No. 07-1529

In the Supreme Court of the United States

JESSE JAY MONTEJO, PETITIONER

v.

STATE OF LOUISIANA

(CAPITAL CASE)

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE IN SUPPORT OF OVERRULING
MICHIGAN* v. *JACKSON

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By order dated March 27, 2009, the Court directed the parties and permitted amici to file briefs addressing the following question: "Should Michigan v. Jackson, 475 U.S. 625 (1986), be overruled?" In the view of the United States, *Michigan* v. *Jackson* was incorrectly decided and has been undermined by recent precedent. The decision therefore should be overruled.

INTEREST OF THE UNITED STATES

Michigan v. *Jackson* held that a defendant's waiver of his right to counsel under the Sixth Amendment is presumed invalid if the police initiate interrogation after he has asserted the right at an arraignment or similar proceeding. Because the Sixth Amendment applies to

the federal government, the Court's resolution of that question implicates the conduct of federal criminal investigations and trials.

ARGUMENT

In *Michigan* v. *Jackson*, 475 U.S. 625 (1986), this Court established a prophylactic rule that automatically invalidates a criminal defendant's waiver of the right to counsel in police-initiated questioning that occurs after his Sixth Amendment right to counsel has attached and he has asserted that right at an arraignment or similar proceeding. *Id.* at 636. The question here is whether this Court should reconsider that holding. The answer is yes.

Under the doctrine of *stare decisis*, the Court generally does not overrule one of its prior decisions absent a special justification. *E.g.*, *Pearson* v. *Callahan*, 129 S. Ct. 808, 816 (2009). But "*[s]tare decisis* is not an inexorable command," and this Court has "never felt constrained" to follow a decision that has proven to be "badly reasoned," *Payne* v. *Tennessee*, 501 U.S. 808, 827-828 (1991) (internal quotation marks omitted), or that has had its underpinnings eroded by later precedent, *Agostini* v. *Felton*, 521 U.S. 203, 235-236 (1997). Because the Court's "interpretation [of the Constitution] can be altered only by constitutional amendment or by overruling [its] prior decisions," *id.* at 235, the Court's "considered practice [is] not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases," *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 543 (1962).

The Court should overrule *Michigan* v. *Jackson*. Although the Sixth Amendment affords criminal defendants a right to counsel at certain critical pre-trial stages, the Amendment should not prevent a criminal defendant from waiving that right and answering ques-

tions from police following assertion of that right at arraignment. *Jackson* serves no real purpose and fits poorly with this Court's recent precedent; although the decision only occasionally prevents federal prosecutors from obtaining appropriate convictions, even that cost outweighs the decision's meager benefits.

A. The Purpose Of The Sixth Amendment Right To Counsel Is To Protect The Adversary Process In Formal Criminal Proceedings

The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. As this Court has repeatedly noted, "the core purpose of the [Sixth Amendment] counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Cronic*, 466 U.S. 648, 654 (1984) (quoting *United States* v. *Ash*, 413 U.S. 300, 309 (1973)).

To protect the adversary process leading to criminal punishment, the Court has extended the right to the assistance of counsel to "certain critical pretrial proceedings," in which "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984) (internal quotation marks omitted; brackets in original). In a line of cases beginning with *Massiah* v. *United States*, 377 U.S. 201 (1964), the Court held that the right to counsel is violated when, after attachment of the right, police deliberately elicit statements (including during custodial interrogation). See *Fellers* v. *United States*, 540 U.S. 519, 523-524 (2004); *Michigan* v. *Harvey*, 494 U.S. 344, 348-349 (1990);

Kuhlmann v. *Wilson*, 477 U.S. 436, 457 (1986); *Maine* v. *Moulton*, 474 U.S. 159, 172-173 (1985); *United States* v. *Henry*, 447 U.S. 264, 270 (1980); *Brewer* v. *Williams*, 430 U.S. 387, 400-401 (1977).

