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 Louisiana Supreme Court*

## SUPPLEMENTAL BRIEF FOR RESPONDENT

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## SUPPLEMENTAL QUESTION PRESENTED

Should *Michigan v. Jackson*, 475 U.S. 625 (1986), be overruled?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Constitutional Provisions**



**Miscellaneous**

## SUMMARY OF ARGUMENT

The Fifth and Sixth Amendments protect an accused in distinct ways. The Fifth helps him face police questioning, and so the Court has enacted powerful rules to "counteract the 'inherently compelling pressures' of custodial interrogation, including the right to have counsel present." *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991) (quoting *Miranda v. Arizona*, 384 U.S. 436, 475 (1966)); *see also Edwards v. Arizona*, 451 U.S. 477 (1981). The Sixth, in contrast, helps the accused face an expert government prosecutor by providing counsel to navigate "the intricacies of substantive and procedural criminal law." *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2583 (2008) (quotations omitted). These constitutional safeguards advance distinct policies, but in *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court conflated them, resulting in doctrinal confusion and unjustifiable social costs. The Court should now overrule *Jackson* and "bring[] its Fifth and Sixth Amendment jurisprudence into a logical alignment." *McNeil*, 501 U.S., at 183 (Kennedy, J., concurring).

*Jackson* held that, after attachment and invocation of the Sixth Amendment right to counsel, "*any* subsequent waiver during a police-initiated custodial interview is ineffective." *McNeil,* 501 U.S., at 175 (emphasis added). *Jackson* simply transplanted into the Sixth Amendment the rule of *Edwards v. Arizona*—a rule designed to safeguard the *Fifth* Amendment right against compelled self-incrimination. *Jackson*, 475 U.S., at 626, 630-36 (adopting *Edwards*). In doing so, *Jackson* created a

perverse new rule that unjustifiably "supersedes the suspect's voluntary choice to speak with investigators," *Texas v. Cobb*, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring), and thus violates the Fifth Amendment policies it was supposed to reinforce.

*Jackson* was anomalous from the day it was decided because the *Edwards* rule "makes no sense at all" outside the Fifth Amendment. *See Jackson*, 475 U.S., at 640 (Rehnquist, J., dissenting). Indeed, the Court would soon discard *Jackson*'s premises in subsequent decisions. *See, e.g., Cobb*, 532 U.S., at 175-76 (Kennedy, J., concurring) (discussing *Jackson*'s doctrinal erosion). More fundamentally, *Jackson* misperceived the nature of the "Assistance of Counsel" guaranteed by the Sixth Amendment. U.S. CONST. amend. VI. The Court should therefore overrule *Jackson* and remove an illogical and unnecessary accretion on this Court's Sixth Amendment jurisprudence that has been thoroughly undermined by subsequent decisions.[1]

In *Jackson*'s absence, an accused's free choice not to speak to police—or to speak only with counsel beside him—will still be protected by three layers: the Fifth Amendment, *Miranda* and *Edwards.* An

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[1] *See, e.g., Payne v. Tennessee*, 501 U.S. 808, 827-30 (1991) (explaining *stare decisis* is weakest when prior constitutional decisions are "unworkable or badly reasoned," "involv[e] procedural and evidentiary rules," were "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions," or "have been questioned by Members of the Court in later decisions") (citations omitted).

accused will still enjoy counsel's Sixth Amendment assistance throughout pretrial critical phases, including custodial interrogation. And the Sixth Amendment will still bar police from circumventing an accused's right to counsel through subterfuge or other conduct that would not allow a *Miranda* waiver. *See, e.g., Patterson v. Illinois*, 487 U.S. 285, 296 n.9 (1988); *Massiah v. United States*, 377 U.S. 201, 205-07 (1964). Overruling *Jackson*, therefore, will not detract in the least from the essential protections of the Fifth and Sixth Amendment, but will instead bring needed coherence to the law and avoid the social cost inherent in suppressing a voluntary confession given in full compliance with *Edwards* and *Miranda*.

Discarding *Jackson* will also free investigators from an unfair presumption that, once the Sixth Amendment has attached, an accused's decision to speak without counsel must be the product of police overreaching. That presumption has no place in a Constitution that forbids *compelled* self-incrimination as a positive evil, U.S. CONST. amend. V, but welcomes "uncoerced confessions [as] … an unmitigated good." *Cobb*, 532 U.S., at 172 (quoting *McNeil*, 501 U.S., at 181).

