No. 07-1529

In The Supreme Court of the United States

JESSIE JAY MONTEJO,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF FOR THE STATES OF NEW MEXICO, ALABAMA, ARIZONA, COLORADO, DELAWARE, FLORIDA, IDAHO, KANSAS, MARYLAND, NEW HAMPSHIRE, OKLAHOMA, OREGON, PENNSYLVANIA, UTAH, VIRGINIA, WASHINGTON, AND WYOMING, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

When an indigent defendant's right to counsel has attached and counsel has been appointed, must the defendant take affirmative action or make an affirmative statement accepting the appointment or otherwise indicating an assertion of the right to counsel in order to secure the protections of the prophylactic rule of *Michigan v. Jackson*, 475 U.S. 625 (1986), that police are precluded from obtaining a waiver of the right to counsel and initiating an interrogation of a formally-charged defendant after the defendant has asserted the right to counsel?

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INTEREST OF THE *AMICI CURIAE*

The *Amici* States have a direct interest in this case because resolution of the question presented will affect the States' "compelling interest in finding, convicting, and punishing those who violate the law." *See Moran v. Burbine*, 475 U.S. 412, 426 (1986). The prophylactic rule adopted in *Michigan v. Jackson*, 475 U.S. 625 (1986), is designed to deter police from badgering a defendant into waiving the right to counsel during a custodial interrogation, while maintaining the proper balance between the defendant's right and society's interest in effective enforcement of criminal laws. The *Amici* States have an interest in the application of *Jackson* in a manner that does not intrude on the societal interest in effective law enforcement more than is necessary to protect a defendant's Sixth Amendment right to counsel, and more than is necessary to establish an administrable rule for police to know when they may not initiate an interview of a defendant whose right to counsel has attached.

SUMMARY OF THE ARGUMENT

I. The Sixth Amendment establishes a formally-charged defendant's right to counsel but does not force the assistance of counsel on a defendant who chooses not to have counsel. *See* U.S. Const. amend. VI. As a prophylactic measure to ensure that a defendant's choice to use counsel is honored, the Court adopted the rule, announced in *Michigan v. Jackson*,

475 U.S. 625 (1986), that police may not obtain a waiver of the right to counsel and initiate an interview of a formally-charged defendant after the defendant has asserted his right to counsel. A State, however, cannot honor a choice that has not been made. As a result, this Court has limited the *Jackson* rule to cases in which the defendant either retained or requested the assistance of counsel.

This case presents the question whether the *Jackson* rule should be extended to a defendant who neither retained nor requested the assistance of counsel and, having been appointed counsel, has not accepted the appointment. *Amici* assert that it should not. When a defendant has not requested, retained or accepted counsel, the defendant has not conveyed a choice to communicate to police only through counsel. Thus, the prophylactic *Jackson* rule should be limited to defendants who have asserted the right to counsel by an affirmative statement or action indicating their choice.

So limited, the *Jackson* rule preserves a defendant's ability to choose to communicate with police either with or without counsel. Allowing a defendant to waive his right to counsel and voluntarily choose to talk to police without counsel strikes a balance between society's compelling interest in effective law enforcement and defendants' Sixth Amendment right. It also recognizes that the States' "ability to obtain uncoerced confessions is not an evil, but an unmitigated good". *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991).

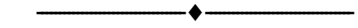
The plain language of *Jackson*, as well as the Court's application of *Jackson* in later cases, establishes the requirement of an affirmative assertion of the right to counsel, which cannot occur by the mere acquiescence in the appointment of counsel. In *Jackson*, the Court repeatedly specified that the prophylactic rule applies to defendants who have "requested" or "asserted" the right to counsel. Only an *affirmative* assertion serves the purposes of deterring police from badgering defendants into waiving the right to counsel and balancing the societal interest in effective law enforcement with the individual's right to counsel.

Moreover, *Jackson*'s grounding in the prophylactic rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), which requires an unambiguous assertion of the right to have counsel present during a pre-indictment custodial interrogation, compels the requirement of an affirmative assertion of the right to counsel under *Jackson*. The requirement of an affirmative assertion under *Jackson* is also consistent with this Court's decision in *Patterson v. Illinois*, 487 U.S. 285, 291 (1988), holding that a formally-charged defendant who has not requested counsel may voluntarily choose to speak with police without counsel. It is the affirmative assertion of the right to counsel, and not the mere existence of an attorney-client relationship, that conveys the defendant's choice to communicate to police only through counsel.

II. Although the *Jackson* rule does not extend to this case, the facts of this case demonstrate the inherent flaw in the premise underlying the rule. The

premise of the *Jackson* rule is that a defendant who requests counsel at arraignment implicitly chooses to have the assistance of counsel in a custodial interrogation. That premise is flawed because, at most, a request for counsel at arraignment conveys the defendant's choice to have the assistance of "an expert in the law to guide him through hearings and trial, and the attendant complex legal matters that might arise". *Texas v. Cobb*, 532 U.S. 162, 177 (2001) (Kennedy, J., concurring). It says nothing about whether the defendant would choose to speak to police without counsel.

