[J-15-2021]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

BAER, C.J., SAYLOR, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 49 MAP 2020
	:	
Appellee	:	Appeal from the Order of the Superior Court at 720 MDA 2019 dated 1/10/20 affirming judgment of sentence of the Lycoming County Court of Common Pleas, Criminal Division, at No. CP-41-CR-89-2017 dated 4/5/19
v.	:	
	:	
JORDAN ADONIS RAWLS,	:	
	:	
Appellant	:	ARGUED: March 10, 2021

OPINION

JUSTICE SAYLOR **DECIDED: August 17, 2021**

This appeal concerns whether law enforcement agents violated the Sixth Amendment to the United States Constitution when, although issuing *Miranda* warnings to an arrestee during an interrogation, they failed to specifically apprise him that criminal charges already had been filed against him.

In October 2016, Appellant and Joseph Coleman perpetrated a home-invasion robbery in Williamsport, during which Kristine Kibler and her son, Shane Wright, were shot and killed. An accomplice, Casey Wilson, served in the role of a getaway driver.

Police investigated and garnered evidence giving rise to probable cause to believe that Appellant participated in the crimes, and a complaint charging him with two counts of criminal homicide and related offenses was filed. Shortly thereafter -- after learning that his picture was circulating in the media in association with the killings -- Appellant

voluntarily presented himself at a police station to address what he initially depicted to the agents as the "crazy nonsense" he had heard. Transcript of Audio/Video Recording dated Nov. 11, 2016, in *Commonwealth v. Rawls*, No. CR-89-2017 (C.P. Lycoming) [hereinafter, "A/V Recording"], at 11. Appellant was immediately placed under arrest.

While shackled, Appellant was interrogated by agents for a period of five-and-one-half hours. At the outset, the lead investigator related to Appellant his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). Among other things, he was told of his entitlement to be represented by an attorney during questioning and warned that anything that he said could and would be used against him in a court of law. *See* A/V Recording at 5. Appellant orally waived his rights and signed a written waiver form. He was also specifically admonished that: he was under arrest; he wasn't free to leave; the agents were investigating the criminal homicides that had appeared in the news; and they had probable cause to obtain a warrant for his arrest. *See id.* at 7. The agents, however, did not specifically advise Appellant that charges already had been lodged against him.

During the interrogation, Appellant initially denied knowing Coleman or Wilson and pervasively lied about his whereabouts before, at, and after the time of the home invasion. The agents repeatedly confronted him with contrary evidence, including video-surveillance footage showing the three co-perpetrators together in various locations, as well as phone records documenting extensive contacts, in relevant time frames. Ultimately, Appellant admitted that he was present at the crime scene when the robbery and homicides were committed, but he professed to having been unarmed, claiming to have served "basically like . . . the lookout." *Id.* at 236.[1]

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[1] Later that day, Appellant was taken before a magisterial district judge, who denied bail. The Commonwealth refers to the bail proceeding as a preliminary arraignment; however,

Appellant filed a pretrial motion seeking to suppress evidence of the interview. In one line of argumentation, he contended that, in the totality of the circumstances, his incriminatory statements were the product of inappropriate police tactics entailing deception, manipulation, and psychological coercion, thus invalidating his *Miranda* waiver per the Fifth Amendment. *See* Brief in Support of Omnibus Motion dated June 1, 2018, in *Commonwealth v. Rawls*, No. CR-89-2017 (C.P. Lycoming), at 8-9, 14-23. *See generally Dickerson v. U.S.*, 530 U.S. 428, 433-34, 120 S. Ct. 2326, 2330-31 (2000) (discussing the due-process-related background pertaining to the voluntariness of confessions, and the incorporation of the Fifth Amendment's self-incrimination clause).

In the second line of his presentation, which gives rise to the legal question now before this Court, Appellant asserted that the agents violated his Sixth Amendment rights when they failed to inform him that criminal charges already had been filed against him. It was his position that, without such information, the waiver of his rights could not be deemed to have been knowing and intelligent. *See generally Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S. Ct. 2079, 2085 (2009) (discussing the knowing-voluntary-and-intelligent litmus associated with a waiver of the Sixth Amendment right to counsel).[2]

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the docket inconsistently reflects that a preliminary arraignment was otherwise scheduled for a later time (and Appellant ultimately waived formal arraignment).

Subsequent to the bail proceeding, the agents conducted a second, shorter interview with Appellant. At that time, he again admitted his knowing participation in the robbery but maintained that he hadn't entered the victims' residence.

[2] The Commonwealth suggests -- and its *amicus*, the District Attorneys Association argues -- that an accused's Sixth Amendment right to counsel doesn't attach merely on account of the filing of criminal charges, but rather, only arises upon a preliminary arraignment. *See* Brief for *Amicus* District Attorneys Ass'n at 10. Particularly given the vagueness of the present record in terms of whether and when a preliminary arraignment as such occurred, *see supra* note 1, and our ultimate disposition favorable to the Commonwealth, we elect to adhere to the question presented by Appellant and selected for review by this Court.

After conducting a hearing, the suppression court found that Appellant had rendered a valid waiver of his right to counsel after receiving appropriate *Miranda* warnings.[3] Regarding the totality assessment, the court found nothing to indicate that he was incapable of understanding the rights explained to him and no evidence that the agents threatened, tricked, or cajoled him. *See Commonwealth v. Rawls*, CR-89-2017, *slip op.* at 5-6, 8-9 (C.P. Lycoming Aug. 13, 2018).

As to the Sixth Amendment right to counsel, the court explained that, under the prevailing jurisprudence of the Supreme Court of the United States, when an accused voluntarily waives his *Miranda* rights, he also waives his Sixth Amendment right to counsel. *See id.* at 5-6 (citing, *inter alia*, *Patterson v. Illinois*, 487 U.S. 285, 293-94, 108 S. Ct. 2389, 2395-96 (1988)); *accord Commonwealth v. Woodard*, 634 Pa. 162, 195-97, 129 A.3d 480, 500-01 (2015) (treating a *Miranda* waiver as also encompassing a waiver of the Sixth Amendment right to counsel). Regarding the present circumstances, the court reasoned:

> [Appellant] was admittedly aware that the incident [for] which he was wanted for questioning in connection to was the shooting death of two people. [Appellant] arguably understood the gravity of his arrest due to this knowledge. Further, [Appellant] was informed of the rights afforded to him and the consequences of abandoning such rights but chose to waive them regardless.

