No. 10-416

In the
Supreme Court of the United States

JESSE JAY MONTEJO,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Petition for Writ of Certiorari to the Louisiana Supreme Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In light of the remand order of this Court, which provided Montejo with the "opportunity" to contend his letter of apology should have been suppressed under the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), but coupled with the caution that Montejo's testimony may have come too late to affect the propriety of the admission of the evidence under Louisiana procedural law, the questions presented to this Court by Montejo are as follows:

1. Whether Montejo's September 10th waiver was invalid because it was based on alleged misrepresentations by police that he had not been appointed a lawyer, even though this issue was never presented to the state court as a basis for suppression and there are disputed facts regarding any alleged misrepresentations, as a result of his failure to raise this issue in the trial court.

2. Whether Montejo's September 10th statement should have been suppressed under *Edwards, supra*, even though this issue was never presented to the state court as a basis for suppression.

3. Whether Montejo can raise any issues with respect to his September 6th videotaped statements and the conduct of the police in relation thereto, when those statements were never at issue when this case was previously before this Court, and therefore, were not part of the remand order.

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STATEMENT OF THE CASE

The Murder and Evidence

On September 5, 2002, Lou Ferrari was murdered in his home in St. Tammany Parish, and was found in the kitchen by his wife, Pat Ferrari. Lou Ferrari had suffered two gunshot wounds, one to the right chest area and one to the right eye. The wound to the chest was determined to be a contact wound, meaning the gun was in contact with Mr. Ferrari's body when it was fired. However, the gunshot wound to the chest exited Mr. Ferrari's body and was a non-fatal injury. The gunshot wound to the right eye resulted in a complete destruction of the right eye. The bullet traveled through the eye, then through the right base of the brain, and exited the back of Mr. Ferrari's skull. This gunshot wound was fatal within a matter of seconds.

The Ferrari family operated a dry-cleaning business for approximately 26 years, operating ten stores in the area at the time of Mr. Ferrari's murder. Lou Ferrari's wife, Pat, and son, Louis, worked with him in the business. Montejo was an acquaintance/friend of Jerry Moore[1], who had

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[1] As a result of his role in the murder of Lou Ferrari, Jerry Moore was charged with and convicted by a jury of second degree murder under Louisiana law. Jerry Moore was not present at the time of the murder and did not discharge the weapon. He later identified Montejo as the shooter. Moore was sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. The conviction and sentence of Moore were affirmed by the Louisiana First Circuit Court of Appeal, Docket no. 2006

performed mechanical work on the equipment at the Ferrari stores for a number of years.

Montejo drove a blue van, which was his mode of transportation in driving Moore. The blue van was apparently quite distinctive, with a "cattle guard" on the front. Neighbors of the Ferraris saw Montejo's blue van in the neighborhood the day before the murder and again at the approximate time of the murder. In fact, the blue van left the scene at a high rate of speed, along with Mr. Ferrari's white Lincoln vehicle, stolen during the course of the robbery.[2] In addition to the foregoing, the investigating officers and crime scene personnel collected fingernail scrapings from Lou Ferrari. Photographs were taken of defendant, which showed abrasions on his neck. Dr. Sudhir Sinha, an expert in molecular biology and DNA, performed the DNA testing on these scrapings. Dr. Sinha testified that the DNA in the left fingernail scrapings resulted from an intentional scratch and was not the result of minor contact, such as shaking hands. According to Dr. Sinha, there was a high degree of certainty, the chance of a random match being 1 in 163 billion, that the DNA found in the fingernail scrapings from the victim matched defendant.

Once Mr. Ferrari entered his home that afternoon, he had no means of escaping Montejo, intent on getting the money he wanted. The testimony of the Chief

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KA 1979, and the Louisiana Supreme Court denied his writ application.

[2] A third person, Eric Gai, was identified as the other driver leaving the scene. Mr. Gai pled guilty to manslaughter in connection with his role in this murder.

Deputy Coroner, Dr. Michael Difatta, established that the gunshot wound to Mr. Ferrari's eye would have resulted in almost instantaneous death, dropping the victim "right there". The crime scene photographs showed the position of Mr. Ferrari, demonstrating that the victim was cornered by Montejo when he was shot and killed.