As a result, if law enforcement agents deliberately elicit statements from a criminal defendant whose Sixth Amendment right to counsel has attached and who has not voluntarily, knowingly, and intelligently waived that right, then the Sixth Amendment renders those statements inadmissible in the prosecution's case in chief at trial. *E.g.*, *Harvey*, 494 U.S. at 348-349. That rule rests on the view that permitting the prosecution to use the defendant's statements as substantive evidence of guilt would undermine the ability of counsel to render assistance that contributes to a fair trial. See *id.* at 348.

In *Michigan* v. *Jackson*, 475 U.S. 625 (1986), this Court went a significant step further, holding that, even if the defendant waives his right to counsel and chooses to speak with the police, his waiver is presumed invalid if the police initiated interrogation after the defendant asserted his right to counsel at an arraignment or similar proceeding. *Id.* at 636; see *Harvey*, 494 U.S. at 345. The Court came to that conclusion by extending the prophylactic rule developed to protect the Fifth Amendment privilege against compelled self-incrimination in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), to the Sixth Amendment right to counsel. In *Edwards*, the Court held that a suspect in custody who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-485. That prophylactic rule was "designed to prevent

police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Harvey*, 494 U.S. at 350.

The *Jackson* Court decided that "the same rule applies to a defendant who has been formally charged with a crime and who has requested appointment of counsel at his arraignment," because "the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before." 475 U.S. at 626, 631. Giving "a broad, rather than a narrow, interpretation to a defendant's request for counsel," the Court "presume[d]" that a defendant who requests a lawyer at his arraignment "requests the lawyer's services at every critical stage of the prosecution," including police interrogation. *Id.* at 633. As a result, even if a defendant responds to police questioning by choosing to speak with police, expressly waives his Sixth Amendment right to counsel, and provides a voluntary confession to the charged crime, *Jackson* renders that confession inadmissible as substantive evidence at his trial. *Id.* at 635; *Harvey*, 494 U.S. at 345.

B. *Michigan* v. *Jackson*'s Rule Is Unnecessary Given The Purposes Of The Sixth Amendment And The Existence Of Other Strong Protections Against Coercion

The *Jackson* rule makes little sense in light of the purposes of the Sixth Amendment right to counsel and the myriad protections otherwise afforded to criminal defendants in custodial interrogation.

The text of the Sixth Amendment provides a criminal defendant with the right to counsel, but leaves to the courts the appropriate means of enforcing that guarantee. See U.S. Const. Amend. VI. To enforce the right to

counsel, this Court long has held that, after the Sixth Amendment right to counsel has attached, law enforcement agents may not deliberately elicit statements from a criminal defendant in the absence of counsel or a valid waiver of the right to counsel and then use those statements as substantive evidence of guilt at the defendant's trial. *E.g.*, *Harvey*, 494 U.S. at 348-349. The Court also has held that, once the Sixth Amendment right to counsel has attached, law enforcement officers "may not interfere with the efforts of a defendant's attorney to act as a medium between [the defendant] and the State during the interrogation." *Moran* v. *Burbine*, 475 U.S. 412, 428-429 (1986) (internal quotation marks omitted). Those rules are consistent with the purpose of the Sixth Amendment guarantee, because if the government could gather evidence from the defendant before trial through circumvention of the defendant's right to counsel, the availability of counsel at the trial itself would be an illusory protection. *United States* v. *Wade*, 388 U.S. 218, 224 (1967).

But the Sixth Amendment does not require an additional, prophylactic rule that overrides a defendant's free choice to speak with the police, in police-initiated interrogation, simply because the defendant previously has requested counsel at an arraignment. The *Jackson* rule was based on the belief that the concern about coercion in the Fifth Amendment context is also present in the Sixth Amendment context. *Jackson*, 475 U.S. at 631-632. But that assumption is unfounded. The Sixth Amendment does not protect a defendant against official compulsion; it ensures that he will have the assistance of counsel to guide him through the intricacies of the trial process and ensure that his trial is fair. *E.g.*, *Cronic*, 466 U.S. at 654. That purpose provides no warrant for auto-

matically invalidating a confession provided by a defendant who has been approached by the police and apprized of his right to counsel, and who nonetheless voluntarily decides to waive that right and speak with police officers.

