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MONTEJO V. LOUISIANA AND THE IMPACT OF PREMATURE MIRANDA WARNINGS

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I. INTRODUCTION

Imagine a scenario in which police want to question an indicted defendant who has been appointed counsel and released from custody. Two investigators knock on the defendant's door, and the defendant speaks with them briefly. Following the Supreme Court's suggestion in *Montejo v. Louisiana*[1] the police utilize a standard Miranda warning and establish that the defendant waives his right to counsel.[2] The defendant responds that he wants to confer with his lawyer before agreeing to speak with the police. The police scrupulously honor the defendant's invocation and terminate the interview.[3] One of the investigators says to the defendant as he departs, "I'll swing by tomorrow to see if you are ready to talk." The defendant says nothing other than "goodbye." The investigator returns the next day and once again begins the meeting by reading a Miranda warning, even though the defendant is not in custody. This time, the defendant signs a Miranda waiver. During the second conversation, the defendant confesses.

Is the confession admissible to prove the defendant's guilt, or is it barred because of the defendant's unapproachability at the time of the

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1. 556 U.S. 778, 786 (2009).

2. *See id.* ("[W]hen a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick [of waiving the right to counsel], even though the *Miranda* rights purportedly have their source in the *Fifth* Amendment . . . .").

3. *See* Miranda v. Arizona, 384 U.S. 436, 478-79 (1966) (imposing prophylactic warning and waiver requirements to ensure defendants are apprised of their "right of silence and to assure that the exercise of the right will be scrupulously honored").

second waiver pursuant to the *Edwards-Minnick* line of cases?[4] Put another way, did the defendant's indication that he wanted to consult with his counsel when police used a Miranda warning to secure a waiver of the Sixth Amendment right to counsel trigger the *Miranda*-based unapproachability rule? Or were police free to reinitiate additional attempts to secure a waiver even after they used a Miranda warning and the defendant appeared to invoke?

In *Montejo v. Louisiana*, the Supreme Court held that the Sixth Amendment right to counsel did not prohibit police from initiating interrogation with a defendant represented by counsel.[5] In so doing, the Court upset its prior decision in *McNeil v. Wisconsin* in which it held the Sixth Amendment protection functioned identically to the *Miranda*-based *Edwards-Minnick* rule barring reinitiation of interrogation once a defendant is represented by counsel.[6]

Central to the Court's decision to reverse course was the requirement that police obtain a knowing and voluntary waiver of the Sixth Amendment right to counsel as a precondition to engaging in interrogation.[7] And, as the *Montejo* Court noted, other protections, most notably those provided by *Miranda v. Arizona*[8] and its progeny, were sufficient to protect the defendant from police badgering.[9] Those protections already require a suspect subjected to custodial interrogation to be advised of his right to assistance of counsel during interrogation, and proof of a knowing and voluntary waiver of that right, for any statement to be admissible in the prosecution's case-in-chief.[10] For the *Montejo* majority, this express notice and waiver was sufficient to demonstrate a waiver of both the Miranda right to counsel and, where applicable, the Sixth Amendment right to counsel.[11]

But how should police establish waiver of the Sixth Amendment right to counsel in situations where the Miranda right to counsel is

4. *See* Minnick v. Mississippi, 498 U.S. 146, 155-56 (1990) (holding that any waiver of the right to counsel is ineffective following the accused's invocation, even after consultation with counsel, describing unapproachability as a "systemic assurance[] that the coercive pressures of custody were not the inducing cause" of admissions or waivers); Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (holding that, following invocation of the *Miranda* right to counsel, an accused "is not subject to further interrogation by the authorities until counsel has been made available to him"); *see also* Michigan v. Jackson, 475 U.S. 625, 636 (1986) (holding 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"), *overruled by Montejo*, 556 U.S. at 797.

5. *Montejo*, 556 U.S. at 794-95, 797.

6. McNeil v. Wisconsin, 501 U.S. 171, 178 (1991).

7. *See Montejo*, 556 U.S. at 786.

8. 384 U.S. 436 (1966).

9. *See Montejo*, 556 U.S. at 794-95.

10. *See* Minnick v. Mississippi, 498 U.S. 146, 150-51 (1990) (synthesizing the substance of *Miranda v. Arizona* and its progeny).

11. *Montejo*, 556 U.S. at 794–95.

inapplicable—situations where police seek to initiate interrogation with a defendant represented by counsel who is not in custody? In *Montejo*, the Court suggested that a Miranda warning and waiver "typically does the trick" to prove the required Sixth Amendment waiver.[12] Was the Court indicating that police should use a Miranda warning and waiver in such situations in order to prove waiver of the distinct Sixth Amendment right? If so, or if police instinctively rely on Miranda warnings in such situations, it raises an interesting question: would an invocation of the right to counsel in response to such a Miranda warning be given full effect even if that warning was not required pursuant to *Miranda*? In other words, if police use a Miranda warning and waiver in a non-custodial situation, will invocation by the suspect be treated identically to invocation of Miranda rights by a suspect in custody?

The significance of this question is not necessarily related to the immediate result of an interrogation. If police were to provide a Miranda warning in a non-custodial situation to a defendant protected by the Sixth Amendment, questioning following invocation would certainly violate that protection. But uncertainty arises if police seek to reinitiate the process with the defendant at a subsequent date. Pursuant to *Montejo*, such reinitiation is not prohibited.[13] However, if police obtain a waiver after such reinitiation, could the defendant assert a violation of the Miranda right to counsel based on the prior invocation of that right even in a non-custodial context?

