No. 07-1529

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

REPLY BRIEF

JELPI P. PICOU
G. BEN COHEN
THE CAPITAL APPEALS
PROJECT
636 Baronne Street
New Orleans, LA 70113

DONALD B. VERRILLI, JR.
Counsel of Record
MARIN K. LEVY
JENNER & BLOCK LLP
1099 New York Ave. N.W.
Suite 900
Washington, D.C. 20001
(202) 639-6000

Counsel for Petitioner

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Jesse Jay Montejo hereby submits this reply in support of his petition for a writ of certiorari, filed June 5, 2008.

I. THE STATE DOES NOT EVEN ATTEMPT TO DENY THE EXISTENCE OF A CONFLICT WARRANTING REVIEW.

The State's brief in opposition does not even purport to address the existence of an enduring conflict among state courts of last resort with respect to whether appointment of counsel triggers the protections of the Sixth Amendment. As the petition explained, the Louisiana Supreme Court's decision squarely conflicts with the decisions of the state courts of last resort in Wisconsin, Arkansas, Texas and the District of Columbia — 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 the absence of counsel. The State simply ignores these conflicting authorities.

Instead, the State emphasizes that the Louisiana Supreme Court's decision in this case is consistent with the Fifth Circuit's decision in *Montoya v. Collins*, 955 F.2d 279 (5th Cir. 1992). But the fact that there are two decisions on Louisiana's side of the conflict rather than just one is a reason for granting review, not denying it. The Fifth Circuit's *Montoya* decision makes clear that the question presented is a recurring one, and that there is a high likelihood of continuing and persistent division in the lower courts. *See also Stokes v. Singletary*, 952 F.2d

1567 (11th Cir. 1992) (disagreeing with analysis set forth in *Montoya*).

Thus, unless review is granted and the conflict is resolved, a defendant's Sixth Amendment right to counsel will continue to mean something different in Louisiana (and in federal court in the Fifth Circuit) than it does in Wisconsin, Arizona, Texas and the District of Columbia.

II. THE RESULT BELOW IS NOT DICTATED BY *MICHIGAN V. JACKSON* AND *ILLINOIS V. PATTERSON.*

The State also asserts that review is unnecessary because this Court's prior decisions have already resolved the question presented in the petition. That is incorrect.

Neither *Michigan v. Jackson*, 475 U.S. 625 (1986), nor *Patterson v. Illinois*, 487 U.S. 285 (1988), comes close to dictating the result reached by the Louisiana Supreme Court in this case. Neither case presented the question of what — if anything — a defendant must do to trigger the protections of the Sixth Amendment when counsel has *already* been appointed. The State's suggestion that those cases control here is thus specious. For example, the State asserts that because the defendant in *Jackson* affirmatively requested the assistance of counsel, it follows that defendants who fail to do so forfeit any Sixth Amendment protection. Br. in Opp. at 11. As a logical matter, that is a non sequitur, and nothing in the Court's opinion implies that a defendant who has been appointed counsel would be denied the protections of the Sixth Amendment simply because the defendant had not affirmatively signaled

"acceptance" of the appointment. The State similarly errs in describing *Patterson* as establishing a rule that a defendant must invariably act to "accept" appointment of counsel in order to trigger Sixth Amendment protection. The defendant in that case was unrepresented at the time of interrogation and neither sought nor had been appointed counsel. Indeed, far from supporting the Louisiana Supreme Court's decision in this case, the following statement in *Patterson* suggests the opposite:

> 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.

Patterson, 487 U.S. at 290 n.3.

The Wisconsin Supreme Court in *State v. Dagnall*, 612 N.W.2d 680 (Wis. 2000), relied on this very language to conclude that a defendant "did not have to invoke his right because he already had counsel." *Id.* at 695. Similarly, the Arkansas Supreme Court stated in *Bradford v. State*, 927 S.W.2d 329 (Ark. 1996) that the natural extension of *Jackson* was to hold that once a defendant has been appointed counsel, a waiver of *Miranda* rights will not suffice to validate a subsequent confession. *Id.* at 334.

Nor has the State explained how its reading of *Jackson* and *Patterson* can be squared with this

Court's precedent regarding self-representation and waiver of the right to counsel. As the petition explained, before a defendant can appear *pro se*, the defendant must affirmatively waive his right to counsel; otherwise, the Court presumes that appointed counsel has been accepted. *See generally Faretta v. California*, 422 U.S. 806 (1975). Moreover, as the Court held in *Brewer v. Williams*, 430 U.S. 387, 404 (1977), 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." (internal quotation marks omitted).

Thus, far from dictating the result below, this Court's precedents are sharply at odds with that result.

