No. 07-1529

IN THE
Supreme Court of the United States

JESSE JAY MONTEJO,
*Petitioner*,

v.

STATE OF LOUISIANA,
*Respondent*.

On Writ of Certiorari to the
Supreme Court of Louisiana

# BRIEF FOR PETITIONER

JELPI P. PICOU
G. BEN COHEN
ROBERT J. SMITH
THE CAPITAL APPEALS PROJECT
636 BARONNE STREET
NEW ORLEANS, LA 70113
(504) 529-5955

DONALD B. VERRILLI, JR.
*Counsel of Record*
IAN HEATH GERSHENGORN
KATHERINE A. FALLOW
MATTHEW S. HELLMAN
THOMAS H. KIM
ADAM G. UNIKOWSKY*
CAROLINE D. LOPEZ*
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001
(202) 639-6000

*Not admitted in DC; supervised by principals of the firm

## QUESTION PRESENTED

When an indigent defendant's right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to "accept" the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present?

## PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 24.1(b), the following list identifies all of the parties before the Supreme Court of Louisiana.

Jesse Jay Montejo was the defendant and appellant in the courts below. The respondent is the State of Louisiana, the prosecutor and appellee in the courts below.

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

## OPINION BELOW

The opinion of the Louisiana Supreme Court is reported at 974 So. 2d 1238 (La. 2008), and is reprinted in the Appendix at Pet. App. 1a-59a.

## JURISDICTION

The opinion of the Louisiana Supreme Court was entered on January 16, 2008. That court denied Montejo's timely petition for rehearing on March 7, 2008. The petition for a writ of certiorari was filed on June 5, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI. The Sixth Amendment is applicable to the states through the Fourteenth Amendment.

## STATEMENT OF THE CASE

### A. Background

*Arrest & Pre-Appointment Interrogation*

On the afternoon of September 6, 2002, Jesse Jay Montejo was taken into custody by Gretna, Louisiana police officers for questioning in connection with the murder of Lewis Ferrari. Mr. Ferrari, the proprietor of a local dry cleaning operation in Slidell, Louisiana, had been shot to death following an apparent

robbery in his home on the previous day. The victim's family suspected Jerry Moore, a local mechanic specializing in repair of dry cleaning equipment, who had a contentious relationship with Mr. Ferrari and who would have known that Mr. Ferrari was likely to be carrying a significant amount of cash with him on the evening of September 5th. Pet. App. 3a-4a; R. 2402-06 (Trial Tr. Mar. 6, 2005); R. 2423-24, 2427 (Trial Tr. Mar. 6, 2005). Montejo was picked up for questioning because he was an acquaintance of Moore who had provided transportation to Moore after Moore's driver's license was revoked. R. 2552-54 (Trial Tr. Mar. 7, 2005).

Montejo was first taken to the Gretna police station. According to Montejo's trial testimony, he was placed in a holding cell and handcuffed to the wall. JA 227. He asked to leave and was told he could not. *Id.* at 227-28. He then asked for a lawyer. In response, the detaining officer told Montejo that he "wouldn't advise that, because . . . we need to question you about some serious matters." *Id.* at 228. When Montejo asked whether he was entitled to have a lawyer present, he was told "Yes, but we wouldn't really recommend that." *Id.*

Upon learning of Montejo's detention in Gretna, Detectives Wade Major and Johnny Morse of the St. Tammany Parish Sheriff's Office went to the Gretna police station at approximately 4 p.m. on the afternoon of the 6th. Pet. App. 9a-10a & n.19. Montejo was transported to the Slidell station of the St. Tammany Parish Sheriff's Office. Pet. App. 9a-10a. Detectives Major and Morse placed Montejo in

a small room and began interrogating him at 4:30 p.m. Pet. App. 10a n.20. They gave Montejo *Miranda* warnings and obtained a waiver from him at 4:38 p.m. *Id.* They then interrogated him until approximately midnight. *Id.*

During that interrogation, as Detective Major later admitted at trial, the detectives repeatedly lied to Montejo to get him to confess. R. 2358 (Trial Tr. Mar. 6, 2005). They also deprived him of sleep, a tactic Detective Major acknowledged could cause a suspect to "tell you whatever you want to hear." R. 2362 (Trial Tr. Mar. 6, 2005).[1]

More than five hours into the interrogation (throughout which Montejo had denied shooting the victim), the detectives pressed Montejo for admissions in increasingly aggressive tones:

> Q: (Shouting) Are you sorry for shooting that man?
>
> A. I didn't shoot him.
>
> Q: Yes you did.
>
> A: I did - not - shoot - that - man.

State's Ex. 14-B (DVD version of the 1st interview of Jesse J. Montejo).

Immediately after that exchange (at approximately 10 p.m.), Montejo invoked his right to counsel, stating unambiguously: "I did not kill that man, I did not break in, I did not steal anything. I

---

[1] As Montejo explained, as a result of the lengthy interrogation, "[I was] so tired . . . [that] I was delirious . . . . [E]ventually I was just like, Okay, I did it, I did the crime." JA 233-34.

would like to answer no more questions unless I'm in front of a lawyer." *Id.*

Instead of ending the interrogation, the detectives pressed Montejo to revoke his request for counsel. Detective Morse told Montejo, "You are under arrest for first degree murder," and then left the interrogation room. Pet. App. 14a. Detective Major indicated to Montejo that he had forfeited any chance of leniency by asking for the assistance of counsel:

> Detective Major: . . . Dude, you don't want to talk to us no more, you want a lawyer, right? I trusted you and you let me down.
>
> Montejo: No, come here, come here.
>
> Detective Major: No, no, I can't.
>
> Montejo: No, come here.
>
> Detective Major: No you've asked for an attorney, and you are getting your charge. And the shame of it is . . .

State's Ex. 14-B (DVD version of the 1st interview of Jesse J. Montejo); Pet App. 15a. Approximately 10 minutes later, Montejo — "visibly upset" and sobbing — revoked his request for counsel. Pet. App. 16a & n.35. The following exchange ensued:

> Detective Morse: Did you of your own free will and accord come to us and tell us that you wish to waive your right to an attorney and you wish to make a statement?
>
> Montejo: What am I doing. What am I doing. What am I doing (*crying and clutching his face*

> *in his hands*). Am I going to sit in prison for life.

State's Ex. 17-A (DVD version of the 2d interview of Jesse J. Montejo).

