No. 10-___

IN THE
Supreme Court of the United States

JESSE JAY MONTEJO
Petitioner,

v.

STATE OF LOUISIANA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Montejo v. Louisiana*, 556 U.S. ___ (2009), this Court remanded the case to the Louisiana Supreme Court so that Jesse Montejo could "pursue an *Edwards* objection" and "press any claim he might have that his Sixth Amendment waiver was not knowing and voluntary." 129 S.Ct. at 2091-92. The Louisiana Supreme Court reinstated Montejo's conviction and death sentence without making the factual determinations or reviewing the substance of the claims that this Court instructed it to address. Given the state court's handling of this issue and the pattern of police conduct that concerned this Court on first review, the following questions arise:

1. Whether Montejo's September 10th waiver was invalid because it was based on the misrepresentations by police that he had not been appointed a lawyer?
2. Whether Montejo's September 10th statement should have been suppressed under *Edwards v. Arizona*, 451 U.S. 477 (1981)?
3. Whether a law enforcement officer's conduct violates *Edwards v. Arizona*, 451 U.S. 477 (1981), where he explicitly expresses disappointment with a suspect after the suspect has made a clear invocation of the right to counsel?

PARTIES TO THE PROCEEDING

The petitioner is Jesse Jay Montejo, the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

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Petitioner Jesse Jay Montejo respectfully petitions for a writ of certiorari to review the judgment of the Louisiana Supreme Court.

OPINION BELOW

The Louisiana Supreme Court's opinion on remand is reported at *State v. Montejo*, 2006-KA-1807 (La. 05/11/10); 40 So. 3d 952, and is reprinted in the Appendix at App. A, 1A-75A. The denial of rehearing is reported at ___ So. 3d ___ and is reprinted in the Appendix at App. B, 76A.

JURISDICTION

The Louisiana Supreme Court entered its opinion on May 11, 2010. Rehearing was denied on June 25, 2010. This Court has jurisdiction. 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. CONST. AMEND. VI. The Sixth Amendment is applicable to the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965).

STATEMENT OF THE CASE

A. *Legal Proceedings*

In *Montejo v. Louisiana*, the Court stated that because its decision to overrule *Michigan v. Jackson*, 475 U.S. 625 (1986), altered the legal landscape, "Montejo should be given an opportunity to contend that his letter of apology should still have been suppressed under the rule of *Edwards*," and "may also seek on remand to press any claim he might have that his Sixth Amendment waiver was not knowing and voluntary, e.g., his argument that the waiver was invalid because it was based on misrepresentations by police as to whether he had been appointed a lawyer." *Id.* at 2091-92. The Court emphasized, "These matters have heightened importance in light of our opinion today." *Id.* The Louisiana Supreme Court declined to consider the merits of either issue. *See infra* Section I.

The Court also remanded the case so the state court could resolve the tension between Montejo's testimony and Detective Hall's testimony regarding the events that transpired on the afternoon of September 10, 2002. Officer Hall's testimony suggests that he asked Montejo whether a lawyer had contacted him, and that Montejo indicated that no lawyer had contacted him yet. Montejo's testimony suggested he told Hall, "I don't . . . I don't . . . I don't really want to go with you . . . I got a lawyer

appointed to me. . . ." JA at 242.[1] Montejo testified that Hall responded: "No, no you don't. . . . [to which Montejo] said, Yeah, I think I got a lawyer appointed to me." "[Hall] said, No, you don't. He said, I checked, you don't have a lawyer appointed to you." *Id.* The Louisiana Supreme Court *still* has not made an explicit credibility determination to ease whatever tension exists. *See infra* Section I(1).

Nor did the Louisiana Supreme Court address Montejo's contention that the elimination of the *Jackson* rule required it to re-examine the *Edwards* issue stemming from the September 6, 2002 interrogation, where Montejo indisputably invoked his right to counsel.[2] That interaction should be analyzed anew for its bearing on Montejo's September 10th invocation and as an independent issue that warrants this Court's review in light of the pattern of unethical police conduct here.

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[1] All citations to the Joint Appendix (JA) refer to the Joint Appendix in *Montejo v. Louisiana*, (07-1529) reported at 556 U.S. ___ (2009).

[2] The Louisiana Supreme Court acknowledged that the police conduct during that interrogation merited "close scrutiny." *State v. Montejo*, 974 So. 2d 1238, 1255 (La. 2008) [hereinafter *Montejo I*].

B. *Factual Predicate*

At 10:02 p.m. on September 6, 2002, a video camera in an interrogation room at the St. Tammany Parish Sherriff's Office begins to roll. Jesse Montejo is "visibly upset," sobbing and sitting with his head in his hands, saying "What am I doing? What am I doing? What am I doing?"[3] *See, e.g.*, *Montejo I*, 974 So. 2d at 1247 n.35; State's Ex. 17-A (DVD version of the 2nd interview of Montejo). Ten minutes earlier, detectives had abruptly stopped the video recording after Montejo said:

> I would like to answer no more questions unless I'm in front of a lawyer.

Id.

