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

# REPLY 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

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

**CONSTITUTIONAL PROVISIONS AND STATUTES**

The State offers no coherent defense of the Louisiana Supreme Court's ruling that a defendant must either request counsel or affirmatively "accept" appointed counsel to trigger the Sixth Amendment protections of *Michigan v. Jackson,* 475 U.S. 625 (1986). Its brief does not come close to refuting Petitioner's showing that the Louisiana Supreme Court's approach is illogical, unworkable, and unfair. *See* Pet. Br. 20-35. Nor is there merit to the State's perfunctory suggestion that an accused should be required to express a specific desire for counsel's assistance during interrogation in order to trigger Sixth Amendment protection. *Jackson* rejected that argument. 475 U.S. at 632-33. The State does not even acknowledge that its suggestion would require overruling *Jackson*, much less justify such a drastic step.

## I. The State Advances No Compelling Argument In Defense of the Louisiana Supreme Court's Approach.

As Petitioner's opening brief demonstrated, the Louisiana Supreme Court's approach to this case has no basis in logic or common sense, or in this Court's precedents. The State's response fails at every level.

1. The State does not even attempt to defend the Louisiana Supreme Court's implausible assumption that an accused who silently accepts appointment of counsel has no desire for counsel's assistance in dealing with the authorities during critical stages of prosecution. In particular, the State does not explain why it is reasonable to expect an accused to do anything other than stand silently while counsel is

appointed at a 72-hour hearing. In Louisiana, as in many other jurisdictions, the system for the appointment of counsel operates routinely upon the premise that an accused who cannot afford a lawyer wants one appointed. It is not structured so as to demand or even to provide an occasion for the accused to respond when counsel is appointed. *See* Br. *Amicus Curiae* of The Louisiana Public Defenders Ass'n ("LPDA Br.") at 4-8.

To obtain the benefit of *Jackson* under the Louisiana Supreme Court's "affirmative acceptance" approach, an accused would have to act in a manner that is manifestly out of keeping with the norms of these proceedings. In many jurisdictions, defendants are admonished not to speak except in response to questions from the court and are warned that anything they say can be used against them. *See United States v. Mullins*, 315 F.3d 449, 455 (5th Cir. 2002) ("routine instructions to defendants regarding the protocols of the court often include the admonition that they are to address the court only when asked to do so"); *see also* Br. *Amicus Curiae* of The Nat'l Legal Aid & Defender Ass'n *et al.* ("NLADA Br."), at 22-25. It would be unreasonable to expect anyone to interject a request for counsel, or an affirmative acceptance of appointment, under such circumstances. It is particularly unreasonable to expect such actions from indigent criminal defendants who, as a group, are poorly educated and have high levels of "learning disabilities and mental impairments." *Halbert v. Michigan*, 545 U.S. 605, 621 (2005).

In short, it defies common sense to infer from a defendant's silence in response to the appointment of counsel that the defendant has elected to go it alone rather than to rely on counsel's assistance during critical stages of the prosecution.

2. The State also fails to address the many practical difficulties inherent in the Louisiana Supreme Court's approach. To begin with, the State cannot deny that the Louisiana Supreme Court's approach will generate an unending flow of cases adjudicating the question of what suffices to trigger the right. The Louisiana Supreme Court required "something more than mere mute acquiescence in the appointment of counsel." Pet. App. 47a (internal quotation marks omitted). The test the Fifth Circuit proposed in *Montoya*, which the Louisiana Supreme Court cited with approval (Pet. App. 47a n.68), was "some kind of positive statement or other action that informs a reasonable person of the defendant's desire to deal with the police only through counsel," even if such a statement falls short of an unequivocal statement such as "I want a lawyer." *Montoya v. Collins*, 955 F.2d 279, 283 (5th Cir. 1992) (internal quotation marks omitted). Would an accused meet either or both of these amorphous standards by nodding approvingly when counsel is appointed? By thanking the presiding magistrate for the appointment? By filling out an affidavit of indigency, the purpose of which is to establish an entitlement to appointed counsel (as occurred in *Michigan v. Jackson*)? By meeting with the appointed lawyer, telephoning the appointed lawyer from prison, writing the appointed lawyer a letter, or by signing a

retention agreement? By responding to police-initiated interrogation with a statement such as "I think I have a lawyer"?

