

MONTEJO v. *LOUISIANA*: AFFIRMATIVE REQUESTS AND THE SIXTH AMENDMENT RIGHT TO COUNSEL

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I. INTRODUCTION

On March 9, 2005, a jury in Louisiana state court found Jesse Jay Montejo guilty of first-degree murder.¹ The jury sentenced Montejo to death the next day after three hours of deliberation.² Montejo alleged twenty assignments of error in his appeal to the Louisiana Supreme Court,³ and the court addressed all but two of his assignments of error in an unpublished appendix to its opinion.⁴

The two other assignments of error, which the Louisiana Supreme Court analyzed fully in the opinion rather than summarily in the unpublished appendix, dealt with purported violations of Montejo's Fifth⁵ and Sixth Amendment rights.⁶ On January 16, 2008, the court held that neither right had been violated,⁷ and then denied Montejo's petition for rehearing on March 7, 2008.⁸ Montejo filed a petition for writ of certiorari on June 5, 2008.⁹

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1. *Louisiana v. Montejo*, 974 So. 2d 1238, 1238–39 (La. 2008).

2. *Id.* at 1241.

3. *Id.* at 1250.

4. *Id.*

5. *Id.* at 1251.

6. *Id.* at 1258. The court also reviewed Montejo's death penalty sentence, as required by Louisiana law, for any "passion, prejudice or any other arbitrary factors." *Id.* at 1263.

7. *Id.* at 1258, 1262.

8. *Id.*

9. *Louisiana v. Montejo*, 974 So. 2d 1238 (La. 2008), *petition for cert. filed*, 77 U.S.L.W. 3358 (U.S. June 5, 2008) (No. 07-1529).

The Supreme Court granted Montejo's petition on October 1, 2008, and scheduled oral arguments for January 13, 2009,¹⁰ to address Montejo's Sixth Amendment right to counsel, but not his purported Fifth Amendment violations.¹¹ The question presented is: "When an indigent defendant's right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to 'accept' the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present?"¹²

II. FACTS

On September 6, 2002, police brought Montejo in for questioning.¹³ Montejo was a close friend and associate of Jerry Moore—the man the police believed had planned the murder of Lewis Ferrari the day before.¹⁴ The police interviewed Montejo from 4:30 p.m. until 11:00 p.m. on September 6, and then from 3:00 a.m. to 4:00 a.m. on September 7.¹⁵ The videotapes from these two interviews proved to be pivotal to the State's case: they showed that "Montejo slowly made increasingly incriminating statements until he finally admitted that he shot the victim who had unexpectedly returned home and interrupted Montejo's burglary."¹⁶ Altogether, by the completion of second interview, Montejo had told police six different versions of how the crime occurred—all of which were drastically different.¹⁷

On the morning of September 10—four days after Ferrari's murder and three days after Montejo's initial interrogation—Montejo appeared in court for a mandatory initial hearing.¹⁸ At this hearing, the judge appointed the Office of the Indigent Defenders to represent Montejo.¹⁹ The record from this hearing does not indicate that

10. *Montejo v. Louisiana*, No. 07-1529 (U.S. June 5, 2008), available at <http://origin.www.supremecourtus.gov/docket/07-1529.htm>.

11. *Id.*

12. *Montejo v. Louisiana*, No. 07-1529 (U.S. June 5, 2008), available at <http://origin.www.supremecourtus.gov/qp/07-01529qp.pdf>.

13. *Louisiana v. Montejo*, 974 So. 2d 1238, 1244 (La. 2008); see also Brief for Petitioner at 1, *Montejo v. Louisiana*, No. 07-1529 (U.S. Nov. 17, 2008).

14. *Montejo*, 974 So. 2d at 1241.

15. *Id.* at 1244.

16. *Id.*

17. *Id.* at 1248.

18. *Montejo*, 974 So. 2d at 1249; see also Brief for Petitioner, *supra* note 13, at 6.

19. *Montejo*, 974 So. 2d at 1249; see also Brief for Petitioner, *supra* note 13, at 7.