Montejo's interaction with the police began earlier that day when Gretna, Louisiana police officers took him into custody. Lewis Ferrari, the proprietor of a local dry cleaning operation in Slidell, had been shot to death following an apparent

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[3] The Louisiana Supreme Court noted that Montejo appeared to be "visibly upset" once the videotape of the interrogation began to play again following the ten-minute gap that occurred immediately after Montejo invoked his right to counsel. *Montejo I*, 974 So. 2d at 1247.

robbery in his home the previous day. The victim's family suspected Jerry Moore, a local mechanic specializing in repair of dry cleaning equipment, who had a contentious relationship with Mr. Ferrari and who would have known that he was likely to be carrying a significant amount of cash with him on the evening of September 5th. *Montejo I*, 974 So. 2d at 1241. Police officers picked up Montejo for questioning because he was Moore's acquaintance who had provided transportation to Moore after his driver's license was revoked. *Id.*

Detectives transported Montejo to the St. Tammany Sheriff's Office. The detectives placed him into a small room and interrogated him over the next seven hours. No recording of the first two hours of interrogation exists. The video recording begins with heated questioning from the detectives who feed Montejo multiple storylines and try to get him to state that Jerry Moore killed Ferrari.[4] For example, the detectives told Montejo:

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[4] The Louisiana Supreme Court acknowledges "the detectives falsely claim[ed] that forensic analysis can determine when [Montejo] was in the home [and that] both detectives conceded at trial that they misled Montejo about forensic science." *Montejo I*, 974 So. 2d at 1245 n.26; *see also id.* at 1246 n.28 ("the detectives again mislead Montejo as to the capabilities of forensic science"); *id.* at 1246 n.29 ("the detectives again

> "It could still be a totally innocent deal for you if you went in there [but Moore shot Ferrari]."
>
> "If you were in the room when the gun was fired, it's not a hurdle we couldn't get past."

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exaggerate the capabilities of forensic science"); *id.* at 1246 n.30 ("Detective Major testified at trial that they did not have the DNA evidence at this time but claimed they did to encourage him to confess."). The Louisiana Supreme Court cites a law review article for the proposition that the technique of misleading suspects with false information is a highly effective device for obtaining self-incriminating information. *Id.* at 1245 n.26. The court did not mention that the article it cites, Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 813 (2006), argues:

> [I]n light of the growing body of empirical evidence demonstrating that law enforcement trickery plays a significant role in false confessions . . . courts should circumscribe interrogation techniques which employ lies to induce a suspect to confess, and legislatures should regulate or proscribe those deceptive interrogation techniques – such as false evidence ploys – which have proven most likely to elicit false confessions.

33 FORDHAM URB. L.J. at 796.

> "You could still be in the room and not be at fault."
>
> "An innocent person, it would only be natural to hide when he [Lou] came home."
>
> "You saw Jerry shoot the guy."

State's Ex. 14-B (DVD version of the 1st interview of Montejo).

Montejo stated that he accompanied an unidentified black male to Ferrari's house where that unidentified man shot the victim. App. A at 66A. This account is essentially consistent with: Montejo's final statement to detectives on September 6, 2002; Montejo's trial testimony; and the testimony of Mary Melancon, who testified at trial that Montejo explained the same order of events to her. *See Montejo I*, 974 So. 2d at 1248.

Detectives quickly rejected Montejo's explanation and urged him to implicate Jerry Moore instead. The videotape shows Montejo attempting to calibrate his version of events to deliver what the detectives wanted to hear. First, Montejo stated that "his only involvement was in driving Moore to the victim's home and leaving him there without knowing that Moore was going to rob and kill the

victim." *Id.* at 1245. The detectives were not satisfied. Next, Montejo said the victim was not home when he and Moore arrived. "After about 10 minutes, Moore started ransacking the residence, so Montejo left. He became disoriented and was briefly lost in the neighborhood. After he regained his bearings, he saw Moore drive away in the victim's car." *Id.* at 1246. The detectives rejected this story, too. The detectives "suggested that Moore would blame Montejo and confronted him with the possibility that the forensic evidence would prove that the victim scratched his neck or that he was present when the murder weapon was fired." *Id.* Again, Montejo calibrated his version to the storylines the detectives provided: Montejo stated that he "did not leave when Moore (who was wearing gloves) ransacked the home. Instead, he and Moore hid when the victim arrived." *Id.* Moore hit the victim in the back of the head with the gun; Montejo ran. "The victim turned and flailed wildly, scratching Montejo, and Moore shot the victim, who remained standing. As Montejo fled, he heard a second shot. Montejo became briefly lost in the neighborhood and saw Moore drive away in the victim's car." *Id.*

Having obtained a version of events that matched their desire to have Montejo implicate Jerry Moore, the detectives shifted gears. The detectives now tried to get Montejo to say that he shot Ferrari himself:

> "Hey, this was an accident, dude."
>
> "Jerry's got no DNA, but you do— this is your last chance to say this was an accident."
>
> "If you didn't mean to kill that man you better tell us now 'cause we're about to leave."
>
> "If you accidentally shot that man, now's the time to say it."

State's Ex. 14-B. Montejo adamantly denied shooting Ferrari. Undeterred, and using a tone the Louisiana Supreme Court labeled "hectoring,"[5] the detectives amped up their intensity level several notches:

> Q: (Shouting): Are you sorry for shooting that man?
>
> A: I didn't shoot him.
>
> Q: Yes you did.
>
> A: I. Did. Not. Shoot. That. Man.

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[5] *Montejo I*, 974 So. 2d at 1255.

Id. After enduring more than five hours of intensive and deceitful questioning, Montejo (this time on videotape) invoked his right to counsel:

> I did not kill that man, I did not break in, I did not steal anything. I would like to answer no more questions unless I'm in front of a lawyer.

Id.

The detectives switched tactics in an effort to convince Montejo to retract his request for counsel: "You are under arrest for first degree murder." *Id.* The detectives then told Montejo in no uncertain terms that it was not in his interest to invoke the right to counsel:

> Detective Major: Dude, you don't want to talk to us no more, ***you*** want a lawyer, right? ***I trusted you and you let me down.***
>
> Montejo: No, come here, come here.
>
> Detective Major: No, no, I can't.
>
> Montejo: No, come here . . .

> Detective Major: No, you've asked for an attorney, and you are getting your charge. And the shame of it is . . ."

