



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

November 4, 2014

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NOV - 6 2014

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Donta Kevon Reid v. State of South Carolina

Dear Mr. Shearouse:

Enclosed is a copy of petition for writ of certiorari, a motion for leave to proceed *in forma pauperis* which I have filed today in the United States Supreme Court. Please contact me if you have any questions.

Sincerely,

Kathrine H. Hudgins
Appellate Defender

KH/brr

Enclosure

cc: Jennifer E. Roberts, Esquire



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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

November 4, 2014

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, DC 20543

RECEIVED

NOV - 6 2014

S.C. Supreme Court

Re: Donta Kevon Reid v. State of South Carolina

Dear Mr. Harris:

Enclosed is Petitioner's Certificate of Filing by Mail in the above-referenced case.

Sincerely,

Kathrine H. Hudgins
Appellate Defender

KH/brr

Enclosure

cc: Jennifer E. Roberts, Esquire
Honorable Daniel E. Shearouse, Clerk

No. 14-_____

RECEIVED

In the Supreme Court of the United States

NOV - 6 2014

Donta Kevon Reid

S.C. Supreme Court

Petitioner,

v.


STATE OF SOUTH CAROLINA

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT**

CERTIFICATE OF FILING BY MAIL

I hereby certify that I am a member of the Bar of this Court and that on November 4, 2014, I filed the petition for writ of certiorari in the above-referenced case, together with a motion for leave to proceed in forma pauperis with accompanying affidavit, by causing the originals and ten copies of the same to be deposited in the United States Mail, postage prepaid, and properly addressed to the Clerk of this Court.


Kathrine H. Hudgins
Counsel of Record

SUBSCRIBED AND SWORN TO before me
this 4th day of November, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.

RECEIVED

NOV - 6 2014

No. 14-_____

S.C. Supreme Court

In the Supreme Court of the United States

Donta Kevon Reid

Petitioner,

v.

STATE OF SOUTH CAROLINA

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT**

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Donta Kevon Reid asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

South Carolina Supreme Court; York County Court of General Sessions.

Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Pursuant to Rule 39(1) a copy of the order appointing counsel is attached. Public Defender Melissa Inzerillo of the York County Public Defender office was appointed to represent

Donta Kevon Reid in the York County Court of General Sessions pursuant to the attached order signed October 3, 2009. Appellate counsel was appointed to represent Donta Kevon Reid through the South Carolina Commission on Indigent Defense.

Respectfully submitted,



Kathrine H. Hudgins

Attorney at Law

South Carolina Commission on Indigent Defense

Division of Appellate Defense

1330 Lady Street, Fourth Floor

Columbia, SC 29201

(803) 734-1330

November 4, 2014



CLERK OF COURT'S OFFICE

Post Office Drawer 11746, Rock Hill, South Carolina 29731-1746

Post Office Box 649, York South Carolina 29745-0649

David Hamilton
Clerk of Court

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

NOTICE OF DATE AND TIME OF
INITIAL APPEARANCE FOR
APPROVED PUBLIC DEFENDER CLIENTS

Mr./Ms. Donta Reid, you are charged with Crim. Consp. Murder
3 etc Armed Robbery, Aggravated Assault with a Firearm, Possession of a Firearm

Uniform Warrant Numbers: 1. 11614267 2. 11614269 3. 11614270
4. 11614271 5. 11614287 6. 11614288 7. 11614281

Your Initial Appearance date is set for the 26 day of October, 2009 at
(circle one) 9 a.m. / 1 p.m. at the Moss Justice Center located at 1675 York Highway, York, South
Carolina. The date and time of your Initial Appearance can NOT be changed.

YOU MUST BE PRESENT AT THIS INITIAL APPEARANCE. IF YOU FAIL TO APPEAR FOR YOUR INITIAL APPEARANCE AT THE ABOVE-STATED DATE AND TIME, YOUR BOND WILL BE TAKEN FROM YOU (REVOKED) AND YOU WILL BE PLACED IN JAIL UNTIL THE TRIAL OF YOUR CASE, WHICH COULD TAKE MANY MONTHS. YOU WILL NOT BE GRANTED A NEW BOND IF YOU FAIL TO APPEAR.

You have been APPROVED for an attorney from the Public Defender's Office. Your assigned attorney will meet with you at your Initial Appearance to discuss your case. Again, you MUST be present at your Initial Appearance or you will be returned to jail until the conclusion of your trial.

If you want to have a preliminary (probable cause) hearing in your case, you must request one through your attorney. This request must be made no later than your Initial Appearance date. Once you have made a request for a preliminary hearing, one will be scheduled and you will be notified of the date and time of your preliminary hearing.

I have read this form or have had it read to me. I understand these instructions and I have been given a copy of this form.

*Donta Reid
Defendant's Signature
Date: 10-3-09

[Signature]
Judge's Signature
Date: 10-3-09

FILED-RECEIVED
OCT 26 2009
11:51 AM

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

09-1921

IN THE COURT OF GENERAL SESSIONS
16TH JUDICIAL CIRCUIT

The State of South Carolina)
Plaintiff,)

Donta Kevin Reid vs.)
Donta Reid)

Defendant.)

AFFIDAVIT OF INDIGENCY
AND
APPLICATION FOR COUNSEL
(Defense of Indigency Act, Form No.2)

Court's 5
11-15-11
Wanda Nelson
PERIOD 600-631-6998

CRIMINAL CHARGING DOCUMENT NO.

K614267, K614269, K614270, K614271
K614287, K614288, K614291

NAME OF APPLICANT	Donta Reid
ADDRESS	[REDACTED] K45C [REDACTED]
TELEPHONE NUMBER(S)	[REDACTED]
DATE OF BIRTH	[REDACTED]
SOCIAL SECURITY NO.	[REDACTED]
NAMES OF CO-DEFENDANTS	[REDACTED]

FILED-REC'D
2009 OCT -6 PM 3:48
CLERK OF COURT
SOUTH CAROLINA

1. Are you presently employed? Yes No
- a. If "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

SALARY OR WAGES PER MONTH	NAME AND ADDRESS OF EMPLOYER

If "no", state the name and address of last employment, date of termination of employment, and amount of your salary or wages per month.

SALARY OR WAGES PER MONTH	NAME AND ADDRESS OF EMPLOYER	TERMINATION DATE

2. Include employment information for the spouse, if applicable.

SALARY OR WAGES PER MONTH	NAME AND ADDRESS OF EMPLOYER

If the spouse is not currently employed, state the name and address of last employment, date of termination of employment, and amount of salary or wages per month.

SALARY OR WAGES PER MONTH	NAME AND ADDRESS OF EMPLOYER	TERMINATION DATE

3. List by name, age and relationship to you, any persons who are dependent upon you for support. Indicate beside each how much you contribute toward their support.

NAME	AGE	RELATIONSHIP	AMOUNT OF SUPPORT

4. Have you received within the past twelve months any money from any of the following sources?

- a. Business, profession or form of self-employment? Yes No
- b. Rent payments, interest or dividends? Yes No
- c. Pensions, annuities or life insurance payments? Yes No
- d. Gifts or inheritances? Yes No
- e. Any other sources? Yes No

If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months.

SOURCE OF MONEY	AMOUNT

5. Do you own cash, or do you have any money in a checking or savings account?

Yes No

If the answer is "yes", state the total amount of the cash owned. _____

6. Do you own any real estate, stocks, bonds, notes, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes No

If the answer is "yes", describe the property and state the appropriate value of the items owned _____

7. What kind of motor vehicle do you own? _____

Is it paid for? Yes No

If not, what are the payments? _____

8. How much do you owe (on liens, mortgages, other encumbrances or debts)? _____

FILED-REC'D
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 FBI - TAMPA

I do solemnly swear that the account by me delivered into this court with my application for counsel does contain a true and full account of all my real and personal estate, debts, credits and effects whatsoever without exception, which I or any person in trust for me have or at the time of my possession had, or am, or was, in any respect, entitled to, in possession, remainder or reversion and that I have not at any time since charges were made against me or before, directly or indirectly sold, leased, assigned or otherwise disposed of or made over, in trust for myself or otherwise, other than is mentioned herein.

I understand the appointment of counsel creates a claim against the assets and estate of the person who is provided counsel or the parents or legal guardians of a juvenile in an amount equal to the cost of representation less the amount paid to appointed counsel, the public defender office and/or the Commission on Indigent Defense. I understand that such claim shall be filed in the office of the Clerk of Court in the county where I, my child, or ward are assigned counsel, but that the filing of a claim shall not constitute a lien against my real or personal property unless, in the discretion of the court, part of all of such claim is reduced to judgment by appropriate order of the court after serving me with at least thirty (30) days notice that judgment will be entered.

I understand that, pursuant to §17-3-30(b), I am required to pay a non-refundable \$40.00 application fee to the Clerk of Court for public defender services or other appointed counsel.

I am financially unable to employ counsel and request that counsel be assigned to represent me. I understand that I am entitled to at least thirty days' notice before a claim against me may be reduced to judgment, and I do hereby waive the right to such notice.

This 3rd day of October 2009

X Donta Reid
Defendant or Parent/Guardian of Defendant if applicable

FILED-RECEIVED
2009 OCT 7 PM 3:48
DAVID HAMILTON
CLERK OF COURT
SOUTH CAROLINA

Subscribed and sworn to before me this _____ day of _____, _____ (L.S.)

Notary Public for South Carolina
My Commission Expires: _____

The applicant's request for court-appointed counsel is hereby granted / denied.

Dated: 10.3.09
RTT, South Carolina

[Signature]
Judge/Clerk or Deputy Clerk

In the Supreme Court of the United States

Donta Kevon Reid

Petitioner,

v.

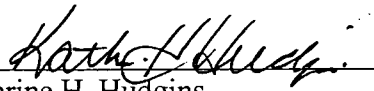
STATE OF SOUTH CAROLINA

Respondent.