After the interrogation resumed, Montejo described a new version of the crime in which he implicated himself, saying that he shot the victim during a "botched burglary." Pet. App. 16a. When the police probed this account, he retracted this version of events and insisted that he would not "take the rap" for something that he did not do. State's Ex. 17-A (DVD version of the 2d interview with Jesse J. Montejo). After the retraction, the detectives ended the interrogation. *Id.* They booked Montejo on a first degree murder charge shortly after midnight, and placed him in a holding cell. Three hours later, they returned to Montejo's cell, checked him out of jail, and transported him to the Covington station of the St. Tammany Parish Sheriff's Office, where they questioned him for an additional hour. Pet. App. 9a n.16; R. 2350 (Trial Tr. Mar. 6, 2005); R. 2706-07, 2730 (Trial Tr. Mar. 8, 2005)

Some but not all of the interrogations on September 6th and 7th were videotaped. Although the interrogation commenced at 4:30 p.m., the videotaping did not begin until 7 p.m. Pet. App. 10a n.20. The recorded portions of the interrogation between 7 p.m. and 10 p.m. show Montejo first denying any involvement in the crime, and eventually stating that he was at the victim's house with an unidentified black male, known only as D.P., who robbed and shot the victim. Pet. App. 18a-20a;

State's Ex. 17-A (DVD version of 2d interview of Jesse J. Montejo). The interrogating detectives turned off the videotape at 10 p.m., just after Montejo unambiguously asked for the assistance of counsel. Pet. App. 15a. They resumed videotaping approximately 10 minutes later, beginning with Detective Morse's question to a weeping and agitated Montejo regarding his purported decision to change his mind and waive the assistance of counsel. Pet. App. 16a & n.35. As a result, there is no videotape evidence of the exchange between the detectives and Montejo that prompted him to revoke his request for counsel. Pet. App. 15a. The officers also did not videotape the first 45 minutes of their interrogation of Montejo at the Covington station at approximately 3 a.m. on September 7th. Pet. App. 10a n.20.

*Appointment of Counsel & Pretrial Interrogation*

On the morning of September 10, 2002 — four days after Montejo was detained and first interrogated — officers from the St. Tammany Parish Sheriff's Office brought Montejo before a St. Tammany Parish judge for a mandatory initial hearing, which Louisiana law dictates must take place within 72 hours of a defendant's arrest.[2] A

[2] Article 230.1, Section A of the Louisiana Code of Criminal Procedure requires the following:

> The sheriff or law enforcement officer having custody of an arrested person shall bring him promptly, and in any case within seventy-two hours from the time of the arrest, before a judge for the purpose of appointment of counsel. . . . However, upon a showing that the defendant is incapacitated, unconscious, or otherwise physically or mentally unable to appear in court within seventy-two hours, then the defendant's presence is

representative of the Sheriff's office attended the hearing. R. 2583 (Trial Tr. Mar. 7, 2005).[3] The minute record (which is the only record of the hearing) attests that the court denied Montejo bail and appointed him counsel through the Office of the Indigent Defender. Pet. App. 63a-64a. Nothing in the record indicates that the court asked Montejo whether he had "accepted" the lawyer appointed to represent him. Nor does the record indicate that the court otherwise notified him that the scope of his protection under the Sixth Amendment might depend on whether he stated that he affirmatively accepted the appointment.

Upon completion of the 72-hour hearing on September 10th, Montejo was brought back to the St. Tammany Parish Sheriff's Office. Shortly after he returned to the office, Detectives Hall and Galloway of the Sheriff's Office visited Montejo to commence another interrogation. Pet. App. 23a n.49. The detectives told Montejo that they wanted him to accompany them on a car ride so that he could show them where he discarded the gun that was used to

---

> waived by law, and a judge shall appoint counsel to represent the defendant within seventy-two hours from the time of arrest.

La. Code Crim. Proc. Ann. art. 230.1(A).

[3] At trial, Detective Morse acknowledged that a representative of the Sheriff's Office was present at the hearing. *Id.* It is unclear from the subsequent colloquy who represented the office, but it was established that Rodney Strain was the sheriff of St. Tammany Parish on the date of the hearing. *Id.* The minute record also notes that Sheriff Strain was present. Pet. App. 63a-64a.

shoot Mr. Ferrari. In response, Montejo told them that he was represented by counsel:

> They asked me if I would come with them to go clear up where I threw the gun at. So I said, Well, and I don't, I don't, I don't really want to go with you. He said, Do you have a lawyer? I said, yeah, I got a lawyer appointed to me.

Pet. App. 49a; JA 242.

Rather than verify whether this statement was true, the detectives pushed Montejo to allow an uncounseled interrogation, as they had done when Montejo asked for the assistance of counsel during his pre-appointment interrogations. *See supra* 3-4. In this instance, they told Montejo that he did not have a lawyer. As Montejo testified:

> He said, No, no, you don't. I said, Yeah, I think I got a lawyer appointed to me, and I guess that's where I messed up, when I said I think I got a lawyer appointed to me. He said, No, you don't, He said, I checked, you don't have a lawyer appointed to you.

Pet. App. 49a; JA 242.

The detectives then gave Montejo *Miranda* warnings. After he agreed to proceed, the detectives took Montejo from the St. Tammany Parish Sheriff's Office in their car. Pet. App. at 21a. Montejo's appointed counsel arrived at the Sheriff's Office to confer with his client shortly after the detectives took Montejo away. JA 180-81. Thus, Montejo's lawyer did not have the opportunity to consult with his

client before Montejo was interrogated on September 10th. JA 179-81.

With his lawyer unavailable to him, Montejo was pressured during the car ride with Detectives Hall and Galloway to write a letter — with a pen and paper the detectives gave him — to the victim's wife expressing remorse for his involvement in the murder. Pet. App. 20a-22a; *id.* at 22a n.49 (setting out text of letter); State's Ex. 76 (letter). At trial, Montejo testified that the detectives dictated much of the letter's content. Pet. App. 22a n.49; JA 246-49. The letter, for example, contained the term "simple burglary" — a classification of burglary specific to the state of Louisiana that was unlikely to be a term known to a layperson. Pet. App. 22a n.48; R. 2736-37 (Trial Tr. Mar. 8, 2005). Montejo testified that he did not know what simple burglary was at the time that he wrote the letter. JA 247. The Louisiana Supreme Court noted Montejo's testimony that Detective Galloway "suggested" most of the letter, and noted further that Detective Galloway did not testify at trial. Pet. App. 23a n.49.

After Montejo finished the letter to the victim's spouse, the detectives ended the car ride. Pet. App. 20a n.44. When they returned to the St. Tammany Parish Sheriff's Office, they found Montejo's lawyer waiting for them. JA 179-81. According to Detective Hall, the "pagers were going off and the cell phones were going off and we were being directed back to the investigation's bureau to meet with a public defender." JA 180. Detective Hall explained that when he met with the public defender, the attorney was "pretty upset that I had been out with Montejo

that afternoon, and he started getting on me pretty intently about having been retained as [Montejo's] counsel." JA 180-81.

### B. Proceedings Below

*The Trial*

On October 24, 2002, Montejo was indicted, along with Jerry Moore, on one count of capital murder. R. 0123. At a pretrial suppression hearing, defense counsel sought to have the letter Montejo wrote during the police-initiated interrogation on September 10, 2002 excluded from evidence on the ground that it was obtained in violation of the Sixth Amendment. The trial court ruled it to be admissible. Pet. App. 21a-22a.

