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No. 07-1529

In the Supreme Court of the United States

JESSE JAY MONTEJO,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ of Certiorari to the Louisiana Supreme Court

BRIEF OF *AMICI CURIAE* THE LOUISIANA PUBLIC DEFENDERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The Louisiana Public Defenders Association consists of statutorily created offices charged with the responsibility of representing indigent defendants in Louisiana. Because of their unique role in the criminal justice system, *amici curiae* can provide this Court with insight regarding the impact of the Louisiana Supreme Court's decision in *Montejo v. State of Louisiana,* 974 So2d. 1238 (La. 2008).

Amici curiae know first hand the practices and procedures in judicial districts across Louisiana regarding the appointment of counsel to indigent defendants. Although local procedures vary throughout Louisiana, it is a common thread that many work counter to the notion that a defendant will be given the opportunity to provide affirmative acceptance of appointed counsel. The practical effect of the interaction of these local practices and the affirmative acceptance requirement espoused by the Louisiana Supreme Court will be to deny counsel to indigent defendants in contradiction of Sixth Amendment rights.

Further, an affirmative acceptance requirement will directly impact an already over-burdened public defender system. The indigent defense system throughout Louisiana is chronically under-

[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to this brief.

resourced, and has only gotten worse since Hurricanes Katrina and Rita.[2] As a result of the Louisiana Supreme Court's holding in *Montejo*, Louisiana public defenders will need to further stretch those limited resources by employing more staff, and spending more time at initial hearings to zealously guard against waiver and in motions practice to defend affirmative acceptance.

A*mici curiae* have a strong institutional interest in the reversal of the Louisiana Supreme Court's affirmative acceptance requirement.

SUMMARY OF ARGUMENT

The Louisiana Supreme Court's approach of requiring an affirmative acceptance of counsel is unworkable under the practices used in Louisiana's

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[2] *See State v. Citizen*, 898 So.2d 325, 327, 335 n.11 (La. 2005) (pointing out that the state legislature has "failed to provide adequate appropriation to support" indigent defense; citing testimony from director of state Indigent Defense Assistance Board "that the state reduced his agency's funding by 25% after its first year of existence, then failed to restore funding in the seven subsequent years"); National Legal Aid & Defender Association, *A Strategic Plan to Ensure Accountability & Protect Fairness in Louisiana's Criminal Courts* (September 2006) at iv (explaining that "it would be disrespectful to those . . . individuals trying to keep the system afloat to suggest that Katrina was *solely* responsible for the systemic collapse of justice in New Orleans. The New Orleans justice system had long-standing, pre-existing systemic deficiencies that were unmasked and accentuated by the catalyst Katrina"). The inevitable procedural changes and motions practice that will result from the Louisiana Supreme Court's affirmative acceptance requirement will severely drain an already limited pool of public defender resources.

local judicial districts, and will result in the denial of counsel in violation of the Sixth Amendment. Although the proceedings governing initial appearance and assignment of counsel vary throughout Louisiana's districts, a common thread is that many do not seek affirmative acceptance from indigent defendants. For example, many appoint counsel automatically or through an indigency investigator. An affirmative acceptance requirement will have the practical effect of denying these indigent defendants counsel because they were never asked to accept counsel and will not understand the necessity of this formality.

Moreover, many judicial districts in Louisiana do not transcribe initial hearings, or, at best, use only clerk minute notes. If the Louisiana Supreme Court's approach is allowed to stand, it will invite extensive motions practice based on off-the-record testimony of court officials, law enforcement personnel, and other witnesses as to whether a defendant in some way signaled acceptance of counsel.

Finally, the affirmative acceptance requirement will place yet another financial burden on already strained public defender resources. In practice, these financial restraints will likely result in defendants losing counsel because this new mandate cannot be addressed in the Louisiana Criminal Courts under the current financing of Louisiana's public defense system.

ARGUMENT

I. THE VARIETY OF PARISH PRACTICES IN LOUISIANA MAKE THE AFFIRMATIVE ACCEPTANCE REQUIREMENT UNWORKABLE.

In Louisiana, a person arrested and detained must be brought in front of a judge within seventy-two hours so that the judge can appoint counsel. La. C. Cr. P. art. 230.1. Under Article 230.1, local parish rules allow a defendant to "appear" in court through alternative means, such as by telephone or video conference. *Id.* Moreover, in cases where the defendant is incapacitated, unconscious, or otherwise physically or mentally unable to appear in court within seventy-two hours, the defendant's presence is waived and the court automatically appoints counsel. *Id.*

In Louisiana, each judicial district is free to set their own practices for compliance with Article 230.1. The requirement of affirmative assent favored by the Louisiana Supreme Court is impractical in the context of the varying district practices. In many districts, defendants are not afforded the opportunity to "accept" counsel. In others, counsel is not present with the defendant during the hearing. In almost all of Louisiana's judicial districts, hearings are not transcribed in any detailed manner. What is clear upon an examination of local practice is that district procedures were not designed to obtain "affirmative acceptance" of counsel at the seventy-two hour hearing, and requiring such acceptance will result in a *de facto* denial of Sixth Amendment rights as

recently affirmed in *Rothgery v. Gillespie County, Texas*, 128 S.Ct. 2578 (2008). Examples from three judicial districts, which are set forth below, illustrate this inherit incompatibility.

