Case at a Glance

Jesse Montejo was convicted of murder and sentenced to death by a Louisiana jury. One important piece of evidence was a letter Montejo wrote admitting his guilt and apologizing to the victim's widow. He now argues that this letter was obtained in violation of his Sixth Amendment right to counsel.

Must a Defendant Expressly Accept Appointment of Counsel to Preclude a Waiver of Sixth Amendment Rights?

by Alan Raphael

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Alan Raphael is an associate professor of law at Loyola University School of Law in Chicago. He can be reached at araphae@luc.edu or (312) 915-7140.

Issue

When an indigent defendant's Sixth Amendment right to counsel has attached and counsel has been appointed to represent him, must he take additional steps to demonstrate his acceptance of the appointment in order to secure the protections of the Sixth Amendment and preclude admission of his statement in response to a police-initiated interrogation that occurred outside the presence of counsel?

Facts

Jesse Jay Montejo was convicted by a Louisiana jury of the 2005 murder of Lewis Ferrari and sentenced to death. The Supreme Court of Louisiana affirmed the conviction and sentence. *State v. Montejo,* 947 So.2d 1238 (La. 2008). He now asks the United States Supreme Court to rule that the Louisiana Supreme Court erred in holding that his incriminating written statement had been properly admitted into evidence. Montejo wrote the statement after he was charged with the crime and counsel had been appointed to represent him, but before he had been given an opportunity to consult with his attorney. According to Montejo, that statement should have been suppressed as being obtained in violation of the Sixth Amendment right to counsel and his case remanded to determine if the error was harmless.

Lewis Ferrari was shot to death in his Slidell, Louisiana, home on September 5, 2002. At the time of the killing, money was stolen from him or from the home. The state's theory of the case was that the burglary was planned by Jerry Moore and carried out by one of his associates, Jesse Montejo, who killed Ferrari when he showed up at his home in the course of the burglary. Evidence showed the deterioration of a business relationship between Ferrari and Moore and that the two had arguments (including one on the day of the killing). The state's evidence also showed the employment of Montejo as Moore's driver, the presence of Moore's vehicle with two people in it near Ferrari's home on the afternoon of the killing, and the departure that afternoon of that vehicle and Ferrari's car from the

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home. Ferrari's left fingernails contained DNA material matching Montejo, indicating that Ferrari had scratched him. Blood matching Ferrari was found in his vehicle, which had been abandoned at a remote location. Police did not find the weapon used in the killing. Examination of Montejo's clothing did not reveal any blood, nor were his fingerprints found in the decedent's vehicle. Bullets were found in Ferrari's body and in a sofa pillow in the room where he died. A search of Montejo's van, which was not alleged to be involved in the crime, disclosed receipts for stereo equipment dated September 6, $322 in cash, and gloves. A seat cushion belonging to Montejo's cousin was found to have $832 in cash concealed in it.

The heart of the state's case consisted of a series of contradictory statements or writings Montejo made under police questioning. Most important were a four-hour videotape of various police interviews over a ten-hour period on September 6 and 7 and an apology written by Montejo to Ferrari's widow on September 10. At the conclusion of the videotaped interviews, Montejo admitted that he shot the victim who had unexpectedly returned home and interrupted the burglary. On appeal, Montejo argued that the September 6 and 7 statements were taken in violation of his Fifth Amendment rights under *Miranda v. Arizona,* 384 U.S. 436 (1966), but the Louisiana Supreme Court rejected those arguments. It recognized that Montejo had made an unambiguous request to speak to an attorney but it concluded that the police had acted properly in honoring that request, and that subsequent questioning of Montejo, although occurring very soon after his invocation of the right to counsel, had taken place after Montejo had changed his mind and volunteered to continue the interrogation and to waive his Fifth Amendment right to counsel. (While the Fifth Amendment's text does not specifically mention the right to counsel, the right was recognized in the *Miranda* decision as necessary to guard against compelled self-incrimination during custodial interrogations). The Fifth Amendment issues are not now before the United States Supreme Court, but Montejo asserts that police repeatedly failed to honor his assertions of the right to counsel, both at this time and later when he asserted his Sixth Amendment right to counsel.

Montejo contends that the state supreme court erred in affirming the trial court's denial of his motion to suppress the letter he composed for Ferrari's widow, which he wrote in the absence of legal counsel in the afternoon of September 10. He had appeared before a judge that morning. Although Louisiana law requires that any arrested person be brought before a judge within 72 hours of arrest for the purposes of filing a charge, setting bail, and appointing counsel, Montejo was not taken before a judge until the fourth day following his arrest. At the 72-hour hearing, the court appointed indigent defense counsel to represent Montejo, who did not speak and was not asked to participate in the proceedings, to make any statement, or to take any action in response to the court's appointment.

