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Miranda Warnings Sufficient to Inform Defendant of Sixth Amendment Right to Counsel for Postindictment Interrogations.

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CRIMINAL PROCEDURE—Right To Counsel—Miranda Warnings Sufficient To Inform Defendant Of Sixth Amendment Right To Counsel For Postindictment Interrogations.

Patterson v. Illinois,
__ U.S. __, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988).

On the morning of August 21, 1983, police officers discovered the body of James Jackson, the victim of a gang-related murder.[1] That afternoon, Tyrone Patterson was arrested on charges of mob action, informed of his Miranda rights, and questioned about the murder.[2] On August 23, while still in police custody, Patterson learned from police officers that he had been indicted for Jackson's murder.[3] Patterson attempted to volunteer information regarding the murder, but was immediately interrupted by a police officer who read him his Miranda rights.[4] Patterson signed a form waiving his Miranda rights and proceeded to make inculpatory statements to the police.[5] That afternoon, the Illinois Assistant State's Attorney confirmed that Patterson understood and thereby properly waived his Miranda rights prior to making his earlier statement.[6] The attorney then re-explained those warnings and obtained a second waiver form signed by Patterson before allowing him to make a second confession.[7] Patterson was convicted of murder in the

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1. Patterson v. Illinois, __ U.S. __, __, 108 S. Ct. 2389, 2392, 101 L. Ed. 2d 261, 269 (1988).

2. *Id.* Patterson agreed to answer questions pertaining to a fight with a rival gang but denied any knowledge of Jackson's death. *Id.* Patterson was held in custody while police continued their investigation. *Id.*

3. *Id.*

4. *Id.*; *see also* Miranda v. Arizona, 384 U.S. 436, 479 (1966)(listing required warnings given by police). Patterson was handed a form listing the five required warnings which he and the officer read together. *Patterson*, __ U.S. at __, 108 S. Ct. at 2392, 101 L. Ed. 2d at 269.

5. *Patterson v. Illinois*, __ U.S. __, __, 108 S. Ct. 2389, 2392-93, 101 L. Ed. 2d 261, 270 (1988). Patterson initialed each of the individual warnings and then signed the form. *Id.* Patterson then described, in detail, his involvement in the murder. *Id.* Patterson conceded "that he was informed of his right to counsel to the extent required by . . . *Miranda v. Arizona*." *Patterson*, __ U.S. at __ n.1, 108 S. Ct. at 2392 n.1, 101 L. Ed. 2d at 269 n.1.

6. *Patterson*, __ U.S. at __, 108 S. Ct. at 2393, 101 L. Ed. 2d at 270.

7. *Patterson*, __ U.S. at __, 108 S. Ct. at 2393, 101 L. Ed. 2d at 270. Additionally, Assistant State's Attorney Smith informed Patterson that he was working with the police and was not Patterson's attorney. *Id.* Patterson told Smith that he was making the confession freely, had not received any promises or threats and had been allowed to eat and rest while in custody. People v. Thomas, 507 N.E.2d 843, 845 (Ill. 1987)(lower court proceeding discussing facts of case).

Illinois trial court.[8] The court admitted Patterson's inculpatory statements into evidence, holding that the Miranda warnings sufficiently informed him of his right to counsel during postindictment questioning.[9] The Illinois Appellate Court and Supreme Court affirmed the conviction.[10] The United States Supreme Court granted writ of certiorari to decide whether Miranda warnings are sufficient to inform a defendant of his sixth amendment right to counsel for postindictment interrogation.[11] Held — *Affirmed*. Miranda warnings are sufficient to inform a defendant of his sixth amendment right to counsel for postindictment interrogations.[12]

The fifth amendment to the United States Constitution provides, in part, that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself."[13] The United States Supreme Court in *Miranda v. Arizona*,[14] established a clear set of warnings designed to protect a suspect's fifth amendment[15] right to be free from coerced self-incrimination.[16] As a prerequisite to custodial interrogation, a suspect must be warned that he has the right: 1) to an attorney; 2) to have that attorney present during questioning; 3) to have an attorney appointed if he cannot afford one; 4) to remain silent; and 5) that anything he says may be used against him in subsequent

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8. Patterson v. Illinois, __ U.S. __, __, 108 S. Ct. 2389, 2393, 101 L. Ed. 2d 261, 270 (1988).

9. *Id.*

10. *Id.*; People v. Thomas, 507 N.E.2d 843, 849 (Ill. 1987); People v. Patterson, 488 N.E.2d 1283, 1289 (Ill. App. Ct. 1986).

11. Patterson v. Illinois, __ U.S. __, __, 108 S. Ct. 227, 227, 98 L. Ed. 2d 186, 186 (1987)(order granting certiorari).

12. Patterson v. Illinois, __ U.S. __, __, 108 S. Ct. 2389, 2399, 101 L. Ed. 2d 261, 277 (1988).

13. U.S. CONST. amend. V.

14. 384 U.S. 436 (1966). "Miranda" collectively refers to four cases chosen at random from nearly eighty cases that presented the same issue during the 1965 term. Note, *Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel*, 82 COLUM. L. REV. 363, 376 n.82 (1982). The other three cases are: *Vignera v. New York*, No. 760; *Westover v. United States*, No. 761; and *California v. Stewart*, No. 584. *See Miranda*, 384 U.S. at 436.

15. *See* U.S. CONST. amend. V. The fifth amendment has previously been applied to a confession scenario. *See* Bram v. United States, 168 U.S. 532, 542 (1897)(defendant's involuntary statements excluded). While *Bram* has been criticized by commentators, it was utilized by the United States Supreme Court in its analysis of valid confessions until 1966. Note, *Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel*, 82 COLUM. L. REV. 363, 376 nn. 84 & 86. (1982). In 1964, the fifth amendment was first held applicable to state trials. *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964)(fifth amendment guarantee binding on all states).

16. Miranda v. Arizona, 384 U.S. 436, 469 (1966). The Court held that "[w]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized." *Id.* at 478. For a detailed account of the history behind *Miranda*, see generally L. BAKER, MIRANDA: CRIME, LAW AND POLITICS (1983).

criminal proceedings.[17] The rationale underlying these warnings is the awareness that custodial interrogations are inherently coercive and likely to induce incriminating statements.[18] Thus, the accused needs the protection of counsel during custodial interrogation to protect the fifth amendment right against self-incrimination.[19] Unlike the prophylactic protection given to the fifth amendment right once an individual has been placed in custody, the sixth amendment right to counsel attaches once the government's role turns from investigator to prosecutor.[20]

The sixth amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."[21] The right to counsel originally applied to the trial phase of a criminal prosecution.[22] In 1964, the sixth amendment right to counsel was extended to protect the accused from government attempts to deliberately elicit incriminating statements after the initiation of formal

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17. *Miranda*, 384 U.S. at 479. The Court stated that "procedural safeguards" were required to protect a suspect's rights. *Id.* at 467-69. If the defendant indicates that he wants to remain silent or to have an attorney present, the interrogation must cease. *Id.* at 474.

