10-1985

Michigan v. Jackson

Lewis F. Powell Jr.

Assum - if it makes list as I expect. Issue is imp. & Mich. Ct. may be wrong - but this is not a good to resolve issue.

Mich. S/Ct held, following (A2), that a defendant must be advised explicitly of his 6th Amend Rt. to counsel in addition to 5th Amend Miranda warnings.

This Resp. was given Miranda warnings several times & he conferred w/ the killing several times, but he & he did not request counsel until subsequent to his arraignment.

Mich S/Ct relied on both State & Fed law.

PRELIMINARY MEMORANDUM

May 9, 1985 Conference
List 3, Sheet 4

No. 84-1531-CSY

MICHIGAN

v.

JACKSON (hired killer)

Cert to Michigan Supreme Court (Cavanagh; Ryan, concurring in part and dissenting in part; Boyle, dissenting)

State/Criminal

NJOT[1]

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[1]The decision was entered and the opinion filed on December 28, 1984, but the opinion, at least, was not released to the parties until January 29, 1985. Mr. Lorson called the Michigan Supreme Court, but could get no explanation why. A look at the Michigan Reports indicates that this practice is common, and I note from the petition in the companion case that the Michigan court runs the period for filing a petition for rehearing from the release date. Michigan v. Bladel, No. 84-1539 (List 1, Sheet 3), App. A. Nevertheless, Rule 20.1 runs the time for filing a petition for cert from the entry of judgment. There is no indication that petr requested an extension of time. I assume, therefore, that the Court would treat this petition as NJOT.

Deny. It seems that a request for counsel at an arraignment (based on 6th Am) should operate as a bar to subsequent questioning without a lawyer, in the same way that Edwards bars further questioning if an attorney is requested

1. SUMMARY: Petr seeks review of the Michigan Supreme Court's holding that once an accused has invoked his sixth amendment right to counsel, the police may not conduct further interrogation unless the accused reinitiates further communication with full awareness of his sixth amendment rights.

2. FACTS AND PROCEEDINGS BELOW: A jury convicted resp of second-degree murder for a hired killing at the behest of a woman seeking her husband's insurance proceeds. Upon his arrest he gave three statements, in each of which he admitted breaking into the victim's house but contended that a cohort had done the shooting. The following day, after failing a polygraph examination, he gave a fourth statement in which he admitted doing the shooting. Shortly thereafter, he gave substantially similar oral and written statements. That afternoon, during his arraignment, resp requested appointed counsel. The following day, after having been readvised of his Miranda rights but before having consulted with counsel, resp gave the statement at issue here--a seventh, taped statement which confirmed that he had done the shooting.

After a pretrial hearing, the trial court held all of resp's statements admissible. The Michigan Court of Appeals upheld this ruling and affirmed the second-degree murder conviction.

The Michigan Supreme Court reversed and remanded for a new trial. It held that the three postpolygraph, prearraignment statements should have been suppressed by virtue of failure to comply with the Michigan prompt-arraignment statute, and that the seventh statement should have been suppressed because the police had reinitiated interrogation after resp had requested counsel at

his arraignment. In reaching the latter result, the court first determined that the sixth amendment right to counsel, as well as its state counterpart, had attached by the time of arraignment, that resp's request for counsel during arraignment had not implicated his fifth amendment right to counsel, and that resp had adequately waived his Miranda rights before the postarraignment interrogation.

The court then undertook a review of the case law to determine whether resp's waiver of his fifth amendment right to counsel sufficed to waive his sixth amendment right as well. Stressing, in reliance on United States v. Mohabir, 624 F.2d 1140 (CA2 1980), the importance of the initiation of a criminal prosecution, it rejected the reasoning of those cases which had found waivers of sixth amendment rights on the basis of waivers of Miranda rights without distinguishing between the two sources. E.g., Jordan v. Watkins, 681 F.2d 1067, 1073-75 (CA5 1982); Johnson v. Commonwealth, 220 Va. 146 (1979), later appeal, 221 Va. 736, cert. denied, 454 U.S. 920 (1981). Where a request for counsel has been made to a magistrate, a Miranda waiver should be no more effective as to sixth amendment rights than it is as to fifth amendment rights under Edwards v. California, 451 U.S. 477 (1981). It concluded:

> We need not decide at this time whether stricter procedural standards for waiver of the sixth amendment right to counsel are required. We need only hold that, at a minimum, the Edwards/[People v. Paintman, 412 Mich. 518 (1982), cert. denied, 456 U.S. 995 (1982)] rule applies by analogy to those situations where an accused requests counsel before the arraigning magistrate. Once this request occurs, the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further

> communications, exchanges, or conversations with the police. If a defendant chooses to reinitiate communications, he must be sufficiently aware of both his Fifth and Sixth Amendment rights to effectuate a voluntary, knowing, and intelligent waiver of each right. ... .
>
> We further hold that before commencing interrogation, the police have an obligation to determine whether an accused has been arraigned and requested counsel. This duty is no more onerous than that imposed by Edwards and Paintman.

Pet. App. 82-84 (emphasis in original). Because resp had requested counsel but had not had the opportunity to speak with him before the police reinitiated questioning, the court ordered suppression of his postarraignment confession. It found it unnecessary to decide the question left open by Solem v. Stumes, 104 S.Ct. 1338 (1984), and since decided by Shea v. Louisiana, No. 82-5920 (Feb. 20, 1985), whether Edwards would apply to defendants whose convictions were not yet final when the decision issued, because the court considered that it had not applied Edwards but only extended the Edwards/Paintman rule by analogy to cases implicating "both the Sixth Amendment right to counsel and its state constitutional counterpart emobodied in Const. 1963, art. a §20." It then held that the rule it had pronounced would apply to cases tried after its opinion had issued and cases on appeal which had raised the issue.

Judge Ryan concurred in the sixth amendment waiver analysis "with the exception, however, that since the Edwards/Paintman ruling derives from an analysis of the United States Constitution, I find it unnecessary and, indeed, inappropriate to base the result in these cases upon Const. 1963, art. 1, §20." Pet. App. 122. He dissented from the suppression of the postpolygraph

statements on state grounds. Judge Boyle concurred in Judge Ryan's dissent, would have found admission of the seventh statement harmless error, and objected to the application of Edwards to the sixth amendment right to counsel.

3. CONTENTIONS: Petr asks the Court to clarify the confusion in the state and lower federal courts on the standards by which to evaluate sixth amendment waivers. It suggests that the mere assertion at arraignment of a desire to have state-paid counsel does not amount to a request to have counsel present at all further contacts with the police. The Miranda waiver should also suffice to waive whatever sixth amendment rights the defendant has. The state will need the seventh statement at the new trial, as in none of the first three did resp admit to the shooting, and the second three have been suppressed under state law.

Resp first suggests that the Michigan court's holding on the state prompt-arraignment statute actually covered his seventh statement as well as the three postpolygraph statements. The court only reached the right-to-counsel issue for purposes of the companion case also treated in the opinion. Accordingly, suppression of the seventh statement rests on adequate and independent state grounds.

Next, resp suggests that it is irresponsible for petr to request the Court to review this case given its concession that a retrial must be held in any event.

Third, resp argues that the suppression of the seventh statment was based on state as well as federal constitutional grounds. Although the Michigan court considered much precedent

discussing the federal right, it explicitly stated that it employed this precedent only "by analogy." Justice Ryan's separate opinion removes all doubt of the alternative ground of the decision in the state constitution.

Finally, relying principally on Justice Marshall's dissent in Wyrick v. Fields, 459 U.S. 42 (1982) (per curiam), in which the majority did not reach the sixth amendment waiver issue, resp argues that the Michigan court correctly applied federal principles and endorses its Edwards analogy.

4. DISCUSSION: There is no support in the Michigan court's opinion for resp's suggestion that the court suppressed the seventh statement in reliance on the prompt-arraignment statute--unsurprisingly, as the statement was given after arraignment--nor is there any indication that resp even made such an argument. See Pet. App. 89. Further, where acquittal will preclude review of the issue and conviction make it unnecessary, of course, the impending trial poses neither a jurisdictional nor a prudential bar to review. Miranda v. Arizona, 384 U.S. 436, 498, n. 71 (1966). Nor, I suspect, would the Michigan Supreme Court's references to the state constitution insulate its holding under Michigan v. Long, 77 L.Ed.2d 1201 (1983). The court did state in at least two places that it was ruling under the Michigan counterpart to the sixth amendment, see Pet. App. 51, 88, but in Michigan v. Long it also explicitly rested on the state constitution as an alternative ground. See 77 L.Ed.2d, at 1212, n. 3. Here the court did not distinguish between federal and state rights in applying the analogy drawn from Edwards and

Paintman; it did not rest on any state cases save Paintman, which itself relied on Edwards; the bulk of the case law it reviewed discussed the federal right; and in numerous places it mentioned only the sixth amendment. Pet. App. 53, 55, 57, 88.

The case does not warrant review, however, even assuming that the Court considers the petition timely. The courts have come to different conclusions concerning the level of awareness of sixth amendment rights required to support a waiver. See United States v. Karr, 742 F.2d 493, 495-96 (CA9 1984) (collecting cases). CA2 has adopted the most stringent stance, requiring that a judicial officer provide the defendant "a clear and explicit explanation of the Sixth Amendment rights defendant is giving up." United States v. Mohabir, 624 F.2d 1140, 1150 (CA2 1980). At the opposite end of the spectrum are those courts which have held Miranda warnings alone sufficient. E.g., Karr, supra. Relatively few courts, however, have as yet addressed the relevance of the Edwards holding to sixth amendment rights--which attach, of course, regardless of an express invocation--where a defendant affirmatively requests the assistance of counsel. Petr offers only West Virginia v. Wyer, 320 S.E.2d 92, 105 and n. 24 (W.Va. 1984) (refusing to equate a "general request for counsel at the initial appearance before a magistrate" with a direct Edwards request to interrogating officers; holding that police may reinitiate questioning so long as, besides receiving Miranda warnings, defendant is informed that he is under arrest and of the charges against him); Jordan v. Watkins, 681 F.2d 1067, 1073 (CA5 1982) (Edwards inapplicable where defendant did not request "the

assistance of counsel with respect to custodial interrogation," but "merely told the judge that he would like appointed counsel to assist him in further judicial proceedings"); Silva v. Estelle, 672 F.2d 457, 458-59 (CA5 1982) (Edwards applies after expression of desire to speak with counsel during arraignment); and United States v. Campbell, 721 F.2d 578, 579 (CA6 1983) (Edwards applies where police resume interrogation after defendant has requested appointed counsel in appearance before magistrate). Other courts have considered essentially the same question of the necessary specificity of a request for counsel only as a matter of fifth amendment rights. See State v. Sparklin, 296 Or. 85, 91-92 (1983) (request for attorney at arraignment not invocation of right not to be questioned without attorney; only invocation of right to counsel "in anticipation of, or during, interrogation" implicates fifth amendment and Edwards); Ross v. State, 326 S.E.2d 194, 199 (Ga. 1985) (expression at a "first appearance" before magistrate of intention to retain counsel insufficient to require application of Edwards). See also Johnson v. Virginia, 454 U.S. 920 (1981) (Marshall, J., dissenting from denial of cert) (request for counsel made at arraignment sufficient to preclude police-initiated questioning under Edwards); Smith v. Illinois, 105 S.Ct. 490, 494, n. 6 (1984) ("a request for counsel coming 'at any stage of the process' requires that questioning cease until counsel has been provided"). Though there is considerable divergence, and the Court will eventually want to address the issue, I would allow it to simmer. Also, it might be best to address the general question of sixth amendment waiver before taking a case where Edwards might

during interrogation. At the very least, a defendant should not be questioned following his 6th Am. request for an attorney unless he receives a "clear and explicit" explanation of the Sixth Amendment rights he is giving up. See US v. Mohabir (CA2 1980). No federal court has reached a contrary conclusion.

