IN THE SUPREME COURT OF THE UNITED STATES

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JESSE JAY MONTEJO, :

Petitioner :

v. : No. 07-1529

LOUISIANA. :

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Washington, D.C.

Tuesday, January 13, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:14 a.m.

APPEARANCES:

DONALD B. VERRILLI, JR., ESQ., Washington, D.C.; on behalf of the Petitioner.

KATHRYN W. LANDRY, ESQ., Baton Rouge, La.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:14 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 07-1529, Montejo v. Louisiana.

Mr. Verrilli.

ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

ON BEHALF OF THE PETITIONER

MR. VERRILLI: Mr. Chief Justice, and may it please the Court:

The question in this case is whether Petitioner Montejo should be denied the Sixth Amendment protections of Michigan v. Jackson because he silently acquiesced in the appointment of counsel at his initial hearing, rather than affirmatively accepting the appointment. The Louisiana Supreme Court believed that an affirmative acceptance was required to trigger Jackson and therefore upheld the admission of a confession elicited during police-initiated interrogation after Montejo's Sixth Amendment right had attached and after a lawyer had been appointed to represent him.

If Jackson applies, that confession should not have been admitted, and Jackson should apply because nothing in this Court's precedents or, frankly, in

common sense supports a rule that affords less Sixth Amendment protection to defendants who are automatically appointed counsel at initial hearings than to defendants who are appointed counsel after a request for counsel has --

JUSTICE SCALIA: I thought that the rationale of Jackson was that the confession is simply deemed to be coerced if the defendant has expressed -- has expressed -- his desire to have counsel present or even to be represented by counsel. It isn't clear that, which is already a stretch, to assume that simply because I said, you know, I would like to have counsel, if the police continue to say, well, come on, won't you talk to us -- it's already a stretch to say it's automatically coerced.

But now you're saying, even if the defendant has never expressed even a desire to be represented by counsel but has simply had counsel appointed, in fact even if he doesn't know about the appointment of counsel, the -- his confession is automatically deemed to be coerced. That seems to me quite, even more extravagant than Jackson.

MR. VERRILLI: Well, I don't -- without taking up at the moment the question whether Jackson was extravagant, it does seem to me, Your Honor, that your

question does get to the heart of the matter. In a situation like Jackson, the defendant requested counsel and that was deemed to be an election of the right to rely on counsel, not merely at the initial hearing but for all purposes.

JUSTICE SCALIA: Right. Right. What has he elected here?

MR. VERRILLI: And the question here, it seems to me, Your Honor, is what does one do when a defendant is automatically appointed counsel? There are two options: One is to treat that defendant as having elected the right to rely on counsel, and --

JUSTICE SCALIA: Why? Why would one do that?

MR. VERRILLI: And the other option is to deem that the defendant has decided to go it alone. Those are the two possibilities here, and it seems to me that --

CHIEF JUSTICE ROBERTS: I'm sorry to interrupt, but isn't there a third, which is that you just don't assume anything and you wait to see if he makes -- says, "I want to talk to my lawyer," or he could well say, "You've told me," as was the case here, "I have a right to a lawyer, I don't have to say anything, I want to talk some more, I don't -- okay,

there's a lawyer, fine, I want to talk without my lawyer, I want to waive my right to counsel." Which he can do.

MR. VERRILLI: I think the problem, Mr. Chief Justice, is that in the -- it is an either/or choice because, if you -- if the defendant is deemed to have elected to rely on counsel on the basis of the appointment, then the police may not initiate interrogation. It's only if the defendant --

CHIEF JUSTICE ROBERTS: Right. If you prevail and you say silence constitutes saying "I want to talk to my lawyer," that's right. I'm saying that's a false, a false alternative.

MR. VERRILLI: Well, I don't think so. I think if the police initiate interrogation after a lawyer has been automatically appointed, then that interrogation either has to be deemed to be in violation of the rule of Jackson or not, and that seems to me to depend on how you characterize what happens in the course of an automatic appointment. If you --

JUSTICE GINSBURG: Mr. Verrilli, the defendant himself could say, "Police, I'd like to talk to you." That would be okay. But this is police initiation.

MR. VERRILLI: That's absolutely the

critical point, Justice Ginsburg. This is a limited rule, and the free choice of the defendant to initiate a conversation with the authorities is always present. The question is, what do we do in an automatic appointment situation? And this is a significant question because -- and I would refer the Court to the appendix, to the amicus brief of the National Legal Aid and Defender Association, which I think is a helpful reference here. It goes through each State, and what it shows is that approximately half the States have procedures in which, as a matter of course, the defendant is asked at the hearing whether he or she wants counsel, and if the defendant says yes, then we're in a Jackson situation.

JUSTICE KENNEDY: I just want to make sure I understood your answer to Justice Ginsburg's question. Assume a lawyer is appointed. The defendant says, "Yes, I want my lawyer." He's in the jail cell. The policeman walks by, he says, "I have a lawyer, but I want to talk to you now." Can the police talk to him?

MR. VERRILLI: Yes, if he initiates. Initiation is the key. Initiation --

JUSTICE KENNEDY: All right. Well, then it seems to me that the Miranda protections give you all -- or, the Miranda rules give you all the protection you

need.

MR. VERRILLI: I don't think so, Justice Kennedy. A couple things. First of all, it seems to me that to reach that conclusion that the Court really would have to overrule what is a key holding in Jackson, and I don't think that that would be appropriate to do in this case for a whole host of reasons.

JUSTICE KENNEDY: Well, I'm wondering if there is some further rule, could the prosecutor talk to the defendant if the defendant was in the cell and the prosecutor walked by, saying, "I know you have an attorney, but I would like to talk to you"? Could the prosecutor do that consistently with the Sixth Amendment?

MR. VERRILLI: Yes. It depends on initiation. It depends on who initiates.

JUSTICE KENNEDY: Really? The lawyer --

MR. VERRILLI: If the defendant --

JUSTICE KENNEDY: The lawyer can talk to a client for another lawyer?

MR. VERRILLI: Well, if the -- if the defendant initiates, then the defendant is -- then the bar of Jackson doesn't apply. That's the rule, but the --

JUSTICE KENNEDY: Well, again, if that's --

if that's the principle that you're operating on and that you'd concede, then I think the Miranda warnings would suffice to give all the protection you need.

MR. VERRILLI: I don't -- apart from the question of whether you can reach that result without overruling the core holding of Jackson here, it does seem to me, with all due respect, we don't agree with that because, on the one hand, we do think that free choice is preserved in the existing regime and, on the other, hand we don't think Miranda can give you all the protection you need.

