No. ___

IN THE
Supreme Court of the United States

JESSE JAY MONTEJO
Petitioner,

v.

STATE OF LOUISIANA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

The petitioner is Jesse Jay Montejo, the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

MISCELLANEOUS

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jesse Jay Montejo respectfully petitions for a writ of certiorari to review the judgment of the Louisiana Supreme Court in this case.

OPINION BELOW

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

JURISDICTION

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

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

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

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

STATEMENT OF THE CASE

A. *Introduction*

The present case raises an issue left unresolved by this Court's Sixth Amendment jurisprudence: When an indigent defendant's right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to "accept" the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present?

In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court held that once a defendant asserts his right to counsel at an arraignment or similar proceeding, any waiver of that right during subsequent police-initiated interrogation without counsel present is presumed invalid unless the accused initiates communication. *Id.* at 633. Two years later, in *Patterson v. Illinois*, the Court held that where the right to counsel has attached but an unrepresented defendant has not requested counsel, nor "retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities," the authorities may initiate interrogation. *Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988).

The question these decisions leave unaddressed — whether an indigent defendant who has been appointed counsel must take additional affirmative steps to "accept" that appointment — has divided the lower courts. The majority rule in the States that have considered the issue is the sensible one — that a defendant who has been appointed counsel need not take any additional steps to secure the

protections of the Sixth Amendment. That is also the view of the Eleventh Circuit. In conflict with these decisions, the Louisiana Supreme Court followed the rule applicable in the Fifth Circuit, which provides that a defendant who has been appointed counsel cannot invoke the protections of *Michigan v. Jackson* unless the defendant has previously done something affirmatively to "accept" the appointment. As will be shown, the Louisiana Supreme Court's Sixth Amendment ruling is manifestly appropriate for plenary review.

B. *Factual Background*

On September 6, 2002, Jesse Jay Montejo was approached by Gretna, Louisiana police officers for questioning in connection with a murder investigation. There is some dispute as to the nature of the encounter — Gretna police officers assert that they asked Montejo to accompany them to the police station, R. 2568, 2574 (Trial Tr. March 7, 2005), whereas Montejo testified that he was pulled from his vehicle at gunpoint, thrown to the ground, and handcuffed. R. 2778 (Trial Tr. March 8, 2005).

According to Montejo's testimony at trial, he asked detectives during his initial detention in Gretna if he could have a lawyer present but they told him they would not recommend that — a fact the Louisiana Supreme Court noted and did not question. Pet. App. 10a n.19. Specifically, Montejo stated that after being taken into a room and handcuffed to the wall, the detectives

> walked in the room and they told me, Oh, we just wanted you for questioning, you're not

> under arrest, though. And at that time, I told them....Can I please leave? He is like, well, we have some questions we want to ask you. And I informed him at that time I don't want to talk to nobody, I don't have no information for nobody, for nothing under any circumstances, can I please leave. Like, no. I said, Well, can I have a lawyer? He said, Well, I wouldn't advise that, because right now, you know, we need to question you about some serious matters. And at that time, I told him, Well, I am allowed to have a lawyer present, ain't I? He's like, Yes, but we wouldn't really recommend that.

R. 2779 (Trial Tr. March 8, 2005).

Following his initial detention, Montejo was transferred to the St. Tammany Parish Sheriff's Office for questioning. Police officers interviewed him from 4:30pm until 11pm on the evening of the 6th, and again between 3am and 4am the next morning. Pet. App. 9a. Roughly four hours of the interrogation was videotaped. *Id.* The tapes show Montejo first denying any involvement in the crime, but eventually stating that he was at the victim's house with an unidentified black male who robbed and shot the victim. *Appellant's Br. at 17, available at* 2007 WL 4560160. The detectives were unconvinced that Montejo played only an indirect role in the crime and pressed him:

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

A: "I did - not - shoot - that - man."

State's Ex. 14-B (DVD version of the video taped statement). At this point, Montejo invoked his right to counsel: "I did not kill that man, I did not break in, I did not steal anything. I would like to answer no more questions unless I'm in front of a lawyer." *Id.*

Following Montejo's request for counsel, the detectives interrogating him switched tactics in an effort to pressure him to revoke his request. One of the detectives declared: "You are under arrest for first degree murder." Pet. App. 14a. They then told Montejo in no uncertain terms that it was not in his interest to invoke the right to counsel:

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

Pet App. 15a. Montejo then relented and the interrogation resumed. *Id.*

The Louisiana Supreme Court noted that "[t]he video recorder was turned off at this point and did not begin again until approximately 10 minutes later." *Id.* When video recording resumed, Montejo was "visibly upset." *Id.* at 16a. The detectives stated on the video that Montejo was "not interviewed during the preceding untaped interval" and that "he

understood his rights and wished to continue the interview in the absence of counsel." *Id.*

After questioning resumed, Montejo described another version of the crime in which he implicated himself, saying that he shot the victim during a botched burglary. *Id.* When the police probed this account, he retracted his story and insisted that he would not "take the rap" for something he did not do. State's Ex. S-17 A (DVD of the 2nd interview with Jesse J. Montejo). The detectives then decided to end the interrogation. *Id.* Montejo was booked on a first degree murder charge shortly after midnight and then returned to a holding cell until just after 3am, when he was subjected to additional questioning. R. 2350 (Trial Tr. March 6, 2005).