If you disagree, it might be better to wait for a timely petition seeking review of a federal court decision.

Lee

apply.

5. RECOMMENDATION: I recommend denial.

There is a response.

May 3, 1985 Donovan Opn in petn

N.B. The case treated in the same opinion, Michigan v. Bladel, No. 84-1539, appears on List 1, Sheet 3, for the May 16, 1985 Conference.

Should have been curve-lined with Mich. v. Jackson 84-1531 - both cases involve same lower ct. op.

Dissent

I voted to Grant 84-1531. If that is granted, this should be granted & consolidated. (See next pg)

PRELIMINARY MEMORANDUM

May 16, 1985 Conference
List 1, Sheet 3

No. 84-1539-CSY

MICHIGAN

v.

BLADEL (murderer)

Cert to Michigan Supreme Court (Cavanaugh; Ryan, concurring in part and dissenting in part; Boyle, dissenting)
State/Criminal NJOT[1]

1. SUMMARY: Petr challenges the Michigan Supreme Court's holding that the rule of Edwards v. Arizona, 451 U.S. 477 (1981),

[1]The decision was filed on December 28, 1984, but the opinion was not released to the parties until January 29, 1985. See App. A. If the earlier date controls, as I assume it does pursuant to Rule 20.1, the petition is NJOT.

You voted to grant in the curve-lined case, No. 84-1531, relisted at the May 9 Conference so it could be considered with this one. I assume, if that one is granted, this one should be held for it - or consolidated with it, since the same lower ct. opinion applies. Linda

applies by analogy to the sixth amendment right to counsel. This petition should have been curvelined with Michigan v. Jackson, No. 84-1531 (May 9, 1985 Conference; List 3, Sheet 4; Discuss List #4).

2. FACTS AND PROCEEDINGS BELOW: When three railroad employees were shot to death at an Amtrak station, suspicion descended on petr, a disgruntled former employee. He was arrested, questioned after being properly advised of his Miranda rights, and released after denying any involvement. When further evidence linking him to the killings developed, he was again arrested and questioned after proper warnings; he again denied involvement.

At a subsequent arraignment, petr requested that counsel be appointed because he was indigent. Counsel was appointed, but petr was not so advised despite several inquiries. Three days after the arraignment, two officers who did not know petr had requested counsel interviewed him in the county jail after properly advising him of his rights. He told them he had requested counsel; they asked whether he wanted an attorney present. He agreed to go ahead without an attorney, signed a waiver, and confessed.

The trial court admitted the statement after a pretrial hearing, and petr was convicted. The Michigan Supreme Court held that it should have been suppressed. In the same opinion underlying the petition in Michigan v. Jackson, No. 84-1531, the court reviewed considerable case law on sixth amendment waiver and concluded:

> We need not decide at this time whether stricter procedural standards for waiver of the sixth amendment right to counsel are required. We need only hold that, at a *minimum*, the Edwards/[People v. Paintman, 412 Mich. 518 (1982), cert. denied, 456 U.S. 995 (1982)] rule applies by analogy to those situations where an accused requests counsel before the arraigning magistrate. Once this request occurs, the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police. If a defendant chooses to reinitiate communications, he must be sufficiently aware of both his Fifth and Sixth Amendment rights to effectuate a voluntary, knowing, and intelligent waiver of each right. ... .
>
> We further hold that before commencing interrogation, the police have an obligation to determine whether an accused has been arraigned and requested counsel. This duty is no more onerous than that imposed by Edwards and Paintman.
>
> ...
>
> ... Since defendants ... requested counsel during their arraignments, but were not afforded an opportunity to consult with counsel before the police initiated further interrogations, their post-arraignment confessions were improperly obtained and must be suppressed.

Pet. App. 23a-25a (emphasis in original).

3. CONTENTIONS: The parties echo the arguments made in No. 84-1531. Reviewing the same cases discussed by the Michigan court and the companion petition, petr contends that a general request for counsel at arraignment does not indicate that the defendant wishes to deal with the police only through counsel; such a request cannot suffice for the narrow and specific request for the assistance of counsel during custodial interrogation which would bring Edwards into play. Resp contends that the Michigan decision rests on an adequate and independent state constitutional ground, but that in any event the court's extension of Edwards to the

sixth amendment is a proper application of federal law.

4. DISCUSSION: See discussion in No. 84-1531.

5. RECOMMENDATION: If the Conference denies No. 84-1531, as recommended, it should deny here; if it grants there, it should hold here.

There is a response.

May 8, 1985 Donovan Opn in petn

June 27, 1985

Court .....
Argued ....., *19*...
Submitted ....., *19*...

Voted on....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 84-1531

MICHIGAN

vs.

JACKSON

Motion for appointment of counsel.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

HB

OK

Appoint Counsel
Schicke b

June 27, 1985 Conference
List 3, Sheet 5

No. 84-1531

STATE OF MICHIGAN

v.

JACKSON

Motion of Respondent for Appointment of Counsel

CAb

SUMMARY: Resp requests that the Court appoint James Krogsrud as his attorney pursuant to Supreme Court Rule 46.7.

On May 28, 1985, the Court granted cert to review the Michigan Supreme Court's holding that once an accused has invoked his Sixth Amendment right to counsel, the police may not conduct further interrogatories unless the accused initiates the subsequent communication with full awareness of his Sixth Amendment rights. The case was consolidated for argument with Michigan v. Gladel, No. 84-1539. On the same day, the Court granted resp's motion to proceed ifp. Having been granted ifp status, resp is eligible for appointed counsel under Rule 46.

Grant motion for appointment of counsel.

Lee

Mr. Krogsrud received his law degree from the University of Wisconsin in 1974. He is a member in good standing of the Bar of the States of Michigan, Wisconsin and North Dakota. Mr. Krogsrud was admitted to this Court's Bar on June 24, 1985.

Mr. Krogsrud is an attorney for the State Appellate Defender of Michigan. Mr. Krogsrud has represented resp since 1980. He was responsible for resp's case in the Michigan Court of Appeals and Michigan Supreme Court. He is familiar with the transcript from resp's six-week trial and the procedural history of this case.

Based upon Mr. Krogsrud's success before the Michigan Supreme Court, he appears to be an effective advocate for his client. He is qualified to represent resp in this Court. Because the case is consolidated with No. 84-1539, the Court may permit argument from only one of resps' counsel. Nonetheless, resp is entitled to separate counsel (at least for his brief) and I recommend that the motion be granted.

There is no response.

6/24/85 Schickele

Court	*Voted on*....., *19*...	May 9, 1985	
Argued ....., *19*...	*Assigned* ....., *19*...	No.	84-1531
Submitted ....., *19*...	*Announced* ....., *19*...		

MICHIGAN

vs.

JACKSON

Time question. Also motion to proceed ifp.

Bagley 84-1539 - next

Denied but related to reconsider with 84-1539

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓	✓										
Brennan, J.			✓										
White, J.		✓	✓										
Marshall, J.			✓										
Blackmun, J.			✓										
Powell, J.		✓											
Rehnquist, J.			✓		Join 3								
Stevens, J.			✓										
O'Connor, J.					Join 3								
.....													

May 16, 1985

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 84-1531

MICHIGAN

vs.

JACKSON

Time question. Also motion to proceed ifp.

Relist SD'C

Grant & consolidated with 84-1539

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	POST	DIS	AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.		✓											
Brennan, J.			✓										
White, J.			✓										
Marshall, J.			✓										
Blackmun, J.			✓										
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.			✓										
O'Connor, J.		✓											

May 23, 1985

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 84-1531

MICHIGAN

vs.

JACKSON

Time question. Also motion to proceed ifp.

Granted
(Consolidated
with
84-1539

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.		✓											
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.													
O'Connor, J.		✓											
.....													

May 16, 1985

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 84-1539

MICHIGAN

vs.

BLADEL

Also motion to proceed ifp.

Relist for SDC as to a motion not before us

Grant & consolidate (same vote as 84-1531)

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.		✓											
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.													
Stevens, J.													
O'Connor, J.		✓											

May 23, 1985

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 84-1539

MICHIGAN

vs.

BLADEL

Also motion to proceed ifp.

Granted
Consolidated
with
84-1531

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													
O'Connor, J.													

September 17, 1985

MICH GINA-POW

84-1531 MICHIGAN v. JACKSON (Mich. Supreme Court)

84-1539 MICHIGAN v. BLADEL (Mich. Supreme Court)

MEMO TO FILE

These two cases were decided in a single opinion by the Supreme Court of Michigan. Although the facts differ somewhat, and there may be subsidiary questions that differ, the primary question (that I believe prompted our granting cert) is the same. We also have granted cert in 84-1485, Moran v. Burdine (CA1) that presents a similar question but under substantially different factual circumstances. Stated quite generally, the question is whether a valid waiver of Fifth Amendment Miranda rights also may constitute a valid waiver of the constitutional Sixth Amendment rights to counsel?

Facts in Bladel

Charged with murder, after his arrest and the giving of Miranda warnings, Bladel was arraigned. At the arraignment hearing before a judicial officer, he was informed of his right to counsel, and requested that counsel be appointed as he was indigent. The court mailed a notice of appointment to a law firm on the day of

arraignment (March 23), but it was not received by counsel until March 27. Bladel was not informed during this interim that counsel had been appointed, although he inquired several times.

On May 26, 1979 two police officers interviewed defendant in the county jail. Detective Rand assigned to this case had been present at the arraignment hearing, knew of defendant's request for counsel, but did not advise the police officers who interviewed the defendant on the 26th. He was again properly advised of his Miranda rights. Bladel informed the officers that he had requested counsel, but nevertheless agreed to proceed without counsel, and signed a form waiving counsel. He then confessed to the killing. No claim is made that the police exercised unfair or improper methods in obtaining the confession. The TC ruled that the confession, as well as two earlier exculpatory statements, were properly admissible because defendant had been correctly advised of his rights and had knowingly and understandably waived them each time.

agreed to be interrogated w/o counsel

Facts in Jackson

Jackson, in a different Michigan jurisdiction, was charged with murder. When arrested he was given Miranda

warnings. At arraignment, he requested that counsel be appointed. Police Sergeants Hoff and Garrison were present when this request was made. The next morning, Jackson again was given Miranda warnings by these two sergeants and he agreed to give tape-recorded statement to "confirm" that he had shot the victim. But defendant had not then had an opportunity to consult with counsel. A different TC admitted defendant's statements, both those made before and after arraignment, because he had been advised of his Miranda rights before each statement, and had never requested that an attorney be present during interrogation. The TC found that Jackson knowingly and voluntarily waived the rights each time, and that no improper promise or threats were made by the police.