Even worse, the basic factual issues concerning what the accused actually said and did would typically have to be decided in the absence of any reliable contemporaneous record. Thus, an accused's entitlement to the protections of *Jackson* could well depend on whether the local practice is for court clerks to transcribe fully or only summarily what happened during an initial hearing appointing counsel (or whether minute orders are even made in a particular jurisdiction).[1]

The State also fails to respond to Petitioner's point that under the Louisiana Supreme Court's approach pure happenstance will often dictate whether *Jackson* applies. In some states, the law requires magistrates at initial hearings to ask an accused whether he or she wants counsel appointed. *E.g.*, Cal. Penal Code § 859 (2008) (magistrate shall "ask the defendant if he or she desires the assistance of counsel"); N.J. R. Crim. P. 3:4-2(b)(4) (judge must

---

[1] Initial hearings are seldom transcribed or recorded. Rather, as *amicus* NLADA explains, "the focus of these initial proceedings is often on processing crowded dockets as efficiently as possible," to the point that defendants are often dealt with *en masse* rather than individually. NLADA Br. at 25-26. Thus, in addition to the disparities in transcription, an accused's entitlement to the protections of *Jackson* could turn on whether the pressures of a relentlessly heavy docket result in magistrates rushing through the procedure, instead of ascertaining whether each individual accused seeks the assistance of counsel.

"ask the defendant specifically whether he or she wants counsel and record the defendant's answer on the complaint"); *see* Br. *Amicus Curiae* of The Nat'l Ass'n of Criminal Defense Lawyers *et al.* ("NACDL Br."), at 14-15; NLADA Br. at 13. In other states, including Louisiana, counsel is appointed automatically upon a showing of (or sometimes the assumption of) indigency on the part of the accused. *See* NACDL Br. at 15; NLADA Br. at 8-13. Under the Louisiana Supreme Court's approach, criminal defendants prosecuted by states in the former category will receive the protection of *Michigan v. Jackson* because they will be asked whether they want the assistance of counsel. But defendants prosecuted in states in the latter category will not be protected because the state-prescribed procedures do not involve any request to the defendant and thus do not elicit any affirmative statement that would trigger *Jackson*.

In addition, in Louisiana and many other states, defendants who are physically or mentally incapacitated do not participate in the 72-hour hearing at all and thus have no opportunity either to request counsel or to affirmatively signal their acceptance of the appointment. La. Code Crim. Proc. Ann. art 230.1(A). There are also significant differences among jurisdictions in terms of whether the defendant appears in person at the initial hearing (or via remote video link), and the extent to which public defender offices can afford to detail lawyers to cover initial hearings – which will affect the likelihood that defendants will be informed that they must request counsel or affirmatively indicate

their acceptance of appointed counsel in order to attain the full measure of Sixth Amendment protection. *See* LPDA Br. at 5-6. The State offers no justification for these myriad forms of disparate treatment based on matters of chance and circumstance that would result from the Louisiana Supreme Court's approach.

Finally, and contrary to the State's contention Resp. Br. 13-14, the factual questions and ambiguities created by the Louisiana Supreme Court's approach will leave the police without any clear sense of when they may permissibly initiate interrogation. By contrast, under the "acceptance by appointment" rule, every officer would know that upon appointment, a defendant is now represented and that all communications would have to be either initiated by the defendant or occur in the presence of the defendant's counsel. This bright-line rule provides salutary guidance to all police officers because it requires no additional research on the part of the individual detective. *See Dickerson v. United States*, 530 U.S. 428, 444 (2000); *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (refusing to modify the *Miranda* rule to require additional warnings when a custodial suspect's lawyer is trying to reach the suspect, because doing so would "clearly undermine the decision's central virtue of informing police and prosecutors with specificity . . . what they may do in conducting [a] custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogations are not admissible" (internal quotation omitted; alterations in original); *see also* Pet. Br. 34-35.

3. Given these many problems, it is unsurprising that the State finds no genuine support for its position in this Court's precedents.

In particular, the State's reliance on *Patterson v. Illinois*, 487 U.S. 285 (1988), ignores what the Court actually said in that case. *Patterson* turned on the fact that the defendant had not made an "initial election" to rely on counsel's assistance during the critical stages of the criminal process, but instead had decided to "go it alone." *Id.* at 291. The absence of that "initial election" was critical to the Court's decision to uphold the defendant's waiver in response to police-initiated interrogation. At the same time, the Court made clear that "a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect" once a defendant "has a lawyer." *Id.* at 290 n.3. Indeed, the Court noted that "the analysis changes markedly once an accused even *requests* the assistance of counsel," making clear that the significance of the request was that it entitled the accused to be treated as though he already had a lawyer for Sixth Amendment purposes, not that the request itself had any independent significance for defendants who already have lawyers. *Id.* (emphasis in original). *See also Michigan v. Harvey*, 494 U.S. 344, 352 (noting that "once a defendant obtains or even requests counsel . . . analysis of the waiver issue changes"); *Carnley v. Cochran*, 369 U.S. 506, 513 (1962); Pet. Br. 25-26. An accused who has been appointed counsel can hardly be said to have made an "initial election" to "go it alone."