Ultimately, the *Jackson* rule is unnecessary because it provides no more protection than already provided by the *Edwards* rule. Where, as here, there is no indication that the defendant has chosen to communicate to police only through counsel, a police request for a waiver of the right to counsel at an interview is not coercive or "badgering." As a result, there is no need for a prophylactic rule such as the *Jackson* rule because there is no Sixth Amendment violation from the police-initiated interrogation. The *Jackson* rule should be abandoned.



ARGUMENT

After giving several incriminating statements to police during custodial interrogations, Petitioner agreed to accompany the police to Lake Ponchartrain and show them where he threw the gun used to

commit the murder. At the time police took Petitioner on the excursion to the lake, Petitioner had neither retained counsel nor requested counsel. However, he was appointed counsel earlier in the day at a hearing required by Louisiana law to be held within 72 hours of arrest. The Louisiana Supreme Court held that admission of a letter containing incriminating statements written by Petitioner during the excursion with police did not violate his Sixth Amendment right to counsel because Petitioner had not asserted his right to counsel at the time he signed the *Miranda* waiver form and agreed to the excursion.

The decision of the Louisiana Supreme Court does not alter the well-established rule that a criminal defendant's Sixth Amendment right to counsel attaches when the government initiates formal charges against him. Rather, the decision of the Louisiana Supreme Court simply applies this Court's prophylactic rule adopted in *Michigan v. Jackson*, 475 U.S. 625 (1986), that police may not obtain a waiver of the right to counsel and initiate an interview of a formally-charged defendant after the defendant has asserted his right to counsel. *See Michigan v. Harvey*, 494 U.S. 344, 352 (1990).

The *Jackson* rule is not intended to preclude a defendant whose right to counsel has attached from waiving his right to have counsel present during a police-initiated interview. In *Patterson v. Illinois*, 487 U.S. 285, 291 (1988), the Court held that a defendant whose right to counsel has attached may waive his right to counsel and agree to a police interview. Just

as, under *Edwards v. Arizona*, 451 U.S. 477 (1981), police are precluded from conducting a custodial interview of a suspect once the suspect has asserted his right to have counsel present during the interview, police are precluded under *Jackson* and *Patterson* from initiating an interview of a defendant who has been formally charged once the defendant has asserted his right to counsel. *Patterson*, 487 U.S. at 635. Thus, the defendant's assertion of the right to counsel is a critical component of the *Jackson* rule. Indeed, in *Patterson*, the Court observed that the decision in *Jackson* "turned on the fact that the accused 'ha[d] asked for the help of a lawyer' in dealing with the police." *Patterson*, 487 U.S. at 291.

Jackson and *Patterson* make clear that police officers are not prohibited from questioning a defendant simply because the defendant's right to counsel has attached. Both decisions further clarify that police officers are not prohibited from questioning a defendant whose right to counsel has attached unless the defendant has asserted his right to counsel. Therefore, the question presented in this case is: what constitutes an assertion of the right sufficient to trigger the *Jackson* rule?

This Court's decisions firmly establish that only an affirmative assertion of the right to counsel, by an affirmative statement or action clearly indicating the defendant's choice to communicate with police only through counsel, is sufficient to trigger the *Jackson* rule. The requirement of an affirmative assertion of the right to counsel is clear from the plain language

of the *Jackson* decision and the decision in *Patterson*, as well as *Jackson*'s roots in *Edwards v. Arizona*, 451 U.S. 477 (1981). An affirmative assertion also furthers the purposes of the *Jackson* rule, and reaches a proper balance of society's compelling interest in effective law enforcement and the defendant's Sixth Amendment right.

I. AN AFFIRMATIVE ASSERTION OF THE RIGHT TO COUNSEL IS NECESSARY TO TRIGGER APPLICATION OF THE *JACKSON* RULE.

A. Suspects are generally permitted to waive the right to counsel and voluntarily talk to police.

1. This Court has repeatedly recognized the importance of police questioning in effective law enforcement. In *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991), the Court refused to adopt a rule that would "seriously impede effective law enforcement" by precluding police from questioning any suspect on any topic once the suspect has been formally charged with a crime. Such a rule, the Court explained, would make "most persons in pretrial custody for serious offenses . . . unapproachable by police officers suspecting them of involvement in other crimes, *even though they have never expressed any unwillingness to be questioned*." *McNeil*, 501 U.S. at 181 (emphasis in original). "Since the ready ability to obtain uncoerced confessions is not an evil, but an unmitigated good, society would be the loser." *Id*. Voluntary statements

are a "proper element in law enforcement", *Miranda v. Arizona*, 384 U.S. 436, 478 (1966), and are "essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 426 (1986); *see also Oregon v. Elstad*, 470 U.S. 298, 305 (1985) (far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable") (internal citation and quotation marks omitted); *Texas v. Cobb*, 532 U.S. 162, 172 (2001).

The Court has therefore long held that suspects may waive their Fifth Amendment right against self-incrimination and their Sixth Amendment right to counsel, so long as the waiver is knowing and voluntary. As the Court explained in *Moran*, "*Miranda* attempted to reconcile [the] opposing concerns" between effective law enforcement and coercive questioning "by giving the *defendant* the power to exert some control over the course of the interrogation." *Moran*, 475 U.S. at 426 (emphasis in original).