The guilt phase of Montejo's trial began on March 5, 2005 and lasted four days. R. 2234. At trial, there was relatively little physical evidence that Montejo had killed Mr. Ferrari. Neither the murder weapon nor the money bag Mr. Ferrari had on the day of the murder were ever found. Pet. App. 20a n.44; *id.* 21a n.45. Nor did the State find any traces of blood spatter in Montejo's van or on any article of his clothing. *Id.* 8a-9a. No witness saw Montejo commit the crime. Although DNA evidence matching Montejo was found under the victim's fingernails, that evidence was consistent with Montejo's explanation at trial that he was involved in an altercation with the victim before the fatal shooting. JA 209-11.

Moreover, the police failed to follow leads that could have confirmed Montejo's account of the events. They did not trace the victim's phone records

to determine whether any outgoing calls had been made to D.P., the man identified by Montejo as the shooter and someone to whom Mr. Ferrari had introduced Montejo several days before the murder. JA 195-98, 268-70. Nor did they attempt forensics on a hair sample found at the scene of the crime, even though the crime laboratory detective at the scene admitted that he could not identify the race or gender of the owner of the hair without further testing and that, "if [he] had been the lead investigator," he might have found it helpful to do follow-up on the hair. R. 2542-43 (Trial Tr. Mar. 7, 2005), *see also* JA 270-72; R. 2542-43 (Trial Tr. Mar. 7, 2005).

Consequently, Montejo's "confession" letter to the victim's spouse was critical to the prosecution's case. The letter was admitted during Detective Hall's trial testimony, Pet. App. 21a-22a, and the prosecution made repeated references to it throughout the trial. JA 166, 290-91. In the opening statement, for example, the prosecution focused on the letter's importance as an admission of guilt. After describing the various places that Montejo went with the police during the September 10, 2002 interrogation, the prosecution stated:

> And most importantly, on the way back in, I'm so sorry.
>
> The defendant executes, and asks, can I have a pen and some paper, I want to write a letter to this lady and tell her I'm sorry, I am so sorry. And the defendant proceeds in his own handwriting to write a heartfelt letter

> describing how it was all an accident, it shouldn't have happened this way and he feels sorry.

JA 166. The prosecution also used the letter to impeach Mary Melancon, a character witness for Montejo and the only witness called by the defense. Ms. Melancon stated that she "didn't even know that [the letter] existed," JA 252, at which point the prosecution showed the letter to the jury, R. 2819-20 (Trial Tr. Mar. 8, 2005). The prosecution also focused the jury's attention on the letter during the rebuttal phase of closing argument, just prior to the jury's retiring to deliberate. JA 290-91.

The jury returned a verdict of guilty of first degree murder. R. 2913 (Trial Tr. Mar. 8, 2005). The penalty phase of the trial began the following morning and was completed before noon, with the defense case comprising a total of four pages of transcript. R. 2938-42 (Trial Tr. Mar. 10, 2005). The jury returned with a sentence of death, R. 2972-73 (Trial Tr. Mar. 10, 2005), and the trial court formally sentenced Montejo to death on May 13, 2005, Pet. App. 69a; R. 2980-82 (Trial Tr. May 13, 2005).[4]

*The Appeal*

Montejo appealed to the Louisiana Supreme Court, contending (among other things) that statements made during the interrogation of him by the St. Tammany Parish Sheriff's Office detectives on the evening of September 6th and early morning

---

[4] Montejo's co-defendant was tried and convicted separately, and was sentenced to life imprisonment without possibility of parole. Pet. App. 1a n.1.

September 7th after he requested counsel were obtained in violation of the Fifth Amendment, Appellant's Br. at 9-20, *available at* 2007 WL 4560160, and that the introduction of the letter written during the September 10th car ride after his right to counsel had attached and he had been appointed counsel violated the Sixth Amendment, *id.* at 21.

With respect to the Sixth Amendment claim, Montejo contended that the police-initiated interrogation on September 10th violated the rule of *Michigan v. Jackson*, 475 U.S. 625 (1986). Furthermore, because Montejo had informed the detectives who approached him on September 10th that he had a lawyer, Appellant's Br. at 25, and because the interrogating officers responded falsely that no lawyer had been appointed to represent him, a valid waiver of his Sixth Amendment rights could not possibly have occurred. *Id.* at 24-25. Accordingly, the introduction at trial of the letter resulting from the September 10 interrogation violated his Sixth Amendment rights. *Id.* at 27.

On January 16, 2008, the Louisiana Supreme Court affirmed. Pet. App. 58a-59a. The court recognized that the police tactics used during the September 6th and 7th interrogations presented a close question under the Fifth Amendment. Montejo's request for counsel was "unequivocal and unambiguous." Pet. App. 32a. The court also found that Detective Major's efforts to pressure Montejo to revoke that request "merit[ed] close scrutiny" because they could be construed as an attempt to elicit a response. *Id.* at 34a. The court noted further

that the defendant was visibly distraught and tired throughout the numerous hours of interrogation. *Id.* at 40a. Nevertheless, the court concluded that Montejo's agreement to resume interrogation was a valid waiver. *Id.* at 41a-42a.

Turning to the Sixth Amendment issue, the court acknowledged that Montejo's "right to counsel attached at the 72-hour hearing held on the morning of September 10, 2002, at which time indigent defense counsel was appointed to represent him." *Id.* at 47a. The court also acknowledged that the minute entry memorializing the hearing (no transcript of the proceeding was made) indicated unambiguously that the court had appointed counsel to represent Montejo. *Id.* The court noted, however, that the minute entry "[did] not show a response by the defendant," and that "[t]he State allege[d] that the defendant simply stood mute at this hearing and defendant does not allege that he made any statement at this hearing asserting his right to counsel." *Id.* The court then ruled that "something more than the mere mute acquiescence in the appointment of counsel is necessary" to trigger *Michigan v. Jackson*. *Id.* (internal quotation marks omitted). In other words, in the view of the Louisiana Supreme Court, although Montejo's "right to counsel had attached, he did not assert his right to counsel such that the prophylactic rule of *Michigan v. Jackson* would invalidate any waiver he would later make." *Id.* In reaching that result, the Louisiana Supreme Court gave no apparent consideration to Montejo's statements to the detectives seeking to interrogate him that: "I don't

really want to go with you," and "yeah, I got a lawyer appointed to me." Pet. App. 49a.

Finally, the court held that Montejo had waived his Sixth Amendment rights in response to police-initiated interrogation, Pet. App. 51a, notwithstanding that Montejo maintained that the interrogating officers had falsely informed him that no lawyer had been appointed to represent him, Pet. App. 49a n. 69, thus creating the impression that he had no lawyer to consult prior to the interrogation.

