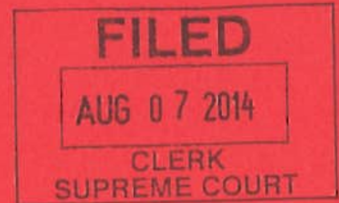

COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
FILE NO. 2013-SC-000531

SHERMAN KEYSOR **APPELLANT**

v. **APPEAL FROM GRAVES CIRCUIT COURT**
HON. TIMOTHY C. STARK, JUDGE
INDICTMENT NO. 2008-CR-00268

COMMONWEALTH OF KENTUCKY **APPELLEE**

BRIEF FOR APPELLANT, SHERMAN KEYSOR

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ERIN HOFFMAN YANG

Introduction

Sherman Keysor entered a conditional plea to two counts of first degree sexual abuse. He reserved the right to appeal the denial of his motion to suppress statements made to police officers who approached him in jail after he had invoked his right to counsel. The Court of Appeals affirmed the trial court. This Court granted Keysor's motion for discretionary review to determine the impact of *Montejo v. Louisiana*, 556 U.S. 778 (2009), on facts of this case and Kentucky Jurisprudence.

Statement Concerning Oral Argument

Mr. Keysor requests oral argument.

Statement Concerning Cites to the Record

Cites to the trial transcripts shall be TR, page number. Cites to the video record shall be VR, date stamp, time stamp.

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Statement of the Case

On October 14, 2008, in Graves County, Sherman Keysor was charged with first degree sexual abuse. VR 6/4/09 at 10:09:40. He requested counsel on October 29, 2008, and the Hon. David Perlow was appointed to represent him on November 12, 2008. *Id.* at 10:10:00. Perlow represented Keysor at a preliminary hearing that same day. *Id.* Deputy David Harrison of the Graves County Sheriff's Department testified at the hearing. Id. at 10:10:20. Keysor was indicted on the Graves County charges on December 18, 2008 and counsel received notice of the indictment on December 22. Id. at 10:10:50.

Despite Perlow's representation by counsel, Deputy Harrison, social worker Jodey Baumen, and Detective Matt Hillbrecht of the Marshall County Sheriff's Department approached Keysor, who remained incarcerated in the Graves County Jail, and interrogated him on January 6, 2009. *Id.* Hilbrecht interviewed Keysor again following a polygraph on January 14, 2009. *Id.* The police had become aware of another alleged incident of sexual abuse that occurred in nearby Marshall County with the same victim, under the same circumstances. *Id.* at 10:11:40. Counsel moved to suppress the statements given by Keysor as a result of the interrogation.

During the January 6, 2009, interrogation, Keysor signed a *Miranda* waiver and the officers began asking Keysor very broad questions-questions that made it impossible to distinguish the alleged Graves County and Marshall County offenses against the same victim. *Id.* at 10:13:50. Keysor was asked to describe his relationship with the victim's family. *Id.* at 10:15:10. The police asked Keysor about his relationship with the alleged victim. *Id.* at 10:15:30. Counsel argued

that surely statements made by Keysor concerning these relationships would implicate him in both the Graves County and Marshall County charges. *Id.*

The officers asked several questions concerning the Graves County charges-charges for which Keysor had been appointed counsel. They asked Keysor about his relationship with the victim's mother, whom he had previously dated, the victim's brother, and where the victim stayed and slept. *Id.* at. 10:16:10. The officers discussed comparisons between the Graves County and Marshall County incidents, and asked Keysor why the victim would fabricate any of the allegations. *Id.* at 10:17:15. They further pressured Keysor by stating that the alleged victim was consistent in all of her statements. *Id.*

Keysor denied the accusations, saying that he did not commit sexual abuse and that the allegations arose due to tension between the alleged victim's mother and himself, because their relationship recently ended on bad terms. *Id.* at 10:19:00. The officers told Keysor that neither the alleged victim or her mother were "smart enough" to make up a story. *Id.* at 10:18:30; 10:19:10. They pled with Keysor to "help" the victim by admitting his guilt. They called him a liar, comparing and contrasting his statements from past interviews-statements concerning charges for which he was already appointed counsel. *Id.* at 10:19:30-10:20:30.