2. The Sixth Amendment right at issue here – the right to communicate with police only through counsel, if one so chooses – was first recognized in *Massiah v. United States*, 377 U.S. 201 (1964). In *Massiah*, the Court held that the police violate a defendant's Sixth Amendment right if they "deliberately elicit[ ]" information from him after he has already retained counsel. *Massiah*, 377 U.S. at 206. The Court did not address waiver in *Massiah* because, where, as there, police use an undercover informant, no waiver is possible. In *Brewer v.*

Williams, 430 U.S. 387 (1977), however, the Court specifically recognized that, even after a suspect has been formally charged and, as a result, his Sixth Amendment right has attached, he may waive his right to counsel. The Court in *Brewer* found that, in violation of *Massiah*, police had deliberately elicited information from the defendant after he had retained counsel and been formally charged. *Brewer*, 430 U.S. at 397-401. But the Court did not end its inquiry there. The Court assessed whether the defendant had waived his Sixth Amendment right when he responded to police questioning. *Id*. at 404-405. Finding that he did not, the Court recognized that a formally-charged defendant may waive his right to counsel, by "'an intentional relinquishment or abandonment'" of the right to counsel. *Brewer*, 430 U.S. at 404.

The Court has recognized the right of a formally-charged defendant to waive the right to counsel several times since *Brewer*. For example, in *Moran*, the Court held that "*absent a valid waiver*, the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches." *Moran*, 475 U.S. at 428 (emphasis added). Similarly, in *Patterson*, the Court held that a defendant who had been indicted, but who had not yet requested counsel or been appointed counsel, validly waived his right to counsel by signing a written waiver after receiving *Miranda* warnings. *Patterson*, 487 U.S. at 293.

In recognizing that a formally-charged defendant may waive the right to counsel, the Court honored a defendant's right to choose between having the assistance of counsel and not having the assistance of counsel in defending against the charges. The Court discussed this choice in *Maine v. Moulton*, 474 U.S. 159 (1985), where it held that the prosecution's use of the defendant's incriminating statements surreptitiously obtained by a co-defendant who was assisting the police violated the defendant's Sixth Amendment right. The Court explained, "Once the right to counsel has attached *and been asserted*, the State must of course honor it." *Moulton*, 474 U.S. at 170 (emphasis added). This means, the Court explained, that the State has "an obligation to respect and preserve the accused's choice to seek assistance of counsel." *Moulton*, 474 U.S. at 171. In *Moulton*, as in *Massiah* and *Brewer*, the defendant had retained counsel at the time of arraignment. *Moulton*, 474 U.S. at 162. The Court therefore found that, not only had the right to counsel attached, the defendant had made clear his choice to have counsel. That decision foreshadowed the Court's subsequent decision in *Michigan v. Jackson*.

B. The prophylactic *Jackson* rule, which overrides an otherwise valid waiver of the right to counsel, applies only where police initiate an interrogation after the defendant has affirmatively asserted the right to counsel.

In *Jackson*, the Court adopted the rule that, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police initiated interrogation is invalid." *Jackson*, 475 U.S. at 636. This rule "is based on the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations", and is designed to protect suspects from the use of overbearing or coercive tactics by police to obtain a waiver of the right to counsel. *Harvey*, 494 U.S. at 350. The *Jackson* rule is a prophylactic rule that is not itself a constitutional right, but protects a constitutional right. *See Harvey*, 494 U.S. at 353. Specifically, the *Jackson* rule is designed to protect a defendant's Sixth Amendment right to counsel in the same way the rule adopted in *Edwards v. Arizona*, 451 U.S. 477 (1981), is designed to protect a defendant's right against self-incrimination – by protecting the defendant's *choice* to communicate with police only through counsel.

The Court's holding in *Jackson* is consistent with its repeated recognition that a defendant whose right to counsel has attached may waive that right and police may rely on that waiver until the defendant asserts the right. If the defendant has affirmatively asserted the right by retaining counsel, as did the defendant in *Moulton*, or by requesting for counsel to be appointed, as did the defendant in *Jackson*, then police may not later seek a waiver of the right to counsel and conduct an interrogation. On the other hand, because a defendant who has not retained counsel, requested appointment of counsel, or otherwise asserted the right to counsel may waive the right to counsel, police may rely on a waiver of the right unless and until the defendant asserts the right.

Because it protects a formally-charged defendant's choice to have the assistance of counsel, the *Jackson* rule requires the defendant to make an affirmative assertion of the right to counsel in order to trigger the prophylaxis of precluding a police-initiated interrogation. This requirement is clear from (1) the plain language of the Court's decision in *Jackson* and subsequent decisions explicating the rule, (2) the clear purposes of the rule, (3) the rule's roots in the *Edwards* rule, and (4) the Court's analysis in *Patterson*.

1. The plain language of *Jackson* and later cases establishes the requirement of an affirmative assertion of the right to counsel.

The Court in *Jackson* repeatedly specified that its newly-created prophylactic rule applies to those cases where a defendant has "requested" or "asserted" counsel. For example, in a critical passage of the opinion, the Court explained why a general request for counsel at an arraignment should be construed as a request for counsel at a subsequent interrogation:

> Doubts must be resolved in favor of protecting the constitutional claim. This settled approach requires us to give a broad, rather than a narrow, interpretation to a defendant's *request* for counsel – we presume that the defendant *requests* the lawyer's services at every critical stage of the prosecution. We thus reject the State's suggestion that respondents' *requests* for the appointment of counsel should be construed to apply only to representation in formal proceedings.