In the afternoon of September 10, detectives took Montejo in a police car so he could show them where he had disposed of the murder weapon and other evidence of the crime. Although Montejo told police he had thrown the gun off a bridge and a substantial search was made, no weapon turned up. Detective Hall, who testified that he was unaware Montejo had counsel appointed earlier that day, read Montejo his *Miranda* warnings, and obtained his waiver of those rights and his agreement to accompany and assist the detectives on that journey. While in the back of the police vehicle, Montejo wrote a two-page letter to the victim's widow, using pen and paper provided by the detectives. The letter expressed remorse and asked for forgiveness. The contents of the letter were summarized by the Louisiana Supreme Court as follows: "Montejo explained in this letter that he only intended to commit a burglary but that when he was unable to frighten the victim with the gun and to escape, he fired two shots (the first intended only as a warning shot) before grabbing the victim's car keys and firing the gun into the couch."

Montejo testified that Detective Hall had asked him if a lawyer had been appointed for him. He said that he told Hall that one had been, but the detective told him he was mistaken. The defendant also wrote a statement that he was accompanying the detectives voluntarily on this trip and that "cooperation makes me feel 100% better." Over his objections, both the letter to the widow and this statement were admitted into evidence. In his testimony, Montejo claimed that he was prompted to write this letter by the detectives and that Detective Galloway, who accompanied Detective Hall on the ride, dictated much of the letter. Defense counsel at trial and on appeal pointed to a term in the letter, "simple burglary," as being a term of law that would be familiar to a detective but not to Montejo, evidence that the language of the letter reflected its composition by one of the detectives.

At trial and on appeal, Montejo argued that the 72-hour hearing marked the attachment of the right to counsel under the Sixth Amendment. After the attachment, no

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agent of the state should have been allowed to communicate with him directly, as at that point agents were required to approach him only through counsel. Responding with several alternative arguments, the state first claimed that the 72-hour hearing is not a "critical stage" of the criminal proceedings at which the right to counsel attaches. Second, the state argued that the right to counsel does not attach at the time counsel is appointed unless the accused makes clear in the record his acceptance of that appointment. Third, it argued that even if the right to counsel had attached, Montejo made a valid waiver of this right. Finally, the state argued that any error in admitting Montejo's written apology was harmless in light of the other evidence of his guilt.

The Louisiana Supreme Court found the statement admissible. Citing precedent, it held that the right to counsel did in fact attach at the time of the 72-hour hearing and that ordinarily a defendant may not be approached except through counsel after such time. However, Louisiana's highest court went on to hold that a defendant whose Sixth Amendment rights had attached may still waive those rights and submit to questioning outside the presence of counsel. The court recognized the rule of *Michigan v. Jackson,* 475 U.S. 625 (1986), in which the United States Supreme Court held that "once defendant's right to counsel has attached, if he makes an assertion or invocation of this right, any waiver he would later make in response to police-initiated interrogation will be considered invalid." However, the Louisiana court held that rule was inapplicable to the facts of Montejo's case because although the right to counsel had attached, Montejo had "not made an assertion or invocation of his right to counsel." In the absence of his agreeing to appointment of counsel, Montejo could make a waiver of his Sixth Amendment rights if the waiver was "knowing, intelligent and voluntary," a standard the court held had been met.

Montejo testified in contradictory ways. At one point he indicated he was unaware that a lawyer had been appointed at the 72-hour hearing, in which case his waiver could not have been "knowing" since he was unaware that he even had an appointed lawyer. At another point, he claimed that he told the police prior to the September 10 police car ride that he did not want to go with them and that a lawyer had been appointed to represent him. According to Montejo's testimony, one of the detectives nevertheless insisted that Montejo did not have a lawyer. This testimony seems intended to support his argument that police did not honor his invocation of counsel, either earlier under questioning governed by the Fifth Amendment or at this time when the Sixth Amendment right to counsel was allegedly violated. Thus, Montejo argues both that he did not know that the trial court had appointed a lawyer and that he had asserted that he had a lawyer but that the detectives insisted that no appointment had been made.

According to the Louisiana Supreme Court, numerous facts supported the finding that there had been a waiver of the right to counsel. Montejo had received *Miranda* warnings and made both written and oral waivers. The *Miranda* warning made Montejo aware of the consequences of waiving his right to counsel. He had attended the 72-hour hearing earlier that day at which counsel was appointed, thus further indicating that Montejo knew he had the right to counsel.