Decision of the Michigan Supreme Court

On appeal (I do not mention decisions by the Michigan intermediate Court of Appeals), Bladel and Jackson (herein called the defendants) argued that their post-arraignment statements were obtained in violation of their Fifth and Sixth Amendment rights to counsel because they had asked for appointed counsel. The Michigan Supreme Court, after reviewing decisions from other jurisdictions, found "no consistent approach to the waiver problem". The Michigan

Court stated that "no court has adopted a per se rule which prevents a defendant from ever waiving his Sixth Amendment right to counsel [and we] also declined to adopt such a rule." The Court then proceeded to hold that in these two cases, where counsel had been requested at arraignment, this was an assertion of the Sixth Amendment right to counsel - a right distinct from the Fifth Amendment due process right found to exist in Miranda. Citing Kirby v. Illinois, the arraignment - like an indictment - is the commencement of a criminal prosecution, and therefore from that time forward the Sixth Amendment is applicable. The Michigan Court stated that "every court has acknowledged that the Sixth Amendment right to counsel is as important, if not more so, than the judicially created Fifth Amendment right. It therefore must be protected by procedural safeguards "at least as stringent as those designed for its lesser counterpart". The Michigan Court declined "to follow the reasoning of those cases which have found valid Sixth Amendment waivers after a request for counsel has been made to a Magistrate based solely on valid waivers of Miranda rights." The Court then observed that in these cases it was not necessary to decide whether stricter

procedural standards for waiver of the Sixth Amendment right to counsel are required. It then said:

> "We need only hold that, at a minimum, the Edwards/Paintman rule applies by analogy to those situations where an accused requests counsel before the arraigning magistrate. Once this request occurs the police may not conduct further interrogations until counsel has been available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police. If a defendant chooses to reinitiate communications, he must be sufficiently aware of both his Fifth and Sixth Amendment rights to effectuate a voluntary, knowing, and intelligent waiver of each right. See Bradshaw, supra, ____ US ____; 77 L Ed 2d 413; Johnson v. Zerbst, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938)."

applies are Edwards analysis

The Michigan Court also held that "before commencing interrogation, the police have an obligation to determine whether an accused had been arraigned and requested counsel. This duty is no more onerous than that imposed by Edwards and Paintman". Since both of these defendants had requested counsel during their arraignment, the court found that they had not been afforded an opportunity to consult with counsel before the police initiated further interrogations. Accordingly, their post-arraignment confessions were improperly obtained and should have been suppressed. The court relied heavily on Edwards and its prophylactic rule. It noted that "if a Miranda waiver is

inadequate to protect the Fifth amendment right to counsel under Edwards, it certainly would be inadequate to protect the greater Sixth Amendment right". Although the Michigan court disclaims adopting a pe se rule, I consider Edwards to have adopted one and the Michigan court - in effect - has done the same thing.

* * *

These cases are well briefed, particularly by Bladel's brief. The brief on behalf of the state by its Chief Appellate attorney argues first that Edward v. Arizona was not actually violated in these cases, and that therefore the Sixth Amendment right had not attached. Moreover, the Sixth Amendment right - if it had attached - was knowingly and intelligently waived. Miranda warnings are said to be sufficient and if the right to counsel is waived at that time, this also constitutes a Sixth Amendment waiver. Counsel on both sides cite a number of our decisions including Brewer v. Williams, Faretta v. California, Oregon v. Bradshaw, and Johnson v. Zerbst.

* * *

These are troublesome cases for me. It is clear - and no arguments to the contrary is made - that both of the defendants were guilty of murder and deserved to be

punished. Under our system, unique in the world, innocence often is irrelevant. Even a plainly guilty defendant is entitled to be tried consistently with constitutional principles. I do not like prophylactic or per se rules, as I think I made clear in both Edwards and briefly Bradshaw. I was of the opinion then, and still believe that the admissibility of confessions - whether before or after arraignment - should be determined under the "facts and circumstances" rule of Zerbst. My view was rejected by the Court in Edwards, and I am bound by that decision.

Even under Edwards and Bradshaw, a plausible argument can be made that the waivers of counsel by these two defendants, even after arraignment, was so explicit that the Edwards test was met. There, in substances, the state only had to show that the defendant initiated the resumption of interrogation. While these defendants did not initiate the resumption, it is perfectly clear, in light of their prior experience with interrogation and the giving of prior statements - that they knew what they were doing, did not object to further interrogation, and understood that they were waiving counsel. I am not yet persuaded where the waiver of counsel is as clear as it

was in these cases, that it is critical to the Court's decision whether there was a prior request for counsel or whether such counsel had actually been appointed. Yet, given the Court's decision in Edwards, and the repeated emphasis in numerous decisions on the obvious importance of the right to counsel - I am not at rest in these cases. I therefore will welcome the views of my clerk.

LFP, JR.

mwm 12/03/85

Reviewed 12/5 - Excellent memo.
Mike would reverse.
Both present same Q

BENCH MEMORANDUM

To: Mr. Justice Powell December 3, 1985

From: Mike

No. 84-1531 MICHIGAN v. JACKSON (Michigan S.Ct.)

84-1539 MICHIGAN v. BLADEL (Michigan S.Ct.)

Set for argument Dec. 9, 1985

Date: December 3, 1985

QUESTION PRESENTED

Under what circumstances may a defendant be deemed to have waived his post-arraignment Sixth Amendment right to counsel?

I. BACKGROUND

Facts in Bladel

On December 31, 1978, Bladel murdered three railroad employees with a shotgun. As a prime suspect, he was questioned several times, each time preceded by a Miranda warning. When his gun was found and determined to be the murder weapon, he was arrested. After again receiving his Miranda warning and waiving his right to an attorney, Bladel was questioned. He did not confess to the killings. Bladel was arraigned the next day. The magistrate informed Bladel that he had "a right to be represented by an attorney, at all stages of the proceedings, including the preliminary examination I just mentioned." Bladel indicated that he wished to exercise that right, and an attorney was appointed for him. In between the arraignment and the time of Bladel's first meeting with counsel, two policemen came to his cell. They went over his rights very carefully. Specifically, they told him "You have a right to consult a lawyer before you answer any questions," "If you can't afford a lawyer, one will be appointed for you before questioning or anytime during the questioning and if you so desire, you may stop and one will be appointed for you," "If you answer questions or make any statement without consulting a lawyer or have a lawyer present you have the absolute right to stop any time you wish and to make no further statement until you consult with a lawyer or have a lawyer present during the questioning." Bladel indicated that he understood his rights. He then was specifically asked if he wanted an attorney present at that time. He said no, and signed a waiver form. During this interrogation, Bladel confessed to the killings.

atty appointed

Warning to Bladel

did not want counsel

Bladel →

Facts in Jackson

Jackson was hired by a Ms. Perry to kill her husband. He and co-defendant Michael White murdered Mr. Perry on July 12, 1979; Jackson was the trigger-man. During the murder investigation, Jackson talked with the police several times. Although he confessed involvement, he tried to blame White for the actual killing. After both he and White were arrested, they were given a polygraph test. The test indicated that Jackson was covering up. He then gave several statements to the police confessing to the killing and to his role as the trigger-man. All of the interrogations were preceded by Miranda warnings. That same afternoon, Jackson was arraigned. He was told of his right to counsel and requested appointed counsel. Following the arraignment, the police once again gave Jackson Miranda warnings. He waived his right to counsel and gave a statement to confirm prior statements that he had shot the victim.

Michigan court decisions

Both of the trial courts (Bladel's and Jackson's) held extensive hearings on the admissibility of the confessions and allowed them to be admitted because the right to counsel was properly waived. The two cases formed the subject of a combined appeal to the Michigan Supreme Court. All the pre-arraignment confessions in Jackson were disallowed. The Mich. S. Ct. reasoned that the 26 1/2 hour delay from the arrest to the arraignment indicated an improper delay under Michigan law. It also decided that there was no Fifth Amendment violation. The central issue before the court in both cases, then, was the admissibility

of the post-arraignment confessions. The court reasoned that the Sixth Amendment right to counsel, which is triggered by arraignment, is at least as broad as the Fifth Amendment right to counsel, which is triggered by a "custodial interrogation." The court then made an analogy to Fifth Amendment law. In the Fifth Amendment context, if a suspect invokes his right to an attorney after Miranda warnings, Edwards v. Arizona, 451 U.S. 477 (1981) forbids the police from further questioning, even following subsequent Miranda warnings, unless the suspect initiates the conversation or acts on the advice of counsel. The court reasoned that at the arraignment, the defendants had invoked their Sixth Amendment right to counsel. Therefore, applying Edwards by analogy, the police should be forbidden to engage in further questioning unless the defendant initiates the conversation or acts on the advice of counsel.

II. DISCUSSION

It is important to set out what is not at issue in this case. First, as you point out, there is no dispute about the guilt of these resps. Therefore, the result below can only be supported on the basis of some prophylactic rule. Second, there is no Fifth Amendment violation. Prior to every instance of questioning, proper Miranda warnings were given. Third, no reasonable argument can be made that these confessions were not informed and voluntary. The officers explained in great detail to Bladel and Jackson that they had a right to an attorney present at that very moment, and could refuse to talk until an attorney

arrived. There was not even light physical pressure, such as long, late night interrogations.

In addition, there are some preliminary legal issue that can be given short shrift in order to clear the way for the single important issue in this case. Resps make lengthy arguments that the Sixth Amendment right to counsel enjoys a higher place in the Constitutional horizon than the Fifth Amendment right to counsel, and therefore is entitled to even greater protection. None of those arguments ~~are~~ convincing. For example, resps point to the fact that the right to counsel embodied in the Fifth Amendment is judge-made, while the Sixth Amendment right to counsel is textual. If that is a basis for distinction, then Roe v. Wade should have been on weaker ground than National League of Cities. Additionally, resps argue that proper Miranda warnings are an inadequate basis for waiving the Sixth Amendment right to counsel. The argument is based on the different theoretical underpinnings for the two rights. Those theoretical distinctions ignore reality. Following arraignment, a defendant may enjoy a right to counsel simultaneously based on two different constitutional provisions. Because any interrogation following arraignment is a "critical stage" within the meaning of Massiah, he enjoys a Sixth Amendment right to counsel. Also, during any "custodial interrogation" he enjoys a Fifth Amendment right to counsel. There may be different constitutional underpinnings for those rights, but the reality is that in post-indictment interrogations a defendant simply has the right to have an attorney present to help him. Miranda warnings such as those administered

in this case inform a defendant that he has the immediate and absolute right to an attorney, and that if he so desires, questioning will cease until one arrives. It defies common sense to say that such a warning is insufficient to waive the Sixth Amendment right to counsel.

The Michigan Supreme Court's rule in this case stands or falls on the applicability of Edwards to this Sixth Amendment context. If Edwards does not apply, then these resps were adequately informed of their right to counsel under both the Fifth and Sixth Amendments, and they both knowingly and voluntarily waived those rights.

The logic of the Mich. S. Ct.'s position is simple. It is roughly a double syllogism that runs something like this:

1. Fifth and Sixth Amendment rights to counsel are entitled to at least the same constitutional safeguards.
2. If a defendant invokes his Fifth Amendment right following a Miranda warning, Edwards says he cannot thereafter be questioned unless he initiates the conversation or acts on the advice of counsel.
3. A request for counsel at an arraignment is the equivalent of an invocation of the Sixth Amendment right to counsel.
4. Therefore, when a defendant requests counsel at an arraignment, he ought to get the same protection that a defendant gets who requests counsel following a Miranda warning--that is, no further questioning unless he initiates the conversation or acts on the advice of counsel.