Jackson, 475 U.S. at 633 (emphasis added).

Various other passages in the opinion repeat the need for a "request." *See, e.g.*, *id*. at 633 n.7 ("We also agree with the comments of the Michigan Supreme Court about the nature of an accused's *request* for counsel. . . ."); *id*. at 634 (addressing the argument that "the police may not know of the defendant's *request* for attorney"); *id*. (a state actor "may not claim ignorance of defendants' unequivocal *request* for

counsel to another state actor"); *id*. at 634-635 ("To the extent that there may have been any doubt about interpreting a *request* for counsel at an arraignment, or about a police responsibility to know of and respond to such a *request*, ... "); *id*. at 635 (written waivers "are insufficient to justify police-initiated interrogations after the *request* for counsel"); *id*. at 636 (concluding that "the need for additional safeguards [are] no less clear, when the *request* for counsel is made at an arraignment") (emphasis added).

Accordingly, the Court held that a defendant's waiver of the right to counsel during a police-initiated interrogation is invalid "if police initiate [the] interrogation after the defendant's *assertion*," of the right to counsel. *Id*. (emphasis added). *See also Jackson*, 475 U.S. at 640 (Rehnquist, J., dissenting) (emphasizing that the Court limited its holding to situations where the defendant has requested counsel, and "*not*" to "all police-initiated interrogations . . . from the moment the defendant's Sixth Amendment right to counsel attaches, with or without a request for counsel by the defendant.").

Later cases applying the *Jackson* rule have reiterated the assertion requirement expressly provided in *Jackson*. *See Patterson*, 487 U.S. at 291 (holding that *Jackson* rule did not apply because the defendant had not asserted his right to counsel before he waived the right by signing a *Miranda* waiver); *Harvey*, 494 U.S. at 350 ("the Court in *Jackson* concluded that the *Edwards* protections should apply when a suspect charged with a crime

requests counsel outside the context of interrogation"); *McNeil*, 501 U.S. at 175 (recognizing that in *Jackson* the Court "held that once this right to counsel has attached and has been invoked, any subsequent waiver during a police initiated custodial interview is ineffective").

2. The requirement of an affirmative assertion of the defendant's choice to communicate with police only through counsel furthers the purposes of the *Jackson* rule.

The Court has noted at least two purposes of the *Jackson* rule: (1) deterring police from badgering defendants into waiving the right, *see Harvey*, 494 U.S. at 350; *McNeil*, 501 U.S. at 177, 180, and (2) balancing society's compelling interest in investigating, solving, and punishing criminal activity with defendants' rights to have counsel present during critical stages of a prosecution, including custodial interrogations, *see McNeil*, 501 U.S. at 181. Both purposes are only served when the defendant affirmatively asserts his right to counsel. The rule should not, therefore, be extended beyond that situation.

a. The *Jackson* rule is premised on the supposition that "suspects who assert their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations." *Harvey*, 494 U.S. at 350. The rule presumes that a waiver of the right to counsel by

a suspect who has asserted the right is the product of "badgering" and, therefore, is not truly voluntary. *See Harvey*, 494 U.S. at 350. Thus, the premise of the *Jackson* rule is that a request for counsel at arraignment constitutes a request for counsel "at every critical stage of the prosecution," including a subsequent custodial interrogation. *Jackson*, 475 U.S. at 633. To the extent that premise is valid at all (*but see* § II, *infra*), it is only valid where the defendant affirmatively asserted his choice to have the assistance of counsel.

Without an affirmative assertion of the right, there is no reason for police to believe that a formally-charged defendant who has not requested counsel or otherwise asserted his right to counsel is unwilling to voluntarily waive that right. This Court has repeatedly recognized that a defendant may waive his Sixth Amendment right to counsel. *See Brewer*, 430 U.S. at 404-405; *Moran*, 475 U.S. at 428; *Jackson*, 475 U.S. at 630; *Patterson*, 487 U.S. at 291. This is consistent with the defendant's right, recognized in *Faretta v. California*, 422 U.S. 806 (1975), to choose to forgo the assistance of counsel and represent himself. The Court has also recognized the State's burden to honor the defendant's choice. Although the Sixth Amendment is not violated when the State obtains "by luck or happenstance" an incriminating statement from a formally-charged defendant, the State may not **knowingly** circumvent the defendant's right to have counsel present during a police interview. *Moulton*, 474 U.S. at 176. However, the State knowingly

circumvents a defendant's choice to have counsel only when it is aware of that choice. Thus, it is reasonable to require a defendant to provide notice of his choice, by way of an affirmative assertion of the right, before applying the *Jackson* rule to preclude police from obtaining a waiver of the right to counsel and initiating an interview.

Moreover, an affirmative assertion indicating the defendant's choice to communicate with police only through counsel provides a bright-line for police to follow. *See Jackson* 475 U.S. at 626 (noting that the *Edwards* rule is a bright-line rule designed to prevent police badgering). An affirmative assertion makes the defendant's choice clear to police, preventing further questioning and eliminating the risk of badgering.

b. Requiring an affirmative assertion also furthers society's interest in effective enforcement of criminal laws by allowing police to seek a waiver and initiate an interview until the defendant asserts the right to counsel. Prophylactic rules such as *Jackson* (and *Edwards* and *Miranda*) impose costs on society by preventing suspects from making intelligent and voluntary confessions. *See Minnick v. Mississippi*, 498 U.S. 146, 161 (1990) (Scalia, J., dissenting). They therefore must be limited to "those types of situations in which the concerns that powered the decision are implicated." *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984). The requirement of an affirmative assertion limits application of the *Jackson* rule to those cases where it is most likely that a waiver of the right to counsel may be the product of police badgering –

cases in which the defendant has indicated by his actions or his statements that his choice is, in fact, to have counsel's assistance.