Accordingly, this Article will consider the consequence of a preemptive invocation of Miranda rights in response to a warning issued in a non-custodial context.[14] Such warnings may actually be more common than the situation implicated by the *Montejo* decision, made by police officers uncertain as to the nature of an encounter but seeking to ensure any statement made by a suspect will be immune from a *Miranda*-based admissibility challenge. Of course, when officers issue a Miranda warning in a non-custodial situation, they do so with the expectation of waiver.[15] But what happens when a suspect unambiguously invokes one or both of the Miranda rights?

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12. *Id.* at 786.

13. *See supra* note 5 and accompanying text.

14. *See supra* Part II.

15. *See* Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381, 385, 389 (2007) (reporting eighty-one percent as an average estimate of the number of "people in general" who waive their *Miranda* rights, according to survey of 612 investigators from multiple agencies); *see also* Anthony J. Domanico et al., *Overcoming Miranda: A Content Analysis of the* Miranda *Portion of Police Interrogations*, 49 IDAHO L. REV. 1, 11-13 (2012) (reporting that ninety-three percent of suspects [twenty-seven out of a sample size of twenty-nine suspects] waived their *Miranda* rights during recorded custodial interrogations involving felony cases in Milwaukee County); *cf.* Mark A. Godsey, *Reformulating the* Miranda *Warnings in Light of Contemporary Law and Understandings*,

II. THE MIRANDA RULE AND ITS RELATIONSHIP TO THE SIXTH AMENDMENT

In *Miranda v. Arizona*, the Supreme Court held that a statement obtained from a suspect subjected to custodial interrogation is considered presumptively coerced and therefore inadmissible (the Court would later limit inadmissibility to the prosecution's case-in-chief).[16] In order to rebut this presumption of coercion, the Court held that the prosecution must establish that the suspect was informed of the so-called Miranda rights and that the suspect voluntarily waived those rights and agreed to submit to interrogation.[17] Included among those rights is a right to have counsel present during questioning—a right to counsel derived from the protection of the Fifth Amendment privilege against compelled self-incrimination and distinct from the right to counsel expressly provided by the Sixth Amendment.[18] And, according to the Court, invoking this Miranda right to counsel requires immediate termination of the questioning.[19]

What the *Miranda* Court did not address was the impact on invocation of the Miranda right to counsel on police efforts to elicit a subsequent Miranda waiver. Would such a waiver be considered valid if police reinitiated the interrogation and obtained an ostensibly valid waiver? Or would invocation of the right preclude such reinitiation and if so, for how long? These questions would be answered by the Court in three subsequent decisions: *Edwards v. Arizona*, *Minnick v. Mississippi*, and *Maryland v. Shatzer*.[20]

In *Edwards v. Arizona*, police obtained a Miranda waiver from petitioner, Edwards, who was arrested on a state criminal charge.[21] However, during the interrogation, Edwards indicated he wanted a lawyer.[22] In compliance with *Miranda*, police terminated questioning.[23]

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90 MINN. L. REV. 781, 792 & n.54 (2006) (citing multiple articles in support of the notion that "modern studies demonstrate that roughly eighty percent of suspects waive their *Miranda* rights and talk to the police").

16. Miranda v. Arizona, 384 U.S. 436, 476 (1966); *see also* Harris v. New York, 401 U.S. 222, 222, 224-26 (1971) (holding an unmirandized statement admissible for impeachment purposes); *cf.* Oregon v. Hass, 420 U.S. 714, 715-16, 722-24 (1975) (holding a statement obtained in disregard of a suspect's invocation of his *Miranda* right to counsel admissible for impeachment).

17. *Miranda*, 384 U.S. at 444-45.

18. *Id.* at 469 (holding that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today").

19. *Id.* at 444-45; McNeil v. Wisconsin, 501 U.S. 171, 177 (1991) (citing Arizona v. Roberson, 486 U.S. 675 (1988)) ("Once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present.").

20. 559 U.S. 98 (2010).

21. *Edwards*, 451 U.S. at 478.

22. *Id.* at 479.

The next day, while Edwards was still in custody, he was informed by a prison guard that police wanted to meet with him.[24] Edwards said he did not want to talk with them but the guard told him he had to.[25] When he met with the officers they once again advised him of his Miranda rights.[26] Edwards then waived his rights and made an incriminating statement.[27]

Edwards moved to suppress his confession prior to trial, asserting that the waiver he made prior to the second interrogation was invalid because his invocation of the Miranda right to counsel during the first interrogation barred police from reinitiating questioning.[28] The trial court denied the motion because police obtained what appeared to be a valid Miranda waiver prior to the second interrogation.[29] However, the Supreme Court agreed with Edwards that police reinitiation after Edwards invoked his Miranda right to counsel was barred, and therefore, the waiver the police obtained was invalidated by the fact that they initiated the second interrogation.[30]

Interestingly, two concurring Justices expressed concern that the Court seemed to be creating a per se rule that any police reinitiation following invocation of the Miranda right to counsel automatically invalidates what may appear to be a valid Miranda waiver.[31] For Justices Powell and Rehnquist, the result was justified because Edwards was forced to meet with police for the second interrogation, thereby indicating the waiver was not truly voluntary.[32] Their concerns about a new per se rule were confirmed nine years later when the Court decided *Minnick v. Mississippi*. Like Edwards, petitioner Minnick waived his Miranda rights when first questioned by police, but during the course of that questioning, invoked his Miranda right to counsel;[33] like Edwards, police reinitiated questioning after Minnick had been returned to confinement;[34] and like Edwards, Minnick appeared to have waived his Miranda rights prior to that second interrogation (although according to the opinion, he refused to sign a written waiver) and made incriminating