Montejo I, 974 So. 2d at 1247 (emphasis added). Montejo then relented and stated that he did not want a lawyer. *Id.*

The Louisiana Supreme Court noted that "[t]he video recorder was turned off at this point and did not begin again until approximately 10 minutes later." *Id.* Thus, there is no recording of the exchange between the detectives and Montejo that prompted him to revoke his request for counsel. When recording resumed, at 10:02 p.m., it began with Detective Morse's question to a weeping and agitated – "What am I doing? What am I doing? What am I doing?" – Montejo regarding his purported decision to change his mind and waive the assistance of counsel. State's Ex. 17-A; *see also Montejo I*, 974 So. 2d at 1247 n.35.[6] The detectives told Montejo that he needed to affirmatively respond that he had voluntarily agreed to resume questioning.

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[6] Detective Morse testified that he resumed interrogation because Montejo "adamantly requested that we speak to him again." R. 1037. This testimony appears to be at odds with the videotape displaying Montejo sobbing and with his head in his hands from the commencement of the video recording.

Montejo relayed a story where he claimed that he was alone in the victim's house, believing that the victim would not be home or coming home any time soon, and that as he rummaged through the victim's bedroom, he found a gun and ammunition. Montejo said that he was startled when the victim arrived home and that the shooting that followed was accidental. State's Ex. 17-A; *see also Montejo I*, 974 So. 2d at 1247.

The videotape shows Montejo becoming more distraught as the detectives continued to interrogate him. Finally, Montejo told the detectives that he could not "take the rap" for something he did not do. State's Ex. 17-A. Montejo told the detectives that he wanted to tell them the truth, but that the truth was not something he thought they wanted to hear. Montejo reiterated his original explanation: He was at Ferrari's house with an unidentified black male who in fact shot Lewis Ferrari. *Id.* Visibly unhappy with this turn of events, the detectives ended the interrogation and formally processed Montejo for first-degree murder.

Montejo arrived at a holding cell around 3:30 a.m. Though Montejo had been picked up by the police more than twelve hours earlier, had been subjected to misleading and intensive questioning, and had ultimately told the detectives the same explanation that he originally provided [the only

version that was made largely without any storylines suggested by the police], the detectives showed up to interrogate him again in the middle of the night. R. 2350. The detectives (again) did not videotape the first portion of this interrogation. In response to this new interrogation, Montejo gave another version of events implicating himself in the murder.

On the morning of September 10, 2002 – four days after Montejo was detained and first interrogated – officers brought Montejo before a judge for a mandatory initial hearing, which Louisiana law dictates must take place within 72 hours of a defendant's arrest. Because the rule is automatic, law enforcement officials have notice that within 72 hours of arrest, indigent defendants will be appointed counsel. A representative of the Sheriff's office attended the hearing.[7] The minute record (which is the only record of the hearing) attests that the court denied Montejo bail and appointed him counsel through the Office of the Indigent Defender. *Montejo I*, 974 So. 2d at 1258-59; *see also* JA at 78.

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[7] Detective Morse acknowledged that a representative of the Sheriff's Office was present at the hearing. JA at 134, 170. It is unclear from the subsequent colloquy who represented the office, but it was established that Rodney Strain was the Sheriff of St. Tammany Parish on the hearing date. *Id.* The minute record also notes that Sheriff Strain was present. *Id.* at 134.

Upon completion of the "72-hour hearing," Montejo was brought back to the Sheriff's office. Shortly after he returned, Detectives Hall and Galloway visited Montejo to commence another interrogation. *Montejo I*, 974 So. 2d at 1250 n.49. The detectives told Montejo that they wanted him to accompany them on a car ride so that he could show them where he discarded the gun that was used to shoot Mr. Ferrari. In response, Montejo told them that he was represented by counsel:

> They asked me if I would come with them to go clear up where I threw the gun at. So I said, Well, and I don't, I don't, I don't really want to go with you. He said, Do you have a lawyer? I said, yeah, I got a lawyer appointed to me.

JA at 242.

The detectives again pushed Montejo to allow an uncounseled interrogation. They told Montejo that he did not have a lawyer. Montejo testified:

> [Hall] said, No, no, you don't. I said, Yeah, I think I got a lawyer appointed to me, and I guess that's where I messed up, when I said I think I got a lawyer appointed to me. He said, No,

> you don't, He said, I checked, you don't have a lawyer appointed to you.

Id.

The detectives gave Montejo *Miranda* warnings. The detectives then took Montejo from the Sheriff's office in their car. Montejo's appointed counsel arrived at the Sheriff's Office to confer with his client shortly after the detectives took Montejo away. JA at 78; *id.* at 180 ("He [Montejo's lawyer] was pretty upset in that I had been out with Mr. Montejo that afternoon."). Thus, Montejo's lawyer did not have the opportunity to consult with his client before the September 10th interrogation.

With his lawyer unavailable to him, the police elicited from Montejo a statement describing his destruction of evidence, and admitting that the statements were freely and voluntary given. They also suggested during the car ride that Montejo write a letter to the victim's wife expressing remorse for his involvement in the murder. *Montejo I*, 974 So. 2d at 1250 n.49; State's Ex. 76 (letter). Montejo testified at trial that the detectives dictated much of the letter's content. *Montejo I*, 974 So. 2d at 1250 n.49; JA at 247. For example, the letter contained the term "simple burglary" — a classification of burglary specific to Louisiana that was unlikely to be a term known to a layperson. JA at 247; *see also Montejo I*,

974 So. 2d at 1250 n.48. Montejo testified that he did not know what simple burglary was at the time that he wrote the letter. JA at 247. The Louisiana Supreme Court noted Montejo's testimony that Detective Galloway "suggested" most of the letter, and noted further that Detective Galloway did not testify at trial. *Montejo I*, 974 So. 2d at 1250 n.49.