Montejo “accepted” this appointment of counsel—the facts suggest that Montejo did not say anything during this hearing.²⁰

After the hearing, Montejo was brought back to the Sheriff’s Office and asked by Detective Hall what he had done with the murder weapon.²¹ Detective Hall was not aware that the Office of the Indigent Defenders had been appointed to represent Montejo earlier that morning.²² After being re-*Mirandized*, Montejo agreed to accompany detectives in their search for the murder weapon and other evidence.²³ The police, however, never found the murder weapon despite Montejo’s assistance.²⁴

While sitting in the back of the police car on the trip to look for the weapon, Montejo wrote an apology letter to the victim’s widow in which he asked for forgiveness and explained that he intended only to commit a burglary, that he had a gun merely to frighten victims, but that he shot her husband only when he was unable either to frighten him or to escape without violence.²⁵

III. LEGAL BACKGROUND

The disposition of *Montejo v. Louisiana* hinges on the Supreme Court’s decision in *Michigan v. Jackson*.²⁶ In *Jackson*, Bladel was charged with murdering three railroad employees.²⁷ At his arraignment, Bladel requested that counsel be appointed for him because he was indigent.²⁸ A notice of appointment was mailed to a local law firm, but the firm did not receive it until four days after Bladel’s arraignment.²⁹ The day before the law firm received the letter, two detectives approached Bladel, advised him of his *Miranda* rights, and obtained a confession.³⁰ Bladel inquired about his representation following the arraignment, but was not told that a law firm had been appointed to represent him.³¹

20. *Montejo*, 974 So. 2d at 1260.

21. *Id.* at 1249; *see also* Brief for Petitioner, *supra* note 13, at 7.

22. *Montejo*, 974 So. 2d at 1249.

23. *Id.*

24. *Id.* at 1249 n.44.

25. *Id.* at 1250.

26. *Michigan v. Jackson*, 475 U.S. 625 (1986).

27. *Id.* at 626–27.

28. *Id.* at 627.

29. *Id.*

30. *Id.*

31. *Id.*

The Court in *Jackson* reiterated that “[t]he arraignment signals the ‘initiation of adversary judicial proceedings’ and thus the attachment of the Sixth Amendment.”³² The Court held that the detectives’ conduct, in approaching and then interrogating the defendant after his Sixth Amendment right to counsel had attached, was unconstitutional.³³ Although the Court did not mention that a defendant must accept the right to counsel at the arraignment hearing in order to obtain Sixth Amendment protection,³⁴ the Court noted in a footnote that “[t]he right to counsel does not depend upon a request by the defendant.”³⁵

In other cases the Court has briefly mentioned the idea of having to request counsel, but these cases do not resolve the issue of whether an affirmative request is required. In *Michigan v. Harvey*, Chief Justice Rehnquist, writing for a majority of the Court, stated that “once a defendant obtains or even requests counsel as respondent had here, analysis of the waiver [of counsel] issue changes.”³⁶ In addition, the Court in *Patterson v. Illinois* stated that “as a matter of some significance . . . petitioner had not retained, or accepted by appointment, a lawyer to represent him at the time he was questioned by authorities.”³⁷

The Court’s most recent Sixth Amendment jurisprudence, *Rothgery v. Gillespie County*, did not address the issue of “requesting” or “accepting” counsel.³⁸ The Court, however, stated:

Jackson saw no need for lengthy disquisitions on the significance of the initial appearance, but that was because it found the attachment issue an easy one. . . . [There is] ‘no doubt’ that the right to counsel attached at the initial appearance, and *Jackson* said that the opposite result would be ‘untenable.’³⁹

IV. HOLDING

Over Montejo’s objection, the trial court admitted Montejo’s apology letter into evidence during Detective Hall’s direct

32. *Id.* at 620 (quoting *United States v. Gouveia*, 467 U.S. 180, 187 (1984)).

33. *Id.* at 636.

34. *Id.* at 633 n.6.

35. *Id.* (quoting *Brewer v. Williams*, 430 U.S. 387, 404 (1977)).

36. *Michigan v. Harvey*, 494 U.S. 344, 352 (1990).

37. *Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988).

38. *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008).