And I think a good illustration of that is this Court's decision in the Moran case. Now, recall in Moran, that was an interrogation that occurred before the defendant's Sixth Amendment rights had attached, and the -- and the police -- and the defendant had a lawyer in that case. His sister had hired a lawyer for him. The lawyer was trying to reach him. The police kept him away, kept the lawyer away from the defendant. The Court held that, in the Fifth Amendment context, because the Sixth Amendment right had not attached, that the Miranda warnings sufficed to guarantee the reliability of the confession.

But the Court was very quick to point out, and then reiterated this again in Patterson, that in the

Sixth Amendment context that would be a violation because it's an interference with the relationship between the defendant and his lawyer, and the ability of the defendant to rely on the lawyer. And that's the key.

JUSTICE SCALIA: It is that, whether or not the defendant initiates the contact. I mean, in civil matters, it's contrary to the ethics of the bar to interrogate the party on the other side when you know he has a lawyer, and that would be the case even if he initiated it. You wouldn't think of negotiating with him without consulting the other lawyer, saying, "Can I talk to your client?" So that doesn't stretch over to this, to this situation.

We're not applying bar ethical rules. We're applying, supposedly, a rule that determines when a confession is coerced. All right? That's what we're doing here.

MR. VERRILLI: Well, what the -- we're applying -- the question here is whether defendants in this category, the category that Mr. Montejo is in, automatic appointment, are entitled to the same Sixth Amendment protection as defendants who are in the category of -- who are brought to trial in States where they -- you have this colloquy as part of the initial

hearing where the defendant is asked.

JUSTICE SCALIA: Why couldn't we solve your practical problem that we don't know in many States whether the defendant accepted appointment or not, by simply saying it is not enough to simply accept appointment of counsel; you must have requested counsel. To merely say, "Oh, that's great, you appointed me counsel" --

MR. VERRILLI: Well --

JUSTICE SCALIA: You must have requested it. And that would be in accord with the holding of Michigan v. Jackson and would solve all of your -- all of your practical problems.

MR. VERRILLI: Well, two things, Your Honor. First, it seems to me that what the dispute here is is whether there is a principled basis for treating these two categories of defendants differently, the defendants who are brought to hearings in States where the procedures require that they be asked and defendants who are brought to hearing in States where they are automatically appointed counsel without a showing of indigency -- upon a showing of indigency. And I don't -- I think with respect to the question of practical problems going forward, sure, if all States -- if the States in that second category were to conform their

practices such that the defendants were asked and had the opportunity to say yes, indeed, I want counsel, then I suppose the problem would be solved. But you really get to the same place by holding, as we submit the Court really should hold, that when -- when you have an automatic appointment, unless there is some reason to think the defendant is rejecting it, that Jackson kicks in and that --

JUSTICE SCALIA: What happens under Michigan v. Jackson if I have never requested counsel? I've never asked the court to appoint counsel, but I've gone out and hired counsel of my own, right?

MR. VERRILLI: Sure. I think it's quite clear that the rule of Michigan against Jackson applies, and that's because --

JUSTICE SCALIA: Is it clear from Michigan v. Jackson itself, or --

MR. VERRILLI: Well, from cases applying it, because in that situation the person is deemed to assert the right to counsel by hiring a lawyer, just as by asking, and the question here is when you have an automatic appointment why should you treat that category of defendants any differently for purposes of applying the Jackson rule?

JUSTICE GINSBURG: Mr. Verrilli, do I

understand correctly that the scenario here was the defendant, uncounseled, was taken before a judicial officer who read him rather standard information, one piece of information was, I'm appointing a lawyer for you? Was there any opportunity for the defendant to say anything at that hearing?

MR. VERRILLI: And that's the whole problem here, Justice Ginsburg. All we have is a one-page minute order which reflects that counsel was appointed. It doesn't reflect anything about a colloquy because in the normal course there's not -- there's no occasion for the colloquy. You come in, you get your lawyer, a decision about bail is made, and you move on, and the next person comes in and that happens.

JUSTICE GINSBURG: He didn't get -- he didn't in fact get a lawyer. I thought he was told that the public defender --

MR. VERRILLI: The Office of Indigent Counsel is appointed to represents you.

JUSTICE GINSBURG: Right, and the actual lawyer didn't show up until later.

MR. VERRILLI: Right. The way the process works is -- it's not in the record, but the way the process works in this judicial district is there is a legal assistant there who takes the names of people who

need lawyers and then immediately -- and the public defender service in this district is a contract service. They're private attorneys who contract out to do it. And then the legal assistant immediately calls, tells the lawyers, well, here is who you are representing.

Now, in a case like this one, which is a capital case, there was of course a great sense of urgency. There are only two lawyers in this district who are qualified to represent capital defendants. They got called immediately. Recall what happened here was that this hearing took place in the morning and Mr. Montejo gets taken back to the jail and very soon after he arrives he gets checked back out by these officers again and taken out in the squad car where he is kept for six hours, and in the meantime essentially while he's going out the back door, while he's being taken out the back door with the police, his lawyer is coming in the front door and raising holy heck about the fact that his client's not --

CHIEF JUSTICE ROBERTS: Well, but the rule you're asking for would apply across the board. How would it apply in a case where the defendant is given Miranda warnings, says, thank you, I don't want to talk to my lawyer, I want to talk to you. He's talking to the police. All of a sudden they bring a note in and

say: They've appointed a lawyer. The police says: I just got a note; you've been appointed a lawyer. Do you want to keep talking?

You would say that's a violation, right? And then he says yes and continues to talk.

MR. VERRILLI: If the police initiated the interrogation, yes, because I think it gets to the heart of the --

CHIEF JUSTICE ROBERTS: That's a violation, even though he knows that if he wanted a lawyer he could request one, he knows one's been appointed for him, and he's been warned that if he doesn't want to talk without a lawyer he doesn't have to, and he's in the middle of a conversation that he initiated, and the police says, do you want to keep talking? That's a violation?

MR. VERRILLI: I'm sorry, Mr. Chief Justice. If the defendant initiated the conversation --

CHIEF JUSTICE ROBERTS: Early on, before the lawyer was appointed, he's given Miranda warnings and he says: I want to talk. He's talking. They say: Now, we just got the word; a lawyer has been appointed; do you want to keep talking? He says yes. That's a violation?

MR. VERRILLI: If the police initiated the interrogation, it's a violation.

CHIEF JUSTICE ROBERTS: Well, I'm trying to -- which stage are you talking about, before the lawyer was appointed or after? I'm telling you before he was appointed, the police did not initiate the conversation. They told him he didn't have to talk. He says: I want to talk. Now, you're saying it counts as initiating the interrogation if they say: You've got a lawyer; do you want to keep talking?