18. *Id.* at 470. *See generally* Note, *Miranda and its Progeny -Application and Limitation of the Warren Court's Legacy*, 21 SYRACUSE L. REV. 232, 239-43 (1969)(*Miranda* intended to diminish use of interrogation as primary tool in criminal justice arsenal).

19. *See Miranda*, 384 U.S. at 470 (fifth amendment requires protection through counsel prior to and during questioning). *Miranda*'s entitlement to counsel is merely a prophylactic protection for the fifth amendment right to be free from coerced self-incrimination. *See generally* Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 988 n.50 (1986)(*Miranda* warnings safeguard fifth amendment right to be free from compulsory self-incrimination).

20. *Compare* New York v. Quarles, 467 U.S. 649, 654 (1984)(Miranda warnings protect right to be free from compulsory self-incrimination in custodial setting) *with* Kirby v. Illinois, 406 U.S. 682, 689 (1972)(return of formal charges marks starting point of adversary proceedings at which point government commits itself to prosecute and sixth amendment right to counsel attaches).

21. U.S. CONST. amend. VI.

22. *See* Gideon v. Wainwright, 372 U.S. 335, 345 (1963)(sixth amendment right to counsel applicable to state trials). Clarence Earl Gideon, indigent and unable to secure counsel, requested that the Florida trial court appoint an attorney for his defense in the felony proceedings against him. *Id.* at 337. This request was denied because Florida only appointed counsel in capital cases. Gideon made an opening statement, cross examined the prosecution's witnesses, presented witnesses in his defense, and made a closing argument, as skillfully as could be expected of a layman. *Id.* His conviction was reversed by the United States Supreme Court which held that the right to counsel was fundamental to a fair trial in either federal or state court. *Id.* at 344-45; *see also* Johnson v. Zerbst, 304 U.S. 458, 468 (1938)(sixth amendment requires appointed counsel for indigent defendants in federal felony trials); Powell v. Alabama, 287 U.S. 45, 68-70 (1932)(fourteenth amendment due process clause guarantees indigent defendant right to counsel during trial for capital crimes during trial). *But see* Scott v. Illinois, 440 U.S. 367, 373-74 (1979)(appointed counsel not required at trial where indigent defendant not sentenced to imprisonment).

charges.[23] The United States Supreme Court reasoned that the assistance of counsel at trial would be of little value if the indicted defendant was denied counsel at a critical pretrial period such as postindictment police interrogation.[24] The right to counsel was later expanded to encompass pretrial phases that were deemed "critical stages."[25] The United States Supreme Court has defined a "critical stage" as any confrontation between the defendant and the government in which an attorney is needed to safeguard the right to a fair trial.[26] This definition was later qualified by the Court when it stated

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23. *See* Massiah v. United States, 377 U.S. 201, 206 (1964)(deliberate postindictment elicitation of incriminating statements outside retained counsel's presence violates sixth amendment guarantee to counsel). The Court held that the government's deliberate elicitation of incriminating statements from an indicted suspect who had been released on bail without retained counsel, violated the fifth and sixth amendments. *Id.* Massiah made incriminating statements in response to questions from co-defendant Colson, who was cooperating with the police. *Id.* at 202-03. Colson allowed the police to install an electronic transmitter in his automobile which enabled the police to monitor the conversation in question. *Id.*

24. *Massiah*, 377 U.S. at 204-05. The Court extended sixth amendment protection to custodial interrogations in *Escobedo v. Illinois*, following the analysis in *Massiah*. *See* Escobedo v. Illinois, 378 U.S. 478, 486-90 (1964)(examination of sixth amendment precedents). The Court's holding was limited to the facts of the case:

> "We hold . . . that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment . . . ."

Id. at 490-91. For further discussion on the attachment of the right to counsel, see generally Grano, Rhode Island v. Innis: *A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 5-9 (1979)(initiation of adversary proceedings as threshold requirement to right to counsel); White, Rhode Island v. Innis, *The Significance of a Suspect's Assertion of his Right to Counsel*, 17 AM. CRIM. L. REV. 53, 57-61 (1979)(examination of triggering events for attachment of sixth amendment right to counsel). For a detailed discussion of the development of the sixth amendment right to counsel before *Escobedo* and *Massiah*, see generally Enker & Elsen, *Counsel for the Suspect*: Massiah v. United States *and* Escobedo v. Illinois, 49 MINN. L. REV. 47, 49-53 (1964)(historical review of sixth amendment right to assistance of counsel prior to 1964).

25. *See* United States v. Wade, 388 U.S. 218, 227-28 (1967)(defining critical stage). The right to counsel attaches at various pretrial stages, such as preliminary hearings, delayed sentencing hearings, initial appearances before a magistrate and pretrial arraignments. *See* Coleman v. Alabama, 399 U.S. 1, 9 (1970)(preliminary hearings); Mempa v. Rhay, 389 U.S. 128, 135-36 (1967)(delayed sentencing hearing); White v. Maryland, 373 U.S. 59, 60 (1963)(initial appearance before magistrate); Hamilton v. Alabama, 368 U.S. 52, 53 (1961)(pretrial arraignment). *See generally* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1972)(extension of sixth amendment to pretrial proceedings); Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 980-82 (1986)(historical expansion of sixth amendment).

26. *See* United States v. Wade, 388 U.S. 218, 227 (1967)(critical stage defined as confron-

that the sixth amendment right to counsel will not be extended to defendants prior to the initiation of formal criminal charges at a preliminary hearing or arraignment, or by the return of an indictment or information.[27] Thus, suspects questioned prior to the return of formal charges are not afforded the same sixth amendment protection as postindictment defendants,[28] though they may be protected by other constitutional rights.[29] At all times, however, a suspect or defendant may waive these rights if the waiver is knowingly and intelligently made.[30]

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tation which requires presence of counsel to assure defendant's interests protected consistently with adversary theory of prosecution). For examples of critical stages, see *Estelle v. Smith*, 451 U.S. 454, 469-71 (1981)(psychiatric examinations used to establish defendant as dangerous and deserving of death penalty); *United States v. Henry*, 447 U.S. 264, 274 (1980)(deliberate postindictment elicitation of incriminating statements via undercover government agent); *Moore v. Illinois*, 434 U.S. 220, 229-30 (1977)(eyewitness identification at preliminary hearing); *Brewer v. Williams*, 430 U.S. 387, 404-05 (1977)(deliberate postarraignment elicitation of incriminating statements); *Gilbert v. California*, 388 U.S. 263, 271-74 (1967)(postindictment eyewitness identification). However, not all stages of a criminal proceeding are deemed critical. *See* United States v. Wade, 388 U.S. 218, 228 (1967). Where the defendant is not present and, therefore, not subjected to prejudicial conditions, the right to counsel does not attach. *See* United States v. Ash, 413 U.S. 300, 317 (1973)(photographic identification where defendant not present is not critical stage). The Court has held that the right to counsel does not apply to scientific examinations of fingerprints, hair, and blood samples because the accused could confront the government's evidence at trial through cross-examination. *See* United States v. Wade, 388 U.S. 218, 227 (1967)(discussing situations in which sixth amendment right to counsel does not attach); *see also* Schmerber v. California, 384 U.S. 757, 766 (1966)(taking blood sample not critical stage). *See generally* J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED: TRIAL RIGHTS §§ 23-31 (1974)(discussing right to counsel at different stages in criminal proceedings); Stephens, *The Assistance of Counsel and the Warren Court: Post-Gideon Developments in Perspective*, 74 DICK. L. REV. 193, 199-212 (1970)(attachment of right to counsel depends on stage of proceeding).

