be found where the suspect happens to be arrested than anywhere else the suspect has been in the intervening time.[106]

It is possible that Justice Scalia meant his contribution to *Gant* to be more modest or that the other Justices in the majority would have restrained its application. But the majority failed to articulate limits on the new exception to the warrant requirement, permitting the kind of "slight deviation[] from legal modes of procedure" that the Court has previously warned can allow unconstitutional practices to get a "first footing."[107] And like *Gant*'s first holding, its second curiously gives police broader rights to search merely because of where the arrest occurred. The search is, in effect, a spoil of the arrest.

The *Gant* majority's aim of bringing the law regarding warrantless searches incident to arrest back to the justifications of preserving officer safety and evidence was a commendable one, and the evidence seized from Gant's car was rightly suppressed. But *Gant* is only a half-step forward, eliminating one legal fiction but reaffirming *Chimel*, a decision that itself lacks any realistic link to the pragmatic necessities of policing. And for a decision that begins by suggesting that exceptions to the Fourth Amendment's warrant requirement must be "specifically established and well-delineated,"[108] *Gant* is surprisingly cavalier about defining the scope of its second exception or explaining why such searches are more than merely convenient.[109] Truly requiring that exceptions to the warrant requirement be justified by necessity will take more boldness.

4. Sixth Amendment — Right to Counsel — Interrogation Without Counsel Present. — In *Edwards v. Arizona*,[1] the Supreme Court held that once an individual in custody asserts the Fifth Amendment right to counsel, no subsequent waiver of that right is valid in a police-initiated interrogation.[2] In *Michigan v. Jackson*,[3] the Court extended this presumption to the Sixth Amendment right to counsel. Thus, under *Jackson*, once an indicted defendant asserts the right to counsel, any subsequent waiver of that right is invalid in a police-initiated in-

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[106] Such a presumption seems even weaker than the "reasonable suspicion" standard justifying *Terry* stops. United States v. Arvizu, 534 U.S. 266, 274 (2002) ("[A]n officer's reliance on a mere 'hunch' is insufficient to justify a stop." (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968))).

[107] Coolidge v. New Hampshire, 403 U.S. 443, 454 (1971) (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).

[108] *Gant*, 129 S. Ct. at 1716 (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

[109] *Id.* at 1723 ("[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." (alteration in original) (quoting Mincey v. Arizona, 437 U.S. 385, 393 (1978)) (internal quotation marks omitted)).

[1] 451 U.S. 477 (1981).

[2] *Id.* at 484–85.

[3] 475 U.S. 625 (1986).

terrogation.[4] Last Term, in *Montejo v. Louisiana*,[5] the Supreme Court considered whether *Jackson* applies when a court grants a defendant Sixth Amendment counsel without the defendant affirmatively requesting it. Rather than decide that issue, however, the Court overturned *Jackson* altogether. Writing for the Court, Justice Scalia held that neither of the two proposed approaches to *Jackson* — applying it only when the defendant affirmatively requests counsel or applying it as soon as the defendant is granted counsel even if there is no affirmative request — is workable.[6] Furthermore, Justice Scalia concluded that the Fifth Amendment waiver cases — *Miranda v. Arizona*,[7] *Edwards*, and *Minnick v. Mississippi*[8] — provide sufficient protection for criminal defendants and that the *Jackson* presumption is thus unnecessary.[9]

By overturning *Jackson*, *Montejo* resolved a tension in Sixth Amendment waiver jurisprudence. Parts of *Jackson* suggested that the Sixth Amendment provides an abstract right to counsel after the initiation of formal proceedings, and hence implied that all waivers at police-initiated interrogation would be invalid, while the Court's decision in *Patterson v. Illinois*[10] emphasized that the Sixth Amendment only protects the voluntariness of a waiver of the right to counsel in the same way the Fifth Amendment does. Although the Court may have been correct that consideration of the voluntariness of a waiver is the appropriate approach to Sixth Amendment waiver, it should still have upheld *Jackson* under a voluntariness approach in order to protect defendants from the "subtle compulsion"[11] the State can have over post-indictment defendants.

On September 6, 2002, Jesse Montejo was arrested for the robbery and murder of Lewis Ferrari.[12] On September 10, Montejo attended his "72-hour hearing," a preliminary hearing required under Louisiana law.[13] The court ordered counsel to be appointed for Montejo.[14] Because Louisiana law does not require that indigent defendants actively request counsel, Montejo "stood in mute acquiescence at this hearing"

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[4] *Id.* at 636.

