

# WHO AMENDED THE AMENDMENT?

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## I. INTRODUCTION

The Sixth Amendment of the U.S. Constitution guarantees the right of assistance of counsel in all criminal prosecutions.<sup>1</sup> But courts have been mired in narrow textual interpretations of the Amendment for at least the last eighty years, and have only parsimoniously recognized some aspects of the right, taking the smallest of steps forward on each occasion, and not infrequently reversing direction while generously sowing the seeds of confusion.<sup>2</sup>

How is it that this Amendment, surely a glorious ornament of the age of political enlightenment, has suffered so much textual and linguistic abuse at the hands of the judiciary?<sup>3</sup> As Professor Sanjay Chhablani observes, “the Court has adopted a number of constructions of the Sixth Amendment that plainly contravene its text and are increasingly less protective of individual liberty.”<sup>4</sup>

The reader can be forgiven for concluding that certain elements of the judiciary will do anything to limit citizens’ rights under the Constitution. Far from being the guardians of the Constitution, those elements of the judiciary seem, in fact, to be its gatekeepers. The twin paths of linguistic and jurisprudential mismanagement can be traced from approximately the time of the Great Depression until the present.<sup>5</sup>

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1. U.S. CONST. amend. VI.

2. *But see* Stephanos Bibas, *Justice Kennedy’s Sixth Amendment Pragmatism*, 44 MCGEORGE L. REV. 211 (2013).

3. Nobody has expressed this idea better or more passionately than Justice Story in his *Commentaries on the Constitution of the United States* (1833).

4. Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 488-89 (2009).

5. A succession of ground breaking cases from that era demonstrate how this issue began to

As Alfredo Garcia has noted, “[t]he Supreme Court’s recent interpretation of the amendment has been marked by doctrinal inconsistency and by a failure to adhere to the functional and symbolic values that are inherent in the amendment.”<sup>6</sup> More critically, Garcia believes that the “Court has adopted a crime control ‘ideology’, stressing efficiency rather than the core ideal of a fair trial that the amendment is designed to safeguard.”<sup>7</sup>

As is well known, the Amendment, as it has stood for the last 220 years, states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.<sup>8</sup>

## II. MORE THAN THE MERE PRESENCE OF AN ATTORNEY

Anyone reading this text will marvel at the simplicity and directness of the language.<sup>9</sup> Much eighteenth century legal English is nowadays almost impenetrable as to its intention, but in this case, the meaning is as clear to us today as it must have been to newspaper readers when the Bill of Rights first appeared in the public press in 1789.<sup>10</sup>

And yet, even the most basic elements of the provision have been contended. As Professor Justin Marceau has pointed out, it has not always been accepted that assistance of counsel is required to be *effective* for the promise of the Amendment to be fulfilled.<sup>11</sup> In fact, it was almost 200 years after ratification in Congress before the U.S.

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be prominent from that time on, including the 1932 case of *Powell v. Alabama*, 287 U.S. 45 (1932), and the slightly later case of *Johnson v. Zerbst*, 304 U.S. 458 (1938).

6. ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE*, ix (1992).

7. *Id.*

8. U.S. CONST. amend. VI.

9. *See id.*

10. “Between 1789 and 1791, the question of whether we would even have a Bill of Rights was one of the most hotly debated issues of the day. Legislatures discussed it; newspapers wrote about it; and people were passionate in their opinions.” Hon. Damon J. Keith, *Challenges for the Constitution in the 1990’s “How May the Constitution Continue to Meet the Emerging Needs of A Changing Nation,”* 34 HOW. L.J. 483, 484 (1991).

11. Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161, 1164-65 (2012).

Supreme Court finally took the plunge and recognized that assistance means *effective* assistance.<sup>12</sup> But it is scarcely credible that it could have taken so long for such a simple idea to take hold. How could anyone define assistance as a quality that could lack effectiveness and still be meaningful? Put even more simply, if assistance is not effective, can it still be called ‘assistance’?<sup>13</sup> Finally, however, the Court rose to the occasion in *Strickland v. Washington*, stating “[t]hat a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command.”<sup>14</sup>

The reading, which was tacitly accepted prior to *Strickland*, does follow a perverse type of textualist rationale: the framers did not say that assistance had to be effective and therefore, apparently, it could not be inferred.<sup>15</sup> This is not to say that *Strickland* was a satisfactory result. As Chhablani notes, the *Strickland* Court redefined a fair trial as one in which the result is reliable, rather than one in which the procedures are fair.<sup>16</sup> Moreover, the *Strickland* burden of proof on the defendant to establish that an attorney’s ineffectiveness prejudiced the outcome is a heavy one.<sup>17</sup>