27. Kirby v. Illinois, 406 U.S. 682, 689 (1972). The Court has refused to extend sixth amendment protection to situations that arise before the initiation of adversarial proceedings. *See* Moran v. Burbine, 475 U.S. 412, 431 (1986)(custodial interrogation prior to return of formal charges not sufficient to trigger sixth amendment counsel right); *see also* United States v. Gouveia, 467 U.S. 180, 187 (1984)(preindictment administrative detention insufficient to give rise to right to counsel under sixth amendment).

28. *See* Moran v. Burbine, 475 U.S. 412, 428-432 (1986)(failure of police to inform defendant that attorney had been retained by third party on his behalf did not violate sixth amendment right to counsel where defendant not arraigned); *see also* United States v. Gouveia, 467 U.S. 179, 192 (1984)(convicted prisoners held in administrative detention during investigation of murdered inmate not deprived of sixth amendment right to counsel until return of indictment); *Kirby*, 406 U.S. at 690 (preindictment eyewitness identification does not violate sixth amendment right to counsel).

29. *See* Miranda v. Arizona, 384 U.S. 436, 470 (1966)(fifth amendment comprehends right to attorney during custodial interrogation); Stovall v. Denno, 388 U.S. 293, 301-02 (1967)(unnecessarily suggestive line-up conducive to irreparable mistaken identity violates fourteenth amendment due process clause).

30. *See Miranda*, 384 U.S. at 475-76 (adopting intentional abandonment standard for

Statements deliberately elicited from the accused outside of the presence of counsel may be used at trial only if the accused has validly waived his right to counsel.[31] Because the assistance of counsel is fundamental to a fair adjudication,[32] waiver of that right is strictly scrutinized.[33] Courts presume that the accused does not desire to waive the right[34] and require the government to show that the defendant intentionally abandoned or relinquished his right to counsel.[35] In analyzing such a waiver, the courts must discern whether it was made voluntarily,[36] if the defendant fully comprehended the nature of the right and if the defendant understood the consequences of abandoning that right.[37] In doing so, the court may consider the circum-

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fifth amendment waiver of counsel); Johnson v. Zerbst, 304 U.S. 458, 464 (1938)(sixth amendment waiver described as intentional abandonment of known right).

31. Michigan v. Jackson, 475 U.S. 625, 632 (1986)(statements made after attachment of sixth amendment right require same protection as those protected by fifth amendment); *see also* Brewer v. Williams, 430 U.S. 387, 404-05 (1977)(postindictment statement deliberately elicited by police officer outside presence of retained counsel held inadmissible in absence of valid waiver); *Miranda*, 384 U.S. at 476 (required warnings and waiver are prerequisites to admissibility of defendant's statements); United States v. Morgan, 346 U.S. 502, 512 (1954)(trial without intelligent and competent waiver of right to counsel bars conviction).

32. *See, e.g.*, United States v. Wade, 388 U.S. 218, 227 (1967)(pretrial counsel necessary to preserve right to fair trial); Massiah v. United States, 377 U.S. 201, 204 (1964)(pretrial right to counsel critical to effective representation at trial); Gideon v. Wainwright, 372 U.S. 335, 343 (1963)(right to counsel fundamental to fair trial); *see also* Powell v. Alabama, 287 U.S. 45, 57 (1933)(period from arraignment to trial critical for defense).

33. *See Brewer*, 430 U.S. at 404 (strict standard for evaluating waiver of right to counsel applies to critical pretrial stages and trial of criminal prosecution); Schneckloth v. Bustamonte, 412 U.S. 218, 238-40 (1973)(waiver of right to counsel at trial strictly scrutinized); *cf. Miranda*, 384 U.S. at 475 (government's heavy burden of proving waiver scrutinized in light of high standards).

34. Brewer v. Williams, 430 U.S. 387, 404 (1977); *see also* Brookhart v. Janis, 384 U.S. 1, 4 (1966)(presumption against waiver of constitutional rights); Glasser v. United States, 315 U.S. 60, 70-72 (1942)(presumption against waiver of fundamental rights); *Johnson*, 304 U.S. at 464 (presumption against acquiescence in loss of fundamental rights); *cf.* Miranda v. Arizona, 384 U.S. 436, 475 (1966)(defendant's silence will not give rise to presumption of waiver).

35. Johnson v. Zerbst, 304 U.S. 458, 464 (1938)(defining waiver); *see also* Brewer v. Williams, 430 U.S. 387, 404 (1977)(waiver of sixth amendment right requires both comprehension and intentional relinquishment); *Miranda*, 384 U.S. at 475 (defendant's preinterrogation waiver of counsel must be knowing and intelligent).

36. *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 421 (1986)(relinquishment of right must be free from deliberate coercion or intimidation); Estelle v. Smith, 451 U.S. 454, 471 n.16 (1981)(waiver of assistance of counsel must be voluntary); *Brewer*, 430 U.S. at 404 (waiver of counsel ineffective where record reflects defendant coerced into making incriminating statements); Walker v. Johnston, 312 U.S. 275, 286 (1941)(defendant deprived of constitutional right where waiver not voluntary); *cf. Miranda*, 384 U.S. at 444 (defendant may waive right to counsel provided waiver made voluntarily).

37. *Moran*, 475 U.S. at 421 (totality of circumstances examined to determine if comprehension was attained to waive right to counsel).

stances and facts of the case,[38] as well as the education,[39] background,[40] and age of the defendant.[41] While the existence of the constitutional right to counsel does not depend on the defendant's request,[42] it is a factor to be considered in analyzing subsequent incriminating responses to police questioning.[43] Applying these factors, the same standard of knowing and intelli-

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38. *Johnson*, 304 U.S. at 464 (valid waiver based upon facts and circumstances of case); *see also Estelle*, 451 U.S. at 471-72 n.16 (knowing and intelligent waiver depends on circumstances and facts of each case); North Carolina v. Butler, 441 U.S. 369, 375 (1979)(reaffirming factors set forth in *Zerbst*); Brewer v. Williams, 430 U.S. 387, 403 (1977)(validity of waiver of counsel requires application of constitutional principles to facts of case); Von Moltke v. Gillies, 332 U.S. 708, 723-25 (1948)(trial judge must investigate circumstances surrounding defendant's waiver of right to counsel).