23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 479-80.
30. *Id.* at 487.
31. *See id.* at 487-88 (Burger, C.J., concurring); *id.* at 489-90 (Powell, J., concurring).
32. *See id.* at 490 (Powell, J., concurring) ("[I]t is clear that Edwards was taken from his cell against his will and subjected to renewed interrogation. . . . [I]t clearly was questioning under circumstances incompatible with a voluntary waiver of the fundamental right to counsel.").
33. *See* Minnick v. Mississippi, 498 U.S. 146, 148-49 (1990).
34. *Id.* at 149.

statements.[35] Furthermore, in the two days between the first invocation and the second waiver, Minnick had consulted his attorney two or three times.[36]

The record suggested Minnick, although refusing to sign a written Miranda waiver, understood his Miranda right to counsel, understood how to invoke that right, had consulted with counsel after his first invocation, and in fact agreed to speak with police without the presence of counsel after being advised of his Miranda rights at the second interrogation; nonetheless, the Court applied the *Edwards* rule to conclude the waiver was invalid.[37] Importantly, the fact that, like Edwards, Minnick testified that he was told prior to the second interrogation that he would "have to talk" to the officer who came to meet with him and he "could not refuse,"[38] appears to have played no role in the Court's decision. Instead, the per se rule, which Justices Powell and Rehnquist had rejected in *Edwards*, was embraced by a majority of the Court.[39] Accordingly, this *Edwards-Minnick* rule means that once a suspect invokes the Miranda right to counsel, police may not approach the suspect to reinitiate interrogation, even if they obtain a new Miranda waiver; police reinitiation automatically invalidates any such waiver. The duration of this "unapproachability" rule was uncertain until 2010 when the Court held in *Maryland v. Shatzer* that it expires fourteen days after the suspect returns to his or her normal environment.[40] According to the Court, fourteen days is sufficient time for the inherent coercion of the custodial interrogation to dissipate and to restore a suspect to a position where he or she may meaningfully exercise the Miranda rights if provided a subsequent rights warning.[41]

A. The Migration of the Unapproachability Rule to the Realm of the Sixth Amendment

In 1964, the Supreme Court decided *Massiah v. United States*[42] and held that the Sixth Amendment right to counsel protected a defendant from pretrial police questioning, whether overt or covert.[43] *Massiah* involved police use of an undercover informant wearing a radio

35. *Id.* at 148-49.
36. *Id.* at 149 ("Petitioner spoke with the lawyer on two or three occasions, though it is not clear from the record whether all of these conferences were in person.").
37. *Id.* at 148-49, 156.
38. *Id.* at 149.
39. *See supra* notes 31-32 and accompanying text.
40. Maryland v. Shatzer, 559 U.S. 98, 110 (2010).
41. *Id.* at 110-11.
42. 377 U.S. 201 (1964).
43. *Id.* at 205-06.

transmitter.[44] The Court held that because Massiah, who had already been indicted, did not make a voluntary and intelligent waiver of his Sixth Amendment right to the assistance of counsel, his statements were inadmissible.[45] The Court would thereafter clarify that the Sixth Amendment right to counsel (as opposed to the Miranda right to counsel) applies only after initiation of formal adversarial process and protects a defendant only in relation to the offense with which he or she has been charged.

In the subsequent case of *Brewer v. Williams*,[46] the Court again held that police violated a defendant's Sixth Amendment right to counsel when they deliberately elicited a statement from the defendant without first obtaining a voluntary and intelligent waiver.[47] However, the *Brewer* opinion emphasized that "[t]he Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams *could not,* without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not."[48] Thus, unlike a suspect who invoked the court-created Miranda right to counsel, police were in no way barred from initiating questioning with a defendant represented by counsel pursuant to the express Sixth Amendment right. So long as police obtained a voluntary and intelligent waiver of the assistance of counsel, that waiver would be effective and any statements by the defendant would be admissible.

The inconsistency between the *Edwards-Minnick* "waiver invalidation" rule and the absence of such a rule applicable to the Sixth Amendment right to counsel became the subject of a subsequent Supreme Court decision: *Michigan v. Jackson*.[49] In *Jackson*, the Court considered the question of whether the logic of *Edwards-Minnick* is equally applicable to the Sixth Amendment context; specifically, the Court considered whether a defendant who requests appointment of counsel thereby "invokes" his Sixth Amendment right to counsel and becomes "unapproachable" to police-initiated interrogation.[50] While the Court acknowledged that the *Edwards-Minnick* rule was adopted to enhance protection of the Fifth Amendment privilege against compelled self-incrimination, it held that the logic of the rule necessitated extending it to the Sixth Amendment context.[51] Specifically, the Court noted that "[a]lthough the *Edwards* decision itself rested on the Fifth

44. *Id.* at 202-03.
45. *Id.* at 206.
46. 430 U.S. 387 (1977).
47. *Id.* at 387, 404-06.
48. *Id.* at 405-06.
49. Michigan v. Jackson, 475 U.S. 625 (1986).
50. *Id.* at 626.
51. *Id.*

Amendment and concerned a request for counsel made during custodial interrogation, the Michigan Supreme Court correctly perceived that the reasoning of that case applies with even greater force to these cases."[52]

But there was a material difference between the per se *Edwards-Minnick* unapproachability/waiver invalidation rule and the application of that same rule to the Sixth Amendment context: a clear indication of invocation. In the *Miranda* context, the *Edwards-Minnick* rule comes into force only when a suspect unambiguously invokes the Miranda right to counsel.[53] This invocation predicate leaves no doubt that the suspect feels assistance of counsel is necessary to aid a decision on whether to waive or invoke the Fifth Amendment privilege and, if waived, how to interact with police.[54] In contrast, depending on jurisdiction, a defendant may be assigned counsel without ever even requesting that assistance.[55] Or even when requesting counsel, the request is normally general in nature and not specifically related to a perceived need for counsel during police questioning.

