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1 P R O C E E D I N G S

2 (10:14 a.m.)

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

6 Mr. Verrilli.

7 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

13 JUSTICE SCALIA: Why? Why would one do
14 that?

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

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

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

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

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

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

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

25 MR. VERRILLI: That's absolutely the

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

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

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

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

1 need.

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

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

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

17 JUSTICE KENNEDY: Really? The lawyer --

18 MR. VERRILLI: If the defendant --

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

21 MR. VERRILLI: Well, if the -- if the
22 defendant initiates, then the defendant is -- then the
23 bar of Jackson doesn't apply. That's the rule, but the
24 --

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

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

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

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

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

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

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

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

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

1 hearing where the defendant is asked.

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

9 MR. VERRILLI: Well --

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

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

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

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

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

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

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

25 JUSTICE GINSBURG: Mr. Verrilli, do I

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

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

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

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

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

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

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

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

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

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

4 You would say that's a violation, right?

5 And then he says yes and continues to talk.

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

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

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

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

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

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

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

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

17 MR. VERRILLI: It's at the outset.

18 CHIEF JUSTICE ROBERTS: At the outset.

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

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

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

1 opposite thing happened here. For one thing, as a
2 factual matter he was told by the police on September
3 10th that he didn't have a lawyer, despite the fact that
4 one had been appointed for him in the morning. That was
5 his testimony.

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

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

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

25 JUSTICE KENNEDY: Miranda.

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

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

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

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

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

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

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

1 The State court credited that and we don't take issue
2 with it. The problem is that this is a police precinct
3 that has, I don't know, maybe 10, 12 officers in it.
4 They have a capital murder suspect in there. He was
5 taken by the police to the hearing. The police were
6 present at the hearing that morning. He was taken back
7 --

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

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

1 him: Did you have a lawyer appointed for you?

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

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

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

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

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

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

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

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

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

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

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

1 Respondent --

2 JUSTICE SCALIA: That's a different
3 question.

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

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

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

25 Does Jackson support the notion that he

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

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

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

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

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

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

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

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Right, and whether
24 or --

25 MR. VERRILLI: -- criminal process.

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 Ms. Landry.

24 ORAL ARGUMENT OF KATHRYN W. LANDRY

25 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

23 MS. LANDRY: Yes.

24 JUSTICE GINSBURG: Is that how it operates?

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

1 operates.

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

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

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

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

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

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

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

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

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

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

10 MS. LANDRY: I would respectfully disagree,
11 Your Honor, because in Patterson the Court said that the
12 Miranda rights were sufficient to apprise a defendant of
13 his post-attachment Sixth Amendment rights. Did they
14 tell him you have a lawyer appointed? No. In fact,
15 Detective Hall testified that he was not aware of the
16 72-hour hearing or the --

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

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

2 MS. LANDRY: I can't answer that question.

3 I can only answer the question that all of the officers
4 testified that they were not aware that counsel had been
5 appointed for the defendant that morning.

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

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

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

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

1 MS. LANDRY: Yes, sir.

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

6 MS. LANDRY: That's correct.

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

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

18 JUSTICE BREYER: Okay. Now, if the --

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

23 JUSTICE BREYER: I'm not talking about that.

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

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

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

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

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

15 JUSTICE BREYER: Correct.

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

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

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

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

3 MS. LANDRY: Well --

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

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

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

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

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

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

25 JUSTICE STEVENS: But it happens in 99

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

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

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

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

23 MS. LANDRY: Yes, I think so.

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

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

8 JUSTICE GINSBURG: Louisiana.

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

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

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

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

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

1 MS. LANDRY: No, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE SOUTER: Then are you equating

1 positive affirmation with request for a lawyer?

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

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

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

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

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

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

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

6 MS. LANDRY: No.

7 JUSTICE KENNEDY: That he requests the
8 appointment.

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

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

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

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

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

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

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

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

14 MS. LANDRY: Yes, I do.

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

1 Those are two different positions.

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

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

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

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

22 JUSTICE SOUTER: Okay.

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

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

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

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

23 MS. LANDRY: Well --

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

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

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

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

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

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

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

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

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

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

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

12 MS. LANDRY: Yes, Your Honor.

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

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

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

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

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

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

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

25 JUSTICE ALITO: Well, isn't the prophylactic

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

14 MS. LANDRY: Well, I would disagree --

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

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

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

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

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

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

17 JUSTICE BREYER: Because?

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

25 JUSTICE BREYER: I see.

1 MS. LANDRY: -- to receive indigent counsel.

2 JUSTICE STEVENS: Let me ask you: If the
3 case had gone to trial without any intermediate
4 proceeding -- they just show up for the day of trial --
5 and there's no record of whether he accepted the lawyer
6 earlier, would the State judge start out with the
7 presumption that Faretta would apply and he's going on
8 his own, or would they start out with the assumption
9 that he is going to have a lawyer?

10 MS. LANDRY: No, Your Honor, because,
11 obviously, just as Patterson discussed, the waiver issue
12 is much different when you're talking about a defendant
13 proceeding through a legal proceeding representing
14 himself than it is in the context here.

15 JUSTICE STEVENS: So you're drawing a
16 distinction between this -- the kind of proceeding
17 that's involved? He doesn't really need help on
18 deciding whether to confess, but he does need help if
19 they go to trial?

20 MS. LANDRY: Well, it's not that he doesn't
21 need help, but he's advised of his right to counsel and
22 can voluntarily choose, exercise his own free will,
23 whether he wants counsel or not.

24 JUSTICE STEVENS: There's an irony in this
25 case that Justice Kennedy put a finger on earlier: If

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

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

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

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

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

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 MS. LANDRY: Thank you.

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

1 REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR.

2 ON BEHALF OF THE PETITIONER

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

4 A couple points of clarification, if I
5 might: Counsel for Respondent has made the suggestion
6 that the only facts that are before you are the facts
7 that were in the suppression hearing, rather than the
8 facts that were subsequently adduced at trial when Mr.
9 Montejo testified that he told them he didn't want to go
10 with them and he thought he had a lawyer and was told he
11 didn't. That's not correct as a matter of Louisiana
12 law. The citation there is State v. Green, 655 Southern
13 2d 272, where it's quite clear as a matter of Louisiana
14 law that the supreme court evaluates the entire record.
15 It's not clear as a matter of federal law. That was one
16 of the holdings of Arizona against Fulminante. Now, we
17 cited that case for harmless error purposes, not this
18 purpose, but --

19 JUSTICE GINSBURG: But, Mr. Verrilli --

20 MR. VERRILLI: -- but quite clear --

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

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

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

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

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

25 JUSTICE SCALIA: Mr. Verrilli, I don't

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

5 MR. VERRILLI: Well, it would come --

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

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

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

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

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

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, Mr.
25 Verrilli.

1 The case is submitted.

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

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