Keysor was asked general questions about whether he touched the alleged victim's vaginal area, again implicating both Graves and Marshall County incidents. *Id.* at 10:20:30. The officers went so far as to urge Keysor to plead guilty to the charges involving both counties. *Id.* at 10:21:38. Keysor became

distressed, stating, *"you're coming at me and I am sitting here without a lawyer."* *Id.* at 10:21:20.

At some point during the interview, Keysor asked to take a polygraph to defend himself, leading the Commonwealth to argue that he initiated the second interview. *Id.* at 10:36:10. However, defense counsel noted that the polygraph request was made in response to the coercive questioning initiated by law enforcement and therefore fruit of the poisonous tree[1]. *Id.* at 10:24:50.

The trial court agreed and suppressed Keysor's statements based on *Linehan v. Commonwealth*, 878 S.W.2d 8 (Ky. 1994). TR p. 85-88. The Commonwealth moved to dismiss the suppression based on the United States Supreme Court's holding in *Montejo v. Louisiana*, 556 U.S. 778 (2009), discussed in the Argument section, *infra*. TR p. 90-91.

Trial counsel argued that the Kentucky Supreme Court had not adopted *Montejo*, and thus *Linehan* remained the controlling law. VR 6/30/09 at 9:51:50-9:53:20. The trial court disagreed, stating that it would anticipate a change in the law and granted the Commonwealth's motion to set aside the suppression. TR p. 113-115.

Sherman Keysor accepted a conditional guilty plea to two counts of first degree sexual abuse, reserving the right to appeal the ill-begotten statements. TR p. 172-130.

The Court of Appeals affirmed, stating:

> [Keysor] asserts that while the police and prosecutor may question a willing subject on new offenses, the evidence may not be used to

[1] See *Wong Sun. United States,* 371 U.S. 471 (1963).

> incriminate him on the pending charges unless his counsel is present.
>
> In *Montejo, supra*, the defendant was appointed counsel at arraignment. Prior to arraignment, however, Montejo had cooperated with the police without asking for appointment of counsel. While Montejo disputed what was said to him while he was in prison, there was a letter he wrote apologizing to the victim's widow that had nothing to do with his police interrogation.
>
> Keysor also argues that we should reject *Montejo, supra*, in favor of the holding in *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986). In *Michigan*, the Supreme Court held that "a defendant who has been formally charged with a crime and who has requested appointment of counsel at his arraignment" must have counsel present while he is being interrogated unless he initiates the conversation with the police. *Id.* at 626, 106 S.Ct. at 1406.

The Graves Circuit Court held that since the Kentucky Supreme Court had relied on federal law in making its decision in *Linehan*, it would speculate that the court would once again go with federal law and use *Montejo* for future decisions. We believe that the trial court is correct *Keysor v. Commonwealth*, 2009-CA-001639-MR, 2013 WL 3480377 (Ky. Ct. App. July 12, 2013).

This Court granted discretionary review to determine the impact of *Montejo v. Louisiana* on state law.

Argument

I. Keysor's Statements Should be Suppressed Since the Facts of this Case are Distinguishable from *Montejo v. Louisiana.*

In *Montejo v. Louisiana*, 556 U.S. 778 (2009), the United States Supreme Court overruled the long standing mandate that a defendant may not be questioned on charges for which he has been appointed counsel. In this case, the trial court initially suppressed Mr. Keysor's statements under *Linehan v.*

Commonwealth, 878 S.W.2d 8 (1994), but later reversed the order assuming this Court would apply *Montejo, supra*.

The facts of Keysor's case are strikingly similar to the facts of *Linehan, supra*. Linehan was charged with breaking into his estranged wife's home and sexually assaulting her. 878 S.W.2d at 9. He was indicted on burglary and rape charges and appointed a public defender. *Id.* Five months later, Linehan again attacked his estranged wife, accosting her from her home and driving her to a remote location to rape her. *Id.*

Linehan was questioned without the presence of counsel and gave a statement suggesting the attack was motivated by the desire to intimidate her regarding the earlier charges. *Id.* He was again arraigned and appointed counsel. *Id.* The two cases were consolidated. *Id.* Linehan argued that statements made regarding the second attack could not be used to incriminate him for the first crime without violating his right to counsel. *Id.* This Court agreed, suppressing Linehan's statement regarding the second attack to the extent that it could be used to incriminate him on the original charges. *Id.* at 10.