## ARGUMENT

### I. *JACKSON* RESTED ON WEAK FOUNDATIONS THAT HAVE BEEN COMPLETELY ERODED BY SUBSEQUENT DECISIONS OF THE COURT.

*Jackson* purports to strengthen the Sixth Amendment's guarantee of the "Assistance of Counsel" in criminal prosecutions. U.S. CONST. amend. VI. In reality, however, *Jackson*'s anti-

waiver rule is only tenuously connected to that constitutional guarantee. Instead, *Jackson* extends a prophylaxis that rationally furthers only the *Fifth* Amendment right against compelled self-incrimination.[2] This Part explains *Jackson*'s origins in the Fifth Amendment, why its original premises made little sense in the Sixth Amendment context, and why those premises have been undermined by subsequent decisions.[3]

Whether before or after attachment of the Sixth Amendment right to counsel, suspects have the Fifth Amendment right to demand counsel's presence, in order to counteract the "inherently compelling pressures" of interrogation. *Miranda v. Arizona*, 384 U.S. 436, 467-74 (1966). The Court later enacted the *Edwards* prophylactic rule "to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990) (discussing *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981)). Once a suspect clearly invokes[4] his right to counsel during interrogation, not only will he be free from further police-initiated questioning outside counsel's presence, but his subsequent

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[2] *See, e.g., McNeil*, 501 U.S., at 176 (discussing "right to counsel" found in Court's Fifth Amendment anti-coercion jurisprudence).

[3] Part II, *infra*, explains why *Jackson*'s exaggerated anti-waiver rule is based on a fundamental misperception of counsel's Sixth Amendment role during questioning.

[4] *See Davis v. United States*, 512 U.S. 452, 459-62 (1994) (requiring that an *Edwards* invocation be unambiguous); *see also infra* Part I.B.

waiver—even if voluntary, knowing, and intelligent—will be presumed invalid. 451 U.S., at 484.

Five years later, *Michigan v. Jackson* engineered "a wholesale importation of the *Edwards* rule into the Sixth Amendment." *Cobb*, 532 U.S., at 175 (Kennedy, J., concurring); *Jackson*, 475 U.S., at 635-36. Under *Jackson*, a defendant's "assertion" of his right to counsel "at an arraignment or similar proceeding" triggers the *Edwards* effect: the police may not subsequently initiate questioning outside counsel's presence, and any waiver of counsel under such circumstances is ineffective. *Id.* *Jackson* thus applied the *Edwards* anti-coercion rule outside the immediate context of custodial interrogation. It also allowed *Edwards* to be triggered by a Sixth Amendment "invocation" that, as the Court later explained, "as a matter of *fact*, [does] *not* … invoke the *Miranda-Edwards* interest." *McNeil*, 501 U.S., at 178.

*Jackson*'s harsh anti-waiver rule was based on a misunderstanding of counsel's Sixth Amendment function during questioning. *See infra* Part II. But as Part I.B *infra* explains, *Jackson*'s own internal reasoning for adopting that rule cannot withstand scrutiny. The *Jackson* dissenters—since echoed by individual Justices—recognized that *Jackson*'s premises were flawed from conception. Moreover, subsequent decisions have unraveled *Jackson*'s analytical framework. *Jackson* is "a mere survivor

of obsolete constitutional thinking" and should therefore be overruled.[5]

### A. From the beginning, the *Edwards* anti-coercion rule fit poorly in the Sixth Amendment context.

*Jackson* was based on three distinct premises that were either faulty when the case was decided, are untenable today in light of subsequent precedent, or both.

- *One.* *Jackson* thought the anti-coercion rationale of *Edwards* was "even *stronger* after [an accused] has been formally charged with an offense than before." 475 U.S., at 631-32 (emphasis added).
- *Two.* *Jackson* gave "a broad, rather than a narrow, interpretation to a defendant's request for counsel," and so rejected the argument that an accused requesting counsel at arraignment "may not have actually intended [his] request to encompass representation during any further questioning by the police." *Id.*, at 632-33.
- *Three.* *Jackson* simply imported *Edwards*'s Fifth Amendment rule, finding "no warrant for a different view under [the] Sixth Amendment," and therefore concluded:

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[5] *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992); *see also United States v. Gaudin*, 515 U.S. 506, 521 (1995) (explaining that *stare decisis* yields when a prior decision's "underpinnings [have been] eroded … by subsequent decisions of [the] Court").