[5] 129 S. Ct. 2079 (2009).

[6] *Id.* at 2083–84.

[7] 384 U.S. 436 (1966).

[8] 498 U.S. 146 (1990).

[9] *Montejo*, 129 S. Ct. at 2090.

[10] 487 U.S. 285 (1988).

[11] McNeil v. Wisconsin, 501 U.S. 171, 189 (1991) (Stevens, J., dissenting) (quoting State v. McNeil, 454 N.W.2d 742, 752 (Wis. 1990) (Heffernan, C.J., dissenting), *aff'd*, 501 U.S. 171) (internal quotation marks omitted).

[12] *Montejo*, 129 S. Ct. at 2082.

[13] *Id.* (citing LA. CODE CRIM. PROC. ANN. art. 230.1(A) (West Supp. 2009)).

[14] *Id.*

and did not affirmatively assert his right to counsel.[15] Later that day, police visited Montejo at prison and requested that he help them find the murder weapon.[16] Montejo was read and waived his *Miranda* rights before this excursion.[17] While in the back of the police vehicle, Montejo wrote a letter of apology to the victim's widow.[18] In this letter, he explained that he had intended only to rob Ferrari and that the murder had been a mistake.[19] The trial court admitted the letter over Montejo's objection.[20] Montejo was convicted of first-degree murder and sentenced to death.[21]

The Supreme Court of Louisiana affirmed, rejecting Montejo's argument that under *Jackson*, after his counsel had been appointed in the 72-hour hearing, the police could not question him without counsel present.[22] It acknowledged that under *Jackson*, once a criminal defendant invokes his Sixth Amendment right to counsel, "any subsequent waiver obtained pursuant to police-initiated interrogation will be presumed involuntary" and hence invalid.[23] However, the court relied on Louisiana precedent to distinguish situations where a defendant "assert[ed]"[24] his right to counsel from situations where a defendant "mute[ly] acquiesce[d]" in the court's appointment of counsel.[25] The court held that in the latter case the prophylactic rule from *Jackson* does not apply, and the question is whether the waiver was "knowing, intelligent and voluntary."[26]

The Supreme Court vacated and remanded,[27] overturning *Jackson*.[28] Writing for the majority, Justice Scalia[29] first noted that the Louisiana Supreme Court's interpretation of *Jackson* would require either case-by-case determinations of whether a defendant invoked the right to counsel at preliminary hearings or a categorical rule that *Jack-*

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15 State v. Montejo, 974 So. 2d 1238, 1259 (La. 2008).

16 *Id.* at 1249.

17 *Id.*

18 *Id.*

19 *Id.* at 1250 n.49. He wrote: "I promise you I didn't cold blood kill Mr. Loue if I could change places I would be dead [sic]." *Id.*

20 *Montejo*, 129 S. Ct. at 2082.

21 *Id.*

22 *Id.*

23 *Montejo*, 974 So. 2d at 1260.

24 *Id.*

25 *Id.* at 1261 (quoting State v. Carter, 664 So. 2d 367, 383 (La. 1995)).

26 *Id.* The court also rejected Montejo's argument that the waiver was not "knowing" because he did not know an attorney had been appointed for him, holding that under *Patterson* a waiver of the *Miranda* right to counsel constitutes a waiver of the Sixth Amendment right to counsel. *Id.* at 1261–62.

27 *Montejo*, 129 S. Ct. at 2092.

28 *Id.* at 2091.

29 Justice Scalia was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito.

son does not cover defendants in states that do not require "assertion" of the right to counsel.[30] Justice Scalia agreed with Montejo that neither of these alternatives is acceptable: the case-by-case determination because it is "unworkable,"[31] and the categorical approach because it would lead "to arbitrary and anomalous distinctions between defendants in different States" based on their initial hearing rules.[32]