In Louisiana's Fourth Judicial District, comprising Morehouse and Ouachita Parishes in the northeast part of the State, defendants in jail appear for their "seventy-two hour hearing" initial appearance by video conference.[3] Although a public defender is often present at the courthouse, there is no attorney present alongside the accused at the jails. At the hearing, the judge asks the defendants if they are able to hire a lawyer. If the defendant answers no, the judge refers him/her to an investigator present at the jail, who immediately interviews the defendant to see if he/she qualifies for public defender representation. If the investigator determines that the defendant is indeed indigent, a public defender is assigned to represent the accused. After the investigator's assessment, there is normally no further dialogue between the defendant and the judge until arraignment. Accordingly, there is no opportunity for the defendant, at the time of appointment, to affirmatively accept counsel before the court.

In the neighboring Fifth Judicial District, comprised of West Carroll, Richland, and Franklin parishes, defendants do not appear for their seventy-two hour hearing. Instead, the Sheriff's Office

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[3] Defendants in custody can also appear at initial hearings by video in the 3rd, 6th, 8th, 10th, 14th, 15th, 16th, 17th, 22nd, 23rd, 39th and 40th judicial districts.

delivers a list of defendants to the judges of the district at various times throughout the day (and sometimes at night). At this initial stage, the judge assumes that any defendant still in jail after seventy-two hours is indigent, appoints an attorney, and telephones the defendant to provide counsel's contact information.[4] These calls are made from the judge's chambers and are not on the record. At the time of appointment, no attorney is present in court, in jail, or in the judge's chambers.

In Louisiana's Twenty-Fourth Judicial District, coextensive with Jefferson Parish and bordering on New Orleans, defendants are physically brought before a magistrate judge for their seventy-two hour hearing. A public defender designated specifically to handle cases arising from the Magistrate Court is present at this initial appearance. At this hearing, the magistrate judge asks the defendant whether he can afford to hire his own attorney; if he cannot, the judge enters into a colloquy with the defendant to determine whether he is indigent. If the judge determines that the defendant qualifies, he/she will order public defender representation. The initial appearance before the magistrate, however, is a non-record proceeding.

These foregoing examples illustrate that the practices in many of Louisiana's judicial districts will result in a failure of indigent defendants to

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[4] Only later, when the defendant appears for his arraignment, does the judge question the defendant in open court as to his financial status and as to whether he wishes to represent himself.

affirmatively accept counsel and secure their Sixth Amendment rights. In districts like Louisiana's Fifth District, where counsel is appointed to anyone in jail after seventy-two hours, defendants are not asked if they accept counsel. Similarly, in judicial districts like the Fourth District—where the public defender is appointed mechanically after an investigator determines indigency—there are limited opportunities for defendants to then affirmatively accept counsel. Moreover, in districts like the Fourth and Fifth Districts where appointment of counsel is done outside the presence of a lawyer, defendants have no opportunity to confer with appointed counsel to ensure "acceptance."

Even the Twenty-Fourth Judicial District's procedures—which are the only procedures of the three districts discussed that includes a personal appearance before a judge and a colloquy on financial considerations—are incompatible with the Louisiana Supreme Court's affirmative acceptance requirement. The Louisiana Supreme Court mandates that the defendant must affirmatively accept court appointed counsel. *Montejo*, 974 So.2d at 1261. Litigation on this issue will inevitably turn, as it did in Mr. Montejo's case, on whether the minute entries sufficiently describe the defendant's reaction to his appointment of counsel. *Id.* at 1260 ("While the minute entry clearly shows that counsel was appointed, it does not show a response by defendant"). In cases like Mr. Montejo's, motions practice will reduce to mere conflicting assertions as to whether the defendant made any type of affirmative response to the appointment of counsel.

These examples make clear that the practical result of an affirmative acceptance requirement will be to deny counsel to many indigent defendants. This Court just recently affirmed that a defendant's Sixth Amendment right to counsel is triggered at seventy-two hour type initial hearings. *See Rothgery*, 128 S.Ct. at 2592 (2008). If the Louisiana Supreme Court's approach is allowed to stand, indigent defendants under many local practices will not "accept" counsel by the mere fact that a chance to accept was never offered. Moreover, even if defendants are given an opportunity to speak to the court after counsel is appointed, an acceptance requirement will result in a trap for the uneducated and mentally infirm, which constitute a large percentage of Louisiana's indigent population. This Court should reject the Louisiana Supreme Court's approach because it is a *de facto* denial of counsel contrary to Sixth Amendments rights as provided in *Rothgery*.