> Just as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in the Sixth Amendment analysis. *Id.*, at 635.

Exposing the weakness of *Jackson*'s original premises begins with then-Justice Rehnquist's dissent (joined by Justices Powell and O'Connor), because subsequent decisions of the Court (and opinions by other Justices) have adopted and reinforced the dissent's fundamental objections. The dissenters focused on three weaknesses in the majority's analysis.

The dissenters first emphasized the fundamental point that *Edwards*'s prophylactic rule was intended to reinforce only the Fifth Amendment's prohibition on compelled self-incrimination. 475 U.S., at 638-40 (Rehnquist, J., dissenting). Applying that anti-coercion rule in the Sixth Amendment context, the dissent explained, "cut[s] the *Edwards* rule loose from its analytical moorings." *Id.*, at 640. "To put it simply," the dissent concluded, "the prophylactic rule set forth in *Edwards* makes no sense at all except when linked to the Fifth Amendment's prohibition against compelled self-incrimination." *Id.* Three different Justices have since echoed the *Jackson* dissenters' basic criticism that transplanting *Edwards* into the Sixth Amendment context was a mistake. *See Cobb*, 532 U.S., at 175 (Kennedy, J., concurring) (criticizing *Jackson*'s

"wholesale importation of the *Edwards* rule into the Sixth Amendment").

Second, the dissenters charged that application of the new *Jackson* rule "graphically reveal[ed] [its] illogic." 475 U.S., at 640 (Rehnquist, J., dissenting). While the *Jackson* bar was triggered by the "assertion" of an accused's right to counsel, attachment of the Sixth Amendment right is not tied to any assertion by a defendant. *Id.*, at 640-41. The *Fifth* Amendment right does arise only when invoked: linking *Edwards*'s prophylactic rule to an "assertion" thus makes sense. *Id.* But applying *Edwards* to the Sixth Amendment, which does not depend on any assertion, left *Jackson* in an "analytical straitjacket." *Id.*, at 641. The *Jackson* rule would be limited "to those defendants foresighted enough, or just plain lucky enough, to have made an explicit request for counsel which we have always understood to be completely unnecessary for Sixth Amendment purposes." *Id.*, at 642. Again, in agreement with the *Jackson* dissenters, three different Justices have since observed that, because "[t]he Sixth Amendment right to counsel attaches quite without reference to the suspect's choice to speak with investigators after a *Miranda* warning … it thus makes little sense for a protective rule to attach absent such an election by the suspect." *Cobb*, 532 U.S., at 176 (Kennedy, J., concurring).

Third, the dissenters viewed *Jackson* as an anomalous extension of the Court's waiver jurisprudence. They observed that the Court had previously erected *per se* barriers against certain police conduct. *See id.*, at 641 n.4 (Rehnquist, J.,

dissenting) (citing *Maine v. Moulton*, 474 U.S. 159 (1985); *United States v. Henry*, 447 U.S. 264 (1980); *Massiah v. United States*, 377 U.S. 201 (1964)). But those were "surreptitious informant" cases, in which an accused did not realize he was being questioned by a government agent and therefore had no opportunity to waive his right to counsel. *Id.* It made little sense to extend these precedents to the circumstances of *Jackson*, in which "the conduct of the police was totally open and aboveboard." *Id.*

There was another critical inconsistency in *Jackson* that was not discussed by the dissent. *Jackson*'s second premise was based on a flawed conflation of a defendant's "assertion" and his "waiver" of the right to counsel. 475 U.S., at 632-33 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). But a defendant's effective or ineffective "assertion" of his right to counsel is in no sense a "waiver" of that right: the two concepts are analytically distinct, and therefore *Zerbst* provides no basis for "broadly" construing a defendant's assertion. More concretely, however, this aspect of *Jackson* flatly contradicted the Court's statement two years earlier in *Smith v. Illinois* that "[i]nvocation and waiver [of the right to counsel] are entirely distinct inquiries, and the two must not be blurred by merging them together." 469 U.S. 91, 98 (1984). *Jackson* made precisely that error, and therefore contravened the Court's own precedent.