But textualism taken to its extremes is always perverse and, moreover, when textualism actually involves a gross misreading of the text it is nothing less than repugnant.<sup>18</sup> William Treanor, for example, argues that some scholars have tried to emphasize the Bill of Rights as rights “of the people”, rather than as the rights of individuals, and points out how, given the wording of the Sixth Amendment, this textualist interpretation is plainly incorrect.<sup>19</sup> As will be shown below, evidence of poor textual interpretation is found in other examples of judicial

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12. *Id.* at 1165-66. “In 1970, the Supreme Court in *McMann v. Richardson* established that [the] right to counsel requires effective and competent legal representation for defendants.” Sean Michael Fitzgerald, *Losing Sight of the Forest for the Trees: The Supreme Court’s Misapplication of Sixth Amendment Strickland Analysis in Missouri v. Frye and Lafler v. Cooper*, 21 AM. U. J. GENDER SOC. POL’Y & L. 681, 684 (2013) (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

13. Marceau, *supra* note 11, at 1165-66.

14. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

15. *See, e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 389 (2010) (Scalia, J., dissenting) (“The Sixth Amendment as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services . . .”).

16. Chhablani, *supra* note 4, at 542-43.

17. *Id.*

18. *See, e.g.*, Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995) (arguing that “[i]n its new form, textualism resembles the extreme versions of intentionalism that the textualists have long criticized.”).

19. William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights*, 106 MICH. L. REV. 487 (2007).

tinkering with the meaning of the Amendment.

### III. A SPEEDY AND PUBLIC TRIAL

There has long been contention as to whether the right to assistance of counsel applied to plea bargain hearings.<sup>20</sup> It is only with the recent decisions in *Missouri v. Frye*<sup>21</sup> and *Lafler v. Cooper*,<sup>22</sup> which were decided by the Supreme Court on the same day, that this issue was at last resolved. For decades, most criminal convictions have of course resulted from plea bargains, which have traditionally been viewed as pre-trial events. Both *Frye* and *Lafler* have now given the official imprimatur to the daily reality of courts throughout the land: “plea bargaining . . . is the criminal justice system.”<sup>23</sup> It is, therefore, only now official that at the plea bargain hearing the defendant is entitled to the assistance of counsel.<sup>24</sup>

Again, the fact that this defect subsisted for so many decades is directly attributable to a textualist misreading of the Amendment, which has allowed the focus to be placed on the trial itself. It appears that in construing the Amendment, judges have placed emphasis on the trial and the stages of the trial, quite simply because the thematic phrase of the Amendment ‘*In all criminal prosecutions*’ has been backgrounded by a school of thought which equated the trial with the prosecution, a view tacitly taken, if not expressed, in *Strickland*.<sup>25</sup> Whether textualism can be reconciled with, “reliability,” however, is another matter.<sup>26</sup>

The standard judicial interpretation of the Amendment therefore appears to have been as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial

~ by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,

~ and to be informed of the nature and cause of the accusation;

~ to be confronted with the witnesses against him;

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20. The earlier decision of *Hill v. Lockhart*, 474 U.S. 52 (1985), applied only to guilty pleas and thus left the door open to ambiguity on this issue.

21. *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

22. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

23. *Frye*, 132 S. Ct. at 1407.

24. See *Frye*, 132 S. Ct. at 1399; *Lafler*, 132 S. Ct. at 1376.

25. See *Strickland v. Washington*, 466 U.S. 668 (1984).

26. See Chhablani, *supra* note 4, at 543.

- ~ to have compulsory process for obtaining witnesses in his favor,
- ~ and to have the Assistance of Counsel for his defense.<sup>27</sup>

The above formatting places the emphasis on *trial*. This is understandable to a degree, given the historical perspective of the Amendment and in view of the evils it set out to address at the time, specifically that a person could be deprived of life or property without a trial.<sup>28</sup> However, I believe a proper parsing of the Amendment should read:

In all criminal prosecutions, the accused shall enjoy the right

- (i) to a (a) speedy and (b) public trial, by an (c) impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and
- (ii) to be informed of the nature and cause of the accusation;
- (iii) to be confronted with the witnesses against him;
- (iv) to have compulsory process for obtaining witnesses in his favor, and
- (v) to have the Assistance of Counsel for his defense.<sup>29</sup>

We, therefore, effectively, have these several rights subsumed into one, which are collectively “the right.” In other words, the right is an integrated one – the sum is greater than the parts; they are not separable from each other. As Randolph Jonakait has noted, the Sixth Amendment “requires reading each of its specific clauses not in isolation, but as part of one integrated Sixth Amendment.”<sup>30</sup>

The right summarizes how the framers saw the process of providing the suspect with a fair opportunity to conduct his defense, in other words *due* process. The right, as framed, particularizes the essential elements of the defense. All aspects of the right pertain to the prosecution and not

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27. U.S. CONST. amend. VI.