Defendant testified at the trial and admitted he was at the Ferrari house when Lou Ferrari was murdered, although he claimed that he was there by virtue of an invitation from Mr. Ferrari. Montejo claimed at trial that a black male who he could only identify as D.P. was the murderer. However, Montejo had previously confessed in a videotaped interview with police. As the Louisiana Supreme Court noted in its original decision herein, the story he gave at trial was the seventh version of the crime given by Montejo, which was "an elaborated variation" of the fifth version. *State v. Montejo*, 974 So.2d 1238, 1248 (La. 2008). Montejo had an extensive criminal history from Florida, with numerous convictions for crimes such as theft, burglary and armed robbery. During the interrogation, he appeared to be a savvy ex-con, who was trying to read the police, attempting to determine how much they knew as he spoke with them. He gave the police bits and pieces of information, which gradually increased until he confessed to shooting Mr. Ferrari, although, even then, he tried to minimize his role and intent in the crime. As the Louisiana Supreme Court noted, the jury watched approximately four hours of the videotaped police interrogation of Montejo, "during which 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." *Montejo*, *supra* at 1244.

While Montejo appears to re-urge some of the issues surrounding his videotaped confession, the admission of the videotaped confession was not at issue in the original proceeding in this Court and was not included in the remand order. The only evidence at issue is the apology letter written by Montejo on September 10th. The Louisiana Supreme Court previously conducted an exhaustive review of those tapes and the applicable law, finding when Montejo initially invoked his *Miranda* counsel right "the interview was terminated" and both detectives "scrupulously honored" his request. *Montejo*, *supra* at 1254-55. That Court found further that Montejo validly retracted his initial request for counsel, *id.* at 1256, and later "validly waived his *Miranda* rights before the resumption of the interview." *Id.* at 1258.

The Apology Letter, Motion to Suppress and Proceedings

Defendant filed a pretrial Motion to Suppress Inculpatory Statements, which alleged as follows:

> Defendant moves to suppress for use as evidence all oral or written inculpatory statements obtained from defendant by all law enforcement officers or other agents of the State in the above captioned and numbered cause.
>
> All of said confessions and other inculpatory statements are inadmissible because they were not made by defendant to said law enforcement officers or anyone else freely and voluntarily,

> but were made under the influence of fear, duress, intimidation, menaces, threats, inducements, and promises, and/or without mover having been advised of his Constitutional rights to remain silent, right to counsel, etc.

At the suppression hearing, defense counsel argued that the written apology letter should be suppressed because counsel had been appointed for defendant earlier that day, and since defendant was appointed counsel, the police were prohibited from speaking with him. Defendant did not assert to the trial court that he told the officers he had a lawyer prior to the excursion at issue or that the officers misrepresented to him the fact that he had counsel appointed. In fact, even after defendant's testimony at the end of the trial, the motion to suppress was never re-urged on the basis now before this Court.

With respect to the letter which is at issue in this case, Detective Jerry Hall testified at the suppression hearing that on the morning of September 10, 2002[3], this follow-up was an effort to locate the gun that had been used in the crime and the money bag taken from Mr. Ferrari. The police already had Montejo's videotaped confession. In fact, Montejo had provided the police, during that confession, with an approximate area where he had thrown the gun into Lake Ponchartrain, the largest lake in Louisiana, consisting of approximately 600 square miles. Montejo had told

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[3] Originally, Detective Hall referred to this contact as occurring on September 9, 2002, but later corrected this reference to September 10, 2002. The original reference to September 9 was simply an error.

the officers in his confession that he just went to the home for a burglary, not murder, and that the gun he used belonged to Mr. Ferrari. Apparently, in his attempt to further exculpate himself, he told the officers he wanted to help them find the gun to prove he was telling the truth.

The police had divers in the lake, but had been unable to locate the weapon. They were working with a large grid, and Lake Ponchartrain can be a treacherous and dangerous body of water. Detective Hall approached Montejo, because Montejo had previously offered to help locate the gun, again read Montejo his rights, and asked Montejo if he would accompany them to the bridge and assist in further pinpointing the area where he disposed of the gun, to which Montejo consented, without issue.

The minute entries from this proceeding reflect that a seventy-two (72) hour hearing, pursuant to Louisiana law, was held earlier that day, on the morning of September 10, 2002. La. C.Cr.P. art. 230.1 provides that the sheriff or law enforcement officer having custody of an arrested person shall bring him promptly, and in any case within seventy-two hours from the time of the arrest, before a judge for the purpose of appointment of counsel, and the judge may also determine or review a prior determination of the amount of bail. The minute entry from that seventy-two hour hearing provides that the defendant was present, and further provides that no bond was set, the defendant, being charged with first degree murder, and the "court ordered the Office of Indigent Defender be appointed to represent the defendant".

