemed to be founded on "speculation."[305] For Justice Stevens, the core concern remained the individual who had been promised a

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291. *Id.* at 18.
292. *Id.*
293. *Shatzer*, 130 S. Ct. at 1223.
294. *Id.* at 1224.
295. *Id.* at 1220.
296. *Id.* at 1221.
297. *Id.*
298. *Id.* at 1223.
299. *See id.* at 1220.
300. *Id.* (citing Montejo v. Louisiana, 129 S. Ct. 2079, 2089 (2009)).
301. *Id.* at 1221.
302. *Id.* at 1223.
303. *Id.* at 1224.
304. *See id.* at 1234 (Stevens, J., concurring in the judgment).
305. *Id.* at 1231.

lawyer but had not yet received one.[306] Even a fourteen-day delay, he reasoned, would not mitigate the effect on such an individual who has not yet received the counsel he requested.[307] Such a suspect would likely "feel that the police lied to him and that he really does not have any right to a lawyer."[308]

After *Montejo*, some defendants who have obtained counsel may have to rely on *Edwards*'s protections. In *Montejo*, the Court reasoned that *Edwards* already protected a defendant to the extent that a similar rule in the Sixth Amendment context was not needed.[309] *Shatzer* curtails the extent to which *Edwards* would offer protection. In his concurrence in *Shatzer*, Justice Stevens asked, "How then, under the Court's decision today, will *Edwards* serve the role that the Court placed on it in *Montejo*?"[310] Justice Stevens's statement indicates that the ruling in *Shatzer* has implications beyond those addressed by the majority and could produce another loophole for police to exploit after *Montejo*.[311]

The current trajectory of the law in this area also portends a collapse of many of the protections that a defendant once enjoyed. Though the Court in *Montejo* acknowledged that the Sixth Amendment's protections were not in dispute,[312] the Court has begun to trim back those protections.[313] *Montejo*, coupled with *Shatzer*, represents a step in the direction of removing protections for the defendant. The temple is indeed collapsing.

V. THE EFFECT OF *MONTEJO V. LOUISIANA* ON SOUTH CAROLINA

South Carolina provides a clear example of why the Court in *Montejo* was too quick to overturn *Jackson*. South Carolina courts have consistently maintained an analysis of the right to counsel that was mindful of the differences between the Fifth and Sixth Amendment contexts.[314] South Carolina courts,

306. *See id.*

307. *See id.* at 1234 n.15.

308. *Id.* at 1229.

309. *See* Montejo v. Louisiana, 129 S. Ct. 2079, 2090–92 (2009).

310. *Shatzer*, 130 S. Ct. at 1233 n.14 (Stevens, J., concurring in the judgment).

311. *See id.* at 1231 n.10 (suggesting that the majority's "rule creates a strange incentive to delay formal proceedings").

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

313. *See generally* Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 36–37 (1991) ("With a few notable exceptions, the Supreme Court's recent Sixth Amendment jurisprudence has been marked by doctrinal inconsistency and by the Court's failure to adhere to the core values embedded in the amendment." (footnote omitted)); Holland, *supra* note 208, at 386 (arguing that the current Supreme Court's right-to-counsel jurisprudence fails to "recognize and protect the necessary professional relationship that attorney and client share in a criminal case"); *The Supreme Court, 2008 Term—Leading Cases*, *supra* note 207, at 192 ("The Court should not be less attuned to the objects of concern under the Sixth Amendment than those under the Fifth Amendment, especially when the Sixth Amendment right to counsel is in the text of the Constitution.").

314. *See supra* Part III.

however, have followed the federal constitutional guidelines.[315] South Carolina decisions regarding the right to counsel follow the Supreme Court decisions interpreting these rights in both the Fifth and Sixth Amendment contexts.[316] Typically, a South Carolina case will cite both the Supreme Court case on point and a similar South Carolina case.[317] South Carolina may, of course, grant a higher degree of protection than the floor mandated by the Supreme Court.[318] Given its reliance on the United States Supreme Court in this area, the court may be unlikely to do so in this situation. Additionally, the South Carolina Constitution does not have a clause that affords a criminal defendant the right to have an attorney.[319]

Absent a change in its typical course, South Carolina law will continue to parallel the federal law in this area. Following the federal law in this area, however, will prove challenging because the law is in a state of flux. A South Carolina court could very well be greeted with a case that falls into one of the gray areas left in the right-to-counsel jurisprudence after *Montejo*. Such a court would be left with little direction and would have to address the question absent guidance from the Supreme Court as to the status of the federal law. Such a court should be mindful of the implications of such a decision. Because the right to counsel stems from two sources, two different sets of concerns are implicated. Not only should a court consider the possibility of police badgering, but a court should also acknowledge that a defendant may be relying on his counsel once the adversarial process has begun. Given the complexity and fluidity of the law in this area, this concern is paramount.