Id. at 6.

At trial, the Commonwealth presented testimony from Wilson, pursuant to a plea agreement, describing in detail his own involvement in the events, as well as that of

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[3] When a suspect makes a statement during custodial interrogation, the burden rests upon the government to show that the defendant knowingly, voluntarily, and intelligently waived his rights. *See, e.g.*, *J.D.B. v. N.C.*, 564 U.S. 261, 269-70, 131 S. Ct. 2394, 2401 (2011) (citing, *inter alia*, *Miranda*, 384 U.S. at 444, 475-76, 86 S. Ct. at 1612, 1628-29).

Appellant and Coleman, and depicting Appellant as the shooter.[4] Other corroborative testimony and evidence was admitted, and an audio-visual recording of Appellant's incriminatory interview with the agents was played for the jurors. Appellant was found guilty of first- and second-degree murder relative to the two victims, respectively, as well as other crimes, and he was sentenced to life in prison.

On appeal, the Superior Court adopted the suppression court's opinion, and we allowed this appeal, limited to the following issue as framed by Appellant:

> Whether police, to protect a person's sixth amendment rights, must do more than administer *Miranda* warnings when the person is subject to police custodial interrogation and police deliberately fail to disclose that criminal charges have already been filed?

Commonwealth v. Rawls, ___ Pa. ___, 237 A.3d 976 (2020) (*per curiam*).[5] In his presentation to this Court, Appellant relies substantially on *Patterson v. Illinois* to vindicate

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[4] Wilson maintained that he remained outside the residence when the home invasion was perpetrated by Appellant and Coleman. Accordingly, he testified that he didn't see the shootings -- but he explained that Coleman had already exited when the shots were fired from the interior, while Appellant still remained inside. *See* N.T., Apr. 1, 2019, at 142.

[5] In his brief, Appellant continues to suggest that various interrogation techniques employed by the agents involved deception and coercion. We agree with the Commonwealth, however, that, per the above formulation of the question presented, the issue before this Court is limited to whether the Sixth Amendment imposes a *per se* prohibition against custodial interrogation of an individual who has been charged with a crime, in the absence of a disclosure that such charges have been filed. *See* Brief for Appellee at 11 (explaining that Appellant "is asking the court to adopt a bright-line rule that invalidates an otherwise valid Sixth Amendment waiver if police deliberately fail to tell the arrestee: 'we have filed charges against you'").

The issue that Appellant has presented also incorporates an assertion of deliberateness, on the agents' part, in their failure to disclose the charges. The suppression court rendered no factual finding of intentionality or deliberateness, however, and there is no direct evidence of it on the record. Accordingly, and given that we view the suppression record in the light most favorable to the Commonwealth, as the prevailing party, *see,*

his position that disclosure of the filing of criminal charges is essential. Like the suppression and intermediate courts, however, the Commonwealth takes the view that *Patterson* militates strongly to the contrary.

In the divided opinion in *Patterson*, a majority of the Supreme Court of the United States rejected the argument that -- because the defendant's Sixth Amendment right to counsel had attached prior to the time that he was questioned by police officers -- his uncounseled confession couldn't be knowing and intelligent, and therefore, it should be suppressed. In this regard, the majority determined that the issuance of *Miranda* warnings made the defendant sufficiently aware, in "sum and substance," of his right to have an attorney present during questioning and the possible consequences of foregoing this entitlement. *Patterson*, 487 U.S. at 292-93, 108 S. Ct. at 2395.

In the course of the decision, the majority recognized the distinction between the rights to counsel under the Fifth and Sixth Amendments. *See generally Montejo*, 556 U.S. at 786-87, 129 S. Ct. at 2085 (explaining that the Fifth Amendment provides the right to counsel at custodial interrogations; whereas, the sometimes overlapping Sixth Amendment right encompasses the assistance of counsel during at least certain post-indictment interrogations). But, according to the *Patterson* majority, the Supreme Court has defined the scope of the right to counsel "by a pragmatic assessment" of counsel's usefulness and the danger presented to a defendant choosing to proceed uncounseled.

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e.g., *Commonwealth v. Worthy*, 598 Pa. 470, 477, 957 A.2d 720, 724 (2008), were our review to turn on the deliberateness concern, Appellant simply could not prevail. *Cf. Moran v. Burbine*, 475 U.S. 412, 423, 106 S. Ct. 1135, 1142 (1986) ("In light of the state-court finding that there was no 'conspiracy or collusion' on the part of the police, we have serious doubts about whether the Court of Appeals was free to conclude that their conduct constituted 'deliberate or reckless irresponsibility.'" (citation omitted)). For this reason, and giving Appellant the benefit of the doubt, we assume that the deliberateness aspect is incidental to his core contention that an arrestee must be advised of pending charges to support a valid waiver of his right to counsel under the Sixth Amendment.

Patterson, 487 U.S. at 298, 108 S. Ct. at 2398. In this respect, the *Patterson* majority viewed Fifth and Sixth Amendment entitlements -- relative to post-indictment interrogation -- as substantially overlapping.

Thus, the majority opined that warnings that are sufficient for purposes of the Fifth Amendment decision in *Miranda* will also generally suffice for Sixth Amendment purposes. *See id.* Along these lines, the majority explained:

> The State's decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase or decrease the value of counsel to the accused at questioning, or expand the limited purpose that an attorney serves when the accused is questioned by authorities. With respect to this inquiry, we do not discern a substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at postindictment questioning.