39. *Id.* at 2591 (citations omitted).

examination.⁴⁰ On appeal, while reviewing the lower court’s factual findings, the Louisiana Supreme Court held that the Sixth Amendment right to counsel attached at the September 10 hearing because, the court acknowledged, the hearing transcript “clearly shows that counsel was appointed.”⁴¹ The court found, however, that Montejo did not make an affirmative response at this hearing, but only “stood mute.”⁴² Therefore, according to the court, “although his right to counsel had attached, he did not assert his right to counsel such that the prophylactic rule of *Michigan v. Jackson* would invalidate any waiver he would later make.”⁴³

After finding that Montejo had not asserted his Sixth Amendment right to counsel, the court held that Montejo waived his Sixth Amendment right to counsel because his decision not to assert it was knowing, intelligent, and voluntary.⁴⁴ The court reasoned that even if Montejo and the police did not know counsel had been appointed, “the giving of *Miranda* warnings and his subsequent waiver of those rights was sufficient to apprise him of his right to have counsel present at the interrogation and the consequences of a decision to proceed without the aid of counsel.”⁴⁵

Again, whether Montejo waived his Sixth Amendment rights is not at issue before the Supreme Court.⁴⁶ Rather, because both parties agree that the police initiated the interrogation, the issue is whether Montejo should be afforded the prophylactic protections of *Jackson*—striking down as unconstitutional the police-initiated interrogation that occurred after Montejo’s Sixth Amendment right to counsel had attached.⁴⁷

40. *Louisiana v. Montejo*, 974 So. 2d 1238, 1250 (La. 2008).

41. *Id.* at 1260.

42. *Id.*

43. *Id.* at 1261. A criminal defendants’ Sixth Amendment right to counsel can be waived; the waiver must be voluntary, knowing and intelligent. “A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

44. *Id.* at 1262.

45. *Id.*

46. *Montejo v. Louisiana*, No. 07-1529 (U.S. Dec. 5, 2008), available at <http://origin.www.supremecourtus.gov/qp/07-01529qp.pdf>.

47. Brief for Petitioner, *supra* note 13, at 1; Brief for Respondent at 9, *Montejo v. Louisiana*, No. 07-1529 (U.S. Dec. 17, 2008).

V. ANALYSIS

In reaching its decision that Montejo had not affirmatively accepted the counsel that was appointed to him, the Louisiana Supreme Court relied on *Montoya v. Collins*.⁴⁸ In *Montoya*, the Fifth Circuit held that the prophylactic rule established in *Jackson* was inapplicable because the defendant, Montoya, had not asserted his right to counsel.⁴⁹ The Fifth Circuit held that because Montoya remained silent after being appointed counsel at his arraignment, the police were not barred from initiating interrogation.⁵⁰ The court explained that it would give a broad interpretation to a defendant's request for counsel, but that interpretation was "only required when there [wa]s a 'request' or an 'assertion' in the first place."⁵¹

If the Supreme Court upholds the Louisiana Supreme Court's decision, the practical effect of *Louisiana v. Montejo* will be that defendants have to "assert" their right to counsel for the prophylactic rule of *Michigan v. Jackson* to come into play—even if, at their arraignment, a magistrate provides them no opportunity to speak, thereby equating silence with waiver. This puts criminal defendants in the illogical position of having to affirmatively request counsel after counsel has already been appointed to them. This could prove to be, as Montejo described in his brief, a "trap for the unwary."

The Louisiana Supreme Court did not address any of the benefits or burdens that could arise from their decision. The court simply held that what is required for the prophylactic rule of *Jackson* to come into play is an affirmative assertion by the defendant; because Montejo did not make any type of assertion, the prophylactic rule of *Jackson* barring police-initiated interrogation was not applicable in Montejo's case.⁵²

The problem with the court's opinion is that the court did not consider how its decision would affect the State of Louisiana.⁵³ How will the decision affect criminal defendants, police officers, and public defenders offices? In Louisiana, police officers can now avoid the prophylactic rule of *Jackson* when defendants remain silent after

48. *Louisiana v. Montejo*, 974 So. 2d 1238, 1261 n.68 (La. 2008).

