No. 07-1529

IN THE
Supreme Court of the United States

JESSIE JAY MONTEJO,
Petitioner,

v.
STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA, THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, AND THE SOUTHERN CENTER FOR HUMAN RIGHTS AS AMICI CURIAE ON THE SUPPLEMENTAL QUESTION

BARBARA BERGMAN
Co-chair, Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1117 Stanford, N.E.
Albuquerque, N.M. 87131
(505) 277-3304

JONATHAN L. MARCUS
Counsel of Record
ANNA E. LUMELSKY
GARY FELDON
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

(*additional counsel listed on inside cover*)

STEVEN SHAPIRO
ROBIN DAHLBERG
AMERICAN CIVIL LIBERTIES UNION NATIONAL LEGAL OFFICE
125 Broad Street
18th Floor
New York, NY 10004
(212) 549-2500

DAVID S. UDELL
MELANCA CLARK
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6730

KATIE SCHWARTZMANN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF LOUISIANA
PO Box 56157
New Orleans, LA 70156
(504) 592-8056

SIDNEY S. ROSDEITCHER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

STEPHEN B. BRIGHT
WILLIAM R. MONTROSS, JR.
SOUTHERN CENTER FOR HUMAN RIGHTS
83 Poplar Street, NW
Atlanta, GA 30303
(404) 688-1202

APRIL 2009 *Counsel for Amici Curiae*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTION

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

The American Civil Liberties Union ("ACLU") is a nonprofit, nonpartisan national organization, and the ACLU of Louisiana is one of its state affiliates. The ACLU is dedicated to preserving the principles of liberty and equality embodied in the Constitution and the civil rights laws of this country.

The Brennan Center for Justice at New York University School of Law ("Brennan Center") is a nonpartisan public policy and law institute that focuses on fundamental issues of democracy and justice.

The Southern Center for Human Rights is a nonprofit organization engaged in litigation, public education, and advocacy to protect the civil and human rights of criminal defendants and prisoners in the South.

---

[1] Each party has consented to the filing of this brief. Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

The NACDL, the ACLU, the ACLU of Louisiana, and the Brennan Center submitted a prior amicus brief in this case on November 24, 2008.

SUMMARY OF ARGUMENT

This Court has long recognized that the Constitution provides a distinct set of protections to an individual against whom a criminal prosecution has been formally initiated. In particular, the Court has stressed the importance of the Sixth Amendment right to the assistance of counsel, and the crucial role that counsel plays as a "'medium' between [the defendant] and the State." *Maine v. Moulton*, 474 U.S. 159, 176 (1985). To ensure that a defendant who desires the assistance of counsel at all critical stages of the prosecution in fact receives it, this Court held in *Michigan v. Jackson*, 475 U.S. 625 (1986), that, outside the presence of counsel, the police may not initiate interrogation of a defendant who has indicated a desire for counsel at an arraignment or similar proceeding. This Court later made clear that the *Jackson* rule is rooted in the constitutional protection against police-initiated interrogation outside the presence of counsel that attends defendants already represented by counsel, who presumptively desire counsel's assistance at all critical stages of the prosecution. *See Michigan v. Harvey*, 494 U.S. 344, 352 (1990); *Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988).

The *Jackson* rule ensures that the right to assistance of counsel does not become a meaningless abstraction, easily lost when police confront the defendant outside the presence of counsel. Amici

strongly support the *Jackson* rule for all persons. In this brief, however, amici present empirical evidence that the concerns undergirding the *Jackson* rule are magnified for particularly vulnerable defendants, including the mentally and developmentally disabled, juveniles, those lacking education, those with substance addiction, and the indigent. These defendants are especially vulnerable to police suggestion that counsel is unnecessary, many such defendants lack the capacity to appreciate the importance of counsel, and many exhibit characteristics that make them prone to give false confessions. If *Jackson* were overruled, incidents of false confessions would likely increase. And, while serious harm would be done to our criminal justice system as a whole, the most severe and tragic consequences would befall the most vulnerable defendants.

ARGUMENT

I. *Michigan v. Jackson* Is Essential To Protect The Sixth Amendment Right Of Defendants, Especially The Most Vulnerable, To The Assistance Of Counsel Once Formal Adversary Proceedings Have Commenced.