Id. at 298-99, 108 S. Ct. at 2398; *cf. Moran*, 475 U.S. at 421-22, 106 S. Ct. at 1141 (stressing the efficacy of *Miranda* warnings for Fifth Amendment purposes and opining, more broadly, that "[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right").

In a dissent supported, for the most part, by three other Justices, Justice Stevens took issue with the majority's decision to downplay the significance of the commencement of formal adversary proceedings. The dissent stressed the strong presumption against waiver of Sixth Amendment protections and opined that the filing of charges substantially alters the relationship between the government and the accused in a way that warrants additional protection. *See id.* at 306-07, 108 S. Ct. at 2402 (Stevens, J., dissenting). It was the dissent's position that warnings offered by an opposing party (*i.e.*, government representatives) cannot convey a full awareness of the disadvantages of self-

representation. *See id.* at 307, 108 S. Ct. at 2403-04. Further, the dissent regarded the majority's reliance on bare *Miranda* warnings to convey the advantages of an attorney's presence and the downsides of foregoing counsel as "a gross understatement of the disadvantage of proceeding without a lawyer and an understatement of what a defendant must understand to make a knowing waiver." *Id.* at 307-08, 108 S. Ct. at 2403. In sum, the dissent portrayed the majority decision as effecting a substantial dilution of essential Sixth Amendment protections.

Presently, Appellant's approach to *Patterson* is first to highlight its recognition of differences in the application of the Fifth and Sixth Amendment rights. *See* Brief for Appellant at 14 ("[T]here will be cases where a waiver which would be valid under *Miranda* will not suffice for Sixth Amendment purposes." (quoting *Patterson*, 487 U.S. at 296 n.9, 108 S. Ct. at 2397 n.9)). Appellant also points to the factual distinction between his case and *Patterson* -- in that the defendant there had been apprised that criminal proceedings had been commenced against him -- and the Supreme Court's concomitant decision to defer from expressly deciding the question presented here. *See Patterson*, 487 U.S. at 295 n.8, 108 S. Ct. at 2396. The clear purport of *Patterson* which Appellant understates, however, is its "pragmatic" recognition of a general rule that "whatever warnings suffice for *Miranda*'s purposes will also be sufficient in the context of postindictment questioning." *Patterson*, 487 U.S. at 297, 108 S. Ct. at 2398.[6]

Next, Appellant overtly relies on core themes from the *Patterson* dissents. *See* Brief for Appellant at 15, 19. It should go without saying, however, that this Court, by virtue of the Supremacy Clause of the United States Constitution, is obliged to apply majority decisions of the United States Supreme Court in addressing

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[6] It is also noteworthy that the *Patterson* majority characterized the desirability of informing an accused that he has been indicted as "a matter that can be reasonably debated." *Patterson*, 487 U.S. at 295 n.8, 108 S. Ct. at 2396 n.8.

federal constitutional issues, unless and until such decisions are overruled by that Court. *See Commonwealth v. Gibson*, 597 Pa. 402, 421 n.8, 951 A.2d 1110, 1121 n.8 (2008) ("[W]e fail to see the benefit of challenging principles embodied in presently prevailing High Court decisions by way of expressions of agreement with the dissents."). And far from being overruled, *Patterson*'s general rule was roundly embraced by the subsequent majority decision in *Montejo*. *See Montejo*, 556 U.S. at 798-99, 129 S. Ct. at 2092 ("[A]s we held in *Patterson*, the *Miranda* warnings adequately inform [a defendant] 'of his right to have counsel present during questioning,' and make him 'aware of the consequences of a decision by him to waive his Sixth Amendment rights[.]'" (citation omitted)).

In *Patterson*'s aftermath, the United States Court of Appeals for the Second Circuit overruled its previous rulings that, in order to effectively waive the right to counsel during post-indictment questioning, an accused must have been informed of his indictment. *See U.S. v. Charria*, 919 F.2d 842, 846-48 (2d Cir. 1990) (explaining that "*Patterson*'s pragmatic approach supersedes previous rulings of this circuit which, based on the concept of a hierarchy of constitutional rights, called for a higher 'knowing and intelligent' standard for sixth amendment waivers than for other waivers"). Significantly, as stressed by the Commonwealth, all federal circuit courts of appeals that have addressed this issue have rejected Appellant's position.[7]

Indeed, the Commonwealth asserts that no jurisdiction in the United States has ever held, after *Patterson*, that the Sixth Amendment requires an arrestee to be apprised of pending charges. *See* Brief for Appellee at 15, 19-20. Appellant's sole response is to

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[7] *See U.S. v. Bryson* 110 F.3d 575, 582 (8th Cir. 1997); *U.S. v. Muca*, 945 F.2d 88, 89 (4th Cir. 1991); *U.S. v. Charria*, 919 F.2d 842, 846 (2d Cir. 1990); *Riddick v. Edminston*, 894 F.2d 586, 590-91 (3d Cir. 1990); *Norman v. Ducharme*, 871 F.2d 1483, 1487 (9th Cir. 1989); *Quadrini v. Clusen*, 864 F.2d 577, 585-87 (7th Cir. 1989).

point to two decisions of state courts decided under their respective state constitutions. According to Appellant, these decisions comprise "compelling[ly] analogous case authority." Reply Brief for Appellant at 5.

The Commonwealth, however, aptly distinguishes these decisions, explaining that both courts understood that *Patterson*'s rationale "suggests that nothing more than *Miranda* warnings are required during post-indictment interrogation for defendants to make a knowing and intelligent waiver of their Sixth Amendment right to counsel." *State v. Sanchez*, 609 A.2d 400, 406 (N.J. 1992); *accord State v. Liulama*, 845 P.2d 1194, 1200 (Haw. 1992); *see also* Brief for Appellee at 20-21. Indeed, it was precisely because these courts concluded that the prevailing Sixth Amendment jurisprudence of the Supreme Court of the United States disapproves -- or at least militates strongly against -- a requirement that arrestees must be apprised of pending charges that both state courts proceeded to consider whether greater protection was accorded by their state constitutions. *See Sanchez*, 609 A.2d at 407-09; *Liulama*, 845 P.2d at 1200-04. The question presented to this Court, however, is expressly limited to the federal constitutional one, and accordingly, we have no basis similarly to consider a departure from the federal norms based on the Pennsylvania Constitution.