49. *Montoya v. Collins*, 955 F.2d 279, 282 (5th Cir. 1992).

50. *Id.*

51. *Id.* at 283.

52. *Montejo*, 974 So. 2d at 1261.

53. See Brief for Petitioner, *supra* note 13, at 33, ("[T]he Louisiana Supreme Court's approach would generate intractable problems of administration.").

being appointed counsel at their arraignments. Must the public defenders in Louisiana now attend every arraignment or, at the very least, read every arraignment transcript to see if the criminal defendant did affirmatively accept counsel?⁵⁴

VI. ARGUMENTS

The State of Louisiana asserts that “[t]he attachment of the Sixth Amendment right to counsel should be distinct from the assertion of such right.”⁵⁵ The State argues that it is not fair to apply the harsh rule of *Michigan v. Jackson* unless an affirmative request for counsel has been made by the defendant because “[j]ust as [Montejo] is entitled to be informed of his rights, the police are entitled to be adequately informed when a suspect desires to assert his right to counsel.”⁵⁶ This is a strong, almost intuitive argument, but it is significantly weakened in Montejo’s case because there was a representative from the sheriff’s office present at Montejo’s arraignment.⁵⁷ It is difficult to believe, therefore, that the Sheriff’s Department was not aware Montejo had been appointed counsel before taking him on a search for the murder weapon—especially when a representative from their department was present at a hearing where Montejo was unambiguously appointed counsel earlier that morning.⁵⁸

The State argues that the defendant’s interest in not being badgered by the police should be balanced against society’s interest in obtaining information regarding a crime.⁵⁹ According to the State, requiring the defendant to affirmatively request counsel would not prove to be an unworkable standard, and could enhance police investigations.⁶⁰

The State argues that because the rule in *Jackson*, barring police-initiated interrogation after a criminal defendant has obtained counsel, is prophylactic and not constitutional, the added protections afforded criminal defendants should be weighed against the potential

54. *Id.*

55. Brief for Respondent, *supra* note 47, at 9.

56. *Id.*

57. *Id.*; Brief for Respondent, *supra* note 47, at 4.

58. Brief for Petitioner, *supra* note 13, at 6–7.

59. Brief for Respondent, *supra* note 47, at 13–14.

60. *Id.* at 17 (“Contrary to Montejo’s assertion, silence of a defendant will not forfeit a constitutional protection. However, silence should not be equated with an outright bar to all police interrogation once counsel is appointed.”).

harm to criminal investigations—investigations that benefit society by deterring crime.⁶¹ Thus, according to the State, the protections in *Jackson* do not need to be completely over-hauled, but the *Jackson* rule should not be interpreted so broadly as to bar all police initiated interrogation after the Sixth Amendment attaches at arraignment. That way criminal defendants would still be afforded the protections of *Jackson* after they affirmatively request counsel, but the police would still be able to initiate interrogations—furthering their investigations and arguably benefiting society by reducing crime—until the defendant requests counsel.⁶²

Montejo's brief focused on three arguments, the first two of which were substantive and analyzed herein: 1) requiring criminal defendants to affirmatively request counsel before the protections of *Michigan v. Jackson* apply is illogical,⁶³ a "trap for the unwary,"⁶⁴ and unadministrable;⁶⁵ 2) the decision by the Louisiana Supreme Court is contrary to governing precedent;⁶⁶ and 3) even if affirmative acceptance is required under the facts of this case, Montejo affirmatively accepted the appointment of counsel.⁶⁷ These three arguments are also present in briefs submitted to the Court by the Louisiana Public Defender's Association⁶⁸ and the National Association of Criminal Defense Lawyers.⁶⁹

Montejo's first argument is perhaps the strongest. At Montejo's arraignment he was appointed counsel by the court. Most criminal defendants would assume that this appointment confers the benefit of

61. *Id.* at 13–14.

62. *Id.*

63. Brief for Petitioner, *supra* note 13, at 20–23.

64. *Id.* at 32.

65. *Id.* at 32–35.

66. *Id.* at 24–32.

67. *Id.* at 35–36.