39. *See* United States v. Hafen, 726 F.2d 21, 25 (1st Cir.)(defendant's status of college graduate and two year completion of law school supported finding defendant knowingly and intelligently waived right to counsel), *cert. denied*, 466 U.S. 962 (1984); United States v. Bailey, 675 F.2d 1292, 1302 (D.C.Cir. 1982)(valid waiver of counsel supported by evidence defendant studied law in prison); Bennett v. State of Miss., 523 F.2d 802, 803-04 (5th Cir. 1975)(defendant's waiver of appellate counsel ineffective in light of third grade education); LaPlante v. Wolff, 505 F.2d 780, 781-83 (8th Cir. 1974)(trial court's explanation to eighteen year-old English-speaking defendant with ninth grade education supported valid waiver of counsel).

40. *See* Faretta v. California, 422 U.S. 806, 835 (1975)(intelligent waiver of counsel does not require defendant have skill and experience of trained lawyer); Glasser v. United States, 315 U.S. 60, 70 (1942)(defendant's professional occupation as attorney considered factor in analyzing waiver of counsel); Fillippini v. Ristaino, 585 F.2d 1163, 1167 (1st Cir. 1978)(validity of written waiver of counsel supported by previous representation by counsel and past criminal record).

41. *See* United States v. Williamson, 806 F.2d 216, 220 (10th Cir. 1986)(eighteen year-old's waiver of legal assistance held valid where court explained right to counsel, charges and punishment); McLemore v. Cubley, 569 F.2d 940, 940-41 (5th Cir. 1978)(assistance of counsel not prerequisite to valid waiver of counsel by juvenile in delinquency proceeding); McBride v. Jacobs, 247 F.2d 595, 596 (D.C. Cir. 1957)(totality of circumstances examined to determine whether minor capable of valid waiver of counsel).

42. *See Brewer*, 430 U.S. at 404-05 (right to counsel not dependent on defendant's request); Carnley v. Cochran, 369 U.S. 506, 513 (1962)(constitutional right to attorney exists independent of defendant's request); *cf.* Miranda v. Arizona, 384 U.S. 436, 470 (1966)(failure to request counsel does not constitute waiver).

43. Michigan v. Jackson, 475 U.S. 625, 633 n.6 (1986). Jackson requested counsel at his arraignment, invoking his sixth amendment right to counsel. *Id.* at 628. Before counsel was actually appointed, Jackson was interrogated and made incriminating statements which were used against him at trial. *Id.* The Court stated that "we construe the defendant's request for counsel as an extremely important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation." *Id.* at 633 n.6. This footnote, however, conflicts with the Court's holding that police initiated interrogations, conducted after the accused invokes his sixth amendment right, invalidates any waiver given for that interrogation session. *Id.* at 636. Justice Rehnquist disagreed, arguing that the policies behind *Edwards* have no application in a sixth amendment context. *Id.* at 637-42 (Rehnquist, J., dissenting). Justice Rehnquist asserted that *Edwards* merely enhances the rights conferred by *Miranda* by providing an additional layer of protection to the fifth amendment. *Id.* at 639. Since there is no evidence that the police routinely violate the sixth amendment right to counsel, a prophylactic

gent waiver applies to both fifth and sixth amendment contexts.[44]

Miranda provided for waiver of the Court's proposed warnings based on the "knowing and intelligent relinquishment or abandonment of a known right or privilege" standard previously set forth in sixth amendment cases.[45] While a majority of the lower federal courts have held that Miranda warnings are sufficient to inform the accused of his sixth amendment right to counsel,[46] the Supreme Court had not yet answered this question.[47]

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rule is unnecessary. *Id. Edwards*, a fifth amendment case, established the rule that once a defendant has requested the assistance of counsel, further interrogation is prohibited until an attorney has been made available, unless the accused initiates further conversations with the police. Edwards v. Arizona, 451 U.S. 477, 484-85 (1981). For an in depth analysis of *Michigan v. Jackson*, see Note, *Criminal Procedure — Right to Counsel/Waivers:* Michigan v. Jackson, 64 U. DET. L. REV. 807, 807-17 (1987).

44. *See* Miranda v. Arizona, 384 U.S. 436, 475 (1966)(adopting *Zerbst* sixth amendment standard for fifth amendment waiver of counsel); Johnson v. Zerbst, 304 U.S. 458, 464 (1938)(adopting intentional relinquishment of known right as standard of waiver for sixth amendment).

45. *Miranda*, 384 U.S. at 475 (adopting standard set forth in *Zerbst*). The Court noted that the record must reflect that the "accused was offered counsel but intelligently and understandingly rejected the offer." *Id.* One commentator has suggested that any defendant who waives the right to counsel acts unintelligently. *See* Recent Cases, *Criminal Law — Confessions — Government Can Satisfy its Burden of Proving Waiver of Miranda Rights by Showing Warnings Given, Signed Waiver and Proof of Defendant's Capacity to Understand the Warnings*, 26 VAND. L. REV. 1069, 1075 n.47 (1973)(defendant should not waive rights until situation evaluated dispassionately). If an interrogation continues without the assistance of counsel, a heavy burden is imposed upon the state to show that the defendant knowingly and intelligently waived his fifth amendment rights. *Miranda*, 384 U.S. at 475. *See generally* Note, *Intoxicated Confessions: A New Haven in Miranda*, 20 STAN. L. REV. 1269, 1280 (1968)(imposition of heavy burden on state intended to diminish state's advantage in conducting inherently coercive interrogations).

46. *See, e.g.*, Blasingame v. Estelle, 604 F.2d 893, 896 (5th Cir. 1979)(defendant's postarraignment waiver of Miranda warnings sufficiently indicated voluntary waiver of counsel); United States v. Monti, 557 F.2d 899, 904 (1st Cir. 1977)(Miranda warnings sufficiently informed postindictment defendant of right to counsel); Moore v. Wolfe, 495 F.2d 35, 36-37 (8th Cir. 1974)(incriminating statement admissible because Miranda warnings enabled defendant to make knowing and intelligent waiver of appointed counsel); United States v. Cobbs, 481 F.2d 196, 199-200 (3rd Cir.)(postindictment interrogation constitutionally permissible outside presence of appointed counsel if defendant waives Miranda warnings), *cert. denied*, 414 U.S. 980 (1973); United States v. Springer, 460 F.2d 1344, 1352-53 (7th Cir.)(defendant must fully understand Miranda warnings to make knowing and intelligent waiver of sixth amendment counsel), *cert. denied*, 409 U.S. 873 (1972); Coghlan v. United States, 391 F.2d 371, 372 (9th Cir.)(Miranda warnings inform defendant of right to counsel such that confession obtained outside presence of appointed counsel is admissible), *cert. denied*, 393 U.S. 870 (1968). The second circuit is alone among the federal appellate courts in support of a higher standard. *See* United States v. Mohabir, 624 F.2d 1140, 1153 (2d Cir. 1980)(requiring federal judicial officer to explain content and significance of right to counsel). Commentators, however, favor a higher standard for sixth amendment waivers. *See, e.g.*, Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 1054-1059 (1986)(explicit sixth amendment warnings required to insure knowing and intelligent waiver); Note,