These contextual differences would ultimately lead to the demise of *Jackson*, which was reversed by the Court when it decided *Montejo*.[56] In that case, petitioner Montejo, charged with murder, had been appointed counsel at an automatic preliminary hearing without ever making a request.[57] On the same day that he was appointed counsel, but before counsel met with Montejo, "two police detectives visited Montejo back at the prison and requested that he accompany them on an excursion to locate the murder weapon."[58] Montejo was read his Miranda rights before agreeing to go with the police in search of the murder weapon.[59] "[D]uring the excursion, he wrote an inculpatory letter of apology to the victim's widow."[60] The apology letter was admitted during the guilt phase of Montejo's first-degree murder trial, and he was convicted and sentenced to death.[61] Montejo had not previously invoked his Miranda right to counsel, so the *Edwards-Minnick* rule played no role in assessing

52. *Id.* at 636.

53. *See* Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) ("We further hold 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.").

54. *See* Davis v. United States, 512 U.S. 452, 461-62 (1994) ("If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.").

55. *See infra* note 57 and accompanying text; *infra* note 62 and accompanying text.

56. Montejo v. Louisiana, 556 U.S. 778, 797 (2009).

57. *Id.* at 781.

58. *Id.*

59. *Id.* at 782.

60. *Id.*

61. *Id.*

the validity of the waiver.[62] And, unlike Jackson, Montejo had never even requested to be represented by counsel in the adversarial process that had already begun.[63] Nonetheless, Montejo argued the waiver was invalid because police had violated *Jackson* by initiating the interrogation after he was, in fact, represented by counsel.[64]

The Court began by laying out the disparity between jurisdictions created by *Jackson*, and how that decision's unapproachability rule turned on whether a defendant requested counsel or was appointed counsel without request.[65] In order to eliminate this disparity, the Court chose not to extend the *Jackson* rule to defendants like Montejo, who never actually requested counsel, but instead to overrule *Jackson* and strip all defendants of a Sixth Amendment-based unapproachability rule.[66] In support of the decision, the majority asserted that the extension of the *Edwards-Minnick* rule to the Sixth Amendment context had always been dubious because the rule was created to protect suspects from "badgering" in the context of custodial interrogation, and nothing in *Jackson* suggested that police request for waiver of the Sixth Amendment right to counsel implicated analogous concerns.[67] Although the dissent pointed out that this reasoning distorted the rationale of *Edwards-Minnick*, which was, in fact, to ensure police do not exploit the invocation of the need for an attorney's assistance when dealing with police—a rationale that applied with equal logic to the Sixth Amendment context[68]—the majority's characterization doomed *Jackson*:

> Which brings us to the strength of *Jackson*'s reasoning. When this Court creates a prophylactic rule in order to protect a constitutional right, the relevant "reasoning" is the weighing of the rule's benefits against its costs. "The value of any prophylactic rule . . . must be assessed not only on the basis of what is gained, but also on the basis of what is lost." We think that the marginal benefits of *Jackson* (viz., the number of confessions obtained coercively that are suppressed by its bright-line rule and would otherwise have been admitted) are dwarfed by its substantial costs (viz., hindering "society's compelling interest in finding, convicting, and punishing those who violate the law.").[69]

62. *Id.* at 789.
63. *Id.* at 782.
64. *Id.* at 786.
65. *Id.* at 785.
66. *Id.* at 797.
67. *Id.* at 787-88.
68. *Id.* at 805-06 (Stevens, J., dissenting).
69. *Id.* at 793 (majority opinion) (internal citations omitted) (first quoting Minnick v. Mississippi, 498 U.S. 146, 161 (1990); and then quoting Moran v. Burbine, 475 U.S. 412, 426 (1986)).

The majority also emphasized the extensive protection against police badgering already afforded to defendants: first, the provision of counsel to aid them in making intelligent waiver decisions,[70] and second, if subjected to custodial interrogation, the protection afforded by *Miranda* and its progeny, including the *Edwards-Minnick* rule.[71] Justice Scalia characterized the limited added value of the *Jackson* rule, and the package of protections available without it, as follows:

> A bright-line rule like that adopted in *Jackson* ensures that no fruits of interrogations made possible by badgering-induced involuntary waivers are ever erroneously admitted at trial. But without *Jackson*, how many would be? The answer is few if any. The principal reason is that the Court has already taken substantial other, overlapping measures toward the same end. Under *Miranda's* prophylactic protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right. Under *Edwards'* prophylactic protection of the *Miranda* right, once such a defendant "has invoked his right to have counsel present," interrogation must stop. And under *Minnick*'s prophylactic protection of the *Edwards* right, no subsequent interrogation may take place until counsel is present, "whether or not the accused has consulted with his attorney." These three layers of prophylaxis are sufficient. Under the *Miranda-Edwards-Minnick* line of cases (which is not in doubt), a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings.[72]

By stripping defendants of a Sixth Amendment unapproachability rule, *Montejo* opened the door for police to solicit and obtain waivers of the Sixth Amendment right to counsel in order to interrogate a defendant. Of course, as the Court noted, if that interrogation were to occur in the context of custodial interrogation, *Miranda* and its progeny would provide a distinct source of protection, and any defendant who invoked the Miranda right to counsel would be protected by the *Edwards-Minnick* unapproachability rule.[73] Furthermore, the Court emphasized that allowing police to initiate interrogation of a represented defendant is only the first step in the admissibility analysis and that ultimately the state would bear the burden of proving the defendant made a voluntary and intelligent waiver.[74] In essence, the Court merely turned the clock back to *Brewer v. Williams*, where the Court rejected a

70. *Id.* at 794.
71. *Id.*
72. *Id.* (internal citations omitted).
73. *Id.* at 794-95.
74. *Id.* at 797-98.