Justice Scalia, however, rejected Montejo's proposed rule that "once a defendant is *represented* by counsel, police may not initiate any further interrogation."[33] Justice Scalia emphasized "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."[34] He argued that the only question addressed by *Jackson* was whether courts must presume that a waiver is not voluntary, knowing, and intelligent under certain circumstances.[35] Justice Scalia characterized *Jackson* as a "wholesale importation" of the Supreme Court's Fifth Amendment decision in *Edwards v. Arizona* into the Sixth Amendment context.[36] *Edwards* held that any waiver of the right to counsel after a suspect has invoked *Miranda* is presumed "to be involuntary, 'even where . . . his statements would be considered voluntary under traditional standards.'"[37] The *Edwards* rule is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights."[38] According to Justice Scalia, *Jackson* simply applied a similar antibadgering rationale to the Sixth Amendment to protect the voluntariness of a defendant's waiver.[39] Because Montejo's proposed rule would cover situations in which the defendant had never invoked the right to counsel, and thus could not be badgered to change his mind, "[s]uch a rule would be entirely untethered from the original rationale of *Jackson*."[40]

Having rejected Montejo's suggested extension of *Jackson* and having concluded that requiring defendants to assert their right to counsel to trigger *Jackson* would be "unworkable" in many states,[41] the Court overruled *Jackson* entirely: "We do not think that *stare decisis* requires

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[30] *See Montejo*, 129 S. Ct. at 2083–84.
[31] *Id.* at 2083.
[32] *Id.*
[33] *Id.* at 2085.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 2086 (quoting Texas v. Cobb, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring)) (internal quotation mark omitted).
[37] *Id.* at 2085 (quoting McNeil v. Wisconsin, 501 U.S. 171, 177 (1991)).
[38] *Id.* (quoting Michigan v. Harvey, 494 U.S. 344, 350 (1990)) (internal quotation marks omitted).
[39] *See id.* at 2086.
[40] *Id.* at 2085.
[41] *Id.* at 2088.

us to expand significantly the holding of a prior decision — fundamentally revising its theoretical basis in the process — in order to cure its practical deficiencies."[42] Justice Scalia stated that considerations in cases implicating stare decisis are workability, "the antiquity of the precedent, the reliance interests at stake, and . . . whether the decision was well reasoned."[43] None of these warranted maintaining *Jackson*.[44]

In discussing the importance of *Jackson* for protecting defendants, Justice Scalia focused particularly on Fifth Amendment prophylactic protections already in place through *Miranda*, *Edwards*, and *Minnick*. Under these cases, if someone in custody invokes the Fifth Amendment right to counsel, "interrogation must stop" until counsel is present.[45] Although these cases protect the Fifth, rather than the Sixth, Amendment right to counsel, "doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver."[46] Justice Scalia concluded that because the marginal benefits of *Jackson* outweigh its "substantial costs to the truth-seeking process," *Jackson* "should be and now is overruled."[47]

Justice Alito[48] concurred. He argued that the dissenting Justices were hypocritical in defending stare decisis in *Montejo* after supporting a "narrow view" of stare decisis in *Arizona v. Gant*.[49]

Justice Stevens[50] dissented, arguing that the Court misinterpreted *Jackson*'s rationale and undervalued stare decisis.[51] Justice Stevens, who wrote *Jackson*, began by arguing that *Jackson* was not based on

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[42] *Id.*

[43] *Id.* at 2088–89.

[44] Justice Scalia observed that *Jackson* "is only two decades old" and that overturning *Jackson* would not upset expectations because "[a]ny criminal defendant learned enough to order his affairs based on . . . *Jackson* would also be perfectly capable of interacting with the police on his own." *Id.* at 2089. Regarding the reasoning of *Jackson*, Justice Scalia concluded that its benefits — "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 — letting guilty individuals go free. *Id.*

[45] *Id.* at 2090.

[46] *Id.*

[47] *Id.* at 2091. The Court remanded the case to determine if Montejo's Fifth Amendment rights under *Edwards* were violated or if his "Sixth Amendment waiver was not knowing and voluntary" based on pre-*Jackson* precedent. *Id.* at 2092.

[48] Justice Alito was joined by Justice Kennedy.

[49] 129 S. Ct. 1710 (2009); *see Montejo*, 129 S. Ct. at 2093 (Alito, J., concurring). Justice Alito acknowledged that Justice Breyer dissented in *Gant*, and thus his dissent in *Montejo* was not hypocritical. *Id.* at 2093 n.*. He accused the dissent of treating constitutional precedents "like certain wines, which are most treasured when they are neither too young nor too old." *Id.* at 2093.

[50] Justice Stevens was joined by Justices Souter and Ginsburg, and was joined by Justice Breyer except for footnote five. In footnote five, Justice Stevens responded to Justice Alito, arguing that in *Gant*, the Court had not actually overruled *New York v. Belton*, 453 U.S. 454 (1981), but had simply interpreted it narrowly. *Montejo*, 129 S. Ct. at 2099 n.5 (Stevens, J., dissenting).