As a matter of pure logic, that is a fairly persuasive argument. But if Judge Wilkey taught me anything, it is that great logic does not always lead to the wisest result. That is true in this case, where on closer examination there are compelling practical reasons why Edwards does not fairly apply in this context.

Edwards involved a defendant who was given his Miranda rights, submitted to some questioning, and then told the police that he did not want to answer any further questions until he had a lawyer present. The next morning, after being told by a guard that he had to talk to the detectives, Edwards was again given his Miranda rights, and confessed to a killing. The Court held that "an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Id., at 484-485. Edwards contemplates the situation of a defendant invoking the proffered right not to submit to further questioning without a lawyer, and then the police act inconsistently with that right by questioning him further. The rationale behind Edwards is that if a defendant invokes a right to counsel during a custodial interrogation, and then is further questioned despite invocation of that right, it is likely that such a defendant did not knowingly and intelligently waive that right. Rather, the implication is that such a defendant might conclude that his right to counsel is illusory, because the police act inconsistently with his invocation of the right.

The factual situation in these cases is very dissimilar to the Edwards context. In these cases, resps "invoked" their Sixth Amendment right to counsel merely by agreeing that they would like to have counsel appointed for them for "all stages of the proceedings, including the preliminary examination." J.A. 3a. While their Sixth Amendment right to counsel includes the right to counsel at all post-indictment interrogations, and while the scope of the right they invoke is certainly not defined by defendants' perceptions of what they have been granted, it was not in this case inconsistent in the Edwards sense for the police to have asked these resps subsequent to arraignment whether they wanted to talk. Neither of these defendants indicated in any way a "desire to deal with the police only through counsel." Edwards, 451 US at 484. The risk present in Edwards--that a defendant would waive his right to counsel based on a perception that his right to counsel was being ignored--is not present in cases where a defendant has simply accepted appointed counsel at an arraignment.

As a general rule, the police ought to be given one chance after an arraignment to test whether a defendant will talk. In most cases, that will not pose the Edwards risk of leading to waivers of the right to counsel that are not truly knowing or intelligent, since by requesting counsel at an arraignment a defendant has not indicated that he only wishes to deal with the police through counsel. Because the Court favors bright-line rules in these cases, I recommend that the police only be given one chance; if at that time defendant indicates

that he wants a lawyer present, the rule of Edwards will quite naturally apply, thereby protecting both the Fifth and Sixth Amendment rights to counsel.[1]

III. CONCLUSION

I recommend reversing the Michigan Supreme Court. Edwards-type protection for the Sixth Amendment right to counsel should not be triggered by accepting appointed counsel at an arraignment. Rather, police should be permitted one chance to determine whether the defendant is willing to talk, since in all but the rarest cases, the defendant will have done nothing in the arraignment to indicate that he desires to deal with the police only through a lawyer.

---

[1] In rare cases, a magistrate may explain the right to counsel in a way that informs a defendant that he has a right to counsel at any interrogation, so that by accepting counsel the defendant does leave the arraignment with an expectation of dealing with the police only through counsel. Even so, it is not completely inconsistent with defendant's expectations to test one time whether he wants to talk, since the police were not the ones who "granted" the right to defendant. In Edwards, part of the inconsistency is that the same people who told a suspect that he had a right not to talk without a lawyer turn around hours later and ask if he wants to talk. That inconsistency is not present here. At any rate, I prefer a rule that sweeps in the rare case where only the speculative risk of an unintelligent waiver of counsel is present, rather than a rule that grants an unnecessary block to confession in favor of a large group of defendants who are not constitutionally entitled to that protection.

84-1539 Mich v. Bladel

Supreme Court of the United States
Memorandum

----------, 19----------

Bladel was asked if he wanted a lawyer present. He said no, & signed a waiver form. Then confessed.

x x x

No need to create a new per se rule. I'd apply Zerbst standard of facts & circumstances. Must be clear there is any express waiver of counsel. Should be taped.

84-1531 Mich v. Jackson

Supreme Court of the United States
Memorandum

----------, 19----------

Confessed 7 times - before arraignment & reversed after a polygraph test - all after warnings. But at arraignment he had requested counsel.

Following arraignment, he expressly waived rt. to counsel

Prelim Notes 12/5

84-531 Miche v. Jackson (Mich 5/4

84-1539 Mich v. Bladel

[Consolidated - same Q]

1. These cases: Both Defs., when arraigned, were advised of right to counsel. Both wanted counsel, & one was appointed ~~for~~ for Bladel. Upon arraignment, Jackson also requested counsel. (Not clear whether one had been appointed.)

Subsequent to arraignment, & before Δs had met with attys, Police gave Miranda warnings, & emphasized right to have counsel present.

Both Δs (separately) declined to have counsel present, & ~~confessed~~ confessed while, under no ~~restraint~~ pressure from police

The warnings were given with care - & clearly.

84-[redacted]31 & 84-1334

2. Mich S/Ct found violation of 6th Amend R/to counsel, & reversed..

It relied primarily on Edwards v Arizona, & found no distinction bet. applying the 6th Amend. here, & 5th in cases like Edwards.

Certain things are clear: (1) there was no 5th Amend. violation as to Miranda warnings were given after arraignment in commendable detail); (2) The confessions clearly were voluntary (as facts make clear); & (3) no doubt as to guilt.

84-1531 & 84-1339

3. Does Edwards apply as much S/Ct ruled?

(1) Argument is that under Edwards, once request for counsel is made at any interrogation, no further questions are permissible unless Δ requests opportunity to talk. These cases are said to be similar to Edwards

(2) But these cases are different. The request for counsel was made at arraignment - i.e. for counsel at all stages. Unlike Edwards, the request for counsel was not made when warnings were given prior to interrogation. There were explicit waivers of counsel - after the clearest advice that counsel would be provided.

Nicks

84-1531 MICHIGAN v. JACKSON
84-1539 MICHIGAN v. BLADEL

Argued 12/9/85

information

Thiede (County Prosecutor)

As BRW noted, there was no warrant & Rork was in custody - thus the criminal process had commenced & no prosecutor is present at arraignment. The Δ appears before a judge who determines whether Δ is indigent & if so appoints counsel. After the arrest, Δ goes before a judge who informs Δ of the charge & appoints an atty if Δ is indigent. The judge also may set bail.

There is the "arraignment"

Miranda warnings are given at this stage.

Twelve days later, there is a "prelim. hearing" to determine probable cause.

Rarely is indictment by G/J used in Mich.

Answering S.O.C, counsel said there may be a period of time after arrest & prior to arraignment, during which Miranda warnings may be given & Δ interrogated unless Δ said he wants an atty.

Jackson was interrogated seven times & was given warnings each time, & he always said he didn't want an atty.

Krogstad (for Resp. Jackson appted by us) [~~Jackson~~]

Relies on Edwards.

Will approach case from viewpoint of "waiver". Mich S/Ct opinion on this is correct. ~~Adversarial~~ Adversarial proceedings begin at arraignment.

When counsel said he wanted counsel at arraignment, ~~burden~~ burden then was on State to show a subsequent waiver of rt. to counsel.

Bonetz (for Resp. Bladel) [~~Bladel~~]

→ Brewer applied 6th amend right after ~~counsel~~ counsel had been engaged.

When counsel has been appointed, at least counsel must have opportunity to confer with client & advise D to remain silent. Here altho counsel had been appted, Resp were interrogated & ~~though~~ though they knew counsel had been appointed they agreed to talk.

→ If we think Edwards is applicable then ends case. If not, then the standard for determining waiver of counsel becomes important - critically imp.

Mich S/Ct op. is OK

No. 84-1531, Michigan v. Jackson Conf. 12/11/85

84 1539 " Bladel

The Chief Justice Passed

This is not an Edwards situation. In Edwards, when interrogation commenced, counsel asked that interrogation stop. Edwards held police could not initiate. Mich. S/Ct & extended Edwards

Passed on first vote.

Justice Brennan Aff in for both

Right to counsel attached when request for counsel was then made.

Would extend Edwards to 6th Amend.

Justice White Aff in & both

Edwards didn't deal with 6th Amend. But its reasoning controls - even tho here the confessions were voluntary. But police were guilty of improper interrogation.

Justice Marshall Affirm

Edwards applies

Justice Blackmun Affirm both cases

Edwards applies

Justice Powell Reverse both

I'd not create another per se constitutional rule. Edwards can be distinguished.

I'd not say interrogation always may occur. BS

I can accept Edwards as the 5th Amend Rule (wrong as it was) - but we need not extend it.

* Courts should be left to determine whether an accused clearly wanted ~~to~~ to confess.

Justice Rehnquist Reverse both

Agree with me

Justice Stevens Affirm

Edwards applies

Justice O'Connor Reverse

Arraignment is proper time for 6th Amend right to attach.

Once that right attaches, is whether there was a waiver.

Edwards ~~was~~ went too far. ~~The~~

The Q is when has police conduct become oppressive.

Here the Ds were willing & anxious to talk.

FLP

To: Justice Powell

From: Mike A well written memo that precisely & concisely answers my questions.

Re: No. 84-1531 MICHIGAN v. JACKSON (Michigan S.Ct.)

No. 84-1539 MICHIGAN v. BLADEL (Michigan S.Ct.)

Date: December 10, 1985

Post-Argument Memo

You asked me to research and answer several questions regarding these two cases. For convenience, I will list them and answer them numerically.

1. Were the post-arraignment confessions tape recorded? In the case of resp Jackson, yes. In the case of resp Bladel, I cannot tell. My impression from reading the transcript of the hearing to determine the voluntariness of the confessions is that it was not tape recorded.

2. Identify the specific language where the police explained to the defendant his post-arraignment right to counsel and asked if he wanted to waive it. In the case of resp Bladel:

In between the arraignment and the time of Bladel's first meeting with counsel, two policemen came to his cell. They went over his rights very carefully. Specifically, they told him "You have a right to consult a lawyer before you answer any questions," "If you can't afford a lawyer, one will be appointed for you before questioning or anytime during the questioning and if you so desire, you may stop and one will be appointed for you," "If you answer questions or make any statement without

consulting a lawyer or have a lawyer present you have the absolute right to stop any time you wish and to make no further statement until you consult with a lawyer or have a lawyer present during the questioning." Bladel indicated that he understood his rights. He then was specifically asked if he wanted an attorney present at that time. He said no, and signed a waiver form. During this interrogation, Bladel confessed to the killings.

In the case of resp Jackson, please refer to page 32 of the Joint Appendix for the Jackson case, where the taped transcript of the interrogation is found. The language is almost identical to the police statement in Bladel. In my opinion, it fully informs defendant of his rights.

3. What is the relevance of Moran v. Burbine, No. 84-1485, to this case? Moran dealt with the Fifth Amendment right to counsel. The issue was whether the police failure to inform defendant that an attorney had been obtained for him somehow violated his Miranda rights. The principle that Moran will stand for, consistent with your vote, is that the police have no duty to inform a suspect of external circumstances that may make it more or less advisable to waive his Fifth Amendment rights. It adheres to the bright line principle of Miranda that the warning is sufficient to advise a suspect of his rights. Moran's relevance to this case is very limited. It says nothing about Sixth Amendment rights. Rather, it reiterates the principle that a suspect is fully capable of waiving the rights embodied in the Miranda warning on his own, without the advice of counsel.