MR. VERRILLI: No, I think that in that situation the defendant has initiated and then you've got the kind of free choice that the law respects, and that's where the line is drawn here. But that is --

CHIEF JUSTICE ROBERTS: How is he -- where is the initiation? Is it when he says, yes, I want to keep talking, after being told -- asked do you want to keep talking? Or is it way back at the beginning?

MR. VERRILLI: It's at the outset.

CHIEF JUSTICE ROBERTS: At the outset.

MR. VERRILLI: At the outset, it seems to me. He has initiated. He exercises free choice.

CHIEF JUSTICE ROBERTS: Isn't that what happened here? He had been given his Miranda warnings, right?

MR. VERRILLI: No, it isn't what happened here at all. In fact, it seems to me the opposite, the

opposite thing happened here. For one thing, as a factual matter he was told by the police on September 10th that he didn't have a lawyer, despite the fact that one had been appointed for him in the morning. That was his testimony.

Now, I recognize that there is a factual issue here that is not resolved, but the Louisiana Supreme Court did not discredit that testimony. It acknowledged it. What it said was -- and I think this points up, Justice Kennedy, what the problem is with relying solely on Miranda -- that even in that situation, even if it's true that the police officers told him on September 10th that he did not have a lawyer, that that wouldn't rise to the level of a problem that would cause a Fifth Amendment issue under Miranda because of the facts of Moran. And it seems to me that's exactly the problem there, that that means in fact, if we apply Moran that way, that the police could deliberately tell him incorrectly that he didn't have a lawyer when he did.

JUSTICE KENNEDY: But wouldn't that be a Miranda problem?

MR. VERRILLI: Well, I don't -- well, Moran says no.

JUSTICE KENNEDY: Miranda.

MR. VERRILLI: Well, Moran says that a Miranda waiver is valid despite that kind of deception. That's the problem here, it seems to me. It does get to the difference. In the Fifth Amendment context, the right to have a lawyer there is a prophylactic protection against a coerced self-incrimination in the setting of custodial interrogation.

JUSTICE KENNEDY: You think, given Moran, that there was no Miranda violation here?

MR. VERRILLI: Well, I think it would be hard, given Moran, to say that there was. And that points up the problem. The essence of this right is the right to rely on the assistance of counsel at critical stages and interrogation is a critical stage.

JUSTICE STEVENS: Mr. Verrilli, is it part of your assumption that at the time the police were doing the interrogating that they knew he had been appointed a lawyer?

MR. VERRILLI: Well, I think that's a bit complicated, Justice Stevens.

JUSTICE STEVENS: That's why I'm interested in your comment.

MR. VERRILLI: But here's my best way to work through the facts. Detective Hall, the only officer who testified, testified that he was not aware.

The State court credited that and we don't take issue with it. The problem is that this is a police precinct that has, I don't know, maybe 10, 12 officers in it. They have a capital murder suspect in there. He was taken by the police to the hearing. The police were present at the hearing that morning. He was taken back --

JUSTICE STEVENS: Do you presume -- do you argue that we should presume that the entire police force is aware of what happened in court?

MR. VERRILLI: Well, I think -- I think under Jackson, Justice Stevens, they are charged with the knowledge. And I think it's important that they have to be charged with the knowledge, because otherwise there is all kinds of room for manipulation and deception. And I do think that's a big part of the problem here, that -- and I also think it's important to point out as a factual matter the one detective who did testify, Detective Hall, testified very carefully. He testified that he asked the defendant when he went to see him whether he had been contacted by counsel or whether his family had gotten him a lawyer, and of course neither of those things was true. He was indigent, his family hadn't gotten him a lawyer, and he hadn't yet been contacted by counsel. He didn't ask

him: Did you have a lawyer appointed for you?

JUSTICE ALITO: Mr. Verrilli, do you think that Michigan v. Jackson is immune from being reexamined at this point?

MR. VERRILLI: I think it ought not be reexamined here, Justice Alito, for several reasons. One, the Respondent has not asked for it. Two, there's a special justification that has to be shown to overrule it, as Dickerson says, in the Miranda context, and this is quite parallel.

JUSTICE ALITO: Well, if we were no longer to adhere to that rule on issues of constitutional criminal procedure?

MR. VERRILLI: I think it's quite important that the Court do so, and there was a strong consensus in Dickerson that the Court do so. I think there's a real problem. This is not something that should be done lightly based on four pages of discussion in one amicus brief. There's a very sharp dividing line in the law between the Fifth Amendment and the Sixth Amendment here, and it applies in numerous areas.

It's true, for example, with respect to lineups. You can have an uncounseled lineup before the Sixth Amendment right attaches, you can't after. You can have an uncounseled psychiatric examination before

it attaches, you can't after. You can engage in surreptitious interrogation of a suspect before the Fifth Amendment -- before the Sixth Amendment right attaches; you can't after. Certain kinds of arraignments have to be done in the presence of counsel.

So it seems to me you would be destabilizing a whole significant area of law without very much consideration here were you to say that in this context we're going to just say that the Fifth Amendment and the Sixth Amendment operate in an equivalent manner.

JUSTICE SCALIA: We wouldn't be saying that. We would just be saying that it is unrealistic to think that a confession is coerced simply because the police initiated the conversation so long as he said: Okay, I'll speak without my counsel present. That's all we -- I don't see how it would infect any of these other areas. It would just say that's -- that's one bridge too far. This is prophylaxis on prophylaxis.

MR. VERRILLI: You would be overruling Jackson in that regard.

JUSTICE SCALIA: That's true, but not much else.

MR. VERRILLI: And in a case in which it seems to me manifestly not appropriate to do so, given the lack of consideration given to this by the

Respondent --

JUSTICE SCALIA: That's a different question.

MR. VERRILLI: And -- well, this is serious business. You are going to overrule a precedent that's been in place for more than 20 years, that provides a very clear bright-line rule for the police to -- to manage their affairs with not the slightest showing that this rule is presenting any practical problems in its administration out there in the field. Nobody has even argued that.

JUSTICE SOUTER: Well, Mr. Verrilli, you have spoken of -- of overruling a bright line, but I think there is something else that would be involved in the overruling. And I -- I haven't pulled Jackson back out since I came on the bench, so this is where you've got to help me out.

There is a -- there is a difference between the way you are phrasing the Sixth Amendment right and the way, for example, Justice Scalia has phrased it in his question. Justice Scalia has phrased it in terms of determining what is a coerced confession. You have phrased it in your argument in terms of saying a right to rely upon counsel, which is a much broader concept.