3. As an extension of the *Edwards* rule, the *Jackson* rule includes the *Edwards'* requirement of an unambiguous assertion indicating the defendant's choice to speak to police only through counsel.

The *Edwards* rule, which precludes police-initiated interrogation after an uncharged suspect has asserted his right to counsel, requires an unambiguous statement indicating the suspect's desire to have counsel present during the interrogation. *Davis v. United States*, 512 U.S. 452, 459-460 (1994). *Jackson*'s grounding in the *Edwards* rule demands the same requirement for triggering the *Jackson* rule.

In adopting the *Jackson* rule, the Court reasoned that, if interrogation of a suspect not yet charged is precluded once the suspect has asserted the right to have counsel present, then interrogation of a formally-charged defendant should likewise be precluded. *Jackson*, 475 U.S. at 632. In *Harvey*, the Court acknowledged that the *Jackson* rule "is based on the Sixth Amendment, but its roots lie in this Court's decisions" in *Miranda* and *Edwards*. *Harvey*, 494 U.S. at 349-350. The Court explained that "*Jackson* simply superimposed the Fifth Amendment analysis of *Edwards* onto the Sixth Amendment right to counsel." *Harvey*, 494 U.S. at 350.

Twice, this Court has refused to treat the *Jackson* rule differently from the *Edwards* rule. First, in *Patterson*, the Court rejected the claim that the attachment of the right to counsel, without an assertion of the right, is sufficient to trigger the *Jackson* rule, and held that a formally-charged defendant who has not asserted the right to counsel may waive the right and agree to speak with police without counsel. *Patterson*, 487 U.S. at 290-291. Second, in *Harvey*, the Court rejected the claim that the attachment of the right to counsel is a sufficient basis for treating *Jackson* violations differently from *Edwards* violations, and held that statements obtained in violation of *Jackson* are admissible, just as statements obtained in violation of *Edwards* are admissible, to impeach the defendant at trial. *Harvey*, 494 U.S. at 350-353. In *Harvey*, the Court explained that the attachment of the Sixth Amendment right is not a basis for treating *Jackson* violations differently from *Edwards* violations because, otherwise, formally-charged defendants who have obtained counsel would be barred from waiving their right to counsel. Rejecting such a result, the Court stated, "To hold that a defendant is inherently incapable of relinquishing his right to counsel once it is invoked would be 'to imprison a man in his privileges and call it the Constitution.'" *Harvey*, 494 U.S. at 353, quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942). *See also Harvey*, 494 U.S. at 352-353, citing *Brewer*, 430 U.S. at 405-406 (recognizing a formally-charged defendant's ability to waive his Sixth Amendment right).

Just as in *Patterson* and *Harvey,* in this case there is no reason to apply the *Jackson* rule differently from the *Edwards* rule. The *Edwards* rule requires an unambiguous assertion of the right that unequivocally articulates the defendant's desire to have counsel present during the interrogation. *Davis*, 512 U.S. at 459-460. Without such a requirement, the *Edwards* rule "'would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity.'" *Id*., quoting *Michigan v. Mosley*, 423 U.S. 96, 102 (1975). The purpose of the prophylactic rule of *Edwards* is not to create "permanent immunity from further interrogation, regardless of the circumstances". *Mosley*, 423 U.S. at 102.

Likewise, the purpose of the prophylactic rule of *Jackson* is not to prevent formally-charged defendants from making voluntary statements to police. Like the *Edwards* rule, the *Jackson* rule is designed to respect the defendant's choice to communicate with police only though counsel. Therefore, the assertion required under the *Jackson* rule also must be an unambiguous indication of the defendant's desire to have counsel present during an interrogation. Anything less fails to strike the balance, struck in *Edwards*, between society's compelling interest in effective law enforcement and the defendant's right to counsel. *See Moran*, 475 U.S. at 426 (discussing the "subtle balance" struck in *Miranda*).

4. The Court's decision in *Patterson* confirms that *Jackson* requires an affirmative assertion unambiguously indicating the defendant's choice to communicate with police only through counsel.

In *Patterson*, the Court found the defendant's waiver valid because he had not requested, retained or accepted appointment of counsel and the *Miranda* waiver forms were sufficient to establish that the waiver of the right to counsel was knowing and intelligent. *Patterson*, 487 U.S. at 291, 295-296. In so holding, the Court rejected the defendant's claim that police are barred from initiating an interview of a defendant after the defendant's right to counsel has attached by the filing of the indictment. *Patterson*, 487 U.S. at 291. The Court noted that the defendant "at no time sought to exercise his right to have counsel present", in contrast to the defendant in *Jackson*, who "'ha[d] asked for the help of a lawyer' in dealing with the police." *Patterson*, 487 U.S. at 291, quoting *Jackson*, 475 U.S. at 631. Indeed, the Court noted that the decision in *Jackson* turned on the fact that the defendant had asked for counsel.