28. See *United States v. Polouizzi*, 687 F. Supp. 2d 133, 169-170 (E.D.N.Y. 2010), *vacated*, 393 Fed. Appx. 784 (2d Cir. 2010) (unpublished) (explaining that the Sixth Amendment’s right to trial by jury “was envisaged as a check against overreaching by the new federal government”); *Baldwin v. New York*, 399 U.S. 66, 72 (1970) (“[T]he primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the Government that has proceeded against him.”).

29. U.S. CONST. amend. VI.

30. Randolph Jonakait, *Foreword: Notes for a Consistent and Meaningful Sixth Amendment*, 82 J. CRIM. L. & CRIMINOLOGY 713, 713 (1992).

just the trial: in the prosecution and throughout the prosecution, hence—“in all criminal prosecutions”; moreover they apply to all criminal prosecutions, hence “in *all* criminal prosecutions.”

#### IV. IN ALL CRIMINAL PROSECUTIONS

On the above basis, one would be forgiven for thinking that the right to counsel would long have applied to all prosecutions, and that this was a settled, established principle. But this is not the case. *Powell v. Alabama*, for example, only applied to capital prosecutions.<sup>31</sup> The restriction as to capital trials appeared to be removed in *Johnson v. Zerbst*,<sup>32</sup> but with reference to federal prosecutions only, and in *Betts v. Brady*,<sup>33</sup> a *habeas* appeal from the state of Maryland, the Court held that there was no right of counsel for indigent defendants prosecuted by the state.<sup>34</sup> The Court cited the fact that many states had laid down their own policies regarding indigent defendants’ right to counsel, and therefore “in the great majority of the States, it has been the considered judgment of the people, their representatives, and their courts that an appointment of counsel for indigent defendants in criminal cases is not a fundamental right.”<sup>35</sup> However, in this instance the court seemed to ignore the fact that the Constitution of the state of Maryland does guarantee counsel as of right.<sup>36</sup> In *Betts*, only Justice Hugo Black considered that the Fourteenth Amendment imposed an obligation on the states to fulfil the command of the Sixth Amendment<sup>37</sup> to guarantee “any person within its jurisdiction the equal protection of the laws.”<sup>38</sup> However, the Court had consistently held, from the time of *Barron v. Baltimore*,<sup>39</sup> that the first eight amendments of the Constitution applied only to the Federal government and not to the individual states.<sup>40</sup> It was only much later in *Gideon v. Wainwright*<sup>41</sup> that the Court recognized that the Fourteenth Amendment did indeed extend the protections of the

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31. *Powell v. Alabama*, 287 U.S. 45, 71-72 (1932).

32. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

33. *Betts v. Brady*, 316 U.S. 455 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

34. *Id.* at 473.

35. *Id.* at 471.

36. MD. CONST. DECL. OF RTS. ART. 21.

37. *Betts*, 316 U.S. at 474.

38. U.S. CONST. amend. XIV.

39. *Barron v. Baltimore*, 32 U.S. 243 (1833).

40. *See, e.g., id.* at 250 (stating that the Fifth, Sixth, and Eighth Amendments to the Constitution apply only to the federal government).

41. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Sixth Amendment to all defendants in state prosecutions.<sup>42</sup>

In other words, it took from 1791 to 1963 for defendants in all criminal prosecutions, federal and state, to be granted the right of assistance to counsel,<sup>43</sup> a further 23 years for the Court to insist that that assistance had to be effective<sup>44</sup> and another 26 years for recognition that assistance was required at stages outside the trial itself.<sup>45</sup>

Does this now mean that every defendant is protected, throughout a criminal prosecution? Alas, it does not, because, despite all of the tribulations that Sixth Amendment jurisprudence has gone through, further opportunities for distorting the intentions of the framers have never been capable of escaping determined judicial machinations.<sup>46</sup>