In *Patterson v. Illinois*,[48] the United States Supreme Court held that Miranda warnings are sufficient to warn a suspect of his sixth amendment right to counsel for postindictment interrogation purposes.[49] The Court conceded that Patterson had a sixth amendment right to counsel by virtue of his postindictment status,[50] but held that his failure to ask for an attorney distinguished his case from those in which the accused actually invoked the right to counsel by requesting legal assistance.[51] The majority found that Patterson made a valid, "knowing and intelligent" waiver of his sixth amendment right.[52] This finding was based on a two part analysis that asked first if the accused was aware of his right to have an attorney present during questioning, and second, if the accused was aware of the consequences of his act.[53] Addressing the first prong, the Court insisted that Miranda warnings adequately encompass the essential elements of the sixth amendment's guaran-

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Sixth Amendment Right to Counsel: Standards for Knowing and Intelligent Pretrial Waivers, 60 B.U.L. REV. 738, 757-763 (1980)(accused must be informed of disadvantages and dangers of waiving sixth amendment counsel in relation to particular critical stage encountered); Note, *Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel*, 82 COLUM. L. REV. 363, 381-91 (1982)(suggesting assistance of counsel as prerequisite to waiver).

47. *See, e.g.*, Michigan v. Jackson, 475 U.S. 625, 635-36 n.10 (1986)(reserving judgment on relationship between fifth and sixth amendment waivers); Moran v. Burbine, 475 U.S. 412, 428 n.2 (1986)(relationship between fifth and sixth amendment waivers not raised); Brewer v. Williams, 430 U.S. 387, 405-06 (1977) (reserving question of sixth amendment waiver).

48. __ U.S. __, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988)(White, J., delivering majority opinion).

49. Patterson v. Illinois, __ U.S. __, __, 108 S. Ct. 2389, 2399, 101 L. Ed. 2d 261, 277 (1988). The Court limited the application of this holding to postindictment questioning, noting that a waiver of the right is binding on the accused until he desires to revoke the waiver. *Id.* at __ n.5, 108 S. Ct. at 2395 n.5, 101 L. Ed. 2d at 272 n.5.

50. *Id.* at __, 108 S. Ct. at 2393, 101 L. Ed. 2d at 270; *see also* Michigan v. Jackson, 475 U.S. 625, 629 (1986)(sixth amendment guarantees assistance of counsel at postarraignment interrogation); *Brewer*, 430 U.S. at 398-401 (accused entitled to attorney after initiation of adversarial proceedings); Massiah v. United States, 377 U.S. 201, 205-07 (1964)(critical stage after arraignment requires counsel).

51. *Patterson*, __ U.S. at __, 108 S. Ct. at 2394, 101 L. Ed. 2d at 271. A request for counsel would have precluded further questioning. *See Jackson*, 475 U.S. at 636 (sixth amendment requires postindictment interrogation cease once defendant requests counsel); *cf.* Miranda v. Arizona, 384 U.S. 436, 474 (1966)(interrogation must stop if defendant invokes right to counsel). *But cf.* Edwards v. Arizona, 451 U.S. 477, 483-84 (1981)(defendant's uncounseled statements admissible after invocation of right to counsel where defendant initiated communication).

52. *Patterson*, __ U.S. at __, 108 S. Ct. at 2397, 101 L. Ed. 2d at 275. The Court stated that Patterson read and signed the waiver form, indicating some level of voluntariness, and that Patterson was unable to recommend any meaningful additional warnings which would have enabled him to make a better decision. *Id.* at __ nn.7-8, 108 S. Ct. at 2396 nn.7-8, 101 L. Ed. 2d at 274 nn.7-8.

53. *Id.* at __, 108 S. Ct. at 2395, 101 L. Ed. 2d at 273; *see also* Moran v. Burbine, 475 U.S. 412, 421 (1986)(discussing two-part waiver analysis).

tee of counsel thereby apprising the defendant of his right to consult an attorney.[54] Addressing the second prong, the majority reasoned that Patterson was made aware of the consequences of his waiver because law enforcement officials warned him that his subsequent statements could be used against him.[55] The Court also rejected Patterson's argument that the judicially created fifth amendment right to counsel was a "lesser" right that required a lower standard of waiver than the accused's sixth amendment right.[56] The Court found little difference in the role of counsel during custodial interrogation and postindictment questioning[57] and concluded that Miranda warnings, already sufficient for fifth amendment interrogations, adequately informed a defendant of his sixth amendment right to counsel.[58]

Justice Blackmun dissented, arguing that once adversarial proceedings commence, the defendant should not have to request the assistance of counsel where that right is constitutionally granted.[59] He further insisted that interrogation should be prohibited until counsel had been consulted, unless the accused initiated the conversation.[60] Justice Blackmun would extend the rule announced in *Edwards v. Arizona*, prohibiting questioning by police after the defendant requested counsel, to all postindictment defendants, whether or not they actually invoke the right to counsel.[61]

Justice Stevens, in a separate dissent,[62] argued that the state's actions were unethical[63] due to the government's role as both advisor and prosecutor.[64] Additionally, Justice Stevens urged that the initiation of formal criminal proceedings so significantly increased the need for safeguards between an

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54. *Patterson*, __ U.S. at __, 108 S. Ct. at 2395, 101 L. Ed. 2d at 273 (*Miranda* warnings make defendant aware of right to consult attorney during questioning).

55. *Id.* at __, 108 S. Ct. at 2394-97, 101 L. Ed. 2d at 272-75.

56. *Id.* at __, 108 S. Ct. at 2397-99, 101 L. Ed. 2d at 275-76. Although there is a difference in the two rights, neither is "superior." *Id.* at __, 108 S. Ct. at 2397, 101 L. Ed. 2d at 275.

57. *See id.* at __, 108 S. Ct. at 2398, 101 L. Ed. 2d at 276 (value of counsel at interrogation not substantially increased by return of formal charges).

58. *Id.* at __, 108 S. Ct. at 2399, 101 L. Ed. 2d at 277.

59. *Patterson*, __ U.S. at __, 108 S. Ct. at 2399, 101 L. Ed. 2d at 277-78 (Blackmun, J., dissenting).

60. *Id.* at __, 108 S. Ct. at 2399, 101 L. Ed. 2d at 277-78.

61. *Id.* at __, 108 S. Ct. at 2399, 101 L. Ed. 2d at 277-78; *see also* Edwards v. Arizona, 451 U.S. 477, 484-85 (1981)(interrogation prohibited after defendant requests assistance of counsel).

62. *See Patterson*, __ U.S. at __, 108 S. Ct. at 2399, 101 L. Ed. 2d at 278 (Stevens, J., dissenting).

63. *See id.* at __ n.1, 108 S. Ct. at 2399 n.1, 101 L. Ed. 2d at 278 n.1 (citing ABA provisions prohibiting communications with a party known to be represented by another attorney).