Likewise, the charges in Keysor's Marshall and Graves County indictments were inexplicably intertwined and his statements incriminated him on both charges. They involved the same acts against the same victim. The only variable between the two cases is the county where the acts occurred. Though the police and prosecutor may question a willing subject on new offenses without regard to prosecution pending on other pending charges, this evidence cannot be used to

incriminate him on pending charges unless counsel is present. *Linehan*, 878 S.W.2d at 12.

Suppression of Keysor's statements are warranted due to the factual distinctions between this case and the facts of *Montejo, supra*. In *Montejo*, the defendant was appointed counsel at arraignment. *Id.* at 781. However, he had no contact with counsel before the police came to speak with him. *Id.* at 782. Montejo was Mirandized and agreed to accompany police to the crime scene. *Id.* at 781. On the way there, *without prompting*, Montejo wrote an incriminating letter apologizing to the victim's widow. *Id.* at 782 [emphasis added]. The letter was introduced at trial and Montejo received the death penalty. *Id.*

By contrast, Hon. David Perlow had already been representing Keysor for several weeks prior to the visit by Deputy Harrison and Detective Hillbrecht. Perlow had made an entry of appearance, made motions and had hearings on Keysor's behalf. Deputy Harrison knew that Perlow was Keysor's attorney. Harrison was questioned by Perlow at Keysor's probable cause hearing. TR p. 68.

Montejo was questioned shortly after arraignment, before speaking with his attorney. *Montejo, supra*, at 781. But Harrison, Hillbrecht, and Beaumann interrogated Keysor after he had spent *69 days* in prison. VR 6/4/09 at 10:11:00. Like Linehan, Keysor had an established right to effective representation by defense counsel.

However, the most important distinction between the *Montejo* versus Keysor's case and *Linehan* is the level of police interference prior to the incriminating statements. In *Montejo, supra*, there was dispute over what was

said to the defendant at the prison; but it was undisputed that he wrote the incriminating letter at issue during a car ride to the murder scene of his own accord. *Montejo*, 556 U.S. at 782. By contrast, the officers can be heard on the tape pressuring Keysor to plead guilty and insisting the victim would not have lied.

Montejo is not applicable to the facts of this case. Contrary to the trial court and Court of Appeals' interpretation of *Montejo,* that case does not condone the behavior of the police in Keysor's case. "The only question posed by *Montejo* is whether courts must presume that such a waiver is invalid under certain circumstances." *State v. Forbush*, 796 N.W.2d 741, 751 (Wisc. 2010) *citing Montejo* 556 U.S. at 787. The "certain circumstances' referenced in the Court's framing of the issue in *Montejo were a charged defendant for whom counsel had been appointed by the court, yet the Supreme Court could not determine whether he had actually invoked his right to counsel. Id.* [emphasis added]. Accordingly, the Court remanded the case to determine whether the protected right to counsel would apply. *Forbush,* 796 NW2d at 751 citing *Montejo*, at 798.

"The *Montejo* decision did not conclude that a charged defendant who has affirmatively invoked his Sixth Amendment right to counsel by retaining and receiving the services of a lawyer for the offenses charged must 're-invoke' his Sixth Amendment right to counsel every time law enforcement attempts to interrogate him." *Id.* at 751. There is a difference between implicitly accepting the appointment of counsel that occurred in *Montejo* and establishing a relationship with retained counsel.