Petitioner proposes a rule in this case that has the same effect as the rule rejected in *Patterson*. In *Patterson*, the defendant proposed a rule that police may never request a waiver of the right to counsel from a defendant whose right to counsel has attached. *Patterson*, 487 U.S. at 290. That proposed rule effectively eliminated the requirement,

consistently recognized by the Court since *Brewer*, that the defendant must assert his right to counsel to preclude the police from seeking a waiver of the right to counsel and initiating an interview. Similarly, Petitioner proposes a rule that would preclude police from seeking a waiver and initiating an interview of a formally-charged defendant who has been appointed counsel regardless of whether the defendant either requested or accepted the appointment. Petitioner's proposed rule, like the proposed rule rejected in *Patterson*, would eliminate the requirement of an assertion of the right.

This Court rejected the proposed rule in *Patterson* on two grounds. First, the Court recognized that the purpose of the prophylactic rule adopted in *Jackson* is not to bar an accused from making a knowing and intelligent waiver of his right to counsel and agreeing to a police interview without counsel. Rather, the purpose of the rule is to preserve "the integrity of an accused's choice to communicate with police only through counsel". *Patterson*, 487 U.S. at 291. Thus, the requirement of an assertion of the right is a critical component of the *Jackson* rule as an indicator of the defendant's choice.

Second, the Court determined that the Sixth Amendment right to counsel is adequately protected by the requirement that a waiver of the right, for purposes of answering questions by police, must be voluntarily, knowingly and intelligently given. *Patterson*, 487 U.S. at 296. In so holding, the Court rejected the claim that a *Miranda* waiver cannot be sufficient

protection of the Sixth Amendment right because the Sixth Amendment right to counsel is superior to the Fifth Amendment right to counsel. *Patterson*, 487 U.S. at 297-298. Accordingly, the Sixth Amendment right does not require a more stringent prophylactic rule – one that does not include the requirement of an assertion of the right – to protect against police overreaching in obtaining a waiver and initiating an interview than is required under the Fifth Amendment.

C. Petitioner's claim that an affirmative assertion of the right to counsel is not required to trigger the *Jackson* rule is unsupported by the Court's decisions.

Apparently recognizing that the Court has consistently required an assertion of the right to trigger the *Jackson* rule, Petitioner argues that the Court's prior decisions suggest, not only that an *affirmative* assertion of the right is not necessary, but also that appointment of counsel is sufficient to indicate the defendant's assertion of the right to counsel. Pet.Br. at pp. 24-25. To the contrary, this Court has never held that an appointment of counsel that was neither requested nor accepted by the defendant constitutes the defendant's assertion of the right to counsel. In *Massiah* and *Brewer*, as well as *Moulton*, the defendants appeared in court with counsel they had retained. *Massiah*, 377 U.S. at 202; *Brewer*, 430 U.S. at 405; *Moulton,* 474 U.S. at 162. As the Court recognized in *Brewer*, the act of retaining counsel is a clear

indication of the defendant's choice to have counsel act as a medium between him and the State and, thus, is an affirmative assertion of the right to counsel. *See Brewer*, 430 U.S. at 405. In *Jackson*, the defendant requested at arraignment that counsel be appointed to represent him. *Jackson*, 475 U.S. at 625. As noted above, the Court emphasized that fact as the critical difference between *Jackson* and *Patterson*. *See Patterson*, 487 U.S. at 291.

Relying on a footnote in *Patterson*, Petitioner argues that formally-charged defendants who have not requested counsel but nevertheless have been appointed counsel should be treated the same as formally-charged defendants who retain their own counsel. Pet.Br. at p. 24, citing *Patterson*, 487 U.S. at 290 n.3. In footnote three in *Patterson*, the Court noted that the defendant had neither retained counsel nor accepted appointment of counsel. *Patterson*, 487 U.S. at 290 n.3. The Court then stated, "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*. It is this statement on which Petitioner relies.

Petitioner's reliance is misplaced. The Court did not explain what "distinct set of constitutional safeguards" apply differently once a formally-charged defendant has counsel. Instead, the Court cited to *Moulton*. *Patterson*, 487 U.S. at 290 n.3. In *Moulton*, the Court did not create a distinct rule for shielding a formally-charged defendant who has counsel from police-initiated interrogation. Rather, the Court

recognized the duty of the State to honor a defendant's choice to have counsel act as a medium between him and the State in defending against criminal charges. *Moulton*, 474 U.S. at 170-171. The Court clearly held that that duty is triggered once the right to counsel has attached and been asserted. *Id*. Thus, the significance of the existence of an attorney-client relationship noted in footnote three in *Patterson* is that the existence of the relationship is the result of the defendant's express choice to have the assistance of counsel.

Petitioner also relies on a similar statement by the Court in *Harvey*, that "'once a defendant *obtains* or even requests counsel . . . analysis of the waiver issue changes' and *Jackson* applies." Pet.Br. at p. 25, quoting *Harvey*, 494 U.S. at 346 (emphasis added by Petitioner). According to Petitioner, that statement indicates that the existence of the attorney-client relationship triggers the *Jackson* rule. However, Petitioner fails to complete the Court's statement. Immediately following the statement quoted by Petitioner the Court explained, "But that change is due to the protective rule we created in *Jackson* based on the apparent inconsistency between *a request for counsel* and a later voluntary decision to proceed without assistance." *Harvey*, 494 U.S. at 352 (emphasis added). Again, as in *Patterson*, the significance of the fact that counsel has been "obtained" is that counsel has been obtained by the affirmative actions of the defendant and, thus, indicates the defendant's express choice to have the assistance of counsel.