68. See Brief of Amici Curiae The La. Pub. Defenders Ass'n in Support of Petitioner at 3, *Montejo v. Louisiana*, No. 07-1529 (U.S. Nov. 24, 2008) ("Although the proceedings governing initial appearance and assignment of counsel vary throughout Louisiana's districts, a common thread is that many do not seek affirmative acceptance from indigent defendants. For example, many appoint counsel automatically or through an indigency investigator. An affirmative acceptance requirement will have the practical effect of denying these indigent defendants counsel because they were never asked to accept counsel and will not understand the necessity of this formality.").

69. See Brief for the Nat'l Ass'n of Criminal Def. Lawyers et al. as Amici Curiae in Support of Petitioner at 9, *Montejo*, No. 07-1529 (U.S. Nov. 24, 2008) ("The Louisiana Supreme Court's approach is unfair because different jurisdictions follow different policies and practices in the appointment of counsel, and these policies and practices often determine whether or not a defendant makes an explicit request for counsel on the record.").

consulting with counsel.⁷⁰ In fact, the most logical action by the criminal defendant could be to sit in silence for the rest of the hearing after the court has appointed an attorney.⁷¹

The criminal defendant's presumption that by remaining silent he has accepted the attorney appointed to him is even stronger if he was not given a chance to speak at the arraignment. When a criminal defendant, such as Montejo, is interrogated by the police hours after being appointed counsel, the criminal defendant could conclude either that the attorney is not coming or that he is obligated to participate in the police initiated interrogation. Thus, the court's requiring an affirmative response to the appointment, as was the case with Montejo, is capable of creating a "trap for the unwary."⁷²

Second, Montejo argued that the Louisiana Supreme Court's decision is contrary to the U.S. Supreme Court's decision in *Patterson v. Illinois*.⁷³ In *Patterson* the defendant did not request a lawyer and had not been appointed one. Under those circumstances, the Court held that the police could initiate interrogation, and that the defendant had waived his Sixth Amendment rights by signing a *Miranda* waiver. The Court, however, noted that the defendant was not "an accused [who] has [a] lawyer" because once a defendant has a lawyer "a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." Thus, as Montejo notes in his brief "*Patterson* specifically cited *Jackson's* prohibition on police-initiated interrogations as one of the protections that arises when a defendant 'has' a lawyer."⁷⁴

VII. DISPOSITION

To predict how the Court may decide *Montejo v. Louisiana*, it is helpful to look at the Court's most recent Sixth Amendment decision in *Rothgery v. Gillespie County*.⁷⁵ There, the Court held that a criminal defendant's first appearance in front of a magistrate marks the point where the Sixth Amendment right to counsel attaches.⁷⁶ The majority opinion was written by Justice Souter, and joined by seven other

70. Brief for Petitioner, *supra* note 13, at 21.

71. *Id.*

72. *Id.* at 20–21.

73. *Patterson v. Illinois*, 487 U.S. 285 (1988).

74. Brief for Petitioner, *supra* note 13, at 24 (quoting *id.* at 290 n.3 (citations omitted)).

75. *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008).

76. *Id.* at 2581.

justices—only Justice Thomas filed a dissenting opinion.⁷⁷ *Rothgery* indicates that a broad array of Sixth Amendments protections kick in at the time of appointment of counsel.⁷⁸

Rothgery does not address whether an affirmative response is required after the right to counsel attaches,⁷⁹ but for a defendant in Montejo’s circumstances, *Rothgery* does give several hints about how each Justice interprets the jurisprudence of *Jackson*.⁸⁰ The majority favorably cited *Jackson* numerous times in its opinion,⁸¹ and that there was no mention in *Rothgery* of requiring a defendant to “accept” an appointment of counsel may indicate that the Court will be unwilling to accept Louisiana’s argument in *Montejo*.⁸² There were no indications in the Court’s *Rothgery* opinion that it wanted to limit the scope of *Jackson* by requiring criminal defendants to affirmatively accept counsel.