Once "the Government has committed itself to prosecute," *Kirby v. Illinois*, 406 U.S. 682, 689 (1972), the Sixth Amendment guarantees a defendant more than simple notice of the right to counsel—it guarantees the right to "*Assistance* of Counsel." U.S. Const. amend. VI (emphasis added). The relationship between a represented defendant and counsel thus commands heightened protection from government interference once formal adversary proceedings have commenced. *See Patterson*, 487 U.S. at 290 n.3; *Harvey*, 494 U.S. at 352. In *Jackson*, this Court recognized that the Sixth Amendment right of a defendant who indicates a desire for an attorney but has not yet had one appointed must be similarly protected, and held that the police may not initiate interrogation of such a defendant without counsel present. *Jackson*, 475 U.S. at 636*; Patterson*, 487 U.S. at 290 n. 3.[2]

---

[2] In *Patterson*, this Court explicitly noted this link between *Jackson* and the attorney-client relationship:

> Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect. … Indeed,

(...continued)

The *Jackson* rule thus lies at the core of this Court's Sixth Amendment jurisprudence, which prohibits State attempts to "circumvent the right to the assistance of counsel" through "exploitation . . . of an opportunity to confront the accused without counsel being present." *Moulton*, 474 U.S. at 176; s*ee also United States v. Henry,* 447 U.S. 264, 274 (1980); *Massiah v. United States*, 377 U.S. 201, 206 (1964). The *Jackson* rule does nothing to prevent defendants from choosing on their own initiative to speak to the police without counsel present, *see Harvey*, 494 U.S. at 352, but instead protects counsel's role "as a 'medium' between [the defendant] and the State," *Moulton*, 474 U.S. at 176.[3]

---

the analysis changes markedly once an accused even *requests* the assistance of counsel. *See Michigan v. Jackson*.

Patterson, 487 U.S. at 290 n.3 (additional citations omitted). *See also Harvey*, 494 U.S. at 352.

[3] The rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), which protects the right against self-incrimination by prohibiting further uncounseled interrogation of suspects who have asserted their *Miranda* rights, *id.* at 484, does not protect the Sixth Amendment role of counsel. *See McNeil v. Wisconsin*, 501 U.S. 171, 177–78 (1991) (distinguishing the Sixth Amendment purpose of "'protect[ing] the unaided layman at critical confrontations' with his 'expert adversary'" from the "quite different interest" protected by *Miranda* and *Edwards*); *cf. Moran v. Burbine*, 475 U.S. 412, 425 (1986) (noting that, although the police failure to inform defendant during an interrogation that counsel was trying to reach him did not violate the Fifth Amendment, the same conduct would violate the Sixth Amendment). Moreover, the Sixth Amendment protection of *Jackson* applies outside the context of custodial interrogation, once adversary proceedings have commenced, while the Fifth Amendment protection of *Edwards* does not. (...continued)

This Court has long recognized that, as important as counsel's role of "medium" is for sophisticated and educated defendants, that role is particularly critical for defendants who do not possess such advantages:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. … He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Powell v. Alabama, 287 U.S. 45, 68-69 (1932). *See also Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002) ("Mentally retarded defendants may be less able to give meaningful assistance to their counsel and … in the aggregate face a special risk of wrongful execution."); *Carnley v. Cochran*, 369 U.S. 506, 511 (1962) (noting that the fact that petitioner was illiterate accentuated the unfairness of trying him without counsel); *Von Moltke v. Gillies*, 332 U.S. 708, 720 (1948) ("This Court has been particularly

---

See Patterson, 487 U.S. at 297 n.9; *United States v. Red Bird*, 287 F.3d 709, 716 (8th Cir. 2002).

solicitous to see that [the Sixth Amendment] right was carefully preserved where the accused was ignorant and uneducated….").

Without the protection of the attorney-client relationship provided by the *Jackson* rule, the Sixth Amendment right to the assistance of counsel will become, for many vulnerable defendants, nothing more than an abstraction.

II. Empirical Evidence Demonstrates That The *Jackson* Rule Is Particularly Important For Vulnerable Defendants.

Empirical evidence casts in stark relief the dangers that overruling *Jackson* would pose for mentally and developmentally disabled defendants, juveniles, those lacking education, those with substance addictions, the indigent, and other vulnerable defendants. Many such defendants have no understanding of their legal rights or of the role of counsel. They also share characteristics that make them highly suggestible and disposed to defer to authority figures, leading to waiver of rights and, in a disturbing number of cases, to false confessions and wrongful convictions.