The State's reliance on *Moran v. Burbine*, 475 U.S. 412 (1986), is even more perplexing. The State places great stock in the fact that *Moran* "rejected an argument that the *existence* of an attorney-client relationship somehow triggered the Sixth Amendment right to counsel." Resp. Br. 12-13. But the critical distinction at issue in *Moran* – which the State ignores – was between interrogations that occur before adversarial proceedings have commenced and those that occur after. As *Moran* made clear, in the former situation the Sixth Amendment right has not yet attached, so a defendant would have no basis for arguing that an alleged interference with the attorney-client relationship violated the defendant's right to counsel. *Moran*, 475 U.S. at 428-29. But "once the right *has* attached" – as it indisputably had here – "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 the interrogation." *Id.* at 428 (emphasis in original; internal quotation marks omitted; alterations in original). The Court emphasized this very point again in *Patterson*, 487 U.S. at 296 n.9, noting that "in the Sixth Amendment context" the waiver the police obtained in *Moran* would not be valid, even though it satisfied *Miranda.*

The same is true about *Maine v. Moulton*, 474 U.S. 159 (1985). In *Moulton*, the defendant appeared in court, "represented by retained counsel," to enter a plea of not guilty. 474 U.S. at 162. Later, a cooperating witness surreptitiously tape-recorded his conversations with the defendant. The Court held

that the use of those recordings at trial violated the Sixth Amendment because the right had attached and the defendant was represented by counsel at the time the secret recordings were made. *Id.* at 176. The Court ascribed no significance to the question whether the defendant had invoked the right to counsel's assistance. The prosecution's conduct violated the Sixth Amendment because it denied the defendant the opportunity to consult with his counsel and the right to have his counsel present during the interrogation.[2] *Id.* at 176, 177.

The State's reliance on *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991), is similarly misplaced. Quoting *McNeil*, the State suggests that the consequence of Petitioner's position is that suspects would be "'unapproachable . . . even though they have never expressed any unwillingness to be questioned.'" Resp. Br. 14 (quoting *McNeil*, 501 U.S. at 181) (ellipses in original). But that quotation omits the critical limiting language making clear that the Court was talking about the ability of the police to approach a suspect for "other crimes" for which the

---

[2] The fact that *Moulton* did not turn on whether the defendant had invoked his right to counsel gives the lie to an argument made by the State *amici*. They contend that *Patterson's* acknowledgement that a "distinct set of constitutional safeguards" once an accused "has a lawyer" still requires that the defendant affirmatively invoke his right to counsel to get those protections. Br. *Amicus Curiae* of N.M. *et al.* ("States Br.") at 24 (citing *Patterson*, 428 U.S. 290 n.3). The *amici* base their claim on the fact that *Patterson* cites *Moulton* (along with *Jackson*) in this passage. *Id.* But since neither *Moulton* nor *Jackson* turned on whether the defendant had, as opposed to requested, a lawyer, the *amici's* argument fails.

suspect had not been charged. *McNeil*, 501 U.S. at 181. In *McNeil*, it was undisputed that the police could not approach an accused outside counsel's presence to initiate interrogation regarding an offense for which the accused was being prosecuted. *Id.* at 175. Notably, the defendant in *McNeil* accepted counsel by appointment, and there was no indication that he ever requested counsel. *See State v. McNeil*, 454 N.W.2d 742, 744 (Wis. 1990) ("The defendant appeared at his initial appearance [for the charged offense]. There he was represented by an attorney from the public defender's office. The record does not reveal whether he requested counsel at his initial appearance, only that he appeared with counsel at that appearance.").