Separate and apart from *Patterson*, Appellant references a series of law review articles in support of his position. The view of most of the commentators in this vein, however, squarely aligns with that of the *Patterson* dissent. *See, e.g.* Eve Brenski Primus, *Disentangling Miranda and Massiah: How to Revive the Sixth Amendment Right to Counsel as a Tool for Regulating Confession Law*, 97 B.U.L. REV. 1085, 1090 (2017) ("By failing to consider the underlying rationales for the Sixth Amendment right to counsel, the *Patterson* Court imported a waiver regime that is ill suited to the purposes of that right."), *cited in* Brief for Appellant at 11-12, 16, 20. While there is no question that commentators

have been highly critical of *Patterson*'s rationale and holding, *see, e.g.*, *Sanchez*, 609 A.2d at 404 (collecting articles), again, as a matter of federal constitutional law, it is the prevailing view of the majority contingents of the Supreme Court of the United States that controls.

For purposes of Fifth Amendment jurisprudence, the Supreme Court has overtly balanced the interests of effective law enforcement against those of criminal defendants in drawing the essential boundaries. *See, e.g.*, *Montejo*, 556 U.S. at 796, 129 S. Ct. at 2091-92 (weighing the costs of according bright-line, prophylactic protections relative to interrogations); *Moran*, 475 U.S. at 426, 106 S. Ct. at 1143 (explaining that admissions of guilt resulting from *Miranda* waivers "are more than merely 'desirable,' they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law" (citation omitted)). For example, in *Moran*, the Supreme Court said that, while it would have been useful for police to advise a suspect that an attorney was attempting to intervene on his behalf, "we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." *Id.* at 422, 106 S. Ct. at 1141. Moreover, in light of *Patterson*'s recognition of a general overlap in the rights under *Miranda* and the Sixth Amendment pertaining to post-indictment interrogation, such balancing has effectively been imported, to a substantial degree, into the Sixth Amendment arena.[8]

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[8] We recognize that the *Moran* Court engaged in a separate Sixth Amendment analysis tied to the fact that the defendant's Sixth Amendment right had not yet attached in the matter. *See Moran*, 475 U.S. at 428-32, 106 S. Ct. at 1144-47. And the *Patterson* majority depicted the *Moran* paradigm (*i.e.*, a scenario in which a suspect wasn't told that a lawyer was attempting to reach him during questioning) as an exception to the general rule accepting *Miranda* waivers as sufficient for Sixth Amendment purposes. *See Patterson*, 487 U.S. at 296 n.9, 108 S. Ct. at 2397 n.9.

Significantly, the Supreme Court of the United States has viewed the federal Constitution as manifesting a tolerance for a range of tactics in police-citizen interactions that fall short of overt coercion, subject to the procurement of a valid *Miranda* waiver in custodial settings.[9] Along these lines, the decisions have depicted a "fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion." *Moran*, 475 U.S. at 426, 106 S. Ct. at 1143 (citation omitted). While this Court may take a different view when presented with an analogous claim under the Pennsylvania Constitution, we simply are not free to do so here.

In light of the above, for purposes of the Sixth Amendment, we apply the judgment of the Supreme Court of the United States that, "[s]o long as the accused is made aware of the 'dangers and disadvantages of self-representation' during postindictment questioning, by use of the *Miranda* warnings, his waiver of his Sixth Amendment right to counsel at such questioning is 'knowing and intelligent.'" *Patterson*, 487 U.S. at 300, 108

Nevertheless, it is difficult if not impossible to apprehend *Patterson*'s approach of generally adjudging the efficacy of a waiver of the right to counsel for Sixth Amendment purposes according to standards arising under *Miranda*, in the context of post-indictment interrogation, as an analysis separate and apart from the Supreme Court's balancing approach associated with *Miranda* waivers. *Accord* Primus, *Disentangling Miranda and Massiah*, 97 B.U.L. REV. at 1114 (explaining that, in *Patterson* and *Montejo*, "the Supreme Court has already conflated Fifth and Sixth Amendment doctrine in the context of warnings and waiver").

[9] *See, e.g.*, *Moran*, 475 U.S. at 423-24, 106 S. Ct. at 1142 ("Granting that the 'deliberate or reckless' withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."); *cf. Commonwealth v. Au*, 615 Pa. 330, 338-39, 42 A.3d 1002, 1008 (2012) (explaining that, in the Fourth Amendment context, the Supreme Court of the United States "has settled on an approach allocating very modest weight to the possibility of psychological coercion arising from a fairly wide range of police conduct which may be regarded as being appropriate and inherent in the circumstances facilitating the interaction").

S. Ct. at 2399. While there are exceptional circumstances in which a *Miranda* waiver will not be effective for Sixth Amendment purposes, *see id.* at 296 n.8, 108 S. Ct. at 2397 n.8, we hold that there is no *per se* rule, arising under this amendment, invalidating such a waiver merely because an arrestee was not advised that charges had been filed.

The order of the Superior Court is affirmed.

Chief Justice Baer and Justices Todd, Donohue and Mundy join the opinion.

Justices Dougherty and Wecht file dissenting opinions.