The concern that a represented defendant will be coerced during custodial interrogation is addressed through this Court's Fifth Amendment rules. In particular, in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court established a number of prophylactic rights to protect a defendant's Fifth Amendment privilege against self-incrimination during custodial interrogation, including the right to have counsel present to counteract the "inherently compelling pressures" of custodial interrogation. *Id.* at 467. In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), the Court established a "second layer of prophylaxis," *McNeil* v. *Wisconsin*, 501 U.S. 171, 177 (1991), holding that when an accused "express[es] his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police," *Edwards*, 451 U.S. at 484-485.[1]

The *Jackson* Court's extension of *Edwards* to the Sixth Amendment context "cut the *Edwards* rule loose

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[1] In *Maryland* v. *Shatzer*, No. 08-680, the Court has granted certiorari to consider whether *Edwards* protection terminates when there has been a break in custody or a significant lapse in time before the reinitiation of custodial interrogation. *Edwards* would continue to serve as an important supplemental safeguard even if the Court were to impose limits on its duration. Indeed, the *Edwards* rule would serve this function even if the Court were to modify it so as to permit police to seek to reinitiate interrogation after the occurrence of attenuating circumstances that prevent police badgering.

from its analytical moorings," *Jackson*, 475 U.S. at 640 (Rehnquist, J., dissenting). The *Edwards* rule was established "to prevent the police from effectively overriding a defendant's assertion of his *Miranda* rights by badgering him into waiving those rights." *Id.* at 638 (Rehnquist, J., dissenting) (internal quotation marks omitted); see *Harvey*, 494 U.S. at 350. But the Sixth Amendment right to counsel is about protecting the adversary process at trial, not about police "badgering," so application of the *Edwards* rule to the Sixth Amendment never made real sense.

Concerns about police coercion are of course important, but they are well and amply addressed through the *Miranda* and *Edwards* rules. Of particular significance here, under *Edwards*, if a defendant receives *Miranda* warnings and invokes his right to counsel, then police questioning must cease and the police may not re-approach him while he remains in custody to seek a *Miranda* waiver. 451 U.S. at 484-485. That rule applies even if the police wish to re-approach the suspect to question him about a factually unrelated offense. See *Arizona* v. *Roberson*, 486 U.S. 675, 678, 680-681 (1988). And the *Edwards* rule continues to apply even if the suspect has had the opportunity to consult with counsel. *Minnick* v. *Mississippi*, 498 U.S. 146, 153-156 (1990). Those rules defuse the risk that a represented defendant would provide an invalid waiver of his rights because of police overreaching.[2]

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[2] As the Court has observed, the Fifth Amendment *Miranda*/*Edwards* protections are both broader and narrower than the Sixth Amendment *Massiah* rule. They are broader because they apply to police questioning about *any* offense, not just the charged offense, and they are narrower because they apply only in the context of custodial interrogation. *McNeil*, 501 U.S. at 178; see *Fellers*, 540 U.S. at 523-524.

Further, the Due Process Clauses of the Fifth and Fourteenth Amendments serve as an additional check on police overreaching by prohibiting actual coercion. See, *e.g.*, *Mincey* v. *Arizona*, 437 U.S. 385, 398-399 (1978). Those myriad protections for criminal defendants during custodial interrogations make an additional prophylactic Sixth Amendment rule unnecessary. See *Texas* v. *Cobb*, 532 U.S. 162, 171 n.2 (2001).