Far from supporting the State, the Court's discussion of *Jackson* in *McNeil* confirms that the Louisiana Supreme Court's approach is irreconcilable with this Court's precedents. *McNeil* explained that the point of *Jackson* was not that a defendant's request to rely on counsel at a first court appearance amounted in fact to an expressed desire to have counsel present during later interrogation, "but that it *did not have to*, since the relevant question was not whether the *Miranda* 'Fifth Amendment' right had been asserted, but whether the Sixth Amendment right to counsel had been *waived*." *McNeil*, 501 U.S. at 179. The Court further explained that because "our 'settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel, . . . we *presume* that the defendant requests a lawyer's service at every

critical stage of the prosecution.'" *Id.* (quoting *Jackson*, 475 U.S. at 633 (emphasis added by *McNeil* Court; alterations in original)). What the State advocates here is precisely the opposite: inferring from the defendant's silence a presumption that the defendant has chosen to go it alone. That approach flies in the face of *Jackson*'s core holding, as well as the well-established principle that presuming waiver of the Sixth Amendment right to counsel "from a silent record" is impermissible. *See Carnley,* 369 U.S. at 516 (assuming from a silent record that the trial judge made an "offer of counsel which the petitioner declined" or that the defendant "was willing to forego" his right to counsel would be "wholly at war with the standard of proof of waiver of the right to counsel").

Thus, the Louisiana Supreme Court's decision cannot be affirmed without overruling the core holding of *Michigan v. Jackson*. As will be shown, that is a step this Court should not take.

## II. This Court Should Not Overrule *Michigan v. Jackson*.

In addition to offering its failed defense of the Louisiana Supreme Court's reasoning, the State also suggests (though only in an offhand way) that the Sixth Amendment should provide an accused no greater protection than does the Fifth Amendment rule of *Edwards v. Arizona*, 451 U.S. 477 (1981). Resp. Br. 14-16. The State does not acknowledge that its suggestion would require wholesale revision of Sixth Amendment law, including overruling *Michigan v. Jackson*. Nor does the State point to

any "special justification" that is required for this Court to overrule its longstanding precedent. *Dickerson*, 530 U.S. at 443. Therefore, and for the reasons that follow, this case provides no basis for overruling *Michigan v. Jackson*.

1. The key holdings of *Michigan v. Jackson* are now more than two decades old and have been applied without difficulty in myriad cases. But while the State's argument cannot be squared with *Jackson*, the State has not asked this Court to overrule the precedent. That omission is sufficient by itself to require adherence to *stare decisis*. *United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 855, 856 (1996). Nor has the State attempted to demonstrate the required "special justification" for departing from *stare decisis*. *See Dickerson*, 530 U.S. at 443 ("[T]he doctrine [of *stare decisis*] carries such persuasive force that we have always required a departure from precedent to be supported by some special justification."); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). The State makes no effort to show that *Jackson* has proven unworkable in practice or has had its legal foundations destroyed or substantially eroded by other developments in the law or is otherwise an appropriate candidate for overruling. *See Dickerson*, 530 U.S. at 443 (finding no special justification given that "doctrinal underpinnings" of precedent remained intact); *Randall v. Sorrell*, 548 U.S. 230, 243-44 (2006) (plurality) (special justification arises where precedent is "legal anomaly" or "circumstances have changed . . . radically"); *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965) (special justification arises

where precedent is "unworkable in practice"). Overruling a precedent of this Court is a serious matter. It should not be contemplated where, as here, a litigant makes no effort to show that such a drastic step is warranted.[3]

2. *Jackson* should not be reconsidered in this case. Petitioner recognizes that three members of the Court have questioned the logic of the broad rule of *Jackson* on the ground that in some circumstances it may "override" the "free choice of a suspect [whether] to remain silent" when interrogated in the absence of appointed counsel and thus may work *against* "the *Edwards* rule[, which] operates to preserve the [suspect's] free choice" *Texas v. Cobb*, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring). For this reason, the Court might find occasion to reconsider the parameters of *Jackson*'s ban on interrogation in a case where the application of that ban *does* "override" a suspect's "free choice" to deal with the police directly rather than through the mediation of counsel. Any such change to *Jackson* would require a careful weighing of any harm to the interests identified in Justice Kennedy's concurrence as compared to the values of adhering to *stare decisis* and the benefit of *Jackson*'s clear and administrable rule for regulating police conduct. *Cf. Dickerson*, 530 U.S. 428.

But this case presents no occasion for making such a reassessment. On the facts, this case is the polar opposite of the kind of "free choice" situation

---

[3] Nor did the State advance any such argument in the Louisiana Supreme Court.

before the Court in *Cobb*. The defendant in that case had been represented by counsel for more than a year before he made the confession that was the subject of that case. He obviously had ample opportunity to consult with his appointed counsel about whether and how to deal directly with the investigating authorities. He was free on bond during the period in question, and thus not subject to the coercive and debilitating pressures that long-term incarceration inflict. And there was no indication that Cobb was misled about the availability of counsel or otherwise subjected to aggressive interrogation techniques. *Cobb*, 532 U.S. at 165-66.

