

The Supreme Court Removes Its
Prophylactic Protection:
Montejo v. Louisiana¹
Legal Question of The Week
Vol. 2, Number 13
June 5, 2009

Brian Beasley
Fan of Subtle Innuendo and
Legal Adviser, HPPD

Before we get into the REAL topic for this week's legal update, I want to answer a question that several of you stopped by to ask about a case that came up in our local District Court last week. It seems that a judge dismissed a larceny charge because the warrant had the victim business' name incorrect. A point often overlooked when a larceny is charged from a business is an arcane rule that the warrant or indictment must allege that the business is a legal entity capable of owning property² (in other words, a corporation) unless the name of the business includes words like "corporation," "incorporated," or "limited," or the abbreviations for those words which indicate that it is a corporation.³ This rule only applies to larceny and embezzlement and not to burglary, breaking and entering, or concealment of merchandise.⁴

The best practice for all charging documents where a business is involved is to use the actual legal name of the business. If you are unsure, you should check the N.C. Secretary of State's webpage at <http://www.secretary.state.nc.us/corporations/> You can search using keywords to find the legal name. Keep in mind that for your larger franchises, your search may pull up legal name for the corporation and several other legal names for related corporations. Searching Wal-Mart, for instance, pulls up a list of 15 corporations including not only Wal-Mart Stores, Inc. but also Wal-Mart Realty Company and Wal-Mart⁵ Transportation, LLC. You will usually be able to determine which corporation name refers to the stores themselves. I would also advise you to include the street address of the particular store in the warrant to ensure that it is clear which store you are alleging.⁶

¹ 556 U.S. ____ (2009).

² See, e.g., *State v. Norman*, 149 N.C. App. 588 (2002).

³ *State v. Cave*, 174 N.C. App. 580 (2005) (abbreviation "Inc." was sufficient)

⁴ *State v. Wooten*, 18 N.C. App. 652 (1973) (ownership need not be alleged for concealment of merchandise)

⁵ By the way, I just noticed that "Wal-Mart" doesn't set off the red wavy line spelling error alarm. That tells you how famous the Wal-Mart name is.

⁶ For instance, was it the Wal-Mart on North Main Street or South Main Street?

Now back to your regularly scheduled legal update...already in progress.

Having already stunned the legal community by changing the long-standing rule concerning when a person's Sixth Amendment rights attach in Rothgery v. Gillespie County, Texas⁷ last year and invalidating most motor vehicle searches done incident to the arrest of an occupant earlier this year in Arizona v. Gant,⁸ one would think that the Court would be content to relax and surf the waves created by these shocking opinions. But, as they say on those late night infomercials for Shamwow⁹ and Snuggie,¹⁰ "wait – that's not all!"¹¹

This latest opinion by the Supreme Court deals again with the Sixth Amendment and effects the rules for when law enforcement officers may approach a person for the purpose of interrogation. In a nutshell, after the Court's decision in Montejo v. Louisiana, there is no longer a prohibition against law enforcement officers initiating interrogation even after the suspect has been appointed counsel or requested counsel at a first appearance or similar proceeding.¹² The Court expressly overruled the decision in Michigan v. Jackson¹³ which had set out this rule.

Our story opens with the discovery of the body of Lewis Ferrari in his own home in Louisiana, the victim of a robbery homicide. Ferrari was the owner of a dry cleaning business¹⁴ and suspicion quickly focused on Jerry Moore, a disgruntled former employee of that business.¹⁵ Police sought to question the star of our show, Jesse Montejo,¹⁶ a known associate of Moore, to gather information on their prime suspect. Montejo instead kept changing his version of events, first claiming that he had only driven Moore to the victim's home and then ultimately admitting that he had shot and killed Ferrari during a burglary.

Montejo was arrested and brought before a judge for a preliminary hearing as required by Louisiana law. At this hearing, because he was charged with First Degree Murder, he was appointed counsel as a matter of course even without his requesting it.

⁷ 128 S. Ct. 2578 (2008).

⁸ 556 U.S. ____ (2009).

⁹ All rights reserved.

¹⁰ No rights deserved.

¹¹ Decisions such as these are bittersweet for the legal office. On one hand, it gives us something to write about besides guns. On the other hand, it seems like every time the Supreme Court moves, one of the previous Legal Updates I've written becomes inaccurate and worthless, causing me to have to go back and correct everything in light of the latest ruling.

¹² This does not affect the rule that interrogation must stop if the suspect asks for an attorney during the interrogation itself, or refuses to waive his Miranda rights.

¹³ 475 U.S. 652 (1986).

¹⁴ The name Lewis Ferrari and the fact that he owns a dry cleaning business make it sound like the facts of this case were actually taken from one of those old film noir movies. Truth is stranger than fiction. I am speculating, but I wonder if the slogan for Ferrari Dry Cleaning, Inc. had something to do with fast service.