### B. Subsequent decisions have abandoned *Jackson*'s premises.

The Court discarded *Jackson*'s first premise a mere two terms later in *Patterson v. Illinois*, 487

U.S. 285 (1988). *Jackson* had said that "the reasons for prohibiting the interrogation of an uncounseled accused are *even stronger* after he has been formally charged with an offense than before." 475 U.S., at 631 (emphasis added). But in deciding that *Miranda* warnings supported waiver of both the Sixth and Fifth Amendment rights to counsel, *Patterson* reasoned:

> The State's decision to take an additional step and 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. With respect to this inquiry, we do not discern a substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at postindictment questioning. 487 U.S., at 298-99.[6]

But that core proposition from *Patterson* plainly repudiated *Jackson*'s first premise. In *Cobb,* furthermore, three Justices recognized precisely that: *Patterson* undermined *Jackson*. *See* 532 U.S., at 175 (Kennedy, J., concurring) (discussing *Patterson*).

*Jackson*'s second premise—conceptually flawed and contrary to *Smith v. Illinois* from the

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[6] An "important basis" for *Patterson* was counsel's "rather unidimensional role" in post-indictment questioning, "largely limited to advising his client as to what questions to answer and which ones to decline to answer." 487 U.S., at 294 n.6; *see infra* Part II.A.

beginning—was further damaged by *Davis v. United States*, 512 U.S. 452 (1994). *Davis* held that a defendant's assertion of his right to counsel must be sufficiently clear and unambiguous "that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.*, at 459. Otherwise it would fail to trigger *Edwards*. *Id.*

*Davis* strictly construed a defendant's request for counsel, resolving any ambiguity in favor of the police.[7] *Jackson* had liberally construed the same request, resolving any ambiguity in favor of the accused. 475 U.S., at 633. There is no reason to assume that an *Edwards* assertion need be any less clear in the Sixth Amendment context. Indeed, to support the *Edwards* effect, the Sixth Amendment should require a *clearer* "assertion" since it would come, if at all, outside the context of interrogation. *Davis* therefore directly undermined *Jackson*'s second premise. In *Cobb*, three Justices recognized just that: *Davis* is "further reason to doubt the wisdom of the *Jackson* holding." *Cobb*, 532 U.S., at 175-76 (Kennedy, J., concurring).

Finally, *McNeil v. Wisconsin*, 501 U.S. 171 (1991), dealt the last blow to *Jackson*'s reasoning. *McNeil* held that an accused's invocation of his Sixth Amendment right to counsel is not, as a matter of fact or policy, an invocation of his Fifth Amendment right to counsel. 501 U.S., at 177-81. *McNeil* reasoned that defendants invoke their Fifth

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[7] *See id.*, at 461 (reasoning that a bright line is needed because "it is police officers who must actually decide whether or not they can question a suspect").

and Sixth Amendment rights to counsel for distinctly different purposes: (1) the Sixth, to insure postindictment protection "at critical confrontations with his expert adversary, the government," *id.*, at 177-78; (2) the Fifth, "to protect a quite different interest: a suspect's 'desire to deal with the police only through counsel,'" *id.*, at 178 (quoting *Edwards*, 451 U.S., at 484). Assertion of the Sixth Amendment right (a *Jackson* assertion) was not, as a matter of fact, the assertion of the Fifth Amendment right (an *Edwards* assertion). *Id.* Nor would such a rule be sound policy, because it would effectively render any accused "unapproachable by police officers suspecting them of involvement in other crimes, even though they have never expressed any unwillingness to be questioned." *Id.*, at 180-81. The Court rejected that result as destructive of a paramount pubic interest: "Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser." *Id.*, at 181.

*McNeil* obliterated *Jackson*'s third premise by completely severing the *Jackson* anti-waiver rule from any tie to *Edwards*. Simply put, a *Jackson* invocation is factually and legally different from an *Edwards* invocation. 501 U.S., at 179. This means that, today, the *Jackson* rule exists only as a disembodied presumption. *See*, *e.g.*, *id.* (characterizing a *Jackson* assertion as merely a "legally presumed … request for the assistance of counsel in custodial interrogation"). In *Cobb*, three Justices recognized that this fundamental problem rendered the *Jackson* rule pointless:

> [T]he acceptance of counsel at an arraignment or similar proceedings 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*. 532 U.S., at 177 (Kennedy, J., concurring).

In sum, overruling *Jackson* will simply recognize what *Patterson*, *Davis* and *McNeil* have already made it: a hopeless anomaly.