## SUMMARY OF ARGUMENT

The Louisiana Supreme Court's decision to deny Montejo the Sixth Amendment protections of *Michigan v. Jackson* lacks any grounding in common sense or this Court's precedents. The Louisiana Supreme Court conceded that Montejo's right to counsel had attached and that Montejo had been appointed counsel at the 72-hour hearing, the very purpose of which is to appoint counsel to indigent defendants. Yet almost immediately after he was appointed counsel — and before his lawyer even had a chance to meet him — the police initiated a custodial interrogation. Because Montejo had a lawyer when the police initiated their interrogation, that interrogation was a plain violation of Montejo's Sixth Amendment rights, and the resulting incriminating statements should never have been admitted at trial. *Michigan v. Harvey*, 494 U.S. 344, 352 (1990); *Patterson v. Illinois*, 487 U.S. 385, 390 n.3 (1988); *Jackson*, 475 U.S. 625; *McNeil v. Wisconsin*, 501 U.S. 171, 179 (1991). Accordingly,

Montejo's conviction and capital sentence cannot stand.

The Louisiana Supreme Court concluded that Montejo could not claim the protection of *Jackson* because Montejo had not made an affirmative statement "accepting" counsel during the appointment hearing. That reading of *Jackson* is illogical and contrary to governing precedent. There is no basis for equating a defendant's silence during the appointment of counsel with a defendant's decision to decline that counsel; to the contrary, the most logical and reasonable inference is that a defendant does not think that it is necessary to do anything else to secure the assistance of the attorney that has just been appointed to him. That is particularly the case where, as here, there is no indication that the defendant was informed that he was required to "affirmatively accept" the appointment of counsel or that he would lose the protections of the Sixth Amendment if he failed to do so.

Moreover, the Louisiana Supreme Court's approach cannot be reconciled with this Court's Sixth Amendment decisions, which make clear that once a defendant "has" or "obtains" an attorney, the rule of *Jackson* applies and the police are barred from initiating uncounseled interrogations. *Harvey*, 494 U.S. at 352; *Patterson*, 487 U.S. at 290 n.3. The Court's decisions uniformly presuppose that a defendant who has been appointed counsel has an attorney for purposes of the Sixth Amendment, and the Court has never suggested that a defendant who remains silent during an appointment hearing

forfeits the safeguards designed to protect the attorney-client relationship. Indeed, this Court has never held that an affirmative affirmation of counsel is necessary to enjoy the protections of the Sixth Amendment, and it even has suggested that those protections apply where a defendant's family members — *unbeknownst* to the defendant — obtain counsel on his behalf. *See Moran v. Burbine*, 475 U.S. 412, 428 (1986); *Patterson*, 487 U.S. at 297 n.9.

Finally, the Louisiana Supreme Court's approach is unfair and unworkable. The "affirmative acceptance" requirement would penalize those defendants who rely on a court's appointment of counsel as an affirmation of their right to counsel. The approach would also create intractable problems of administration, as it would make the protections of the Sixth Amendment turn on a highly-subjective and context-sensitive analysis of the defendant's statements and gestures (as well as the vagaries of transcription) during the appointment hearing. By contrast, a rule recognizing that a defendant who has been appointed an attorney has "obtained" an attorney for purposes of the Sixth Amendment would be easy to understand and administer for defendants, the courts, and the police.

Accordingly, the decision below should be overturned.

## ARGUMENT

### I. The Police May Not Initiate A Pre-Trial Interrogation Of A Defendant, Like Montejo, Who Has Counsel.

It is well established that once "a defendant obtains or even requests counsel," statements obtained from the defendant during subsequent police-initiated custodial questioning regarding the charge at issue (even if the defendant purports to waive his rights) are inadmissible. *Michigan v. Harvey*, 494 U.S. 344, 352 (1990) (citing *Patterson v. Illinois*, 487 U.S. 385, 390 n.3 (1988) (once the "accused has a lawyer" police may not initiate pre-trial questioning)). The rule described in *Harvey* and *Patterson* was established more than 20 years ago in *Michigan v. Jackson*, 475 U.S. 625 (1985). As the Court made clear in *Jackson*, such a rule is necessary to protect the defendant's "'right to rely on counsel as a medium between him and the State'" during custodial interrogations. *Id.* at 632 (quoting *Maine v. Moulton*, 474 U.S. 159, 176 (1985)). The conduct of the authorities who interrogated Montejo after he had a lawyer appointed to represent him was a direct violation of this Sixth Amendment rule.

Montejo was entitled to the protection of the Sixth Amendment when the police interrogated him after he was appointed counsel on September 10, 2002. Just last Term, the Court made clear that the Sixth Amendment right to counsel attaches "when the government has used the judicial machinery to signal a commitment to prosecute," and that a proceeding such as Louisiana's 72-hour hearing

triggers attachment of the right. *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2591 (2008). It is equally clear the police's pretrial interrogation of Montejo was a "critical stage" of the criminal process at which Montejo was entitled to counsel's assistance. *Id.* ("[T]he accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings . . . ."); *id.* at 2594 (Alito, J., concurring) (noting that pretrial interrogation is one of the "critical stages" long recognized by the Court); *see also Moulton*, 474 U.S. at 170 (after the Sixth Amendment right to the assistance of counsel has attached, a defendant has the right to the assistance of counsel at every "critical stage" of the prosecution).

The record in this case makes clear that Montejo's Sixth Amendment rights were violated when the police initiated interrogation of him after he obtained appointed counsel at the 72-hour hearing. At the time Montejo was interrogated on September 10, 2002, his Sixth Amendment right to counsel had attached and he in fact obtained an attorney "by appointment" only hours earlier. *See Patterson*, 487 U.S. at 290 n.3; *see also* Pet. App. 51a (Louisiana Supreme Court ruling that Montejo "was told counsel was being appointed for him" at the 72-hour hearing). When the detectives returned to the jail to question Montejo shortly after the hearing, they were presumed to know that he was represented by appointed counsel.[5] *Jackson*, 475 U.S. at 634 ("Sixth

[5] According to the Louisiana statute governing such proceedings, the very point of a 72-hour hearing is to provide counsel to indigent defendants. *See* note 6 n.2 *supra*.

Amendment principles require that we impute the State's knowledge from one state actor to another . . . . One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the state)."). The detectives initiated the subsequent questioning and the fruits of that questioning were introduced against Montejo at trial. Under settled law, "any statements obtained from the accused during subsequent police-initiated custodial questioning regarding the charge at issue (even if the accused purports to waive his rights) are inadmissible." *McNeil v. Wisconsin*, 501 U.S. 171, 179 (1991). Thus, the incriminating statements the detectives obtained during their interrogation on September 10, 2002 were obtained in violation of the Sixth Amendment and should not have been admitted into evidence.

