No. 07-1529

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A. *State Court Proceedings*

Defendant herein, Jesse J. Montejo, (hereinafter referred to as "Montejo") and another individual, Jerry Moore, were indicted on October 24, 2002 by a grand jury for the first degree murder of Louis Ferrari, who was found by his wife after being murdered in their home on September 5, 2002. The trials of the two individuals, Montejo and Jerry Moore, were severed pursuant to a defense motion.

The defendant herein, Montejo, proceeded to trial, and a jury found Montejo guilty of first degree murder on March 9, 2005. Following the penalty phase, which was held on March 10, 2005, the jury determined that Montejo should be sentenced to death. Montejo's conviction and sentence were affirmed by the Louisiana Supreme Court on January 16, 2008, and his request for rehearing was denied on March 7, 2008.

Montejo has now petitioned this Honorable Court, arguing that his Sixth Amendment rights were violated when the police interrogated him after his right to counsel had attached and counsel had been appointed to represent him. Montejo argues that a letter he wrote to the victim's widow, which was introduced into evidence at the trial, was obtained in violation of his Sixth Amendment rights and should have been excluded from evidence.

For the reasons stated herein, the State submits that the Petition for Writ of Certiorari filed herein by Jesse Montejo should be denied. While the State submits that Montejo's claim should fail on the merits,

the State further submits that any error in the introduction of the statement at issue was harmless in light of the other evidence, which is not the subject of this application and which overwhelmingly proved Montejo's guilt.

B. *Facts*

On September 5, 2002, Lou Ferrari was murdered in his home in St. Tammany Parish. Lou Ferrari was found in the kitchen of his home by his wife, Pat Ferrari. Lou Ferrari had suffered two gunshot wounds, one to the right chest area and one to the right eye. (Testimony of Dr. Michael Difatta, Record at p. 2268 and 2272). 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. (Testimony of Dr. Michael Difatta, Record at pp. 2269–2270). 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. (Testimony of Dr. Michael Difatta, Record at pp. 2272-2273).

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

Montejo was known to drive a blue van, which was his mode of transportation in driving Moore. (Testimony of Louis Ferrari, III, Record at pp. 2428). The blue van was apparently quite distinctive, with a "cattle guard" on the front. (Testimony of Stacy Stubbenville, Record at pp. 2438-2439). Defendant was placed at the scene of the murder at the approximate time of the murder by neighbors of the Ferraris who recalled this van. 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. (Testimony of Detective Jerry Hall, Record at pp. 2712-2713). 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

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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 was affirmed by the Louisiana First Circuit Court of Appeal, Docket no. 2006 KA 1979, and the Louisiana Supreme Court denied his writ application.

chance of a random match being 1 in 163 billion, that the DNA found in the fingernail scrapings from the victim matched defendant. (Testimony of Dr. Sudhir Sinha, Record at pp. 2623-2632).

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 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". (Testimony of Dr. Michael Difatta, Record at p. 2273). 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. Defendant 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 decision, 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. (Pet. App., p. 18a). Montejo, as detailed below, had an extensive criminal history. 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 claiming accident and a third party's involvement 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." (Pet. App. 9a).

Montejo further testified at trial to his extensive criminal history from Florida, particularly with regard to burglary and robbery, and his prior convictions are as follows:

Docket No. 963783:	Theft, burglary
Docket No. 962944:	Armed burglary, criminal mischief
Docket No. 962945:	Burglary, petty theft
Docket No. 962723:	Burglary, grand theft
Docket No. 962946:	Armed burglary, burglary, grand theft
Docket No. 963343:	Armed burglary
Docket No. 963342:	Burglary, petty theft
Docket No. 963226:	Armed burglary, theft
Docket No. 963227:	Burglary, grand theft
Docket No. 963228:	Burglary, grand theft
Docket No. 963341:	Armed burglary, grand theft
Docket No. 962344:	Burglary, grand theft
Docket No. 960294:	Armed burglary, burglary

With respect to the letter which is at issue in this Petition, a hearing was held on defendant's motion to suppress. Detective Jerry Hall testified that on the

morning of September 10, 2002[2], 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 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. (Testimony of Det. Wade Major, Record at p. 967).