Although defendant has alleged, citing his own testimony at trial, that he told Detective Hall that he had a lawyer appointed to him that morning, defendant's testimony directly contradicts the testimony of the officers and was the first time he had ever made such a claim. Detective Jerry Hall testified that he asked Montejo that morning if he had been contacted by an attorney, to which Montejo responded that he had not. Montejo not only did not tell the officers that counsel had been appointed, but he unequivocally denied having a lawyer when directly asked by Detective Hall. In fact, Montejo told the detectives he just wanted to clear this up and never requested a lawyer at that time. Montejo was again provided with his *Miranda* rights and again waived such rights before accompanying the detectives to the lake. While in the back of the police vehicle on the way back to the jail, Montejo requested a pad and pen from the detectives and told them he wanted to write something. He wrote a letter to the widow of the victim, expressing remorse for the shooting of her husband, which was consistent with the videotaped statement in which he claimed that he found the gun while in the home and tried to use it to scare Mr. Ferrari. As the Louisiana Supreme Court found, "there is no dispute that defendant was given his *Miranda* warnings and that he signed a waiver of these rights prior to the September 10 excursion to look for the murder weapon, during which time he wrote the apology letter to Mrs. Ferrari." *Montejo*, *supra* at 1261. In the letter, Montejo attempts to excuse his actions, in yet another exculpatory attempt.

As stated above, defendant's sole argument for exclusion of the letter to the trial court was based on the fact that counsel had been appointed to represent

him on the morning of September 10th, and using the rationale of *Michigan v. Jackson*, 475 U.S. 625 (1986), the police were prohibited from approaching him thereafter. This Court overruled *Michigan v. Jackson*, holding that "Montejo's solution is untenable as a theoretical and doctrinal matter" and that Montejo's interpretation of *Michigan v. Jackson* was "off the mark". *Montejo v. Louisiana*, 556 U.S. –, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009). This Court remanded this case in order to allow Montejo the opportunity to contend that his letter of apology should still have been suppressed under *Edwards v. Arizona*, 451 U.S. 477 (1981). However, the Court specifically noted the potential procedural bar to such a review, stating that since "Montejo's testimony came not at the suppression hearing, but rather only at trial" "we are unsure whether under state law that testimony came too late to affect the propriety of the admission of the evidence". *Montejo, supra* at 2092. This issue was left to the Louisiana Supreme Court upon remand, and for the reasons that follow, the State submits the Louisiana Supreme Court correctly held that Montejo's claims herein are procedurally barred under state law, but further held the claims fail on the merits, or in the alternative, the admission of the letter constituted harmless error.

ARGUMENT

A. This Court recognized that since Montejo's testimony came not at the suppression hearing, but only at trial, under state procedural law, it may have come "too late" to affect the propriety of the admission of the evidence

Montejo repeatedly argues that the Louisiana Supreme Court failed to address the claims that this Court "instructed" it to address, and that it "ignored" the remand order of this Court. (Pet., p. i, 19, n. 10). This Court provided Montejo with the "opportunity" to contend his letter of apology should have been suppressed under the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981). However, Montejo never acknowledges or addresses the basis of the ruling by the Louisiana Supreme Court, which was recognized by this Court in its remand order as follows:

> . . . Montejo's testimony came not at the suppression hearing, but rather only at trial, and we are unsure whether under state law that testimony came too late to affect the propriety of the admission of the evidence. These matters are best left for resolution on remand. *Montejo v. Louisiana*, 556 U.S. —, 129 S.Ct. 2079, 2092 (2009).

The Louisiana Supreme Court determined that, under its state procedural law, defendant's testimony at trial came too late for consideration as to the admissibility of the letter because those grounds for suppressing the evidence were available at the time, but were not asserted by defendant as a basis for

suppression of the evidence. *Montejo, supra,* App. A at 73A.

B. Montejo never raised an Edwards argument in support of suppression of the letter prior to appeal

Montejo filed a "brief boilerplate motion to suppress all inculpatory statements" with the state district court. *Montejo, supra*, App A at 11A. That motion alleged as follows:

> Defendant moves to suppress for use as evidence all oral or written inculpatory statements obtained from defendant by all law enforcement officers or other agents of the State in the above captioned and numbered cause.
>
> All of said confessions and other inculpatory statements are inadmissible because they were not made by defendant to said law enforcement officers or anyone else freely and voluntarily, but were made under the influence of fear, duress, intimidation, menaces, threats, inducements, and promises, and/or without mover having been advised of his Constitutional rights to remain silent, right to counsel, etc.