On the morning of September 10, 2002, Montejo went before a St. Tammany Parish judge for a "seventy-two hour hearing."[1] At the hearing, his request for bond was denied, and he was remanded into state custody and formally appointed counsel through the Office of the Indigent Defender. Pet.

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

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

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

App. 63a-64a. Nothing in the record indicates that Montejo was asked during the hearing whether he "accepted" the lawyer that had been appointed to represent him. Nor does the record indicate that he was otherwise made aware that he needed to "accept" the appointment in order to secure his Sixth Amendment rights.

Despite the fact that Montejo had appointed counsel, police detectives returned to question him later on September 10, 2002, asking Montejo to accompany them to search for the discarded murder weapon. R. 2582-83 (Trial Tr. March 7, 2005). Montejo responded by telling the officers that he was represented by counsel:

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

Pet. App. 49a; R. 2787 (Trial Tr. March 8, 2005). Rather than terminate the interview and verify whether Montejo had a lawyer, the detectives pressed on (as they had in their previous interrogations) to obtain further testimony. In this instance, they told Montejo (falsely) that he did not have a lawyer. As Montejo testified:

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

Pet. App. 49a; R. 2787. At that point, the police gave Montejo another set of *Miranda* warnings, Pet. App. at 21a, and began interrogating him again. He subsequently signed a statement asserting that he was voluntarily accompanying the police officers. State's Ex. 75.

During the car ride, Montejo wrote a letter — with pen and paper provided by detectives — to the victim's wife expressing remorse for his involvement in the murder. Pet. App. 20a-21a; State's Ex. 76. At trial, Montejo testified that detectives pressured him into writing the letter and that one detective in particular dictated much of the letter's content as he sat next to Montejo. R. 2790-91 (Trial Tr. March 8, 2005). After Montejo was directed to write the letter, the detectives eventually ended the venture as they were unable to determine the location of the murder weapon. Pet. App. 20a-21a n.44.

The detectives returned Montejo to the St. Tammany jail that evening, whereupon they were met by Montejo's lawyer, who was irate that his client had been questioned without notice to him. R. 2724-25 (Trial Tr. March 8, 2005).

On October 24, 2002, Montejo was indicted, along with a co-defendant, on one count of capital murder. R. 0123. Defense counsel sought to have the letter excluded from evidence on the ground that it was procured in violation of the Sixth Amendment, but the trial court ruled it to be admissible after a suppression hearing. Pet. App. 21a-22a. It was admitted at trial during the testimony of one of the detectives.

C. *Proceedings Below*

The guilt phase of Montejo's trial began on March 5, 2005. R. 2234. Four days later, the jury returned a verdict of guilty of first degree murder. R. 2913. The penalty phase of the trial began the following morning and was completed before noon, with the defense case comprising a total of four pages of transcript. R. 2938-42. The jury returned with a sentence of death, R. 2973, and the trial court formally sentenced Montejo to death on May 13, 2005. Pet. App. 69a.

Montejo appealed his conviction and sentence to the Louisiana Supreme Court. Among his allegations of error, Montejo contended that statements made during his initial interrogation on September 6th and 7th after Montejo requested counsel were obtained in violation of the Fifth Amendment, *Appellant's Br. at i-iii, available at* 2007 WL 4560160, and that introduction of the letter written during the September 10th car ride violated the Sixth Amendment. *Id.* at 21. With respect to the latter claim (which is the issue presented in this petition) Montejo asserted that his right to counsel attached at the Seventy-Two Hour Hearing and that the subsequent interrogation constituted a "'critical stage' proceeding." *Id.* Because he had appointed counsel, Montejo asserted, the police-initiated interrogation on September 10th violated *Michigan v. Jackson.* Montejo further argued that he never validly waived his right to counsel prior to producing the handwritten letter, in part because he had been falsely told by the interrogating officers that no lawyer had been appointed to represent him. *Id.* at

24-25. Accordingly, he contended, the introduction of the letter into evidence violated the Sixth Amendment and necessitated a new trial. *Id.* at 27.