Petitioner further claims that the existence of an attorney-client relationship should be the triggering event for application of the *Jackson* rule. But *Moran* rejected that claim. *Moran*, 475 U.S. at 430-431 ("As a practical matter, it makes little sense to say that the Sixth Amendment right to counsel attaches at different times depending on the fortuity of whether the suspect or his family happens to have retained counsel prior to interrogation."). Moreover, Petitioner's claim ignores that the *Jackson* rule is rooted in the *Edwards* rule, the purpose of which is to preclude, as a prophylactic measure, police from badgering a defendant into waiving his right to counsel and talking to police without counsel. *See Harvey*, 494 U.S. at 350. Central to both *Edwards* and *Jackson* is the principle that a defendant must choose whether to waive his right to counsel and speak to police without the assistance of counsel. *See Patterson*, 487 U.S. at 291 (purpose of *Edwards* and *Jackson* is to preserve the integrity of the defendant's choice to communicate with police through counsel). The existence of an attorney-client relationship forced on a defendant by the State, in the absence of the defendant's express request for counsel or express acceptance of counsel, says nothing about the defendant's choice. As this case demonstrates, it is entirely possible for a defendant to have counsel appointed without ever having made the choice to communicate with police only through counsel.

Thus, to the extent the existence of an attorney-client relationship is relevant to the *Jackson* rule,

such a relationship does not exist by the mere appointment of counsel. Until he or she accepts the appointment of counsel, there can be no attorney-client relationship between the defendant and appointed counsel. Even if acquiescence in the appointment is sufficient to establish acceptance for general purposes of having the assistance of counsel in defending against the charges, for the specific purpose of indicating the choice to communicate to police only through counsel, mere acquiescence in the appointment of counsel is insufficient. To be an adequate assertion of the right to trigger the *Jackson* rule, acquiescence in the appointment should be shown *at least* by some action by the defendant, such as cooperating with the appointed counsel or appearing in court with counsel. Without such action, mere appointment of counsel by the State says nothing about the defendant's decision to communicate with the police only through appointed counsel, but only speaks to the State's decision to appoint counsel even without a request from the defendant.

Moreover, contrary to Petitioner's suggestion (Pet.Br. at pp. 22-23), a rule that requires an express acceptance of appointed counsel does not eliminate the defendant's right to counsel. A formally-charged defendant is entitled to the assistance of counsel, regardless of whether he has retained counsel, requested counsel, or been appointed counsel. The *Jackson* rule does not affect that principle because the purpose of the *Jackson* rule is to preserve the integrity of the defendant's choice to communicate

with police through counsel, not to bar a defendant from waiving his right to counsel. *See Patterson*, 487 U.S. at 291. In other words, the purpose of the *Jackson* rule is "to help guarantee that waivers are truly voluntary." *Harvey*, 494 U.S. at 349. A defendant who has an attorney, whether retained or appointed, may reasonably and voluntarily decide to communicate with police without counsel. As Justice Kennedy explained in his concurring opinion in *Cobb*, "It is quite unremarkable" that a defendant would want the assistance of counsel "to guide him through hearings and trial" but also "choose to give on his own a forthright account of the events that occurred." *Cobb*, 532 U.S. at 177 (Kennedy, J., concurring). The *Jackson* rule does not prohibit such a choice, but protects the defendant's ability to make that choice while ensuring that the choice will not be the result of police coercion.

II. THE *JACKSON* RULE SHOULD BE MODIFIED TO APPLY ONLY "WHERE A SUSPECT HAS MADE A CLEAR AND UNAMBIGUOUS ASSERTION OF THE RIGHT NOT TO SPEAK OUTSIDE THE PRESENCE OF COUNSEL".

As shown in Section I, the *Jackson* prophylactic rule is designed to protect a defendant's choice to have the assistance of counsel, a choice that must be manifested by an affirmative assertion or request. The rule's premise is that a formally-charged defendant's request to be represented by counsel reflects

the choice to communicate with police only through counsel. *See Jackson*, 475 U.S. at 633. From the day the decision was announced, however, *Jackson*'s critics have questioned the correctness of that premise. Certainly, a defendant who requests counsel during a post-arraignment interrogation has made the choice to communicate with police only through counsel. But it is far from obvious that, absent such a request, a defendant who has retained or requested counsel has made that same choice. For this reason, Justice Kennedy observed that the *Jackson* rule makes sense only where the defendant "has made a clear and unambiguous assertion of the right not to speak outside the presence of counsel, the same clear election required under *Edwards*." *Cobb*, 532 U.S. at 176 (Kennedy, J., concurring, Justices Scalia and Thomas, joining). *Amici* agree and ask the Court to reconsider *Jackson*.