## V. ENTER THE CRITICAL STAGE DOCTRINE

Under the critical stage doctrine, any prosecution is considered to consist of a number of key stages in addition to the trial itself.<sup>47</sup> Despite the doctrine's identification with Sixth Amendment jurisprudence, it finds its roots equally in Fourteenth Amendment case law, specifically *Hamilton v. Alabama*,<sup>48</sup> where the Court ruled that the absence of counsel at the defendant's arraignment was a violation of due process rights prescribed by the Fourteenth Amendment.<sup>49</sup> In *Hamilton*, the Court referred to *Powell v. Alabama*,<sup>50</sup> where it had stated that in capital cases the guiding hand of counsel was required "at every step in the proceedings."<sup>51</sup>

Critical stages include the indictment, some identification processes, and certain preliminary hearings.<sup>52</sup> In *United States v.*

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42. *Id.* at 343.

43. *Id.*

44. *Jackson v. Michigan*, 475 U.S. 625 (1986).

45. *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

46. In order to appreciate the truth of this point, we have only to look back at the length of time it took to have all defendants in all criminal prosecutions given the right of assistance to counsel, the delay in insisting that that assistance must be effective, and recognition that assistance needed to be available at stages of the prosecution which happened to lie outside of courtroom processes.

47. *See United States v. Wade*, 388 U.S. 218, 226 (1967) ("It is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.")

48. *Hamilton v. Alabama*, 368 U.S. 52 (1961).

49. *Id.* at 54.

50. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

51. *Id.* at 68-69.

52. Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1651-52 (2003). Note, however, that trial consolidation hearings are excluded. *See Van v. Jones*, 475 F.3d 292, 313 (6th Cir. 2007).

*Wade*,<sup>53</sup> the defendant had been identified post-indictment by the victims in an identification line-up without the presence of his attorney. The Court held that an identification line-up was a critical stage of the prosecution and therefore the attorney ought to have been present.<sup>54</sup> However, in *Kirby v. Illinois*,<sup>55</sup> the Court ruled that if the line-up occurs before indictment, the absence of counsel is not a violation of the Amendment. In a sense, therefore, *Kirby*<sup>56</sup> overrules *Wade*<sup>57</sup> because police forces can simply choose to postpone the indictment.<sup>58</sup> They are able to say, following the Court's ruling in *Kirby*, that the Amendment has not been violated because the prosecution has not yet commenced. The logic of this is severely flawed and lends itself to absurdity: how can a stage considered to be critical post-indictment not be critical just because it occurs pre-indictment?<sup>59</sup> If we are to keep the critical stage doctrine then it should be the case that the right attaches just because a critical stage has been reached, because such a critical stage is itself evidence that the prosecution is in progress. To do otherwise is to reinforce an irrational formalism.

Moreover, the Amendment was designed to ensure that the suspect is not prejudiced by any aspect of the prosecution.<sup>60</sup> A prosecution is a legal pursuit of an individual for an alleged crime. If a prosecution is a legal pursuit of an individual for an alleged crime, once that individual is targeted the organized forces of society are ranged against him—he is, effectively, being prosecuted and must therefore be entitled to the protection of the law. Such was the view of the minority in the *Kirby* court.<sup>61</sup> They followed the line of reasoning given in *Wade*.<sup>62</sup> The risks posed by a pre-indictment line-up are no less than those posed by a post-

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53. *United States v. Wade*, 388 U.S. 218 (1967).

54. *Id.* at 237.

55. *Kirby v. Illinois*, 406 U.S. 682 (1972).

56. *Id.*

57. *Wade*, 388 U.S. 218.

58. *See Forte v. State*, 759 S.W.2d 128, 134 (Tex. Crim. App. 1988), *overruled by* *McCambridge v. State*, 778 S.W.2d 70 (Tex. Crim. App. 1989) (explaining that “the basis and rationale of the Wade-Gilbert rule and the Kirby line of cases [is] difficult if not impossible to reconcile”).

59. *See Metzger, supra* note 52, at 1668 (“Pre-charge bargaining is an important aspect of effective advocacy. When the government has committed itself to prosecuting an individual and its failure to file formal charges is a mere formality, a defendant should have the right to the assistance of counsel.”).

60. *See, e.g., Singer v. United States*, 380 U.S. 24, 31 (1965) (stating that the right of trial by jury “was clearly intended to protect the accused from oppression by the Government”); *see also Metzger, supra* note 52, at 1639 (stating that the American colonies “emphasized the right to counsel as a guarantee against prosecutorial privilege and governmental overreaching.”).

61. *Kirby*, 406 U.S. at 698-699.