[51] *Montejo*, 129 S. Ct. at 2094 (Stevens, J., dissenting).

the antibadgering rationale discussed by the majority.[52] He described *Jackson* as "rel[ying] primarily on cases discussing the broad protections guaranteed by the Sixth Amendment right to counsel."[53] He noted that in discussing *Edwards*, the *Jackson* Court stated that the Sixth Amendment entitles arraigned defendants to "'at least as much protection' during interrogation as the Fifth Amendment affords unindicted suspects."[54] Justice Stevens concluded that although the rules "in *Edwards* and *Jackson* are similar, *Jackson* did not rely on the reasoning of *Edwards* but remained firmly rooted in the unique protections afforded to the attorney-client relationship by the Sixth Amendment."[55]

Justice Stevens further accused the majority of only "[p]aying lip service" to stare decisis.[56] He explained that the majority's discussion of *Jackson*'s workability is misleading because it is based on the Louisiana Supreme Court's "cramped" interpretation.[57] "*Jackson*'s simple, bright-line rule," Justice Stevens argued, had proved easily administrable and had "done more to advance effective law enforcement than to undermine it."[58] He concluded that "*Jackson* remains relevant, well grounded in constitutional precedent, and easily administrable," and that its sua sponte rejection "can only diminish the public's confidence in the reliability and fairness of our system of justice."[59]

Justice Breyer also dissented. Although joining most of Justice Stevens' dissent, he wrote briefly to emphasize that his position in this case was consistent with his dissent in *Gant*.[60]

By overturning *Jackson*, *Montejo* resolved a tension in Sixth Amendment waiver doctrine between *Jackson* and *Patterson*. That tension concerned whether Sixth Amendment waiver cases should apply an abstract Sixth Amendment right to counsel — limiting defendants' ability to waive the right to protect the attorney-client relation-

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[52] *Id.* at 2096.

[53] *Id.*

[54] *Id.* (quoting Michigan v. Jackson, 475 U.S. 625, 632 (1986)).

[55] *Id.* Justice Scalia portrayed this characterization as a "revisionist view of *Jackson*," one that nonsensically attempted to safeguard the right to counsel from a knowing and voluntary waiver. *Id.* at 2086 (majority opinion).

[56] *Id.* at 2097 (Stevens, J., dissenting).

[57] *Id.*

[58] *Id.* Justice Stevens further disagreed with the Court's discussion of the "antiquity" of *Jackson*, stating that he "would have thought that the 23-year existence of a simple bright-line rule would be a factor that cuts" against overruling *Jackson*. *Id.* at 2098.

[59] *Id.* at 2098–99. Justice Stevens also argued that even under pre-*Jackson* precedent, Montejo's waiver would be invalid because the police questioned him "without notice to, and outside the presence of, his lawyer." *Id.* at 2099. He noted that *Patterson* recognized that "there will be cases where a waiver which would be valid under *Miranda* will not suffice for Sixth Amendment purposes." *Id.* at 2100 (quoting Patterson v. Illinois, 487 U.S. 285, 297 n.9 (1988)) (internal quotation mark omitted). He argued that many cases, including *Montejo*, fall into that category. *Id.*

[60] *See id.* at 2101–02 (Breyer, J., dissenting).

ship absent a determination that the waiver was involuntary — or a voluntariness analysis similar to that conducted under the Fifth Amendment. Even if the Court was correct in adopting a voluntariness inquiry, *Jackson* can still be defended as necessary to ensure a knowing and voluntary waiver.

In the years preceding *Jackson*, the Court emphasized the importance of the "initiation of judicial criminal proceedings."[61] The initiation of adversary proceedings fundamentally alters the relationship between the defendant and the State; it is only at this point that "the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified."[62] The Court portrayed criminal defendants as significantly disadvantaged compared to the State. The Sixth Amendment is necessary, after the initiation of adversary proceedings, to "protect[] the unaided layman at critical confrontations with his adversary."[63] Thus the Court held that police procedures can violate the Sixth Amendment right to counsel even though they would not violate defendants' Fourth or Fifth Amendment rights.[64] The government, the Court stated, cannot "intentionally creat[e] a situation likely to induce [defendants] to make incriminating statements without the assistance of counsel."[65]