The *Jackson* rule also runs counter to the general principle that criminal defendants may waive their constitutional rights. The effect of the *Jackson* rule is to invalidate a concededly knowing and intelligent waiver of the right to counsel. This Court long has recognized that the Sixth Amendment right to counsel, like any other basic right of a criminal defendant, may be waived. See *Faretta* v. *California*, 422 U.S. 806, 833-835 (1975); see also *Peretz* v. *United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are * * * subject to waiver."). To the extent that concerns about police coercion justify invalidating a defendant's waiver of Fifth Amendment rights after he has requested counsel, no similar concerns in the Sixth Amendment context justify a special anti-waiver rule. See *Cobb*, 532 U.S. at 174-175 (Kennedy, J., concurring) ("[I]t is difficult to understand the utility of a Sixth Amendment rule that operates to invalidate a confession given by the free choice of suspects who have received proper advice of their *Miranda* rights but waived them nonetheless.").

Although the Sixth Amendment applies to police questioning beyond custodial interrogation, the Court has never held that such non-custodial questioning raises concerns about coercion. Those concerns arise from the fact of custody itself, see, *e.g.*, *Davis* v. *United States*, 512 U.S. 452, 458 (1994), and thus provide no justification for extending the *Edwards* rule to the Sixth Amendment context.

Jackson rests as well on an erroneous factual premise. The Court assumed that a defendant's assertion of his Sixth Amendment right to counsel in the formal context of a courtroom necessarily should carry over to police-initiated interrogation, thus "giv[ing] a broad, rather than a narrow, interpretation to a defendant's request for counsel." 475 U.S. at 633. But it is one thing to assume that a defendant who desires counsel in court for one hearing also desires it for other formal procedural encounters with prosecutors, and it is quite another thing to presume that the defendant who desires counsel in the formal criminal setting also feels the need for counsel in dealing with the police. A criminal defendant "might want the assistance of an expert in the law to guide him through hearings and trial, and the attendant complex legal matters that might arise, but nonetheless might choose to give on his own a forthright account of the events that occurred" to police. *Cobb*, 532 U.S. at 177 (Kennedy, J., concurring); see *McNeil*, 501 U.S. at 178 (making the same point).

Unlike the situation in *Edwards*, where the defendant has received warnings from the police and has made a clear and unambiguous assertion of his rights in custodial interrogation, *Davis* v. *United States*, 512 U.S. 452, 459 (1994), a defendant protected by *Jackson* has made no similar decision. *Cobb*, 532 U.S. at 176 (Kennedy, J., concurring). *Jackson* is triggered solely by a request for counsel at arraignment. The *Jackson* rule therefore precludes the defendant from "making an initial election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone" in any case in which the police initiate questioning. *Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988) (emphasis deleted). Because the defendant, by his assertion of the right to coun-

sel at arraignment, has not in fact elected to deal with the police only through counsel, the defendant should be permitted afterward to waive his rights and respond to police-initiated questioning.

C. The *Jackson* Rule Imposes Limited, But Significant Costs

In federal prosecutions, the effect of the *Jackson* rule must be assessed in light of other constraints on prosecutors approaching represented defendants after the Sixth Amendment right to counsel has attached. In the main, federal authorities do not approach represented defendants, for reasons independent of `*Jackson*. State rules of professional conduct generally prohibit attorneys from knowingly communicating with a represented person about the matter on which he is represented without counsel's presence, unless counsel consents to the communication or the communication is authorized by law or court order, see, *e.g.*, Model Rule of Prof'l Conduct 4.2, and those rules are made applicable to federal prosecutors, see 28 U.S.C. 530B(a) (a federal government attorney is subject to state rules of professional conduct to the same extent as any other similarly situated attorney). Although some jurisdictions deem communications permitted by the Constitution to be authorized by law within the meaning of the professional conduct rule, see, *e.g.*, Utah Rule Prof'l Conduct 4.2(a) and (b), in other jurisdictions the rule would require prosecutors to refrain from initiating communication with represented defendants notwithstanding the *Jackson* rule. And although federal law enforcement agents generally are not constrained by the ethical rules that apply to prosecutors, law enforcement interests are not well-served when law enforcement agents have an incentive to communicate with repre-

sented defendants without direction from prosecutors. Accordingly, even if this Court were to overrule *Jackson*, that decision likely would not significantly alter the manner in which federal law enforcement agents investigate indicted defendants. Nor has the *Jackson* rule resulted in the suppression of significant numbers of statements in federal prosecutions in the past.