On January 16, 2008, the Louisiana Supreme Court affirmed. Pet. App. 58a-59a. The court recognized the police tactics used during the September 6th and 7th interrogations presented a close question under the Fifth Amendment. Montejo's request for counsel was "unequivocal and unambiguous." Pet. App. 32a. And the officers' efforts to pressure him to revoke that request "merit[ed] close scrutiny" because they could be construed as an attempt to elicit a response. *Id.* at 34a. The court further noted the "hectoring" tone of one of the detectives. *Id.* at 35a. Finally, the court noted that the defendant was visibly distraught and tired throughout the numerous hours of interrogation. *Id.* at 40a. The court nevertheless concluded that Montejo's agreement to resume interrogation was a valid waiver. *Id.* at 42a.

Turning to the Sixth Amendment issue, the court agreed that Montejo's "right to counsel attached at the 72-hour hearing held on the morning of September 10, 2002, at which time indigent defense counsel was appointed to represent him." *Id.* at 47a. The court also acknowledged that the minute entry memorializing the hearing (no transcript of the proceeding was made) unambiguously indicated that counsel was appointed to represent Montejo. *Id.* The court noted, however, that the minute entry "[did] not show a response by defendant," and that "[t]he State allege[d] that the defendant simply stood mute at this hearing and defendant does not allege that he made any statement at this hearing

asserting his right to counsel." *Id.* The court then ruled that "something more than the mere mute acquiescence in the appointment of counsel is necessary to show the defendant has asserted his right to sufficiently trigger the enhanced protection provided by *Michigan v. Jackson*'s prophylactic rule." *Id.* (internal quotation marks omitted). Thus, the court held that although Montejo's "right to counsel had attached, he did not assert his right to counsel such that the prophylactic rule of *Michigan v. Jackson* would invalidate any waiver he would later make." *Id.*

In reaching this result, the court did not appear to consider that the record contained no indication that Montejo was asked at the hearing by the presiding magistrate whether he "accepted" the appointment of counsel, nor did it contain any suggestion that he was told he would lose his Sixth Amendment rights unless he affirmatively "accepted" the appointment. Further, the court gave no consideration to the fact that Montejo, by the time of the Seventy-Two Hour Hearing, might well have feared affirmatively asking for a lawyer, given the treatment he had received from the authorities holding him in custody when he had asked for a lawyer previously. Finally, the court held that Montejo had validly waived his Sixth Amendment rights in response to police-initiated interrogation notwithstanding that the interrogating officers had falsely informed him that no lawyer had been appointed to represent him, thus creating the impression that he had no lawyer to consult prior to the interrogation.

After rejecting Montejo's Fifth and Sixth Amendment claims, the Louisiana Supreme Court affirmed his conviction and death sentence. *Id.* at 58a. Montejo's timely petition for rehearing was denied March 7, 2008. *Id.* at 1a.

REASONS FOR GRANTING THE WRIT

In this case, the Louisiana Supreme Court upheld the admissibility of statements Petitioner Montejo made in response to police-initiated interrogation that occurred after Montejo had been appointed counsel at an initial hearing. According to the Louisiana Supreme Court, Montejo could not claim the protections of the Sixth Amendment rule of *Michigan v. Jackson* — which bars police-initiated interrogation in the absence of counsel after a defendant has counsel — because Montejo did not take any affirmative steps to "accept" the counsel that had been appointed to represent him. The Louisiana Supreme Court then went on to hold that Montejo made a free and voluntary choice to proceed without his appointed counsel, notwithstanding that the police who initiated interrogation falsely told Montejo that no lawyer had been appointed for him when pressuring him to making the incriminating statements that were later used against him at trial.

Certiorari should be granted to review the Louisiana Supreme Court's Sixth Amendment decision. The court's ruling that a criminal defendant who has been appointed counsel at an initial hearing must take additional affirmative steps to "accept" the appointment conflicts with the decisions of at least four other state courts of last

resort (as well as the Eleventh Circuit) and is impossible to reconcile with this Court's Sixth Amendment jurisprudence.

The decision below is certain to lead to a proliferation of factual controversies over what constitutes "acceptance" and whether or not such "acceptance" occurred in every case in which a defendant with appointed counsel has been subjected to police-initiated interrogation (particularly given that most States do not transcribe initial hearings at which counsel is appointed). The issue is one that recurs frequently and for which a clear, administrable rule is manifestly necessary. The issue is squarely presented on the record below. Thus every consideration favors plenary review.

I. THE LOUISIANA SUPREME COURT'S DECISION CONFLICTS WITH THE DECISIONS OF FOUR OTHER STATE COURTS OF LAST RESORT AND THE ELEVENTH CIRCUIT

A. The Louisiana Supreme Court's Decision Conflicts With The Decisions Of Four State Courts Of Last Resort.

The Louisiana Supreme Court's decision squarely conflicts with the decisions of at least four other state courts of last resort, all of which have rejected the argument that a defendant must affirmatively act to "accept" counsel by appointment so as to bar subsequent state-initiated interrogation.