Here, in contrast, the police acted "in a calculated way to undermine" the protections of *Edwards*. *Cf. Missouri v. Seibert*, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring). When the police took Montejo on the excursion on September 10th to find the murder weapon, they likely knew (or were properly charged with the knowledge) that Montejo already had a lawyer. It is difficult to believe that none of the several officers involved in the investigation were aware that Montejo had been removed from jail on the morning of the 10th to attend his 72-hour hearing. Moreover, Detective Morse, who instructed Detectives Jerry Hall and Dale Galloway to check Montejo out of custody on September 10th and take him to search for the weapon, R. 2582-84 (Trial Tr. Mar. 7, 2005), was the officer who transported Montejo from Gretna on September 6th and conducted the initial custodial interrogation of Montejo on that date. Pet. App. 9a-

10a. By the time he instructed Detectives Hall and Galloway to check Montejo out on the 10th, Detective Morse surely knew that more than 72 hours had elapsed since his first encounters with Montejo.[4] At a minimum, therefore, Detective Morse had every reason to think Montejo was represented by counsel, and in any case that knowledge would be imputed to him and the other officers who interrogated Montejo. *Jackson*, 475 U.S. at 634 & n.8 (citing *Moulton*, 474 U.S. at 170-71). Thus, the conduct of the police on September 10th is hard to understand as anything other than an effort to elicit further incriminating testimony from Montejo before he had a chance to consult his newly appointed lawyer.

The officers' dealings with Montejo on the 10th reinforce that conclusion. According to the State, the record shows that "Montejo did not invoke or assert his right to counsel" in response to the officers' effort to initiate further interrogation. Resp. Br. 15; *id.* 4-5. But the State ignores Montejo's testimony that, when Detectives Hall and Galloway approached him on September 10th, he told them "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" – as well as his further testimony that the officers sought to dissuade him from relying on counsel by telling him "No, you don't . . . I checked, you don't have a lawyer appointed to you." Pet. App. 49a; JA 242 (testimony of Montejo). The State attempts to dismiss Montejo's

---

[4] Every criminal defendant in Louisiana is required to be brought before a judge for the purpose of appointment of counsel within 72 hours of arrest. La. Code Crim. Proc. Ann. art. 230.1(A).

testimony as "self-serving." Resp. Br. 15. But the Louisiana Supreme Court did not reject that testimony.[5] *See* Pet. App. 21a nn.46 & 47; *id.* at 49a-50a. The court merely observed that, in its view, even if the detectives had falsely told Montejo he had no lawyer, it would not have invalidated Montejo's subsequent *Miranda* waiver because the facts did not

---

[5] The State repeatedly refers to the purported testimony of "the detectives" or "the officers" to the effect that, when the officers asked Montejo on September 10, 2002 whether he had obtained counsel, he told them he had not. Resp. Br. 4-5, 15. In fact, only one of the officers involved – Detective Hall – testified that Montejo stated that he did not have counsel, Pet. App. 21a & n. 46. Detective Galloway, who was also present for the September 10th interrogation, did not testify at the hearing on the motion to suppress or at trial. Pet. App. 23a n.49. Although Detective Johnny Morse instructed the detectives on September 10, 2002 to "check [Montejo] out of the jail and go search for a weapon," R. 2582 (Trial Tr. Mar. 7, 2005), he did not testify about any statements by Montejo concerning whether he had counsel.

Moreover, Detective Hall's testimony was artfully crafted. He testified that he asked Montejo whether a lawyer had contacted him, not whether he had been appointed a lawyer. What Hall claims Montejo said was that "he *had not been contacted* by an attorney." Pet. App. 50a (emphasis added). Of course, the very reason that Montejo had not been contacted by counsel is that his attorney's efforts to reach him were thwarted by the decision to remove him from his jail cell and interrogate him immediately after the 72-hour hearing. *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, when he finally returned Montejo to the station house, "the pagers [had been] going off" and Montejo's attorney was "pretty upset that I had been out with Montejo that afternoon . . .").

rise to the level of *Moran v. Burbine*. Pet. App. 49a n.69. [6]

Moreover, the prior efforts of the police to pressure Montejo into revoking his request for counsel are highly probative in evaluating what transpired on September 10th. By that time, the police had already actively dissuaded him from seeking counsel on two previous occasions.[7] Pet. Br. 2-5. Although the Louisiana Supreme Court ultimately upheld the lawfulness of that conduct, it recognized that the officers' actions "merit[ed] close scrutiny," Pet. App. 34a, and that Montejo was "visibly upset" after he supposedly revoked his request for counsel's assistance (in an exchange that, inexplicably, was not captured on the videotape of the interrogation), *id.* at 16a.