## II. The Louisiana Supreme Court's "Affirmative Acceptance" Requirement Should Be Rejected.

Despite finding that Montejo's right to counsel attached at his 72-hour hearing and that Montejo had been appointed counsel, Pet. App. 47a, the Louisiana Supreme Court nevertheless affirmed Montejo's conviction and capital sentence because it concluded that *Jackson* does not protect a defendant who actually has a lawyer absent "'an actual, positive statement or affirmation of the right to counsel.'" Pet. App. 47a-48a & n.68 (quoting *Montoya v. Collins*, 955 F.2d 279, 283 (5th Cir. 1992)). The Louisiana Supreme Court's decision should be reversed because it lacks any support in logic or in this Court's precedents, sets a trap for the

unwary, and would create intractable problems of administration.

### A. The Louisiana Supreme Court's Approach Lacks A Logical Foundation.

The Louisiana Supreme Court's decision rests on the implausible assumption that a defendant who remains silent while a court is appointing counsel does not "accept" that appointment. Far from indicating a desire to forego counsel's assistance, the accused's silence in the face of a routine procedure appointing counsel surely reflects the perfectly logical and reasonable judgment that nothing more is needed to secure counsel's assistance. After all, indigent defendants in Louisiana are not asked whether they want a lawyer — they are told they have a lawyer. So they have no occasion at the hearing to express their desire for counsel's assistance. Nor are defendants informed that they must make an affirmative gesture of acceptance in order to secure the protections of the Sixth Amendment. So they have no reason to think that they will lose any Sixth Amendment protection if they do not expressly affirm their desire to be represented by the lawyer who has been appointed for them.

Nothing in the record in this case supports a different inference in Montejo's case. There is no suggestion that Montejo was asked during the 72-hour hearing whether he "accepted" the lawyer that had been appointed to represent him. Nor does the record indicate that he was otherwise made aware that he needed to "accept" the appointment in order

to secure his Sixth Amendment rights. And there is certainly nothing in the record indicating that he had "declined" the counsel being offered. In short, nothing at the hearing provides any basis to depart from the reasonable background understanding that silence constitutes acceptance of the counsel being offered. And any doubt on that score is dispelled by the evidence indicating that Montejo in fact understood that counsel had been appointed, and that he wanted the protections that counsel would provide when confronted by the St. Tammany Parish detectives on September 10, 2002. Pet. App. 49a; R. 2787 (Trial Tr. Mar. 8, 2005).

Further, the limitations on *Jackson* imposed by the Louisiana Supreme Court make no sense. If (as *Jackson* holds) an unfulfilled request for counsel triggers the constitutional protection against police-initiated interrogation, then actual appointment must necessarily do so as well. A defendant appointed counsel as part of a routine state judicial process simply has no need to ask for counsel (the act that triggered Sixth Amendment protection in *Michigan v. Jackson*) — as counsel has just been given to him — so nothing can plausibly turn on the defendant's failure to make such a request during the appointment hearing. In fact, the Louisiana Supreme Court's approach would lead to the anomalous result that defendants appointed counsel in States whose statutes provide that the defendant shall be asked whether he wants to be represented, *see*, *e.g.*, Cal. Penal Code § 859; Mich. Comp. Laws § 6.005(A), would receive the protections of the *Jackson* rule, while defendants in States such as

Louisiana that automatically appoint counsel without first asking the defendant would be left to vicissitudes of chance. Moreover, the reasons that justify the *Jackson* rule apply with equal force when a defendant actually has counsel. The risk of interference with the attorney-client relationship and the accused's ability to consult with counsel is equally strong whether a defendant has asked for a lawyer or has a lawyer — as the facts of this case vividly confirm. The opposite conclusion would lead to the perverse result that defendants who seek but do not obtain appointed counsel receive greater Sixth Amendment protection than do defendants who actually have counsel appointed for them.

In short, there is no basis to conclude that an accused's silence after appointment of counsel should be taken as a decision *not* to accept the appointment and to deal with the prosecution unaided. Although a defendant is free to "mak[e] an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone," *Patterson*, 487 U.S. at 291, the "initial election" must be made "knowingly and intelligently," *id.* A defendant's silence — especially where, as here, there is no indication that the defendant was warned about the possible consequences of his failure to make an affirmative statement accepting the appointment — cannot support the conclusion that the defendant has chosen to "go it alone" rather than rely on counsel as an intermediary in dealing with the prosecution.

### B. The Holding Below Is Erroneous Under Governing Precedent.

Unsurprisingly, the Louisiana Supreme Court's approach cannot be reconciled with this Court's precedents. This Court's decisions have consistently presupposed that the appointment of counsel is sufficient to invoke the Sixth Amendment bar against police-initiated interrogation.

This Court's decision in *Patterson v. Illinois* makes the point clearly. *Patterson* involved a defendant who had neither requested a lawyer nor had one appointed for him. The Court held that the police could interrogate a defendant under those circumstances provided that the defendant waived his right to an attorney under *Miranda*. This Court took pains to observe, however, that it was "a matter of some significance" that Patterson was not "an accused [who] *has* a lawyer." 487 U.S. at 290 n.3 (emphasis added). For once an accused has a lawyer, "a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." *Id.* *Patterson* specifically cited *Jackson*'s prohibition on police-initiated interrogations as one of the protections that arises when a defendant "has" a lawyer. *Id.* The case therefore unambiguously indicates that *Jackson* protects all defendants who have a lawyer.[6]

---

[6] In Sixth Amendment decisions preceding *Michigan v. Jackson*, the Court recognized that, once a defendant has counsel, the police may not interrogate a defendant in the absence of his counsel. *See*, *e.g.*, *Massiah v. United States*, 377 U.S. 201, 201 (1964) (holding that the State's surreptitious interrogation of

Likewise, in *Michigan v. Harvey*, 494 U.S. 344, 352 (1990), the Court found that the protections of *Jackson* were triggered by the appointment of counsel at Harvey's initial arraignment, and did not attribute any additional significance to a request for counsel. As the Court phrased it, "once a defendant *obtains* or even requests counsel . . . analysis of the waiver issue changes" and *Jackson* applies. *Id.* at 352 (emphasis added). *Id.* at 346. The significant fact in *Harvey* was that the defendant had a lawyer. The Court made the point that a defendant who "even requests counsel" should receive the same protection as a defendant who has counsel — not that defendants who request lawyers receive more

---

the defendant violated the Sixth Amendment, based on the mere fact that "[h]e retained a lawyer"); *Moulton*, 474 U.S. 159, 162, 176-80 (holding that the State's tape recording of defendant's telephone conversations with police agent violated the Sixth Amendment, where defendant had previously appeared in court to enter a plea of not guilty "represented by retained counsel"); *Brewer v. Williams*, 430 U.S. 387, 400-02 (1977) (invoking "the clear rule of *Massiah* . . . that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him" in holding that the direct interrogation of the defendant in the absence of his retained counsel violated the Sixth Amendment ). In *Jackson*, the Court cited *Massiah* and *Brewer* for the proposition that "a valid waiver of counsel rights should not be inferred from the mere response by the accused to overt or more subtle forms of interrogation or other efforts to elicit incriminating information." 475 U.S. at 635 n.9 (internal citations and quotation marks omitted). The Court explained, "In *Massiah* and *Brewer*, counsel had been engaged or *appointed* and the admissions in question were elicited in his absence." *Id.* (emphasis added).