Sixth Amendment unapproachability rule but held instead that the police detective failed to obtain a valid waiver.[75]

Perhaps this is why the Court emphasized that normally, the use of a Miranda warning and waiver would satisfy the prosecution burden of proving a waiver of the Sixth Amendment right to counsel when implicated by police interrogation.[76] Specifically, the Court indicated:

> Our precedents also place beyond doubt that the Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent. The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled. And when a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick, even though the *Miranda* rights purportedly have their source in the *Fifth* Amendment: As a general matter . . . an accused who is admonished with the warnings prescribed by this Court in *Miranda* . . . 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.[77]

In a situation where the Sixth Amendment right to counsel has attached and the defendant is subjected to custodial interrogation, use of the Miranda waiver to prove waiver of both the Miranda right to counsel and the Sixth Amendment right to counsel is logical. However, this passage from the opinion also raises the possibility that police might use a Miranda warning and waiver to establish waiver of the Sixth Amendment right to counsel in situations where the defendant *is not* in custody and therefore not actually entitled to Miranda protections.[78]

The Court's suggestion to use a Miranda warning and waiver to establish Sixth Amendment waiver raises an interesting question: what would be the effect of invocation of the right to counsel in response to such a warning? While this scenario might be relatively uncommon, what is the broader question of the impact of a premature or unnecessary Miranda warning? In *Oregon v. Mathiason*[79] and *Berkemer v. McCarty*,[80] the Supreme Court clarified the meaning of custody for

75. *See supra* note 47 and accompanying text.
76. *Montejo*, 556 U.S. at 786-87.
77. *Id.* (internal citations omitted) (quoting Patterson v. Illinois, 487 U.S. 285, 296 (1988)).
78. *See* Salinas v. Texas, 570 U.S. 178, 182-83 (2013) (holding that a prosecutor's comment on a defendant's silence during a non-custodial police interview did not violate the defendant's Fifth Amendment due process rights because he did not specifically invoke the privilege).
79. 429 U.S. 492 (1977).
80. 468 U.S. 420 (1984).

purposes of triggering *Miranda* protections.[81] Those cases extended the definition of custody beyond formal arrest or station-house detention to include the functional equivalent of arrest: any deprivation of liberty that would lead a reasonable person to believe they had been restrained to a degree tantamount to formal arrest.[82] Because of this, it is not uncommon for police officers to provide Miranda warnings to a suspect who has been detained in situations that, in hindsight, might not have actually qualified as custody. Such practice is a logical response to situations of "custody uncertainty": situations where the officer is unsure whether the level of restraint imposed on the suspect will be determined by a court to have qualified as Miranda custody.[83] In short, there are likely many situations where police utilize a prophylactic procedure of providing a Miranda warning to offset any risk that a confession might be vulnerable to *Miranda*-based suppression.

What is the effect of invocation of Miranda rights in response to such a warning, whether in the Sixth Amendment context or the uncertain custody context? Answering this question implicates two considerations: first, the Court's approach to what might be called "preemptive" invocations of constitutional rights; and second, the totality analysis of what qualifies as Miranda custody. But before addressing these considerations, why is this question even significant? Certainly, if the suspect waives the Miranda rights and submits to interrogation, the question of whether the warning was in fact required is irrelevant, and the warning and waiver would almost certainly nullify any claim of actual coercion in violation of due process. And, as *Montejo* emphasized, such a waiver would also satisfy the requirement to prove waiver of the Sixth Amendment right to counsel when implicated.[84]

But what would be the outcome of invocation of the Miranda right to counsel? In the Sixth Amendment context, the answer seems clear:

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81. *Id.* at 440, 442 (holding that the standard for custody is whether a reasonable person would feel free to leave, and that a *Terry* stop does not necessarily equate to custody); *Mathiason*, 429 U.S. at 495 (holding that parolee who voluntarily came to police station was not in custody).

82. *See Berkemer*, 468 U.S. at 440 (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)) ("It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a 'degree associated with a formal arrest.'"); *Mathiason*, 429 U.S. at 495 (quoting Miranda v. Arizona, 384 U.S. 436, 444 (1966)) (holding it was "clear" that suspect who "came voluntarily to the police station, where he was immediately informed that he was not under arrest," "was not in custody 'or otherwise deprived of his freedom of action in any significant way'").

83. *See, e.g.*, Christopher L. McFarlin, *Back 2 Basics: When Must Police Give Miranda Warnings?*, IN PUB. SAFETY (Nov. 27, 2017), https://inpublicsafety.com/2017/11/back-2-basics-when-must-police-give-miranda-warnings (suggesting, through officer training material, that "Miranda advisements don't cost anything but your time. If you are unsure about whether they are necessary or not, play it safe and either stop asking questions or give the warnings!").

84. *See supra* text accompanying note 76.

subsequent interrogation would violate the right.[85] The *Miranda* context seems more complicated. Would an individual who was not actually in custody then be able to seek exclusion of any statement based upon invocation of Miranda rights provided as a prophylactic measure in response to the uncertainty as to custody? And in either context, the invocation would raise the difficult question of whether the defendant was then protected by the *Edwards-Minnick* rule. Would a subsequent waiver of either the Miranda right to counsel or the Sixth Amendment right to counsel be treated as invalid if obtained as the result of police reinitiation within fourteen days of the initial invocation? If treated as a preemptive or premature invocation of the Miranda right to counsel, the answer should be no. But perhaps the use of the Miranda warning should itself be treated as an indication that the individual was in custody for purposes of Miranda.[86]