In sum, this is manifestly not the sort of case hypothesized in Justice Kennedy's *Cobb* concurrence, where "a suspect might want the assistance of an expert in the law to guide him through hearings and

---

[6] Of course, even under the Louisiana Supreme Court's approach, Montejo's statement to the officers was surely "[s]omething more than mere mute acquiescence," sufficient to constitute acceptance of appointed counsel. Pet. App. 47a.

[7] The State questions Montejo's testimony regarding his requests for counsel at his initial detention in Gretna, stating that the officers testified to the contrary. Resp. Br. 15 n.3. But the trial court made no credibility findings as to the statements concerning Montejo's first request for counsel at the Gretna police station. The Louisiana State Supreme Court noted without questioning Montejo's testimony that officers at Gretna told him that "they would not recommend" obtaining a lawyer. Pet. App. 10a n.19.

trial . . . but nonetheless might choose to give on his own a forthright account of the events that occurred." 532 U.S. at 177. Whether or not a retraction of the *Jackson* rule in such a case would commend itself to the Court, Montejo's case is an altogether inappropriate one in which to consider that question. *No* plausible interpretation of the Sixth Amendment could support the admission of Montejo's confession given that the police obtained it by falsely telling him that he did not have a lawyer and by removing him from jail before his lawyer could meet with him. Pet. Br. 31-32.

3. The above considerations should dispose of the suggestion made by an *amicus* group consisting of a minority of States that *Jackson* should be overruled. Under the *amici*'s proposed rule it would not matter for Sixth Amendment purposes whether the accused had obtained or had requested a lawyer; instead, the police would be free to interrogate the accused unless and until he clearly and specifically indicated he did not wish to speak to the police without the aid of counsel. States Br. at 28-29. The *amici*'s rule would even apply where – as here – the police initiated their interrogation before the accused had received any advice from counsel at all. The Court should reject the *amici*'s invitation.

The *amici* contend that there is no warrant for granting an accused any protections beyond those that *Edwards* already provides under the Fifth Amendment. States Br. at 29, 32-33. Accepting that argument would require this Court not only to overrule *Jackson* but also to disavow an entire line of

cases – stretching before and after *Jackson* – recognizing that once a prosecution begins, the "Sixth Amendment guarantees the accused . . . the right to rely on counsel as a 'medium' between him and the State." *Moulton*, 474 U.S. at 176. For "'[i]t is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Id.* at 170 (quoting *United States v. Gouveia*, 467 U. S. 180, 189 (1984) (quoting *Kirby v. Illinois*, 406 U. S. 682, 689 (1972))).

Thus, for example, although the police are permitted under the Fifth Amendment to question a defendant without telling him his attorney is trying to reach him and are also permitted to use an undercover informant to elicit information in the absence of an attorney, the Sixth Amendment forbids those practices once the state's prosecution begins. *Moran*, 475 U.S. at 428 (defendant must be informed of attorney's attempt to reach him); *United States v. Henry*, 447 U.S. 264, 274-75 (1980) (no undercover eliciting of information). The common thread in all of these cases is that the Sixth Amendment gives the accused a qualitatively different right to deal with the State through counsel than he had prior to initiation of formal charges.[8]

---

[8] The *amici* wrongly contend that *Patterson* establishes that the protections afforded to defendants in post-arraignment interrogations are no more robust than in pre-arraignment interrogations. As noted at page 7 *supra*, *Patterson* specifically reaffirmed that where a defendant has "retained [a lawyer] or accepted [a lawyer] by appointment," the Sixth Amendment bars the police from initiating questioning of the defendant.

The focus of these cases on the importance of counsel in the face of a prosecution demonstrates why it would be improper to reduce the Sixth Amendment's protections to those of *Edwards*. *Jackson* requires that the police initiate an interrogation of a counseled defendant only when his lawyer is present. The *Edwards* rule would allow the police to bypass the defendant's lawyer in the hope of getting the defendant to waive his right to counsel. The *Edwards* rule makes sense in the Fifth Amendment context given that most people interrogated by the police lack lawyers in the first instance. Moreover, to the extent a suspect wishes the aid of counsel to exercise his Fifth Amendment right against self-incrimination, it is appropriate that he make the request in conjunction with an interrogation, which is the precise scenario in which the right is most likely to come into play.