Nevertheless, *Jackson* can potentially and inappropriately result in the loss of statements in federal prosecutions. This occurs, for example, federal agents misjudge whether a defendant has initiated dialogue with the officers and they commence interrogation in the belief that the interchange is permissible under *Jackson*. The rule in *Jackson* may also be inadvertently implicated when federal agents approach represented defendants to investigate other crimes and obtain statements on the charged offense. The conduct of state law enforcement agents could also result in the loss of evidence in federal prosecutions if state officials obtain evidence in violation of *Jackson*, federal agents seek to use that evidence in a federal prosecution, and the state and federal offenses are treated as the "same offense" for Sixth Amendment purposes. See, *e.g.*, *United States* v. *Burgest*, 519 F.3d 1307, 1310-1311 (11th Cir.) (noting circuit split on whether state and federal offenses with the same elements are the "same offense"), cert. denied, 129 S. Ct. 274 (2008). Those consequences, even if infrequent in federal cases, provide cause for concern about constitutionalizing through an exclusionary remedy a violation of professional norms.

This Court has recognized that exclusion of a defendant's own voluntary statement from his trial imposes real costs on the truth-seeking process by depriving the trier of fact of "what concededly is relevant evidence."

Colorado v. *Connelly*, 479 U.S. 157, 166 (1986). The loss of "highly probative evidence of a voluntary confession" is a "high cost to legitimate law enforcement activity." *Oregon* v. *Elstad*, 470 U.S. 298, 312 (1985). In light of its costs to the truth-seeking function, the *Jackson* rule requires a substantial justification. No such justification is present here. See pp. 5-11, *supra*.

D. *Jackson* Has Been Undermined By Subsequent Decisions And Cannot Readily Be Cabined By An Affirmative Request Rule

The *Jackson* rule is not only unfounded, but warrant reconsideration because it has been substantially undermined by several subsequent decisions of this Court and cannot otherwise be readily confined.

1. In *Patterson* v. *Illinois*, 487 U.S. 285, 298 (1988), this Court held that a defendant whose Sixth Amendment right to counsel has attached may waive that right and agree to talk with the police. In so holding, the Court made three key points that fundamentally undermine its rationales in *Jackson*. First, the Court recognized the difference between protecting an accused's prior choice to deal with the police only through counsel and "barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone." *Id.* at 291. In the latter case, the Court explained, the suspect should be permitted to knowingly and intelligently waive the right to counsel. *Ibid.* Yet the *Jackson* rule precludes a defendant who has asserted the right to counsel in a formal courtroom context from making the initial choice whether to talk with police if the police, rather than the defendant, happen to initiate questioning.

Second, the *Patterson* Court rejected the view that it should be more difficult to waive the Sixth Amendment right to counsel during interrogation than the Fifth Amendment protections set forth in *Miranda*. The Court explained that "[t]he State's decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning, or expand the limited purpose that an attorney serves when the accused is questioned by authorities." 487 U.S. at 298-299. The Court therefore rejected the *Jackson* Court's assumption that "the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before," 475 U.S. at 626, 631.

Third, the *Patterson* Court noted that there is no reason to assume automatically that a defendant who elects counsel at his arraignment is unwilling to speak with the police on his own: "[A]n attorney's role at postindictment questioning is rather limited, and substantially different from the attorney's role in later phrases of criminal proceedings," because "[a]t trial, an accused needs an attorney to perform several varied functions—some of which are entirely beyond even the most intelligent layman," while "during postindictment questioning, a lawyer's role is rather unidimensional: largely limited to advising his client as to what questions to answer and which ones to decline to answer." 487 U.S. at 294 n.6. That observation directly contradicts the *Jackson* Court's "presum[ption]" that a defendant who requests counsel in courtroom proceedings necessarily has invoked his right to counsel in the very different context of police interrogation. 475 U.S. at 633.