Sixth Amendment protection than defendants who have been appointed lawyers.

The same situation arose in *United States v. Henry*, 447 U.S. 264, 269-75 (1980), where the Court held that the police's attempt to obtain statements surreptitiously from the defendant in the absence of his appointed counsel constituted "impermissible interference with the right to the assistance of counsel." Again, the Court imposed no requirement that the defendant affirmatively express a desire to rely on counsel. That Henry had been appointed counsel sufficed. *See id.* at 276 (Powell, J., concurring) ("The rule of *Massiah* serves the salutary purpose of preventing police interference with the relationship between a suspect and his counsel once formal proceedings have been initiated.").

In each of these cases, the dispositive facts were that (i) the defendant's Sixth Amendment right had attached and (ii) the accused in fact had a lawyer. None turned on whether the accused requested the assistance of counsel or expressed a preference to be interrogated only in the presence of counsel. If a defendant "has a lawyer," *Patterson*, 487 U.S. at 290 n.3, the *Jackson* rule applies, just as it does when a defendant asks for but does not receive a lawyer. The point of *Jackson*, after all, was not to provide superior protection for defendants who merely ask for lawyers. It was to ensure that defendants who ask for but have not yet obtained the assistance of counsel are not afforded inferior protection to defendants who actually have lawyers. *See Jackson*, 475 U.S. at 627 (noting that counsel had been appointed for the defendant in response to his

request, at arraignment, but that the police-initiated interrogation producing incriminating evidence occurred before appointed counsel had an opportunity to speak with the defendant).

The Louisiana Supreme Court's approach is also irreconcilable with *Moran v. Burbine*, 475 U.S. 412, 428 (1986). In that case, a criminal suspect whose Sixth Amendment rights had not yet attached was interrogated while being kept ignorant of the fact that a lawyer his family had obtained to represent him was trying to reach him to provide assistance during the interrogation. The Court held that such conduct was permissible because the suspect had not been arrested and his Sixth Amendment right to counsel had not attached. But the Court could not have been clearer that such interrogation is impermissible once the Sixth Amendment right attaches, even with a *Miranda* waiver. For "once the right *has* attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a 'medium' between [the suspect] and the State during interrogation." *Id.* at 428 (internal quotation marks omitted); s*ee also Patterson*, 487 U.S. at 296 n.9 (reciting this statement in *Moran* with approval). If a family member's decision to obtain counsel is sufficient to give rise to Sixth Amendment protections, then surely the State's decision to appoint counsel must be sufficient.

The conclusion that a defendant's silence effectively rejects rather than accepts appointment of counsel is also impossible to square with this Court's jurisprudence concerning when a criminal defendant may be deemed to have validly waived the right to

assistance of counsel. "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer." *Carnley v. Cochran*, 369 U.S. 506, 516 (1962). As *Carnley* establishes, without such a showing, there is no basis for concluding that a violation of a defendant's Sixth Amendment right to counsel can be excused by waiver. Yet that is precisely what the Louisiana Supreme Court's approach purports to do. For similar reasons, a defendant is permitted to proceed to trial pro se only after he has "be[en] made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta v. California*, 422 U.S. 806, 835 (1975) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). In sharp contrast, the starting point for the Louisiana Supreme Court's approach is nothing less than a presumption from "silence" that the defendant has opted to act without counsel.

In light of this Court's precedents, a strong majority of the state high courts to have addressed the question have concluded that appointment triggers the Sixth Amendment *Jackson* rule. *See, e.g.*, *State v. Dagnall*, 612 N.W.2d 680, 695 (Wis. 2000) (holding that "[t]o require an accused person to assert the right to counsel after the accused has counsel would invite the government to embark on a persistent campaign of overtures and blandishments to induce the accused into giving up his rights");

*Bradford v. State*, 927 S.W.2d 329, 335 (Ark. 1996) (explicitly overturning an earlier Arkansas Court of Appeals case that required affirmative invocation); *Holloway v. State*, 780 S.W.2d 787, 795 n.10 (Tex. Ct. Crim. App. 1989) (holding that "police initiated interrogation of an indicted accused who . . . has been appointed defense counsel" is impermissible, and that "the Sixth Amendment will impose higher waiver standards in those situations in which higher standards appear necessary to preserve the integrity of preexisting attorney-client relationships."); *Dew v. United States*, 558 A.2d 1112, 1116 (D.C. 1989) (finding "little, if any, room for an argument that the Supreme Court would permit a police-initiated request for a post-indictment waiver of counsel by a represented defendant, except through defense counsel"); *People v. Kidd*, 544 N.E.2d 704, 713 (Ill. 1989) (relying on the statement in *Patterson* that "a distinct set of constitutional safeguards" takes effect "[o]nce an accused has a lawyer" in holding that the police "knowingly circumvented defendant's right to counsel" by obtaining incriminating statements in the absence of his appointed counsel").

The Louisiana Supreme Court, however, followed the reasoning of the Fifth Circuit in *Montoya v. Collins* in holding that Montejo's silence meant that he did not "accept" his appointment of counsel. *See* Pet. App. 47a-48a; *Montoya*, 955 F.2d at 283. The *Montoya* court read the phrase "accepted by appointment" in this Court's *Patterson* decision to create a rule under which an appointment of counsel is ineffective unless the defendant affirmatively indicates acceptance. *See Patterson*, 487 U.S. at 290

n.3. But that reading is wrong. If anything, the Court's choice of words suggests the opposite. *Patterson* did not state that Sixth Amendment protection is triggered when a defendant "chooses to accept" appointed counsel, or even that the protection is triggered when the defendant "accepts an appointment" of counsel. Rather, the opinion uses the phrase "accepted by appointment," indicating that appointment itself connotes acceptance. *Id.* That is doubtless why in *Patterson*, and in later cases, the Court has consistently said that the *Jackson* rule is triggered when a defendant "retain[s]" or "obtains" counsel — rather than when a defendant asks for counsel. *Id.*; *Harvey*, 494 U.S. at 352.[7]

In short, this Court's cases simply leave no room for the Louisiana Supreme Court's approach to limiting *Jackson*. To be sure, three members of the Court have questioned the breadth of *Jackson* on the ground that it may in some circumstances "override" the "free choice of a suspect [whether] to remain silent" when interrogated in the absence of appointed