4. Are there CA decisions supporting the result you recommend? The main CA decision supporting the result of letting in these confessions is Nash v. Estelle, 597 F.2d 513 (CA5 1979). Nash is instructive because it involves a defendant who clearly wanted appointed counsel, but who just as clearly wanted to talk. The following dialogue occurred:

Policeman: You want one to be appointed for you?

Nash: Yes, sir.

Policeman: OK. I had hoped that we might talk about this, but if you want a lawyer appointed, then we are going to have to stop right now.

Nash: But, uh I kinda, you know, wanted, you know to talk about it, you know, to try to get it straightened out. (Petr's Br. in Bladel at 35-36)

5. Final thoughts? In Brewer v. Williams 430 US 387 (1977), the Court wrote, and you reiterated in your concurrence, that the Sixth Amendment right to counsel can be "waived, after it has attached, without notice to or consultation with counsel." 430 U.S. at 413 (POWELL, J., concurring). In this case, then, the only question is whether the police sufficiently informed the defendants of their right to permit a knowing waiver. I conclude that they did. The fact that an attorney would have advised them not to talk is irrelevant; if it were, no constitutional rights ever would be waived. In addition, the question is what to require as a general matter before a Sixth Amendment right can be waived. I would not reommend some Sixth Amendment variation of Miranda. Rather, I think Miranda itself is sufficient to support

a waiver of the Sixth Amendment right, since it incorporates the same principles in Zerbst that apply to the Sixth Amendment context. See Brewer, supra, 430 US at 404. I therefore recommend reversing the court below either on the basis that Zerbst was satisfied, or on the basis that the first post-arraignment administering of Miranda is also sufficient to waive the Sixth Amendment right to counsel.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 14, 1985

Re: No. 84-1531 - Michigan v. Jackson
84-1539 - Michigan v. Bladel

MEMORANDUM TO THE CONFERENCE

At Conference I "passed" with respect to these cases. I now conclude to affirm.

Regards,

WEB

Sincerely,
Supreme Court

B R W have joined.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: FEB 1 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84–1531 AND 84–1539

MICHIGAN, PETITIONER
84–1531 *v.*
ROBERT BERNARD JACKSON

MICHIGAN, PETITIONER
84–1539 *v.*
RUDY BLADEL

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

[February ——, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

In *Edwards* v. *Arizona*, we held that an accused person in custody who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U. S. 477, 484–485 (1981). In *Solem* v. *Stumes* ——- U. S. —— (1984), we reiterated that "*Edwards* established a bright-line rule to safeguard pre-existing rights," *id.*, at ——, slip op. at 8—"once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him." *Id.*, at ——, slip op. at 3.

The question presented by these two cases is whether the same rule applies to a defendant who has been formally charged with a crime and who has requested appointment of counsel at his arraignment. In both cases, the Michigan Supreme Court held that post-arraignment confessions were improperly obtained—and the Sixth Amendment violated—because the defendants had "requested counsel during their

arraignments, but were not afforded an opportunity to consult with counsel before the police initiated further interrogations." 421 Mich. 39, 67–68, 365 N. W. 2d 56, 69 (1984). We agree with that holding.

I

The relevant facts may be briefly stated. Respondent Bladel was convicted of the murder of three railroad employees at the Amtrak Station in Jackson, Michigan on December 31, 1978. Bladel, a disgruntled former employee, was arrested on January 1, 1979 and, after being questioned on two occasions, was released on January 3. He was arrested again on March 22, 1979, and agreed to talk to the police that evening without counsel. On the following morning, Friday, March 23, 1979, Bladel was arraigned. He requested that counsel be appointed for him because he was indigent. The detective in charge of the Bladel investigation was present at the arraignment. A notice of appointment was promptly mailed to a law firm, but the law firm did not receive it until Tuesday, March 27. In the interim, on March 26, 1979, two police officers interviewed Bladel in the county jail and obtained a confession from him. Prior to that questioning, the officers properly advised Bladel of his *Miranda* rights.[1] Although he had inquired about his representation several times since the arraignment, Bladel was not told that a law firm had been appointed to represent him.

The trial court overruled Bladel's objection to the admissibility of all four statements. On appeal from his conviction and sentence, Bladel challenged only the post-arraignment confession. The Michigan Court of Appeals first rejected

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[1] See *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The *Miranda* warnings were also given prior to the questioning on January 1, January 2, and March 22. Although Bladel made certain inculpatory statements on those occasions, he denied responsibility for the murder until after the arraignment. As the Michigan Supreme Court noted, even without his own statements, the evidence against Bladel was substantial. 365 N. W. 2d, at 58–59, and n. 2.

that challenge and affirmed the conviction, 106 Mich. App. 397, 308 N. W. 2d 230 (1981), but, after reconsideration in the light of a recent decision by the State Supreme Court, it reversed and remanded for a new trial. 118 Mich. App. 498, 325 N. W. 2d 421 (1982). The Michigan Supreme Court then granted the prosecutor's application for leave to appeal and considered the case with respondent Jackson's appeal of his conviction. 421 Mich. 39, 365 N. W. 2d 56 (1984).

Respondent Jackson was convicted of second degree murder and conspiracy to commit second degree murder. He was one of four participants in a wife's plan to have her husband killed on July 12, 1979. Arrested on an unrelated charge on July 30, 1979, he made a series of six statements in response to police questioning prior to his arraignment at 4:30 p. m. on August 1. During the arraignment, Jackson requested that counsel be appointed for him. The police involved in his investigation were present at the arraignment. On the following morning, before he had an opportunity to consult with counsel, two police officers obtained another statement from Jackson to "confirm" that he was the person who had shot the victim. As was true of the six pre-arraignment statements, the questioning was preceded by advice of his *Miranda* rights and Jackson's agreement to proceed without counsel being present.

The Michigan Court of Appeals held that the seventh statement was properly received in evidence. 114 Mich. App. 649, 319 N. W. 2d 613 (1982). It distinguished *Edwards* on the ground that Jackson's request for an attorney had been made at his arraignment whereas Edwards' request had been made during a custodial interrogation by the police. Accordingly, it affirmed Jackson's conviction of murder, although it set aside the conspiracy conviction on unrelated grounds.

The Michigan Supreme Court held that the post-arraignment statements in both cases should have been suppressed. Noting that the Sixth Amendment right to counsel attached at the time of the arraignments, the Court concluded that the

Edwards rule "applies by analogy to those situations where an accused requests counsel before the arraigning magistrate. Once this request occurs, the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police. . . . The police cannot simply ignore a defendant's unequivocal request for counsel." 421 Mich., at 66–67, 365 N. W. 2d, at 68–69 (footnote omitted). We granted certiorari, —— U. S. —— (1985), and we now affirm.[2]

II

The question is not whether respondents had a right to counsel at their post-arraignment, custodial interrogations. The existence of that right is clear. It has two sources. The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations. *Edwards*, *supra*, 451 U. S., at 482; *Miranda* v. *Arizona*, 384 U. S. 436, 470 (1966). The Sixth Amendment guarantee of the assistance of counsel also provides the right to counsel at post-arraignment interrogations. The arraignment signals "the initiation of adversary judicial proceedings" and thus the attachment of the Sixth Amendment, *United States* v. *Gouveia*, —— U. S. ——, —— (1984), slip op. at

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[2] Respondent Jackson points out that the Michigan Supreme Court also held that his fourth, fifth, and sixth statements should have been suppressed on grounds of pre-arraignment delay under a state statute. He therefore argues that the decision rests on an adequate and independent state ground and that the writ of certiorari should be dismissed. The state court opinion, however, does not apply that pre-arraignment delay holding to the seventh statement. Thus, although the Michigan Court's holding on the other statements does mean that Jackson's conviction must be reversed regardless of this Court's decision, the admissibility of the seventh statement is controlled by that court's Sixth Amendment analysis, and is properly before us.

6–7;[3] thereafter, government efforts to elicit information from the accused, including interrogation, represent "critical stages" at which the Sixth Amendment applies. *Maine* v. *Moulton*, —— U. S. —— (1985); *United States* v. *Henry*, 447 U. S. 264 (1980); *Brewer* v. *Williams*, 430 U. S. 387 (1977); *Massiah* v. *United States*, 377 U. S. 201 (1964). The question in these cases is whether respondents validly waived their right to counsel at the post-arraignment custodial interrogations.

In *Edwards*, the request for counsel was made to the police during custodial interrogation, and the basis for the Court's holding was the Fifth Amendment privilege against compelled self-incrimination. The Court noted the relevance of various Sixth Amendment precedents, 451 U. S., at 484, n. 8, but found it unnecessary to rely on the possible applicability of the Sixth Amendment. *Id.*, at 480, n. 7. In these cases, the request for counsel was made to a judge during ar-

[3] In *Jackson*, the State concedes that the arraignment represented the initiation of formal legal proceedings, and that the Sixth Amendment attached at that point. Brief for Petitioner, 84–1531, at 10. In *Bladel*, however, the State disputes that contention, Brief for Petitioner, 84–1539, at 24–26. In view of the clear language in our decisions about the significance of arraignment, the State's argument is untenable. See, *e. g.*, *Brewer* v. *Williams*, 430 U. S. 387, 398 (1977) ("a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information *or arraignment*' ") (emphasis added), quoting *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (plurality opinion). See also *United States* v. *Gouveia*, —— U. S. ——, —— (1984), slip op. at 7 (quoting *Kirby*); *Estelle* v. *Smith*, 451 U. S. 454, 469–470 (1981) (quoting *Kirby*); *Moore* v. *Illinois*, 434 U. S. 220, 226 (1977) (quoting *Kirby*). Cf. *Powell* v. *Alabama*, 287 U. S. 45, 57 (1932) ("the most critical part of the proceedings against these defendants" was "*from the time of their arraignment* until the beginning of their trial") (emphasis added). The question whether arraignment signals the initiation of adversary judicial proceedings, moreover, is distinct from the question whether the arraignment itself is a critical stage requiring the presence of counsel, absent a valid waiver. Cf. *Hamilton* v. *Alabama*, 368 U. S. 52 (1961) (Alabama arraignment is a "critical stage").

raignment, and the basis for the Michigan Supreme Court opinion was the Sixth Amendment's guarantee of the assistance of counsel.[4] The State argues that the *Edwards* rule should not apply to these circumstances because there are legal differences in the basis for the claims; because there are factual differences in the contexts of the claims; and because respondents signed valid waivers of their right to counsel at the post-arraignment custodial interrogations. We consider these contentions in turn.

The State contends that differences in the legal principles underlying the Fifth and Sixth Amendments compel the conclusion that the *Edwards* rule should not apply to a Sixth Amendment claim. *Edwards* flows from the Fifth Amendment's right to counsel at custodial interrogations, the State argues; its relevance to the Sixth Amendment's provision of the assistance of counsel is far less clear, and thus the *Edwards* principle for assessing waivers is unnecessary and inappropriate.

In our opinion, however, the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before. The State's argument misapprehends the nature of the pretrial protections afforded by the Sixth Amendment. In *United States* v. *Gouveia*, —— U. S. —— (1984), we explained the significance of the formal accusation, and the corresponding attachment of the Sixth Amendment right to counsel:

> "[G]iven the plain language of the Amendment and its purpose of protecting the unaided layman at critical con-

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[4] The Michigan Supreme Court found that "defendants' request to the arraigning magistrate for appointment of counsel implicated only their Sixth Amendment right to counsel," 421 Mich., at 52, 365 N. W. 2d, at 62, because the request was not made during custodial interrogation. It was for that reason that the Michigan Court did not rely on a Fifth Amendment *Edwards* analysis. We express no comment on the validity of the Michigan Court's Fifth Amendment analysis.