Does Jackson support the notion that he

simply has a right to rely upon counsel? I think that is your principal argument here because that would be the argument that supports your claim that there shouldn't be a distinction between a case in which the State simply appoints counsel without being asked and a case in which he actually asks for counsel. That would be a nice way of rationalizing that distinction.

Isn't it the case that you understand Jackson to be a broader rule than a merely no-coercion rule? And, number two, if that is so, then overruling Jackson would, as I take it, in your view be more than simply substituting a -- a one bright-line coercion rule for a different bright-line coercion rule. So what are your responses to those two questions?

MR. VERRILLI: That is absolutely correct, Justice Souter. The text of the Sixth Amendment provides that the -- the accused shall have the right to the assistance of counsel. The essence of the right is the right to rely on the lawyer at critical stages of the proceeding.

And what Jackson says is that that right deserves a very significant measure of protection, and we are going to assume that once a defendant asserts it, the defendant wants the -- wants the assistance of counsel through every critical stage of the proceeding.

JUSTICE SCALIA: You have to assume that his voluntary relinquishment of it is somehow coerced. I mean there -- there is no way around that. The man has said: I know I have counsel, but that's okay; I'll talk anyway. And you say: So long as the police have initiated that conversation, we will deem it to be coerced. You can't get around the coercion aspect of -- of this matter. But that question is whether that is at all realistic.

MR. VERRILLI: Well, I think -- I think the facts of this case make it quite clear that it's a very serious risk. Here you have a situation in which a defendant who, after all, even before his right attached has been subjected to very, very aggressive tactics that the Louisiana Supreme Court recognized presented even a close case even -- even under the Fifth Amendment.

Then he -- he finally has a 72-hour hearing. He gets a lawyer appointed. As soon as he gets back, they take him out in a squad car for six or seven hours, at the end of which he produces a -- an apology-letter confession written on a pad with a pen given to him by the police officers and --

CHIEF JUSTICE ROBERTS: Again, you are arguing the facts of a particular case, and we are looking at a rule that is going to apply across the

board. In a particular case, as you say, the Louisiana Supreme Court said this almost violated his Fifth Amendment right. There are protections against the actual coercion, which it seems to me you're arguing. As I understood Justice Scalia's question, he says: Don't you have to assume that there is coercion even in the mildest case, not the most extreme one, but the mildest one?

MR. VERRILLI: No, you have -- what you have is a right to rely on the assistance of your lawyer, and you have -- and -- and it's critical. A good example of why it's critical --

CHIEF JUSTICE ROBERTS: A right that you can relinquish, a right that you can waive, and all that's being suggested is that it is not totally determinative whether the police say: Do you want to keep talking, or if the defendant says: I want to keep talking.

MR. VERRILLI: But Jackson drew a clear line. It did so because -- and the Court has said -- it was a -- a prophylactic rule, but it's a prophylactic rule that represents -- reflects the centrality of -- of the --

CHIEF JUSTICE ROBERTS: Right, and whether or --

MR. VERRILLI: -- criminal process.

CHIEF JUSTICE ROBERTS: -- whether or not your -- your dialogue with my colleagues about overruling Jackson -- putting that to one side, what you are arguing is an extension of Jackson from the context in which it arose to this context.

MR. VERRILLI: Well, I think two -- two points on that, Mr. Chief Justice: First, I think it would actually break new ground for this Court to hold that the defendant who has a lawyer isn't entitled to the protection of Jackson. This Court has never held that. And every time it has addressed the issue, it said the opposite. Admittedly in dictum, but in Patterson and Moran it said the opposite. So that is what is really breaking new ground, it seems to me.

And second, the only way to treat these two categories of people differently is to come up with a principled distinction for why the right should apply differently to one than the other, and I submit that none has been offered.

I would like to reserve the balance of my time. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Landry.

ORAL ARGUMENT OF KATHRYN W. LANDRY

ON BEHALF OF THE RESPONDENT

MS. LANDRY: Mr. Chief Justice, and may it please the Court:

The generous prophylactic rule of Michigan v. Jackson which imputed a defendant's request for counsel in one forum, i.e., his arraignment, to another forum of post-attachment custodial interrogation should not be expanded in this case to a defendant who has done nothing whatsoever to make such a request.

JUSTICE GINSBURG: Did he have an opportunity to do it at the so-called 72-hour hearing? Was there any -- did the judicial officer ever ask him anything about whether he wanted counsel, whether he accepted counsel? Was there any colloquy between them at all?

MS. LANDRY: Not that I'm aware of, Justice Ginsburg.

JUSTICE GINSBURG: And is that standard operating procedure at these 72-hour hearings: That the -- the defendant, who is there uncounseled is -- is just standing there, and the judicial officer says: I'm appointing counsel for you, and he goes on to the next thing he's telling him?

MS. LANDRY: Yes.

JUSTICE GINSBURG: Is that how it operates?

MS. LANDRY: Yes, Your Honor, that is how it

operates.

But I think one of the fallacies of Petitioner's argument is that it leads to the conclusion that this defendant had to make that choice at that moment at that hearing, and that is not what we have asserted either in the Louisiana Supreme Court or at this Court.

Our position is he needs to make a request. Whether the request is made in the court proceeding, which Jackson said he can make it in the court proceeding and it applies thereafter to critical stages, which would include custodial interrogation, but in this case after they approached him again, there's no request at the hearing --

JUSTICE GINSBURG: Did anybody ever tell him he needed to request? I mean, he had just been told by a judicial officer: I'm appointing counsel for you. He's not counseled at that point. How does he know that, in order to protect his right to counsel, he has to make some kind of an affirmative assertion? He's just been told he's got one.

MS. LANDRY: Because subsequently, when the police approached him, again there being no request prior to this that prohibited them from approaching him, they provided him with his Miranda rights, which

Patterson says is sufficient in the context of a custodial interrogation that takes place post-attachment.

They provided him with his rights, which included the right to counsel, and he then waived those rights. In fact, this particular defendant on seven occasions, three of which -- four of which were pre-attachment and three of which were post-attachment, was given his rights, including the right to counsel, and each of those seven times waived in writing those rights.

Our position is what he needed to do for Jackson is make some sort of request or some sort of positive assertion that he was asserting his request for counsel.

JUSTICE GINSBURG: I would have no problem at all with the argument you are making if someone had told him that he needed to do that. But he didn't have a judge to tell him that; he didn't have a lawyer to tell him that; and the police certainly didn't tell him that.

MS. LANDRY: No, but when the police did approach him after that 72-hour hearing, they advised him again of his rights, including his right to counsel, and asked him if he wished to waive those rights.