What these initial cases did not answer, however, was whether police initiation of interrogation was one of the police procedures no longer available after indictment.[66] During the pre-*Jackson* period, however, the Court did address this waiver question under the *Fifth* Amendment right to counsel. The Fifth Amendment right to counsel, first established in *Miranda*, is not an express requirement of the Fifth Amendment's text, but is a prophylactic protection of the right against compelled self-incrimination.[67] The emphasis in the Fifth Amendment context is thus squarely on the voluntariness of waivers to protect suspects against compelled self-incrimination. To protect that voluntariness, *Edwards* held that once a suspect in custody invokes the Fifth Amendment right to counsel, "a valid waiver of that right cannot be established by showing only that he responded to further police-

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61 Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion).

62 *Id.*

63 United States v. Gouveia, 467 U.S. 180, 189 (1984).

64 *See* Maine v. Moulton, 474 U.S. 159, 178–80 (1985) (Fourth Amendment); United States v. Henry, 447 U.S. 264, 272 (1980) (Fourth and Fifth Amendments); Massiah v. United States, 337 U.S. 201, 206–07 (1964) (Fourth Amendment); *see also* Michigan v. Jackson, 475 U.S. 625, 632 (1986).

65 *Henry*, 447 U.S. at 274.

66 The Court had established that a defendant can waive the Sixth Amendment right to counsel if that waiver is knowing and voluntary but had also emphasized that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights." Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)).

67 *See, e.g.*, McNeil v. Wisconsin, 501 U.S. 171, 176 (1991).

initiated custodial interrogation even if he has been advised of his rights."[68] *Edwards* was designed to ensure the voluntariness of any Fifth Amendment waiver by "prevent[ing] police from badgering a defendant into waiving his previously asserted *Miranda* rights."[69]

In *Jackson*, the Court concluded that a similar rule applies in the Sixth Amendment context, when a defendant asserts his right to counsel at his arraignment but subsequently waives that right when questioned by the police.[70] At times, the Court did suggest that *Jackson* was based on the same antibadgering reasoning as *Edwards*. The opinion concluded by stating, "Although the *Edwards* decision itself rested on the Fifth Amendment and concerned a request for counsel made during custodial interrogation, . . . the reasoning of that case applies with even greater force to these cases."[71]

The Court relied predominantly, however, on the cases emphasizing the vulnerability of and special protections needed for a post-indictment defendant. It emphasized "the significance of the formal accusation,"[72] the importance of "the right to rely on counsel as a 'medium' between [the defendant] and the State,"[73] and the fact that after formal proceedings have begun, the police are limited in the type of investigative techniques available.[74] Thus, despite *Jackson*'s reliance on *Edwards*, *Jackson* suggested that approaching a defendant after his Sixth Amendment right to counsel had attached, or at least after counsel had been appointed, was among the techniques that police may no longer employ.

This view was seriously put into question by the Court's opinion only two years later in *Patterson*. In *Patterson*, police obtained a defendant's written waiver of *Miranda* rights after his Sixth Amendment right to counsel had attached, but before counsel had been appointed or requested.[75] *Patterson* thus directly posed the question of whether approaching defendants and asking them to waive their right to counsel is a technique for eliciting information that remains available after Sixth Amendment rights attach. Over an angry dissent from Justice Stevens,[76] the Court emphasized the importance of respecting defendants' voluntary choice, not the unequal relationship between post-indictment defendants and the State. The Court specifically noted

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[68] Edwards v. Arizona, 451 U.S. 477, 484 (1981).

[69] Michigan v. Harvey, 494 U.S. 344, 350 (1990).

[70] Michigan v. Jackson, 475 U.S. 625, 626–27 (1986).

[71] *Id.* at 636.

[72] *Id.* at 631.

[73] *Id.* at 632 (quoting Maine v. Moulton, 474 U.S. 159, 176 (1985)) (internal quotation mark omitted).

[74] *Id.*

[75] Patterson v. Illinois, 487 U.S. 285, 288–89 (1988).

[76] *See id.* at 301 (Stevens, J., dissenting). Justice Stevens also wrote the *Jackson* majority.

that "[t]he fact that petitioner's Sixth Amendment right came into existence with his indictment . . . does not distinguish him from the preindictment interrogatee."[77]

Furthermore, the Court embraced an interpretation of *Jackson* strongly focused on the *Edwards* rationale of ensuring voluntariness. The Court emphasized that Patterson's Sixth Amendment argument "cannot be squared with our rationale in *Edwards*," noting that "[p]reserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny."[78] Nowhere did the Court emphasize increased protections for defendants or the integrity of the accused's choice after the initiation of formal proceedings.