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As a result, the "Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." *Maine* v. *Moulton*, —— U. S. ——, —— (1985), slip op. at 15. Thus, the Sixth Amendment right to counsel at a post-arraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation.

Indeed, after a formal accusation has been made—and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment—the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation. Thus, the surreptitious employment of a cell mate, see *United States* v. *Henry*, 447 U. S. 264 (1980), or the electronic surveillance of conversations with third parties, see *Maine* v. *Moulton*, *supra*; *Massiah* v. *United States*, 377 U. S. 201 (1964), may violate the defendant's Sixth Amendment right to counsel even though the same methods of investigation might have been permissible before arraignment or indictment.[5] Far from undermining the *Ed-*

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wards rule, the difference between the legal basis for the rule applied in *Edwards* and the Sixth Amendment claim asserted in these cases actually provides additional support for the application of the rule in these circumstances.

The State also relies on the factual differences between a request for counsel during custodial interrogation and a request for counsel at an arraignment. The State maintains that respondents may not have actually intended their request for counsel to encompass representation during any further questioning by the police. This argument, however, must be considered against the backdrop of our standard for assessing waivers of constitutional rights. Almost a half century ago, in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), a case involving an alleged waiver of a defendant's Sixth Amendment right to counsel, the Court explained that we should "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Id.*, at 464. For that reason, it is the State that has the burden of establishing a valid waiver. *Brewer* v. *Williams*, 430 U. S. 387, 404 (1977). Doubts must be resolved in favor of protecting the constitutional claim. This settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel—we presume that the defendant requests the lawyer's services at every critical stage of the prosecution.[6] We thus reject the

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Sixth Amendment provides a right to counsel at a "critical stage" even when there is no interrogation and no Fifth Amendment applicability. See *United States* v. *Wade*, 388 U. S. 218 (1967) (Sixth Amendment provides right to counsel at post-indictment line-up even though Fifth Amendment is not implicated).

[6] In construing respondents' request for counsel, we do not, of course, suggest that the right to counsel turns on such a request. See *Brewer* v. *Williams*, *supra*, 430 U. S., at 404 ("the right to counsel does not depend upon a request by the defendant"); *Carnley* v. *Cochran*, 369 U. S. 506, 513 (1962) ("it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request"). Rather, we construe the defendant's request for counsel as an extremely

State's suggestion that respondents' requests for the appointment of counsel should be construed to apply only to representation in formal legal proceedings.[7]

The State points to another factual difference: the police may not know of the defendant's request for attorney at the arraignment. That claimed distinction is similarly unavailing. In the cases at bar, in which the officers in charge of the investigations of respondents were present at the arraignments, the argument is particularly unconvincing. More generally, however, Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual.[8] One set of state actors (the police) may not claim ignorance of de-

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important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation.

[7] We also agree with the comments of the Michigan Supreme Court about the nature of an accused's request for counsel:

"Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further interrogation to a defendant who asks a police officer for an attorney, but permit further interrogation to a defendant who makes an identical request to a judge. The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly." 421 Mich., at 63–64, 365 N. W. 2d, at 67.

[8] See, *e. g.*, *Maine* v. *Moulton*, —— U. S. ——, —— (1985), slip op. at 10:

"Once the right to counsel has attached and been asserted, *the State* must of course honor it. This means more than simply that *the State* cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on *the State* an affirmative obligation to respect and preserve the accused's choice to seek this assistance." (emphasis added) (footnote omitted).

fendants' unequivocal request for counsel to another state actor (the court).

The State also argues that, because of these factual differences, the application of *Edwards* in a Sixth Amendment context will generate confusion. However, we have frequently emphasized that one of the characteristics of *Edwards* is its clear, "bright line" quality. See, *e. g.*, *Smith* v. *Illinois*, 469 U. S. ——, —— (1984); *Solem* v. *Stumes*, —— U. S. ——, ——, (1984), slip op. at 8; *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1044 (1983) (plurality opinion); *id.*, at 1054, n. 2 (MARSHALL, J., dissenting). We do not agree that applying the rule when the accused requests counsel at an arraignment, rather than in the police station, somehow diminishes that clarity. To the extent that there may have been any doubts about interpreting a request for counsel at an arraignment, or about the police responsibility to know of and respond to such a request, our opinion today resolves them.

Finally, the State maintains that each of the respondents made a valid waiver of his Sixth Amendment rights by signing a post-arraignment confession after again being advised of his constitutional rights. In *Edwards*, however, we rejected the notion that, after a suspect's request for counsel, advice of rights and acquiescence in police-initiated questioning could establish a valid waiver. 451 U. S., at 484. We find no warrant for a different view under a Sixth Amendment analysis. Indeed, our rejection of the comparable argument in *Edwards* was based, in part, on our review of earlier Sixth Amendment cases.[9] Just as written waivers are

[9] After stating our holding "that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights," 451 U. S., at 484, we appended this footnote:

"*8/*In *Brewer* v. *Williams*, 430 U. S. 387 (1977), where, as in *Massiah* v. *United States*, 377 U. S. 201 (1964), the Sixth Amendment right to counsel had accrued, the Court held that a valid waiver of counsel rights should not be inferred from the mere response by the accused to overt or more subtle

insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in a Sixth Amendment analysis.[10]

III

Edwards is grounded in the understanding that "the assertion of the right to counsel [is] a significant event," 451 U. S., at 485, and that "additional safeguards are necessary when the accused asks for counsel." *Id.*, at 484. We conclude that the assertion is no less significant, and the need for additional safeguards no less clear, when the request for counsel is made at an arraignment and when the basis for the claim is the Sixth Amendment. We thus hold that, if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.

Although the *Edwards* decision itself rested on the Fifth Amendment and concerned a request for counsel made dur-

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forms of interrogation or other efforts to elicit incriminating infromation. In *Massiah* and *Brewer*, counsel had been engaged or appointed and the admissions in question were elicited in his absence. But in *McLeod* v. *Ohio*, 381 U. S. 356 (1965), we summarily reversed a decision that the police could elicit information after indictment even though counsel had not yet been appointed." *Id.*, at 484, n. 8.

[10] The State also argues that the Michigan Supreme Court's finding of a valid Fifth Amendment waiver should require the finding of a valid Sixth Amendment waiver. The relationship between the validity of waivers for Fifth and Sixth Amendment purposes has been the subject of considerable attention in the courts, 421 Mich., at 55–62, 365 N. W. 2d, at 63–67 (discussing and collecting cases), and the commentaries, 421 Mich., at 54, n. 15, 365 N. W. 2d, at 63, n. 15. In view of our holding that the *Edwards* rule applies to the Sixth Amendment and that the Sixth Amendment requires the suppression of the post-arraignment statements, we need not decide either the validity of the Fifth Amendment waiver in this case, see n. 4, *supra*, or the general relationship between Fifth and Sixth Amendment waivers.

ing custodial interrogation, the Michigan Supreme Court correctly perceived that the reasoning of that case applies with even greater force to these cases. The judgments are accordingly affirmed.

It is so ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 21, 1986

Re: No. 84-1531 - Michigan v. Jackson
No. 84-1539 - Michigan v. Bladel

Dear John:

Please join me.

Sincerely,

T.M.

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 24, 1986

No. 84-1531) Michigan v. Jackson
)
No. 84-1539) Michigan v. Bladel

Dear John,

I agree.

Sincerely,

Bill

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 24, 1986

84-1531 - Michigan v. Jackson

84-1539 - Michigan v. Bladel

Dear John,

Please join me.

Sincerely yours,

Justice Stevens

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:

From: **Justice Stevens**

Circulated: _____

Recirculated: FEB 26 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84–1531 AND 84–1539

I'm in dissent

84–1531 MICHIGAN, PETITIONER *v.* ROBERT BERNARD JACKSON

84–1539 MICHIGAN, PETITIONER *v.* RUDY BLADEL

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

[February ——, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

In *Edwards* v. *Arizona*, 451 U. S. 477 (1981), we held that an accused person in custody who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.*, at 484–485. In *Solem* v. *Stumes*, 465 U. S. 638 (1984), we reiterated that "*Edwards* established a bright-line rule to safeguard pre-existing rights," *id.*, at 646, "once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him." *Id.*, at 641.

The question presented by these two cases is whether the same rule applies to a defendant who has been formally charged with a crime and who has requested appointment of counsel at his arraignment. In both cases, the Michigan Supreme Court held that postarraignment confessions were improperly obtained—and the Sixth Amendment violated—because the defendants had "requested counsel during their arraignments, but were not afforded an opportunity to con-

sult with counsel before the police initiated further interrogations." 421 Mich. 39, 67–68, 365 N. W. 2d 56, 69 (1984). We agree with that holding.

I

The relevant facts may be briefly stated. Respondent Bladel was convicted of the murder of three railroad employees at the Amtrak Station in Jackson, Michigan, on December 31, 1978. Bladel, a disgruntled former employee, was arrested on January 1, 1979, and, after being questioned on two occasions, was released on January 3. He was arrested again on March 22, 1979, and agreed to talk to the police that evening without counsel. On the following morning, Friday, March 23, 1979, Bladel was arraigned. He requested that counsel be appointed for him because he was indigent. The detective in charge of the Bladel investigation was present at the arraignment. A notice of appointment was promptly mailed to a law firm, but the law firm did not receive it until Tuesday, March 27. In the interim, on March 26, 1979, two police officers interviewed Bladel in the county jail and obtained a confession from him. Prior to that questioning, the officers properly advised Bladel of his *Miranda* rights.[1] Although he had inquired about his representation several times since the arraignment, Bladel was not told that a law firm had been appointed to represent him.

The trial court overruled Bladel's objection to the admissibility of all four statements. On appeal from his conviction and sentence, Bladel challenged only the postarraignment confession. The Michigan Court of Appeals first rejected that challenge and affirmed the conviction, 106 Mich. App.

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[1] See *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The *Miranda* warnings were also given prior to the questioning on January 1, January 2, and March 22. Although Bladel made certain inculpatory statements on those occasions, he denied responsibility for the murder until after the arraignment. As the Michigan Supreme Court noted, even without his own statements, the evidence against Bladel was substantial. 421 Mich., at 44 and n. 2, 365 N. W. 2d, at 58–59, and n. 2.

397, 308 N. W. 2d 230 (1981), but, after reconsideration in the light of a recent decision by the State Supreme Court, it reversed and remanded for a new trial. 118 Mich. App. 498, 325 N. W. 2d 421 (1982). The Michigan Supreme Court then granted the prosecutor's application for leave to appeal and considered the case with respondent Jackson's appeal of his conviction. 421 Mich. 39, 365 N. W. 2d 56 (1984).

Respondent Jackson was convicted of second-degree murder and conspiracy to commit second-degree murder. He was one of four participants in a wife's plan to have her husband killed on July 12, 1979. Arrested on an unrelated charge on July 30, 1979, he made a series of six statements in response to police questioning prior to his arraignment at 4:30 p. m. on August 1. During the arraignment, Jackson requested that counsel be appointed for him. The police involved in his investigation were present at the arraignment. On the following morning, before he had an opportunity to consult with counsel, two police officers obtained another statement from Jackson to "confirm" that he was the person who had shot the victim. As was true of the six prearraignment statements, the questioning was preceded by advice of his *Miranda* rights and Jackson's agreement to proceed without counsel being present.