---

[7] In *Montoya*, the Fifth Circuit dismissed *Harvey*'s reference to "obtaining" an attorney as being inapplicable to a defendant who is appointed an attorney but remains silent during the hearing. *Montoya*, 955 F.2d at 284. According to the Fifth Circuit, that language "is reasonably construed to refer to situations where a defendant 'obtains' counsel after, and because, he 'requests' counsel." *Id.* But there is no basis, in the *Harvey* decision or elsewhere, for limiting the meaning of "obtains" to refer only to situations where counsel is obtained because of a request by the defendant. *Harvey* used the terms "obtains" and "even requests" in the disjunctive as two alternative triggers for Sixth Amendment safeguards.

counsel. *See Texas v. Cobb*, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring). Whether a narrowing of *Jackson* is appropriate in light of these concerns would presumably depend upon whether the Court concludes that any cost to "free choice" that results from the current rule outweighs the values of adhering to *stare decisis* and maintaining a clear-edged, bright-line precept for the regulation of police conduct. *Cf. Dickerson v. United States*, 530 U.S. 428, 444 (2000). However, any such reconsideration must be left for another day because this case is the polar opposite of a "free choice" situation. *This* case is one in which the police acted "in a calculated way to undermine" the accused's constitutional protections. *Cf. Missouri v. Siebert*, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring in judgment).

Montejo repeatedly made clear to his interrogators that he did not choose to deal with them in the absence of a lawyer, but the police used a succession of tactics to persuade him to reverse that choice. When he first told them he did not wish to speak with them without a lawyer, they responded that they would not recommend his insisting on obtaining counsel. When he later told them again during an intense interrogation that "I would like to answer no more questions unless I'm in front of a lawyer," they undertook to teach him the danger of such persistence by penalizing his renewed request with an immediate charge of first-degree murder. Then after a lawyer had been appointed to represent him, they undertook to persuade him of the futility of requesting the lawyer's assistance in dealing with them, by falsely informing him that no such

appointment had been made. And they then quickly removed him from the police station for further interrogation (which resulted in the incriminating evidence at issue here) before his appointed counsel had any opportunity to meet with him, thus depriving him of any opportunity to consult with counsel to discuss the advisability of further discussion with the police. *Cf. Cobb*, 532 U.S. at 172 n.2. Whatever the merits of the criticism of *Jackson* in other circumstances, there is manifestly no reason for refusing to follow it here.

### C. The Louisiana Supreme Court's Rule Is Unfair And Not Administrable.

Even if the Louisiana Supreme Court's approach were not foreclosed by this Court's precedents (and it is), reversal is still warranted because Louisiana's rule is unfair and would create unacceptable problems of administration.

*First*, the Louisiana Supreme Court's approach creates a trap for the unwary. In situations such as the one presented in this case, an accused who desires to exercise his right to counsel would be expected to remain silent, reasonably believing that the appointment itself obviates any need to take additional steps to secure the protections that the appointment of counsel are meant to provide. The defendant is neither asked whether he or she wants a lawyer nor told that the full scope of Sixth Amendment protection will not arise absent an affirmative statement accepting the appointment. Under the Louisiana Supreme Court's approach, defendants who rely on the appointment of counsel

by the court as an affirmation of their right to counsel thus do so, unknowingly, at their peril. They have no reason to think that their silence will forfeit an important constitutional protection. And they have every reason to remain silent, given that they have just been appointed a representative whose responsibility it is to speak for them in the criminal process.

*Second*, the Louisiana Supreme Court's approach would generate intractable problems of administration. Under that approach, determining whether a defendant's Sixth Amendment right to counsel was invoked would require a context-sensitive "totality of the circumstances" analysis in every case. Courts would have first to determine the historical fact of what defendants actually said respecting their desire to accept an appointment of counsel and then decide whether whatever was said amounted to acceptance or affirmation of the appointment. Making such factual determinations will be particularly vexing because most jurisdictions do not transcribe the initial hearings at which counsel is appointed. Disputes will therefore have to be resolved on the basis of after-the-fact swearing contests. This evidentiary void is not a design flaw; rather, it reflects the natural conclusion that the defendant has accepted the counsel appointed, thus obviating the need to record or further elicit the defendant's choice.[8]

---

[8] Indeed, Louisiana's procedures for recording minute entries of the appointment of counsel in capital cases illustrate precisely this problem. The Louisiana Code of Criminal Procedure requires that the court minutes "show either that the defendant

The protection of a defendant's Sixth Amendment right to counsel should not turn on the kinds of highly subjective and idiosyncratic determinations the Louisiana Supreme Court's approach would require. *See*, *e.g.*, *Rothgery*, 128 S. Ct. at 2588 (rejecting a rule tying attachment of the right to counsel to prosecutorial awareness, because such a rule would be "wholly unworkable," "impossible to administer," and "have the practical effect of resting attachment on such absurd distinctions as the day of the month an arrest is made"). Thus, the Court should refuse here to undermine the clarity and simplicity of *Jackson*'s bright line approach, just as it refused in *Moran v. Burbine* to modify the *Miranda* rule to require the police to provide additional warnings when a custodial suspect's lawyer is trying to reach him. In *Moran*, the Court held that such additional requirements would "clearly undermine" *Miranda*'s "central virtue of informing police and prosecutors with specificity . . . what they may do in conducting [a] custodial interrogation, and of

---

was represented by counsel or that he was informed by the court of the defendant's right to counsel, including the right to court-appointed counsel, and that he waived such right." La. Code Crim. Proc. Ann. art. 514. The Louisiana Code's requirement that the record contain minute entries of either appointment of counsel or informed waiver of counsel assumes that criminal defendants are in only one of two possible positions: Either the defendants have been appointed counsel, or they have waived counsel. The provision does not account for the need to record a third category of defendant who has been appointed counsel but has not ratified that appointment. Thus, the minute requirements do not create the kind of record necessary to implement the Louisiana Supreme Court's approach to affirmative acceptance of counsel.

informing courts under what circumstances statements obtained during such interrogations are not admissible." *Id.* at 426 (internal quotation marks omitted; alternations in original); *see also Berkemer v. McCarty*, 468 U.S. 420, 430 (1984) (refusing to adopt a proposed exception to the *Miranda* rule because doing so would "substantially undermine" the *Miranda*'s "crucial advantage" of clarity); *Dickerson*, 530 U.S. at 444 (declining to overrule *Miranda*, in part because the alternative of case-by-case assessments of voluntariness would be "more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner."). The same reasoning applies here.[9]

Thus, the Louisiana Supreme Court's approach is insupportable and should be rejected.