Overruling *Jackson* would be particularly detrimental for such defendants because of the confusing instructions regarding counsel that they would receive. At the initial hearing, they would likely learn that an attorney was being appointed for them. In a later custodial interrogation, however, they would be informed in the traditional manner of "their right to counsel" and right to have counsel "appointed" if they are indigent, notwithstanding

that counsel had already been appointed in open court. These conflicting statements would be confusing to anyone, but would be especially baffling to defendants with mental disabilities or other impairments.

A. The Most Vulnerable Defendants Are Unable To Understand Their Rights In The Absence Of Counsel.

Numerous studies have demonstrated that juveniles and those with mental deficits are particularly vulnerable in confrontations with police without counsel present because they are often unable to understand the warnings that are recited. This vulnerability carries significant ramifications: if *Jackson* is overruled, the Sixth Amendment right to counsel will hinge, not only on a defendant's understanding of the importance of counsel, but also on the understanding that the previous appointment of counsel was not sufficient to prevent police from initiating interrogation in counsel's absence.[4] The evidence is clear that the most vulnerable defendants cannot comprehend the significance of the right to counsel in the abstract, let alone the right's significance when the police confront them in counsel's absence.

In a study of how mental disabilities affect the ability to comprehend the *Miranda* warnings,

---

[4] Knowledge that a defendant has had counsel appointed is imputed to the police under the Sixth Amendment. *See Jackson*, 475 U.S. at 634.

mentally disabled subjects and control subjects were given a series of tests that measured their understanding of (1) the vocabulary used in the *Miranda* warnings; (2) the principles embodied in the warnings; and (3) the legal context of the criminal justice system. Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. Chi. L. Rev. 495, 532–34 (2002). Subjects in the mentally disabled group averaged 20% on the first test, compared to 83% for the controls; 27% on the second test, compared to 90% for the controls; and 38% on the third test, compared to 87% for the controls. *Id.* at 539. On the section designed to test their understanding of the right to counsel, mentally disabled subjects averaged 35%, compared to 93% for the controls. *Id.* at 556–57. Of the disabled group in the study, 22% had IQs somewhat higher than the standard cutoff for mental retardation (70), but these subjects nevertheless scored poorly. *Id.* at 535–57.

Like mentally disabled defendants, juvenile defendants often do not understand the right to counsel. A study of juveniles' understanding of their *Miranda* rights found that "as a class, juveniles younger than [15] failed to meet both the absolute and relative (adult norm) standards for comprehension." Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Cal. L. Rev. 1134, 1152 (1980). The study found that the least understood of the *Miranda* rights was the right to counsel during questioning. *Id.* at 1154. Even an expression of understanding by a juvenile "may reflect compliance with authority rather than an actual subjective appreciation of the

meaning of the warning." Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 Minn. L. Rev. 26, 44, 78 (2006). These studies confirm what this Court observed long ago:

> [A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police …. [He] is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded, and … is unable to know how to protest his own interests or how to get the benefits of his constitutional rights.

Gallegos v. Colorado, 370 U.S. 49, 54 (1962).

Although research has traditionally focused on the mentally disabled and juveniles, recent studies indicate that mentally ill defendants who are not retarded also often are unable to understand *Miranda* warnings.[5] *See* William C. Follette, Deborah Davis & Richard A. Leo, *Mental Health Status and Vulnerability to Police Interrogation*

---

[5] In 2005, more than half of all prison and jail inmates had a mental health problem. Doris J. James & Lauren E. Glaze, U.S. Dept. of Justice, NCJ 213600, *Mental Health Problems of Prison and Jail Inmates* (2006), at 1, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf.
Approximately 43% of State prisoners and 54% of jail inmates reported symptoms meeting the criteria for mania. *Id.* Approximately 15% of State prisoners and 24% of jail inmates reported symptoms meeting the criteria for a psychotic disorder. *Id.*

Tactics, 22 Crim. Just. 42, 45–46 (Fall 2007); Richard Rogers, et al., *Knowing and Intelligent: A Study of Miranda Warnings in Mentally Disordered Defendants*, 31 Law & Hum. Behav. 401, 401 (2007).