In *State v. Dagnall*, 612 N.W.2d 680 (Wis. 2000), the Wisconsin Supreme Court addressed the question of whether one must take affirmative steps to "invoke" the right to counsel to give it effect, even

after an attorney has been "retained." *Id.* at 683. In that case, the defendant's Sixth Amendment right to counsel had attached, but he had not affirmatively "invoked" counsel. *Id.* Unlike the present case, defense counsel had been retained rather than appointed. The Wisconsin Supreme Court deemed that distinction immaterial. *Id.* at 695.

The Wisconsin Supreme Court noted that this Court's holding in *McNeil v. Wisconsin*, 501 U.S. 171, 175-79 (1991) "crystallize[d] the Court's view that a charged defendant in custody who does not have counsel must invoke, assert, or exercise the right to counsel to prevent interrogation." 612 N.W.2d at 693. But the court in *Dagnall* refused to "read *McNeil* to require an accused defendant *who has an attorney for the crime charged*' to take any additional affirmative steps to preclude police-initiated interrogation. *Id.* (emphasis in original). The court explained that it saw

> nothing in *McNeil* that forces such a defendant to *reassert* the Sixth Amendment right to counsel to quash police-initiated questioning about the crime charged. *McNeil* does not repudiate the unambiguous declaration that "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." *Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988).

Id.

The court also stated unambiguously that the same rule would apply to defendants who had received appointed counsel:

> [The defendant] did not have to invoke his right because he already had counsel. To require an accused person to assert the right to counsel after the accused has counsel would invite the government to embark on a persistent campaign of overtures and blandishments to induce the accused into giving up his rights. This would be inconsistent with both the letter and the spirit of our law.
>
> Even if Sixth Amendment doctrine now requires some invocation of the right to counsel before an accused retains an attorney, we think the formality of either appointing counsel or retaining counsel serves to invoke the right.

Id. at 695.

The Arkansas Supreme Court reached the same conclusion in *Bradford v. State*, 927 S.W.2d 329 (Ark. 1996).[2] In *Bradford* — as in this case — the police initiated a post-indictment interrogation of a defendant for whom counsel had been appointed at

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[2] The Arkansas Supreme Court overruled an earlier decision by the Arkansas Court of Appeals to reach its decision. As the Court stated:

> It should be noted that the Arkansas Court of Appeals has recently held that the mere appointment of counsel is not enough. Rather, there must be affirmative invocation of the right to counsel in order to invalidate a later confession. *See Lanes v. State*, 53 Ark.App. 266, 922 S.W.2d 349 (1996). That demission is in direct conflict with our decision today. Accordingly, we overrule *Lanes v. State* on that point.

Bradford v. State, 927 S.W.2d at 335.

an initial hearing. Although Bradford signed a *Miranda* waiver before making incriminating statements, the Arkansas Supreme Court concluded that such a waiver was insufficient to overcome the defendant's Sixth Amendment right. *Id.* at 334. The court reasoned:

> We read *Michigan v. Jackson* to stand for the proposition that once the Sixth Amendment right to counsel attaches and once the defendant requests counsel, an ordinary waiver of *Miranda* rights will not suffice to validate a subsequent confession. The same principle should apply to appointed counsel, which is the situation that we have before us.

Id. As the court continued, "[t]hough Bradford never formally requested counsel, the court's appointment provided a medium between herself and investigating officers. Her mere waiver of *Miranda* rights could not equate to a waiver of appointed counsel, a fact of which she was unaware." *Id.* at 335.

The Arkansas Supreme Court distinguished this Court's decision in *Patterson*:

> The critical fact, though, that did not exist in *Patterson* but exists in the instant case is that counsel had already been appointed for Bradford, and under *Michigan v. Jackson, supra*, knowledge of that fact was imputed to the police officers. The failure of police officers to learn about the appointment and obtain a statement from Bradford that she did not want appointed counsel present at the interrogation is what requires suppression in this case.

Id. at 334. The *Bradford* court thus not only endorsed the view that an affirmative invocation is unnecessary once counsel has been appointed; it went one step further by stating that *Jackson* places an affirmative burden on the state actor to determine whether counsel has already been appointed.[3]

The Louisiana Supreme Court's decision in this case also conflicts with the decision of the Texas Court of Criminal Appeals in *Holloway v. State*, 780 S.W.2d 787 (Tex. Crim. App. 1989), a case decided on summary remand from this Court in light of *Michigan v. Jackson*. Holloway was arrested, indicted, and appointed counsel all on the same day. *Id.* at 788-89. Though Holloway was not present when the court appointed him counsel, his lawyer visited him at the jail the same day and instructed Holloway not to submit to questioning. *Id.* at 789. The following day, police initiated an interrogation with Holloway, in the absence of his lawyer. *Id.* Holloway was read his *Miranda* rights and signed a

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[3] The Arkansas Attorney General filed a petition for certiorari to this Court on this very issue. Specifically, the Arkansas Attorney General presented the following question:

> Does the Sixth Amendment to the United States Constitution or this Court's decision in *Michigan v. Jackson*, 475 U.S. 625 (1986), prohibit police-initiated questioning of indigent criminal defendants after arraignment or other similar proceeding when those defendants have never requested counsel or otherwise indicated a desire to have counsel present, but who nevertheless have had counsel appointed for them?