Jackson and *Patterson* are thus in tension concerning the proper approach to Sixth Amendment waivers. Although ambiguous in places, *Jackson* suggested an emphasis on the importance of the initiation of formal proceedings in changing the relationship between an individual and the State, limiting the power of the police to approach uncounseled defendants.[79] *Patterson* emphasized individual autonomy, suggesting that the only issue is the "integrity" of the accused's choice and directly equating preindictment with postindictment interrogatees. Indeed, demonstrating the tension between the opinions, only Justice White joined both majorities,[80] and Justice Scalia, in overruling *Jackson* in *Montejo*, expressed his approval of *Patterson*,[81] while Justice Stevens, in supporting *Jackson*, described *Patterson* as "dubious."[82]

The tension between *Patterson* and *Jackson*, and the extent to which the Court began to embrace the *Patterson* approach, became clear in Justice Kennedy's concurrence in *Texas v. Cobb*,[83] in which he disapproved of *Jackson*.[84] Justice Kennedy emphasized that *Edwards* "serve[s] to protect a suspect's voluntary choice not to speak outside his lawyer's presence[, while] [t]he parallel rule announced in *Jackson* . . . supersedes the suspect's voluntary choice to speak with investigators."[85] Relying on *Edwards*'s emphasis on free choice in the Fifth Amendment context, and *Patterson*'s emphasis on free choice in the

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[77] *Id.* at 290–91 (majority opinion).

[78] *Id.* at 291.

[79] *See* Brooks Holland, *A Relational Sixth Amendment During Interrogation*, 99 J. CRIM. L. & CRIMINOLOGY 381, 393 (2009).

[80] Justices Brennan, Marshall, Blackmun, and Stevens were in the majority in *Jackson* and dissented in *Patterson*.

[81] *Montejo*, 129 S. Ct. at 2092 ("The Court in *Patterson* did not consider the result dubious, nor does the Court today.").

[82] *Id.* at 2100 (Stevens, J., dissenting).

[83] 532 U.S. 162 (2001).

[84] *See id.* at 174 (Kennedy, J., concurring).

[85] *Id.* at 175.

Sixth Amendment context, Justice Kennedy argued that *Jackson* serves no purpose because "[w]hile the *Edwards* rule operates to preserve the free choice of a suspect . . . , if *Jackson* were to apply it would override that choice."[86] Kennedy's concurrence thus underscores both the tension between *Jackson* and *Patterson* and the Court's gradual migration to a free-will approach in the Sixth Amendment context, an approach that was firmly established by overturning *Jackson* in *Montejo*.[87]

Even under a voluntariness inquiry, the Court still should have upheld *Jackson* as necessary to protect the voluntariness of Sixth Amendment waivers, just as *Edwards* protects the voluntariness of Fifth Amendment waivers, even in a situation in which counsel is appointed by the State rather than directly requested by the defendant. Such a result need not have been based on the "antibadgering" rationale of *Edwards*, but on traditional Sixth Amendment precedent emphasizing the inequality between the "unaided layman"[88] and the "prosecutorial forces of organized society."[89] This inequality created by the initiation of formal proceedings creates a "subtle compulsion,"[90] which seriously undermines a defendant's ability to voluntarily waive the right to counsel.[91] After formal adversary proceedings have begun, the decision of what and how much to say to the police can be part of a complicated legal and strategic decision. Indeed, Justice Stevens, as part of his more abstract defense of *Jackson*, hinted at the need to ensure a knowing and voluntary waiver, emphasizing how *Jackson* "assures that any waiver of counsel will be valid."[92] He explained that "[t]he assistance offered by counsel protects a defendant from surren-

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[86] *Id.*; *see also* Holland, *supra* note 79, at 410 (noting that "free will remains the critical focus of the Court's inquiry" in the Sixth Amendment context).

[87] By the time of oral argument in *Montejo*, it was clear that the free-will approach had become dominant. Justice Scalia explained that Montejo's counsel "ha[d] to assume that [Montejo's] voluntary relinquishment of [the right to counsel] is somehow coerced," and questioned "whether that [assumption] is at all realistic." Transcript of Oral Argument at 24, *Montejo*, 129 S. Ct. 2079 (2009) (No. 07-1529), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-1529.pdf. Justice Alito noted that *Jackson* would apply even if the defendant is "the most experienced criminal defense attorney in the world." *Id.* at 48.