### D. Even If An Affirmative Acceptance Were Required, Montejo Affirmatively Accepted Counsel.

Even if an accused were required to make some kind of an affirmative statement to secure the protections of the Sixth Amendment against police-initiated interrogation, Montejo made such a statement. When the detectives approached him on September 10, 2002, after he had been appointed counsel at his 2-hour hearing, Montejo told them that he had a lawyer and did not want to speak

---

[9] A rule requiring an affirmative act of acceptance would also create uncertainty for police officers, who will have to determine whether a particular defendant affirmatively accepted counsel before they can begin interrogation.

without his lawyer present. Pet. App. 49a; JA 242 (Testimony of Montejo) ("I don't really want to go with you . . . I got a lawyer appointed to me. . . . I think I got a lawyer appointed to me.").[10] If Montejo had somehow not "accepted" his appointed counsel prior to the officers' approach, his unambiguous expression of a desire not to accompany the police absent his appointed counsel surely was sufficient acceptance. Thus, even under the Louisiana Supreme Court's erroneous approach, there was no basis for upholding the police-initiated interrogation after Montejo had counsel.

* * *

---

[10] The Louisiana Supreme Court noted that Montejo and one of the officers who conducted the interrogation on September 10th offered differing accounts of what was said about Montejo's appointed counsel, but the court made no factual findings as to which version was correct. *See* Pet. App. 21a nn.46 & 47; *id.* at 49a-50a. In any event, Detective Hall's testimony was in some respects consistent with Montejo's. For example, Detective Hall stated that Montejo "told him he had not been contacted by an attorney," *id.* at 50a, when the officers began to interrogate him — which apparently is true, as Montejo's court-appointed lawyer was trying *unsuccessfully* to reach Montejo while the police were interrogating him. *See id.* 21a n.46 ("Detective Hall was confronted by indigent defense counsel when he returned Montejo to jail); *see also* JA 180-81 (testimony of Detective Hall) (explaining that Montejo's attorney "was pretty upset that I had been out with Montejo that afternoon, and he started getting on me pretty intently about having been retained as his counsel"). According to the Louisiana Supreme Court, Detective Hall also "testified that, at some point during this excursion," — *i.e.*, *after* the police had improperly obtained the "waiver" — "he asked Montejo whether he had a lawyer or anyone in his family had contacted him about retaining one for him, and Montejo responded negatively." Pet. App. 21a n.46.

Because the police-initiated interrogation after Montejo had been appointed counsel violated the Sixth Amendment, the "confession" letter should never have been admitted at trial, and Montejo's conviction must be overturned.

## III. This Court Should Reject The State's Harmless Error Argument.

In its brief in opposition to the petition for certiorari, the State suggested that the judgment of the Louisiana Supreme Court should be affirmed because the violation of Montejo's Sixth Amendment rights was harmless error. Br. in Opp'n to Pet. for Writ of Cert. at 21-22. That suggestion should be rejected.

Because the Louisiana Supreme Court did not undertake a harmless error analysis, this Court would generally remand rather than consider the harmless error question in the first instance. *See, e.g.*, *Sandstrom v. Montana*, 442 U.S. 510, 526 (1979); *Carella v. California*, 491 U.S. 263, 266 (1989); *Neder v. United States*, 527 U.S. 1, 25 (1999); *Dobbs v. Zant*, 506 U.S. 357, 359 n.* (1993) (per curiam).

Here, however, the error plainly was not harmless. Because the issue is presented on direct review, the *Chapman* standard applies. *See Chapman v. California*, 386 U.S. 18 (1967). Under *Chapman*, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless, beyond a reasonable doubt." *Id.* at 24; *see also Fry v. Pliler*, 127 S. Ct. 2321, 2325 (2007); *Neder*, 527 U.S. at 15-16; *Sullivan*

*v. Louisiana*, 508 U.S. 275, 278-79 (1993). It is the State's burden to prove that the error was harmless. *See Sullivan*, 508 U.S. at 279; *Chapman*, 386 U.S. at 24.

The State cannot meet that stringent burden. Montejo's letter amounts to a confession that he committed the crime; it is difficult to imagine evidence more highly probative of guilt. *See Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (alterations in original) ("[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct.").

In this instance, moreover, the confession was particularly powerful because of the absence of physical evidence to show that Montejo had committed the murder. As noted, *see supra* 10-11, neither the murder weapon nor the victim's money bag was ever found, and no blood was found in Montejo's car or on his clothing. Moreover, the police had refused to investigate seriously Montejo's contention that another individual had shot the victim.

It is therefore unsurprising that the prosecution relied heavily upon this letter throughout the trial, raising it during its opening statement, the testimony of a key witness, and its closing statement. The prosecution's opening statement repeatedly and dismissively invoked what it referred to as Montejo's "I'm so sorry" defense. *See* JA 166 ("The defendant .

. . write[s] a letter to this lady and tell[s] her I'm sorry, I am so sorry. . . . [I]t shouldn't have happened this way and he feels sorry."); R. 2258-59 (Trial Tr. Mar. 5, 2005) (Wait, wait, wait, we got another version . . . the I am so sorry version."); R. 2259 (Trial Tr. Mar. 5, 2005) ("So it will be up to you to evaluate the . . . I-am-so-sorry version. . . ."); R. 2261 (Trial Tr. Mar. 5, 2005) ("We also then get the I'm-so-sorry version"). By the end of the prosecution's opening statement, the prosecution was using the letter not just to incriminate Montejo but to mock him. R. 2262 (Trial Tr. Mar. 5, 2005) ("It was a close contact wound. I am so sorry.").

The prosecution next used the letter to impeach the testimony of Mary Melancon, the only witness called by Montejo to testify on his behalf. After being shown the letter, Melancon testified that she "didn't even know that [the letter] existed" JA 252. The prosecution then showed the letter to the jury. R. 2819-20 (Trial Tr. Mar. 8, 2005).

Finally, during the rebuttal portion of closing argument — the last statement the jury heard before it began deliberating — the prosecution again returned to "I am so sorry" and invited the jury to credit Montejo's confession while at the same time calling him a liar. *See* JA 290-91 ("[Y]ou know [it] is not to be true" that "the finest of St. Tammany Parish police officers lied, deceived you, because they coerced an apology letter from the defendant."); R. 2834 (Trial Tr. Mar. 9, 2005) ("A man died for that shit, you are touching my heart. . . . Another lie. I am so sorry.").

In sum, as a result of the erroneous admission of the letter, the prosecution was able to raise highly damning evidence at all stages of the trial. Such an error could not possibly have been harmless beyond a reasonable doubt. *See Sullivan*, 508 U.S. at 279.

## CONCLUSION

The judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

JELPI P. PICOU
G. BEN COHEN
ROBERT J. SMITH
THE CAPITAL APPEALS PROJECT
636 BARONNE STREET
NEW ORLEANS, LA 70113
(504) 529-5955

DONALD B. VERRILLI, JR.
*Counsel of Record*
IAN HEATH GERSHENGORN
KATHERINE A. FALLOW
MATTHEW S. HELLMAN
THOMAS H. KIM
ADAM G. UNIKOWSKY*
CAROLINE D. LOPEZ*
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Suite 900
Washington, DC 20001
(202) 639-6000

* Not admitted in DC; supervised by principals of the firm

November 17, 2008