See generally Pet. for Cert. at i, *Arkansas v. Bradford*, No. 96-556 (U.S. filed Sept. 30, 1996), *available at* 1996 WL 33422328. Review was denied. *Arkansas v. Bradford*, 519 U.S. 1028 (1996).

waiver form before making inculpatory statements that were later used against him at trial. *Id.*

The court in *Holloway* did not apply *Jackson*, because Holloway never requested counsel. *Id.* Even so, after engaging in an analysis of this Court's holdings in *Moulton* and *Patterson*, the Texas court held that Holloway's confession was obtained in violation of his Sixth Amendment right to counsel and that the trial court erred in refusing to suppress it. *Id.* at 796. In coming to this conclusion, the court reasoned:

> Given the Supreme Court's express limitation of its holding in *Patterson* to unrepresented defendants, see 108 S.Ct. at 2393 n.3, and its warning that a represented defendant would be differently situated, see 108 S.Ct. at 2397 n.9, coupled with the Court's consistent precedent barring deliberate police efforts to elicit incriminating statements in the absence of counsel when the accused is represented, we can find no room for the State's argument that the Supreme Court would permit the police-initiated interrogation of an indicted accused who has retained or has been appointed defense counsel.

Id. at 795. Thus, the court held that "where a relationship between the accused and his attorney is established after the Sixth Amendment has become applicable, the Sixth Amendment precludes dissolution of that relationship in the absence of counsel." *Id.*

Finally, the District of Columbia Court of Appeals addressed a similar issue in *Dew v. United States*, 558 A.2d 1112 (D.C. 1989). The defendant was

indicted and appointed counsel, but failed to appear for his arraignment. *Id.* at 1114. The *Dew* court accordingly held that there was an unresolved question of fact about whether the defendant's right to counsel "expire[d]" when he failed to make an initial appearance (as this would have been the first time he would have been informed of the charges and his right to counsel). *Id.* at 1113. The court observed, however, that it found "little, if any, room for an argument that the Supreme Court would permit a police-initiated request for a post-indictment waiver of counsel by a represented defendant, except through defense counsel." *Id.* at 1116. The *Dew* court pointed to this Court's "express limitation of its holding in *Patterson* to unrepresented defendants," as well as the "Court's consistent precedent barring deliberate police efforts to elicit incriminating statements in the absence of counsel when the suspect is represented." *Id.*

The rule in Louisiana previously conformed to the majority rule set forth in the cases discussed above. Specifically, in *State v. Hattaway*, 621 So. 2d 796 (La. 1993), the Louisiana Supreme Court held that after the first adverse criminal proceeding and the court's appointment of an attorney, the State cannot obtain a waiver from the accused or otherwise communicate with him with respect to his offense except through counsel. *Id.* at 798, 807. Two years later, however, the court overruled itself in *State v. Carter*, finding that "*Hattaway*'s holding that right to counsel could not be waived after counsel had been appointed at the initial hearing was too broad because it was based on United States Supreme Court jurisprudence that dealt only with covert

interrogation of a defendant." Pet. App. 45a, discussing *State v. Carter*, 664 So. 2d 367, 374 (La. 1995). Accordingly, the Louisiana Supreme Court has placed itself in opposition to the prevailing rule that a defendant who has been appointed counsel need not take any additional affirmative steps to activate the protections of the Sixth Amendment.

The *Montejo* court made clear that, in its view, an affirmative statement or action of "acceptance" is required to activate the protections of the Sixth Amendment: "As we held in *Carter*, '[s]omething more than the mere mute acquiescence in the appointment of counsel is necessary to show the defendant has asserted his right to counsel [to] sufficiently trigger the enhanced protection provided by *Michigan v. Jackson*'s prophylactic rule.'" Pet. App. 47a, citing *Carter*, 664 So. 2d at 383. The Louisiana Supreme Court did not, however, provide any guidance as to what would suffice to constitute an affirmative act of "acceptance."