At the suppression hearing, defense counsel argued that the written apology letter should be suppressed because counsel had been appointed for defendant earlier that day, and since defendant was appointed counsel, the police were prohibited from speaking with him. *Defendant never argued, at any time, to the trial court that he told the officers he had a lawyer prior to the excursion at issue or that the officers*

misrepresented to him the fact that he had counsel appointed. In fact, even after defendant's testimony at the end of the trial, the motion to suppress was never re-urged on that basis. Defendant's sole argument for exclusion of the letter was the applicability of *Michigan v. Jackson*, 475 U.S. 625 (1986).

The Louisiana Supreme Court, following remand from this Court, found that Montejo "did not present any evidence, or argument, at the motion to suppress that he asserted his right to counsel for *Edwards* purposes on September 10, that the police lied to him about not having a lawyer, or that the police kept him from seeing his lawyer". *Montejo, supra*, App A at 33A. Moreover, with regard to Montejo's argument on remand that he had clearly asserted his right to counsel but was worn down by the badgering of the police, the Louisiana Supreme Court observed that Montejo had previously asserted quite the opposite to that Court. In Montejo's brief to the Louisiana Supreme Court on original hearing, "defense counsel conceded that '[b]y Mr. Montejo's own admission his request for counsel [on September 10] was not a clear assertion or invocation of his right'". *Montejo, supra*, App A at 52A.

C. Louisiana procedural law has long prohibited defendants from raising new grounds for suppressing evidence on appeal

Montejo's assertion that the Louisiana Supreme Court crafted a new and unique rule to apply to him is wholly without merit. Defendant argues that Louisiana jurisprudence does not prohibit a new argument in support of suppression on appeal if the

constitutional provision at issue is the same as originally raised. However, he cites no authority for that argument, and in fact, the cases cited by the Louisiana Supreme Court, referenced below, dispel that argument.

The Louisiana Supreme Court reviewed the applicable Louisiana procedural rules governing suppression motions and the review of rulings thereon by appellate courts. *Montejo, supra*, App A at 36A. Motions to suppress are governed by La. C.Cr.P. art 703. A defendant may testify at the hearing of a suppression motion without being subject to interrogation into other matters, and his testimony cannot be used by the state at trial, except to attack the credibility of his trial testimony.

"Louisiana courts have long held a defendant may not raise new grounds for suppressing evidence on appeal that he did not raise at the trial court in a motion to suppress." *Montejo, supra*, App A at 40A. In reiterating this long-standing principle, the Louisiana Supreme Court cited *State v. Brown*, 434 So.2d 399 (La. 1983), which rejected a defendant's alternative argument regarding the denial of his motion to suppress because he had not raised the issue at trial; *State v. Johnson*, 993 So.2d 326 (La. App. 4 Cir. 2008), which held that failure to raise a ground for suppressing evidence in a properly filed motion to suppress waives such a basis for exclusion on appeal; and *State v. Jackson*, 904 So.2d 907 (La. App. 5 Cir. 2005), *writ denied* 924 So.2d 162 (La. 2006), which held that a defendant is limited on appeal to the grounds he articulated at trial, and a new basis for a claim, even if it would be meritorious, cannot be raised for the first time on appeal. In *Jackson*, the Louisiana

court found that while the defendant had challenged the voluntariness of his confession, neither his written motion nor the evidence presented at the motion hearing alleged that the statement was involuntary because of his young age or because he was sleep deprived at the time of the statement. The defendant was not allowed to raise these new bases for suppression of his statement for the first time on appeal, and therefore, they were not properly before the appellate court. This ruling specifically contradicts Montejo's argument that a Louisiana court has never ruled that an alternative argument based on the same constitutional ground has been held to constitute "new grounds" prohibited on appeal. In that case, the constitutional reason, i.e. voluntariness, remained the same, but the factual argument differed, and the courts held the new argument was barred for failure to assert the same issue to the trial court.

La. C.Cr.P. art. 841 provides that a new basis for an objection cannot be raised for the first time on appeal. The underlying principle for this rule is to "give the State adequate notice so that it may present evidence and address the issue at trial on the motion. Because Montejo did not raise these grounds in a motion to suppress or allege facts supporting these grounds, the State had no need to put on evidence tending to show that defendant never made a clear assertion of his right to counsel or that the police never misled him". *Montejo, supra*. App A at 44A.