## II. *JACKSON* MISPERCEIVED THE NATURE OF THE "ASSISTANCE OF COUNSEL" AFFORDED DURING CUSTODIAL INTERROGATION.

In addition to its internal flaws, *Jackson* should be discarded in light of the very Sixth Amendment right to counsel it is said to protect. *Jackson* interprets counsel's role during custodial interrogation in a manner irreconcilable with the meaning and purpose of the Sixth Amendment, as well as the Court's broader jurisprudence. *Jackson* consequently erected an exaggerated anti-waiver rule, transforming counsel from an advisor into a shield against voluntary confessions.

### A. Counsel's "simple and limited" Sixth Amendment role in questioning requires only a "simple and limited" waiver standard.

Since "an unaided layman ha[s] little skill in arguing the law or in coping with an intricate procedural system," the Sixth Amendment right to counsel guarantees him "a guide though complex legal technicalities." *United States v. Ash*, 413 U.S. 300, 307 (1973). Its "core purpose" is expert aid at the trial event, when "the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States v. Gouveia*, 467 U.S. 180, 188-89 (1984) (quoting *Ash*, 413 U.S. at 309). The rise of the "public prosecutor" in colonial America explains this central function of the Sixth Amendment:

> The accused in the colonies faced a government official whose specific function it was to prosecute, and who was incomparably more familiar than the accused with the problems of procedure, the idiosyncrasies of juries, and, last but not least, the personnel of the court.

*Ash*, 413 U.S. at 308 (quoting F. HELLER, THE SIXTH AMENDMENT 20-21 (1951)).[8]

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[8] *See also Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) (explaining that Sixth Amendment protects defendants who lack "the professional legal skill to protect [themselves] … before a tribunal … wherein the prosecution is presented by experienced and learned counsel").

While focused on trial, the Sixth Amendment right to counsel becomes operative, before trial, upon the initiation of "adversary judicial proceedings," when the defendant is first "immersed in the intricacies of substantive and procedural criminal law." *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2583 (2008) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)). Thus the Court applies the right, after attachment, to all proceedings deemed "critical"[9]—stages where "the accused [is] confronted, *just as at trial*, by the procedural system, or by his expert adversary, or both." *Gouveia*, 467 U.S., at 189 (quotations omitted) (emphasis added).[10]

The Court discerns critical stages by asking whether, during a particular event, "the accused require[s] aid in coping with legal problems or assistance in dealing with his adversary." *Ash*, 413 U.S., at 313.[11] For example, at arraignment an accused needs a lawyer to "advis[e] [him] on available defenses … [and] to allow him to plead intelligently." *Id.* at 312 (discussing *Hamilton v. Alabama*, 368 U.S. 52, 54-55 (1961); *White v.*

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[9] *See, e.g., United States v. Wade*, 388 U.S. 218, 224 (1967) (explaining that "the Sixth Amendment guarantee … appl[ies] to 'critical' stages of the proceedings").

[10] *See also Ash*, 413 U.S., at 310 (reasoning that the right to counsel extends to "pretrial events that might appropriately be considered … parts of the trial itself").

[11] *See also Rothgery*, 128 S. Ct., at 2589 (explaining that a government's "commitment to prosecute" triggers Sixth Amendment protection by "defin[ing] [the accused's] capacity and control[ling] his actual ability to defend himself against a formal accusation that he is a criminal").

*Maryland*, 373 U.S. 59, 60 (1963)). Likewise, he requires legal assistance at a post-indictment lineup given the peculiar pitfalls and "grave potential for prejudice" inherent in such encounters. *United States v. Wade*, 388 U.S. 218, 236-37 (1967). Finally, during interrogation—as the Court explained in a case where the prosecution secretly recorded the accused's conversations—"counsel could have advised [the accused] on the benefits of the Fifth Amendment and could have sheltered him from the overreaching of the prosecution." *Ash*, 413 U.S., at 312 (discussing *Massiah*, 377 U.S., at 205). In sum, the lawyer's Sixth Amendment role at these stages "has remained essentially the same as his function at trial … [*i.e.*] act[ing] as a spokesman for, or advisor to, the accused." *Ash*, 413 U.S., at 412.[12]

But even when counsel's pretrial assistance is constitutionally guaranteed, the accused can waive it. *See, e.g., Patterson*, 487 U.S., at 296 (explaining an accused's Sixth Amendment "waiver on [the basis of *Miranda* warnings] will be considered a knowing and intelligent one"). What a waiver demands depends on 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." *Id.*, at 298. Thus, waiver of counsel *at trial itself* is strait-jacketed by "the most rigorous restrictions," given the "enormous importance and role that an attorney

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[12] *See generally, e.g., Rothgery*, 128 S. Ct., at 2594-95 (Alito, J., concurring) (discussing application of Sixth Amendment right to critical pretrial stages).

plays at a criminal trial." *Id.* (citing *Faretta v. California*, 422 U.S. 806, 835-36 (1975)).