After Montejo finished the letter to the victim's spouse, the detectives ended the car ride. *Id.* at 1249 n.44. When they returned to the Sheriff's office, they found Montejo's lawyer waiting for them. JA at 179-81. Detective Hall testified: the "pagers were going off and the cell phones were going off and we were being directed back to the investigation's bureau to meet with a public defender." *Id.* at 180. Detective Hall explained that when he met with the public defender, the attorney was "pretty upset that I had been out with Montejo that afternoon, and he started getting on me pretty intently about having been retained as [Montejo's] counsel." *Id.* at 180-81. No testimony established why the detectives would not expect Montejo to be represented more than 72 hours after his arrest. Nor does the record establish why the dispatcher could not reach the detectives as they drove around in their own police vehicle with pagers and cell phones (and also a closed-circuit radio in the vehicle) while Montejo's counsel remained at the Sherriff's office trying to contact the detectives to bring his client back to the station.

C. *Proceedings Below*

The proceedings that occurred prior to the decision in *Montejo v. Louisiana* are detailed in Montejo's opening brief in that case. In *Montejo*, this Court remanded the case to the Louisiana Supreme Court. Montejo urged the Louisiana Supreme Court to remand to the district court for fact finding. He also contended that the State's intentional misrepresentations prevented him from meeting his attorney, rendering his statements inadmissible. Montejo also pressed his *Edwards* claim, both because the police ignored his clear request for counsel on September 10th, and because the detectives never complied with his unequivocal request for counsel on September 6th. He detailed why these errors are not harmless beyond a reasonable doubt.

The Louisiana Supreme Court affirmed Montejo's conviction and death sentence. *State v. Montejo*, 2006-KA-1807 (La. 05/11/10); 40 So. 3d 952 (hereinafter *Montejo II*). Despite this Court's consternation of Louisiana's "unsound," "unworkable" and "troublesome" interpretation of the then-applicable *Jackson* rule,[8] the Louisiana

[8] This Court noted that the Louisiana Supreme Court's analysis of the *Jackson* rule was derived from a Fifth Circuit decision. *Montejo*, 129 S. Ct. at 2083.

Supreme Court referred to Montejo's *Jackson* claim as "dubious" even if *Jackson* remained good law. App. A at 48-49A. Though this Court stated that Montejo's reliance on *Jackson* instead of *Edwards* or *Burbine* was "understandabl[e]," the Louisiana Supreme Court explained that the "dubious basis" of Montejo's *Jackson* claim meant that he should have relied upon *Edwards* and *Burbine* as alternative grounds at the suppression hearing. *Id.* That court refused to provide substantive review, and refused rehearing. This Petition ensues.

REASONS FOR GRANTING THE WRIT

The State of Louisiana secured a conviction and death sentence against Jesse Montejo through a series of interrogations over a four-day period despite Montejo's repeated requests for counsel.

The Louisiana Supreme Court's opinion on remand seems calibrated to evade this Court's review. This Court was very clear. The state court should answer the state law question: whether testimony at trial could be considered when determining whether a statement can be introduced. The Louisiana Supreme Court answered that question, "yes."[9] This Court also held that Montejo

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[9] The Louisiana Supreme Court agreed it "has stated that it will look to the totality of the evidence presented at the motion

could press any claim related to the September 10th statement. But, the Louisiana Supreme Court held that Montejo *could not* raise the claims because they had not been raised before.[10]

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to suppress hearing and the trial." App. A at 45A (citing *State v. Burkhalter*, 428 So. 2d 449, 455 (La. 1983) and *State v. West*, 408 So. 2d 1302, 1308 (La. 1982) ("Although the state put on no evidence at the hearing on the motion to suppress, we look to the totality of the evidence produced both at that hearing and at trial when we assess whether the state has carried its burden.")).

[10] That the Louisiana Supreme Court ignored the remand order should suffice. Additionally, the district court specifically cited *Burbine* and *Edwards* in relation to its decision to admit the September 10th interrogation, and the Louisiana Supreme Court decided the *Burbine* claim on the merits. *See, e.g*, *Cohen v. Cowles Media Co.,* 501 U.S. 663, 667 (1991) ("It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided."). Moreover, the procedural rule that the Louisiana Supreme Court applied to default Montejo is newly crafted and uniquely applied to him. Not a single case that the Louisiana Supreme Court cites in support of its purported procedural bar stands for the proposition that Louisiana courts read "new grounds" to include alternative arguments under the same constitutional ground asserted at the suppression hearing. *See, e.g.*, *State v. Brown*, 434 So. 2d 399, 402 (La. 1983) (accused cannot rely on state procedural bar argument on appeal when he relied at trial solely on the grounds that "the incriminating statements were elicited from the defendant in derogation of his Sixth Amendment right to

The state court's decision to leave intact its original treatment of the *Burbine* issue is particularly troublesome. The Louisiana Supreme Court's decision relied upon a clear misstatement of federal law: "[T]he United States Supreme Court permitted a *Miranda* waiver to stand under the *Sixth Amendment* where a suspect was not told that his lawyer was trying to reach him during questioning and the lawyer was told by police that the defendant would not be questioned without the lawyer's presence." *Montejo I*, 974 So. 2d at 1262 n.69 (emphasis added). *Burbine* is a *Fifth Amendment* decision wherein the Court emphasized that deceitful police conduct of the type evidenced there would not be tolerated in the Sixth Amendment context. Supreme Court Rule 10 (c) review is appropriate because the state court "decided an important federal question in a way that conflicts with relevant decisions of this Court."

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counsel."). Unsurprisingly, the Louisiana Supreme Court itself frequently uses the term "grounds" to apply to the specific federal constitutional amendment upon which the claim rests rather than an alternative argument that springs from the same constitutional source. *See, e.g.*, *State v. Smith*, 785 So. 2d 815, 818 (La. 2001) ("The failure . . . to secure a *Miranda* waiver . . . *did not require suppression . . . on Fifth Amendment grounds*.") (emphasis added).

Finally, the state court ruled that any potential error was harmless merely because DNA evidence connected Montejo to the murder scene. The harmless-error analysis did not even consider whether the introduction of the tainted evidence prejudiced Montejo's defense against the death penalty, or whether it prejudiced his defense of second rather than first-degree murder (a claim entirely consistent with the Montejo's defense in the case).