62. *Wade*, 388 U.S. 218.

indictment line-up.<sup>63</sup> The minority further reasoned that to rely on the abstract notion that a prosecution commences only upon formal indictment is to deny the suspect the protection of the Amendment.<sup>64</sup>

The same issues arose in the case of *United States v. Ash*<sup>65</sup> where the identification process had been a photographic line-up. Because there was no actual confrontation between prosecutor and defendant, it could not be viewed as a critical stage.<sup>66</sup> For that reason, the absence of counsel was not a breach of the Amendment, even though there was the possibility of prejudice.<sup>67</sup> However, this narrow interpretation ignores the basic fact that the photographic line-up was, in essence, a confrontation between prosecutorial and defense interests, even if the defendant was not physically present at the event.<sup>68</sup>

Judicial thinking, therefore, is that only certain events within the overall prosecution are critical stages of the prosecution.<sup>69</sup> Only critical stages are protected by the Amendment: if something occurs, even though it may be prejudicial to the defendant, then, unless it does so at a critical stage, the defendant is not entitled to the protection of the Amendment.<sup>70</sup> But this is pure inductive reasoning. Rather than deducing what constitutes a critical stage from the facts, courts have *a priori* limited the ambit of the critical stage to certain structural events and then dismissed as legally insignificant any event that is not a critical stage.<sup>71</sup> To the contrary, the very fact that an event has the potential to be prejudicial should be sufficient to ensure that it is, *per se*, a critical stage.

As is well known, the Amendment does not refer to critical stages of the prosecution. Its language could not be clearer: it states “in all

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63. *Kirby*, 406 U.S. at 699.

64. *Id.* at 698-99.

65. *United States v. Ash*, 413 U.S. 300 (1973).

66. *Id.* at 317.

67. *Id.* at 319.

68. *See Stovall v Denno*, 388 U. S. 293 (1967), for another aspect of the potential for tainted identification evidence. In that particular case, a victim made an identification from a hospital bed of her alleged assailant, without the suspect having the benefit of counsel.

69. For example, a defendant who is entering a guilty plea, whether the charge is a misdemeanor or felony, is a critical stage that enjoys the right to counsel. *Iowa v. Tovar*, 541 U.S. 77, 81 (2004).

70. *See, e.g., Ash*, 413 U.S. 300 (“The Sixth Amendment does not grant an accused the right to have counsel present when the Government conducts a post-indictment photographic display, containing a picture of the accused, for the purpose of allowing a witness to attempt an identification of the offender.”).

71. *See Metzger, supra* note 52, at 1636 (arguing that the “rigid right-to-counsel doctrine deprives modern criminal defendants of counsel at proceedings that are truly critical stages of contemporary criminal procedure”).

criminal prosecutions,”<sup>72</sup> which in this context should mean throughout the entire prosecution process. The device of the critical stage, while welcome in that it guarantees rights for a number of key events within the prosecution process, is a double-edged sword because it is able to exclude the operation of those rights for stages that are not considered critical.<sup>73</sup>

#### IV. ATTACHMENT AND INVOCATION

The Sixth Amendment right to assistance of counsel is generally considered to ‘attach’ when the criminal prosecution begins, usually when the suspect (i) learns of the charges against him and (ii) his liberty is affected.<sup>74</sup> However, the attachment of the right to counsel does not mean that the suspect is entitled to the assistance of counsel.<sup>75</sup> For that right to be actuated, proceedings must have reached a critical stage.<sup>76</sup> One would have thought that the fact that the prosecution had commenced was itself evidence of a critical stage, from which point the suspect “shall” or “must” enjoy the right and that attachment of the right would mean entitlement to exercise it. In eighteenth-century English—and still found in some legal contexts today—to “enjoy” means to have the benefit or use of something, or to possess it. Thus, by stating that the accused “shall enjoy the right,”<sup>77</sup> it is clear that the Amendment commands that the accused has the benefit of the right: that it is indisputably his right unless he chooses not to exercise it and that it applies throughout the prosecution, *viz.* “in all prosecutions.”

However, in practice, the attachment of the right to counsel and the right to assistance of counsel are separate events: the right to assistance is actuated by a critical stage.<sup>78</sup> Under *Jackson v. Michigan*,<sup>79</sup> once the right had attached police could not question a defendant in the absence of counsel even if the defendant waived his right to have an attorney present during questioning. This is because any direct confrontation between the prosecutorial authorities and/or the police and the defendant

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72. U.S. CONST. amend. VI.