While the Louisiana Supreme Court noted the jurisprudential rule that appellate courts will review the totality of the evidence presented at the suppression hearing and trial when reviewing a suppression ruling, this rule is "not applied where the

grounds for suppression were not asserted in the motion to suppress". *Montejo, supra*, App A at 46A. The Louisiana Supreme Court has "never allowed a defendant to allege facts for the first time in trial testimony which would support a new argument for suppression of evidence, and have a reviewing court consider those facts in determining whether the district court should have granted a motion to suppress on grounds that were never argued to, or considered by, the district court". *Montejo, supra*, App A at 46A. "The entire criminal justice system will become chaotic if the Court allows defendants to withhold testimony which they allege is relevant to a suppression issue until the end of trial after the evidence has been admitted, then raise the issue on appeal, when the trial court has had no opportunity to rule with all evidence before it." *Montejo, supra*, App A at 46-47A.

While this Court overruled *Michigan v. Jackson*, the jurisprudence that Montejo now relies upon was in force at the time of the filing of and hearing on the motion to suppress herein. There was nothing prohibiting Montejo from raising these issues at that time, in order to allow the State to present evidence on this issue. As the Louisiana Supreme Court held, if he had such a claim, he was required to raise it in the motion to suppress. *Montejo, supra*, App A at 50A.

The Louisiana Supreme Court answered the query raised by this Court in its remand, i.e. whether Montejo's testimony may have come too late to affect the propriety of the admission of the evidence. Under Louisiana procedural law, it did come too late, when he never raised these issues either in the motion to suppress or at the hearing on that motion.

D. Montejo did not make a clear assertion of the right to counsel when the officers approached him about accompanying them on the search for the weapon, and therefore, Edwards does not require suppression

Although the State asserts Montejo is procedurally barred from asserting this issue, as detailed above, the State further asserts that the claim fails on the merits.

The testimony at the suppression hearing by the police officers on this issue was uncontradicted. Detective Jerry Hall testified that, on the date at issue, he asked defendant if he had been contacted by a lawyer, and defendant responded that he had not, and defendant never indicated to him that he had a lawyer, never mentioned that a lawyer had been appointed to represent him and denied having a lawyer. In fact, according to Detective Hall, when he asked Montejo if he had been contacted by a lawyer, Montejo told him he did not need a lawyer and just wanted to clear this up, which is consistent with Montejo's claims that he entered the Ferrari house unarmed, then found the victim's gun. Montejo had offered to help find the gun, presumably to help prove his version of events, which he believed would show that he had no intent to murder the victim, because he was unarmed when he arrived. While Montejo only cites the testimony of Detective Hall regarding his questioning of Montejo as to whether he had been contacted by a lawyer, arguing it did not contradict Montejo's testimony, it ignores other testimony by Detective Hall in which it is clear that Montejo never requested counsel. Detective Hall specifically testified that Montejo never told him, at any time during that

day, that he had been appointed counsel, and Montejo did not ask for a lawyer. Accordingly, the State submits that there was no evidence before the trial court to suggest that Montejo ever indicated, in any manner, his "desire to deal with the police only through counsel". If this Court considers defendant's self-serving, last minute, disingenuous trial testimony, made after the admission of the evidence at issue, then the issue becomes a factual issue, one based on the credibility of the witnesses, one which was never determined by the trial court, because it never had the opportunity to do so since it was never raised by defendant.

In *Edwards*, *supra*, this Court held that an accused, having 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. A suspect must unambiguously request counsel. He must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect. See *Moran v. Burbine*, 475 U.S. 412, 433, n. 4 (1986) ("The interrogation must cease until an attorney is present *only* if the individual states that he wants an attorney"). (Citations and internal quotation marks omitted).

"The *Edwards* rule -- questioning must cease if the suspect asks for a lawyer -- provides a bright line that

can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong. We therefore hold that, after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney. . . . If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him. . . . But we are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer. Unless the suspect actually requests an attorney, questioning may continue." *Davis v. United States*, 512 U.S. 452 (1994).

"The *likelihood* that a suspect would wish counsel to be present is not the test for applicability of *Edwards*. The rule of that case applies only when the suspect 'has *expressed*' his wish for the particular sort of lawyerly assistance that is the subject of *Miranda*. It requires, at a minimum, 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*." *McNeil v. Wisconsin*, 501 U.S. 171 (1991). (Citations omitted.) While defendant likens his statement to that asserted by the defendant in *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990), the State

submits that the cases are not close. In *Minnick*, the defendant told the police, "Come back Monday when I have a lawyer", and he further stated that he would make a more complete statement then with his lawyer present.