Especially now that *Jackson* no longer stands, thorough review of apparent police misconduct is necessary to guarantee that a post-attachment decision to forego counsel is the result of a voluntary choice by the accused. The Louisiana Supreme Court twice failed to provide meaningful review. This Court should grant the Petition and reverse.

I. THE SEPTEMBER 10th STATEMENTS SHOULD HAVE BEEN SUPPRESSED

1. The Detectives Violated the Sixth Amendment by Falsely Informing Montejo that He Did Not Have a Lawyer Appointed to Represent Him

Montejo testified at trial that he explained to Detective Hall on September 10th that he did not want to go for a ride and that he already had been appointed counsel: "I said, well, and I don't, I don't, I don't really want to go with you. He said, Do you

have a lawyer? I said, yeah, I got a lawyer appointed to me." JA at 242. Detective Hall said, "no, no, you don't. I said, Yeah, I think I got a lawyer appointed to me, and I guess that's where I messed up, when I said I think I got a lawyer appointed to me. He said, No, you don't, He said, I checked, you don't have a lawyer appointed to you."[11] *Id.*

The Louisiana Supreme Court assumed Montejo's testimony to be credible, but cited *Burbine* – incorrectly identifying it as a decision under the Sixth rather than Fifth Amendment – for the proposition that deliberate law enforcement deceitfulness does not vitiate the integrity of a right to counsel waiver. *See Montejo I*, 974 So. 2d at 1261-62 n 69. This is not so.

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[11] Detective Hall's testimony was in some respects consistent with Montejo's. For example, Detective Hall stated that Montejo "told him he had not been contacted by an attorney," when the officers began to interrogate him — which apparently is true, as Montejo's court-appointed lawyer was trying unsuccessfully to reach Montejo while the police were interrogating him. According to the Louisiana Supreme Court, Detective Hall also "testified that, at some point during this excursion," — i.e., after the police had improperly obtained the "waiver" — "he asked Montejo whether he had a lawyer or anyone in his family had contacted him about retaining one for him, and Montejo responded negatively." *Montejo I*, 974 So. 2d at 1249 n.46.

In *Moran v. Burbine*, 475 U.S. 412 (1986), this Court addressed a case where the lawyer for a pre-indictment suspect (whom the suspect's sister had retained without suspect's knowledge) phoned the police station to inform officers that she represented the suspect. The officers assured her that he would not be interrogated before she arrived the next day. However, the suspect confessed later that same evening. The police never informed him that his sister had retained a lawyer for him. But, he never made any semblance of a request to have counsel present. Stating that the police are not required to "supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights," the Court held "only that the Court of Appeals erred in construing the Fifth Amendment to the Federal Constitution to require the exclusion of respondent's three confessions." 475 U.S. at 422, 428.

This Court has suggested just the opposite in the Sixth Amendment context. In *Burbine*, the Court explained that the "difficulty for respondent is that the interrogation sessions that yielded the inculpatory statements took place *before* the initiation of 'adversary judicial proceedings.'" *Id.* at 428 (internal citation omitted) (emphasis in original). Indeed, the *Burbine* Court "readily agree[d] that once the right has attached, it follows that the police may not interfere with the efforts of a defendant's

attorney to act as a medium between the suspect and the State during the interrogation." *Id.* (internal citation omitted). The Court has explicitly recognized that the scope and nature of a defendant's right to counsel changes when his Sixth Amendment right attaches. Where a defendant's Sixth Amendment right to counsel is at stake, the police may not prevent an attorney from trying to meet his client. *See Maine v. Moulton*, 474 U.S. 159, 176 (1985); *Brewer v. Williams*, 430 U.S. 387, 401 n.8 (1977); *Patterson v. Illinois*, 487 U.S. 285, 296 n.9 (1988) ("For example, we have permitted a *Miranda* waiver to stand where a suspect was not told that his lawyer was trying to reach him during questioning; in the Sixth Amendment context, this waiver would not be valid." (citing *Burbine*, 475 U.S. at 424, 428)).

Not only did the encounter at issue occur after Montejo's Sixth Amendment right to counsel attached, but the facts here are far more offensive to the right than those presented in *Burbine*. The detectives did not simply fail to "help [the defendant] calibrate his self-interest;" Detective Hall affirmatively told Montejo[12] that he had not been

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[12] Detective Hall indisputably provided Montejo with incorrect information. The only question left unresolved by the Louisiana Supreme Court was whether Detective Hall knew he was providing false information or whether, as Hall claimed, he was

appointed counsel. *Cf. Colorado v. Spring*, 479 U.S. at 576 n.8 ("the Court has found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege."); *Missouri v. Seibert*, 542 U.S. 600, 616 (2004) (plurality opinion) (ruling statements inadmissible where it found: "At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings."); *id.* at 620-21 (Kennedy, J., concurring) (The unconstitutional "tactic relies on an *intentional misrepresentation* of the protection that *Miranda* offers and does not serve any legitimate objectives that might otherwise justify its use." (emphasis added)).

Moreover, unlike Mr. Burbine, Montejo stated that he did not want to go with the detectives and then affirmatively indicated that he had been appointed counsel. This is the second indication that Montejo made to the same detectives that he wished to speak with a lawyer. Montejo's testimony is particularly disturbing because the detective claimed that he had checked and that Montejo had not been appointed counsel. In *Moulton*, the Court emphasized that the Sixth Amendment provides the

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unaware that counsel had been appointed to Montejo in this capital murder case.

accused with "the right to rely on counsel as a 'medium' between him and the State." 474 U.S. at 176. The Court elaborated on the unique "affirmative obligation" that the Sixth Amendment imposes on law enforcement "not to act in a manner that circumvents the protections accorded the accused by invoking this right." *Id.* The *Moulton* Court underscored that a determination of whether a law enforcement agency's actions contravene the right to counsel must be made in light of this obligation.