The police had divers in the lake, but had been unable to locate the weapon. Detective Hall approached Montejo, because Montejo had previously offered to help locate the gun 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. Although defendant alleges, 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

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[2]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. (Testimony of Detective Jerry Hall, Record at p. 1016).

officers. 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. (Testimony of Detective Jerry Hall, Record at p. 999). 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. (Testimony of Detective Jerry Hall, Record at p. 1002). 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." (Pet. App. 49a).

ARGUMENT

A. The Ruling of the Louisiana Supreme Court Was in Accordance with the precedent of this Honorable Court

1. Facts Relevant to Sixth Amendment Issues

The minute entries from this proceeding reflect that a seventy-two (72) hour hearing, pursuant to Louisiana law, was held 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 is included in Petitioner's Appendix D, p. 63a, and 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".

Prior to this date, the police already had Montejo's videotaped confession, which was admitted at trial, and which is not the subject of this petition. During that confession, Montejo had provided the police with an approximate area where he had thrown the gun into Lake Ponchartrain, the largest lake in Louisiana, consisting of approximately 600 square

miles. During his confession, Montejo told the officers 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. (Testimony of Det. Wade Major, Record at p. 967).

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 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.

Although defendant alleges, based upon 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. 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. (Testimony of Detective Jerry Hall, Record at p. 999). Not only did Montejo not ask for the help of a lawyer, he specifically denied having a lawyer. In fact, Montejo told the detectives he just wanted to clear this up and never requested a lawyer. (Testimony of Detective Jerry Hall, Record at p. 1002). 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." (Pet. App. 49a). In the letter, Montejo attempts to excuse his actions, in yet another exculpatory attempt.

2. Montejo's Sixth Amendment Rights Were Not Violated

The Sixth Amendment right to counsel is triggered at or after the time judicial proceedings have been initiated, whether by way of formal charge, preliminary hearing, indictment, information or arraignment. *Fellers v. United States*, 540 U.S. 519, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004).

The Louisiana Supreme Court held in this case that the seventy-two hour hearing on September 10, 2002 marked the initiation of adverse criminal proceedings, and in this case, Montejo's right to counsel attached at that hearing. (Pet. App., p. 47a). The State submits that the issues then become whether the police interrogated or "deliberately elicited" incriminating statements from Montejo after that hearing, whether Montejo asserted or exercised his right to counsel, and whether the waiver of his rights was valid.

In *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), this Honorable Court held that if police initiate interrogation *after a defendant's assertion* at an arraignment or similar proceeding of his right to counsel, any waiver of the defendant's right to counsel for that police initiated interrogation is

invalid. The first issue is whether the actions at issue herein constituted an "interrogation" or "deliberate elicitation" of incriminating words by police. The State submits that Montejo had already confessed on videotape, had provided a general description of the location where he threw the gun into the lake and told the police he wanted to find the gun to prove the fact that he was not armed when he entered the home. The officers testified that Montejo asked them for a pen and paper, and he wrote the letter to Mrs. Ferrari without any promises or coercion. (Testimony of Det. Jerry Hall, Record at p. 2723). Accordingly, the State submits the officers did not interrogate or deliberately elicit any statements from Montejo. This letter was written by Montejo as yet another attempt to minimize his actions.

In addition, in *Michigan v. Jackson, supra*, the record reflected that the defendant had "requested" that counsel be appointed for him at his arraignment. While in footnote 6 of that ruling this Court stated that it was not suggesting that the right to counsel turned on such a request, the Court also stated that the defendant's *request* for counsel was an "extremely important fact" in considering the validity of a subsequent waiver in response to police initiated interrogation. *See Michigan v. Jackson, supra* at p. 633. It is clear from the Court's statements therein that an affirmative request by a defendant for counsel should be considered. In the case presently before this Honorable Court, there was no such request. The officers clearly testified that Montejo never mentioned to them he had an attorney, and in fact, one of the detectives specifically asked Montejo if he had an

attorney, to which Montejo responded negatively. The officers did not attempt to ignore any request by Montejo for counsel. They actively inquired of Montejo whether he had counsel, and it was Montejo who denied having counsel. Moreover, the minute entry of the hearing does not reflect a request by Montejo for counsel. The state court merely refused to set bond and appointed the public defender to represent Montejo.