The case of *State v. Anderson* provides some support for a defendant.[320] Moreover, *Anderson* demonstrates that the Supreme Court's previous cases established guidelines that South Carolina courts could easily follow. Because South Carolina courts have not had difficulty determining whether a suspect has

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315. *See* State v. Owens, 346 S.C. 637, 661, 552 S.E.2d 745, 758 (2001) (stating that "South Carolina follows the federal constitutional rule" regarding the Sixth Amendment), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 105–06, 610 S.E.2d 494, 501 (2005).

316. *See, e.g.*, State v. Council, 335 S.C. 1, 15, 515 S.E.2d 508, 515 (1999) (citing both United States Supreme Court and South Carolina cases interpreting Fifth and Sixth Amendment decisions).

317. *See, e.g.*, State v. Grizzle, 293 S.C. 19, 20–21, 358 S.E.2d 388, 389 (1987) (citing Edwards v. Arizona, 451 U.S. 477 (1981); State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982)) (citing both a United States Supreme Court case and a South Carolina Supreme Court case for the proposition from *Edwards* that police may not initiate contact after a suspect invokes *Miranda*).

318. *See, e.g.*, McNeil v. Wisconsin, 501 U.S. 171, 181–82 (1991) (rejecting a bright-line rule proffered by the petitioner barring any police-initiated questioning of a suspect in custody and, instead, noting that police are "free, if they wish, to adopt it on their own"); Ross v. Moffitt, 417 U.S. 600, 618 (1974) (holding that the Constitution did not require states to provide counsel for indigent defendants in discretionary appeals but also stating that the court did not want to "discourage" those states that did make counsel available at all stages of judicial review).

319. *See* S.C. CONST. art. I §§ 1–24 (providing a list of the declaration of rights).

320. *See* State v. Anderson, 357 S.C. 514, 519–20, 593 S.E.2d 820, 822–23 (Ct. App. 2004) (applying the *Jackson* rule and excluding a statement made by a defendant in a police-initiated interview).

invoked the right to counsel,[321] *Jackson* could be applied without difficulty. *Montejo* needlessly complicates this area of the law, and South Carolina need not follow the path of the Supreme Court. Unfortunately, *Anderson* relied upon the now overruled *Michigan v. Jackson*.[322] Other South Carolina cases discussing *Jackson*'s protections also rely solely on *Jackson*.[323]

South Carolina should nevertheless refuse to deviate from *Anderson*. *Anderson* could be understood as a common law case standing for the proposition that, in South Carolina, a statement made in a police-initiated interview by a defendant who has been arraigned is not made voluntarily. South Carolina criminal law recognizes the continued vitality of the common law.[324] In this tradition, case law builds upon earlier rulings that have identified principles, and *Anderson* could be cited to represent South Carolina's recognition of the principle undergirding the decision in *Jackson*.

Anderson fits within South Carolina's common law in a number of ways. First, South Carolina law has long held that admissions must be voluntary in order to be admissible.[325] When faced with a set of facts similar to either *Montejo* or *Anderson*, an attorney should argue that South Carolina already has a case on point standing for the proposition that statements made to police when police initiate the interrogation of a defendant who has invoked his right to counsel are not made voluntarily. As a result, such a situation need not be relitigated.

Second, prior to *Miranda*, South Carolina law recognized the dangers inherent in a custodial interrogation. Though the court refused to adopt a per se rule that a custodial confession is inadmissible,[326] it has held that, in such a situation, the officer's conduct will be "rigidly scrutinized."[327] In *Anderson*, the court determined that initiating an interview with a represented defendant was inappropriate conduct by the officer.[328] Though the court interpreted the case

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321. *See supra* notes 167–69 and accompanying text.

322. *See Anderson*, 357 S.C. at 518–19, 593 S.E.2d at 822.

323. *See, e.g.*, State v. McCray, 332 S.C. 536, 548, 506 S.E.2d 301, 307 (1998) (citing Michigan v. Jackson, 475 U.S. 625 (1986)) (discussing protections outlined in *Jackson*); State v. Drayton, 293 S.C. 417, 427, 361 S.E.2d 329, 335 (1987) (citing *Jackson*, 475 U.S. 625) (same).

324. *See* S.C. CODE ANN. § 14-1-50 (1976); *see also* State v. Carson, 274 S.C. 316, 318, 262 S.E.2d 918, 919–20 (1980) (citing § 14-1-50) (recognizing the crime of misprision of a felony despite the fact that the law had long been dormant); State v. Nall, 304 S.C. 332, 337–39, 404 S.E.2d 202, 206–07 (Ct. App. 1991) (relying upon English common law to recognize citizen's arrest).

325. *See, e.g.*, State v. Middleton, 69 S.C. 72, 76, 48 S.E. 35, 36 (1904) (holding that to admit statements that had been procured by duress would be "shocking to all sense of justice"); State v. Workman, 15 S.C. 540, 544 (1881) (citing 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 219 (Boston, Little, Brown and Co. 1860)) (discussing the necessity that confessions must have been "free and voluntary" and not have been "extracted by fear or induced by hope").