In reaching this conclusion, the Louisiana Supreme Court followed the Fifth Circuit's decision in *Montoya v. Collins*, 955 F.2d 279 (5th Cir. 1992), in which "the Fifth Circuit held that not every appointment of counsel by a committing magistrate to protect the accused's interests constitutes a request for, or an assertion of, the right to counsel for purposes of *Michigan v. Jackson*." Pet. App. 47a n.68. Specifically, the court in *Montoya* found:

> The rule of *Jackson* is invoked by the defendant's "assertion...of the right to counsel." This language connotes an actual, positive statement or affirmation of the right to counsel. At no time did Montoya make such

> a statement or affirmation — as the state court found, he did not request counsel, and he said nothing at all when the magistrate appointed counsel for him. We do not say that by his silence Montoya "waived" any of his rights, for at any time subsequent to his appearance before the magistrate, including during his interrogation, Montoya could have asked to see a lawyer and *Jackson* would have barred any further police-initiated interrogation. Rather, Montoya never asserted, or invoked, his right to counsel in the first place....For purposes of *Jackson*, an "assertion" means some kind of positive statement or other action that informs a reasonable person of the defendant's "desire to deal with the police only through counsel."

Montoya, 955 F.2d at 282-83 (first ellipsis in original; footnote and citations omitted).

That the Louisiana Supreme Court would reach this conclusion on the present record is particularly surprising. There is no suggestion in the record that Montejo was ever asked by the presiding magistrate whether he wanted to "accept" the counsel that had just been appointed to represent him. Nor was there any suggestion that Montejo had been informed that a failure to "accept" counsel would waive his Sixth Amendment protections against police-initiated interrogation. Under those circumstances, Montejo's silence is hardly surprising.

Accordingly, the decision of the Louisiana Supreme Court cannot be reconciled with the decisions of the other four state courts of last resort to address whether an accused must do something

more than be appointed representation before he can be said to have invoked the Sixth Amendment right to counsel.[4]

B. The Law Of The Eleventh Circuit Is Consistent With The Majority Rule In The State Courts And In Conflict With The Decision Below As Well As The Law Of The Fifth Circuit.

In *Stokes v. Singletary*, 952 F.2d 1567 (11th Cir. 1992), the Eleventh Circuit took the opposite approach from that of the Louisiana Supreme Court and the Fifth Circuit. The accused in *Stokes* was

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[4] The Supreme Court of Florida in *Smith v. State*, 699 So. 2d 629 (Fla. 1997), similarly relied on the reasoning employed in *Montoya*. However, the *Smith* court addressed a different question: whether it could be said that the defendant "invoked" his right to counsel when, before the defendant was located and taken into custody, a public defender volunteered to act as the defendant's lawyer, without defendant's knowledge. *Id.* at 637-38. The *Smith* court held that the "mere appointment of an attorney at the attorney's request is not enough to invoke the right; the accused must invoke the right. *See Montoya v. Collins*, 955 F.2d 279 (5th Cir. 1992)." *Id.* at 639. Though the court did go on to note that an accused "invokes the right to counsel by statements that indicate a desire to deal with police only through counsel," it distinguished an earlier case in which a public defender was appointed to represent the defendant at a first appearance after arrest, and at which the defendant physically appeared. *Id.* The court wrote: "This is in contrast to the events which occurred in this case, in which Smith did not appear when counsel was summarily appointed and did not invoke or accept the appointment of counsel." *Id.* at 640. Thus, though the *Smith* court did not definitively weigh in on the question at hand, the Florida decision clearly demonstrates confusion among the lower courts generally.

appointed an attorney at his first appearance, at which point his Sixth Amendment right to counsel was deemed to have attached. *Id.* at 1569. The accused maintained that he had requested counsel, but no record existed to corroborate his claim. *Id.* at 1579. The State asserted that no invocation was made during or subsequent to the initial appearance. *Id.* The police initiated contact with the accused without counsel present after the defendant's first appearance. *Id.* at 1569.

The Eleventh Circuit rejected the State's theory that the defendant could not claim the protection of the Sixth Amendment because he had yet to invoke the right to counsel. Instead, the court found the "dispute concerning Stokes's request for counsel at his initial appearance to be a distinction without a difference." *Id.* at 1579. As the court reasoned, "[i]rrespective of Stokes's request for an attorney, he had appointed counsel, which knowledge was imputed to the investigating officers." *Id.* The Eleventh Circuit ultimately held that *Jackson* was inapplicable, because Stokes's conviction had become final prior to this Court's decision in *Michigan v. Jackson*. *Id.* at 1579 n.12. The court therefore found that the relevant issue was whether Stokes had subsequently waived his right to counsel under *Brewer*, which required additional findings, and the court accordingly remanded the case. *Id.* at 1581.

Nevertheless, the Eleventh Circuit's adoption of the majority rule on this issue further justifies a grant of certiorari to review the Louisiana Supreme Court's contrary ruling.