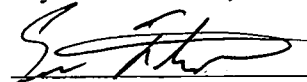
**ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT**

CERTIFICATE OF SERVICE

I certify that copies of the motion for leave to proceed in forma pauperis have been served upon opposing counsel, Jennifer E. Roberts, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, and via email at JRoberts@scag.gov on this 4th day of November, 2014.


Kathrine H. Hudgins
Counsel of Record

SWORN TO BEFORE me this 4th
day of November, 2014.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.



No. 14-_____

In the Supreme Court of the United States

Donta Kevon Reid

Petitioner,

v.

STATE OF SOUTH CAROLINA

Respondent.

***ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT***

PETITION FOR A WRIT OF CERTIORARI

Kathrine H. Hudgins
Counsel of Record
Appellate Defender
SOUTH CAROLINA COMMISSION
ON INDIGENT DEFENSE
DIVISION OF APPELLATE DEFENSE
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330
khudgins@sccid.sc.gov

QUESTION PRESENTED

Does the signing of a *Miranda* waiver alone, without any further determination as to whether the waiver was knowing and voluntary, constitute a valid Sixth Amendment waiver when, at arraignment, Petitioner requested counsel, was ruled to be indigent and was appointed counsel but Petitioner's attempts to obtain counsel were futile because before he had an opportunity to meet with appointed counsel, police initiated a fourth custodial interrogation?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Donta Kevon Reid respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of South Carolina.

OPINION BELOW

The opinion of the South Carolina Supreme Court (App. A1) is reported at *State v. Reid*, 408 S.C. 461, 758 S.E.2d 904 (2014).

JURISDICTION

The South Carolina Supreme Court issued its opinion on July 2, 2014. Petitioner filed a timely petition for rehearing that was denied on August 6, 2014. (App. p. A12). This Court has jurisdiction pursuant to 28 U.S.C §1257(a), as Petitioner is asserting the deprivation of a right guaranteed by the United States Constitution.

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 Fourteenth Amendment provides in relevant part: [N]or shall any State deprive any person of life, liberty, or property, without due process of law. U.S. Const.amend.XIV,§1.

STATEMENT

This Court has held that the Sixth Amendment waiver to the right to counsel must be made knowingly and voluntarily. *Patterson v. Illinois*, 487 U.S. 285, 292, n. 4, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988); *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). In *Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S. Ct. 2079, 2085, 173 L. Ed. 2d 955 (2009), this Court reversed the bright line rule of *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct.1404, 89 L.Ed.2d 631 (1986) finding that a waiver of counsel need not be presumed invalid simply because the Sixth Amendment right to counsel has attached and counsel automatically appointed. In the present case the police initiated a fourth custodial interrogation of Petitioner, Donta Kevon Ried, after Reid requested counsel and was approved for appointed counsel but before appointed counsel could meet with Reid. Prior to each interrogation the police advised Reid of his *Miranda* rights. During the course of reading the *Miranda* rights the police each time told Reid, “We have no way of appointing an attorney, but one will be appointed by the court for you, if you wish.” Despite Reid’s request for counsel and the appointment of counsel, the police initiated a fourth custodial interrogation. Reid’s attempt to obtain counsel was futile. He signed the *Miranda* waiver and provided a fourth statement which was more incriminating than the previous statements.

At trial Reid argued that his fourth statement should be suppressed because it was the result of a post arraignment, police initiated interrogation conducted after Petitioner invoked his right to counsel in violation of the Sixth amendment right to counsel. The State argued, pursuant to *Montejo v. Louisiana*, 556 U.S. 778, 129 S.Ct. 2079, 173 L.Ed 2d 98 (2009) that by signing a

Miranda waiver Reid waived his Sixth Amendment right to counsel. The judge denied the motion to suppress relying on *Montejo v. Louisiana*.

On appeal Reid challenged the admission of the fourth statement as being taken in violation of his Sixth Amendment right to counsel. Reid argued that the trial judge erred in refusing to suppress, as a violation of the Sixth Amendment right to counsel, the fourth statement taken as the result of a police initiated fourth interrogation after had appellant invoked his right to counsel but before he had the opportunity to meet with court appointed counsel. Reid argued that this Court's holding in *Montejo v. Louisiana*, 556 U.S. 778, 129 S.Ct. 2079, 173 L.Ed 2d 98 (2009) simply removed the presumption of invalidity of a waiver of counsel after the Sixth Amendment right to counsel has attached and counsel has been requested and appointed.

The Supreme Court of South Carolina rejected the argument that *Montejo* simply removed the presumption of invalidity of a Sixth Amendment waiver of counsel and found that Reid had waived his right to counsel by signing the *Miranda* waiver prior to giving his fourth statement. (App. p. A1). The Supreme Court of South Carolina made no findings in regard to the knowing and voluntary nature of the Sixth Amendment waiver apart from the *Miranda* advisement. Reid filed a timely petition for rehearing arguing that the South Carolina Supreme Court's interpretation of *Montejo* is overly broad. (App. p. A12). Reid argued that pursuant to *Montejo*, a court is still required to make a finding that any Sixth Amendment waiver is knowing and voluntary, apart from the *Miranda* advisement. Reid argued that under the specific facts of his case, the waiver was not valid. Reid alternatively argued in the petition for rehearing that a remand was appropriate to determine if the waiver was knowing and voluntary. The petition for rehearing was denied. (App. p. A29).

The opinion of the Supreme Court of South Carolina expands this Court's narrow ruling in *Montejo* and is irreconcilable with this Court's established Sixth Amendment and waiver jurisprudence. An indigent defendant who requests and is appointed counsel but who is unable to meet with court appointed counsel prior to the police interrogating him for a fourth time while in custody does not waive his Sixth Amendment right to counsel by simply signing a *Miranda* waiver. When the Sixth Amendment right is invoked, as it was in the present case, any subsequent waiver must be knowing and voluntary apart from *Miranda* warning.

An indigent defendant in South Carolina, like Reid, who requests and is appointed counsel may have to wait several weeks before meeting with court appointed counsel. Reid was told on three previous occasions that the police had no way of appointing an attorney, but one would be appointed by the court if he wanted. When Reid got to court for the first time, he requested an attorney and the judge appointed an attorney. Reid's attempt to obtain assistance from his court appointed attorney, however, was futile as the police interrogated him for a fourth time before he was able to meet with his court appointed attorney. This Court should grant certiorari to ensure that indigent defendants receive the same degree of Sixth Amendment protection as defendants who are able to immediately hire the services of an attorney and to consult with that attorney about the next course of action. While an indigent defendant can certainly waive his Sixth Amendment right to appointed counsel, the waiver should not be presumed valid simply because the police were able to mirandize and interrogate the indigent defendant at the jail before he was able to meet with appointed counsel.

1. *Legal Background.*

Petitioner, Donta Kevon Reid, was indicted for murder, assault and battery with intent to

kill, three counts of armed robbery, four counts of possession of a firearm during the commission of a violent crime and criminal conspiracy. Petitioner proceeded to jury trial and was found guilty of the lesser included offense of assault and battery of a high and aggravated nature and guilty of three counts of armed robbery, three counts of possession of a firearm during the commission of a violent crime and criminal conspiracy.

At trial Reid objected to the admission of a statement arguing that the statement was taken in violation of the Sixth Amendment right to counsel. The judge admitted the statement, over objection, citing *Montejo v. Louisiana*. On appeal Reid challenged the admission of the statement as being taken in violation of his Sixth Amendment right to counsel..

The South Carolina Supreme Court¹ found that *Montejo* barred Petitioner's Sixth Amendment claim writing:

Turning to our case, we find *Montejo* bars Reid's claim that his Sixth Amendment right to counsel was violated. Although Reid makes much of the factual distinctions between the cases—*Montejo* was automatically appointed counsel while Reid elected to file a form requesting counsel—it is exactly this type of argument *Montejo* meant to preclude by overruling *Jackson*. The Court did more than merely remove the presumption of invalidity of a waiver after a defendant's Sixth Amendment rights were invoked. It held that where, as here, a defendant claimed a violation of his Sixth Amendment right to counsel in the context of a custodial interrogation, the relevant inquiry was what happened the moment police initiated contact. Therefore, the question is no longer, as Reid posits, whether the defendant invoked his right to counsel at arraignment, but whether he waived his rights prior to the interrogation. *See id.* at 797, 129 S.Ct. 2079 (“What matters for *Miranda* and *Edwards* is what happens when the defendant is approached for interrogation, and (if he consents) what happens during the interrogation—not what happened at any preliminary hearing.”).

We accordingly find that under *Montejo*, Reid waived his right to counsel by signing the *Miranda* waiver prior to giving his fourth statement. Because he made no allegations that he requested his counsel be present or that this waiver

¹ Reid filed his appellate brief in the South Carolina Court of Appeals. Pursuant to South Carolina Appellate Court Rule 204(b), the Supreme Court of South Carolina certified the appeal and the case was transferred from the South Carolina Court of Appeals to the Supreme Court of South Carolina for disposition.

was otherwise not knowing and voluntary, we affirm the admission of his statement.⁶

State v. Reid, 408 S.C. 461, 471-72, 758 S.E.2d 904, 909 (2014), reh'g denied (Aug. 6, 2014). (endnote #6 omitted). (App. pp. A8-A9).