73. *See, e.g., Kirby v. Illinois*, 406 U.S. 682 (1972) (no Sixth Amendment right to counsel in a pre-indictment line-up).

74. *United States v. Gouveia*, 467 U.S. 180, 187-188 (1984).

75. *Massiah v. United States*, 377 U.S. 201 (1964).

76. *See United States v. Cronin*, 466 U.S. 648, 659 (1984) (“The presumption that counsel’s assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.”).

77. U.S. CONST. amend. VI.

78. *United States v. Wade*, 388 U.S. 218, 224 (1967).

79. *Jackson v. Michigan*, 475 U.S. 625 (1986).

is a critical stage requiring the assistance of counsel.<sup>80</sup> The sole exception to this restriction was if the defendant initiated the dialogue and sought to confess.<sup>81</sup>

In *Montejo v. Louisiana*,<sup>82</sup> the Court rejected *Jackson* on the grounds that it was unworkable. As Michael C. Mims points out, the Court reasoned that since some states require the assertion of his rights by the defendant in order for the right to attach, while other states consider attachment to commence by the court's automatic appointment of an attorney, then in different states *Jackson* would be applied differently.<sup>83</sup> Offered the opportunity of removing the distinction in *Jackson* between those defendants who asserted their Sixth Amendment right and those who obtained it from the trial court, the Supreme Court rejected this as being inconsistent with the ratio in *Jackson*.<sup>84</sup> The Court considered that *Jackson* showed there to be a distinction between a defendant who had asserted his right and one who had not. The former would be less likely to waive his right to allow a post-indictment interrogation, whereas the latter had not even asserted his right.<sup>85</sup>

Thus, under *Jackson*,<sup>86</sup> as interpreted by the Louisiana Supreme Court in *Montejo*,<sup>87</sup> if the defendant had not asserted his right to assistance of counsel then law enforcement were entitled to question him without the assistance of counsel if he waived his *Miranda*<sup>88</sup> right to the presence of an attorney.<sup>89</sup> If, however, he had previously asserted his right to assistance of counsel then any confession he made would not be admissible.<sup>90</sup>

The *Montejo* court not only considered that the potentially different applications of *Jackson* pointed to its unworkability. They also determined that its main benefit, namely to prevent prosecution from coercing defendants into waiving their Sixth Amendment right, was outweighed by its potential cost, namely the danger that the guilty would

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80. “[G]overnment efforts to elicit information from the accused, including interrogation, represent “critical stages” at which the Sixth Amendment applies.” *Id.* at 629-630 (citing *Maine v. Moulton*, 474 U.S. 159 (1985)).

81. This is the bright line rule established in *Edwards v. Arizona*, 451 U.S. 477 (1981).

82. *Montejo v. Louisiana*, 556 U.S. 778 (2009).

83. Michael C. Mims, *A Trap for the Unwary: The Sixth Amendment Right to Counsel After Montejo v. Louisiana*, 71 LA. L. REV. 345, 361 (2010).

84. *Id.* at 361-62.

85. *Id.* at 363.

86. *Jackson v. Michigan*, 475 U.S. 625 (1986).

87. *State v. Montejo*, 974 So. 2d 1238 (La. 2008), *vacated sub nom.*, *Montejo v. Louisiana* 556 U.S. 778 (2009).

88. *Miranda v. Arizona*, 384 U.S. 436 (1966).

89. *Montejo*, 974 So. 2d at 1238.

90. *Id.* at 1251-52.

walk free.<sup>91</sup> The Court considered that the combined prophylaxis already being provided by exclusionary rules developed under the *Miranda*,<sup>92</sup> *Edwards*,<sup>93</sup> and *Minnick*<sup>94</sup> line was sufficient to protect the defendant against coercive police tactics.<sup>95</sup> However, the Sixth Amendment goes far wider than mere protection against police coercion: it is intended to provide the full weight of the justice system to ensure fairness throughout the criminal prosecution.<sup>96</sup>

Notwithstanding this self-evident truth, instead of broadening the rule under *Jackson* to include defendants who had not asserted their right but had been granted it by the trial judge, the Court reversed *Jackson*, thus extinguishing the rule altogether.<sup>97</sup> It no longer matters if the defendant has asserted his right or obtained it from the court, he may be questioned in the absence of his attorney post-indictment, providing he waives the right to have an attorney present<sup>98</sup> under *Miranda*.<sup>99</sup> But, as Michael C. Mims argues,<sup>100</sup> the prophylactic comforts of the *Miranda* protections are wholly inadequate to address the Sixth Amendment right. *Miranda* was developed in order to avoid police coercion.<sup>101</sup> The Sixth Amendment exists to ensure the integrity of the adversarial system.<sup>102</sup> However, *Patterson v. Illinois*<sup>103</sup> had already decided that a waiver of *Miranda* rights did not violate the Sixth Amendment. In other words, a valid waiver under the Fifth Amendment will suffice to act as a waiver under the Sixth Amendment.<sup>104</sup> The Court was able to attack *Jackson* in

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91. *Montejo v. Louisiana*, 556 U.S. 778, 793-794 (2009).