JUSTICE SOUTER: Excuse me. They advised him, you say, of his right to counsel. If they gave him the standard Miranda warning, what they said was: You have the right to have a counsel appointed. They didn't say: You have a lawyer who has been appointed. And, in fact, his testimony at least is that they told him the opposite. But if all they did was give him the Miranda warning, they certainly were not informing him of his Sixth Amendment right or his Sixth Amendment status.

MS. LANDRY: I would respectfully disagree, Your Honor, because in Patterson the Court said that the Miranda rights were sufficient to apprise a defendant of his post-attachment Sixth Amendment rights. Did they tell him you have a lawyer appointed? No. In fact, Detective Hall testified that he was not aware of the 72-hour hearing or the --

JUSTICE GINSBURG: That's very puzzling. This is an experienced police officer. The 72-hour hearing is required in every case where defendant is in State custody. So how could an experienced police officer not know? Somebody, by the way, who knew this man had been kept until -- even more than 72 hours. And he testifies -- it's true that Detective Hall testified: I didn't know that he appointed -- had been appointed a lawyer. The very same day that he got to the 72-hour

hearing a day late, how could he not have known?

MS. LANDRY: I can't answer that question. I can only answer the question that all of the officers testified that they were not aware that counsel had been appointed for the defendant that morning.

JUSTICE KENNEDY: Well, of course, they know -- it's a death case -- that counsel is going to be appoint -- or it's a murder case -- that counsel is going to be appointed. Everybody knows that except this defendant. He doesn't know; of course he doesn't know.

MS. LANDRY: I understand. They testified that they weren't aware that counsel had not been appointed that morning.

JUSTICE BREYER: Just to clarify in my mind. Case one, the defendant has no lawyer. He is -- they give him Miranda warning. He says: I don't want a lawyer. Okay. Now, do you want to speak against yourself? Yes, he says, I do. Sorry, strike -- he says: No, I don't; I don't want to say anything, but I don't want a lawyer.

Six hours later the policemen say to him: Are you really sure that you don't want to speak? He says: Well, maybe I will, and he makes a full absolutely voluntary decision. That's okay under the Constitution, right?

MS. LANDRY: Yes, sir.

JUSTICE BREYER: Okay. Now, it's the same case, except this time he says: I have a lawyer; I hired him yesterday. Now the policeman cannot say, are you sure? Is that correct?

MS. LANDRY: That's correct.

JUSTICE BREYER: That's the law. So, the law is -- and the reason for that second is because once you have a lawyer, police communicate through the lawyer. Isn't that the reason, basically? I just always thought that was the reason. Once a person has a lawyer, another lawyer communicates through the lawyer. They don't go and talk to the client. I thought that was the kind of rationale for it. Maybe I'm wrong.

MS. LANDRY: No, I don't think that you're wrong. I think that is part of the rationale. What Jackson is trying to do was to deter --

JUSTICE BREYER: Okay. Now, if the --

JUSTICE SCALIA: Excuse me. I think it's -- I think it's wrong. I think it's common ground that so long as he says, even though I have a lawyer, I'll talk to you, that's okay.

JUSTICE BREYER: I'm not talking about that.

JUSTICE SCALIA: And that's not okay in civil cases, but it's perfectly okay here.

JUSTICE BREYER: I was trying to give a hypothetical and my hypothetical is a different one than you were just told. In my hypothetical the person has a lawyer, and I thought where he has a lawyer the police are not allowed to go and ask him questions about whether he wants to waive. Of course, he can volunteer it. Am I right about that?

MS. LANDRY: Yes, but I also thought that your hypothetical included the fact that he told the police that he had a lawyer, I retained one yesterday, which I think --

JUSTICE BREYER: That's correct, that's correct.

MS. LANDRY: -- which I think goes further.

JUSTICE BREYER: Correct.

MS. LANDRY: To me that connotes under Jackson --

JUSTICE BREYER: Correct, that's the conundrum of the case. Now I understand it. The conundrum of this case is he didn't tell the police, I have a lawyer. He had one.

Now, if he had hired one and not told the police, it would be the same result as we just said, wouldn't it? If he had one but didn't tell the police, the police could not initiate questioning; am I right or

wrong? All I'm driving at is shouldn't the result here be the same?

MS. LANDRY: Well --

JUSTICE BREYER: The same whether you hired the lawyer or the same whether the lawyer was appointed? At least that's what's in my head. And if you can show me that you want the same result in both cases, that would go a long way towards convincing me.

MS. LANDRY: I would disagree with your last hypothetical because if a defendant goes out and hires a lawyer but never says anything to the police, he makes no request, no statement to them regarding the lawyer --

JUSTICE BREYER: He tells some of the police. Some of the police know. It just happens that these particular ones don't.

MS. LANDRY: I think if he voices to the police some type of positive affirmation -- I have a lawyer, I got a lawyer yesterday -- to me that --

JUSTICE STEVENS: Let me just interrupt. Isn't it perfectly realistic to presume that the police knew at the 72-hour hearing he was appointed a lawyer?

MS. LANDRY: Well, I don't know that you can presume that. I mean, you would be overriding the testimony of the officers.

JUSTICE STEVENS: But it happens in 99

percent of the cases, I think, in a capital case. And surely, the police should be presumed to know what the normal procedure is.

MS. LANDRY: And in this case, even if you presumed that they knew that he had a lawyer, I still don't think it overrides the key issue in Jackson as I see it, which is his request for counsel, some type of affirmation or statement or action to the police that he wants to deal through his counsel.

JUSTICE SOUTER: But that doesn't go to the issue in this case. The issue in this case, as I understand it, is not that he lost because he failed to make a request. He lost because he failed to make it affirmatively clear that he accepted the appointment of the lawyer who had, in fact, been appointed for him as he had been told. That's not a request.

As I understand it, under the -- under the State court ruling, if he had stood at the 72-hour hearing and the court had said, we're appointing the X office to defend you, and he had said, great, that would have changed the result in this case; isn't that correct?

MS. LANDRY: Yes, I think so.

JUSTICE SOUTER: So the issue is not request. The issue is acceptance. That's what it

seems -- just to get my point, that's what seems to me to be the acute point of several of the questions you have been asked. Why -- we're not talking about requests. Why should it make a constitutional difference whether the man stands in a Tennessee courtroom and simply stands silent when they said, you've got a lawyer --

JUSTICE GINSBURG: Louisiana.

JUSTICE SOUTER: -- as distinct from a case where they say you have got a lawyer, and he says, that's fine?

MS. LANDRY: Well, I would disagree with the characterization. As I see the case, the question is Jackson turned on the fact that that defendant had asked for, had requested the help of a lawyer. Patterson said so. Patterson said Jackson turned on --

JUSTICE STEVENS: Yes, but in this very case, if there had been a court reporter present -- present, and if the record showed that this defendant said, thank you, I would like to be represented, then he would have been protected, right?