Detective Hall testified that he did not know that Montejo had been appointed an attorney. JA at 77. His testimony is at least puzzling. *See* Transcript of Oral Argument at 30-31, *Montejo*, No. 07-1529 (U.S. argued Jan. 13, 2009) (Ginsburg, J.), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-1529.pdf ("That's very puzzling. This is an experienced police officer. The 72-hour hearing is required in every case where defendant is in State custody. So how could an experienced police officer not know? . . . The very same day that he [Montejo] got to the 72-hour hearing a day late, how could he [Hall] not have known?"); *id.* at 31 (Kennedy, J.) ("of course, they [the police] know – it's a death case – that counsel is going to be appoint – or it's a murder case – that counsel is going to be appointed. Everybody knows that except this defendant."); *id.* at 34-35 (Stevens,

J.) ("But it happens in 99 percent of the cases, I think, in a capital case. And surely, the police should be presumed to know what the normal procedure is.").

The detectives that approached Montejo *after* he attended his 72-hour hearing were experienced law enforcement officers.[13] They also were the same detectives who were present at the interrogation on September 6th and 7th. These officers knew both that every defendant in Louisiana is taken to a 72-hour hearing to have counsel appointed *and* that Montejo had been in custody for more than 72 hours.[14]

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[13] Article 230.1, § A of the Louisiana Code of Criminal Procedure requires that "a 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. . . . ." La. C. Cr. P. Art. 230.1.

[14] Even if those particular detectives did not know that Montejo had been appointed counsel (an implausible scenario), the minute record of the 72-hour hearing indicates that Sheriff Strain was present. JA at 78. Detective Morse also testified at the suppression hearing that a representative of the Sherriff's office stood present at the hearing. This Court's jurisprudence imputes knowledge of a defendant's request for counsel to the entire police force. *See Arizona v. Roberson*, 486 U.S. 675, 680 n.3 (1988) ("knowledge of request for counsel 'is imputed to all law enforcement officers who subsequently deal with the suspect'") (internal citation omitted).

Detective Hall's carefully calibrated testimony suggests that the police conduct was guided by deception rather than a desire for a voluntary rights waiver.[15]

Moreover, in *Burbine*, the retained lawyer simply called the police station. She did not show up and demand to speak with her client. In contrast, the record here suggests Montejo's counsel walked through the front door while detectives scrambled out the back door with Montejo in tow. The detectives drove Montejo in their official police vehicle. In addition to any two-way radio native to the vehicle, the detectives had cell phones and pagers "going off." No evidence explained why the prison staff could not reach the detectives in their official vehicle. However, Detective Hall testified

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[15] Police misconduct throughout the record colors the detectives' credibility. The detectives repeatedly deceived Montejo during the September 6th interrogation. *See, e.g.*, *supra* note 4. Other mistakes also give pause. On the videotape initially provided to defense counsel, Montejo's request for counsel was inaudible due to 'electronics' malfunction. *See* JA at 88 ("Defense counsel: The tape that we saw does not show asking for a lawyer right. . . . It ended before that."). The waiver forms that make up State's Exhibits 67 and 68 both indicate that Detective Hall interviewed Montejo prior to the appointment of counsel on September 9th; however in both instances the interviews actually occurred after the appointment of counsel on September 10th. *See* JA at 175.

that when they finally arrived back at the station, "pagers were going off and the cell phones were going off and we were being directed back to the investigation's bureau to meet with a public defender." JA at 180. Detective Hall testified that Montejo's lawyer was "pretty upset that I had been out with Montejo that afternoon, and he started getting on me pretty intently about having been retained as [Montejo's] counsel." JA at 180-181.

The detectives affirmatively misrepresented to Montejo that he did not have a lawyer, prevented his counsel from locating him; and failed to fulfill their duty under *Moulton*. On the afternoon of September 10th, Montejo had asked for a lawyer more than three days earlier and still had not met with one. Montejo also thought he had already been appointed an attorney, but, according to the police, that appointment had not really happened. Faced with rife misinformation and deceit, Montejo confronted two grim prospects: first, the police would continue to interrogate him indefinitely (or, presumably until he gave them the answers they wanted to hear); and, second, no lawyer would come to represent him. The police conduct here runs afoul of the Sixth Amendment.

This Court provided the Louisiana Supreme Court with a second opportunity to make an explicit credibility determination regarding the testimony

that forms the core of the Sixth Amendment issues here. That court chose to leave the record unaltered. This Court should decide the case on this record. The prosecution must demonstrate the voluntariness of a Sixth Amendment waiver. It cannot do so here.

2. The Detectives' Refusal to Comply with Mr. Montejo's Unambiguous Request for Counsel Violates Edwards.

The record contains two versions of what happened when detectives approached Montejo on September 10, 2002. One version – Montejo's – establishes an *Edwards* violation. The other version – Detective Hall's – does nothing to disprove it. *See supra* Section I(1) (detailing Hall's testimony). Because the state court declined to make a credibility determination, Montejo's testimony governs, and it establishes that the detectives violated *Edwards.*

The question under *Edwards* is whether the suspect "has invoked his right to have counsel present;" if he has, the "interrogation must stop." *Montejo*, 129 S.Ct. at 2090 (citing *Edwards*, 451 U.S. at 484). The record clearly establishes that the interrogation did not stop; thus, the question here simply is whether Montejo invoked his right to counsel when told the detectives:

> I don't, I don't, I don't really want to go with you, . . . I got a lawyer appointed to me.