II. THE LOUISIANA SUPREME COURT'S ANALYSIS CANNOT BE RECONCILED WITH THIS COURT'S SIXTH AMENDMENT PRECEDENT

This Court has never suggested that an accused who has already been appointed counsel must take additional affirmative steps to "accept" the appointment in order to activate the protections of the Sixth Amendment. To the contrary, the Court has drawn a dividing line between those who have a lawyer or requested one, and those who have no counsel and have not expressed their desire to obtain one. *See Michigan v. Harvey*, 494 U.S. 344, 352 (1990) ("To be sure, once a defendant obtains or even requests counsel as respondent had here, analysis of the waiver issues changes.") (emphasis added); *Patterson*, 487 U.S. at 290 n.3 ("We note as a matter of some significance that petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities. Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect."). Thus, the reasoning of the Louisiana Supreme Court — that a defendant who has already been given a lawyer must somehow still invoke his right to have one — lacks any basis in this Court's Sixth Amendment jurisprudence.

Moreover, the logical underpinning of Louisiana's rule — that appointed counsel is not yet counsel to the accused because the accused must do something more to confirm representation — is impossible to reconcile with this Court's jurisprudence respecting the right of defendants to proceed pro se. In that

context, the Court presumes that appointed counsel has been accepted by the defendant absent a clear and informed statement to the contrary from the defendant. Though a state cannot force counsel onto an unreceptive defendant, a defendant must affirmatively waive his right to counsel in order to proceed pro se. *See generally Faretta v. California*, 422 U.S. 806 (1975). Before a court can accept a defendant's waiver, the trial judge must make the accused "aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." *Id.* at 835 (internal quotation marks omitted). "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer." *Carnley v. Cochran*, 369 U.S. 506, 516 (1962). The burden is on the "[s]tate to prove an intentional relinquishment or abandonment of a known right or privilege" and "courts indulge in every reasonable presumption against waiver." *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (internal quotation marks omitted). Furthermore, this strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings. *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 238-40 (1973)). This presumption directly contradicts the starting point for the Louisiana Supreme Court — which is nothing less than a presumption from "silence" that the defendant has opted to act without counsel.

Also weighing against the Louisiana Supreme Court's decision is this Court's recognition in *Patterson v. Illinois* that although this Court had "permitted a *Miranda* waiver to stand where a suspect was not told that his lawyer was trying to reach him during questioning; in the Sixth Amendment context, this waiver would not be valid." 484 U.S. at 297 n.9. The *Patterson* Court was referencing *Moran v. Burbine*, 475 U.S. 412 (1986), in which the police failed to inform a preindictment defendant in their custody that a lawyer had called on his behalf. *Id.* at 415. The lawyer, who had been retained by the defendant's sister, was told by the police that her client would not be questioned for the rest of the day. *Id.* at 417. The police never informed the defendant that an attorney had been retained for him, *id.*, nor did he request counsel at any time. *Id.* at 415. Later that evening, the police Mirandized the defendant, had him sign a series of waivers, and then obtained a confession from him. *Id.* at 417-18. Ultimately, the Court held that this police conduct did not violate the Sixth Amendment right to counsel, because adversary judicial proceedings had not yet commenced, and thus the defendant's right had not yet attached. *Id.* at 432. The Court went on to acknowledge that "once the right *has* attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a medium between [the suspect] and the State' during the interrogation." *Id.* at 428 (internal quotation marks omitted).

Given the *Patterson* Court's recognition that the defendant in *Moran* would have been entitled to relief had his Sixth Amendment right to counsel

attached, it is difficult to imagine that an accused who was present in court while a judge appointed counsel would not be afforded the same protection. And it is particularly egregious that the Louisiana Supreme Court would conclude that Montejo could and did validly waive his Sixth Amendment rights on this record. The right to counsel had attached and Montejo had indisputably been appointed a lawyer who was representing him at the time of the police-initiated interrogation. Worse yet, in order to gain Montejo's cooperation, the interrogating officers falsely told Montejo that no lawyer had been appointed to represent him. And all of this occurred against a backdrop of none-too-subtle police pressure that conditioned Montejo to believe that insisting on a lawyer's help would harm his prospects for leniency.

Accordingly, the Louisiana Supreme Court's failure to hold Montejo's waiver presumptively invalid cannot be reconciled with this Court's Sixth Amendment jurisprudence.

III. THE LOUISIANA SUPREME COURT'S "AFFIRMATIVE INVOCATION" TEST IS UNWORKABLE IN PRACTICE AND LOGICALLY UNSOUND

A bright-line rule barring the State from initiating interrogation with an accused after counsel has been appointed protects the "distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship." *Patterson*, 487 U.S. at 290 n.3. This "acceptance by appointment" rule has the additional advantage of being an easily administrable standard that provides

clear guidance to the authorities and a clear test for judges deciding suppression motions. In contrast, the Louisiana Supreme Court's "affirmative invocation" rule is both impractical and logically unsound.

A. The Louisiana Supreme Court's Test Would Have Grave Practical Consequences.

Under the Louisiana Supreme Court's rule, whether a defendant's Sixth Amendment right has been invoked depends on what the defendant says or does not say directly after appointment. Though the Louisiana Supreme Court noted that the defendant need not "utter the magic words, 'I want a lawyer,' in order to assert his right to counsel," some sort of affirmative statement or gesture is required. Pet. App. 47a-48a n.68, citing *Montoya*, 955 F.2d at 283.