Reid filed a timely petition for rehearing asserting that the South Carolina Supreme Court's interpretation of *Montejo* is overly broad. Reid asserted that pursuant to *Montejo*, a court is still required to make a finding that any Sixth Amendment waiver was made knowingly and voluntarily. In the petition for rehearing Reid requested that the South Carolina Supreme Court make a voluntariness determination on the waiver of counsel apart from the *Miranda* warnings. Reid argued that the substantial factual differences between the present case and *Montejo* rendered the statement in the present case involuntary, despite the reading of *Miranda* rights. The *Miranda* advisement in the present case did not effectively apprise Reid of his Sixth Amendment right to counsel, rendering the fourth statement involuntary. Reid further asserted that the ruling in *Montejo* is narrow and simply removes the presumption of invalidity of a waiver after a defendant's Sixth Amendment rights were invoked. *Montejo* does not bar this Court from finding the waiver invalid as being involuntary and ineffective.

While Reid argued in the petition for rehearing that the Sixth Amendment waiver was not voluntary, alternatively, Reid argued that, consistent with this Court's ruling in *Montejo*, a remand was necessary to determine if the Sixth Amendment waiver was knowing and voluntary. Reid did not specifically argue to the trial court that the fourth statement was involuntary because he relied upon *State v. Anderson*, 357 S.C. 514, 593 S.E.2d 820 (Ct.App. 2004) and *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct.1404, 89 L.Ed.2d 631 (1986). While *Montejo* overruled the bright line rule of *Jackson* finding that a waiver of counsel need not be presumed invalid simply

because the Sixth Amendment right to counsel has attached and counsel automatically appointed, *Anderson* was still good South Carolina law upon which Petitioner properly relied at trial. The South Carolina Supreme Court denied the petition for rehearing on August 6, 2014.

2. *Factual Background.*

On the evening of October 1, 2009, Tyrone King, Kenny Cunningham and Henry "Maurice" Jackson were sitting on Jackson's front porch when a woman approached the three and asked for a cigarette. A man then appeared with a gun and told them this was a "stickup." The woman then took wallets, cell phones and cigarettes from the three men on the porch. As the man and woman were leaving, the man fired his gun. King and Cunningham were both shot. King died as a result of the shooting.

Aileen "Lee Lee" Newman admitted to police that she and Davontay Henson robbed the three men and Henson shot at them. According to Newman, she and her girlfriend, Samantha Ervin were riding around with Henson and Reid when the four came up with a plan to commit a robbery. Newman testified that Reid was friends with the victims and suggested them as targets of the robbery. Jackson testified that prior to the robbery Reid came to the house looking for marijuana. While at the house, Reid used Jackson's phone and Jackson heard him say, "It's two of them."

When the police learned that Reid had been at the house prior to the robbery, they tried to interview him on October 2, 2009, the day after the murder and robbery, but he was not at home. Reid called the police later that same day. The police picked Reid up from his home, took him to the police station and interviewed him. Reid initially denied any involvement with the robbery and told the police that when he left Jackson's house he went to visit a girl at the Midtown Apartments.

After Reid accompanied the police to the Midtown Apartments and the police interviewed two

witnesses, the police determined that Reid was not being truthful. (R. p. 52, line 15 – p. 53, lines 1-7). Reid was placed in handcuffs and taken back to the police station. (R. p. 53, line 8 – p. 54, lines 1-12).

Once they arrived at the station the police removed the handcuffs and advised Reid of his *Miranda* rights. The detective testified that he read the *Miranda* warnings off of a computer screen. During the course of reading the *Miranda* rights the police told Reid, “We have no way of appointing an attorney, but one will be appointed by the court for you, if you wish.” Reid waived his *Miranda* rights and at 1:45 PM Reid provided his first statement to police. (R. p. 57, lines 5-19). In the statement Reid admitted some involvement in the robbery but implicated Darius “Duke” Jeter as the robber.

On October 2, 2009, at 2:15 PM, after providing police with a statement, Reid was taken to the jail for processing. On that same day, after Petitioner was booked in at the jail, personnel from the jail contacted the police and indicated that Petitioner wished to speak with them again. Police went to the jail, brought petitioner to an interview room and again advised Reid of his *Miranda* rights. The detective testified that he read the *Miranda* warnings off of a computer screen, the same way he did it the first time. Reid was again told by the police, “We have no way of appointing an attorney, but one will be appointed by the court for you, if you wish.” Reid waived his *Miranda* rights and provided a second statement at 4:10 PM on October 2, 2009.

Later that same day, after talking with Jeter, the police initiated a third custodial interrogation of Reid. Police again went to the jail and placed Reid in an interview room. The police again advised Reid of his *Miranda* rights by reading them off of a computer screen, the same way it had been done the first and second time. Reid was again told by the police, “We have no

way of appointing an attorney, but one will be appointed by the court for you, if you wish.” Reid again waived his *Miranda* rights and on October 2, 2009, at 11:55 PM Reid gave a third statement again implicating Jeter but also implicating Samantha Ervin.

At arraignment the next day on October 3, 2009, before a magistrate judge, Reid requested an attorney. Reid completed and signed an “Affidavit of Indigency and Application for Counsel.” The judge granted Reid’s request for appointment of counsel. Reid was provided with the “Notice of Date and Time of Initial Appearance for Approved Public Defender Clients.” This notice advised Reid that he would not meet with his appointed counsel until his initial appearance on October 26, 2014.

On October 6, 2009, three weeks before Reid could meet with his appointed counsel, the police initiated a fourth custodial interrogation. The police transported Reid from the jail to the police department for a fourth interrogation. The police read Reid his *Miranda* rights from the computer screen, the same way it was done for the three previous interrogations. For a fourth time Reid was told by the police, “We have no way of appointing an attorney, but one will be appointed by the court for you, if you wish.” Reid waived his *Miranda* rights and provided a fourth statement implicating Henson, and Newman as the robbers and Ervin as the get away driver. Reid further implicated himself in this fourth statement. Newman and Ervin both testified against Reid and Henson at trial

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for writ of certiorari to address when a Sixth Amendment waiver of counsel is knowing and voluntary in light of this Court's ruling in *Montejo v. Louisiana*, 556 U.S. 778, 129 S.Ct. 2079, 173 L.Ed 2d 98 (2009). *Montejo* simply removed the presumption of invalidity from a waiver of counsel after the Sixth Amendment right to counsel has attached. Once the Sixth Amendment right to counsel attaches and is invoked, as it was in the present case, any Sixth Amendment waiver must still be knowing and voluntary. The holding by the Supreme Court of South Carolina that Reid, after arraignment, after requesting an attorney, after the appointment of an attorney but before meeting with his court appointed attorney, waived his right to counsel by simply signing the *Miranda* waiver is irreconcilable with this Court's established Sixth Amendment and waiver jurisprudence. Prior to this Court's ruling in *Jackson*, this Court wrote, "The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. *Maine v. Moulton*, 474 U.S. 159, 176, 106 S. Ct. 477, 487, 88 L. Ed. 2d 481 (1985). In *Moulton* this Court held that, "[T]he Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." 474 U.S. 159, 176, 106 S.Ct. 477, 88 L.Ed.2d 481(1985).

In *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389 (1988), this Court discussed in a footnote that a waiver that may be valid pursuant to *Miranda* would not be valid for Sixth Amendment purposes, writing:

This does not mean, of course, that all Sixth Amendment challenges to the

conduct of post indictment questioning will fail whenever the challenged practice would pass constitutional muster under *Miranda*. 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. See *Moran v. Burbine*, 475 U.S., at 424, 428, 106 S.Ct., at 1142, 1144–1145. Likewise a surreptitious conversation between an undercover police officer and an unindicted suspect would not give rise to any *Miranda* violation as long as the “interrogation” was not in a custodial setting, see *Miranda*, 384 U.S., at 475, 86 S.Ct., at 1628; however, once the accused is indicted, such questioning would be prohibited. See *United States v. Henry*, 447 U.S. 264, 273, 274–275, 100 S.Ct. 2183, 2188–2189, 65 L.Ed.2d 115 (1980).

Thus, because the Sixth Amendment's protection of the attorney-client relationship—“the right to rely on counsel as a ‘medium’ between [the accused] and the State”—extends beyond *Miranda*'s protection of the Fifth Amendment right to counsel, see *Maine v. Moulton*, 474 U.S., at 176, 106 S.Ct., at 487, there will be cases where a waiver which would be valid under *Miranda* will not suffice for Sixth Amendment purposes. See also *Michigan v. Jackson*, 475 U.S., at 632, 106 S.Ct., at 1409.

Patterson v. Illinois, 487 U.S. at 297, 108 S.Ct. at 2397, n. 9.

A waiver pursuant to *Miranda* is not valid for Sixth Amendment purposes when an indigent defendant's request for appointed counsel is futile because police circumvent the appointment process by badgering the defendant through continued custodial interrogations before appointed counsel has an opportunity to meet with the defendant. This Court should grant the petition to prevent erosion of the Sixth Amendment right to counsel when, as in the present case, an indigent defendant requests and is appointed counsel but is unable to meet with appointed counsel before the police initiate a fourth custodial interrogation. The Sixth Amendment waiver under these circumstances is not knowing and voluntary.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

November 4, 2014

RECEIVED

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No. 14-_____

S.C. Supreme Court

In the Supreme Court of the United States

Donta Kevon Reid

Petitioner,

v.

STATE OF SOUTH CAROLINA

Respondent.

***ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT***

A P P E N D I X

Kathrine H. Hudgins
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ATTORNEY FOR PETITIONER

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Donta Reid, Appellant.

Appellate Case No. 2011-204288

Appeal from York County
The Honorable John C. Hayes, III, Circuit Court Judge

Opinion No. 27407
Heard December 5, 2013 – Filed July 2, 2014

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of Columbia,
for Appellant.

Attorney General Alan M. Wilson, Assistant Attorney
General Mark R. Farthing, and Assistant Attorney
General Jennifer E. Roberts, all of Columbia, for
Respondent.

Deputy Public Defender Christopher D. Scalzo, of
Greenville, for Amicus Curiae, South Carolina Public
Defender Association.