JA at 242. The meaning of Montejo's statement is clear: I do not want to go with you because I have a lawyer. *Cf. Minnick v. Mississippi*, 498 U.S. 146 (1990) (*Edwards* violation occurred where police continued interrogation after the suspect stated (in part): "Come back Monday when I have a lawyer").[16]

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[16] Though the Louisiana Supreme Court procedurally barred this claim, it addressed the merits in summary fashion, stating that Montejo's request for counsel is "more properly characterized as a statement that the defendant might want counsel, or an 'ambiguous or equivocal' request for counsel, or an indecisive request for counsel, each of which the *Davis* Court stated would be insufficient to trigger *Edwards* protections against further questioning." App. A at 55A (citing *Davis v. United States*, 512 U.S. 452, 459 (1994). This everything-but-the-kitchen-sink justification for the fact that the police did not respect Montejo's invocation is incorrect. In *Davis*, the suspect stated, "[m]aybe I should talk to a lawyer." 512 U.S. 452, 455 (1994). The *Davis* Court noted that "the uncontradicted testimony of one of the interviewing agents" that the police,

> made it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren't going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and

Here, the suspect did not elect to speak with the police. *See Texas v. Cobb,* 532 U.S. 162 (2001). Montejo had been in police custody for more than 90 hours at the time the detectives arrived at his holding cell on the 10th. He had been interrogated extensively, and as the Louisiana Supreme Court noted, harshly and deceitfully, including for more than seven hours straight on the 6th and 7th. The video shows Montejo's distress as the police display persistent displeasure. The video shows Montejo's despair as he attempts to tell detectives the truth, which is that he was not the shooter, and they

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> he said, [']No, I'm not asking for a lawyer,' and then he continued on, and said, 'No, I don't want a lawyer.'

Id. In stark contrast, Montejo stated that he did not want to go *and* that he had been appointed a lawyer. Unlike *Davis*, the detectives here did not "ma[k]e it very clear that we're not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him," but instead responded by falsely informing Montejo that he had not been appointed counsel. *See Spring*, 479 U.S. at 576 n.8 (noting "the Court has found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege"); *Burbine*, 475 U.S. at 424 (police "conduct is [ ] relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.").

respond with disdain. The video shows Montejo unequivocally assert his desire to speak with a lawyer, but the detectives swiftly expressed disappointment with Montejo when he elected to take that path, and they immediately charged him with first-degree murder. A magistrate had appointed counsel earlier on the 10th. But, the detectives continued to come and go from his holding cell at least three times on that day alone. This is the context in which this Court must consider Montejo's invocation of the right to counsel.

In *Montejo v. Louisiana*, this Court provided assurance that "a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings." 129 S.Ct. at 2090. At that point, not only must the immediate contact end, but 'badgering' with later requests is also prohibited. However, none of the promises of *Edwards*'s sufficiency ring true here if this Court leaves Montejo's conviction and sentence intact. First, the record indicates that on September 10th, detectives provided Montejo with *Miranda* warnings *after* Montejo told them he did not want to go and that he already had an attorney. In this situation, there is no need to worry about protecting the defendant's ability to elect to speak with police; the concern must be to protect the defendant from badgering that renders the Fifth Amendment hollow.

September 10th was not the first time Montejo requested counsel. Once a defendant invokes his right to counsel, police officers cannot re-initiate questioning unless the defendant has counsel with him. *Minnick*, 498 U.S. at 153. Therefore, in considering the September 10th letter, this Court should also answer the antecedent question – addressed in Section II, of whether the September 6th waiver following Montejo's unequivocal request for counsel was valid.

3. The Error Is Not Harmless Beyond A Reasonable Doubt

This Court reviews state court harmless-error analysis *de novo*. *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988). Under *Chapman*, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless, beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). The State must carry that stringent burden, and cannot do so on this record.

As the Louisiana Supreme Court observed, at the time of trial, the defense made clear that Montejo would not have testified but for the trial court's rulings on the motion to suppress statement. App. A at 15A ("On the morning before trial, out of the presence of the jury, defense counsel remarked that his client's decision to testify was based, in part, on the denial of his motion to suppress."). Montejo

defended against the first-degree murder charge by stating at trial that he did not shoot Ferrari. That defense was consistent with Montejo's September 6th statements and is corroborated by Mary Melancon's trial testimony. The September 10th letter is the strongest evidence contradicting Montejo's trial testimony because it indicates that Montejo intentionally shot Ferrari during the course of a burglary. The only other evidence that Montejo shot Ferrari comes from Montejo's statement early in the morning on September 7th, after he had endured an enervating and ruthless 12-hour long interrogation. The September 10th letter is damning because it corroborates that version of events.

The error's harmfulness is particularly acute at the sentencing phase. The entire penalty phase was completed before lunch. The defense called only two witnesses. Montejo had testified at the guilt phase to confront the letter. His efforts to retract the apology letter – and thus support his defense that he did not shoot Ferrari – were characterized as retracting his remorse for his role in the shooting death of Mr. Ferrari.

The letter's powerful nature reveals why the prosecution relied so heavily upon it throughout the trial. The State's opening statement repeatedly and dismissively invoked what it referred to as Montejo's

"I'm so sorry" defense.[17] By the end of the opening, the prosecution was using the letter not just to incriminate Montejo, but also to mock him. R. 2262 ("It was a close contact wound. I am so sorry."). The prosecution next used the letter to impeach Mary Melancon, the only witness the defense called in the guilt phase. After being shown the letter, Melancon testified that she "didn't even know that [the letter] existed." JA at 253. The prosecution then showed the letter to the jury. R. 2819-20. Finally, during the rebuttal portion of closing argument – the last statement the jury heard before deliberating – the prosecution again returned to "I am so sorry" and invited the jury to credit Montejo's confession while at the same time calling him a liar.[18]

The Louisiana Supreme Court's determination that the error was harmless is akin to sticking the

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[17] *See* JA at 166 ("The defendant . . . write[s] a letter to this lady and tell[s] her I'm sorry, I am so sorry. . . . [I]t shouldn't have happened this way and he feels sorry."); R. 2258-59 (Wait, wait, wait, we got another version . . . the I am so sorry version."); R. 2259 ("So it will be up to you to evaluate the . . . I-am-so-sorry version. . . ."); R. 2261 ("We also then get the I'm-so sorry version").