II. THE AFFIRMATIVE ACCEPTANCE REQUIREMENT IN *MONTEJO* WILL ADD UNNECESSARY COSTS TO AN ALREADY STRAINED PUBLIC DEFENDER SYSTEM.

In addition to the incompatibility of Louisiana practice with an affirmative acceptance rule, such a rule would also result in an immense drain on the already limited resources of Louisiana's public defender system. Louisiana's public defender program has neither the personnel nor the capital resources to commit to such hearings.

Already, Louisiana public defenders are heavily burdened by large caseloads and small budgets. In many Louisiana parishes, public defender caseloads far exceed the recommend level set by the National Legal Aid and Defender Association (NLADA). National Legal Aid and Defender Association, *In Defense of Public Access to Justice, An Assessment of Third Level Indigent Defense Services in Louisiana 40 Years after Gideon*, 6 (2004).[5] One report looking at public defender resources in Louisiana before and after Hurricane Katrina commented:

> Pre-Katrina, the public defender system in New Orleans was not obligated to adhere to any national, state or local standards of justice resulting in public defenders handling too many cases, with insufficient support staff, practically no training or supervision, experiencing undue interference from the judiciary, all while compromising their practices by working part-time in private practices to augment their inadequate compensation . . . . In the aftermath of the storm things only got worse.[6]

As an example of the existing restraints, attorneys in Rapides Parish have reported handling up to three times the recommended felony cases, several of them capital defense cases. *Id.* at 37. Under the NLADA guidelines, attorneys should "handle no more than one or two capital cases per

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[5] http://www.lapda.org/Parish%20Report/In_Defense_of_Public_Access_to_Justice.pdf.

[6] National Legal Aid & Defender Association, *A Strategic Plan to Ensure Accountability & Protect Fairness in Louisiana's Criminal Courts* (September 2006) at iv.

year and nothing else." *Id.* With personnel already spread thin, the Louisiana public defender system cannot handle the further strain of appearing before the types of hearings resulting from *Montejo*.

Moreover, Louisiana's public defender system does not have the financial resources to conform to an affirmative acceptance rule. Louisiana receives funding for its public defenders from the state government and from court fees, which have not kept up with the increasing demand that is put on public defenders. For instance, while felony rates in Caddo Parish from 1999 through 2002 increased by 16.6%, indigent defense funding fell by 4.2%. NLADA, *In Defense of Public Access to Justice, An Assessment of Third Level Indigent Defense Services in Louisiana 40 Years after Gideon*, 25 (2004). This situation is by no means isolated to Caddo Parish. A report prepared after Hurricane Katrina by the Department of Justice, Bureau of Justice Affairs, noted that while the budgetary needs of the New Orleans public defender system were approximately eight million dollars ($8,000,000), the system received only about one-third of that amount. Nicholas Cbiarkis, D. Alan Henry, & Randolph Stone, *An Assessment of the Immediate and Longer-Term Needs of the New Orleans Public Defender System*, Study of the Bureau of Justice Initiative National Training & Technical Assistance Initiative Project at American University 26 (2006).[7]

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[7] http://www.lajusticecoalition.org/doc/DOJ-Orleans-Parish-Study.pdf.

If an affirmative acceptance requirement is implemented, Louisiana public defenders will need to commit personnel and financial resources that it does not have to *all* initial appointment hearings to ensure that the record clearly demonstrates the defendant's acceptance of counsel. Furthermore, public defenders would need to consult with potential clients during any colloquy with the judge to discuss the need for an affirmative assertion and the implications thereof.

The extraordinary costs of complying with this new regime are multifold. Because many hearings in Louisiana are done by video or telephone, an attorney would have to be present both at the courthouse with the judge and at the jail with the defendant. Further complications arise with respect to non-English speaking defendants, in which case translators would have to be present to translate and explain the proceedings to the defendant on behalf of the public defenders. An affirmative acceptance requirement would demand more public defenders and support staff time, and increase the costs of initial hearings. This would severely and unnecessarily put additional strain on the limited financial and personnel resources of the Louisiana public defenders' offices. [8]

In addition, an affirmative acceptance requirement will inevitably result in costly and time-

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[8] In addition to the burden on defense attorneys, the local Louisiana courts—which are also strapped for resources—will be burdened with an unnecessary formality.

consuming motions practice to challenge and defend the defendant's acceptance of appointed counsel. The Louisiana Supreme Court vaguely allows "some kind of positive statement or other action" in order to affirmatively accept counsel. *Montejo*, 974 So.2d at 1261. Because many judicial districts do not transcribe these proceedings, any dispute over acceptance of appointed counsel would depend on testimonial evidence from those present at the hearing. In light of the financial strains that already exist on Louisiana public defenders, this procedurally cumbersome practice will be a significant burden on already limited resources.

CONCLUSION

For the foregoing reasons, the judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

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