B. McNeil v. Wisconsin *and the Invalidity of Preemptive Miranda Invocations*

In *McNeil*, the Supreme Court addressed the issue of whether invocation of the Sixth Amendment right to counsel implicitly invoked the Miranda right to counsel.[87] *McNeil* was decided after *Jackson*, but before *Jackson* was overruled by *Montejo*. Paul McNeil sought to suppress a statement he made implicating himself in a murder in Caledonia, Racine County, Wisconsin, during an interview police initiated after he had been appointed a public defender for an armed robbery in West Allis, Milwaukee County, Wisconsin.[88] McNeil was arrested in Omaha, Nebraska in May 1987 on a warrant charging him with the West Allis robbery.[89] While McNeil was still in Omaha, deputies from the Milwaukee County Sheriff's Office attempted to question him regarding the robbery.[90] Upon hearing his Miranda rights, McNeil exercised his right to remain silent, but did not specifically request counsel.[91] After being transported back to Milwaukee County,

85. *See* McNeil v. Wisconsin, 501 U.S. 171, 179 (1991).

86. *See generally* Ann F. Walsh, *Should Unnecessary Warnings Wrap a Suspect in the Panoply of* Miranda *Protections?*, 10 SUFFOLK J. TRIAL & APP. ADVOC. 135 (2005) (examining the implications of police provision of *Miranda* rights to defendants in situations in which they may prove obsolete).

87. *McNeil*, 501 U.S. at 173.

88. *Id.* at 173-74.

89. *Id.* at 173.

90. *Id.*

91. *See id.* ("He refused to answer any questions, but did not request an attorney."). *But see* Salinas v. Texas, 570 U.S. 178, 186-87 (2013) ("Our cases establish that a defendant normally does not invoke the privilege by remaining silent. . . . A witness does not expressly invoke the privilege by standing mute.").

McNeil was appointed a public defender, who represented McNeil at his initial appearance on the robbery charge.[92]

After his bail hearing, McNeil was approached by a detective who was investigating a murder and related offenses in Caledonia.[93] The investigator read McNeil his Miranda rights and McNeil signed a written waiver.[94] McNeil "did not deny knowledge of the Caledonia crimes, but said that he had not been involved."[95] The detective returned and reinitiated interrogation regarding the Caledonia crimes two days later, and during the second interview, McNeil admitted he was involved in the murder in Caledonia along with two accomplices.[96] Police interrogated McNeil a third time before he was "formally charged with the Caledonia crimes and transferred to that jurisdiction."[97] Before each interview, police read McNeil his Miranda rights and each time McNeil initialed and signed written waivers.[98] McNeil sought to suppress his statements to police regarding the Caledonia murder because police had initiated interrogation after he was represented by counsel on the robbery charge.[99]

Thus, the issue in *McNeil* is whether an accused represented by counsel pursuant to the Sixth Amendment is unapproachable so that even apparently voluntary waivers are per se invalid if counsel is not present. The Court acknowledged that *Jackson* would require invalidation of any ostensible waiver of McNeil's Sixth Amendment right to counsel.[100] However, the confession McNeil sought to suppress was unrelated to the robbery charge for which he had been appointed counsel in another county.[101] Accordingly, based on the established rule that the Sixth Amendment protection is offense-specific—that it does not protect a defendant from questioning about an unrelated offense—McNeil had no basis to assert a violation of his Sixth Amendment right to counsel.[102] McNeil argued that the waivers obtained by police were all invalid pursuant to the *Edwards-Minnick* rule.[103] McNeil asserted that when he was appointed counsel at his initial appearance, that appointment implicitly invoked his Miranda right to counsel, thereby

92. *McNeil*, 501 U.S. at 173.
93. *Id.*
94. *Id.*
95. *Id.* at 174.
96. *Id.*
97. *Id.*
98. *Id.* at 173-74.
99. *Id.*
100. *Id.* at 175.
101. *Id.* at 175-76.
102. *Id.*
103. *Id.* at 177.

implicating the *Edwards-Minnick* rule.[104] The government responded that the *Edwards-Minnick* rule was inapplicable to assessing the validity of these waivers because McNeil had never invoked his Miranda right to counsel.[105]

The Court rejected McNeil's assertion of implied invocation of Miranda rights, emphasizing that the interests implicated by an invocation of the Sixth Amendment right to counsel are different from those implicated by invocation of the Miranda right to counsel.[106] As the Court said:

> To invoke the Sixth Amendment interest is, as a matter of *fact*, *not* to invoke the *Miranda-Edwards* interest. One might be quite willing to speak to the police without counsel present concerning many matters, but not the matter under prosecution. It can be said, perhaps, that it is *likely* that one who has asked for counsel's assistance in defending against a prosecution would want counsel present for all custodial interrogation, even interrogation unrelated to the charge. That is not necessarily true, since suspects often believe that they can avoid the laying of charges by demonstrating an assurance of innocence through frank and unassisted answers to questions. But even if it were true, the *likelihood* that a suspect would wish counsel to be present is not the test for applicability of *Edwards*. The rule of that case applies only when the suspect "ha[s] *expressed*" his wish for the particular sort of lawyerly assistance that is the subject of *Miranda*. It requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*. Requesting the assistance of an attorney at a bail hearing does not bear that construction.[107]

This difference led the Court to reject the notion of an implied Miranda invocation. The Court bolstered the rationale for this rejection by emphasizing that the opportunity to invoke the Miranda right to counsel, when advised of that right, was fully sufficient to protect a suspect who was represented by counsel on one offense:

> If a suspect does not wish to communicate with the police except through an attorney, he can simply tell them that when they give him the *Miranda* warnings. There is not the remotest chance that he will feel "badgered" by their asking to talk to him without counsel present, since the subject will not be the charge on which he has already requested counsel's assistance (for in that event *Jackson* would preclude initiation of the interview) and he will not have rejected uncounseled interrogation on *any* subject before (for in that event

104. *Id.*
105. *Id.* at 177-78.
106. *Id.* at 178.
107. *Id.* (internal citation omitted) (quoting Edwards v. Arizona, 451 U.S. 477, 484 (1981)).