JUSTICE HEARN: In this criminal appeal, Donta Reid challenges the trial court's failure to suppress his confession, arguing it was obtained in violation of his Sixth Amendment right to counsel. We disagree and find the facts of Reid's case fall within the purview of *Montejo v. Louisiana*, 556 U.S. 778 (2009), in which the United States Supreme Court held a valid *Miranda*¹given waiver prior to a custodial interrogation sufficed to waive a defendant's Sixth Amendment right to counsel regardless of whether he retained representation at a prior arraignment. *Id.* at 795. Reid further contends the trial court erred in failing to grant a directed verdict of acquittal on the charges for possession of a firearm during the commission of a violent crime because the State failed to prove he actually or constructively possessed a firearm. We find those charges were properly submitted to the jury and therefore affirm his convictions.

FACTUAL/PROCEDURAL BACKGROUND

On the evening of October 1, 2009, Maurice Jackson, Tyrone King, and Kenny Cunningham, the victims, were sitting on Jackson's front porch when Jackson received a text from Reid inquiring about buying marijuana. When Jackson informed Reid he did not have any marijuana, Reid said he would stop by Jackson's house regardless. Upon arriving, Reid invited Jackson to accompany him to "midtown," stating he had located some marijuana. Jackson declined because he could not leave his company on his porch. Reid asked to use Jackson's cell phone and during the course of his conversation Jackson and Cunningham overheard him say "There's two" or "It's two of them." Reid indicated he would come back and left, but he never returned.

Jackson and his companions remained on the porch and roughly fifteen to thirty minutes later a man and a woman approached the porch, neither of whom the victims recognized. The woman ran up the steps and announced that it was a robbery. The man, who wore a mask, pulled a rifle from his pants, echoed the woman's pronouncement that this was a robbery, and threatened to shoot if any of them moved.

The woman went through the victims' pockets and collected the contents. The man and woman started to leave, but the man turned around and began shooting at the victims. Cunningham was struck through his left leg and between his toes. King was shot in the head and later died from the wounds.

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

After interviewing the victims, the police investigation focused on Reid, and the day after the robbery, detectives questioned him about the incident. Reid informed law enforcement that he stopped by Jackson's house to use Jackson's phone to call a female friend, who he then went to visit. Reid agreed to accompany the detectives to this friend's apartment so she could corroborate his story; however, once they arrived at the address Reid gave them, he indicated the detectives needed to question a different woman. That woman's mother denied that Reid had been there the night before.

Thereafter, Reid was handcuffed and taken to the police station where he was read his *Miranda* rights, which he waived. Over the next few days, Reid made four different statements to law enforcement. Reid gave the first statement at 1:45 p.m. indicating a man named Darius Jeter acted alone in the robbery and was both the shooter and instigator. Reid admitted he assisted Jeter by reconnoitering Jackson's porch prior to the robbery. He also stated he did not witness the robbery, but heard the shots. Reid was then taken to a jail cell in the police department.

A few hours later Reid asked to speak with the detectives again to provide additional information. Prior to the interview, Reid was Mirandized again and after waiving his rights he gave a second statement at 4:10 p.m. In this statement, he maintained Jeter was the lone robber and shooter; however, this time Reid described witnessing the events of the robbery, although he still stated he only heard the shots as he walked away and did not see the gunfire.

Prior to midnight that same day, detectives approached Reid again for questioning. After waiving his *Miranda* rights, Reid made another statement, this time indicating a female—Samantha Ervin—was also involved in the robbery. Reid still maintained Jeter was the shooter but now stated Ervin helped plan the robbery and drove the three of them to Jackson's house. He also indicated Ervin accompanied Jeter to Jackson's house while he waited in her truck for them. Reid stated after he heard gunfire, Jeter and Ervin ran back to Ervin's truck, and Jeter said he thought he shot one of them.

During his arraignment the following day, Reid filed a request for counsel and a supporting affidavit of indigency. He was approved for appointment of counsel that day. Over the course of the next few days, law enforcement interviewed Ervin and she eventually disclosed that in addition to herself and Reid, Davontay Henson and Aileen Newman were also involved in the crimes. Based on this information, Henson and Newman were both arrested. Thereafter, detectives

questioned Reid on October 6 at 9:40 a.m., informing him they knew he had not been truthful in his prior statements. Although Reid had not yet met with his appointed counsel, he again waived his *Miranda* rights and gave a fourth statement.

In his fourth statement, Reid stated he was with Henson and Newman at Ervin's house earlier in the evening on October 1 when Henson pulled out a rifle and said he wanted to rob someone. Ervin asked if Reid would assist in robbing Jackson and he assented. Reid then walked over to Jackson's home and called Ervin to inform her there were two other people at Jackson's house. After Reid left Jackson's home, he met up with Henson, Ervin, and Newman, who had all been riding around in Ervin's truck. Reid informed them there were three people on the porch and he could not convince Jackson to leave with him. Henson then stated he would just rob all three of them. Reid and Ervin waited in Ervin's truck while Henson and Newman walked to Jackson's home. Reid heard gunshots and shortly thereafter, Henson and Newman returned to the truck. Henson then threatened to "come back and get" anyone who disclosed the events of the evening.

Based on law enforcement's investigations, Reid, Henson, Newman, and Ervin were subsequently charged with murder, assault and battery with intent to kill (ABWIK), criminal conspiracy, armed robbery, and possession of a firearm during the commission of a violent crime. Ervin and Newman both pled guilty, but Henson and Reid proceeded to a joint trial.²

Prior to trial, Reid moved to suppress his fourth statement to the police on the grounds it was obtained in violation of his Sixth Amendment right to counsel. During the *Jackson v. Denno*³ hearing, Reid argued he requested and was appointed counsel at his arraignment on October 3, and therefore, it was a violation of his constitutional rights for police to question him on October 6 without his attorney present. The State contended Reid's argument was no longer viable because *Montejo* held a valid *Miranda* waiver prior to a custodial interrogation is not rendered constitutionally inadequate simply because the defendant was appointed counsel at a prior arraignment. The trial court denied the motion to suppress and the case proceeded to trial.

² Ervin pled guilty to three counts of armed robbery and one count of criminal conspiracy, and Newman pled guilty to one count of ABWIK, one count of criminal conspiracy, and three counts of armed robbery.

³ 378 U.S. 368 (1964).

At trial, Cunningham and Jackson both testified about their encounter with Reid prior to the incident and indicated he was not one of the perpetrators present during the robbery. Additionally, Newman and Ervin testified about the particulars of the plan to rob Jackson and how it was executed. They described Reid's participation in scouting out the porch and his attempt to lure Jackson away from the home. They also indicated Reid knew Henson had a rifle he planned to employ, but Reid himself did not take part in the commission of the robbery.

Ultimately, the jury found Reid not guilty of murder, but guilty of assault and battery of a high and aggravated nature, three counts of armed robbery, three counts of possessing a firearm during the commission of a violent crime, and criminal conspiracy. Reid appealed, and the Court certified the case pursuant to Rule 204(b), SCACR.

ISSUES PRESENTED

- I. Did the trial court err in allowing the introduction of Reid's fourth statement to law enforcement?
- II. Did the trial court err in failing to grant a directed verdict in favor of Reid on the three charges of possession of a firearm during the commission of a violent crime?

LAW/ANALYSIS

I. SIXTH AMENDMENT RIGHT TO COUNSEL

Reid argues the trial court erred in failing to suppress his fourth statement because the police obtained it in violation of his Sixth Amendment right to counsel. We disagree.

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. IV.⁴ "[O]nce the adversary judicial process has been initiated, the Sixth Amendment guarantees a

⁴ The protections of the Sixth Amendment have been extended to the states through the Fourteenth Amendment. *Powell v. Alabama*, 287 U.S. 45, 61; 53 (1932).

defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo*, 556 U.S. at 786. This right to counsel may be waived by a defendant provided relinquishment of the right is voluntary, knowing, and intelligent. *Id.* However, the decision to waive counsel need not itself be counseled. *Id.* Generally, "an accused who is admonished with the warnings prescribed [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." *Patterson v. Illinois*, 487 U.S. 285, 296 (1988).

Reid contends his Sixth Amendment right to counsel was implicated at the arraignment when he requested appointment of counsel. He therefore argues the subsequent police-initiated interview violated that right and his waiver was invalid. We find the United States Supreme Court foreclosed this argument in *Montejo*.

Prior to *Montejo*, the Court established the rule in *Michigan v. Jackson*, 475 U.S. 625 (1986), 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." *Id.* at 636. The Court expounded this holding as an extension of the rule in *Edwards v. Arizona*, 451 U.S. 477 (1981), that "an accused person in custody who has 'expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.'" *Jackson*, 475 U.S. at 626 (quoting *Edwards*, 451 U.S. at 484-85).

However, in *Montejo* the Court expressly overruled *Jackson*, finding the protections afforded in *Miranda*, *Edwards*, and *Minnick*⁵ sufficiently safeguard a defendant's Sixth Amendment right to counsel. *Montejo*, 556 U.S. at 794. In that case, Jesse Montejo was arrested in connection with a robbery and murder. *Id.* at 781. He waived his right to counsel under *Miranda* and gave various accounts of the incident. *Id.* Several days later, Montejo was brought before a court for a "72-hour hearing," a preliminary hearing required in Louisiana during which the court automatically appointed him an attorney as part of the course of the proceeding. *Id.* Prior to meeting with his newly retained attorney, detectives visited Montejo in prison and requested he accompany them in searching for the murder weapon. *Id.*

⁵ *Minnick v. Mississippi*, 498 U.S. 146 (1990).

The detectives read Montejo his *Miranda* rights again and he agreed to go on the excursion, during which time he wrote an inculpatory letter of apology to the victim's widow. *Id.* at 782.