Assistance of counsel is necessary to address the severe vulnerabilities of such defendants. *See, e.g.*, Grisso, *supra*, at 1160–64 (finding that "the requirement that counsel be present [during interrogation] affords the best protection for juveniles under the age of fifteen"). The *Jackson* rule is thus particularly critical for these groups.

B. Overruling *Jackson* Would Lead To More False Confessions And Wrongful Convictions.

Police attempts to obtain an adversarial advantage by interrogating defendants without counsel present create perilous risks for the accused. As this Court recently observed, the coercive pressures of custodial interrogation "can induce a frighteningly high percentage of people to confess to crimes they never committed." *Corley v. United States*, 556 U.S. __, No. 07-10441, slip op. at 16 (Apr. 6, 2009) (citing Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 906–07 (2004)); s*ee also* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. __ (2009) (forthcoming), *available at* http://ssrn.com/abstract=1280254, at 1 (finding that, of 232 individuals exonerated by post-conviction DNA

testing, 32—or about 15%—had falsely confessed).[6] Vulnerable defendants such as those discussed above are particularly likely to confess falsely. A recent study found that of 34 individuals who had falsely confessed and were exonerated by post-conviction DNA evidence, 20 were either mentally retarded or juveniles or both at the time of the offense.[7] Garrett, *supra,* at 10; *see also* Samuel R. Gross, et al., *Exonerations in the United States 1989-2003*, 95 J. Crim. L. & Criminology 523, 544–46 (2005) (in a study of 340 exonerations over 15 years, finding that 42% of juvenile exonerees and 69% of mentally ill and mentally retarded exonerees falsely confessed, compared to 8% of adult exonerees without known mental disabilities).

This Court has recognized the particular problem of false confessions among mentally disabled defendants. *See Atkins*, 536 U.S. at 320 & n.25. One study of false confessions found that at least 28 out of 125 defendants who had falsely confessed, or 22% of the total, were mentally retarded. *See* Drizin & Leo, *supra*, at 891, 971; *see also* Garrett, *Judging Innocence*, 180 Colum. L. Rev. 55, 88–89 (2008).

Mentally disabled defendants share a number of characteristics that make them vulnerable to police

---

[6] Research indicates that the innocent are particularly likely to waive their *Miranda* rights because they assume that their innocence will protect them. *See* Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?* 60 Am. Psychologist 215, 218-19 (April 2005).

[7] All 34 of these individuals had waived their *Miranda* rights and lacked counsel before confessing. Garrett, *supra,* at 4.

pressure, including susceptibility to the perceived wishes of authority figures; eagerness to please others; inability to discern adversarial situations; poorly formed notions of personal culpability, resulting in a willingness to assume blame for actions of others; lack of focus and impulse control; inability to judge their own capacities; and desire to hide their disability. *See* Cloud et al., *supra*, at 511–14. As a result, "[i]t is common for mentally retarded suspects to succumb to coercive attempts to elicit confessions." Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R.-C.L. L. Rev. 105, 123 (1997).

Juveniles face a similar risk. *See* Drizin & Leo, *supra*, at 944. Juveniles are socialized to comply with adults' perceived wishes, especially those of authority figures such as police officers. *See* Feld, *supra*, at 57-58; *see also Roper v. Simmons*, 543 U.S. 551, 569 (2005) ("[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.").[8] Juveniles have a tendency to change their recollection of events in the face of negative feedback and repeated questions. *See* Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 16 (1997); Rachel Sutherland & Harlene Hayne, *Age-Related Changes in the Misinformation*

---

[8] At least one scholar has argued that this Court's decision in *Roper* signals the need for heightened protection of juveniles during custodial interrogation. *See* Tamar R. Birkhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 Wash. & Lee L. Rev. 385 (2008).

Effect, 79 J. Exp. Child Psychol. 388, 388–404 (2001). Moreover, many juveniles do not fully understand the consequences of their actions—in one study of more than 400 subjects, juveniles who were asked the consequences of waiving their right to silence most often focused on the immediate police response rather than on the long-term impact of the decision. *See* Thomas Grisso, *Juvenile Competency to Stand Trial*, 12 Crim. Just. 5, 9 (1997) (internal citation omitted); *see also Johnson v. Texas*, 509 U.S. 350, 367 (1993) ("A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults …. These qualities often result in impetuous and ill-considered actions and decisions.").