MS. LANDRY: I think he would have under Jackson.

JUSTICE STEVENS: Louisiana does not -- does not provide a transcript of all these hearings, does it?

MS. LANDRY: No, Your Honor.

JUSTICE STEVENS: So what would -- what should we presume to be the general practice that happened, that most of them say, no, I don't want one or most of them will say, thank you?

MS. LANDRY: Well, probably in most cases nothing is said. But, again -- and that goes back to my earlier point, the police then approached -- I mean, the defendant could have said something at the hearing, but presuming nothing was said --

JUSTICE STEVENS: He had no -- no way of knowing that being silent would produce a different result than saying, yes, I'm happy with the lawyer. Does the uncounseled defendant have any way to know that? Does the routine require the judge to tell him, you have got a lawyer, but he's not going to be available unless you say you want him?

MS. LANDRY: No, because I think subsequently if he doesn't say anything when the police approach him, they tell him he has the right to counsel, and at that point he can exercise that right and say, I want a lawyer, I don't want to talk to you without a lawyer.

JUSTICE SCALIA: Ms. Landry, I don't really understand what you're arguing here. I thought you were

saying there has to be a request in your response to Justice Souter, but then you accept as sufficient his merely saying thank you. That's not a request.

JUSTICE GINSBURG: Did the Louisiana Supreme Court say there has to be a request? I thought they said there had to be some action, affirmative act of acceptance.

JUSTICE SCALIA: That's what I thought, too. But you were saying there had to be a request. You abandon that? There doesn't have to be a request?

MS. LANDRY: No, I think there does have to be a request --

JUSTICE SCALIA: "Thank you" is not a request.

MS. LANDRY: I'm sorry, I didn't finish my --

JUSTICE SOUTER: You're not merely defending the State court here. You're asking for a -- in effect, a different rule from that which the State court applied.

MS. LANDRY: No, we believe that the State court was correct when it held that some type of positive affirmation -- and that to me is the whole question --

JUSTICE SOUTER: Then are you equating

positive affirmation with request for a lawyer?

MS. LANDRY: Yes. I think there has to be some action --

JUSTICE SOUTER: Then on your -- then on your theory, this individual's Sixth Amendment right would not have attached if he had stood in the courtroom and said, thank you very much, that's great.

MS. LANDRY: Well, whether the Sixth Amendment right attached I think is a different issue from whether the Jackson rule applies to then bar any police-initiated conversation with him, and the issue I think in this case is whether or not his silence -- the Petitioner has argued that the mere appointment of counsel with nothing further by this defendant constituted the request necessary under Jackson to invoke the rule.

JUSTICE KENNEDY: One of my concerns is that Jackson is a formality, but you're arguing for a formality on top of a formality. I don't know what functional purpose is served by your position that he has to request the lawyer at the arraignment, especially when he's not versed in the law, he's in this stressful situation, and you require a formalistic request on the part of the defendant? It just makes no sense to me.

MS. LANDRY: But Your Honor, I'm not

requiring a formalized request on the part of the defendant at the hearing.

JUSTICE KENNEDY: No, you're requiring some kind of ritualistic phrase to indicate that he -- that he accepts the appointment.

MS. LANDRY: No.

JUSTICE KENNEDY: That he requests the appointment.

MS. LANDRY: No, sir. I believe that he can remain silent, but later, just as in this case, the police approach him; under Patterson they give him his rights, which include right to counsel. At that point he can request and invoke, and then Jackson becomes applicable because he has made a request.

JUSTICE STEVENS: I understood you to concede that if he had made that request at the 72-hour hearing, the outcome of this case would be different.

MS. LANDRY: Yes, because Jackson says he can make the request --

JUSTICE STEVENS: The key time is did he make the request at the hearing, not at the time he was confronted by the officers.

MS. LANDRY: I was just saying he can make it either time. The fallacy of their argument is that he has to make it --

JUSTICE STEVENS: But it's sufficient protection for him if you presume, as is true in most States, that he did make the request, then you would lose. You would argue against such a presumption, I know, but if we did indulge that presumption, the case would be over.

MS. LANDRY: Clearly I would argue against any such presumption; that's the whole reason -- the key to Jackson was --

CHIEF JUSTICE ROBERTS: No, no, I didn't understand you to be doing that. I thought your position was once there's a request, there's a request, and that's enough.

MS. LANDRY: Yes, I do.

JUSTICE SOUTER: But you're also arguing, it seems to me, that a request -- well, you're -- I think you're arguing two different things. On the one hand, you're arguing that a request is necessary, and yet on the other hand, I understood you to concede in answer to a question from me that if he had stood in the courtroom in Tennessee, having been told that counsel was appointed for him and had said, yes, thank you, I accept that lawyer, that that would have been sufficient to satisfy Jackson, and that would have made the difference in this case.

Those are two different positions.

MS. LANDRY: Well, but I think the question boils down to whether or not the latter hypothetical, "yes, I want one," whether that is enough to constitute the request under Jackson.

JUSTICE SOUTER: Well, so far as I understand it, and you correct me if I'm wrong, but as I understand it, what the State Supreme Court said was not that he had to make a request, "I want a lawyer," but simply that he had to indicate in some way that he accepted the appointment of the lawyer which he had been told had been appointed for him; and that is a different situation from Jackson.

So if -- if you are saying, yes, if he had said "thank you, I accept the lawyer," that would have been enough, then that in effect is -- is maintaining the position that the State court took; but if you're saying something more, that he had to say then or later on, "I want a lawyer," then I think you're going beyond the case that we have in front of us. Am I wrong?

MS. LANDRY: No, you're not wrong.

JUSTICE SOUTER: Okay.

CHIEF JUSTICE ROBERTS: So I -- I suppose what the dialogue simply establishes is that like in any situation there's going to be factual issues about

what's a request or not. I mean, he could say, the court says I'm appointing Johnson, and he says, "Johnson? Is that the best you can do?" And the question is, is that accepting Johnson or not? He says is that the best you can do? Maybe it is, maybe it's not. I mean, but the point is whether or not you establish a rule that requires some request, and in the odd case there will be a debate about what's a request or not, but the issue is the general rule.

MS. LANDRY: Yes, Your Honor, that's correct.

JUSTICE SCALIA: Well, I don't -- I don't -- I agree with Justice Souter. I -- acceptance is something different from a request. As I read the -- the State court's opinion, it was setting up a sort of offer and acceptance scenario. The State was offering him counsel, said, "I appoint counsel," but it was ineffective until he says yes, "I accept counsel," whereupon, you know, he's lawyered up, but he isn't lawyered up until he says "I accept," and that's something quite different from -- from requesting counsel.