> *Edwards* would preclude initiation of the interview). The proposed rule would, however, seriously impede effective law enforcement. . . . Thus, if we were to adopt petitioner's rule, most persons in pretrial custody for serious offenses would be *unapproachable* by police officers suspecting them of involvement in other crimes, *even though they have never expressed any unwillingness to be questioned.* Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser.[108]

This rejection then led the dissent to predict that a defendant making his or her first appearance, knowing that the request for or appointment of counsel is no shield to police-initiated interrogation on other offenses, would simply announce invocation of the Miranda right to counsel to gain the benefit of the *Edwards-Minnick* rule.[109]

The majority response, provided in footnote three of the opinion, indicated it highly unlikely that invocation of Miranda protections would be recognized as valid prior to the Miranda right being triggered by custodial interrogation:

> The dissent predicts that the result in this case will routinely be circumvented when, "[i]n future preliminary hearings, competent counsel . . . make sure that they, or their clients, make a statement on the record" invoking the *Miranda* right to counsel. We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than "custodial interrogation"—which a preliminary hearing will not always, or even usually, involve. If the *Miranda* right to counsel can be invoked at a preliminary hearing, it could be argued, there is no logical reason why it could not be invoked by a letter prior to arrest, or indeed even prior to identification as a suspect. Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the *Miranda* right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect. Assuming, however, that an assertion at arraignment would be effective, and would be routinely made, the mere fact that adherence to the principle of our decisions will not have substantial consequences is no reason to abandon that principle. It would remain intolerable that a person in custody who had expressed *no* objection to being questioned would be unapproachable.[110]

This footnote indicates that an anticipatory invocation of Miranda rights has no impact on whether that invocation has any actual effect.

108. *Id.* at 180-81.
109. *Id.* at 184 (Stevens, J., dissenting).
110. *Id.* at 182 n.3 (majority opinion).

However, it seems equally clear that the Court was significantly influenced by the fact that neither police nor the Court had done anything to indicate to McNeil that he was in a situation subject to the Miranda warning and waiver requirement. Perhaps even more significant was that by rejecting the notion of an implied invocation of the Miranda right to counsel resulting from request for or appointment of counsel at McNeil's first appearance, the Court concluded that McNeil had done nothing to indicate a need for assistance of counsel during police interrogation.[111]

If, however, police were to follow the suggestion in *Montejo* that use of a Miranda warning and waiver normally "does the trick" to prove waiver of the Sixth Amendment right to counsel, the context of anticipatory invocation would be very different than that in *McNeil*. In that situation, an individual who requests a lawyer following the warning would have indicated, unlike McNeil, a desire to be assisted by counsel during interrogation. Nonetheless, unless the individual were actually in custody at that time, he or she would be invoking a right that was not yet applicable. Would the *Edwards-Minnick* rule prohibit police from reinitiating contact with the individual within the *Shatzer* fourteen-day unapproachability timeframe? If so, the significance of the *Montejo* decision to overrule *Jackson* would be somewhat nullified as any statement obtained after police reinitiation would run afoul of the *Miranda*-based *Edwards-Minnick* rule even if a waiver were considered valid for Sixth Amendment purposes. Or would the absence of custody nullify any claim to the protection of *Miranda* and its unapproachability progeny?

While *McNeil* rejected the validity of an anticipatory Miranda invocation, it seems equally invalid to inform an individual of a "right" to assistance of counsel but then deny the benefit of invoking that right because the warning was not legally required. The direct consequence of ignoring such an invocation would be interrogation of the individual immediately following the invocation. This seems highly unlikely as the police officer would almost certainly terminate the interrogation based on the invocation. In the context of attempting to establish proof of waiver of the Sixth Amendment right to counsel, the "invocation" by the defendant in response to a Miranda warning would render the outcome of any questioning inadmissible as there would be no evidence of waiver. In the context of a police officer using a Miranda warning prophylactically in a situation of custody uncertainty, it is less certain that any statement would be inadmissible if the suspect invoked

111. *See id.* at 178, 180-82 ("To invoke the Sixth Amendment interest is, as a matter of *fact*, *not* to invoke the *Miranda–Edwards* interest. One might be quite willing to speak to the police without counsel present concerning many matters, but not the matter under prosecution.").

following the warning. But how likely would it be that the officer who issued the warning would ignore the invocation and question the suspect nonetheless? Probably not very likely.[112]

The more difficult question is whether a Miranda invocation in a situation where Miranda protection is not legally applicable due to the absence of custody should render the suspect unapproachable pursuant to *Edwards-Minnick*. There are several ways this issue could logically be addressed.

One approach could be to treat the Miranda warning as dispositive proof of custody. Doing so would eliminate all uncertainty as to the effect of an invocation, as treating the situation as custody would bring the *Miranda* rule into force. But such an approach is fundamentally inconsistent with the Court's definition of Miranda custody and its focus on whether a reasonable person in the suspect's situation would believe he was restrained to a degree tantamount to formal arrest. Being provided a Miranda warning may be a factor in that assessment, but it is hard to imagine how it could ever be dispositive. First, short of formal arrest, no single factor is dispositive; the test is inherently one based on the totality of the circumstances.[113] Second, if used to prove waiver of the Sixth Amendment right to counsel, there will be many situations where no other objective indicia of custody will be present. Indeed, the issue presented herein assumes a Miranda warning in situations where custody would not be established pursuant to established jurisprudence.