64. *Id.* at __, 108 S. Ct. at 2404, 101 L. Ed. 2d at 283-84. The dissent reasoned that the state's "advice" on legal rights and the consequences involved in a waiver of those rights could mislead the accused as to the adversarial nature of the proceedings, "color" the advice offered, and give the appearance of impropriety. *Id.*

accused and the state that the ability to waive an accused's sixth amendment right should not be permitted after mere receipt of Miranda warnings.[65] Justice Stevens also insisted that the pretrial role of counsel was equally important as representation at trial, contrary to the majority's limited view of the role counsel plays at an interrogation.[66]

The *Patterson* Court was correct in holding that Miranda warnings inform the accused of his sixth amendment right to counsel for postindictment interrogations.[67] The Miranda warnings sufficiently inform the accused of his right to counsel[68] and of the consequences when that right is waived,[69] thus allowing the defendant to make a knowing and intelligent waiver.[70] Further, although the accused has a sixth amendment right to counsel after the initiation of adversary proceedings, the accused must exercise that right to bring the full weight of the sixth amendment into force.[71] Finally, while the fifth and sixth amendment rights to counsel are different, the sixth amendment right is not superior and does not require a higher standard of waiver in the

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65. *See* Patterson v. Illinois, __ U.S. __, __, 108 S. Ct. 2389, 2400-02, 101 L. Ed. 2d 261, 279-81 (1988). As an example, the dissent noted that certain methods of eliciting information such as electronic surveillance or undercover agents may be acceptable prior to, but not after, the initiation of formal proceedings. *Id.* at __ n.3, 108 S. Ct. at 2402 n.3, 101 L. Ed. 2d at 281 n.3.

66. *See id.* at __, 108 S. Ct. at 2403, 101 L. Ed. 2d at 282-83. Relying on precedents set in *Escobedo*, *Wade*, and *Spano*, the dissent stressed the need for pretrial assistance of counsel, insisting that the right to counsel at trial would be of little value if such assistance were not available before that trial. *Id.* at __ n.5, 108 S. Ct. at 2403 n.5, 101 L. Ed. 2d at 282 n.5; *see also* United States v. Wade, 388 U.S. 218, 226 (1967)(counsel at trial ineffective if denied pretrial); Escobedo v. Illinois, 378 U.S. 478, 487-88 (1964)(right to counsel at trial meaningless if conviction assured through pretrial interrogation); Spano v. New York, 360 U.S. 315, 325-26 (1959)(Douglas, J., concurring) (deprivation of pretrial counsel more harmful than denial of counsel during trial). Conversely, the majority sees the role of counsel at questioning as limited, essentially advising the defendant to answer questions or remain silent. Patterson v. Illinois, __ U.S. __, __ n.6, 108 S. Ct. 2389, 2395-96 n.6, 101 L. Ed. 2d 261, 273 n.6 (1988).

67. *Cf.* Oregon v. Elstad, 470 U.S. 298, 316 (1985)(*Miranda* warnings inform accused of right to counsel).

68. *Id.*

69. *Cf.* United States v. Washington, 431 U.S. 181, 188-89 (1977) (grand jury witness cannot complain when testimony used against him if previously warned of right to remain silent).

70. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938)(valid sixth amendment waiver requires intentional relinquishment of known right); Moran v. Burbine, 475 U.S. 412, 421 (1986)(defendant must be aware of nature of right and consequences of abandoning that right for waiver to be valid).

71. *Cf.* Michigan v. Jackson, 475 U.S. 625, 631, 633-35 (1986)(sixth amendment violated when postindictment interrogation continues when defendant requests counsel); Maine v. Moulton, 474 U.S. 159, 176 (1985)(state obligated to afford defendant sixth amendment protection once right invoked).

context of interrogation.[72]

The Miranda warnings given to Patterson sufficiently apprised him of his right to counsel.[73] To elicit an effective waiver for sixth amendment postindictment questioning, the defendant must know he has a right to counsel's presence at questioning and know the consequences of his decision to abandon that right.[74] The first prong of this test was satisfied when Patterson was apprised of his rights twice by state officials,[75] and also when he personally initialed each of the Miranda warnings.[76] The accused was told that he had the right to speak with a lawyer, to have that lawyer present during questioning, and to have a lawyer appointed if he could not afford one.[77] These warnings thus conveyed the "sum and substance" of the sixth amendment's right to counsel.[78] The same reasoning applies with equal force in the second prong of the waiver analysis: when the accused has been warned that anything he says can be used against him at trial, he has been warned of the ultimate adverse consequence of making an uncounseled statement.[79] Because the accused has been informed of the consequences of making an un-

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72. Patterson v. Illinois, __ U.S. __, __, 108 S. Ct. 2389, 2397, 101 L. Ed. 2d 261, 275 (1988).

73. *See id.* at __, 108 S. Ct. at 2399, 101 L. Ed. 2d at 277 (1988)(Miranda warnings elicit essence of sixth amendment right to counsel); Oregon v. Elstad, 470 U.S. 298, 316 (1985)(Miranda warnings inform accused of right to counsel). The majority's holding does not imply that *Miranda* warnings will suffice in all sixth amendment situations because the sixth amendment right to counsel is broader than the fifth amendment right protected by *Miranda*. *Patterson*, — U.S. at __ n.9, 108 S. Ct. at 2397 n.9, 101 L. Ed. 2d at 275 n.9; *see also Jackson*, 475 U.S. at 632 (sixth amendment right to counsel attaches at every critical stage while fifth amendment right to counsel requires both custody and interrogation).

74. *Patterson*, __ U.S. at __, 108 S. Ct. at 2395, 101 L. Ed. 2d at 272. The essential inquiry into the validity of a waiver of the sixth amendment right to counsel at postindictment questioning is whether the accused was aware of his right to an attorney during questioning and of the consequences of abandoning that right. *Id. Compare Moran*, 475 U.S. at 421 (fifth amendment waiver requires awareness of right and consequences of decision to waive same right) *with Johnson*, 304 U.S. at 464 (waiver of sixth amendment right requires the intentional relinquishment of known right).

75. *Patterson* __ U.S. __, 108 S. Ct. at 2392, 101 L. Ed. 2d at 269. Upon learning that he had been indicted, Patterson began to volunteer information regarding the murder. *Id.* A police officer immediately interrupted, handing Patterson a *Miranda* waiver form. *Id.* Patterson read the warnings with the officer, initialed each warning, and then signed the form before making his confession. *Id.* at __, 108 S. Ct. at 2392-93, 101 L. Ed. 2d at 269-70.

76. *Id.* at __, 108 S. Ct. at 2393, 101 L. Ed. 2d at 270. The Illinois Assistant State's Attorney reviewed Patterson's initial waiver form with him, ensuring that he understood his rights. *Id.* The State's attorney then repeated the entire waiver procedure, securing another signed waiver form. *Id.*

77. Patterson v. Illinois, __ U.S. __, __, 108 S. Ct. 2389, 2395, 101 L. Ed. 2d 261, 273 (1988).

78. *Id.* at __, 108 S. Ct. at 2395, 101 L. Ed. 2d at 273; *cf.* Oregon v. Elstad, 470 U.S. 298, 316 (1985)(Miranda warnings inform defendant of right to attorney).