[J-15-2021] [MO: Saylor, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 49 MAP 2020
	:	
Appellee	:	Appeal from the Order of the
	:	Superior Court at 720 MDA 2019
	:	dated January 10, 2020 Affirming
v.	:	Judgment of Sentence of the
	:	Lycoming County Court of Common
	:	Pleas, Criminal Division, at No. CP-
JORDAN ADONIS RAWLS,	:	41-CR-89-2017 dated April 5, 2019
	:	
Appellant	:	ARGUED: March 10, 2021

DISSENTING OPINION

JUSTICE WECHT **DECIDED: August 17, 2021**

In this matter of first impression, today's Majority concludes that law enforcement agents need not apprise an arrestee that they already have charged him with the crime under investigation in order to secure from him a "knowing and intelligent" waiver of his Sixth Amendment right to counsel prior to a custodial interrogation about that crime. I believe that the interrogator's failure to advise Jordan Rawls that he formally had been named as a defendant in a criminal prosecution violated the Commonwealth's duty to make Rawls aware of the "full dangers and disadvantages of self-representation." *Patterson v. Illinois*, 487 U.S. 285, 299-300 (1988) (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)). Accordingly, I dissent.

The Sixth Amendment to the United States Constitution commands that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. Among the "immutable principles of

justice which inhere in the very idea of free government," the right to counsel guaranteed by the Sixth Amendment is "a necessary requisite of due process of law." *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (quoting *Holden v. Hardy*, 169 U.S. 366, 389 (1898)). The Supreme Court of the United States has characterized the right to counsel as one of "the fundamental safeguards of liberty" enshrined in the Bill of Rights, applicable to the States pursuant to the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963). At its core, "[t]he purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). Consequently, the right is "indispensable to the fair administration of our adversary system of criminal justice." *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

It is well-settled that "the right to counsel attaches at the initiation of adversary judicial criminal proceedings," *United States v. Gouveia*, 467 U.S. 180, 189 (1984), "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality). Because "the government has committed itself to prosecute" at that point, solidifying its adverse position vis-à-vis the accused, *id.*, a defendant is entitled to the assistance of counsel during all "critical stages" of the prosecution, *United States v. Wade*, 388 U.S. 218, 227 (1967), including custodial interrogations that are conducted by law enforcement after the arrestee formally has been charged with the crimes under investigation. *Patterson*, 487 U.S. at 290. "The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution." *Wade*, 388 U.S. at 227.

Moreover, once charged with a crime, a defendant need not expressly invoke his Sixth Amendment right to counsel in order to secure its protections. *Carnley v. Cochran*, 369 U.S. 506, 513 (1962). Notwithstanding this automatic conferral, as with other constitutional rights, a defendant may waive the Sixth Amendment's prohibitions against uncounseled, post-charging questioning by police. *Id.* However, any such relinquishment must be "voluntary, knowing, and intelligent," *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009), which the government bears the burden of proving. *Patterson*, 487 U.S. at 293. "The determination of whether there has been an intelligent waiver of [the] right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson*, 304 U.S. at 464.

This case raises the question of whether a waiver constitutionally is valid when investigators withhold from an arrestee the critical fact that he already has been charged with a crime prior to a custodial interrogation regarding that offense. To that end, this Court must decide what quantum of information must be provided to the arrestee under these circumstances so that a subsequent waiver by that individual of his Sixth Amendment right to counsel can be deemed "knowing" and "intelligent." The Majority concludes that the government need not inform the arrestee that he has been charged as a prerequisite to a valid waiver. The principles cited above compel me to disagree.

The Majority, on the other hand, relies principally upon the Supreme Court's observation in *Patterson* that, "[a]s a general matter, . . . an accused who is admonished

with the warnings prescribed" in *Miranda v. Arizona*, 384 U.S. 436 (1966)[1], "has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one." *Patterson*, 487 U.S. at 296; *accord Commonwealth v. Woodard*, 129 A.3d 480, 500-01 (Pa. 2015). Although *Patterson*'s general rule undoubtedly would apply to the vast majority of pre-trial Sixth Amendment waiver cases, the Supreme Court expressly refused to consider whether that rule applied to the particular circumstances at issue here—*i.e.*, whether a defendant who is unaware that he formally has been charged with a crime is in the same position to make a knowing and intelligent waiver as a defendant who had been so informed, *ceteris paribus*. Because Patterson conceded that the police had informed him of his indictment on murder charges before he waived his *Miranda* rights and submitted to their questioning, the Court declined to "address the question whether or not an accused must be told that he has been indicted before a postindictment Sixth Amendment waiver will be valid." *Patterson*, 487 U.S. at 295 n.8.

Although the Court referred skeptically to "the desirability of so informing the accused," *id.*, it did so in reference to a line of authority arising from the United States Court of Appeals for the Second Circuit, culminating with *United States v. Mohabir*, 624 F.2d 1140 (2d Cir. 1980), which established unprecedented procedures for testing

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[1] *Miranda*, of course, mandates that law enforcement adhere to certain safeguards before initiating a custodial interrogation. In order to protect an individual's Fifth Amendment privilege against compulsory self-incrimination, *Miranda* requires that, "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. at 444.

the validity of Sixth Amendment waivers. *See, e.g.*, *Carvey v. LeFevre*, 611 F.2d 19, 22 (2d Cir. 1979) (holding that post-indictment statements that complied with *Miranda* but were not preceded by any indication to the defendant that an indictment was pending against him precluded a knowing waiver of his Sixth Amendment rights because it failed to communicate information necessary for an indicted defendant to "appreciate the gravity of his legal position" and "the urgency of his need for a lawyer's assistance"); *United States v. Satterfield*, 558 F.2d 655, 657 (2d Cir. 1976) (finding waiver to be involuntary where the defendant was "distraught, upset, weeping and obviously out of control at the initial questioning, still in great need of help at the later interview"); *contra United States v. Lord*, 565 F.2d 831, 839 (2d Cir. 1977) (holding that a defendant's pre-arraignment confession was voluntary).