An alternate approach would be to treat the Miranda warning as purely gratuitous with no legal impact derived from the *Miranda* decision and its progeny. This does not mean that an invocation would have no legal significance, but rather that significance would derive from the Fifth Amendment privilege against self-incrimination itself, and not the *Miranda* rule. Like any other context, indicating a desire to remain silent would qualify as an invocation of the constitutional privilege. But unlike an invocation of Miranda rights, this invocation would not carry with it the derivative protection against police reinitiation of questioning at a later time. Because of the absence of Miranda custody, such an invocation, in accordance with *McNeil*, would not indicate the suspect felt a need for assistance of counsel in the

112. For a discussion of the interests in tension involved in police questions, see Anna Strandberg, *Asking for It: Silence and Invoking the Fifth Amendment Privilege Against Self-Incrimination After* Salinas v. Texas, 8 CHARLESTON L. REV. 591, 596 (2014) (proposing that two modifications be made to Fifth Amendment privilege analysis: "First, the inherent protections stemming directly from the Fifth Amendment itself should be recognized as distinct from the procedural safeguards imposed by either *Miranda* or the Due Process Clause. Second, for the purposes of Fifth Amendment analysis, a defendant's silence in the face of accusation should be treated as distinct from an express admission.").

113. California v. Beheler, 463 U.S. 1121, 1124-25 (1983).

presumptively coercive environment of custodial interrogation. The absence of that presumptive coercion would accordingly mean that any subsequent decision to submit to police questioning, even if initiated by police, need not be treated as presumptively invalid.

This latter approach seems best aligned with existing jurisprudence. It also seems logical where the individual provided a premature or unnecessary Miranda warning invoking the right to remain silent. That invocation outside the context of custody would function no differently than any other non-custodial invocation of the right to silence: it would require termination of questioning but would have no other lingering effect on subsequent questioning efforts. What seems more complicated is the non-custodial suspect who seeks to invoke the Miranda right to counsel in response to a premature non-custodial Miranda warning. It is difficult to see how this should not be viewed as an expression of desire to deal with police interrogation only with the assistance of counsel. As a result, the invocation would implicate the *Edwards-Minnick* concerns that the *McNeil* Court concluded were not implicated by a general request for counsel at a first appearance.

Accordingly, a third approach might be to focus on the specific nature of the premature warning invocation. If that invocation specifically relates to the Miranda right to counsel, an equitable extension of the *Edwards-Minnick* protection might be warranted. Of course, such an approach is swimming up a proverbial stream against the powerful currents of *Jackson* and *McNeil*. But if the rationale of *McNeil* deprives a defendant of the benefit of a premature Miranda invocation because the "general" request for representation indicates that the specific interests of *Miranda* were not implicated, it is at least plausible that where they are implicated—specifically as the result of police action that indicates they are applicable—such an equitable extension would at least be aligned with this jurisprudence.

III. CONCLUSION

There may be an easy answer to the question of a premature *Miranda* invocation presented in this Article: *Miranda* protections are simply inapplicable until they are triggered by custodial interrogation. But when an individual asserts Miranda rights after being informed of those rights by police, the fact that the warning was unnecessary seems to be an odd justification for allowing police to ignore the consequences of that invocation.

One solution to the disconnect between what the officer advised in the way of informing the individual and the actual impact of that advice would be to simply treat the invocation like any other pre-custodial

invocation of the Fifth Amendment privilege: it would prohibit questioning but would in no way prohibit police reinitiation of questioning. However, where the individual specifically invokes the Miranda right to counsel in response to a Miranda warning, this seems like an incomplete solution, as the invocation indicates the individual's desire to deal with police only through counsel. This solution seems even more problematic when the reinitiation occurs outside the context of custody and therefore need not involve another Miranda warning. Thus, in response to the premature Miranda warning, the individual would have indicated the desire for assistance of counsel, but when police subsequently reinitiate questioning, the individual would not then again be advised of the right to that assistance.

The other solution would be to treat the Miranda warning itself as sufficient to bring the protections of the *Miranda* rule into force—to include the unapproachability protection provided by *Edwards* and *Minnick*. While this is undoubtedly an extension of the *Edwards-Minnick* rule, which will be viewed by many as an unnecessary extension of a prophylactic rule that has been criticized even when triggered by custodial interrogation,[114] it would produce a more equitable alignment between the individual's expectations and the consequences of invoking a right based on a premature advisement.

A third solution could be to develop a warning and waiver specifically tailored to the Sixth Amendment for use in situations where police sought to initiate interrogation of an individual protected by the Sixth Amendment in a non-custodial setting. Use of the Miranda warning and waiver will serve the dual-purpose of proving waiver of both the Miranda and Sixth Amendment rights to counsel when the individual is subjected to custodial interrogation. Indeed, in that situation, the Miranda waiver will indeed "do the trick." But the "trick" will be on the individual subjected to questioning when police use the Miranda warning in the non-custodial setting precisely because the warning is not properly tailored to the right implicated by the questioning. Using a warning and waiver specifically focused on the Sixth Amendment right to counsel in situations where police sought to initiate interrogation of an individual protected by the Sixth Amendment in a non-custodial setting will avoid creating a false expectation of protection derived from the *Miranda* rule. Waiver will allow questioning; invocation will require police to terminate questioning. But invocation after a specific Sixth Amendment warning will not render the individual unapproachable by police who seek to reinitiate at a later date.

114. *See supra* text accompanying note 67.

This Sixth Amendment waiver approach is not a complete answer to the premature Miranda warning question, as it in no way addresses the premature warning unrelated to an effort to secure a waiver of the Sixth Amendment right to counsel, but it will at least fill a potential gap of uncertainty created by *Montejo's* suggestion to use a Miranda warning and waiver to secure waiver of the Sixth Amendment right to counsel.

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