[88] United States v. Gouveia, 467 U.S. 180, 189 (1984).

[89] Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion).

[90] McNeil v. Wisconsin, 501 U.S. 171, 189 (1991) (Stevens, J., dissenting) (quoting State v. McNeil, 454 N.W.2d 742, 752 (Wis. 1990) (Heffernan, C.J., dissenting), *aff'd*, 501 U.S. 171) (internal quotation marks omitted).

[91] In discussing why suspects so often waive their *Miranda* rights, Professor Richard Leo concludes, "The [police] interrogator exercises power through his ability to frame the suspect's definition of the situation, exploiting the suspect's ignorance to create the illusion of a relationship that is symbiotic rather than adversarial." Richard A. Leo, Miranda*'s Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259, 284 (1996). Although discussing *Miranda*, Leo's analysis of police manipulation applies more directly to Sixth Amendment waivers in which the interrogator-*defendant* relationship is explicitly adversarial and the State has "an affirmative obligation not to . . . circumvent[]" the right to counsel. Maine v. Moulton, 474 U.S. 159, 171 (1985).

[92] *Montejo*, 129 S. Ct. at 2096 n.2 (Stevens, J., dissenting).

dering his rights with an insufficient appreciation of what those rights are and how the decision to respond to interrogation might advance or compromise his exercise of those rights."[93]

Thus, just as the Fifth Amendment's key concern — the coercive pressures of custody — merits a rule protecting voluntariness in the Fifth Amendment context, the Sixth Amendment's key concerns — the coercive pressures and legal complexities of criminal adjudication — merit a rule protecting voluntariness and knowingness in the Sixth Amendment context. The Court should not be less attuned to the objects of concern under the Sixth Amendment than those under the Fifth Amendment, especially when the Sixth Amendment right to counsel is in the text of the Constitution.[94]

5. Sixth Amendment — Sentencing — Factfinding in Sentencing for Multiple Offenses. — Seeking "to give intelligible content to the right of jury trial,"[1] the Supreme Court in *Apprendi v. New Jersey*[2] held that "any fact [other than recidivism] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[3] Commentators, however, have found that instead of proving intelligible, the Court's sentencing jurisprudence has been "confusing" and "incoherent."[4] The *Apprendi* line of cases, they charge, has failed to provide a "sensible" principle for allocating factfinding between judge and jury.[5]

Last Term, in *Oregon v. Ice*,[6] the Court again tried to articulate *Apprendi*'s reach, holding that, in light of historical practice and respect for state sovereignty, the Sixth Amendment does not prohibit states

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[93] *Id.* The evidence at issue in *Montejo* was a letter Montejo wrote to the victim's wife at the police's suggestion. It is doubtful that Montejo recognized that his waiver would allow police to encourage him to write an inculpating letter or that such a letter could be used against him.

[94] Justice Scalia has consistently opposed any attempt to protect defendants based on a judgment that an apparently "free" choice has been coerced, whether under the Fifth or Sixth Amendment. He has described both *Edwards* and *Minnick* as "explicable . . . only as [efforts] to protect suspects against what is regarded as their own folly." Minnick v. Mississippi, 498 U.S. 146, 166 (1990) (Scalia, J., dissenting). He has expressed his strong belief in respecting individual autonomy in other contexts, noting the importance of the "supreme human dignity of being master of one's fate rather than a ward of the State — the dignity of individual choice." Indiana v. Edwards, 128 S. Ct. 2379, 2393 (2008) (Scalia, J., dissenting). It is Justice Kennedy who distinguishes between the Fifth and Sixth Amendment contexts. *Compare* Texas v. Cobb, 532 U.S. 162, 174–77 (2001) (Kennedy, J., concurring), *with Minnick*, 498 U.S. 146 (Kennedy, J.).

[1] Blakely v. Washington, 542 U.S. 296, 305 (2004).

[2] 530 U.S. 466 (2000).

[3] *Id.* at 490.

[4] Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 37 (2006); *see also* Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 776 (2008); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1088 (2005).

[5] Jonathan F. Mitchell, Apprendi's *Domain*, 2006 SUP. CT. REV. 297, 298.

[6] 129 S. Ct. 711 (2009).