At trial, Montejo argued the letter must be excluded under *Jackson* because counsel was appointed at his arraignment and therefore his subsequent waiver was presumptively invalid. *Id.* The trial court rejected his argument and allowed admission of the letter. *Id.* The jury convicted Montejo of first-degree murder and sentenced him to death. *Id.* On appeal, the Louisiana Supreme Court affirmed his conviction. *Id.* In rejecting his reliance on *Jackson*, that court found the

prophylactic protection of *Jackson* is not triggered unless and until the defendant has actually requested a lawyer or has otherwise asserted his Sixth Amendment right to counsel. Because Montejo simply stood mute at his 72-hour hearing while the judge ordered the appointment of counsel, he had made no such request or assertion.

Id.

On certiorari to the United States Supreme Court, Montejo argued Louisiana's application of *Jackson* produced an arbitrary and unworkable standard that could not be applied consistently nationwide because some states automatically appoint counsel to indigent defendants while others require affirmative action by the defendant to obtain counsel. *Id.* at 783-84. Montejo contended the Sixth Amendment's right to counsel should not turn on whether a defendant *requested* counsel but whether he was *represented* by counsel, and once represented the defendant could not constitutionally be approached by law enforcement for questioning while in custody. *Id.* at 786. The majority of the Court rejected both interpretations. *Id.* at 792. Although agreeing Louisiana's interpretation invited mischief in determining whether a defendant adequately "invoked" his right to counsel, the Court found Montejo's reading was inconsistent with the *Jackson* holding. *Id.* at 783. Specifically, the Court noted that the evil *Jackson* sought to redress was the potential for police badgering defendants into changing their minds and waiving their right to counsel after that right was asserted. *Id.* at 798. However, under Montejo's construction of *Jackson*, if a defendant is automatically appointed counsel, the police cannot initiate questioning of him despite the fact he never asserted the right to have his attorney present. *Id.* This, the majority found, was an inconsistent expansion from the antibadgering rationale that drove the decision in *Jackson*, for a defendant could not be coerced

into changing his mind if he never actually invoked his right to counsel in the custodial setting. *Id.*

In light of what it considered equally untenable interpretations, the Court determined the rule enunciated in *Jackson* had proved unworkable and should be abandoned. *Id.* at 792. Furthermore, the Court observed the limited benefits of *Jackson* in light of the safeguards provided by *Miranda*, *Edwards*, and *Minnick*:

Under *Miranda*'s prophylactic protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right. Under *Edwards*' prophylactic protection of the *Miranda* right, once such a defendant "has invoked his right to have counsel present," interrogation must stop. And under *Minnick*'s prophylactic protection of the *Edwards* right, no subsequent interrogation may take place until counsel is present, "whether or not the accused has consulted with his attorney."

Id. at 794 (citations omitted). Accordingly, the Court reasoned that "[i]f that regime suffices to protect the integrity of a suspect's voluntary choice not to speak outside his lawyer's presence before his arraignment, it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached." *Id.* at 795 (citations and quotations omitted). Ultimately, the Court overruled *Jackson* and remanded *Montejo*'s case to allow him to invoke any *Edwards*' protections he might claim, such as arguing he clearly asserted his right to counsel when officers approached him. *Id.* at 797.

Turning to our case, we find *Montejo* bars Reid's claim that his Sixth Amendment right to counsel was violated. Although Reid makes much of the factual distinctions between the cases—*Montejo* was automatically appointed counsel while Reid elected to file a form requesting counsel—it is exactly this type of argument *Montejo* meant to preclude by overruling *Jackson*. The Court did more than merely remove the presumption of invalidity of a waiver after a defendant's Sixth Amendment rights were invoked. It held that where, as here, a defendant claimed a violation of his Sixth Amendment right to counsel in the context of a custodial interrogation, the relevant inquiry was what happened the moment police initiated contact. Therefore, the question is no longer, as Reid posits, whether the defendant invoked his right to counsel at arraignment, but whether he waived his rights prior to the interrogation. *See id.* at 797 ("What

matters for *Miranda* and *Edwards* is what happens when the defendant is approached for interrogation, and (if he consents) what happens during the interrogation—not what happened at any preliminary hearing.").

We accordingly find that under *Montejo*, Reid waived his right to counsel by signing the *Miranda* waiver prior to giving his fourth statement. Because he made no allegations that he requested his counsel be present or that this waiver was otherwise not knowing and voluntary, we affirm the admission of his statement.⁶

II. DIRECTED VERDICT

Reid also argues the trial court erred in failing to direct a verdict of acquittal on the charges for possession of a firearm during the commission of a violent crime. We disagree.

On appeal from the denial of a motion for a directed verdict, the Court views the evidence in the light most favorable to the State. *State v. Buckmon*, 347 S.C. 316, 321, 555 S.E.2d 402, 404 (2001). To survive a directed verdict motion, the State must provide direct or substantial circumstantial evidence reasonably tending to prove the defendant's guilt, or from which the defendant's guilt can be fairly and logically deduced. *State v. Walker*, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002).

In his motion for a directed verdict, Reid argued the State failed to prove he ever possessed the rifle. The State countered that he could be convicted under the theory of "the hand of one is the hand of all." The trial court denied the motion.

⁶ Although Reid makes allusions to the fact that a state can provide more expansive protection than that mandated by the federal Constitution, he never raised before the trial court any South Carolina constitutional provision or other state law upon which to ground such an extension. Instead, he argued only a violation of his Sixth Amendment rights under the United States Constitution and this Court must apply those rights as interpreted by the United States Supreme Court. *Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("[A] State is free as a matter of its own law to impose greater restrictions [on] police activity than those this Court holds to be necessary upon federal constitutional standards. But, of course, a State may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them." (internal citations omitted)). We therefore confine our analysis to Reid's rights under the United States Constitution.

The doctrine of accomplice liability arises from the theory that "the hand of one is the hand of all." 23 S.C. Jur. Homicide § 22.1 (2014). Under this theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose. *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). A person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act to be guilty under a theory of accomplice liability. *State v. Langley*, 334 S.C. 643, 648–49, 515 S.E.2d 98, 101 (1999). Accordingly, proof of mere presence is insufficient, and the State must present evidence the participant knew of the principal's criminal conduct. *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987). If "a person was 'present abetting while any act necessary to constitute the offense [was] being performed through another,' he could be charged as a principal—even 'though [that act was] not the whole thing necessary.'" *Rosemond v. United States*, 134 S. Ct. 1240, 1246 (2014) (alteration in original) (quoting 1 J. Bishop, Commentaries on the Criminal Law § 649, p. 392 (7th ed. 1882)).

Just as Reid could be convicted of assault and battery of a high and aggravated nature and armed robbery under a theory of accomplice liability even though he did not wield the offending weapon, so could he be found guilty for possession of that firearm. Although there was no evidence presented Reid assisted Henson in possessing the firearm, the State presented evidence Reid helped orchestrate the robberies and reconnoitered the scene. Furthermore, Reid knew Henson had a rifle in his possession for use during the robberies. Reid then waited at the getaway vehicle for Henson to return with the proceeds.⁷ We find the State presented direct or substantial circumstantial evidence Reid facilitated the robbery and knew Henson intended to use a firearm during the commission of the crime. We therefore hold the trial court properly denied Reid's motion for a directed verdict on the charges for possession of a firearm during the commission of a violent crime.⁸

⁷ This Court has previously held that a participant need not witness the crime to be "present at the scene" and guilty under a theory of accomplice liability. *See State v. Chavis*, 277 S.C. 521, 522, 290 S.E.2d 412 (1982) (affirming a defendant's conviction as a principal where the defendant helped plan the robbery, but was three miles away from the scene when the crime actually occurred).

⁸ This holding is in accord with other jurisdictions that have considered guilt under an accomplice liability theory in similar circumstances. *See, e.g., Rosemond*, 134

CONCLUSION

Based on the foregoing, we affirm both the trial court's denial of Reid's motion to suppress his fourth statement and its denial of his directed verdict motion on the charges of possessing a firearm during the commission of a violent crime.

**TOAL, C.J., PLEICONES, BEATTY and KITTREDGE, JJ.,
concur.**

S. Ct. at 1243 (holding a defendant can be convicted as a principal for aiding and abetting the crime of "us[ing] or carr[y]ing a firearm" during a crime if the "defendant actively participated in the underlying drug trafficking or violent crime with advance knowledge that a confederate would use or carry a gun during the crime's commission," even if the defendant did not use or carry a gun himself); *Battle v. United States*, 515 A.2d 1120, 1128 (D.C. 1986) (holding an unarmed aider and abettor is subject to a sentence enhancement where the principal was armed); *Com. v. Humphries*, 991 N.E.2d 652, 658 (Mass. 2013) ("[T]o establish liability for firearm possession under a theory of joint venture, it is not necessary that the Commonwealth prove that a defendant had actual or constructive possession of a firearm, but only that such a defendant was accessory to another identified defendant in possessing a firearm." (internal quotation marks omitted)); *State v. White*, 484 A.2d 691, 695 (N.J. 1984) (finding that the Graves Act, which allows sentence enhancement based on use or possession of a firearm, applies to an unarmed accomplice); *but see Dailey v. State*, 675 P.2d 657, 661 (Alaska Ct. App. 1984) (holding that Alaska's sentence enhancement statute for possession of a firearm during the commission of a felony should apply "only to a defendant who personally uses or possesses a firearm during the commission of an offense"); *Garringer v. State*, 909 P.2d 1142, 1149 (Haw. 1996) (interpreting Hawaii's sentencing enhancement statute to preclude the imposition of enhanced sentencing where defendant did not personally possess, threaten to use, or use a firearm while engaged in the commission of that felony).