[18] *See* JA at 291, 290 ("[Y]ou know [it] is not to be true" that "the finest of St. Tammany Parish police officers lied, deceived you, because they coerced an apology letter from the defendant."); R. 2834 ("A man died for that shit, you are touching my heart. . . . Another lie. I am so sorry.").

label-'kosher' on a pig and calling it a cow. Saying it doesn't make it so. The court's opinion does not even address the statement's impact on the penalty phase, or on the jury's determination that Montejo was guilty of first rather than second-degree murder. Nor does the Court address the possibility that multiple confessions could unfairly "reinforce[] and corroborate[] each other." *Arizona v. Fulminante*, 499 U.S. 279, 299 (1991). The error is not harmless.

II. THE POLICE OBTAINED THE SEPTEMBER 6th STATEMENTS BY VIOLATING *EDWARDS*.

The Fifth Amendment jurisprudence requires police officers to "scrupulously honor" the defendant's request for counsel by ceasing interrogation immediately after the suspect's request for a lawyer. *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). In *Rhode Island v. Innis*, the Court underscored that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." 446 U.S. 291, 301 (1980).

The Louisiana Supreme Court acknowledges that Montejo unequivocally requested counsel on September 6, 2002. *See Montejo I*, 974 So. 2d at 1254

("Defendant's unequivocal and unambiguous request for counsel was captured on video."). However, that court ruled that Montejo unilaterally retracted his request and re-initiated conversation about his case. The video recording tells a different story:

> Detective Major: Dude, you don't want to talk to us no more, you want a lawyer, right? *I trusted you and you let me down.*
>
> Montejo: No, come here, come here.
>
> Detective Major: No, no, I can't.
>
> Montejo: No, come here . . .
>
> Detective Major: No, you've asked for an attorney, and you are getting your charge. And the shame of it is . . . .

Id. at 1255 (emphasis added). Only at this point does Montejo relent and state that he does not want a lawyer. *Id.*

The Louisiana Supreme Court found Detective Major's comments warrant "close scrutiny" because he commented on Montejo's election to not communicate outside the presence of counsel. *Id.* That court also commented on Detective Major's "hectoring" tone when the detective stated: "No,

you've asked for an attorney, and you are getting your charge. And the shame of it is . . . ." *Id.* Detective Major's comments constitute the functional equivalent of interrogation. Any person – not to mention a person who has been arrested, placed into an interrogation room, and lied to and screamed at for more than five hours – would respond to sentiments such as "I trusted you and you let me down" and "the shame of it is" with a response.

The Louisiana Supreme Court was simply wrong to hold that a defendant's response to the police officer's assertion "you let us down," constituted an initiation. *Id.* at 1256. That the officer's statements precipitated Montejo's change of mind is a clear indication that the detective rather than Montejo initiated the communication. *See, e.g.*, *United States v. Gomez*, 927 F.2d 1530, 1539 (11th Cir. 1991).

Moreover, the fact that the video recording – which had been working properly for hours on end while the police sought to have Montejo incriminate himself – coincidentally stopped right when the detectives attempt to get Montejo to retract his right to counsel is at least unsettling. The testimony of lead detective Morse only heightens the discomfort. Morse testified:

We were walking out of the interview room. He said well, what is going to happen now? Basically, we said, well, you're going to be arrested. He said wait, I have some other stuff I want to talk to you about. I told him, I said, well, you have asked for an attorney. We cannot continue with this interview with you. He said please, I really got a lot more stuff. He said I don't want it to look bad for me. I want to talk to you some more. I said, Jesse, I can't talk to you anymore. This went on a couple times. I said I cannot talk to you anymore. You have asked for a lawyer. You have to have one present now before I can ask you any further questions. He basically begged us to reinterview him. At that point I said well we have some things we are going to have to clarify before we proceed and at that point we did so. * * *

See, it was our intention to cease the interview at the point he had requested an attorney. We decided to continue after he basically, like I said, begged us to continue the interview because he said he had some additional things he wanted to say.

JA at 19-20. The video casts serious doubt upon[19] Morse's claim that Montejo "begged" the officers to re-interview him. And, though Morse testified that Montejo was "not interviewed during the preceding untaped interval" and that "he understood his rights and wished to continue the interview in the absence of counsel," the ten-minute gap in the recording gives way to a tearful Montejo who is covering his head with his hands and moaning: "What am I going? What am I doing? What am I doing?" State's Ex. 17-A. The detectives' behavior and the first-impression created when the recording resumes indicate that the detectives intentionally tried to obtain a retraction from Montejo.

In *Montejo*, this Court again emphasized that "the *Edwards* rule is designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." 129 S.Ct. at 2085 (internal citation omitted). That anti-badgering design failed here. After Montejo requested counsel on September 6th, the detectives badgered him into retracting. On September 10th, after Montejo explicitly stated that he did not wish to go on a ride with the police and that he had been appointed a lawyer, a detective falsely informed Montejo that no lawyer had been

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[19] The record reflects that defense counsel was not able to watch the videotape until after Morse's testimony. *See supra* note 15.

appointed. The detectives twice engaged in the very conduct that *Edwards* was meant to prohibit. The Louisiana Supreme Court's rubber-stamp approval of the police conduct is especially difficult to swallow here because this is the case in which this Court overruled *Jackson*'s broader protections and held that the *Edwards* rule would "suffice to protect" "the integrity of a suspect's voluntary choice not to speak outside his lawyer's presence" in the Sixth Amendment context. *Montejo*, 129 S.Ct. at 2090. The pattern of police conduct – specifically, the badgering of Mr. Montejo on September 6th – warrants a summary reversal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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