As stated above, on the morning in question, the detectives were trying to follow up to locate the gun used to kill Mr. Ferrari. Montejo had already confessed at this point in a videotaped interview, given a general description of the area where he threw the gun and offered to help find the gun. However, Lake Ponchartrain is the largest lake in Louisiana, covering approximately 600 square miles. The officers had been unable to find the gun based upon Montejo's verbal description, so they asked him to accompany them to point out the area where he threw the gun. Montejo voluntarily accompanied the officers. (Testimony of Det. Jerry Hall, Record at pp. 987-990). While in the car, Montejo asked for a pen and paper and wrote an apology letter to Mrs. Ferrari. According to the officers, they did not tell him to write the letter and did not direct him on what to include in the letter. (Testimony of Det. Jerry Hall, Record at p. 2736). It is this letter which is the subject of this petition.

The fact that a defendant's affirmative request for counsel is pivotal to this issue is further exemplified by this Honorable Court's ruling in *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988). In that case, the court determined

whether the interrogation of the defendant after his indictment violated his Sixth Amendment right to counsel. In doing so, this Court noted that there was no doubt that defendant had the right to assistance of counsel at his post-indictment interviews under the Sixth Amendment. The Court noted, in footnote 3 of its ruling, that defendant "had not retained or accepted by appointment" a lawyer to represent him at the time of the questioning. *See Patterson v. Illinois, supra* at p. 290. The court specifically noted that the defendant in that case at no time sought to exercise his right to have counsel present and stated as follows:

> The fact that petitioner's Sixth Amendment right came into existence with his indictment, *i.e.*, that he had such a right at the time of his questioning, does not distinguish him from the preindictment interrogatee whose right to counsel is in existence and available for his exercise while he is questioned. Had petitioner indicated he wanted the assistance of counsel, the authorities' interview with him would have been stopped and further questioning would have been forbidden (unless petitioner called for such a meeting). This was our holding in *Michigan v. Jackson, supra* which applied *Edwards* to the Sixth Amendment context. We observed that the analysis in *Jackson* is rendered wholly unnecessary if petitioner's position is correct: under petitioner's theory, the

> officers in *Jackson* would have been completely barred from approaching the accused in that case unless he called for them. Our decision in *Jackson,* however, turned on the fact that the accused "ha[d] asked for the help of a lawyer" in dealing with the police. [*Citations omitted.*] *Patterson v. Illinois*, *supra* at pp. 290-291.

In rejecting Montejo's alleged Sixth Amendment violation claim, the Louisiana Supreme Court relied upon a decision issued by the United States Fifth Circuit of Appeals in *Montoya v. Collins*, 955 F.2d 279 (5th Cir. 1992), *cert. denied* 506 U.S. 1036, 113 S.Ct. 820, 121 L.Ed.2d 692 (1992). The facts of that case with respect to the Sixth Amendment issues were very similar to the facts currently before this Honorable Court. In *Montoya, supra,* the defendant was taken before a magistrate, and the court noted that his Sixth Amendment rights attached at that time. It was undisputed that during Montoya's appearance before the magistrate, the magistrate appointed counsel to represent Montoya. The Fifth Circuit noted that the Texas state courts found, based upon the record, that Montoya did not request counsel, but the magistrate appointed counsel. The court further noted that at no time did Montoya make a statement or affirmation requesting counsel or accepting counsel. The court found that he "did nothing at all" when the magistrate appointed counsel for him. *See Montoya, supra* at p. 282. The same is true herein. Montejo's Sixth Amendment rights attached at the time of the 72 hour hearing. The minute entry reflects that bond was

denied and the Indigent Defender Board was appointed to represent the defendant, but there was no statement, request or other affirmation made by Montejo at that time to reflect his request for or acceptance of such counsel. The Louisiana Supreme Court held that something more than "mute acquiescence" in the appointment of counsel is necessary to trigger the enhanced protection provided by *Michigan v. Jackson, supra*. (Pet. App., p. 47a).