The Sixth Amendment calculus is different. By definition, the Sixth Amendment's protections come into force only once the prosecution has begun, and they are broader than protecting against mere self-incrimination. The Sixth Amendment guarantees the accused "the Assistance of Counsel for his defence." U.S. Const. amend. VI. It thus presupposes that the defendant will need and use counsel in responding to "the prosecutorial forces of organized society." *Moulton*, 474 U.S. at 170 (internal quotation marks omitted). The defendant will not have the full measure of that protection if

---

487 U.S. at 290 n.3. That is a flat rejection of the rule and rationale that *amici* advance here.

the police can bypass his counsel to seek a waiver for interrogation, or for any other critical stage of the prosecution. *Moran*, 475 U.S. at 428 ("[W]e readily agree that once the [Sixth Amendment] 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.") (citation omitted); *Coleman v. Alabama*, 399 U.S. 1, 7 (1970) ("This Court has held that a person accused of crime 'requires the guiding hand of counsel at every step in the proceedings against him.'") (quoting *Powell v. Alabama*, 287 U.S. 45, 57 (1932)).

While the *amici* contend that the mere fact that a defendant asks for counsel does not necessarily indicate a desire for assistance with interrogation, that view minimizes counsel's role under the Sixth Amendment. Absent counsel, most defendants will have little sense of their optimal strategy in dealing with the forces of the prosecution now marshaled against them. They likely will not be able to distinguish in advance among the "critical stages" they will face, or to anticipate the advice that counsel would give in mounting a defense. It is unreasonable and inconsistent with counsel's role as a "medium" to assume that a defendant intends to rely on counsel for some but not all of these critical stages. And it frustrates the Sixth Amendment right to allow the police to meet alone with a counseled defendant in the hopes of getting him to waive his right to counsel.

The facts of this case make this point with crystalline clarity. Here the police told Montejo he had no lawyer with whom to consult and prevented counsel from meeting with Montejo by taking him out of the police station to search for the murder weapon. Montejo thus had no opportunity to learn from his lawyer about the assistance he could render at each stage of the proceeding, let alone to discuss whether he would be best served by talking with the police alone. Allowing the police to interpose themselves between Montejo and his attorney before Montejo had the benefit of any counsel whatsoever grossly undermined his Sixth Amendment rights.

Of course a defendant always remains free under *Jackson* to initiate a conversation with the police. The *amici* are thus incorrect to imply that *Jackson* tramples on society's interest in having guilty defendants confess to their crimes. States Br. at 17, 20. The defendant who believes that it is in his best interest to meet with the police alone – whether to confess or to present his own version of the events – may always do so. *Jackson* prohibits (properly) the police only from initiating an interrogation once the accused has counsel.

Moreover, *amici* ignore the many practical problems that would follow from adopting their proposed approach. There are many critical stages in a prosecution prior to trial, including pretrial hearings, lineups, psychiatric exams, and various types of arraignments. *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2594 (2008) (Alito, J., concurring). If the States' rule were adopted, the police would be

required to give a modified *Miranda* warning before each stage in order to determine whether or not the defendant wished to have the benefit of his counsel during that particular critical stage. Suffice it to say that this approach would require the creation of new and complicated doctrines that would surely generate substantial litigation.

Finally, there is no basis for accepting *amici*'s contention that *Jackson* can safely be overruled as a practical matter because there is no longer a risk today of the police badgering a defendant into waiving his right to counsel. The facts of this case refute the point.

## III. The Error Is Not Harmless.

Even if this Court were to depart from its usual practice and consider the harmless error argument raised by the State, *see, e.g.*, *Neder v. United States*, 527 U.S. 1, 25 (1999); *Dobbs v. Zant*, 506 U.S. 357, 359 n.* (1993) (per curiam), that argument provides no basis for affirmance. The State does not even cite – much less attempt to satisfy – the governing *Chapman* standard, which provides that "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." *Chapman v. California*, 386 U.S. 18, 24 (1967). Under this standard, the error in this case was not harmless.

1. As described in Petitioner's opening brief, the evidence elicited as a result of the officers' illegal interrogation was highly damning. Pet. Br. 38-39. Montejo's letter is tantamount to a confession that he committed the crime. No other type of evidence is

more probative of guilt. *See Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (holding that "the 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") (alterations in original). The confession was particularly damaging here because of the lack of physical evidence showing that Montejo had committed the murder. Pet. Br. 38. Moreover, the prosecution relied upon the letter repeatedly during the trial, raising it during the opening statement, *see* JA 166, R. 2258-62 (Trial Tr. Mar. 5, 2005), the testimony of a key defense witness *see* J.A. 252, and the closing statement, *see* JA 290-91, R. 2834 (Trial Tr. Mar. 9, 2005).