Critically for the present case, however, *Patterson* emphasized that "the role of counsel at [post-indictment] questioning"—while protected by the Sixth Amendment"—is nonetheless "*relatively simple and limited*." *Id.*, at 300 (emphasis added). In contrast to "later phases of criminal proceedings," counsel's earlier role at questioning is "substantially different," even "unidimensional: largely limited to advising his client as to what questions to answer and which ones to decline to answer." *Id.*, at 294 n.6. Furthermore, although an indictment triggers the Sixth Amendment right to counsel, nonetheless it

> … 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 298-99.

Finding counsel's Sixth Amendment role at questioning "simple and limited," the Court had "no problem in having a waiver procedure at that stage which is likewise simple and limited." *Id.*, at 300. Consequently, *Patterson* held the same *Miranda* warnings supporting waiver of the Fifth Amendment right to counsel also support waiver of the Sixth Amendment right. *Id.*, at 298-300.

An accused's free, informed, and unilateral waiver of counsel under such circumstances is perfectly consistent with his enjoying a constitutionally-protected right to counsel. As the Court explained in *Cobb*, "there is no 'background

principle' of our Sixth Amendment jurisprudence establishing that there may be no contact between a defendant and police without counsel present." 532 U.S., at 171 n.2. After all, "the Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor." *Moran v. Burbine*, 475 U.S. 412, 430 (1986).

### B. *Jackson* exaggerates the required waiver by warping counsel's Sixth Amendment role in questioning.

In light of the general principles explained above, *Jackson* is an aberration. The problem with *Jackson* is not that it assigned counsel a Sixth Amendment role in post-indictment questioning, but that it misperceived that role and constructed an exaggerated waiver requirement based on that misperception.

*Jackson*'s anti-coercion origins, *see supra* Part I, show it to be fundamentally at odds with the Court's general understanding of the Sixth Amendment right to counsel and the proper standards for its waiver during custodial interrogation. The Sixth Amendment furnishes a skilled advocate preeminently as a *trial* protection, and extends to earlier "trial-type confrontations" *Gouveia*, 467 U.S., at 190, only to safeguard the integrity of the trial event itself.[13] *See supra* Part II.A. In other

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[13] *See, e.g., Gouveia*, 467 U.S., at 189 (explaining that Sixth Amendment counsel right extends to pretrial stages "where the results of the confrontation 'might well settle the accused's fate and reduce the trial itself to a mere formality'") (quoting

words, the "defence" protected by the counsel guarantee "means defense at trial, not defense in relation to other objectives that may be important to the accused." *Rothgery*, 128 S. Ct., at 2594 (Alito, J., concurring) (interpreting U.S. CONST. amend. VI). Against that backdrop, the Court has recognized that counsel's Sixth Amendment role during *pretrial* interrogation is "relatively simple and limited […] to advising his client as to what questions to answer and which ones to decline to answer." *Patterson*, 487 U.S., at 300, 294 n.6. And the Court consequently approved a "waiver procedure at that stage which is likewise simple and limited." *Id.* at 300; *see supra* Part II.A.

But *Jackson* implicitly assigned a far different Sixth Amendment role to counsel during post-indictment questioning, and explicitly demanded a far higher waiver standard. *Jackson* fancies counsel so critical at that stage that counsel's absence *presumptively invalidates* a waiver—even if voluntary, knowing, and intelligent. In *Jackson*'s world, then, counsel effectively acts as a shield, not against police badgering (which *Miranda-Edwards* already prevent), but against the accused's own free election to speak to the police in the first place. *See, e.g., Cobb*, 532 U.S., at 175 (Kennedy, J., concurring) (observing that "[w]hile the *Edwards* rule operates to preserve the free choice of a suspect

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*Wade*, 388 U.S., at 224); *see also Rothgery*, 128 S. Ct., at 2590 (observing that initial appearance triggers Sixth Amendment right to counsel since at that point, "a defendant … is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives").

to remain silent, if *Jackson* were to apply it would override that choice").