326. *See* State v. Brown, 212 S.C. 237, 246, 47 S.E.2d 521, 525 (1948) (citing State v. Judge, 208 S.C. 497, 503, 38 S.E.2d 715, 718 (1946)).

327. *Brown*, 212 S.C. at 246, 47 S.E.2d at 525 (quoting State v. Henderson, 74 S.C. 477, 478, 55 S.E. 117, 118 (1906)) (internal quotation marks omitted).

328. *See* State v. Anderson, 357 S.C. 514, 520, 593 S.E.2d 820, 823 (Ct. App. 2004).

using the rule from *Jackson*,[329] *Anderson* could be understood as an application of this older test in a more recent case.

Finally, South Carolina law provides more general statements that one arguing for the continued vitality of *Anderson* could rely upon. In *State v. Corn*,[330] the court concluded that "before the life of another on account thereof is forfeited, such one should be convicted only on testimony that leaves no reasonable doubt as to his guilt, and entirely free of influences not properly a part of the trial."[331] Again, *Anderson* could be understood to demonstrate that when police officers initiate an interview with a represented defendant, they improperly influence the defendant.

In each of these cases, however, the courts deemed that these situations called for a case-by-case analysis.[332] Unfortunately, the Supreme Court rejected a bright-line rule when it overturned *Jackson*.[333] Because that case offered easy-to-follow guidelines, *Anderson* could now remain valid in South Carolina and stand for such a bright-line rule. If faced with a similar factual scenario, courts could hold that *Anderson* governs and refuse to allow the issue to be relitigated. Accordingly, South Carolina could, in the common law tradition, retain the protections of *Jackson* as embodied in *Anderson*.

Moreover, understanding *Anderson* in this manner also squares with the idea that the law protects core principles. South Carolina has already identified and protected the principle that the criminal defendant should be protected in a custodial situation.[334] Additionally, South Carolina has protected the criminal defendant's right to counsel.[335] *Anderson* implicates both of these core principles already enshrined in South Carolina law. By retaining the holding of *Anderson*, South Carolina would protect its criminal defendants from undue coercion, provide police officers with a clearly established line, and continue to protect the core principles supporting the Fifth and Sixth Amendments.

VI. CONCLUSION

The law in this area has become increasingly complex, and *Montejo* did little to restore clarity to the area. A suspect in custody facing judicial proceedings—a context traditionally understood to fall within the Sixth Amendment's protections—must now rely on the Fifth Amendment protections outlined in *Miranda* and *Edwards*.[336] Though *Jackson* was not without its problems,[337] it did

329. *See id.* at 519, 593 S.E.2d at 822.

330. 215 S.C. 166, 54 S.E.2d 559 (1949).

331. *Id.* at 174, 54 S.E.2d at 562.

332. *See, e.g.*, State v. Workman, 15 S.C. 540, 544 (1881) (citing GREENLEAF, *supra* note 325, § 219) (providing that each case must "depend upon its own circumstances").

333. *See* Montejo v. Louisiana, 129 S. Ct. 2079, 2091–92 (2009).

334. *See supra* Part III.

335. *See supra* Part III.

336. If a suspect is not in custody, he receives no protection except for his own discretion as to whether to talk to police.

provide protections that squared with the context. In *Montejo*, the Court overturned *Jackson* because it believed *Jackson* improperly extended a Fifth Amendment rule into a Sixth Amendment context, but the result is that a defendant in a Sixth Amendment context must now rely on Fifth Amendment protections. Because the Court relied on these Fifth Amendment protections in *Montejo*, it left many questions unanswered as to their application in a Sixth Amendment context.[338]

Retaining the rule from *Anderson*—the South Carolina case that adopts the rule in *Jackson*—in a common law fashion relieves South Carolina courts from the requirement of developing a new body of case law to fill in the gaps after *Montejo*. Because the adversarial process often begins while a defendant is still in custody and is still being interrogated, such a rule protects against the coercion that *Miranda* found inherent in such custodial interrogations. As a result, such a rule would provide protection regardless of whether *Edwards* provided protection.[339] *Anderson* forbids police-initiated interrogation or questioning of defendants who have invoked the Sixth Amendment right to counsel and allays the concerns inherent in such interrogations. Moreover, it protects the attorney–client relationship and acknowledges the defendant's reliance upon his attorney. In addition to protecting a defendant's rights, it also provides both police and prosecutors with a clear line. Accordingly, South Carolina should refuse to reconsider the extent of its right-to-counsel jurisprudence and should retain *Anderson*'s holding and protect long-standing, core principles of South Carolina law. The temple need not collapse.

Adam J. Hegler

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337. For example, *Jackson*'s requirement that a suspect must invoke the right to counsel led directly to the problem in *Montejo*. *See supra* Part II.D.

338. *See supra* Part IV.C.

339. In light of the recent decision in *Maryland v. Shatzer*, a suspect cannot indefinitely rely on *Edwards* to prevent reinterrogation. *See supra* notes 293–94 and accompanying text.

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