In *Montoya, supra*, the Fifth Circuit noted that, although Montoya's Sixth Amendment rights attached when he was brought before the magistrate, "standing alone however the mere *attachment* of a defendant's Sixth Amendment rights does not bar police from attempting to interrogate him". *Montoya, supra* at p. 282, *citing Patterson v. Illinois, supra.*

In holding that Montoya did not assert his right to counsel within the meaning of *Michigan v. Jackson, supra*, the Fifth Circuit reasoned as follows:

> The rule of *Jackson* is invoked by the defendant's 'assertion. . . of the right to counsel'. This language connotes an actual, positive statement or affirmation of the right to counsel. At no time did Montoya make such a statement or affirmation-as the state court found, he did not request counsel, and he said nothing at all when the magistrate appointed counsel for him . . . Rather, Montoya never asserted, or invoked, his right to counsel in the first place . . . For purposes of *Jackson,* an 'assertion' means

> some kind of positive statement or other action that informs a reasonable person of the defendant's 'desire to deal with the police only through counsel'. . . This holding does not require a defendant to utter the magic words 'I want a lawyer,' in order to assert his right to counsel . . . But interpretation, whether broad or narrow, is only required when there is a 'request' or an 'assertion' in the first place. [*Footnotes omitted.*] [*Citations omitted.*] *Montoya, supra* at p. 282-283.

The Fifth Circuit found that the argument set forth by Montoya would extend the prophylactic rule of *Michigan v. Jackson, supra,* to situations where the magistrate tells the defendant that he is appointing counsel for the defendant, and the defendant does not reject the appointment, but also does not seek to consult with counsel. The court cited this Honorable Court's decision in *Patterson v. Illinois, supra,* stating that in that case, although the defendant had the right to have the assistance of counsel at his post-indictment interviews, *Michigan v. Jackson* did not apply because the defendant "at no time sought to exercise his right to have counsel present". *Montoya, supra* at p. 283, *citing Patterson v. Illinois, supra* at p. 290. The Fifth Circuit further noted footnote 3 in *Patterson v. Illinois, supra,* recited hereinabove by the State, which references whether a defendant had retained or accepted by appointment a lawyer to represent him. The Fifth Circuit continued as follows:

> If the rule of *Jackson* is invoked by a defendant's 'indicating' his 'choice', then it makes little sense to apply the rule in this case, where Montoya indicated nothing, expressed no choices and made not the slightest response to the magistrate's intention to appoint a lawyer for him. *Montoya, supra* at p. 283.

The State submits the reasoning by the Fifth Circuit Court of Appeals is soundly based upon the precedent of this Honorable Court, and in fact, this Honorable Court denied certiorari in *Montoya, supra*. On the date in question, September 10, 2002, Montejo never requested nor did he accept by appointment counsel. When directly asked about counsel, he denied having counsel. He never sought to invoke his right to counsel, and therefore, the rule of *Michigan v. Jackson, supra*, was inapplicable.

The issue then becomes whether this defendant, Montejo, validly waived his right to counsel. The Louisiana Supreme Court found that there was no dispute that Montejo 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. (Pet. App. 49a). In *Patterson v. Illinois, supra*, this Honorable Court noted that a waiver of the Sixth Amendment right to counsel is valid only when it reflects an intentional relinquishment or abandonment of a known right or privilege. In *Patterson, supra* at p. 293, this Court was convinced that by admonishing the defendant with *Miranda*

warnings, the state had met its burden and that defendant's waiver of his right to counsel at the post indictment questioning was valid. This Court held that the *Miranda* warnings given to defendant made him aware of his right to have counsel present during the questioning and also served to make him aware of the consequences of a decision by him to waive his Sixth Amendment rights during post-indictment questioning. The Court specifically noted that the defendant therein knew that any statement he made could be used against him in subsequent criminal proceedings, noting that this is the ultimate adverse consequence a defendant could have suffered by virtue of his choice to make uncounseled admissions to the authorities. In holding that *Miranda* warnings and the waiver of his rights was sufficient to apprise him of the nature of his Sixth Amendment rights, this Honorable Court stated as follows in *Patterson v. Illinois*, *supra*:

> As a general matter, then, an accused who is admonished with the warnings prescribed by this Court in *Miranda* has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights so that his waiver on this basis will be considered a knowing and intelligent one ... Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer and that he was aware of the state's intention to use his statements to secure

a conviction, the analysis is complete and the waiver is valid as a matter of law. . .