The Michigan Court of Appeals held that the seventh statement was properly received in evidence. 114 Mich. App. 649, 319 N. W. 2d 613 (1982). It distinguished *Edwards* on the ground that Jackson's request for an attorney had been made at his arraignment whereas Edwards' request had been made during a custodial interrogation by the police. Accordingly, it affirmed Jackson's conviction of murder, although it set aside the conspiracy conviction on unrelated grounds.

The Michigan Supreme Court held that the postarraignment statements in both cases should have been suppressed. Noting that the Sixth Amendment right to counsel attached at the time of the arraignments, the court concluded that the *Edwards* rule "applies by analogy to those

situations where an accused requests counsel before the arraigning magistrate. Once this request occurs, the police may not conduct further interrogations until counsel has been made available to the accused, unless the accused initiates further communications, exchanges, or conversations with the police. . . . The police cannot simply ignore a defendant's unequivocal request for counsel." 421 Mich., at 66–67, 365 N. W. 2d, at 68–69 (footnote omitted). We granted certiorari, 471 U. S. —— (1985), and we now affirm.[2]

II

The question is not whether respondents had a right to counsel at their postarraignment, custodial interrogations. The existence of that right is clear. It has two sources. The Fifth Amendment protection against compelled self-incrimination provides the right to counsel at custodial interrogations. *Edwards*, 451 U. S., at 482; *Miranda* v. *Arizona*, 384 U. S. 436, 470 (1966). The Sixth Amendment guarantee of the assistance of counsel also provides the right to counsel at postarraignment interrogations. The arraignment signals "the initiation of adversary judicial proceedings" and thus the attachment of the Sixth Amendment, *United States* v. *Gouveia*, 467 U. S. 180, 187, 188 (1984);[3] thereafter, govern-

[2] Respondent Jackson points out that the Michigan Supreme Court also held that his fourth, fifth, and sixth statements should have been suppressed on grounds of prearraignment delay under a state statute. He therefore argues that the decision rests on an adequate and independent state ground and that the writ of certiorari should be dismissed. The state court opinion, however, does not apply that prearraignment delay holding to the seventh statement. Thus, although the Michigan court's holding on the other statements does mean that Jackson's conviction must be reversed regardless of this Court's decision, the admissibility of the seventh statement is controlled by that court's Sixth Amendment analysis, and is properly before us.

[3] In *Jackson*, the State concedes that the arraignment represented the initiation of formal legal proceedings, and that the Sixth Amendment attached at that point. Brief for Petitioner in No. 84–1531, p. 10. In *Bladel*, however, the State disputes that contention, Brief for Petitioner in

ment efforts to elicit information from the accused, including interrogation, represent "critical stages" at which the Sixth Amendment applies. *Maine* v. *Moulton*, 474 U. S. —— (1985); *United States* v. *Henry*, 447 U. S. 264 (1980); *Brewer* v. *Williams*, 430 U. S. 387 (1977); *Massiah* v. *United States*, 377 U. S. 201 (1964). The question in these cases is whether respondents validly waived their right to counsel at the postarraignment custodial interrogations.

In *Edwards*, the request for counsel was made to the police during custodial interrogation, and the basis for the Court's holding was the Fifth Amendment privilege against compelled self-incrimination. The Court noted the relevance of various Sixth Amendment precedents, 451 U. S., at 484, n. 8, but found it unnecessary to rely on the possible applicability of the Sixth Amendment. *Id.*, at 480, n. 7. In these cases, the request for counsel was made to a judge during arraignment, and the basis for the Michigan Supreme Court opinion was the Sixth Amendment's guarantee of the assistance of counsel.[4] The State argues that the *Edwards* rule

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No. 84–1539, pp. 24–26. In view of the clear language in our decisions about the significance of arraignment, the State's argument is untenable. See, *e. g.*, *Brewer* v. *Williams*, 430 U. S. 387, 398 (1977) ("a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information *or arraignment*'") (emphasis added), quoting *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (plurality opinion). See also *United States* v. *Gouveia*, 467 U. S., at —— (quoting *Kirby*); *Estelle* v. *Smith*, 451 U. S. 454, 469–470 (1981) (quoting *Kirby*); *Moore* v. *Illinois*, 434 U. S. 220, 226 (1977) (quoting *Kirby*). Cf. *Powell* v. *Alabama*, 287 U. S. 45, 57 (1932) ("the most critical period of the proceedings against these defendants" was "*from the time of their arraignment* until the beginning of their trial") (emphasis added). The question whether arraignment signals the initiation of adversary judicial proceedings, moreover, is distinct from the question whether the arraignment itself is a critical stage requiring the presence of counsel, absent a valid waiver. Cf. *Hamilton* v. *Alabama*, 368 U. S. 52 (1961) (Alabama arraignment is a "critical stage").

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should not apply to these circumstances because there are legal differences in the basis for the claims; because there are factual differences in the contexts of the claims; and because respondents signed valid waivers of their right to counsel at the postarraignment custodial interrogations. We consider these contentions in turn.

The State contends that differences in the legal principles underlying the Fifth and Sixth Amendments compel the conclusion that the *Edwards* rule should not apply to a Sixth Amendment claim. *Edwards* flows from the Fifth Amendment's right to counsel at custodial interrogations, the State argues; its relevance to the Sixth Amendment's provision of the assistance of counsel is far less clear, and thus the *Edwards* principle for assessing waivers is unnecessary and inappropriate.

In our opinion, however, the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before. The State's argument misapprehends the nature of the pretrial protections afforded by the Sixth Amendment. In *United States* v. *Gouveia*, we explained the significance of the formal accusation, and the corresponding attachment of the Sixth Amendment right to counsel:

> "[G]iven the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the initiation of adversary judicial criminal proceedings 'is far from a mere formalism.' *Kirby* v. *Illinois*, 406 U. S., at 689. It is only at

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As a result, the "Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." *Maine* v. *Moulton*, 474 U. S., at ——. Thus, the Sixth Amendment right to counsel at a post-arraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation.

Indeed, after a formal accusation has been made—and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment—the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation. Thus, the surreptitious employment of a cellmate, see *United States* v. *Henry*, 447 U. S. 264 (1980), or the electronic surveillance of conversations with third parties, see *Maine* v. *Moulton*, *supra*; *Massiah* v. *United States*, 377 U. S. 201 (1964), may violate the defendant's Sixth Amendment right to counsel even though the same methods of investigation might have been permissible before arraignment or indictment.[5] Far from undermining the *Edwards* rule, the difference between the legal basis for the rule

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[5] Similarly, after the initiation of adversary judicial proceedings, the Sixth Amendment provides a right to counsel at a "critical stage" even when there is no interrogation and no Fifth Amendment applicability. See *United States* v. *Wade*, 388 U. S. 218 (1967) (Sixth Amendment provides right to counsel at postindictment line-up even though Fifth Amendment is not implicated).

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[6] In construing respondents' request for counsel, we do not, of course, suggest that the right to counsel turns on such a request. See *Brewer* v. *Williams*, 430 U. S., at 404 ("the right to counsel does not depend upon a request by the defendant"); *Carnley* v. *Cochran*, 369 U. S. 506, 513 (1962) ("it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request"). Rather, 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.

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The State points to another factual difference: the police may not know of the defendant's request for attorney at the arraignment. That claimed distinction is similarly unavailing. In the cases at bar, in which the officers in charge of the investigations of respondents were present at the arraignments, the argument is particularly unconvincing. More generally, however, Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual.[8] One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court).

The State also argues that, because of these factual differences, the application of *Edwards* in a Sixth Amendment context will generate confusion. However, we have frequently emphasized that one of the characteristics of *Edwards* is its clear, "bright line" quality. See, *e. g.*, *Smith* v. *Illinois*, 469 U. S. ——, —— (1984); *Solem* v. *Stumes*, 465 U. S., at 646; *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1044 (1983) (plurality

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"Although judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking; he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. It makes little sense to afford relief from further interrogation to a defendant who asks a police officer for an attorney, but permit further interrogation to a defendant who makes an identical request to a judge. The simple fact that defendant has requested an attorney indicates that he does not believe that he is sufficiently capable of dealing with his adversaries singlehandedly." 421 Mich., at 63–64, 365 N. W. 2d, at 67.

[8] See, *e. g.*, *Maine* v. *Moulton*, 474 U. S. ——, —— (1985):

"Once the right to counsel has attached and been asserted, *the State* must of course honor it. This means more than simply that *the State* cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on *the State* an affirmative obligation to respect and preserve the accused's choice to seek this assistance." (emphasis added) (footnote omitted).

opinion); *id.*, at 1054, n. 2 (MARSHALL, J., dissenting). We do not agree that applying the rule when the accused requests counsel at an arraignment, rather than in the police station, somehow diminishes that clarity. To the extent that there may have been any doubts about interpreting a request for counsel at an arraignment, or about the police responsibility to know of and respond to such a request, our opinion today resolves them.

Finally, the State maintains that each of the respondents made a valid waiver of his Sixth Amendment rights by signing a postarraignment confession after again being advised of his constitutional rights. In *Edwards*, however, we rejected the notion that, after a suspect's request for counsel, advice of rights and acquiescence in police-initiated questioning could establish a valid waiver. 451 U. S., at 484. We find no warrant for a different view under a Sixth Amendment analysis. Indeed, our rejection of the comparable argument in *Edwards* was based, in part, on our review of earlier Sixth Amendment cases.[9] Just as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insuf-

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[9] After stating our holding that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights," 451 U. S., at 484, we appended this footnote:

"In *Brewer* v. *Williams*, 430 U. S. 387 (1977), where, as in *Massiah* v. *United States*, 377 U. S. 201 (1964), the Sixth Amendment right to counsel had accrued, the Court held that a valid waiver of counsel rights should not be inferred from the mere response by the accused to overt or more subtle forms of interrogation or other efforts to elicit incriminating infromation. In *Massiah* and *Brewer*, counsel had been engaged or appointed and the admissions in question were elicited in his absence. But in *McLeod* v. *Ohio*, 381 U. S. 356 (1965), we summarily reversed a decision that the police could elicit information after indictment even though counsel had not yet been appointed." *Id.*, at 484, n. 8.

ficient to justify police-initiated interrogations after the request for counsel in a Sixth Amendment analysis.[10]

III

Edwards is grounded in the understanding that "the assertion of the right to counsel [is] a significant event," 451 U. S., at 485, and that "additional safeguards are necessary when the accused asks for counsel." *Id.*, at 484. We conclude that the assertion is no less significant, and the need for additional safeguards no less clear, when the request for counsel is made at an arraignment and when the basis for the claim is the Sixth Amendment. We thus hold that, if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.

Although the *Edwards* decision itself rested on the Fifth Amendment and concerned a request for counsel made during custodial interrogation, the Michigan Supreme Court correctly perceived that the reasoning of that case applies with even greater force to these cases. The judgments are accordingly affirmed.

It is so ordered.