Drawing inspiration from the late Judge Henry Friendly's dissent in *United States v. Massimo*, 432 F.2d 324 (2d Cir. 1970), in which he questioned the sufficiency of *Miranda* waivers in the Sixth Amendment context, *id.* at 327, the court of appeals ultimately inferred a "higher standard" of proof for waiver of the right to counsel under the Sixth Amendment than under the Fifth Amendment. *Mohabir*, 624 F.2d at 1147-48, 1151, 1153; *Carvey*, 611 F.2d at 22; *Satterfield*, 588 F.2d at 657. To survive a challenge to the validity of a post-indictment waiver under the court of appeals' enhanced criteria, the *Mohabir* court held that any waiver first "must be preceded by a federal judicial officer's explanation of the content and significance of this right." *Mohabir*, 624 F.2d at 1153. Additionally, the court ruled that

> a defendant arrested after indictment should be shown the indictment and told by the judicial officer that he has been indicted, the significance of an indictment, that he has a right to counsel, and the seriousness of his

> situation in the event he should decide to answer questions of any law enforcement officers in the absence of counsel.

Id.

The *Mohabir* court considered "[t]he advantages of such a rule [to be] clear." *Id.* By requiring warnings to be given by a judicial officer instead of an agent of the law enforcement, the court believed that "disputes as to what occurred will be rare and legal battles as to" the sufficiency of a defendant's comprehension in support of a waiver finding "will be less likely." *Id.* Importantly, however, the court did not consider these directives to be mandated by the Sixth Amendment. Rather, the court predicated its decision upon an "exercise of [its] supervisory power." *Id.* Although the court understood that its ruling likely would result in a marked decrease in the number of confessions obtained from uncounseled, indicted defendants, it accepted that consequence as "the price of defining in a more precise way the 'higher standard' that must be met for waiver of the Sixth Amendment right." *Id.*[2]

In admonishing the Second Circuit for its exceptionally heavy-handed approach to testing waiver and rejecting the notion that the Sixth Amendment right to counsel is "superior" or "more difficult to waive than the Fifth Amendment counterpart," the *Patterson*

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[2] Perhaps as a sign of restraint, the *Mohabir* court deliberately "put off until another day consideration of . . . simply 'outlawing' all statements following uncounseled waivers by indicted defendants," *Mohabir*, 624 F.2d at 1153, thus avoiding consideration of Judge Friendly's (admittedly extraconstitutional) prophylactic remedy. *See Massimo*, 432 F.2d at 327 (Friendly, J., dissenting) ("[I]n the case of a federal trial there would seem to be much ground for outlawing all statements resulting from post-arraignment or indictment interrogation (as distinguished from volunteered statements) in the absence of counsel when the questioning has no objective other than to establish the guilt of the accused, *even if the Sixth Amendment does not require so much*." (emphasis added)) (citing *Ricks v. United States*, 334 F.2d 964 (D.C. Cir. 1964)).

Court clarified that there is no hierarchy for assessing waivers of constitutional rights. *Patterson*, 487 U.S. at 297-98. Today's Majority interprets that critique as precluding the *per se* rule advanced by Rawls. Maj. Op. at 13.[3] But the United States Supreme Court long has recognized the value of some bright-line rules in the Sixth Amendment context, and *Patterson* acknowledged that "there will be cases where a waiver which would be valid under *Miranda* will not suffice for Sixth Amendment purposes" once a person is charged with a crime. *Patterson*, 487 U.S. at 296 n.9.

Significantly, the Supreme Court has held that law enforcement may not surreptitiously use a jailhouse informant or co-defendant to elicit incriminating admissions from a defendant because those tactics deliberately circumvent his right to have counsel present post-indictment. *Maine v. Moulton*, 474 U.S. 159, 176 (1985) (addressing co-defendants); *United States v. Henry*, 447 U.S. 264, 273-74 (1980) (addressing jailhouse informants). Nor can police trick a defendant into agreeing to talk by withholding from him the fact that his lawyer is trying to reach him, *Patterson*, 487 U.S. at 296 n.9 (citing *Moran v. Burbine*, 475 U.S. 412, 424, 428 (1986)), or by questioning him while he is isolated and in transit against the express wishes of defense counsel. *Brewer*, 430 U.S.

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[3] The Majority also finds decisions from seven of the federal courts of appeals that have rejected Rawls' position to be persuasive. Maj. Op. at 10 & n.7. The persuasive value of these cases is questionable, at best, as a number of them involved defendants who were aware that they had been criminally charged when they waived their right to have counsel present during questioning by law enforcement. *See, e.g.*, *United States v. Charria*, 919 F.2d 842, 844 (2d Cir. 1990) (defendant was shown copy of arrest warrant indicating that he was under indictment for conspiracy to distribute cocaine and money laundering); *Riddick v. Edminston*, 894 F.2d 586, 588 (3d Cir. 1990) (defendant "signed a waiver of extradition on a form that stated he had been charged with murder in New Jersey"); *Norman v. Ducharme*, 871 F.2d 1483, 1487 (9th Cir. 1989) (defendant was "shown a copy of his arrest warrant, which stated that an information charging first degree murder had been filed").

at 399, 404-05. In announcing bright-line rules favoring the continuous entitlement to counsel over investigatory strategies in these situations, the Court focused upon the particular sleights of mind used to subvert the defendants' awareness of their Sixth Amendment rights, whether or not formal attorney-client relationships existed at the time.

That inquiry is applicable here. While endeavoring to secure Rawls' waiver, the interrogating officer, Agent Trent Peacock of the Williamsport Police Bureau, made a series of comments that seemed to downplay Rawls' culpability in order to overcome his reticence to speak. *See* Notes of Testimony ("N.T."), Suppression Hearing, 4/26/2018, at 14, 36-40. For ease of reference, the relevant portions of the transcript derived from the videotaped interrogation of Rawls, introduced at the suppression hearing as the Commonwealth's Exhibit-2, are reproduced below. The scene begins with Rawls' introduction to the interrogating officers following his arrest:

Agent Peacock:	You walked in here today to see us in regards to information that's been released in the media as you as a person of interest, correct?
Jordan Rawls:	Yes.
Agent Peacock:	Okay. When you came in I placed you under arrest.
Jordan Rawls:	Okay.
Agent Peacock:	Okay. And at this point you are not free to go.
Jordan Rawls:	Okay.
Agent Peacock:	Okay. With that in mind, for us to discuss this incident, okay, I need to advise you of your rights, okay. Are you good with that?
Jordan Rawls:	(Inaudible).