The primary problem with Louisiana's rule is that the process by which defendants are appointed counsel is not designed to also produce a reliable answer to the question of whether the defendant has affirmatively "accepted" that appointment. Most States do not transcribe initial appearances when counsel is appointed. Thus, disputes over "acceptance" will invariably come down to unreliable after-the-fact swearing contests. Even more to the point, most States do not require that the judge or magistrate engage in any sort of colloquy with the defendant during initial appearances. These are not design flaws; rather, they reflect the natural conclusion that the defendant has accepted the counsel appointed, thus obviating the need to record or further elicit the defendant's choice. Yet, if judges

must look back to these hearings to determine not simply whether counsel was appointed but also whether that counsel was somehow affirmatively "accepted," under the current system, they will be facing an evidentiary void. The result will be intractable disputes about whether the defendant affirmatively accepted counsel or not. And the situation is, to put it mildly, a trap for the unwary. Unless a defendant is informed at the initial hearing that he or she must affirmatively "accept" the appointment, the defendant will have no reason to think any affirmative act of "acceptance" is necessary.

A rule requiring an affirmative act of acceptance will also create intractable uncertainty for police officers, who must determine if a particular defendant did or did not affirmatively accept counsel before they can begin questioning. Under Louisiana's rule, an officer would need to discover if the defendant did, in fact, say he appreciated the appointment of counsel or if he stood silent or if he made a gesture and so on. Such an undertaking would be necessary to avoid the suppression of statements made by a defendant who had, in fact, asserted his right to counsel. Under the "acceptance by appointment" rule, however, every officer would know that upon appointment, a defendant is now represented and that all communications would have to be either initiated by the defendant or with the defendant's counsel present. A bright-line rule of this kind, which would require no additional research on the part of the individual detective, would provide salutary guidance to all police officers. *See Dickerson v. United States*, 530 U.S. 428, 444

(2000) (declining to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), in part because the alternative of case-by-case assessments of voluntariness would be "more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner.").

B. The Louisiana Supreme Court's Test Is Logically Unsound.

Beyond its practical problems, the Louisiana State Court rule is logically flawed. There is simply no reason why a criminal defendant who has just been told he has been appointed a lawyer would feel any need to take any affirmative step to "accept" the appointment. After all, the defendant has not been asked whether he wants a lawyer — he has been told that a lawyer is being appointed. Accordingly, the Louisiana rule requires defendants to ask for the very thing they have just been told is theirs.

Forty-five jurisdictions — forty-three States, the District of Columbia and the federal government — provide counsel before, at, or directly after initial appearance. Br. *Amicus Curiae* Nat'l Ass'n of Criminal Defense Lawyers In Support of Petitioner at 1a, *Rothgery v. Gillespie*, No. 07-440 (U.S. filed Jan. 23, 2008) *available at* 2008 WL 218874. Though the manner of appointment varies from State to State, the exchange between the court and the accused is generally the same: The judge or magistrate informs the accused that he has been appointed counsel and, in several jurisdictions — including Parish County, Louisiana — the accused is

subsequently given a card that notes his lawyer's name.

In no other context — legal or otherwise — would we expect people to request the very thing that has just been provided to them. It would be as logical to ask that a defendant utter the phrase "I am hungry" after having just received food. Without being told that a statement is necessary or prompted to speak by the court, silent acceptance by the defendant seems not only understandable but prudent. And that is all the more true on this record, given that the authorities questioning Montejo had repeatedly warned him that asking for the help of a lawyer was not in his interest.

C. The Louisiana Supreme Court's Test Is Objectionable As A Matter of Constitutional Principle.

In *Powell v. Alabama*, 287 U.S. 45 (1932), the Court noted that:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad....He requires the guiding hand of counsel at every step in the proceedings against him...If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Id. at 69. This Court properly recognized that the right to counsel is particularly crucial for those defendants who struggle to understand the "science

of the law." *Id.* And yet it is these very same defendants who are most likely to be prejudiced by the Louisiana rule. Unable to articulate their need for help, or believing quite reasonably that no such articulation is necessary where a judge has just announced the appointment of counsel, these defendants are likely to stand silent. By construing this silence as a desire to proceed without representation, Louisiana and the Fifth Circuit have created a rule that denies such defendants — the very ones likely most vulnerable during post-indictment police interrogation — the protections of the Sixth Amendment.

The very reason these defendants receive appointed counsel is that this Court has deemed that they could not otherwise have a fair trial. As this Court clearly stated in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), lawyers in criminal proceedings are "necessities, not luxuries." The Louisiana Supreme Court's rule denies those necessities to the people who need them the most.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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