1. The dissent in *Jackson* criticized the Court's decision as an illogical extension of the *Edwards* rule. *Jackson*, 475 U.S. at 637-642. (Rehnquist, J., dissenting). The *Edwards* rule, the dissent noted, "does not arise until affirmatively invoked by the defendant during custodial interrogation." *Id*. at 641. In contrast, the *Jackson* rule is not tied to a request for counsel during a custodial interrogation. Rather, it is triggered by "the otherwise legally insignificant request for counsel" at arraignment. *Id*. at 642. The dissent criticized the decision for providing "no satisfactory explanation for its decision to extend the *Edwards* rule to the Sixth Amendment," while

limiting "that rule to those defendants foresighted enough, or just plain lucky enough, to have made an explicit request for counsel" which is "completely unnecessary for Sixth Amendment purposes." *Id*. The Court in *McNeil* similarly viewed the *Jackson* rule as based on the premise that the "invocation of the Sixth Amendment right to counsel" at arraignment constitutes a "request for the assistance of counsel in custodial interrogation." *McNeil*, 501 U.S. at 179.

The wisdom of the *Jackson* rule depends on the validity of that premise. Yet there is serious reason to question its validity. As Justice Kennedy stated:

> [T]he acceptance of counsel at arraignment or similar proceeding only begs the question: acceptance of counsel for what? It is quite unremarkable that a suspect might want the assistance of an expert in the law to guide him through hearings and trial, and the attendant complex legal matters that might arise, but nonetheless might choose to give on his own a forthright account of the events that occurred. A court-made rule that prevents a suspect from even making this choice serves little purpose, especially given the regime of *Miranda* and *Edwards*.

Cobb, 532 U.S. at 177 (Kennedy, J., concurring).

Of course, if the Constitution itself mandates the *Jackson* rule, the rule's practical effect would be irrelevant. But *Jackson* is "not compelled directly by the Constitution". *Harvey*, 494 U.S. at 351-352. Rather, *Jackson* establishes a prophylactic rule "designed to

ensure voluntary, knowing, and intelligent waivers of the Sixth Amendment right to counsel." *Id*. at 351. A prophylactic rule must be limited to its stated objectives so that it strikes a balance between those objectives and societal interests. *See United States v. Patane*, 542 U.S. 630, 639 (2004) (extension of a prophylactic rule designed to protect the privilege against self-incrimination "must be justified by its necessity for the protection of the actual right"); *Minnick v. Mississippi*, 498 U.S. at 161 (Scalia, J., dissenting) ("The value of any prophylactic rule (assuming the authority to adopt a prophylactic rule) must be assessed, not only on the basis of what is granted, but also on the basis of what is lost."). Therefore, the Court "ought to question the wisdom of a judge-made preventative rule to protect a suspect's desire not to speak when it cannot be shown that he had that intent." *Cobb*, 532 U.S. at 176 (Kennedy, J., concurring).

Moreover, *Jackson*'s extension of *Edwards* cannot be justified on the ground that post-arraignment custodial interrogations deserve heightened protection compared to pre-arraignment interrogations. In *Patterson*, the Court explained that it has "defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." *Patterson*, 487 U.S. at 298. Applying this approach, the Court concluded that "[t]he State's decision to . . . commence formal adversarial proceedings against the accused

does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose that an attorney serves when the accused is questioned by authorities." *Id*. at 298-299.

Nor can the *Jackson* rule be justified as a rule that protects against police routinely badgering defendants into waiving their right to counsel, one justification offered by the Court for adopting the *Jackson* prophylactic rule. Criticizing that justification, the *Jackson* dissent observed, "[t]he Court does not even suggest that the police commonly deny defendants their Sixth Amendment right to counsel" and it is unlikely that "such a claim [would] be borne out by empirical evidence." *Jackson*, 475 U.S. at 625 (Rehnquist, J., dissenting). In other words, it is unlikely that the evil targeted by the *Jackson* rule rises to the level sufficient to justify the prophylactic rule. *See Hudson v. Michigan*, 547 U.S. 586, 599 (2006) ("we now have increasing evidence that police forces across the United States take the constitutional rights of citizens seriously"; factors such as "education, training, and supervision of police officers," the deterrent effect of liability under 42 U.S.C. § 1983, and the professionalism of "modern police forces" reduce the risk of constitutional violations by police.).

2. In the end, the *Jackson* rule is unnecessary. As discussed above, the rule was created to protect formally-charged defendants from being coerced into waiving their right to counsel during police-initiated interrogations. A defendant, however, is *already*

protected against the use of such tactics: that protection is provided by *Miranda* and *Edwards*. At all times before and after the initiation of adversarial proceedings, a police-initiated custodial interrogation (1) must be preceded by *Miranda* warnings and a *Miranda* waiver, and (2) must terminate if the defendant rescinds the waiver and requests counsel. Under *Edwards*, the defendant is always protected from being badgered by police into withdrawing a previous request for counsel during a custodial interrogation.

Accordingly, as Justice Kennedy concluded, the *Jackson* rule should "apply only where a suspect has made a clear and unambiguous assertion of the right not to speak outside the presence of counsel, the same clear election required under *Edwards*." *Cobb*, 532 U.S. at 176 (Kennedy, J., concurring). To the extent the *Jackson* rule appears to provide additional protection beyond that provided by the *Edwards* rule, it should be abandoned.

CONCLUSION

This Court should affirm the decision of the Louisiana Supreme Court.

Respectfully submitted,

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