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

DONTA KEVON REID,

APPELLANT

Appellate Case No. 2011-204288

Appeal from York County

John C. Hayes, III, Circuit Court Judge

Opinion No. 27407

PETITION FOR REHEARING

I. Introduction

Pursuant to Rule 221(a), SCACR, counsel for Donta Reid petitions the Court for rehearing. On July 2, 2014, this Court issued a published opinion affirming Petitioner's conviction and sentence. On appeal Petitioner challenged the trial judge's refusal to suppress a confession, following a fourth custodial interrogation, as being taken in violation of Petitioner's Sixth Amendment right to counsel because it was taken post arraignment, after Petitioner requested and had been appointed counsel but before Petitioner had an opportunity to meet with appointed counsel. This Court found that Montejo v. Louisiana, 556 U.S. 778, 129 S.Ct. 2079; 173 L.Ed 2d 98 (2009) barred Petitioner's Sixth Amendment claim and affirmed the conviction. Counsel

respectfully submits first, that this Court's interpretation of Montejo is overly broad. Pursuant to Montejo, a court is still required to make a finding that any Sixth Amendment waiver was knowing and voluntary. Respectfully, this Court overlooked the substantial factual differences between the present case and Montejo that rendered the statement in the present case involuntary, despite the reading of Miranda rights. The Miranda rights administered in the present case did not effectively apprise Petitioner of his Sixth Amendment right to counsel, rendering the fourth statement involuntary. The ruling in Montejo was narrow and simply removed the presumption of invalidity of a waiver after a defendant's Sixth Amendment rights were invoked. Montejo does not bar this Court from finding the waiver invalid as being involuntary and ineffective. Based on the record before this Court and consistent with Montejo, the fourth statement should have been suppressed as being involuntary and taken in violation of the Sixth Amendment.

Second, counsel respectfully submits that this Court, in fashioning a remedy, overlooked the fact that in Montejo the United States Supreme Court remanded the case to determine if the statement should be suppressed pursuant to Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) as well as to determine if the Sixth Amendment waiver was knowing and voluntary. As in Montejo, Petitioner in the present case is entitled to a remand. Petitioner did not specifically argue to the trial court that the fourth statement was involuntary because he relied upon State v. Anderson, 357 S.C. 514, 593 S.E.2d 820 (Ct.App. 2004) and Michigan v. Jackson, 475 U.S. 625, 106 S.Ct.1404, 89 L.Ed.2d 631 (1986). Again, while Montejo overruled the bright line rule of Jackson finding that a waiver of counsel need not be presumed invalid simply because the Sixth Amendment right to counsel has attached and counsel automatically appointed, Anderson was still good South Carolina law upon which Petitioner properly relied at trial. Counsel submits that this Court should find the fourth statement involuntary and taken in violation of the Sixth

Amendment. Alternatively, however, Petitioner seeks a remand, based on this Court's decision not to follow Anderson, to fully argue that the fourth statement should be suppressed because it was not voluntary. Petitioner seeks rehearing on this Court's finding that Montejo bars Petitioner's Sixth Amendment Claim. Alternatively, counsel seeks rehearing on the Court's affirming Petitioner's conviction without a remand to give Petitioner an opportunity to challenge the voluntary nature of the Sixth Amendment waiver apart from Anderson and Jackson.

II. Facts

On October 6, 2009, the police transported Petitioner from the jail to the police department for a fourth interrogation. (R. p. 535, lines 7-23). Petitioner was mirandized and provided a fourth statement. (R. pp. 536 – 545; State's Exhibit #44, Statement, R. p. 957). Three days earlier at arraignment on October 3, 2009, Petitioner requested an attorney and his request for court appointed counsel was granted. (Affidavit of Indigency and Application for Counsel, R. p. 941).

Prior to trial the judge held a Jackson v. Denno¹ hearing to determine the admissibility of all four of the statements given by Petitioner. (R. pp. 47-127). Petitioner, relying on State v. Anderson, 357 S.C. 514, 593 S.E.2d 820 (Ct.App. 2004), argued that the fourth statement given by Petitioner should be suppressed because it was the result of a post arraignment, police initiated interrogation conducted after Petitioner invoked his right to counsel. (R. p. 109, lines 5 – p. 110, 111, 112 lines 1-15). The State argued, pursuant to Montejo v. Louisiana, 556 U.S. 778, 129 S.Ct. 2079, 173 L.Ed 2d 98 (2009) that Petitioner did not invoke his right to counsel. (R. p. 109, lines 20 – p. 113, 114, 115, 116, 117, lines 1-22). Petitioner distinguished the Louisiana system of automatically appointing counsel from the system used in South Carolina arguing that in the present case the Petitioner invoked his right to counsel by signing a form requesting the appointment of counsel. (R. p. 117, lines 24 – p. 118, lines 1-20). Additionally, Petitioner argued that based on

South Carolina case law, specifically State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) and Anderson, the state courts may afford more expansive rights than those provided by the federal courts. (R. p. 118, lines 21 – p. 119, 120, lines 1-5). The judge denied the motion to suppress relying on Montejo v. Louisiana.

III. Arguments

A. The Montejo case does not bar this Court from finding the Statement involuntary

The trial judge erred in refusing to suppress a post arraignment confession, following a fourth custodial interrogation, initiated by the police, as being in violation of Petitioner's Sixth Amendment right to counsel because it was taken after Petitioner requested and had been appointed counsel but before Petitioner had an opportunity to meet with appointed counsel. In Montejo v. Louisiana, 556 U.S., 778, 789, 129 S.Ct. 2079, 2086 (2009), the United State Supreme Court wrote:

With this understanding of what Jackson stands for and whence it came, it should be clear that Montejo's interpretation of that decision—that no *represented* defendant can ever be approached by the State and asked to consent to interrogation—is off the mark. When a court appoints counsel for an indigent defendant in the absence of any request on his part, there is no basis for a presumption that any subsequent waiver of the right to counsel will be involuntary. There is no “*initial election*” to exercise the right, Patterson, 487 U.S., at 291, 108 S.Ct. 2389, that must be preserved through a prophylactic rule against later waivers. No reason exists to assume that a defendant like Montejo, who has done *nothing at all* to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present. And no reason exists to prohibit the police from inquiring. Edwards and Jackson are meant to prevent police from badgering defendants into changing their minds about their rights, but a defendant who

¹ 378 U.S. 68 (1964)

never asked for counsel has not yet made up his mind in the first instance.

In Montejo the United States Supreme Court reversed the bright line rule of Michigan v. Jackson, 475 U.S. 625, 106 S.Ct.1404, 89 L.Ed.2d 631 (1986) finding that a waiver of counsel need not be presumed invalid simply because the Sixth Amendment right to counsel has attached and counsel automatically appointed. The Montejo case simply removed the presumption of invalidity. In fact, in Montejo the Court remanded the case to the State court to determine if the statement in question should have been suppressed pursuant to Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) and to allow Montejo to argue that the Sixth Amendment waiver was not knowing and voluntary. The Court wrote:

Although our holding means that the Louisiana Supreme Court correctly rejected Montejo's claim under Jackson, we think that Montejo should be given an opportunity to contend that his letter of apology should still have been suppressed under the rule of Edwards. If Montejo made a clear assertion of the right to counsel when the officers approached him about accompanying them on the excursion for the murder weapon, then no interrogation should have taken place unless Montejo initiated it. Davis, supra, at 459, 114 S.Ct. 2350. Even if Montejo subsequently agreed to waive his rights, that waiver would have been invalid had it followed an 'unequivocal election of the right,' Cobb, 532 U.S., at 176, 121 S.Ct. 1335 (KENNEDY, J., concurring).

Montejo understandably did not pursue an Edwards objection, because Jackson served as the Sixth Amendment analogy to Edwards and offered broader protections. Our decision today, overruling Jackson, changes the legal landscape and does so in part based on the protections already provided by Edwards. Thus we think that a remand is appropriate so that Montejo can pursue this alternative avenue for relief. Montejo 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, cf. Moran, 475 U.S., at 428-429, 106 S.Ct. 1135. These matters have heightened importance in light of our opinion today.

Montejo, 556 U.S. at 797-798, 129 S.Ct. at 2091-2092 (2009).

In State v. Forbush, 332 Wis.2d 620, 796 N.W.2d 741 (2011), the Wisconsin Supreme Court found that the Montejo case did not require the overruling of Wisconsin law protecting a defendant's right to counsel after he affirmatively invoked his Sixth Amendment right to counsel by retaining and receiving the services of counsel. While not controlling, the reasoning of the Wisconsin court is persuasive. "Montejo decided only that courts need not 'presume that such a waiver is invalid under certain circumstances.' Montejo, 556 U.S. at —, 129 S.Ct. at 2085. The 'certain circumstances' of Montejo were a charged defendant for whom the Sixth Amendment right to counsel had attached and who was represented. However, the Court concluded that it should not presume that Montejo had actually invoked his Sixth Amendment right to counsel, simply from the fact that he was represented. Accordingly, the Supreme Court remanded the case to the trial court to determine whether Montejo had actually invoked his Sixth Amendment right to counsel such that the protections of Edwards would apply. *Id.* at 2091–92." Forbush, 332 Wis.2d at 637, 796 N.W.2d at 750.

The Montejo case simply removed the presumption of invalidity created by Michigan v. Jackson. Courts must still determine if the Sixth Amendment waiver was knowing and voluntary and must still conduct an analysis pursuant to Edwards. While there is no allegation in the present case that Petitioner requested counsel when the police initiated the fourth custodial interrogation after Petitioner requested and had been appointed counsel but before Petitioner had an opportunity to meet with appointed counsel in violation of Edwards, the specific facts of this case, specifically the unequivocal invocation of the right to counsel at the arraignment and the fact that Petitioner's attempts to obtain appointed counsel had been futile prior to the fourth custodial interrogation, initiated by police, render the statement involuntary and taken in violation of the Sixth Amendment.