Montejo petitioned the United States Supreme Court, which granted a writ of certiorari to review the Louisiana decision.

Case Analysis

In *Massiah v. United States,* 377 U.S. 201 (1964), the Supreme Court held that the Sixth Amendment right to counsel made a statement made by an indicted defendant who had retained counsel inadmissible at trial when the government had deliberately elicited the statement in the absence of that counsel. Because the statement in that case was obtained by a codefendant who was acting secretly as a government agent, Massiah had been unaware that the government was seeking his statement, and thus he could not have waived his Sixth Amendment rights. The *Massiah* rule was reiterated in *Brewer v. Williams,* 430 U.S. 387 (1977), which held that the Sixth Amendment right to counsel applies at the point when judicial proceedings have been initiated against the defendant, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." According to *Brewer,* the defendant in that case could waive his Sixth Amendment rights and make an admissible statement, but the facts of the case did not meet the stringent test for showing a valid waiver of constitutional rights.

Michigan v. Jackson, 475 U.S. 625 (1986), involved police questioning of a defendant who was formally charged with a crime and who requested the appointment of counsel at his arraignment. Before the defendant consulted with counsel, the police approached him to seek a statement about the crime for which he had been charged. The Court concluded that although the defendant signed a written waiver of his right to counsel prior to making his statement, no valid waiver would be found when police initiate interrogation after a person whose Sixth

Amendment rights have attached has requested counsel. This ruling applied in the Sixth Amendment context of a similar rule from *Edwards v. Arizona,* 451 U.S. 477 (1981), which bars waiver in the Fifth Amendment context after a suspect asserts the right to counsel after receiving *Miranda* warnings.

Academic commentators and numerous Supreme Court justices have criticized the rule of *Michigan v. Jackson.* Three justices dissented in *Jackson* and another indicated that although he concurred out of respect for stare decisis, he believed *Edwards* should be reconsidered. Subsequent cases have limited the *Jackson* rule by applying it only to questioning about the crime for which the defendant has been charged, by allowing police initiation of questioning about other crimes, whether related or not to the original charge, and by allowing statements violating *Jackson* to be used to impeach a defendant who takes the stand to testify. *Texas v. Cobb,* 532 U.S. 162 (2001), was one of the cases holding that the attachment of Sixth Amendment rights is offense-specific and does not bar questioning about uncharged (even if related) crimes. In his concurrence in that case, Justice Kennedy, joined by Justices Scalia and Thomas, indicated that *Jackson* was wrongly decided and should be overruled. In the view of these three justices, a waiver that is sufficient under *Miranda* to waive Fifth Amendment rights is also sufficient to waive Sixth Amendment rights. In their view, *Jackson*'s preclusion of such waiver was an unwarranted extension of the Sixth Amendment and an inappropriate limitation on the admission of evidence. In *Patterson v. Illinois,* 487 U.S. 285 (1988), the Court ruled that statements made by a defendant who has been indicted but who has not retained or requested the appointment of counsel may be found to be waived by a *Miranda* waiver because the defendant "at no time sought to exercise his right to have counsel present."

Crucial to the decision in this case are the requirements of *Jackson*. The first issue under *Jackson* is whether Sixth Amendment rights have attached. There is no question that Sixth Amendment rights attached in the present case and that the triggering event was the commitment by the state to go forward with the charges as shown by such events as the bringing of formal charges or arraignment. *Jackson* also requires that to come within its rule, the defendant must either obtain or request counsel, thus clearly indicating by his actions or speech that he wishes to have the protections of representation and does not wish to deal directly with the state at this time What is contested is whether it is sufficient that the defendant has counsel—retained or appointed—or whether *Jackson* requires the defendant to take an additional, affirmative action to indicate that he wishes counsel to function as an intermediary between him and the state.

Montejo clearly did not have retained counsel that would have satisfied this prong of *Jackson*. He claims that he did in fact have counsel by the end of the 72-hour hearing, however, because the court's notation indicates that counsel had been appointed for him. The state argues that unlike the defendant in *Jackson,* Montejo never requested counsel. The government contends that the rule in *Jackson* is inapplicable unless the defendant demonstrates that he wants counsel, either by retaining one, asking the court to appoint one, or otherwise expressly indicating his acceptance of the appointment of counsel.