Agent Peacock:	Okay. Do you have any problem reading or writing?
Jordan Rawls:	No.
Agent Peacock:	Okay. And you can slide right up here. You can follow along. My name is Agent Peacock of the Williamsport Bureau of Police. I wish to advise you that you have an absolute right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to an attorney before and have an attorney present with you during questioning. If you cannot afford to hire an attorney one will be appointed to represent you without any charge before questioning if you so desire. If you decide to answer any questions, you may stop at any time you wish.
Jordan Rawls:	Okay.
Agent Peacock:	Do you understand these rights I've explained to you?
Jordan Rawls:	Yes.
Agent Peacock:	If you understand them, I need yes and your initials on that line. Okay. With these rights in mind, do you wish to talk to me without having an attorney present? Obviously, you come in here to talk to me because you have an account of why you're on video and - - and - -

Interrogation Tr., 11/11/2016, at 4-5.

Upon asking Rawls if he understood his rights—but before receiving his answer—Agent Peacock suggested to Rawls that he "obviously" came to the police station to give his "account." *Id.* at 5. Rawls immediately voiced his growing uncertainty:

Jordan Rawls:	I'm actually kinda confused. I'm - - I'm like more confused.
Agent Peacock:	Okay.

Jordan Rawls: That's why I really came in.

Agent Peacock: Okay. And - - and at this point, okay --

Jordan Rawls: Uh-hum.

Agent Peacock: - - you understand we are investigating a criminal homicide by what's been released in - - in the news?

Jordan Rawls: Okay.

Agent Peacock: Okay.

Jordan Rawls: All right. Yeah.

Agent Peacock: And based on the information we've received - -

Jordan Rawls: Uh-hum.

Agent Peacock: - - okay, we have probable cause to obtain an arrest warrant.

Jordan Rawls: Okay.

Agent Peacock: Okay.

Jordan Rawls: Okay.

Agent Peacock: Now, probable cause is not sufficient to convict you of any crimes, okay. Probable cause is sufficient to arrest you.

Jordan Rawls: Uh-hum.

Agent Peacock: Okay. Is the burden of proof we need to arrest you, okay.

Jordan Rawls: Uh-hum.

Agent Peacock: But in a courtroom we're gonna have to prove beyond a reasonable doubt - -

Jordan Rawls: Uh-hum.

Agent Peacock: - - that you're guilty of any crimes.

Jordan Rawls:	Uh-hum.
Agent Peacock:	Okay.
Jordan Rawls:	Okay.
Agent Peacock:	**So right now to get an arrest warrant it's a lower standard - -**
Jordan Rawls:	Uh-hum.
Agent Peacock:	**- - than to find somebody guilty.**
Jordan Rawls:	Right.
Agent Peacock:	**Okay. And based on that lower standard - -**
Jordan Rawls:	Uh-hum.
Agent Peacock:	**- - there may be some middle ground here, okay - -**
Jordan Rawls:	Uh-hum.
Agent Peacock:	**- - that you're not the guy that did it.**
Jordan Rawls:	Uh-hum.
Agent Peacock:	Okay.
Jordan Rawls:	Okay.
Agent Peacock:	And that burden of proof is gonna be on us, okay.
Jordan Rawls:	Okay.
Agent Peacock:	From a beyond a reasonable doubt standard.
Jordan Rawls:	Uh-hum.
Agent Peacock:	Okay.

Id. at 5-8 (emphasis added).

In an effort to reassure Rawls, in effect bolstering his confidence to answer questions without the assistance of counsel, Agent Peacock provided a CliffsNotes description of the different burdens of proof for obtaining an arrest warrant versus securing a conviction at trial. To hammer home his point that an arrest warrant requires a lower standard of proof than a guilty verdict, Agent Peacock suggested to Rawls that "there may be some middle ground here" between the two standards: Rawls might not be "the guy that did it." *Id.* at 7. In other words, Rawls might not have committed the double-homicide with which he already was charged, and for which Agent Peacock immediately took him into custody once Rawls voluntarily entered the police station. Color me incredulous.

Rawls then appears to parrot Agent Peacock's reference to "the guy that did it," still evidently unaware of the necessity of first waiving his *Miranda* rights:

Jordan Rawls:	**The guy that - - that did - -**
Agent Peacock:	I can't ask you anything, okay. And I really don't want you to say anything at this point because any conversation, okay - - we can't really have a conversation without you understanding and being aware and waiving your rights.
Jordan Rawls:	Okay.
Agent Peacock:	Okay.
Jordan Rawls:	Yeah. I got it. All right. Okay.
Agent Peacock:	Do you wish to talk to us, understanding that you can stop at any time you wish, you don't have to answer questions if you choose not to answer questions, okay?
Jordan Rawls:	'Uh - -

Agent Peacock:	**Do you want to give us your side of - - I believe - - I believe you have a side of the story that - - I don't suspect that you would have come bouncin' in here - -**
Jordan Rawls:	Uh-hum.
Agent Peacock:	**- - if you were the guy responsible for this.**
Jordan Rawls:	Listen, I don't got no problem answering any of y'all's questions.
Agent Peacock:	Okay.
Jordan Rawls:	Anything y'all, 'uh, feel like y'all need to ask me, go ahead and ask me. I'm - -
Agent Peacock:	Okay.
Jordan Rawls:	I'm comfortable with it.
Agent Peacock:	Okay. Then with these rights in mind do you wish to talk to us without having an attorney present?
Jordan Rawls:	Yes. Yeah.
Agent Peacock:	Okay. Go ahead, yes and your initials. By affixing your signature on this waiver you're acknowledging that you have read and understand the rights explained to you on this form.
Jordan Rawls:	Okay.
Agent Peacock:	Okay. If you understand them, go ahead and sign right there. Okay. . . .