92. *Miranda*, 384 U.S. 436.

93. *Edwards v. Arizona*, 451 U.S. 477 (1981).

94. *Minnick v. Mississippi*, 498 U.S. 146 (1990).

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

96. See, e.g., Meredith B. Halama, *Loss of a Fundamental Right: The Sixth Amendment as a Mere "Prophylactic Rule,"* 1998 U. ILL. L. REV. 1207, 1241 (1999) ("The Sixth Amendment exists to protect the fairness and balance of our adversarial system."); Alfredo Garcia, *Clash of the Titans: The Difficult Reconciliation of a Fair Trial and a Free Press in Modern American Society*, 32 SANTA CLARA L. REV. 1107, 1108 (1992) (arguing that "the rights conferred on the accused by the Sixth Amendment are designed to ensure fairness in the criminal process").

97. *Montejo*, 556 U.S. at 797.

98. In his dissenting opinion, Justice Stevens stated: "Today's decision eliminates the rule that 'any waiver of Sixth Amendment rights given in a discussion initiated by police is presumed invalid' once a defendant has invoked his right to counsel. *Id.* at 810 (Stevens, J., dissenting).

99. *Miranda v. Arizona*, 384 U.S. 436 (1966).

100. Mims, *supra* note 83, at 369.

101. *Id.* at 352-53.

102. *Id.* at 355.

103. *Patterson v. Illinois*, 487 U.S. 285 (1988).

104. *Id.* at 298-99. It should be noted that in *Patterson* the defendant at no time requested counsel. He had been indicted, but had not asserted his right to counsel. It also bears observing that the minority in *Patterson* did not accept that a waiver under *Miranda* sufficed to satisfy the Sixth Amendment requirement, given that the waiver of a right to have an attorney present during

this way because, at an earlier stage in *Montejo*'s appeal, the Louisiana Supreme Court had held that, under *Jackson*, a defendant must request counsel or otherwise assert his right to counsel, in order to invoke his Sixth Amendment rights.<sup>105</sup> According to the Louisiana Supreme Court, since *Montejo* had not made such a request or asserted a right to counsel in any other way, he had not activated the protection of the Amendment.<sup>106</sup> This is surely a very small, pettifogging point: how was *Montejo* to know, when told that counsel would be appointed for him, that his Sixth Amendment rights were not being engaged? Moreover, following *Johnson v. Zerbst*, the defendant did not make "an intentional relinquishment or abandonment of a known right".<sup>107</sup> Standing 'mute' can hardly be described as a voluntary, knowing or intelligent waiver.<sup>108</sup> Further, as the dissenting voices in *Montejo* argued, it is not significant how the attorney-client relationship comes about, the point is that in *Montejo*'s case it must have attached—even though by court appointment.<sup>109</sup>

If the words "shall enjoy the right" mean anything, then surely an insistence on the assertion of the right is a distortion of the Amendment's intent.<sup>110</sup> In this context—and this is not a matter of subjective interpretation—"shall" means "must."<sup>111</sup> It is obligatory that the suspect has the right, subject only to a voluntary, intelligent and knowing waiver.

Further, as Michael Mims points out,<sup>112</sup> there is now a fatal muddying of the waters between the right under the Fifth Amendment,

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questioning is hardly the same thing as the waiver of a right to have assistance of counsel.

105. *State v. Montejo*, 974 So. 2d 1238, 1260-1261 (La. 2008), *vacated sub nom.*, *Montejo v. Louisiana*, 556 U.S. 778 (2009). *See also* *Montoya v. Collins*, 955 F. 2d 279 (1992).

106. *Id.* at 1260-61.

107. *Johnson v. Zerbst*, 304 U.S. 458,464 (1938).

108. *See generally* *State v. Carter*, 664 So. 2d 367, 383 (La. 1995) (stating that "something more than mere mute acquiescence in the appointment of counsel is necessary to show the defendant has asserted his right to counsel sufficiently to trigger the enhanced protection provided by *Michigan v. Jackson*'s prophylactic rule.").