But that distorts the Sixth Amendment role this Court has described for counsel during questioning. At that stage, *Jackson* does not rationally safeguard counsel's role as a "guide through complex legal technicalities." *Ash*, 413 U.S., at 307; *see also supra* Part II.A. That *could not* be a function *Jackson* hoped to protect, since, as *Patterson* explained, counsel's role during questioning is "simple," "limited" and "unidimensional." *See* 487 U.S., at 300, 294 n.6.[14] More to the point, *Jackson* does not envision Sixth Amendment counsel as *merely* instructing the accused "as to what questions to answer and which ones to decline to answer." *Id.*, at 294 n.6. Instead, the upshot of *Jackson*'s anti-waiver rule is that, during questioning, counsel should simply tell an accused to keep silent.

Well before *Jackson*, the Court explained counsel's function during questioning was to "advis[e] his client on the benefits of the Fifth Amendment and … shelter[] him from the overreaching of the prosecution." *Ash*, 413 U.S., at 312 (discussing *Massiah*, 377 U.S., at 205). The Court has since clarified that *Miranda* warnings perform the same function, by "convey[ing] [to the accused] … the sum and substance of the rights that

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[14] *See also Rothgery*, 128 S. Ct., at 2594 (Alito, J., concurring) (interpreting Court's critical stage jurisprudence "to require the appointment of counsel only after the defendant's prosecution has begun, *and then only as necessary to guarantee the defendant effective assistance at trial*") (emphasis added).

the Sixth Amendment provide[s]." *Patterson*, 487 U.S., at 293.[15] But *Jackson* is at odds with these principles because it presumptively invalidates a properly Mirandized waiver.

*Jackson*'s anti-waiver rule, then, must be premised on the notion that, if counsel were present during questioning, he should always *overstep* his proper Sixth Amendment role. That is, *Jackson* appears to expect counsel to go beyond merely explaining why the accused need not speak, and instead to make sure the accused says nothing, even if he *wants* to come clean. But as the Court explained in *Moran*, "[t]he Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor." 475 U.S., at 430.[16]

*Jackson*'s conception of Sixth Amendment counsel violates that basic principle. It does not actually protect an accused's free will, but to the contrary "operates to invalidate a confession given by the free choice of suspects who have received proper advice of their *Miranda* rights but waived them nonetheless." *Cobb*, 532 U.S., at 174-75

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[15] *See also Davis*, 512 U.S., at 460 (explaining that "the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves").

[16] *See also Cobb*, 532 U.S., at 171 n.2 (explaining that "there is no 'background principle' of our Sixth Amendment jurisprudence establishing that there may be no contact between a defendant and police without counsel present").

(Kennedy, J., concurring). While it may be true that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances," *Watts v. State of Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring and dissenting), the Sixth Amendment itself is more ambivalent. It lets the accused decide for himself whether to talk.

Since *Jackson* fundamentally misperceives counsel's Sixth Amendment role during questioning, and erects an exaggerated anti-waiver rule based on that misperception, *Jackson* departs from this Court's Sixth Amendment jurisprudence and should be overruled.[17]

## III. ELIMINATING *JACKSON* WILL LEAVE UNDISTURBED FIFTH AND SIXTH AMENDMENT SAFEGUARDS ON AN ACCUSED'S RIGHT TO COUNSEL.

Discarding *Jackson* and its dubious benefits will leave an accused with the robust protections already provided by the Fifth and Sixth Amendments. An accused will, for instance, still be able to raise his silence or his demand for counsel as a Fifth

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[17] This Court's recent decision in *Rothgery* does not commit it to upholding, nor does it otherwise approve, *Jackson*'s anti-waiver rule. *Rothgery*'s "narrow" holding only addresses when the Sixth Amendment counsel right *attaches*, 128 S. Ct., at 2592, and explicitly avoids deciding "the scope of an individual's postattachment right to the presence of counsel," *id.*, at 2591 n.15. Thus, *Rothgery* does not touch on the continuing validity of *Jackson*'s anti-waiver rule. *See also id.*, at 2592, 2594 (Alito, J., concurring) (joining Court's opinion because it only addresses *when* the Sixth Amendment attaches and not "*what* the right guarantees").