Other particularly vulnerable groups, such as mentally ill defendants and defendants with substance abuse problems, also may exhibit characteristics that lead to false confessions, including impulsivity, deficits in cognitive processing, suggestibility, delusions and extreme compliance. Follette, et al., *supra*, at 46–49 (discussing defendants with substance addictions, schizophrenia, clinical depression, and anxiety disorders, among other conditions).

Case studies of defendants who confess falsely demonstrate the vulnerabilities that lead to such confessions. One 13-year-old "was so upset by his unfair arrest and the police officers' unwillingness to accept his innocence, he made a false statement he imagined he could withdraw after he got home where his family would believe him." Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 Crim. Just. 26, 33 (2000). A

learning disabled sixteen-year-old who confessed falsely to a murder later said: "They kept telling me I know you did it so why are you lying to me. They had me so upset I wasn't thinking right . . . [I]f I said, yeah, I did it, I could go home. If I said I didn't do it, I could go to jail so I said I did it and I want to see my parents and everything." Drizin & Leo, *supra*, at 970 (quoting *20-20* ABC television broadcast, Mar. 15, 2002) (internal quotation marks omitted) (alterations in original). Jerry Townsend, a mentally retarded man who served 22 years in prison before being cleared by DNA evidence, confessed to each of the approximately 20 unsolved murders that police asked him about. Garrett, *The Substance of False Confessions*, *supra*, at 10, 32, 46.

False confessions do not result only from police coercion. Without counsel present, police officers or prosecutors who are convinced that a defendant is guilty may, unwittingly or otherwise, feed the defendant facts about the crime. A suggestible defendant may then repeat the facts in a confession. Marcellius Bradford, aged 14, initially stated during interrogation that the murder weapon in an Illinois rape and murder case was a brick. *Id.* at 14. The police knew that a piece of concrete with human blood was recovered from the crime scene. *Id.* at 13. The State attorney asked Bradford: "Was this brick a piece of concrete from the ground?" *Id.* at 14. Bradford responded that it was. *Id.* Based on the confession of Bradford and another 14-year old boy, they and two other boys were convicted and served

6.5 to 13.5 years in jail, until DNA evidence exonerated them. *Id.* at 13.[9]

Without the protection of the attorney-client relationship provided by the *Jackson* rule, false confessions and wrongful convictions will undoubtedly become even more common.

C. Indigent Defendants Are Vulnerable Because They Often Face Prolonged Detention Without Any Contact with Counsel.

Indigent defendants face an increased risk of uninformed waiver of counsel because they are less likely than other defendants to have had any meaningful contact with counsel by the time they are subject to interrogation.[10]

According to a Department of Justice study of pre-trial detainees in 1989, 34% of detainees with assigned counsel had not met with their attorneys more than two weeks after detention, compared with 19% of those with hired counsel. Steven K. Smith &

---

[9] Police provision of a confession's crucial details is a common feature of false confession cases, including multiple cases in Louisiana, Michigan, New York, Virginia, and Pennsylvania. *Id.* at 13-26.

[10] The population of indigent defendants is substantial. In 2000, approximately 66% of felony defendants in federal court and 82% of felony defendants in large state courts were represented by publicly financed counsel at the end of their case. Caroline W. Harlow, U.S. Dep't of Justice, NCJ 179023, *Defense Counsel in Criminal Cases* (2000), at 1, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf.