In affirming Petitioner's conviction this Court wrote:

Turning to our case, we find Montejo bars Reid's claim that his Sixth Amendment right to counsel was violated. Although Reid makes much of the factual distinctions between the cases – Montejo was automatically appointed counsel while Reid elected to file a form requesting counsel – it is exactly this type of argument Montejo meant to preclude by overruling Jackson. The Court did more than merely remove the presumption of invalidity of a waiver after a defendant's Sixth amendment rights were invoked. It held that where, as here, a defendant claimed a violation of his Sixth amendment right to counsel in the context of a custodial interrogation, the relevant inquiry was what happened the moment the police initiated contact. Therefore, the question is no longer, as Reid posits, whether the defendant invoked his right to counsel at arraignment, but whether he waived his rights prior to the interrogation. See *id.* at 797, 129 S.Ct. 2079 (“What matters for Miranda and Edwards is what happens when the defendant is approached for interrogation, and (if he consents) what happens during the interrogation—not what happened at any preliminary hearing.”).

State v. Reid, -- S.C. --, 758 S.E.2d 904, 909 (2014).

Counsel respectfully submits that this Court's reading of Montejo is overly broad. While the relevant inquiry for purposes of the Edwards analysis is what happened the moment the police initiated contact, the court must still make a voluntariness determination apart from Edwards. Montejo does not bar Petitioner's claim that the fourth statement was involuntary and in violation of his Sixth Amendment right to counsel. The Court's decision in Montejo was narrow and, contrary to the finding of this Court, merely removed the presumption of invalidity created by Michigan v. Jackson. As noted by the Court in Montejo:

The *only* question raised by this case, and the only one addressed by the *Jackson* rule, is whether courts must *presume* that such a waiver is invalid under certain circumstances. 475 U.S., at 630, 633, 106 S.Ct. 1404. We created such a presumption in Jackson by analogy to a similar prophylactic rule established to protect the Fifth Amendment based Miranda right to have counsel present at any custodial interrogation. Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), decided that once “an accused has invoked his right to have counsel present during custodial interrogation ... [he] is not subject to further interrogation by the authorities until counsel has been made available,” unless he initiates the contact. *Id.*, at 484–485, 101 S.Ct. 1880.

Montejo v. Louisiana, 556 U.S. 778, 787, 129 S.Ct. 2079, 2085 (2009)(emphasis in original).

The question in the present case is whether the Sixth Amendment waiver was voluntary or effective under the specific facts of this case. This Court, however, broadened Montejo to find that Petitioner's mere signing of the Miranda waiver constituted a valid Sixth Amendment waiver. "We accordingly find that under Montejo, Reid waived his right to counsel by signing the Miranda waiver prior to giving his fourth statement. Because he made no allegations that he requested his counsel be present or that this waiver was otherwise not knowing and voluntary, we affirm the admission of the statement." State v. Reid, -- S.C. --, 758 S.E.2d 904, 909 (2014). The specific facts of the present case support that the waiver was ineffective and involuntary. Petitioner challenged the trial judge's refusal to suppress a confession, following a fourth custodial interrogation, initiated by the police, as being taken in violation of Petitioner's Sixth Amendment right to counsel because it was taken after Petitioner requested and had been appointed counsel but before Petitioner had an opportunity to meet with appointed counsel. Respectfully, this Court erred in finding that Petitioner voluntarily waived his right to counsel by signing the Miranda waiver prior to giving his fourth statement without making a voluntariness determination apart from Jackson and Edwards but based on the specific facts of the case.

In Patterson v. Illinois, 487 U.S. 285, 108 S.Ct. 2389 (1988), the United States Supreme Court discussed in a footnote that a waiver that may be valid pursuant to Miranda would not be valid for Sixth Amendment purposes, writing:

This does not mean, of course, that all Sixth Amendment challenges to the conduct of post indictment questioning will fail whenever the challenged practice would pass constitutional muster under Miranda. 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. See Moran v. Burbine, 475 U.S., at 424, 428, 106 S.Ct., at 1142, 1144-1145. Likewise a surreptitious conversation between an undercover police officer and an unindicted suspect would not give rise to any Miranda

violation as long as the “interrogation” was not in a custodial setting, see Miranda, 384 U.S., at 475, 86 S.Ct., at 1628; however, once the accused is indicted, such questioning would be prohibited. See United States v. Henry, 447 U.S. 264, 273, 274–275, 100 S.Ct. 2183, 2188–2189, 65 L.Ed.2d 115 (1980).

Thus, because the Sixth Amendment's protection of the attorney-client relationship—“the right to rely on counsel as a ‘medium’ between [the accused] and the State”—extends beyond Miranda's protection of the Fifth Amendment right to counsel, see Maine v. Moulton, 474 U.S., at 176, 106 S.Ct., at 487, there will be cases where a waiver which would be valid under Miranda will not suffice for Sixth Amendment purposes. See also Michigan v. Jackson, 475 U.S., at 632, 106 S.Ct., at 1409.

Patterson v. Illinois, 487 U.S. at 297, 108 S.Ct. at 2397, n. 9.

The Court in Montejo acknowledged that an involuntary Sixth Amendment waiver was invalid apart from Jackson. In discussing the advantage of the bright line rule of Jackson as opposed to a case by case voluntariness determination ultimately established by the case, the Court in Montejo wrote:

What does the Jackson rule actually achieve by way of preventing unconstitutional conduct? Recall that the purpose of the rule is to preclude the State from badgering defendants into waiving their previously asserted rights. See Harvey, *supra*, at 350, 110 S.Ct. 1176; see also McNeil, 501 U.S., at 177, 111 S.Ct. 2204. The effect of this badgering might be to coerce a waiver, which would render the subsequent interrogation a violation of the Sixth Amendment. See Massiah, *supra*, at 204, 84 S.Ct. 1199. Even though involuntary waivers are invalid even apart from Jackson, see Patterson, 487 U.S., at 292, n. 4, 108 S.Ct. 2389, mistakes are of course possible when courts conduct case-by-case voluntariness review. A bright-line rule like that adopted in Jackson ensures that no fruits of interrogations made possible by badgering-induced involuntary waivers are ever erroneously admitted at trial.

Montejo v. Louisiana 556 U.S. 778, 794, 129 S.Ct. 2079, 2089 (2009). Respectfully, this Court erred in failing to make a voluntariness determination apart from Jackson and Edwards but based on the specific facts of this case.

Counsel respectfully submits that if this Court made a proper voluntariness determination based on the specific facts of the case which differ significantly from Montejo, this Court would

find that the fourth statement should have been suppressed. The police conduct in the present case in initiating a fourth custodial interrogation after Petitioner requested and was appointed counsel but was unable to meet with counsel is precisely the type of badgering that the Jackson and Edwards rules were designed to prevent. While Miranda warnings were found sufficient to render the Sixth Amendment waiver valid in Montejo, under the facts of the present case the Miranda warnings were not sufficient to render the Sixth amendment waiver valid. “Just as ‘no talismanic incantation [is] required to satisfy [Miranda's] strictures,’ California v. Prysock, 453 U.S. 355, 359, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981) (per curiam), it would be absurd to think that mere recitation of the litany suffices to satisfy Miranda in every conceivable circumstance. ‘The inquiry is simply whether the warnings reasonably conve[y] to [a suspect] his rights as required by Miranda’ Duckworth v. Eagan, 492 U.S. 195, 203, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989) (quoting Prysock, supra at 361, 101 S.Ct. 2806).” Missouri v. Seibert, 542 U.S. 600, 611, 124 S.Ct. 2601, 2610 (2004). Based on the specific facts of this case where Petitioner asserted his Sixth Amendment right to counsel at arraignment but was not permitted to speak with appointed counsel prior to the fourth custodial interrogation by police, the Miranda warnings did not reasonably convey to Petitioner his Sixth Amendment right to counsel.

Miranda's prophylactic protection simply does not work when, as in the present case, an indigent defendant's request for counsel is futile because police are allowed to badger the defendant through continued custodial interrogations before appointed counsel has an opportunity to meet with the defendant. Such a waiver is not consistent with the protections afforded by the Sixth Amendment and is not consistent with the long established precedent of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The Miranda warnings in the present case did not convey to Petitioner his Sixth Amendment right to counsel.

In the case of In re Tracy B., 391 S.C. 51, 66, 704 S.E.2d 71, 78-79 (Ct.App. 2010) (cert.granted February 9, 2012); In re Tracy B., 400 S.C. 502, 704 S.E.2d 504 (2012) (cert. dismissed as improvidently granted, December 12, 2012), the South Carolina Court of Appeals wrote:

A criminal defendant is deprived of due process if his conviction is founded, in whole or in part, upon an involuntary confession.” State v. Pittman, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007) (citing Jackson v. Denno, 378 U.S. 368, 377, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)). In conducting the due process analysis, “courts look to the totality of circumstances to determine whether a confession was voluntary.” Withrow v. Williams, 507 U.S. 680, 693, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993). The pertinent circumstances include “the youth of the accused, his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.” Pittman, 373 S.C. at 566, 647 S.E.2d at 164 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). No one factor is determinative; each case requires careful scrutiny of all the surrounding circumstances. Pittman, 373 S.C. at 566, 647 S.E.2d at 164 (citing Schneckloth, 412 U.S. at 226, 93 S.Ct. 2041).

In making a voluntariness determination under the totality of the circumstances, the specific facts of this case are critically important. On October 3, 2009, after three custodial interrogations, two police initiated, Petitioner was arraigned and requested an attorney. His request for court appointed counsel was granted. (Affidavit of Indigency and Application for Counsel, R. p. 941). Petitioner’s Sixth Amendment right to counsel had clearly attached. Petitioner’s request for appointed counsel, however, was futile as he was unable to meet with counsel prior to October 6, 2009, when the police transported Petitioner from the jail to the police department for a fourth interrogation. (R. p. 535, lines 7-23). Petitioner was mirandized and provided a fourth statement. These factors are important to the voluntariness determination because, as noted by the Court in Montejo:

No reason exists to assume that a defendant like Montejo, who has done *nothing at all* to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present. And no reason exists to prohibit the police from inquiring. Edwards and Jackson are meant to prevent police from badgering defendants into changing their minds about their rights, but a defendant who never asked for counsel has not yet made up his mind in the first instance.