MS. LANDRY: Well --

JUSTICE SCALIA: Now, are you -- are you standing on the -- on the State court's analysis or not?

MS. LANDRY: Yes, Your Honor, and I think the State court analysis comes from -- well, it came from the Fifth Circuit case of Montoya which was very similar factually, and the Fifth Circuit relied on the Court's opinion in Patterson, and I believe cited a footnote from Patterson that refers to, you know, affirmative acceptance of the appointment of counsel.

JUSTICE KENNEDY: But this is still an artificial framework, because we know that in this case he has to have a lawyer under Gideon unless he waives it after being fully advised. You couldn't rely just on -- on the failure to make a request not to proceed with a trial lawyer. Of course he's going to have a lawyer unless after he very, very careful colloquy from the district judge or the trial judge, declines.

So it seems to me that this -- this whole framework here is quite artificial. Now, I do think there's a Miranda problem here, if we accept his -- the defendant's testimony that the police told him, "oh no, you don't have a lawyer." I know there's a factual issue on that. And I -- I think the counsel for the Petitioner may not be quite correct in Moran v Burbine. I didn't have time to talk with him about that. There there was no misleading; they just didn't tell him that he had a lawyer. Here, assuming his version of the

facts is correct, they told him, "oh, no, you don't have a lawyer," they affirmatively misled him, and it seems to me that's a Miranda problem, if it's true, and that Miranda is completely sufficient to protect his rights.

MS. LANDRY: But also, if I can address that factual issue, because I think it is important in the context here, because the question presented to this Court, the assignment of error at the Louisiana Supreme Court was only premised on the fact that counsel was appointed.

There was never any argument -- they bring up the factual issues about, well, the defendant testified at trial that he told them he had a lawyer, and the officers testified he didn't, to make it appear there's a factual issue there; but if you look back at the proceedings in this case, the motion to suppress, which is at the Joint Appendix page 6, never alleged any of those issues. It only alleged that his statements were not free and voluntary.

Then the suppression hearing comes. Now, most of the effort at the suppression hearing was toward the videotape which is not at issue here, but the argument by the defendant's counsel on this issue was merely what exactly it is here, that the mere appointment of counsel was sufficient to trigger

Jackson, and therefore everything after that should not have been admitted.

There was never any testimony at the suppression hearing by the defendant or anyone else that he had been -- that he told the officers, "I've been appointed counsel," "I think I've been appointed counsel," "I think I might have a lawyer."

JUSTICE GINSBURG: It's just that everything after -- as far as I understand, the only piece of evidence we're talking about is his condolence letter to the widow which amounted to a confession of guilt.

MS. LANDRY: Yes, Your Honor.

JUSTICE GINSBURG: There is no other. Because all of the Mirandized free 72-hour hearing, all that is not in contest; all of that came in.

MS. LANDRY: That's correct, it's just the --

JUSTICE BREYER: Can I ask -- I'm getting a different idea from what you're arguing. I want to try it on you and see what your response is. It's simply this, that there's something backwards about this case, and what's backwards is this, that when they're talking about a prophylactic rule in Jackson, what they're thinking of is the following: Everyone agrees that when a person really has a counsel, at that point, unlike the

Miranda point, the police cannot talk to him further, though he can initiate.

Now, everyone agreeing, what do we do with a case where a person doesn't have a lawyer, but he requests one? Now, in such a circumstance, we're going to treat it as if he had one. That's the prophylactic part. But here's a case where he really has one. So it doesn't fall outside Jackson. It falls within the basic assumption of Jackson, that the difference between having a lawyer and not having a lawyer is, if you have a lawyer, the police can initiate nothing. You can't talk to him.

Now, if that's right, your case -- I mean, I'm afraid, their side, for your point of view, is a fortiori for Jackson, not the borderline of Jackson. Now, explain to me why I've got it wrong.

MS. LANDRY: Because, in our case and in the case where there's just counsel appointed, again I go back to the issue, there's no request; there's no positive action by the defendant constituting a request in indicating that he's requesting a lawyer, which was the basis of the ruling in Jackson. It was -- and Patterson later said, Jackson turned on the fact that that defendant had asked for a lawyer.

JUSTICE ALITO: Well, isn't the prophylactic

aspect of Jackson not what Justice Breyer just said, but the rule that a person who has a lawyer is thereafter incapable of waiving the assistance of the lawyer if the person wishes to speak with the police and the police happen to initiate the conversation? You could have a defendant who's the most experienced criminal defense attorney in the world, who knows everything there is to know about trial tactics, who has a lawyer and decides it's in my best interest now to speak to the police. They happen to initiate it. But Jackson has a prophylactic rule that says even in that situation, it can't be done. That's the prophylactic aspect of Jackson, isn't it?

MS. LANDRY: Well, I would disagree --

JUSTICE BREYER: Accept that, for argument's sake. Accept that, and then same -- same question.

CHIEF JUSTICE ROBERTS: Counsel, why don't you answer Justice Alito's question?

MS. LANDRY: I was going to say that I disagree to the -- to the extent that I think part of the basis of Jackson was wanting to deter police from badgering a defendant into waiving a right that he had already asserted. That was the crux, it seemed to me, of Jackson, that this defendant had asserted his right to counsel at the arraignment. They then approached him

later. And the Court found that that was a form of police badgering to then approach him after he had made the request for counsel. And I believe that that's one of the differentiations in this case, where we talk about whether there's a request for counsel.

JUSTICE BREYER: Interesting. I think this is very interesting to me because I'm learning a lot. Suppose -- Let's assume Justice Alito is absolutely right and that when you have a counsel, that's what you've done and that's the reason why you don't talk to the police, or at least they can't initiate. Fine. Take that as the rationale, and now apply it to this case. Since he has a lawyer, whether he said yes, no, maybe, "I accept" or not, it would have nothing to do with it. The same rationale would apply or would it?

MS. LANDRY: No, I don't think it would.

JUSTICE BREYER: Because?

MS. LANDRY: Because, again, the appointment of counsel, as in this case, was an action taken by the State. There was no action by this defendant asserting or requesting counsel. This was a State action: We're appointing counsel for you. It's a pro forma thing that goes on, and then subsequently they go through the paperwork to determine whether he's qualified --

JUSTICE BREYER: I see.