Carol J. DeFrances, U.S. Dep't of Justice, NCJ 158909, *Indigent Defense* (1996), at 4 tbl. 7, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/id.pdf. The numbers are far worse in certain jurisdictions. One report states that in 83% of the cases in Calcasieu Parish, Louisiana, "there is nothing to suggest that a public defender ever met his indigent client out of court." Standing Comm. on Legal Aid & Indigent Defendants, Am. Bar Ass'n, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* 16 (2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf. A study of prisoners who were detained pre-trial in Orleans Parish, Louisiana, when Hurricane Katrina struck and remained incarcerated six months later found that none had met with a lawyer in the six months since Katrina, and the vast majority had not seen a public defender outside of a courtroom in the six months before Katrina. S. Ctr. for Human Rights, *A Report on Pre- and Post-Katrina Indigent Defense in New Orleans* (March 2006), at 5; *see also* Eric Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. Times (Nov. 8, 2008) at A1 (reporting that "[p]ublic defenders' offices in at least seven states are refusing to take on new cases or have sued to limit them, citing overwhelming workloads that they say undermine the constitutional right to counsel for the poor").[11]

---

[11] Compounding the risk of uninformed waiver of counsel, defendants with vulnerabilities such as mental illness are far more likely than other defendants to be indigent. *See* Seth J. Prins & Laura Draper, *Improving Outcomes for People with Mental Illnesses under Community Corrections Supervision: A*

(...continued)

The right to counsel is necessarily abstract to a defendant who has never met or spoken with counsel. Moreover, defendants who have been held for days or weeks without meaningful interaction with counsel—after having been told that a lawyer would be appointed to assist them—become receptive to police suggestions that their lawyer cannot or is not interested in helping them, making waiver and false confessions more likely. *See* Drizin & Leo, *supra*, at 918 (noting that a feeling of hopelessness is a primary cause of false confessions).

D. The Facts Of This Case Illustrate The Inadequacy Of Fifth Amendment Protections For Vulnerable Defendants Facing Formal Adversary Proceedings.

Petitioner's case exemplifies the way that police can circumvent counsel's role "as a 'medium' between [the defendant] and the State," *Moulton*, 474 U.S. at 176, a practice that will become commonplace if *Jackson* is overruled.

Guide to Research-Informed Policy and Practice (2009), at 13, *available at* http://nicic.gov/Downloads/PDF/Library/023634.pdf ("Of local jail detainees, 30 percent with mental illnesses, compared with 17 percent without mental illnesses, had been homeless in the year before their arrest."); Bureau of Justice Statistics, U.S. Dep't of Justice, *More than a Quarter Million Prison and Jail Inmates are Identified as Mentally Ill* (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/press/mhtip.pr (noting that in 1998, about 40 percent of mentally ill prison and jail inmates were unemployed before their arrest).

By confronting petitioner before his lawyer could meet him and falsely telling him that no lawyer had been appointed, Pet. App. 49a, the police "intentionally creat[ed] a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel," in violation of the Sixth Amendment. *Henry*, 447 U.S. at 274. The police deliberately set out to eliminate the protective presence of counsel by confronting petitioner before he had an opportunity to meet with his appointed counsel and convincing him that invoking his right to counsel would be futile. Pet. App. 49a.

Similar scenarios will be commonplace if this Court overrules *Jackson*, as the police will seek to extract confessions from represented defendants before counsel has had an opportunity to assist them. Even where officers do not intend to circumvent the right to counsel, particularly vulnerable defendants will make uninformed waivers and false confessions at significantly higher rates than they do today. The Sixth Amendment right to the assistance of counsel will be rendered illusory for many defendants, as it was for petitioner here.

CONCLUSION

This Court's holding in *Michigan v. Jackson*, 475 U.S. 625 (1986), should not be overruled.

Respectfully submitted,

BARBARA BERGMAN
Co-chair, Amicus Committee
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1117 Stanford, N.E.
Albuquerque, N.M. 87131
(505) 277-3304

JONATHAN L. MARCUS
Counsel of Record
ANNA E. LUMELSKY
GARY FELDON
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

STEVEN SHAPIRO
ROBIN DAHLBERG
AMERICAN CIVIL LIBERTIES UNION NATIONAL LEGAL OFFICE
125 Broad Street
18th Floor
New York, NY 10004
(212) 549-2500

DAVID S. UDELL
MELANCA CLARK
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6730

KATIE SCHWARTZMANN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF LOUISIANA
PO Box 56157
New Orleans, LA 70156
(504) 592-8056

SIDNEY S. ROSDEITCHER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

STEPHEN B. BRIGHT
WILLIAM R. MONTROSS, JR.
SOUTHERN CENTER FOR
HUMAN RIGHTS
83 Poplar Street, NW
Atlanta, GA 30303
(404) 688-1202

APRIL 2009 *Counsel for Amici Curiae*