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[10] The State also argues that the Michigan Supreme Court's finding of a valid Fifth Amendment waiver should require the finding of a valid Sixth Amendment waiver. The relationship between the validity of waivers for Fifth and Sixth Amendment purposes has been the subject of considerable attention in the courts, 421 Mich., at 55–62, 365 N. W. 2d, at 63–67 (discussing and collecting cases), and the commentaries, *id.*, at 54, n. 15, 365 N. W. 2d, at 63, n. 15. In view of our holding that the *Edwards* rule applies to the Sixth Amendment and that the Sixth Amendment requires the suppression of the postarraignment statements, we need not decide either the validity of the Fifth Amendment waiver in this case, see n. 4, *supra*, or the general relationship between Fifth and Sixth Amendment waivers.

February 27, 1986

84-1531 Michigan v. Jackson

Dear John:

Bill Rehnquist has agreed to write a dissent in this case.

Sincerely,

Justice Stevens

lfp/ss

cc: The Confernce

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 27, 1986

Re: No. 84-1531, Michigan v. Jackson
No. 84-1539, Michigan v. Bladel

Dear John:

Please join me.

Sincerely,

Harry

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 27, 1986

No. 84-1531 Michigan v. Jackson
No. 84-1539 Michigan v. Bladel

Dear John,

I will wait for the dissent.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference

You are awaiting the dissent. Sally - may I see full

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

L.F.P.

From: **Justice Rehnquist**

Circulated: MAR 18 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84–1531 AND 84–1539

Join

MICHIGAN, PETITIONER
84–1531 *v.*
ROBERT BERNARD JACKSON

MICHIGAN, PETITIONER
84–1539 *v.*
RUDY BLADEL

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

[March ——, 1986]

JUSTICE REHNQUIST, dissenting.

The Court's decision today rests on the following deceptively simple line of reasoning: *Edwards* v. *Arizona*, 451 U. S. 477 (1981), created a bright-line rule to protect a defendant's Fifth Amendment rights; Sixth Amendment rights are even more important than Fifth Amendment rights; therefore, we must also apply the *Edwards* rule to the Sixth Amendment. The Court prefers this neat syllogism to an effort to discuss or answer the only relevant question: Does the *Edwards* rule make sense in the context of the Sixth Amendment? I think it does not, and I therefore dissent from the Court's unjustified extension of the *Edwards* rule to the Sixth Amendment.

My disagreement with the Court stems from our differing understandings of *Edwards*. In *Edwards*, this Court held that once a defendant has invoked his right under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), to have counsel present during custodial interrogation, "a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been ad-

vised of his rights." 451 U. S., at 484. This "prophylactic rule," see *Solem* v. *Stumes*, 465 U. S. 638, 644, 645 (1984), was deemed necessary to prevent the police from effectively "overriding" a defendant's assertion of his *Miranda* rights by "badgering" him into waiving those rights. See *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1044 (1983) (plurality opinion of REHNQUIST, J.) (*Edwards* rule "designed to protect an accused in police custody from being badgered by police officers").[1] In short, as we explained in later cases, "*Edwards* did not confer a substantive constitutional right that had not existed before; it 'created a protective umbrella serving to enhance a constitutional guarantee.'" *Solem* v. *Stumes*, *supra*, at 644, quoting *Michigan* v. *Payne*, 412 U. S. 47, 54 (1973); see also *Shea* v. *Louisiana*, —— U. S. ——, —— (WHITE, J., dissenting) (describing "prophylactic purpose" of *Edwards* rule).

What the Court today either forgets or chooses to ignore is that the "constitutional guarantee" referred to in *Solem* v. *Stumes* is the Fifth Amendment's prohibition on compelled self-incrimination. This prohibition, of course, is also the constitutional underpinning for the set of prophylactic rules announced in *Miranda* itself. See *Moran* v. *Burbine*, —— U. S. ——, —— (1986); *Oregon* v. *Elstad*, —— U. S. ——, —— (1985).[2] *Edwards*, like *Miranda*, imposes on the police

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[1] The four dissenters in *Oregon* v. *Bradshaw* apparently agreed with the plurality's characterization of the *Edwards* rule. See 462 U. S., at 1055, n. 2 (MARSHALL, J., joined by BRENNAN, BLACKMUN, and STEVENS, JJ., dissenting) (citing passage from plurality opinion quoted in the text, and noting that "[t]he only dispute between the plurality and the dissent in this case concerns the meaning of 'initiation' for purposes of *Edwards*' *per se* rule").

[2] The Court suggests, in dictum, that the Fifth Amendment also provides defendants with a "right to counsel." See *ante*, at 4. But our cases make clear that the Fifth Amendment itself provides no such "right." See *Moran* v. *Burbine*, *supra*, at ——, n. 1; *Oregon* v. *Elstad*, *supra*, at ——. Instead, *Miranda* confers upon a defendant a "right to counsel," *but only when such counsel is requested during custodial interrogations.* Even

a bright-line standard of conduct intended to help ensure that confessions obtained through custodial interrogation will not be "coerced" or "involuntary." Seen in this proper light, *Edwards* provides nothing more than a second layer of protection, in addition to those rights conferred by *Miranda*, for a defendant who might otherwise be compelled by the police to incriminate himself in violation of the Fifth Amendment.

The dispositive question in the instant case, and the question the Court should address in its opinion, is whether the same kind of prophylactic rule is needed to protect a defendant's right to counsel under the Sixth Amendment. The answer to this question, it seems to me, is clearly "no." The Court does not even suggest that the police commonly deny defendants their Sixth Amendment right to counsel. Nor, I suspect, would such a claim likely be borne out by empirical evidence. Thus, the justification for the prophylactic rules this Court created in *Miranda* and *Edwards*, namely, the perceived widespread problem that the police were violating, and would probably continue to violate, the Fifth Amendment rights of defendants during the course of custodial interrogations, see *Miranda*, 384 U. S., at 445–458,[3] is conspicuously absent in the Sixth Amendment context. To put it simply, the prophylactic rule set forth in *Edwards* makes

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under *Miranda*, the "right to counsel" exists solely as a means of protecting the defendant's Fifth Amendment right not to be compelled to incriminate himself.

[3] In *Miranda*, this Court reviewed numerous instances in which police brutality had been used to coerce a defendant into confessing his guilt. The Court then stated:

"The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. . . . The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved . . . there can be no assurance that practices of this nature will be eradicated in the foreseeable future." 384 U. S., at 446–447.

no sense at all except when linked to the Fifth Amendment's prohibition against compelled self-incrimination.

Not only does the Court today cut the *Edwards* rule loose from its analytical moorings, it does so in a manner that graphically reveals the illogic of the Court's position. The Court phrases the question presented in this case as whether the *Edwards* rule applies "to a defendant who has been formally charged with a crime *and who has requested appointment of counsel at his arraignment.*" *Ante*, at 1 (emphasis added). And the Court ultimately limits its holding to those situations where the police "initiate interrogation *after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel.*" *Ante*, at 11 (emphasis added).

In other words, the Court most assuredly does *not* hold that the *Edwards per se* rule prohibiting all police-initiated interrogations applies from the moment the defendant's Sixth Amendment right to counsel attaches, with or without a request for counsel by the defendant. Such a holding would represent, after all, a shockingly dramatic restructuring of the balance this Court has traditionally struck between the rights of the defendant and those of the larger society. Applying the *Edwards* rule to situations in which a defendant has not made an explicit request for counsel would also render completely nugatory the extensive discussion of "waiver" in such prior Sixth Amendment cases as *Brewer* v. *Williams*, 430 U. S. 387, 401–406 (1977). See also *id.*, at 410 (POWELL, J., concurring) ("The critical factual issue is whether there had been a voluntary waiver . . . ."); *id.*, at 417 (BURGER, C. J., dissenting) ("[I]t is very clear that Williams had made a valid waiver of his . . . Sixth Amendment right to counsel . . . .); *id.*, at 430, n. 1 (WHITE, J., joined by BLACKMUN and REHNQUIST, JJ., dissenting) ("It does not matter whether the right not to make statements in the absence of counsel stems from *Massiah* v. *United States*, 377 U. S. 201 (1964),

or *Miranda* v. *Arizona*, 384 U. S. 436 (1966). In either case the question is one of waiver.").[4]

This leaves the Court, however, in an analytical straitjacket. The problem with the limitation the Court places on the Sixth Amendment version of the *Edwards* rule is that, unlike a defendant's "right to counsel" under *Miranda*, which does not arise until affirmatively invoked by the defendant during custodial interrogation, a defendant's Sixth Amendment right to counsel does not depend at all on whether the defendant has requested counsel. See *Brewer* v. *Williams*, *supra*, at 404; *Carnley* v. *Cochran*, 369 U. S. 506, 513 (1962). The Court acknowledges as much in footnote six of its opinion, where it stresses that "we do not, of course, suggest that the right to counsel turns on . . . a request [for counsel]." *Ante*, at 8, n. 6.

The Court provides no satisfactory explanation for its decision to extend the *Edwards* rule to the Sixth Amendment, yet limit that rule to those defendants foresighted enough, or

[4] See also *Moran* v. *Burbine*, —— U. S. ——, —— (1986) ("It is clear, of course, that, *absent a valid waiver*, the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches").

Several of our Sixth Amendment cases have indeed erected virtually *per se* barriers against certain kinds of police conduct. See, *e. g.*, *Maine* v. *Moulton*, —— U. S. —— (1985); *United States* v. *Henry*, 447 U. S. 264 (1980); *Massiah* v. *United States*, 377 U. S. 201 (1964). These cases, however, all share one fundamental characteristic that separates them from the instant case; in each case, the nature of the police conduct was such that it would have been impossible to find a valid waiver of the defendant's Sixth Amendment right to counsel. See *Maine* v. *Moulton*, *supra*, at —— (undisclosed electronic surveillance of conversations with a third party); *United States* v. *Henry*, *supra*, at 265, 273 (use of undisclosed police informant); *Massiah* v. *United States*, *supra*, at 202 (undisclosed electronic surveillance). Here, on the other hand, the conduct of the police was totally open and above-board, and could not be said to prevent the defendant from executing a valid Sixth Amendment waiver under the standards set forth in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938).

just plain lucky enough, to have made an explicit request for counsel which we have always understood to be completely unnecessary for Sixth Amendment purposes. The Court attempts to justify its emphasis on the otherwise legally insignificant request for counsel by stating 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." *Ibid.* This statement sounds reasonable, but it is flatly inconsistent with the remainder of the Court's opinion, in which the Court holds that there can be no waiver of the Sixth Amendment right to counsel after a request for counsel has been made. See *ante*, at 11, n. 10. It is obvious that, for the Court, the defendant's request for counsel is not merely an "extremely important fact"; rather, it is the *only* fact that counts.

The truth is that there is no satisfactory explanation for the position the Court adopts in this case. The glaring inconsistencies in the Court's opinion arise precisely because the Court lacks a coherent, analytically sound basis for its decision. The prophylactic rule of *Edwards*, designed from its inception to protect a defendant's right under the Fifth Amendment not to be compelled to incriminate himself, simply does not meaningfully apply to the Sixth Amendment. I would hold that *Edwards* has no application outside the context of the Fifth Amendment, and would therefore reverse the judgment of the court below.

March 19, 1986

84-1531 Michigan v. Jackson

Dear Bill:

Please join me in your dissenting opinion.

Sincerely,

Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 27, 1986

No. 84-1531 Michigan v. Jackson
No. 84-1539 Michigan v. Bladel

Dear Bill,

Please join me in your dissent.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference