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 SUPPLEMENTAL BRIEF FOR PETITIONER

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INTRODUCTION

For the better part of a century, this Court has recognized that the Sixth Amendment entitles a defendant to have "the guiding hand of counsel at every step" of a prosecution against him. *Powell v. Alabama*, 287 U.S. 45, 69 (1932). And going back at least as far as *Brewer v. Williams*, 430 U.S. 387 (1977), this Court has held that the Sixth Amendment's guarantee of assistance bars the police from circumventing a defendant's counsel after a prosecution has commenced and attempting to interrogate the defendant outside his counsel's presence. Louisiana and its *amici* have asked this Court to overturn that rule, which has become known as the *Michigan v. Jackson* rule, 475 U.S. 625, 636 (1986), and which the Court has reaffirmed in cases like *Moran v. Burbine* and *McNeil v. Wisconsin*, among others. This Court should not take that step.

Far from showing that the *Jackson* rule is unworkable, the briefs of Louisiana and its *amici* reveal exactly what the *amici* former prosecutors have concluded: *Jackson*'s bright-line rule is used and relied upon by police and prosecutors every day to obtain clear guidance about the admissibility of post-attachment statements. Having largely ceded the argument that *Jackson* should be overturned on practicality grounds, Louisiana falls back on the nonsequitur that the *Jackson* rule is unnecessary to protect against coercion under the Fifth Amendment. But *Jackson* is a Sixth Amendment rule that "rejects any equivalence" between Fifth and Sixth Amendment rights. *McNeil v. Wisconsin*, 501 U.S.

171, 179 (1991). *Jackson* is thus neither unworkable nor unreasonable, and there is no warrant – let alone grounds in this case, which involved the rank circumvention of Montejo's counsel – for this Court to overturn it.

ARGUMENT

I. Louisiana, The United States, And The State *Amici* Effectively Recognize That The *Jackson* Rule Is Workable And Does Not Impede Law Enforcement.

The supplemental briefs of Louisiana, the United States, and the State *amici* confirm that *Jackson* is administrable and has virtually no, if any, impact on legitimate law enforcement. The United States candidly admits that *Jackson* has not "resulted in the suppression of significant numbers of statements." U.S. Br. 12. Louisiana and its handful of State *amici* cite no evidence to contradict the United States' view. Indeed, it is hard to see how there could be any legitimate law enforcement interest in overturning *Jackson* because ethical rules generally prohibit prosecutors from contacting counseled defendants in the absence of their attorneys. *See* U.S. Br. 11; La. Rules of Prof'l Conduct R. 4.2.[1] Moreover, law enforcement is facilitated – not hindered – by "an easily enforceable rule [that] provides … a straightforward, objective

[1] *See also* U.S. Br. 11-12 ("[L]aw enforcement interests are not well-served when law enforcement agents have an incentive to communicate with represented defendants without direction from prosecutors").

standard to determine whether … confessions are admissible." Larry D. Thompson, William Sessions, *et al*. ("Former Prosecutors and Judges") Br. 3.

To be sure, the United States hypothesizes a handful of "infrequent" scenarios in which *Jackson*'s bright-line rule might "potentially" cause confusion about when the prosecution could interrogate a defendant. U.S. Br. 12. Yet, neither the United States nor Louisiana or the handful of other States seeking the overruling of *Jackson* are able to cite a single instance where *Jackson* actually did cause confusion for either prosecutors or the courts. A rule that is concededly workable, that has not resulted in the suppression of significant evidence, and that tracks ethical norms hardly presents the "special justification" this Court requires to overturn a precedent. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

Moreover, there are powerful practical reasons for *retaining* the *Jackson* rule. Louisiana contends that even without *Jackson*, *Miranda* warnings and restrictions on the circumvention of counsel will be sufficient to protect a defendant's Sixth Amendment rights. But as Petitioner's opening supplemental brief explains, these protections will be far harder to administer than the bright-line *Jackson* rule. Petr. Supp. Br. 9-14; *see also* U.S. Br. 6 (predicting a case-by-case examination of whether an uncounseled waiver was obtained "through circumvention of the defendant's right to counsel").[2]

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[2] Replacing *Jackson* with *Edwards* may be further complicated by whether the "*Edwards* protection

One need look no further than this case to see the difficulties that abandoning the *Jackson* rule would cause. Louisiana's approach would have reviewing courts attempt to determine what Montejo said at the untranscribed hearing at which counsel was appointed, and then – assuming that the right to counsel was not invoked at the hearing – determine whether the police engaged in circumvention by approaching Montejo for a waiver immediately after the hearing before Montejo had ever had a chance to consult with his counsel. To be sure, given that the police falsely told Montejo that he did not have counsel, the facts of this case are sufficiently extreme to establish circumvention under any conception of the Sixth Amendment. But other cases will require courts to assess more subtle forms of circumvention, injecting needlessly "[u]ncertainty, unpredictability, burden, and expense" into prosecutions, adjudications, and plea bargains. Former Prosecutors and Judges Br. 12.

Jackson's bright line rule avoids all of these problems and would be preferable even as a matter of first impression. As a question of *stare decisis*, the argument for overruling *Jackson* on administrability grounds could not be weaker. *Cf. Arizona v. Gant*, No. 07-542, 2009 WL 1045962, at *17-18, --- S. Ct. --- (Apr. 21, 2009) (Alito, J., dissenting) (arguing against overruling rule of criminal procedure that was workable and relied upon by law enforcement).

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terminates when there has been a break in custody or a significant lapse in time before the re-initiation of custodial interrogation." U.S. Br. 7 n.1.

II. *Jackson* Protects The Sixth Amendment Right To The Assistance Of Counsel, Not The Fifth Amendment Guarantee Against Coerced Self-Incrimination.

Given the *Jackson* rule's conceded practical desirability, Louisiana faces a heavy burden to show that the rule is so unreasonable that it nevertheless should now be abandoned. It has not come close to carrying that burden. The *Jackson* rule serves distinct Sixth Amendment values, and it fits within a vital line of Sixth Amendment jurisprudence stretching before and after *Jackson* that recognizes that the police may not bypass a defendant's counsel.

A. The *Jackson* Rule Is Correct.

The argument that *Jackson* should be overturned flows entirely from the mistaken premise that the *Jackson* rule is intended to protect against coercion within the meaning of the Fifth Amendment. Resp. Supp. Br. 3-13. But the *Jackson* rule does not concern the Fifth Amendment at all. Rather, it is a straightforward implementation of the Sixth Amendment's distinct textual guarantee of a defendant's right "to have the assistance of counsel" at critical stages of his defense. Petr. Supp. Br. 2-9; *McNeil*, 501 U.S. at 179 (explaining that the *Jackson* rule "rejects any equivalence" between Fifth and Sixth Amendment rights).

Louisiana ignores this distinction, relying on *Patterson v. Illinois*, 487 U.S. 285 (1988), to argue that *Miranda* warnings are a sufficient substitute for the assistance of counsel. Resp. Supp. Br. 20. But

Patterson itself recognized that its waiver analysis applies only in the gap between the commencement of adversarial proceedings and the point where counsel is secured or requested: "Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." *Patterson*, 487 U.S. at 290 n.3. Thus, *Patterson* did not implicate the core Sixth Amendment violation that arises when the State circumvents the defendants' counsel after former adversarial proceedings have been initiated. *A fortiori*, *Patterson* did not address whether a purported waiver obtained by circumventing the defendant's counsel is enforceable. Rather, *Patterson* concerned the question whether, in the absence of such circumvention, the government must use some set of "magic words" beyond *Miranda* to obtain a waiver. In answering no, the Court relied heavily on the defendant's failure in that case to identify any prejudice under those circumstances. *Id.* at 295.

The *Jackson* rule applies, however, where a defendant *does* have counsel – or at least has requested counsel – after formal adversarial proceedings have commenced. A purported waiver obtained in those circumstances could only be obtained by circumventing counsel. And such circumvention plainly results in significant prejudice in violation of the Sixth Amendment. The *Jackson* rule thus recognizes that a waiver obtained from a defendant only by circumventing his counsel – and thus by violating the Sixth Amendment – cannot be enforced.

The vast majority of criminal cases are resolved by guilty pleas, and sentencing is substantially affected by the nature and scope of the defendant's cooperation with the government. Thus, post-charge encounters between the accused and the government are always effectively a part of the adversary process by which guilt is determined, the scope of the crimes is defined, and punishment is meted out. The fact that these out-of-court interactions take place through negotiation rather than adjudication does not change their fundamental character as adversarial attempts to resolve formal legal charges. Such negotiations require an intricate knowledge of the elements of substantive crimes, possible lesser offenses, and sentencing factors, as well as a familiarity with the processes that surround these negotiations. For example, the functions of defense counsel during post-charge communications between the government and the defendant include, *inter alia*, "mak[ing] certain that admissions are complete…, explaining to defendants the significance of facts that can diminish their culpability … and facilitating a downward departure or other sentencing relief for cooperating with the government." Crim. Just. Inst. of Harvard Law School ("CJI") Br. 10-11. In short, they require expertise in the type of "complex legal technicalities" in which an "unaided layman ha[s] little skill." *United States v. Ash*, 413 U.S. 300, 307 (1973).

Moreover, the presence of counsel at a post-charge interview benefits both parties by facilitating prompt administration of justice. CJI Br. 10. The defendant who decides to "go it alone" in the face of

police questioning may do so because he believes it is in his best interest to lie or be hostile. A lawyer will advise him to be more forthcoming in light of the importance of cooperation for plea bargains and sentencing. *Id.*[3]

A *Miranda* warning serves as a prophylactic against coercion. But it plainly does not provide the "assistance of counsel" that the Sixth Amendment guarantees during critical stages, including post-charge interviews. When the police bypass a defendant's counsel to seek an uncounseled confrontation with the defendant, they have deprived him of that assistance. To be sure, nothing in *Jackson* prevents a defendant from clearing his conscience and speaking with the police of his own accord. *Texas v. Cobb*, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring). As this Court has long recognized, "the right to assistance of counsel may be waived, after it has attached, without notice to or consultation with counsel" but only where the defendant has "freely, on his own initiative, confessed" and the police have "refrained from coercion and interrogation" outside the lawyer's presence. *Brewer*, 430 U.S. at 413 (Powell, J.,

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[3] Indeed, a defendant who goes it alone may end up giving a false confession in the face of questioning by an expert adversary. *Cf.* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. (forthcoming 2009), *available at* http://ssrn.com/abstract=1280254, at 1 ("[P]ost-conviction DNA testing has now exonerated 232 convicts, 34 of whom falsely confessed to rapes and murders"). These concerns are particularly great where the defendant is a juvenile or has diminished mental capacity. *See* NACDL Br. 12-14.

concurring). But no purported waiver of the Sixth Amendment right to assistance of counsel is enforceable when it is obtained through the circumvention of that very right, as occurred here.

B. The Foundations Of The *Jackson* Rule Have Not Been Eroded.

Nor is there is any argument that the *Jackson* rule's foundations have been eroded by subsequent case law. To the contrary, *Jackson* is situated in a long line of cases recognizing that the prosecution may not bypass a defendant's counsel and initiate contact with the defendant after the right to counsel has attached. Long before *Jackson*, in *Brewer v. Williams*, this Court held that when a defendant has been formally charged and has counsel, statements made after a *Miranda* warning but outside the presence of the defendant's lawyer could not be admitted under the Sixth Amendment. 430 U.S. at 397-98 ("There is no need to review … the doctrine of *Miranda v. Arizona*, a doctrine [concerning] compulsory self-incrimination [because the defendant] was deprived a different constitutional right – the right to … counsel"). Likewise, in *Moran v. Burbine*, issued just prior to *Jackson*, this Court "readily" acknowledged that the Sixth Amendment would not permit the police to question a *Mirandized* defendant outside the presence of his attorney while his attorney was trying to reach him. 475 U.S. 412, 428 (1986) (citing *Brewer*).

Jackson itself involved an application of these principles to a special case in which a defendant had invoked his right to counsel, but apparently did not

yet have a lawyer. 475 U.S. at 627-28[4] But what is now known as the *Jackson* rule applies not just in the unusual circumstances of *Jackson* itself, but also in the long-recognized heartland of Sixth Amendment cases – like this one – in which the defendant actually *has* a lawyer but the police circumvent the defendant's counsel. *E.g., Michigan v. Harvey*, 494 U.S. 344, 349 (1990) (referring to *Jackson* in a case in which defendant actually had counsel). From *Brewer* on, the heartland "*Jackson*" cases have been ones likesthis in which the police have bypassed appointed or retained counsel to interrogate a defendant. This Court has consistently recognized that such tactics are improper under the Sixth Amendment. *McNeil*, 501 U.S. at 179; *Cobb*, 532 U.S. at 167-68. *Cf. Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2590 (2008) ("*Jackson* refutes the [] argument that Fifth Amendment protections at the early stage obviate attachment of the Sixth Amendment right at initial appearance.").

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[4] In light of the peculiar circumstances of *Jackson* in which the defendant had *requested* a lawyer but did not yet have one, the Court drew an analogy to the Fifth Amendment *Edwards* rule, which likewise turns on a request by the defendant. But the unbroken line of "*Jackson*" cases from *Brewer* on make perfectly clear that a purported waiver is invalid under the in the present circumstances because it is obtained by circumventing the "assistance of counsel" guaranteed by the Sixth Amendment – not because of any violation of the Fifth Amendment's voluntariness protections. In any case, as both *Jackson* and *Edwards* recognized, once the Sixth Amendment right to counsel has attached, no invocation of that right is necessary to secure its protection. *Jackson*, 475 U.S. at 633 n.6; *Edwards v. Arizona*, 451 U.S. 477, 480 n.7 (1981).

Louisiana is thus incorrect to argue that the *Jackson* rule has been undermined by three later precedents. *Contra* Resp. Supp. Br. 9-13. *Davis v. United States*, the first case Louisiana cites, is a Fifth Amendment case that has nothing to do with the Sixth Amendment *Jackson* rule. The second and third cases, *McNeil* and *Patterson* are even less helpful to Louisiana because they explicitly reaffirmed *Jackson*. In ruling that *Jackson* was offense-specific, *McNeil* reiterated that the police could *not* have confronted the defendant outside the presence of his lawyer concerning the charge for which his Sixth Amendment right had attached. 501 U.S. at 179. And, as noted above, *Patterson* held that a defendant who had not requested counsel could waive his Sixth Amendment rights, but, critically, stated that "the analysis changes markedly once an accused even requests the assistance of counsel." 487 U.S. at 290 n.3.

In sum, the necessary special justification for overturning *Jackson* is absent given the Court's strong reaffirmation of *Jackson*'s rule.

III. Montejo Should Prevail Under Even Lousiana's View Of The Sixth Amendment.

Even under Louisiana's view of the Sixth Amendment, Montejo's interrogation was unconstitutional. The police secured initial statements from Montejo by interrogating him through the night. When he initially asked for a lawyer, the police told him "you don't want to talk to us no more, you want a lawyer, right? I trusted you

and you let me down. . . . You've asked for an attorney, and you are getting your charge. And the shame of it is . . .." Petr. Br. 4. The police then turned off the video-tape for a period of time, after which Montejo came on camera, asked to speak to the police, and then made additional salient admissions. *Id.* 4-5

After providing these admissions, Montejo insisted that he would not take charge for something he did not do. *Id.* 5. The officers ultimately waited four days to bring Montejo into court, where he was finally appointed a lawyer. *Id.* 6.

Shortly afterwards, the police removed Montejo from the jail. *Id.* 7-8. When Montejo asked about his counsel, the police told him that he did not have a lawyer and gave him a *Miranda* warning.[5] *Id.* 8. The inaccurate *Miranda* warning suggested Montejo could get a lawyer in the future rather than informing him that he had a lawyer who in fact was trying to reach him. After securing a confession used to convict and sentence Montejo to death, the police returned to the jail and found his irate lawyer. *Id.* 9-10.

Louisiana concedes that even absent *Jackson* the Sixth Amendment will still bar circumvention of counsel. Resp. Supp. Br. 3; *see Missouri v. Seibert*, 542 U.S. 600, 618 (2004) (Kennedy, J., concurring in judgment). In this case, the conviction and death

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[5] Putting aside the veracity of the police's account of the events, it is undisputed that the police officers never told Montejo that he had counsel.

sentence were predicated on evidence secured by the police officers' circumvention of the adversarial process. No plausible view of the Sixth Amendment supports the result below, and thus this Court should reverse even if it chooses to overturn *Jackson*.

CONCLUSION

This Court should not overrule *Michigan v. Jackson*, and the judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

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