III. THE QUESTION PRESENTED IS SQUARELY PRESENTED ON THIS RECORD.

The State also seeks to muddy the waters by asserting that there was no police-initiated interrogation after Petitioner Montejo was appointed counsel. Br. in Opp. at 11. It should suffice to note that the State never raised that argument before the Louisiana Supreme Court. In all events, the record evidence forecloses the argument.

This Court has held that once a defendant's Sixth Amendment right has attached, the protections of the Sixth Amendment apply when the government makes "efforts to elicit information from the accused, including interrogation." *Michigan v. Jackson*, 475 U.S. 625, 630 (1986); *see also Maine v. Moulton*, 474 U.S. 159 (1985); *United States v. Henry*, 447 U.S.

264 (1980); *Brewer v. Williams*, 430 U.S. 387 (1977); *Massiah v. United States*, 377 U.S. 201 (1964). It is undisputed that the detectives approached Montejo at the jail on September 10, 2002, and asked him to come with them to show them where he supposedly discarded the murder weapon. Montejo did not seek out the police and offer to show them where the weapon could be found. The officers' actions were obviously an attempt to elicit information from the accused. Moreover, the record does not remotely establish that Montejo first had the idea of writing a letter to the victim's spouse and that he asked for a pen and paper to do so. Thus, the State's attempt to now claim that the detectives never deliberately elicited information from Montejo lacks any basis.

IV. THE STATE'S HARMLESS ERROR ANALYSIS IS MISTAKEN, AND NOT A REASON TO DENY REVIEW.

The half-hearted harmless error argument set forth at the end of brief in opposition provides no basis for denying review. The Louisiana Supreme Court did not rule that the alleged Sixth Amendment error was harmless — even though that court routinely accompanies its ruling on the merits with harmless error analysis — doubtless because the contention is meritless.

Although the State does not even bother to identify the standard of review governing its harmless error claim, the *Chapman* standard governs. *See Chapman v. California*, 386 U.S. 18 (1967). Under *Chapman*, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless

beyond a reasonable doubt." *Chapman*, 386 U.S. at 24; *see also Fry v. Pliler*, 127 S. Ct. 2321, 2325 (2007); *Neder v. United States*, 527 U.S. 1, 15 (1999); *Sullivan v. Louisiana*, 508 U.S. 275, 278-79 (1993). The burden lies on the State to prove that the error was harmless. *See Sullivan*, 508 U.S. at 279; *Chapman*, 386 U.S. at 24.

Contrary to what Louisiana suggests, the question is not whether a reasonable jury presented with the case absent the constitutional error could have convicted a defendant. Rather, the State must prove beyond a reasonable doubt that the defendant's conviction rested in no way upon the error. "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan*, 508 U.S. at 279; *see also Chapman*, 386 U.S. at 23. Accordingly, Louisiana must show beyond a reasonable doubt that the prosecution's presentation of the letter and several references to that letter in its case played no role in the eventual guilty verdict against Montejo.

The State cannot meet that standard here. The prosecution relied directly on the letter at several critical moments in the trial. The prosecution discussed the letter in both its opening statement and closing arguments to the jury, going so far as to make the letter its lead point in rebuttal. R. 2264 (Trial Tr. March 5, 2005), R. 2859-60 (Trial Tr. March 9, 2005). In the midst of trial, the government sought to have the letter given to the jury to read and examine, and the trial court granted that

request. R. 2819-20 (Trial Tr. March 8, 2005). Perhaps most importantly, the prosecution used the letter to impeach the testimony of Mary Malencon — the only witness called by Montejo's defense to testify directly on his behalf. R. 2818-19 (Trial Tr. March 8, 2005). The improperly obtained letter was hardly peripheral to the prosecution's case. Having made the letter a central focus of its presentation to the jury, the State cannot now reasonably claim that such use of the letter had, beyond a reasonable doubt, no effect on the outcome reached at Montejo's trial. *See, e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 296-300 (1991) (holding that admission of a confession obtained by violating defendant's Fifth Amendment rights was not harmless despite physical evidence from the scene, circumstantial evidence, and a second confession); *Satterwhite v. Texas*, 486 U.S. 249, 258-60 (1988) (holding in a capital murder case that admission at sentencing phase of psychiatrist's testimony as to future dangerousness was not harmless despite evidence of prior convictions, testimony from eight police officers as to defendant's reputation for violent crimes, and testimony that defendant had once shot his mother's husband during an argument).

In short, the introduction of the illegally-obtained letter cannot be considered harmless.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JELPI P. PICOU
G. BEN COHEN
THE CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 70113

DONALD B. VERRILLI, JR.
Counsel of Record
MARIN K. LEVY
JENNER & BLOCK LLP
1099 New York Ave. N.W.
Suite 900
Washington, D.C. 20001
(202) 639-6000

Counsel for Petitioner