* * *

. . . we have never suggested that one right is 'superior' or 'greater' than the other, nor is there any support in our cases for the notion that because a Sixth Amendment right may be involved, it is more difficult to waive than the Fifth Amendment counterpart.

* * *

Applying this approach, it is our view that whatever warnings suffice for *Miranda*'s purposes will also be sufficient in the context of postindictment questioning. The State's decision to take an additional step and commence formal adversarial proceedings against the accused does not substantially increase the value of counsel to the accused at questioning or expand the limited purpose that an attorney serves when the accused is questioned by authorities. With respect to this inquiry, we do not discern a substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation and his value to an accused at post indictment questioning.

* * *

Thus, we require a more searching or formal inquiry before permitting an accused to waive his right to counsel at

> trial than we require for a Sixth Amendment waiver during postindictment questioning-*not* because postindictment questioning is 'less important' than a trial (the analysis that petitioner's 'hierarchical' approach would suggest)-but because the full 'dangers and disadvantages of self-representation' during questioning are less substantial and more obvious to an accused than they are at trial. Because the role of counsel at questioning is relatively simple and limited, we see no problem in having a waiver procedure at that stage which is likewise simple and limited. So long as the accused is made aware of the 'dangers and disadvantages of self-representation' during postindictment questioning, by use of the *Miranda* warnings, his waiver of his Sixth Amendment right to counsel at such questioning is 'knowing and intelligent'. [*Citations omitted.*] [*Footnotes omitted.*] *Patterson v. Illinois, supra* at pp. 298-300.

As stated hereinabove, there is no factual dispute that Montejo was given his *Miranda* rights and waived those rights prior to writing the letter at issue. Accordingly, the State submits his waiver was valid.

B. Harmless Error

As argued above, the State of Louisiana submits that the state court correctly allowed the introduction into evidence of the letter written by defendant, which he asserts herein was obtained in violation of his Sixth Amendment rights. However, the State submits that even if any error is found by this Honorable Court with the admission of such letter, any such error was harmless in light of the other overwhelming evidence of defendant's guilt at trial.

This Honorable Court has previously held that the admission of a confession alleged to have been obtained in violation of a defendant's rights is subject to harmless error analysis. *Milton v. Wainwright*, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972) and *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The only evidence at issue herein alleged to have been obtained in violation of defendant's Sixth Amendment right to counsel is the letter which he wrote to the victim's widow on September 10, 2002. The State submits that the verdict rendered herein was certainly not attributable to any error in the introduction of the letter at issue. The jury had before it approximately four hours of videotaped interviews with Montejo, conducted prior to this time, in which Montejo admitted that he shot Mr. Ferrari when he unexpectedly returned home and interrupted Montejo's burglary of the home. The videotaped confession is not at issue in this Petition, and the admission of such videotaped interviews with Montejo were upheld by the state district court and the Louisiana Supreme Court. Moreover, the

uncontradicted testimony of the witnesses at trial placed Montejo at the scene of the crime at the approximate time of the murder, DNA evidence matching defendant was found under the fingernails of the victim, and photographs taken of defendant shortly after his arrest shows abrasions on his neck consistent with scratches. The Louisiana Supreme Court noted in its decision the testimony of Dr. Sinha, an expert in molecular biology and DNA analysis, who testified at the trial and "concluded that the victim intentionally scratched defendant because sample characteristics ruled out DNA transfer by coincidental contact". (Pet. App., p. 5a).

This Honorable Court need not reach the merits of Montejo's claims herein, because any error in allowing introduction of the letter at issue was harmless.

CONCLUSION

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

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