¹⁵ No information is provided as to why Mr. Moore was disgruntled or whether he had been "gruntled" or disgruntled as a current employee.

¹⁶ "Hello. My name is Jesse Montejo. You killed my father. Prepare to die." (Random Princess Bride reference due to the fact that I watched it the other night.)

Later that same day, two detectives went to visit Montejo in the pokey in an attempt to get his assistance in locating the murder weapon (which Montejo had confessed to throwing in a lake.) Montejo was again read his Miranda warnings, waived them, and agreed to accompany police to locate the weapon. During the trip, Montejo wrote a letter of apology to the victim's widow. Upon their return to jail, Montejo met his court appointed attorney for the first time, who was not pleased (to say the least) that detectives had interrogated his client in his absence.¹⁷ At trial, the letter of apology was admitted over defense objection. Montejo was convicted of First Degree Murder and sentenced to death.¹⁸

Let's take a moment and review our interrogation law leading up to this case. Miranda v. Arizona¹⁹ established the prophylactic²⁰ rule that a statement made by a suspect during custodial interrogation would be presumed to be involuntarily made unless the suspect was first advised of and waived his or her Fifth Amendment rights. Edwards v. Arizona²¹ took it a step further and ruled that once a defendant has invoked their right to have counsel present during custodial interrogation, the interrogation must stop. Finally, under Minnick v. Mississippi,²² no further interrogation can occur until counsel has been made available or the defendant initiates communication with an officer. This rule was designed to prevent officers from badgering a defendant into waiving his previously asserted Miranda rights.

Miranda, Edwards, and Minnick dealt with the Fifth Amendment's right against self-incrimination. The Sixth Amendment gives the right to have legal counsel for any critical stage of prosecution. Unlike the Fifth Amendment right, the Sixth Amendment right exists whether or not the defendant is in custody and is limited to the specific charge(s) that it has attached to or been asserted for. Under the now overruled case of Michigan v. Jackson, the rule was if the defendant had asserted his right to counsel by requesting an attorney or announcing his plans to retain an attorney, the police could not approach the defendant for interrogation without his attorney being present unless the defendant initiated contact. The Rothgery case from last year moved the time in which that right attached and could therefore be asserted back to when the defendant first appeared in front of a magistrate to determine whether probable cause exists and to set bail.

Then along came Montejo. The Louisiana Supreme Court had determined that the apology letter was not a violation of Michigan v. Jackson since Montejo had not actually asserted his right to counsel because an attorney was automatically appointed to

¹⁷ Typically, the attorney didn't blame his misguided client, he blamed the police. Go figure.

¹⁸ Apparently they still do that in Louisiana.

¹⁹ 384 U.S. 436 (1966). No word on whether the Court will overturn this case next week. Stay tuned.

²⁰ Lest you think that I'm using this word just because it sounds funny or is a double entendre for a condom (not that those wouldn't be sufficient reasons,) this is a word that the Court uses when talking about the bright line rules that protect criminal defendants. In fact, in the Montejo opinion, including concurrences and dissents, the word prophylactic or prophylaxis is used 14 times in 42 pages. This might be the real reason Sandra Day O'Connor retired.

²¹ 451 U.S. 477 (1981).

²² 498 U.S. 146 (1990).

him. In fact, *Montejo* had said nothing at this preliminary hearing. The U.S. Supreme Court, however, pointed out that this analysis would lead to defendants being treated differently in different states (since everyone appoints counsel in their own unique way – some requiring a request first and others doing it with or without a request.) They also observed that the important question of whether a defendant had in fact requested an attorney would necessarily turn on what was remembered from a court proceeding that is usually hurried and in almost all cases is not recorded or transcribed in any way. Therefore, they determined that the Louisiana court had reached the right decision in the wrong way.

Instead, the Court decided that it would overturn the *Michigan v. Jackson* rule, stating in its opinion that the rule was not necessary to protect defendants because of the safeguards found in *Miranda*, *Edwards*, and *Minnicks*. The Court held that in this situation, “three layers of prophylaxis are sufficient.”²³ I can’t make this stuff up.

WHAT DOES THIS MEAN FOR YOU?

I’m glad you asked. After *Montejo*, you may approach an individual for interrogation even if that person has asserted his Sixth Amendment right to counsel for the charge which you wish to question him about. You must advise him of his rights²⁴ whether he is in or out of custody, but if he waives those rights and agrees to talk to you, anything he says can and will be used against him, as the saying goes.

And as in every tricky legal situation, if you have a question, your legal adviser is just a phone call away.

Brian T. Beasley

Police Attorney
High Point Police Department

²³ Insert your own risqué joke here.

²⁴ You may advise him of his rights using the same form you always do, even though he’s actually waiving his Sixth Amendment rights instead of his Fifth Amendment rights. *Patterson v. Illinois*, 487 U.S. 285 (1988).