79. *Patterson*, __ U.S. at __, 108 S. Ct. at 2395, 101 L. Ed. 2d at 273; *cf.* United States v.

counseled statement and acknowledged the meaning of this right by waiving counsel's presence at questioning, it can only be assumed that the defendant understood the effect of his actions.[80] Additional warnings or formulations to inform the defendant of the consequences involved with waiver are not required.[81] The state is not required to show complete understanding of the defendant's psychological appreciation of all consequences resulting from the waiver.[82]

Although the sixth amendment right to counsel arises after the initiation of adversarial proceedings,[83] the accused must invoke the right to enjoy its full protection.[84] While requesting or retaining counsel is sufficient to trig-

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Washington, 431 U.S. 181, 188-89 (1977)(grand jury witness cannot complain when testimony used against him if previously warned of right to remain silent).

80. *Patterson*, __ U.S. at __, 108 S. Ct. at 2395-96, 101 L. Ed. 2d at 273.

81. *Id.* at __ n.8, 108 S. Ct. at 2396-97 n.8, 101 L. Ed. 2d at 274 n.8 (rejecting second circuit requirement of additional warnings and explanation by neutral judicial officer). It is questionable whether there are any additional warnings that would more clearly inform the accused of his right to have counsel present during questioning or apprise him of the consequences of a waiver of that right. *Id.* at __ n.7, 108 S. Ct. at 2396 n.7, 101 L. Ed. 2d at 274 n.7. Patterson was unable to articulate additional information which would increase his understanding of right to counsel. *Id.* at __ n.7, 108 S. Ct. at 2396 n.7, 101 L. Ed. 2d at 274 n.7. *But see* United States v. Calabrass, 458 F. Supp. 964, 967 (S.D.N.Y. 1978)(additional warnings must be tailored to facts and circumstances of each case).

82. *See* Colorado v. Spring, 479 U.S. 564, 575-77 (1987)(Miranda waiver not invalidated by defendant's mistaken belief that interrogation would focus on one crime); Colorado v. Connelly, 479 U.S. 157, 164-67 (1986)(irrational decision to waive Miranda rights does not invalidate waiver); *Elstad*, 470 U.S. at 316-17 (defendant's ignorance of consequences of decision does not vitiate voluntariness).

83. *See Jackson*, 475 U.S. at 629-30 (postarraignment request for counsel invokes sixth amendment protection); Brewer v. Williams, 430 U.S. 387, 398-401 (1977)(sixth amendment guarantees right to counsel at postarraignment interrogation); Massiah v. United States, 377 U.S. 201, 205-07 (1964)(accused entitled to counsel after initiation of adversarial proceedings).

84. *See* Michigan v. Jackson, 475 U.S. 625, 631, 633-35 (1986)(sixth amendment violated when postindictment interrogation continues without assistance of counsel after defendant expressly invoked right). Jackson requested counsel at his arraignment, but before counsel was actually appointed, Jackson was interrogated and made incriminating statements which were used against him at trial. *Id.* at 628. The Court held that police initiated interrogations, occurring after the accused invokes his sixth amendment right, invalidate any waiver given for that interrogation session. *Id.* at 636. Patterson's contention that *Jackson* invalidates any waiver where police interrogate postindictment defendants outside the presence of counsel is erroneous because *Jackson* clearly requires a request for the assistance of counsel. Patterson v. Illinois, __ U.S. __, __ 108 S. Ct. 2389, 2394, 101 L. Ed. 2d 261, 271 (1988); *Jackson*, 475 U.S. at 636; *see also* Maine v. Moulton, 474 U.S. 159, 176 (1985)(state obligated to afford defendant sixth amendment protection once right invoked). Moulton, represented by retained counsel, was induced to make incriminating statements to codefendant Colson, who had previously consented to wear a recording device for the police. *See id.* at 164. The Court held that the undercover agent's deliberate elicitation of inculpatory statements deprived Moulton of his sixth amendment right to counsel. *Id.* at 176-77. Patterson cannot rely on *Moulton* for support since Moulton, unlike Patterson, invoked the protection of the sixth amendment by re-

ger the safeguards of the sixth amendment,[85] Patterson never requested counsel prior to or during questioning.[86] Patterson's position is distinguishable from the defendant in *Edwards v. Arizona*[87] who had requested counsel.[88] The essence of *Edwards* is to preserve the integrity of the defendant's choice to communicate directly to the police or to speak through counsel.[89] *Edwards* does not stand for the proposition that the defendant can only be interrogated by police in the presence of counsel even if he never made that request.[90] Patterson thus misinterpreted the holding of *Edwards* on which he relied as a bar to interrogation unless initiated by the accused.[91]

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taining counsel. *Compare Patterson*, __ U.S. at __, 108 S. Ct. at 2394, 101 L. Ed. 2d at 271 (failure to request counsel) *with Moulton*, 474 U.S. at 162 (defendant retained counsel). Additionally, Patterson's incriminating statements were not deliberately elicited; Patterson volunteered the information upon learning that he had been indicted. *Patterson*, __ U.S. at __, 108 S. Ct. at 2392, 101 L. Ed. 2d at 269; *cf.* Edwards v. Arizona, 451 U.S. 477, 485 (1981)(invocation of right to counsel is significant event); Fare v. Michael C., 442 U.S. 707, 719 (1979)(request for attorney invokes Miranda's fifth amendment protection); Michigan v. Mosley, 423 U.S. 96, 104 n.10 (1975)(Miranda's procedural safeguards triggered by request for attorney).

85. *See Jackson*, 475 U.S. at 631, 633-35 (defendant's request for counsel at arraignment invoked sixth amendment protection); Maine v. Moulton, 474 U.S. 159, 176 (1985)(sixth amendment safeguard of attorney-client privilege effective once accused retains counsel).

86. *Patterson*, __ U.S. at __, 108 S. Ct. at 2394, 101 L. Ed. 2d at 271.

87. 451 U.S. 477 (1981).

88. *See Patterson*, __ U.S. at __, 108 S. Ct. at 2394, 101 L. Ed. 2d at 271 (discussing Patterson's failure to request counsel); *see also Edwards*, 451 U.S. at 484 (1981)(defendant's request for counsel bars further interrogation unless initiated by defendant). Edwards was arrested on burglary, robbery and murder charges, informed of his rights under *Miranda* and interrogated. *Id.* at 478. Questioning ceased when Edwards requested an attorney, but resumed the following day, in the absence of counsel. *Id.* at 480. The Court held that when an accused invokes the right to counsel he shall not be subjected to further interrogation until counsel is present, unless the accused initiates further exchanges, conversations, or communication with the police. *Id.* at 484-85.