Montejo argues that the right to counsel attached at the 72-hour hearing and that counsel was appointed for him at that hearing, which is one of the major purposes for which that proceeding is held. A short while later, police began their interrogation of Montejo without providing him with any opportunity to meet his counsel. Because he alleges that the police conduct violated his Sixth Amendment right, he seeks to have the apology letter he wrote suppressed and the conviction vacated. He maintains that his silence and lack of express acceptance of the appointment of counsel should not be treated as a rejection of counsel. It is not part of the Louisiana procedure to require the defendant to accept the appointment nor was he ever asked to comment on the court's action. Once the appointment was made, Montejo argues that he had the right to assume he had counsel who would serve as an advocate and intermediary between him and the state and that he needed to do nothing further to have the assistance of an attorney.

According to Montejo, no prior case has ever required a defendant to accept the appointment of counsel or questioned whether a defendant is represented once an appointment has been made. Many states require a defendant to request the appointment of counsel or require judges to ask unrepresented defendants if they wish court-appointment counsel. Louisiana procedures, however, neither require nor request any expression from the defendant and assume that all unrepresented persons should have counsel provided by the state, with appointment immediate but contingent on proof at a later date of the defendant's indigence.

Montejo's counsel further argues that the rule applied by the

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Louisiana Supreme Court is unfair and unworkable, in part because it would rely on matters difficult to resolve. There may be no record of the hearing, or the determination may depend on nonverbal responses or gestures. Even if some acceptance of counsel were to be required, Montejo contends that he made that acceptance when the detectives approached him after the September 10 hearing and he stated that he had a lawyer and did not want to speak with them without having his lawyer present. The defendant's final argument in this case is that if his apology statement is suppressed, the United States Supreme Court should not engage in harmless error analysis itself, but rather should remand the case to the Louisiana Supreme Court, which had never determined whether the error was harmless beyond a reasonable doubt.

Significance

The most immediate importance of this case is that Montejo will be executed if he fails to convince the Supreme Court to reverse his conviction and sentence. If the Court reverses and remands the case, the Louisiana Supreme Court would have to decide whether the constitutional error was harmless. If it was harmless, the judgment of conviction and sentence of execution would remain in force. If not, however, Montejo would face retrial, at which his apology statement would be inadmissible. If retried and convicted, he could again be sentenced to death.

What makes this case important is that the Supreme Court may use it to reverse or modify the *Jackson* rule. Three sitting justices have previously called for overruling *Jackson* and allowing the question of waiver always to be decided in Sixth Amendment cases, and the two most recently appointed justices might be sympathetic to this position. Still, it is unclear that this case will be used as a vehicle for the Court to revisit the wisdom of *Jackson*. The question the Court agreed to review is a more limited one of whether *Jackson* is applicable absent a clear indication that the defendant wants representation of counsel. As a result, the briefs in this case have not addressed the question of whether *Jackson* should be overruled. Best practice consistent with the adversary system is for the Court only to address issues discussed by the parties in order to obtain the best arguments before making a decision and for the Court not to "reach out" to decide issues not required for its decision of a particular case. Had the Court wished to use this case to reconsider the wisdom of *Jackson,* it could have modified the question presented and asked the parties to address this larger question.

Regardless of how the Court addresses the narrower question before it, it may clarify the law and affect subsequent practice. If the Court upholds the Louisiana decision and rationale, *Jackson* will have been modified to require that for an indigent defendant for whom counsel is appointed to be considered to have counsel, the record must clearly indicate that the defendant accepted or requested counsel. In most states, the record already reflects such a request. In a state like Louisiana, defendants would have to make a clear statement of acceptance. It is possible that the Supreme Court of the United States or the highest court of Louisiana would require that the defendant be specifically asked at the 72-hour hearing whether he accepts the appointment of counsel. Such a requirement does not currently exist, however. In its absence, a rule requiring a statement of acceptance could mean that the least able and least prepared defendants, who perhaps most need counsel, would be denied the benefit of an attorney during questioning following the filing of formal charges. If, on the other hand, the Court reverses the decision of the Louisiana court, then it would be clear that the *Jackson* rule applies to any person for whom appointment of counsel is made and against whom the state has decided to bring charges.

Attorneys for the Parties

For Petitioner Jesse Jay Montejo
(Donald B. Verrilli Jr. (202) 639-6000)

For Respondent State of Louisiana
(Kathryn Landry (225) 766-0023)

Amicus Briefs

In Support of Petitioner Jesse Jay Montejo

Louisiana Public Defenders Association (G. Paul Marx (337) 237-2537)

National Association of Criminal Defense Lawyers et al. (Jonathan L. Marcus (202) 662-5892)

National Legal Aid & Defender Association et al. (Catharine F. Easterly (202) 628-1200)