Although the State asserts that Montejo's testimony on this issue was not credible, his testimony did not establish that he made a "clear request" for counsel. Even under Montejos' version, he only stated that he thought he had a lawyer appointed to represent him, not that he was expressing a desire to deal with the police through counsel, as required by *Edwards*. In addition, the Louisiana Supreme Court found that Montejo, in his original brief on appeal in that court, had conceded that his request for counsel on September 10 was not a clear assertion or invocation of his right. *Montejo, supra,* App A at 52A. Montejo's statements did not constitute a clear assertion of his right to counsel for purposes of *Edwards*, and the State submits this argument fails.

E. The police did not make any intentional misrepresentations to Montejo regarding his counsel and repeatedly informed him of his right to counsel

Montejo's arguments regarding alleged intentional misconduct by the police are completely based upon the truth and veracity of his testimony. The police unequivocally testified that Montejo told them he did not have a lawyer, and he was repeatedly advised of his right to counsel, which he repeatedly waived. There is no evidence to suggest that Det. Hall knew that counsel had been appointed earlier that day to represent Montejo, and in fact, Det. Hall testified he

did not know of the appointment of counsel. In addition, Montejo's characterization of Montejo's counsel walking through the front door while the police took Montejo out the back door is without merit and unsupported by the record. It was not until the officers *returned* to the jail with Montejo that they were notified that Montejo's counsel was trying to reach him, and when contacted, the police promptly met Montejo's counsel. The officers did not prevent Montejo's counsel from meeting with him. Typically, the trial court would have determined any credibility issues, but Montejo never allowed it to do so on this issue, because he never raised this issue before the trial court.

This alleged conduct is certainly not the "egregious" police misconduct referenced by the Court in *Moran v. Burbine*, 475 U.S. 412 (1986), nor does such conduct constitute "intentional" or "affirmative" misrepresentations, as described by Montejo in his Petition. As this Court recognized in its opinion herein, "[p]olice who did not attend the hearing would have no way to know whether they could approach a particular defendant; and for a court to adjudicate that question *ex post* would be a fact-intensive and burdensome task". *Montejo, supra* at 129 S.Ct. 2084.

F. The September 6th confession by Montejo was not at issue when this case was originally before this Court and was not at issue in the remand, and accordingly, it is not properly before this Court

The only issue before this Court originally was the admission of the apology letter written by Montejo on September 10th. The issues surrounding his

videotaped confession on September 6th were not previously before this Court and were not part of the remand by this Court. This Court specifically stated in its opinion that Montejo "should be given an opportunity to contend that his letter of apology should still have been suppressed under the rule of *Edwards*". *Montejo v. Louisiana*, 556 U.S. ---, 129 S.Ct. 2079, 2091 (2009). In accordance with the remand, it was the admission of the letter of apology that was before the Louisiana Supreme Court, not the videotaped confession.

Now, Montejo seeks to argue the merits of the admission of the September 6th statements, and the State submits that issue is not properly before this Court. The Louisiana Supreme Court previously ruled on this issue in its original opinion, and no further review of that issue was sought before this Court.

G. Harmless Error

Although the State submits that the trial court properly denied defendant's motion to suppress, the erroneous admission of a confession is a trial error which is subject to a harmless error analysis. The State submits the jury had sufficient other evidence before it to render the verdict surely unattributable to this alleged error. The jury heard the videotaped confession of Montejo, which admissibility was upheld by the Louisiana Supreme Court and, as stated above, was not an issue before this Court. In addition, the corroborating evidence was substantial.

The State submits any error in admitting the letter at issue was harmless in light of the other evidence presented to the jury at trial, including the "properly

admitted videotaped confession, Montejo's own incredible trial testimony, the eyewitnesses who saw Montejo's car flee the vicinity of the crime, evidence of the proceeds of the crime found on Montejo and Gai, the testimony concerning motive, and the presence of Montejo's DNA under the victim's fingernails which an expert testified was the result of the victim intentionally scratching the defendant". *Montejo, supra*, App A at 71-72A.

The Louisiana Supreme Court agreed that any such error was harmless, noting that while the letter was introduced in the State's case in chief, references to the letter by the State were minimal and more akin to impeachment, whereas the defense referred to the letter at length in an attempt to diminish the credibility of the police. The Louisiana Supreme Court found the letter was inconsequential in comparison to the other evidence, and any error in its admission was harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the State of Louisiana submits that the Petition for Writ of Certiorari filed by Jesse Montejo should be denied.

Respectfully submitted:

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