89. *See* Edwards v. Arizona, 451 U.S. 477, 484-85 (1981)(rule bars interrogation after defendant requests counsel unless defendant initiates confession). This holding expressly protects the defendant's freedom to choose the manner in which he deals with government officials. *Id.*

90. *See id.* at 484-85 (interrogation barred until requested counsel has been made available or defendant initiates communication). The *Edwards* Court did not hold that all interrogations are prohibited merely because the sixth amendment had attached, independent of a request for counsel. *Id.*; *see also* Patterson, __ U.S. at __, 108 S. Ct. at 2394, 101 L. Ed. 2d at 271 (explaining *Edwards*); Michigan v. Jackson, 475 U.S. 625, 640 (1986)(Rehnquist, J., dissenting) (opposing extension of *Edwards* to sixth amendment context).

91. *Compare* Patterson v. Illinois, __ U.S. __, __, 108 S. Ct. 2389, 2394, 101 L. Ed. 2d 261, 271 (1988)(rejecting Patterson's argument that *Edwards* controls instant case) *with Edwards*, 451 U.S. at 484-85 (establishing rule barring interrogations after defendant invokes right to counsel). Extending *Edwards* to situations in which the defendant had not requested the assistance of counsel would void the concept of waiver and disrupt the balance between the interests of society and the rights of the accused. *Jackson*, 475 U.S. at 640 (Rehnquist, J., dissenting).

While the fifth and sixth amendment rights to counsel differ in scope, time of attachment, and underlying policies,[92] neither is superior.[93] Because of the equal treatment attributed to each right, a higher waiver standard purported to lie with the sixth amendment right to counsel is insupportable.[94] The Court has applied the same "knowing and intelligent" standard in analyzing the waiver of counsel at custodial interrogations for both fifth and sixth amendment cases.[95] Traditionally, a pragmatic examination of counsel's usefulness to the accused is applied to the question of sixth amendment waivers at each stage in the criminal proceedings.[96] Because counsel plays a

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92. *Compare* Kirby v. Illinois, 406 U.S. 682, 689 (1972)(sixth amendment right to counsel arises only after initiation of adversary criminal proceedings) *with* Miranda v. Arizona, 384 U.S. 436, 478-79 (1966)(custodial interrogation triggers procedural safeguards necessary to protect fifth amendment rights). One author views the fifth amendment entitlement as preservative of the accusatorial nature of the American criminal justice system and the sixth amendment right as crucial to the system's adversarial character. *See* Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts,* 71 IOWA L. REV. 975, 979-94 (1986)(comparing origins and purposes of fifth and sixth amendments). For a discussion of fifth and sixth amendment right to counsel differences, see generally Note, *Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel,* 82 COLUM. L. REV. 363, 363-65 (1982)(discussing threshold issues and waiver requirements); Recent Decision, *Constitutional Law — Right to Counsel — Waiver of Sixth Amendment Right to Counsel Requires that a Federal Defendant be Brought before a Judicial Officer for an Explanation of the Content and Significance of the Right to Counsel and of the Indictment* — United States v. Mohabir, 624 F.2d 1140 (2d Cir. 1980), 49 GEO. WASH. L. REV. 399, 400-02 (1981)(historical examination of each right).

93. *See Patterson,* __ U.S. at __, 108 S. Ct. at 2397, 101 L. Ed. 2d at 275 (caselaw does not support theory that more stringent standard exists for sixth amendment right); *see also* Brewer v. Williams, 430 U.S. 385, 430 n.1 (1977)(White, J., dissenting) (important question not whether right arises under *Massiah* or *Miranda* but waiver itself); Moran v. Burbine, 475 U.S. 412, 463 (1986)(Stevens, J., dissenting) (right to attorney during interrogation not dependent on whether source of right is fifth, sixth, or combination of amendments).

94. *Compare* Johnson v. Zerbst, 304 U.S. 458, 464 (1938)(adopting intentional relinquishment of known right as sixth amendment standard for waiver of right to counsel) *with Miranda,* 384 U.S. at 475 (adopting *Zerbst*'s high standards for waiver of fifth amendment entitlement to counsel).

95. *See, e.g.,* Michigan v. Jackson, 475 U.S. 625, 632-33 (1986) (sixth amendment); Moran v. Burbine, 475 U.S. 412, 421 (1986) (fifth amendment); Edwards v. Arizona, 451 U.S. 476, 482 (1981)(fifth amendment); *Brewer,* 430 U.S. at 404 (sixth amendment).

96. *See Johnson,* 304 U.S. at 465 (waiver of right to counsel at trial imposes serious duty upon trial judge to insure valid waiver). *But see* United States v. Ash, 413 U.S. 300, 313-20 (1973)(no right to counsel at postindictment photographic display identification). *Compare* Faretta v. California, 422 U.S. 806, 835-36 (1975)(defendant desiring to proceed pro se must be made fully aware of disadvantages and dangers of decision to waive right to counsel) *with* United States v. Wade, 388 U.S. 218, 227 (1967)(scientific examinations of blood and fingerprints not critical stages therefore no sixth amendment right to counsel attaches). Thus, the usefulness and need for counsel at each particular stage in a criminal proceeding defines the requisite level of knowledge necessary to waive the right to counsel. Patterson v. Illinois, __ U.S. __, __, 108 S. Ct. 2389, 2398-99, 101 L. Ed. 2d 261, 276-77 (1988).

limited role in interrogations, essentially advising the accused to answer only certain questions or to remain silent,[97] counsel's "usefulness" at postindictment questioning is equivalent to his "usefulness" at preindictment custodial interrogation.[98] Miranda warnings, sufficient to warn the defendant of the right to counsel during custodial interrogations, are therefore sufficient to inform the accused of the right to counsel during postindictment questioning.[99]

Patterson is significant because the Court formally adopted sixth amendment right to counsel warnings for postindictment interrogations. The standard Miranda warnings are easily administered and effectively inform the accused of the right to counsel independent of the source of that right. The Court correctly foreclosed unnecessary expansion of the right to counsel. While not immune from criticism, the result strikes a fair balance between the rights of the accused and the interests of society in effective law enforcement.

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97. *See Patterson*, __ U.S. at __ n.6, __, 108 S. Ct. at 2395-96 n.6, 2398, 101 L. Ed. 2d at 273 n.6, 276 (counsel's role at postindictment questioning is substantially less useful than role at trial). There are functions counsel could fulfill during an interrogation, such as explaining the charges, examining the indictment, and plea bargaining, any of which could have some effect on the outcome at trial. *Id.* at __, 108 S. Ct. at 2403, 101 L. Ed. 2d at 282-83 (Stevens, J., dissenting).

98. *Id.* at __, 108 S. Ct. at 2398, 101 L. Ed. 2d at 276.

99. *Id.* at __ nn. 12,13, 108 U.S. at 2398 nn.12,13, 101 L. Ed. 2d at 276-77 nn.12,13. This is supported by the fact that *Miranda* explicitly adopted the sixth amendment, *Zerbst* standard for analyzing waivers of right to counsel. Miranda v. Arizona, 384 U.S. 436, 475 (1966).