2. Nevertheless, the State contends the error was harmless on three grounds. It first notes that "the uncontradicted testimony of the witnesses at trial placed Montejo at the scene of the crime at the approximate time of the murder" and that Montejo's DNA was discovered under the victim's fingernails. Resp. Br. 18. But Montejo conceded at trial that he was in the victim's house at the time of the murder and was involved in a physical altercation with the victim. JA 209-11. What he denied was shooting the victim. *Id.* No witness testified that Montejo shot the victim and the prosecution presented no evidence at trial linking Montejo to the murder weapon. Pet. Br. 10-11, 38.

Next, the State argues that the letter was merely cumulative. Resp. Br. 18. But Montejo's initial "confession" was elicited at 3:45 a.m., after almost twelve hours of interrogation. Pet. Br. 2-6, R. 2350 (Trial Tr. Mar. 6, 2005), 2706-07 (Trial Tr. Mar. 8, 2005), 2730-31 (Trial Tr. Mar. 8, 2005). Montejo confessed only after repeatedly denying that he committed the crime and insisting he would not "take the rap" for something he did not do. Pet. Br. 5, State's Ex. 17-A (DVD version of the 2d interview with Jesse J. Montejo). Moreover, during that twelve-hour interrogation, Montejo requested a lawyer and rescinded his request only after his interrogators responded to his request by charging him with first-degree murder. Pet. Br. 3-4. At trial Montejo argued that his initial confession was coerced, R. 2780-82 (Trial Tr. Mar. 6, 2005), and in the absence of the letter as corroborating evidence of guilt, the jury may well have believed him.

Moreover, the State's argument is undermined by *Fulminante*, a case on which the State relies. In that case, the defendant confessed to a murder twice: once to an informant and once to the defendant's wife. 499 U.S. at 296-97. The jury was told of both confessions. *Id.* The Court concluded that the confession to the informant should have been suppressed, and, notwithstanding that there was no dispute that the confession to the defendant's wife was properly admitted into evidence, it held that the erroneous admission of the confession to the informant was not harmless. *Id.* at 296. The Court emphasized that a reviewing court must "exercise extreme caution before determining that the

admission of the confession at trial was harmless," *id.*, and observed that in the case at hand, there was little physical evidence of the crime and "a successful prosecution depended on the jury's believing the two confessions," *id.* at 297. It therefore concluded that the confessions may have "reinforced and corroborated each other," rendering the admission of the confession to the informant not harmless. *Id.* at 299.

The same analysis applies here. There was no physical evidence or testimony directly tying Montejo to the shooting; a successful prosecution depended upon the jury believing Montejo's two confessions. The letter surely "reinforced and corroborated" the initial confession and assuaged the jury's doubts as to whether the initial confession was coerced. Under these circumstances, *Fulminante* requires that the error not be considered harmless.

Finally, the State speculates that even if the trial court had correctly determined that the letter should have been suppressed, the prosecution might still have used it as impeachment evidence under *Michigan v. Harvey*, 494 U.S. 344 (1990). This contention is meritless. The prosecution did not use the letter to impeach Montejo at the trial that actually occurred; it is at best unclear whether the prosecution would have used the letter to impeach Montejo at a hypothetical different trial in which the letter was suppressed. Even if the prosecution did use the testimony as impeachment evidence, the jury would have been instructed that it could not consider the letter as direct evidence that Montejo committed

murder, significantly diminishing its probative value. Montejo might not have testified if he knew that doing so would allow the State to impeach him with highly damning evidence that would otherwise have been excluded. Finally, and most importantly, it is irrelevant whether Montejo would have been convicted at a hypothetical different trial in which the letter was used only for impeachment. The harmless-error inquiry "is not whether the legally admitted evidence was sufficient to support" the conviction, "but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988) (quoting *Chapman*, 386 U.S. at 24)); *see also Fulminante*, 499 U.S. at 296 ("[I]t must be determined whether the State has met its burden of demonstrating that the admission of the confession . . . did not contribute to [the] conviction."). What happened in Montejo's actual trial was the exact opposite of what happened in the State's hypothetical alternative trial – the State *did* use the letter as direct evidence of Montejo's guilt but *did not* use the letter to impeach Montejo. In the trial that actually took place, the erroneous admission of the letter was not harmless.

## 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

January 6, 2009