The Court again distinguished between a defendant's choice to have counsel at formal proceedings and his choice to have counsel during police questioning in *McNeil* v. *Wisconsin*, 501 U.S. 171 (1991), when it held that a defendant's invocation of his Sixth Amendment right to counsel in judicial proceedings does not constitute invocation of the *Miranda* right to counsel. *Id.* at 178-179. The Court recognized the very different purposes of the Fifth and Sixth Amendments, and it noted that it is "not necessarily true" that a defendant who has requested counsel's assistance in formal proceedings has chosen to deal with the police only through counsel. *Id.* at 178. For that reason, the Court explained, the *Edwards* rule applies only when the defendant has made "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police.*" *Ibid.* That observation runs contrary to the Court's reasoning in *Jackson* that a defendant who has elected counsel at his arraignment should be presumed to have invoked his right to counsel in police questioning. 475 U.S. at 636.

The Court's decision in *Davis* v. *United States*, 512 U.S. 452 (1994), similarly undermines *Jackson*'s reasoning. In *Davis*, the Court held that a suspect must "unambiguously request counsel" during custodial interrogation for the prophylactic rule of *Edwards* to apply; "[i]f the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect." *Id.* at 459. Yet *Jackson* imposes the *Edwards* rule without an unambiguous invocation of the right to counsel for custodial interrogation, 475 U.S. at 636, in circumstances in which the defendant may be will-

ing to speak to the police without counsel. See p. 10, *supra*.

The reach of the *Jackson* rule also has been limited by this Court's decision in *Texas* v. *Cobb*, 532 U.S. 162 (2001), which reiterated that the Sixth Amendment right to counsel is offense-specific. *Id.* at 165. As a result, the prophylactic *Jackson* rule applies only to questioning about the crime for which the defendant has been indicted, and law enforcement officers may initiate questioning of a represented defendant about any other crimes. See *id.* at 167-168; see also *McNeil*, 501 U.S. at 175 ("[J]ust as the right [to counsel] is offense specific, so also its *Michigan* v. *Jackson* effect of invalidating subsequent waivers in police-initiated interviews is offense specific."). *Cobb* confirms that the police may question an indicted defendant about crimes other than the charged offense and that, when questioned about other crimes, a defendant may well wish to provide a full and truthful account to police. 532 U.S. at 171-172. At the same time, *Cobb* reaffirms that the Fifth Amendment plays a substantial role "in protecting a defendant's right to consult with counsel before talking to police." *Id.* at 171 n.2. In light of *Cobb*, there is both little basis and little need for the prophylactic rule announced in *Jackson*.

2. The difficulty in identifying a coherent limiting principle in cases like this one, in which the defendant did not even request counsel, provides a final reason to revisit that decision. Several of this Court's precedents may be read to suggest that *Jackson* applies only when a defendant affirmatively requests counsel. See, *e.g.*, *McNeil*, 501 U.S. at 175; *Harvey*, 494 U.S. at 350; *Patterson*, 487 U.S. at 291; *Jackson*, 475 U.S. at 633 & n.7, 634. Yet a rule that distinguishes between those defendants who speak up in connection with the routine ap-

pointment of counsel at an arraignment and those who do not is difficult to square with the rationale of *Jackson* and the practical realities of arraignment proceedings. A defendant who silently accepts counsel at arraignment neither more nor less signals a desire not to speak with the police than one who requests counsel at arraignment; and a defendant who is automatically appointed counsel would rarely have occasion to speak up in order to invoke *Jackson*. It therefore would be appropriate to overrule *Jackson* rather than take the intermediate step of lessening its impact by limiting it to cases in which the defendant affirmatively has requested counsel.

CONCLUSION

Michigan v. *Jackson*, 475 U.S. 625 (1986), should be overruled.

Respectfully submitted.

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APRIL 2009