Chief Justice Roberts and Justice Alito both filed concurring opinions in *Rothgery*.⁸³ Chief Justice Roberts’s one paragraph concurrence, which Justices Scalia and Alito joined, simply stated that he saw no need to overturn the *Jackson* decision.⁸⁴ Justice Alito’s concurrence, like the majority opinion, did not appear to lend any credence to Louisiana’s argument in *Montejo*.⁸⁵ Justice Alito never mentioned the criminal defendant’s need to accept appointment of counsel—even though his concurrence discussed *Jackson* at length: “I interpret the Sixth Amendment to require the appointment of counsel only after the defendant’s prosecution has begun.”⁸⁶

Because eight Justices are unwilling to overturn the *Jackson* decision,⁸⁷ and because none indicate that they would require defendants to affirmatively accept appointment of *Jackson*,⁸⁸ it seems likely that the Court will rule in favor of Montejo. The State’s

77. *Id.* at 2596–2605 (Thomas, J., dissenting).

78. *Id.* at 2591 (majority opinion) (“Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any ‘critical stage’ of the postattachment proceedings. . . .”) (citations omitted).

79. *Id.* at 2578–93.

80. *See id.* (citing to *Jackson* favorably more than twenty times).

81. *Id.*

82. *Id.*

83. *Id.* at 2578.

84. *Id.* at 2592 (Roberts, C.J., concurring).

85. *See id.* at 2592–95 (Alito, J. concurring).

86. *Id.* at 2594.

87. *See id.* at 2578–93 (majority opinion).

88. *See id.*

strongest argument is that society benefits from enhanced police investigations, and that requiring criminal defendants to affirmatively accept appointment of counsel is not sufficiently burdensome to justify compromising these investigations.⁸⁹ This argument, however, seems to cut against the spirit of *Jackson*—affording criminal defendants greater Sixth Amendment protection once they become an accused.⁹⁰

The whole issue of affirmatively accepting counsel would appear to be resolved if the magistrate would, at first appearance, simply ask the defendant if he wants to have counsel appointed—if the defendant says yes, then *Jackson* becomes applicable.⁹¹ In Montejo’s situation, however, it seems peculiar, and perhaps a “trap for the unwary,”⁹² not to ask Montejo any direct questions, appoint him counsel while he is present, and then require him at some later date to affirmatively accept this appointment. Surely the logical conclusion drawn by Montejo was that by not saying anything when counsel was appointed, that he accepted this appointment. And perhaps the most persuasive fact suggesting that Montejo was being represented by counsel is that when he arrived back to the Sheriff’s Office after his trip with detectives to look for the murder weapon, Montejo’s public defender was waiting to speak with him and was upset with the detectives.⁹³

The *Jackson* Court went to great lengths to ensure that criminal defendant’s Sixth Amendment rights are protected.⁹⁴ Thus, with such

89. Brief for Respondent, *supra* note 47, at 13–14.

90. See *Michigan v. Jackson*, 475 U.S. 625, 632 (1986) (“[A]fter a formal accusation has been made—and a person who had previously been just a ‘suspect’ has become an ‘accused’ within the meaning of the Sixth Amendment—the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.”).

91. See Brief for Petitioner, *supra* note 13, at 21 (“[I]ndigent defendants in Louisiana are not asked if they want a lawyer—they are told they have a lawyer. So they have no occasion at the hearing to express their desire for counsel’s assistance. Nor are defendants informed that they must make an affirmative gesture of acceptance in order to secure the protections of the Sixth Amendment.”).

92. *Id.* at 20–21.

93. See *id.* at 9 (“After Montejo finished the letter to the victim’s spouse, the detectives ended the car ride. When they returned to the St. Tammany Parish Sheriff’s Office, they found Montejo’s lawyer waiting for them.”).

94. See *Jackson*, 475 U.S. at 632 (“[G]iven the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the initiation of adversary judicial criminal proceedings is far from a mere formalism. It is only at that time that the government has

compelling facts suggesting that Montejo was represented by counsel, the current Court, which continues to support the *Jackson* decision,⁹⁵ will likely strike down the Louisiana Supreme Court's affirmative acceptance requirement because it is an unnecessary formality, a "trap for the unwary," for criminal defendants who have already been appointed a lawyer.

committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.") (internal citations and quotations omitted).

95. See *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2578–93 (2008) (citing to *Jackson* favorably more than twenty times).