Montejo v. Louisiana 556 U.S. 778, 789, 129 S.Ct. 2079, 2086 - 2087 (2009).

In State v. Anderson, 357 S.C. 514, 518-519, 593 S.E.2d 820, 822 (Ct.App. 2004), decided prior to United States Supreme Court decision in Montejo, the South Carolina Court of Appeals wrote:

The Sixth Amendment guarantees that in all criminal prosecutions “the accused shall enjoy the right to ... have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. “[O]nce a criminal defendant invokes his Sixth Amendment right to counsel, a subsequent waiver of that right—even if voluntary, knowing, and intelligent under traditional standards—is presumed invalid if secured pursuant to police-initiated conversation,” and “statements obtained in violation of that rule may not be admitted as substantive evidence in the prosecution's case in chief.” Michigan v. Harvey, 494 U.S. 344, 345, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990) (stating the holding of Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986)). Likewise, the South Carolina Supreme Court has held:

When the Sixth Amendment right to counsel has attached, if police initiate interrogation after a defendant's assertion, at an arraignment or other similar proceedings, of his right to counsel, any waiver of the defendant's right to counsel for that police initiated interrogation is invalid unless the defendant initiates the contact himself. State v. Council, 335 S.C. 1, 15-16, 515 S.E.2d 508, 515 (1999).

In both Anderson and Council the South Carolina Appellate Courts found that the defendants invoked their Sixth Amendment right to counsel at arraignment when they signed paperwork requesting a public defender. In both cases the Courts found that any subsequent interrogation violated the protections guaranteed by the Sixth Amendment. Like the defendant in

Anderson and Council, Petitioner invoked his Sixth Amendment right to counsel at arraignment when he requested and was appointed a public defender.

In the case of In re Tracy B., 391 S.C. 51, 62, 704 S.E.2d 71, 76 (Ct.App. 2010) (cert.granted February 9, 2012); In re Tracy B., 400 S.C. 502, 704 S.E.2d 504 (2012) (cert. dismissed as improvidently granted, December 12, 2012), the South Carolina Court of Appeals discussed the Anderson and Montejo cases writing:

In addition, the Anderson opinion hinges upon the bright-line rule set forth in Michigan v. Jackson that once a defendant invokes his or her Sixth Amendment right to counsel, any subsequent waiver is presumed invalid if secured pursuant to police-initiated conversation. See Anderson, 357 S.C. at 518–19, 593 S.E.2d at 822 (citing Michigan v. Jackson, 475 U.S. 625, 636, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986)).

Jackson was recently overruled by Montejo v. Louisiana, 556 U.S. 778, 129 S.Ct. 2079, 2091; 173 L.Ed.2d 955 (2009). In Montejo, the Supreme Court concluded that Jackson's expansion of the Edwards rule was not warranted in light of the “marginal benefits” and “substantial costs” of that expansion. *Id.* at 2091. The Montejo Court remanded to permit Montejo to argue whether or not he initiated the subsequent police interrogation in accordance with Edwards. *Id.* at 2091. Therefore, the additional protection afforded by Edwards is currently applicable in both Fifth Amendment and Sixth Amendment contexts. (footnote omitted).

In re Tracy B. held that the juvenile, after invoking the Fifth Amendment right to counsel, re-initiated contact with police through a third party, the mother, rendering the statement admissible for purposes of the Fifth Amendment. The present case does not involve the question of whether Petitioner initiated or re-initiated contact with police. It is undisputed that the contact before the fourth interrogation was police initiated. The present case involves a fourth statement given to the police as the result of a police initiated interrogation after appellant invoked his right to an attorney but was in effect denied the right to an attorney. The Montejo

case involved a defendant who had automatically been appointed counsel. In contrast, in the present case, Petitioner unequivocally asserted his right to counsel by filling out the form requesting appointment of counsel. Appellant's request for court appointed counsel was granted. (Affidavit of Indigency and Application for Counsel, R. p. 941). Petitioner, however, was unable to meet with counsel before the police badgered him by initiating a fourth custodial interrogation. The subsequent interrogation was in violation of Petitioner's Sixth Amendment right to counsel and in derogation of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

In the present case, unlike in Montejo, Petitioner requested counsel and was approved for appointed counsel but, before he could meet with court appointed counsel, Petitioner was badgered by the police through a fourth custodial interrogation. Again, this is precisely the type of police conduct Edwards and Jackson are meant to prevent. Petitioner's attempt to seek counsel was circumvented by the police action. The Sixth Amendment waiver was not valid under these circumstances and the Miranda warnings given did not validate the waiver.

As discussed at oral argument, Montejo did not overrule the traditional Sixth Amendment analysis found in Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) and Maine v. Moulton, 474 U.S. 159, 170-171, 106 S.Ct. 477, 484, 88 L.Ed.2d 481 (1985). Applying traditional Sixth Amendment analysis in Maine v. Moulton, 474 U.S. 159, 170-171, 106 S.Ct. 477, 484, 88 L.Ed.2d 481 (1985), the United States Supreme Court wrote:

Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance. We have on several occasions been called upon to clarify the scope of the State's obligation in this regard, and have made clear that, at the very least, the prosecutor and

police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.

The fourth police initiated interrogation **after** Petitioner requested and was appointed counsel circumvented and diluted the protection afforded by the Sixth Amendment. While Petitioner was mirandized prior to giving the fourth statement, his earlier attempt to obtain counsel was futile. The Sixth Amendment waiver was not knowing and voluntary. Appointing counsel for the indigent defendant and then not permitting that indigent defendant to meet with appointed counsel before the police badger him for a fourth time is the equivalent of the police not telling a defendant his lawyer was trying to reach him and continuing to conduct the interrogation. Under both situations the Miranda waiver may be valid while the Sixth Amendment waiver would not be valid. As the Court noted in Patterson v. Illinois, 487 U.S. at 297, 108 S.Ct. at 2397, n. 9, “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. See Moran v. Burbine, 475 U.S., at 424, 428, 106 S.Ct., at 1142, 1144–1145.” The fourth statement should have been suppressed.

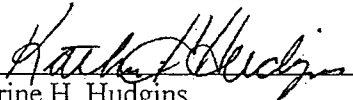
B. Petitioner is entitled to a remand

Alternatively, this Court should remand the case to the trial court for a determination of voluntariness apart from Jackson and Anderson and Edwards. As noted by the Court in Montejo in issuing a remand in that case, overruling Jackson changed the legal landscape so, “Montejo 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, *cf.* Moran,

475 U.S., at 428–429, 106 S.Ct. 1135. These matters have heightened importance in light of our opinion today.” Montejo, 556 U.S. at 798, 129 S.Ct. at 2092 (2009). Petitioner in the present case at trial properly relied on State v. Anderson, 357 S.C. 514, 593 S.E.2d 820 (Ct.App. 2004) and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), cases decided prior to Montejo, in arguing for the suppression of the fourth statement based on a Sixth Amendment violation. While counsel submits that the record before this Court is sufficient to find the waiver involuntary and the fourth statement taken in violation of Petitioner’s Sixth Amendment rights, if the Court disagrees, Petitioner should be given an opportunity to argue that the Miranda warnings were ineffective in advising petitioner of his Sixth Amendment right to counsel rendering the fourth statement involuntary apart from Jackson and Anderson and Edwards.

Counsel respectfully seeks rehearing.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

This 16th day of July, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

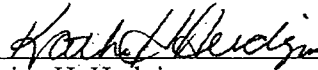
DONTA KEVON REID,

APPELLANT

Appellate Case No. 2011-204288

CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, this 16th day of July, 2014.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 16th day
of July, 2014.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.

The Supreme Court of South Carolina

The State, Respondent,



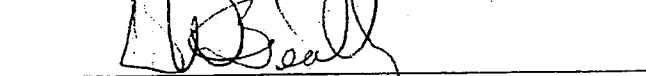
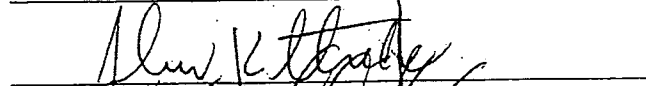
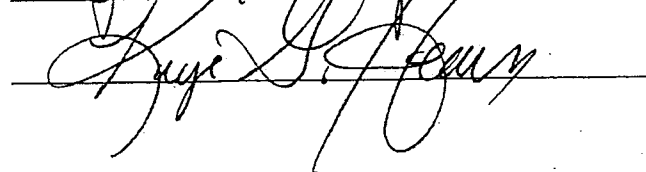
v.

Donta Kevon Reid, Appellant.

Appellate Case No. 2011-204288

ORDER

The Petition for Rehearing filed in the above entitled matter is denied.

 C.J.
 J.
 J.
 J.
 J.

Columbia, South Carolina

August 6, 2014

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SC OFFICE OF
APPELLATE DEFENSE

In the Supreme Court of the United States

Donta Kevon Reid

Petitioner,

v.

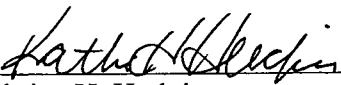
STATE OF SOUTH CAROLINA

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT**

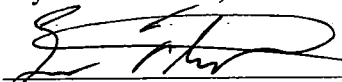
CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel for Respondent, the State of South Carolina, Jennifer E. Roberts, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, and via email at JRoberts@scag.gov on this 4th day of November, 2014.



Kathrine H. Hudgins
Counsel of Record

SWORN TO BEFORE me this 4th
day of November, 2014.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.