Id. at 8-9 (emphasis added). Once again, after asking Rawls if he wanted to talk—but before Rawls could answer—Agent Peacock interjected that he did not "suspect" that Rawls would have come "bouncin'" to the police station of his own volition if he actually had been "responsible for" the double-homicide. *Id.* at 8-9.

As the foregoing interaction reveals, Rawls ultimately agreed to waive his rights only after Agent Peacock twice responded to Rawls' reluctance and apparent confusion by intimating that Rawls might be innocent. In reality, Agent Peacock knew that Rawls was the prime suspect of the Commonwealth's investigation and had, in fact, been charged with two counts of criminal homicide the day before. Notwithstanding Rawls' reflexive "uh-hums" and "okays," on this record I am not confident that he truly understood the "full dangers and disadvantages of" waiving his right to counsel or that those risks adequately were explained to him. *Patterson*, 487 U.S. at 299-300. The problem here is particularly acute given the interrogating officer's attempt to assuage Rawls' concern with an abstract description of the burdens of proof at play, which is not a requirement of *Miranda* and may have been counterproductive.[4]

The Majority implicitly chalks up this rigmarole to run-of-the-mill police work—the kind of "police-citizen interaction[] that fall[s] short of overt coercion" and thus is constitutionally tolerable. Maj. Op. at 12 & n.9. Whatever minimal constitutional obligations Agent Peacock satisfied by accurately providing *Miranda* warnings, he undercut his efforts to secure a knowing and intelligent waiver of Rawls' Sixth Amendment

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[4] I, for one, would not presume that a layperson in Rawls' position meaningfully understands the difference between "probable cause" and "reasonable doubt"—to say nothing of the Commonwealth's burden to substantiate its charges with *prima facie* evidence in order to survive a preliminary hearing—without further explanation. Indeed, even experienced jurists occasionally falter when attempting to explain reasonable doubt to jurors in plain English. *See Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (*per curiam*) (holding that a reasonable doubt jury instruction that "equated a reasonable doubt with 'grave uncertainty' and an 'actual substantial doubt,' . . . suggested a higher degree of doubt than is required for acquittal" in violation of federal due process principles); *accord Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). Nor is it likely that Rawls would have waived his right to counsel had he grasped the fact that he would not have been free to leave *regardless* of his candor with law enforcement from the get-go.

right to counsel by repeatedly downplaying Rawls' criminal liability thereafter, thereby providing him with a false sense a security about his exposure and need for a lawyer. That fact sets this case apart from the Fourth and Fifth Amendment contexts, in which the government has more leeway to withhold information from a suspect. Where the Sixth Amendment is concerned, however, psychologically coercive interrogation tactics run afoul of the Constitution when they are employed with the aim of subverting the decision to ask for counsel. For those reasons, a bright-line rule requiring would-be interrogators to inform defendants in clear terms that they formally had been charged with a crime when attempting to secure waivers is needed to preserve the fundamental right to counsel from undue pressures. Such a rule almost certainly would have sufficed to avoid the muddle that resulted from Agent Peacock's deception here.

While the Majority rightly acknowledges that we may take a different view if presented with an analogous claim under our organic Charter, Maj. Op. at 12, I am dismayed by the perpetuation of what the late Justice Arthur Goldberg long ago described as a system of criminal justice that has "come[] to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights." *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964). The filing of formal charges categorically alters the dynamic between the accused and his government. "It is the starting point of our whole system of adversary criminal justice," the moment at which "a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby*, 406 U.S. at 689. If all that law enforcement must do to effectuate a waiver of the right to counsel under the Sixth Amendment is regurgitate *Miranda* warnings—even after misleading a defendant about

his legal risk—attachment would be reduced to "a mere formalism." *Id.* Where does that leave "the crucible of meaningful adversarial testing"? *United States v. Cronic*, 466 U.S. 648, 656 (1984).

Because the interrogation tactics employed in this case likely amplified Rawls' confusion regarding his legal jeopardy, *Miranda* warnings alone were inadequate to apprise him of the value of having an attorney present and "the consequences of abandoning those rights." *Patterson*, 487 U.S. at 296. Under these circumstances, I cannot agree that the waiver of his right to counsel under the Sixth Amendment was knowing or intelligent. Accordingly, I would vacate his conviction and remand for a new trial without the use of his uncounseled statements.

[J-15-2021] [MO: Saylor, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 49 MAP 2020
	:	
Appellee	:	Appeal from the Order of the
	:	Superior Court at 720 MDA 2019
	:	dated January 10, 2020 Affirming
v.	:	Judgment of Sentence of the
	:	Lycoming County Court of Common
	:	Pleas, Criminal Division, at No. CP-
JORDAN ADONIS RAWLS,	:	41-CR-89-2017 dated April 5, 2019
	:	
Appellant	:	ARGUED: March 10, 2021

DISSENTING OPINION

JUSTICE DOUGHERTY **DECIDED: August 17, 2021**

I agree with the majority's conclusion there is no *per se* rule invalidating a waiver of the Sixth Amendment right to counsel, by use of the *Miranda*[1] warnings, "merely because an arrestee was not advised that charges had been filed." Majority Opinion at 13.[2] However, the record reveals the circumstances surrounding appellant's waiver in the present case included more than the mere fact he was not advised that charges had been filed against him. On this point, I agree with Justice Wecht that Agent Peacock's assuaging of appellant's culpability, in addition to his failure to advise appellant of the charges against him, leads to the conclusion the Commonwealth failed to prove appellant "truly understood the 'full dangers and disadvantages of' waiving his right to counsel or

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] I also reiterate the majority's point that "this Court may take a different view when presented with an analogous claim under the Pennsylvania Constitution[.]" Majority Opinion at 13.

that those risks were adequately explained to him." Dissenting Opinion at 14, *quoting Patterson v. Illinois*, 487 U.S. 285, 299-300 (1988). As such, I would hold appellant's waiver of his Sixth Amendment right to counsel was unknowing based "upon the particular facts and circumstances surrounding [this] case[.]" *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Therefore, I respectfully dissent.