109. *Montejo v. Louisiana*, 556 U.S. 778, 804 (2009) (Stevens, J., dissenting).

110. *See id.* at 809 ("[T]he Court fails to identify the real reliance interest at issue in this case: the public's interest in knowing that counsel, once secured, may be reasonably relied upon as a medium between the accused and the power of the State. That interest lies at the heart of the Sixth Amendment's guarantee, and is surely worthy of greater consideration than it is given by today's decision.").

111. Except when used by the first person singular, *e.g.* 'I shall', the word 'shall' always means 'must.' Nowadays, law framers tend to avoid 'shall', but it is still found in American laws—the Patriot Act, for example: "The Director of the United States Secret Service shall take appropriate actions . . ." and many other examples—also means 'is obliged to,' 'has a duty to.'

112. Mims, *supra* note 83, at 370.

as held in *Edwards v. Arizona*,<sup>113</sup> and the right under the Sixth Amendment. This is contrary to the intent of the Sixth Amendment: once the prosecution commences the defendant ought to have the protection of the Sixth Amendment. Falling back on *Miranda*, as though it were a default of some kind, is nothing less than a sham.

## VII. CONCLUSION: HIGH LEGAL ART AND JUDICIAL DISINGENUOUSNESS

Despite its conceptual shortcomings, as outlined above, the critical stage doctrine at least provides some protections, but overruling *Jackson*<sup>114</sup> has diminished the significance of the critical stage, and further weakened the scope and effectiveness of the Sixth Amendment. Equally alarming in this context was the decision in *Kansas v. Ventris*<sup>115</sup> where it was held that the defendant can no longer exclude as of right pre-trial “uncounseled admissions elicited by government agents.”<sup>116</sup> The court’s explanation for this ruling, which involves a particularly convoluted interpretation of the *Massiah*<sup>117</sup> doctrine, was that the violation occurred pre-trial and thus its impact on the outcome of the trial was irrelevant.<sup>118</sup> Professor James Tomkovicz considers the decision in *Ventris* to be “dubious and disingenuous” and “hopelessly misguided.”<sup>119</sup> The decision in *Ventris* is undoubtedly a serious interpretative flaw in that, once again, it equates the trial with the prosecution.<sup>120</sup>

The Sixth Amendment<sup>121</sup> is a pillar of the U.S. Constitution, itself the highest legal art of the eighteenth, or indeed any other, century, in any country. Yet its first two centuries of existence have not delivered its promise in anything like the way in which the framers must have envisaged. It has been haggled over and mangled linguistically and jurisprudentially possibly more than any other constitutional provision.<sup>122</sup> The reader must hope that these onslaughts have not

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113. *Edwards v. Arizona*, 451 U.S. 477 (1981).

114. *Michigan v. Jackson*, 475 U.S. 625 (1986).

115. *Kansas v. Ventris*, 556 U.S. 586 (2009).

116. James J. Tomkovicz, *Sacrificing Massiah: Confusion over Exclusion and Erosion of the Right to Counsel*, 16 LEWIS & CLARK L. REV. 1 (2012).

117. *Massiah v. United States*, 377 U.S. 201 (1964).

118. *Ventris*, 556 U.S. at 593-94.

119. Tomkovicz, *supra* note 116, at 1.

120. *See Ventris*, 556 U.S. at 596 (2009) (Stevens, J., dissenting) (“We have never endorsed the notion that the pretrial right to counsel stands at the periphery of the Sixth Amendment. To the contrary, we have explained that the pretrial period is ‘perhaps the most critical period of the proceedings’ during which a defendant ‘requires the guiding hand of counsel.’”).

121. U.S. CONST. amend. VI.

122. *See* Frank O. Bowman, III, *Debacle: How the Supreme Court Has Mangled American Sentencing Law and How it Might Yet Be Mended*, 77 U. CHI. L. REV. 367 (2010) (discussing a

wounded it fatally and that the judicial activism which has long been its lot to endure will one day be replaced by a new spirit of the laws, or-rather-by that same spirit of the laws that acted as the wellspring for the inception of the Bill of Rights at a time when an anxious legislature saw itself as the bulwark between tyranny and civilization, and knew that one of its main tasks was to ensure the protection of the individual from the ravages of powerful and despotic governments.<sup>123</sup>

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related topic in Sixth Amendment jurisprudence).

123. *See generally* BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* (D.W. Carrithers ed., 1977).