MS. LANDRY: -- to receive indigent counsel.
JUSTICE STEVENS: Let me ask you: If the case had gone to trial without any intermediate proceeding -- they just show up for the day of trial -- and there's no record of whether he accepted the lawyer earlier, would the State judge start out with the presumption that Faretta would apply and he's going on his own, or would they start out with the assumption that he is going to have a lawyer?
MS. LANDRY: No, Your Honor, because, obviously, just as Patterson discussed, the waiver issue is much different when you're talking about a defendant proceeding through a legal proceeding representing himself than it is in the context here.
JUSTICE STEVENS: So you're drawing a distinction between this -- the kind of proceeding that's involved? He doesn't really need help on deciding whether to confess, but he does need help if they go to trial?
MS. LANDRY: Well, it's not that he doesn't need help, but he's advised of his right to counsel and can voluntarily choose, exercise his own free will, whether he wants counsel or not.
JUSTICE STEVENS: There's an irony in this case that Justice Kennedy put a finger on earlier: If

there were a civil case, whether you could go talk to a lawyer -- a client, rather, who was represented by a lawyer, the answer would be quite clear: You could not, as a matter of professional ethics.

MS. LANDRY: Right, and I think that that's true of the --

JUSTICE STEVEN: And the Constitution gives less protection than the -- than the professional ethics does.

JUSTICE SCALIA: Of course, the usual legal rule is that silence implies consent, right? Read the prosecution of Thomas More. That's the legal rule. So why shouldn't we assume consent just from the fact that he stood silent?

MS. LANDRY: Because, again, in Jackson, the assertion or the request for counsel is what implies to the police that this defendant does not want to deal with the police on his own, that he wishes to only communicate through counsel. And the Sixth Amendment right that attached and his right to counsel is just that: It's a right.

JUSTICE GINSBURG: Ms. Landry, you're trying to explain your position, let's assume, to an intelligent layperson, and the first example is, in many States at the equivalent of the 72-hour hearing, the

defendant is told: The court is prepared to appoint a lawyer for you. Would you like us to appoint a lawyer? And the defendant will say yes. So he will have made the request for a lawyer. And then there are States like Louisiana where this is a rapid-fire proceeding, and the defendant isn't asked any questions, he isn't asked to agree or disagree, and he doesn't have any lawyer there to assist him.

So you are essentially asking the Court to make a distinction between defendants in the same position, both uncounseled, both not knowledgeable in the law, but the one who has the good fortune to be in a State where the judge tells the defendant, "You have a right to have a lawyer. Would you like me to appoint one?" And then this procedure. Shouldn't defendant's rights turn on that distinction in the State law?

MS. LANDRY: Yes, because the police then approach him under Patterson, give him his rights, which includes the right to counsel. He has every right to then exercise his free will, if he didn't do so at the hearing, and invoke his right to counsel.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MS. LANDRY: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Verrilli, you have four minutes remaining.

REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR.
ON BEHALF OF THE PETITIONER

MR. VERRILLI: Thank you, Mr. Chief Justice.

A couple points of clarification, if I might: Counsel for Respondent has made the suggestion that the only facts that are before you are the facts that were in the suppression hearing, rather than the facts that were subsequently adduced at trial when Mr. Montejo testified that he told them he didn't want to go with them and he thought he had a lawyer and was told he didn't. That's not correct as a matter of Louisiana law. The citation there is State v. Green, 655 Southern 2d 272, where it's quite clear as a matter of Louisiana law that the supreme court evaluates the entire record. It's not clear as a matter of federal law. That was one of the holdings of Arizona against Fulminante. Now, we cited that case for harmless error purposes, not this purpose, but --

JUSTICE GINSBURG: But, Mr. Verrilli --

MR. VERRILLI: -- but quite clear --

JUSTICE GINSBURG: -- you just struck two chords: One, harmless error; the other, that this defendant testified at his trial. We have held that a defendant's statements, although he wasn't given his Jackson right, can come in by way of impeachment if he

testifies. So in this defendant's case, even if we accept everything you say, the -- that condolence letter could have been used for impeachment purposes.

MR. VERRILLI: Yes. We don't contest that, Justice Ginsburg. Of course, it wasn't used for impeachment purposes; it was used in fact as substantive evidence, and there was no limiting instruction to let the jury know that it could only be considered for that limited purpose. And I don't think that suffices even remotely to overcome the harmless error problem here.

The second point of clarification, it does seem to me clear, both from pages 14 and 15 of Respondent's brief and Respondent's argument here today and in particular the citation to the Montoya case in the Fifth Circuit, they are not advocating a request rule; they are advocating a request or assertion rule. In fact, the very passage in Montoya to which Respondent's counsel adverts -- it says there doesn't have to be a request so long as there is an assertion.

And that's the principle they're advocating. It just doesn't make any sense as a sensible dividing line between categories of defendants who are protected by Jackson and those who aren't for the reasons that we have discussed.

JUSTICE SCALIA: Mr. Verrilli, I don't

understand your response to Justice Ginsburg. I mean, it seems to me, if this thing was going to come in anyway, how could you possibly say it was harmful and not harmless error?

MR. VERRILLI: Well, it would come --

JUSTICE SCALIA: What difference does it make whether it's introduced in the case in chief or whether it's introduced to refute the defendant's assertion that he didn't do it?

MR. VERRILLI: Well, if it's introduced in the case in chief, it's substantive evidence on which the prosecution relied or can rely to establish the case. It's very much like Fulminante in that regard. There were two confessions, one admissible, the other inadmissible. And it was the self-reinforcing character of the two that made it not a harmless error for Fulminante. We really have the same thing.

But, if I could, I would like to get back, Justice Kennedy, to the Moran case. I do think, with all due respect, there was an element of deception in Moran that was sanctioned as consistent with Miranda. Two things happened there: The police informed Moran's lawyer that they -- incorrectly, falsely -- that they weren't going to interrogate him, but they also failed to inform Moran that he had a lawyer, and the lawyer was

standing out there. And that's fully as much of a deception as telling somebody he doesn't have a lawyer when he does, or withholding information that made a big difference for Sixth Amendment purposes, which is why the Court in Moran drew that line very sharply and said, for Fifth Amendment purposes, the Sixth Amendment right hasn't attached, there isn't an interference with the attorney-client relationship, but the very same thing would be forbidden under the Sixth Amendment.

And Patterson says exactly the same thing. In Patterson, again -- just to conclude, Justice Breyer -- drew the line exactly where Your Honor's hypothetical drew it. What Patterson says is that, if a defendant does not have a lawyer, we operate one way; when a defendant has a lawyer, a different set of rules kick in. And then, it says, indeed the different rules kick in even if a defendant requests a lawyer, making clear that the point of extending to request was to put defendants who have asked for lawyers but don't have them yet in the same position as defendants who have lawyers, not to give them a superior Sixth Amendment protection.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Verrilli.

The case is submitted.

(Whereupon, at 11:15 a.m., the case in the above-entitled matter was submitted.)