Amendment shield against police questioning, nullifying any subsequent police-initiated waivers. Furthermore, an accused will still have a Sixth Amendment right to counsel at post-indictment questioning—but he will simply be able to waive it on the same terms, and under the same safeguards, as his Fifth Amendment right. Finally, an accused will still be shielded by the Sixth Amendment from surreptitious tactics that would not furnish the opportunity for a *Miranda* waiver. *See, e.g., Patterson*, 487 U.S., at 296 n.9; *Massiah*, 377 U.S., at 205-07. *Jackson*'s demise will, in short, have no real effect on an accused's ability to counteract the "inherently compelling" pressures of custodial interrogation through the medium of counsel. *See Miranda*, 384 U.S., at 467.

Even assuming an accused happens to "invoke" *Jackson* at or following Sixth Amendment attachment,[18] his subsequent confrontation with investigators reveals just how illusory and superfluous *Jackson*'s benefits are. "[T]here can be no doubt that a suspect must be apprised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation." *Cobb*, 532 U.S., at 171 (citing *Miranda*, 384 U.S., at 479; *United States v. Dickerson*, 530 U.S. 428, 435 (2000)). Those warnings, of course, support a waiver of either the

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[18] *See Jackson*, 475 U.S., at 642 (Rehnquist, J., dissenting) (criticizing practical limit on availability of *Jackson* bar to "those defendants foresighted enough, or just plain lucky enough" to have explicitly requested counsel outside the context of custodial interrogation).

Fifth or Sixth Amendment rights to counsel. *Patterson*, 487 U.S., at 296. And this Court has explained that "the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves." *Davis*, 512 U.S., at 460.

But an accused who wants the help of counsel in dealing with the pressures of interrogation need only say four words, "I want my lawyer." From that moment, *Edwards* will shield him from any further police-initiated questioning and presumptively nullify any subsequent waiver of the right to counsel—even if the accused meant to waive it. And it will ensure him the *presence* of an attorney. *McNeil*, 501 U.S., at 177 (citing *Minnick v. Mississippi*, 498 U.S. 146 (1990)). Given this armory of constitutional and prophylactic rights that are activated by an accused's mouthing four simple words, one might ask: what is the purpose of the additional, dubious protection afforded by *Jackson*? The answer: none.

While *Jackson*'s benefits are scant, its costs are steep. Its disruption of Sixth Amendment jurisprudence has already been detailed. *See supra* Part II. But *Jackson* also undermines the very Fifth Amendment anti-coercion principles it purported to reinforce. After all, *Jackson* simply adopted *Edwards*, whose "essence" was "[p]reserving the integrity of an accused's choice to communicate with police only through counsel." *Patterson*, 487 U.S., at 291. *Edwards* was assertedly *not* about "barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone."

*Id.* But, as three members of this Court have already observed, *Jackson* undermines *Edwards* by doing precisely that: "[w]hile the *Edwards* rule operates to preserve the free choice of a suspect to remain silent, … *Jackson* … would override that choice." *Cobb*, 532 U.S., at 175 (Kennedy, J., concurring).

And when *Jackson* overrides an accused's "free choice," it does more than disrupt the Court's jurisprudential architecture. It also prevents the admission of otherwise valid confessions. No sensible rule of constitutional law should desire that outcome, particularly in an area that has not been plagued with the same "perceived widespread problem[s]" that inspired and justified the regime of *Miranda* and *Edwards*. *See Jackson*, 475 U.S., at 639-40 (Rehnquist, J., dissenting). Without tangible, compensating benefits, *Jackson* unreasonably hampers "the ready ability to obtain uncoerced confessions." *McNeil*, 501 U.S., at 181. Since that ability "is not an evil but an unmitigated good," *id.*, at 181, *Jackson* should go.

## CONCLUSION

*Jackson* furthers "a thinly disguised constitutional policy of minimizing or entirely prohibiting the use of evidence of voluntary out-of-court admissions and confessions made by the accused." *Massiah*, 377 U.S., at 209 (White, J., dissenting). But since the law "rejoice[s] at an honest confession," *Minnick*, 498 U.S., at 167 (Scalia, J., dissenting), the Sixth Amendment should not bar one freely given by an accused who has not declared he will communicate only through counsel,

and has even voluntarily waived that right. *Jackson*'s contrary rule furthers, not the Sixth Amendment, but a paternalism that "imprison[s] a man in his privileges and call[s] it the Constitution." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942).

The Court should overrule *Michigan v. Jackson*.

Respectfully submitted,

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