Once the right to counsel is invoked, defense counsel must consult a defendant about important decisions, and keeping the defendant informed of important developments in the case. See *Strickland v. Washington*, 466 U.S. 668, 689 (1984). "Government violates the right to effective assistance [of counsel] when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Id.* at 686. It is crucial to the role of defense counsel that he able to competently advise a criminal defendant regarding the advisability of accepting a plea offer and the consequences of rejecting such an offer. *Id.*

Other states have condemned contacting a defendant represented by counsel based on the circumstances of the encounter, notwithstanding the Supreme Court's holding in *Montejo*. For example, in *State v. Robert*, the Arizona appellate court found that investigators committed misconduct when they conveyed a plea offer and the pros and cons of waiving a preliminary hearing to a defendant who had counsel. 2011 WL 6034762, *6 (Ariz. Ct. App. 2011), review denied (Aug. 28, 2012)[2]. "Apache County's conduct undoubtedly intruded upon counsel's role as an advocate for Defendant" when an investigator "sought to encourage Defendant to accept a plea offer from the position of both the prosecution and defense." These communications fall within the province of

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[2] According to Ariz. R. Crim. P. 31.24, Memorandum decisions shall not be regarded as precedent nor cited in any court except for (1) the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case or (2) informing the appellate court of other memorandum decisions so that the court can decide whether to publish an opinion, grant a motion for reconsideration, or grant a petition for review. Any party citing a memorandum decision pursuant to this rule must attach a copy of it to the motion or petition in which such decision is cited.
Accordingly, the opinion is attached in Appendix 2.

defense counsel—not the state and showed "brazen disregard of Defendant's right to have his attorney be both communicator and advisor regarding the plea offer and waiver of preliminary hearing." The *Robert* court held:

> Government violates the right to effective assistance [of counsel] when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. It is fundamental to the role of defense counsel that he or she be able to competently advise a criminal defendant regarding the advisability of accepting a plea offer and the consequences of rejecting such an offer.
> *Id.,* internal citations omitted.

Likewise, the Maryland Supreme Court found that once a defendant established an attorney client relationship, the right to counsel could not be simply discarded under *Montejo*. *In re Darryl P.*, 63 A.3d 1142, 1188 (Md. Ct. Spec. App. 2013). The role of defense counsel was not limited to counsel's presence during the interrogation and, therefore, "could not so simply be waived." *Id.* Like Keysor, the defendant had retained counsel for two and one-half months before he was subjected to interrogation. "The State, as an entity, was fully aware, moreover, of both the appellant's constitutional right to counsel and his contractual retention of counsel." *Id.*

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. 477], *there will be cases where a waiver which would be valid under Miranda will not suffice for Sixth Amendment purposes.*" *Id.* at 1188; [emphasis in original].

The appellant had a Sixth Amendment right to counsel that went beyond the mere Fifth Amendment-based right to the presence of a lawyer during custodial interrogation. *Id.* at 1189. Under the circumstances, while the lesser right to a lawyer during custodial interrogation may well have been waived, the extended or incremental right to have "counsel as a medium between himself and the State" was not voluntarily and knowledgeably waived. *Id.*

The *Darryl P.* court held that counsel would not merely have sat in on a custodial interrogation-counsel would have stopped the interrogation. "Counsel's role would have been more than that contemplated by *Miranda.*" *Id.* The appellant was not informed about any of these aspects of his right to counsel and any ostensible waiver of them was correspondingly not knowledgeable. *Id.*

Sherman Keysor lost more than the right to remain silent. Keysor unwittingly waived the right to effective assistance of counsel when he was asked to implicate himself and consider a plea without the guidance of his attorney. This Court should follow *Linehan, supra*, and hold that the government may not interfere with an established attorney client relationship; and not place the onus of repeatedly re-invoking the Sixth Amendment right to counsel on incarcerated clients who have an existing relationship with their attorneys.

II. Kentucky Should Expressly Reject *Montejo v. Louisiana* Under Section 11 of the Kentucky Constitution.

Montejo is a controversial decision from a sharply divided Court.

In *Montejo v. Louisiana*, a sharply divided Court overruled *Michigan v. Jackson*, 475 U.S. 625 (1986) in a five-four decision. Justice Stevens authored a

scathing dissent stating that overruling *Michigan v. Jackson* "rests on a misinterpretation of *Jackson's* rationale and a gross undervaluation of the rule of *stare decisis*." *Montejo,* 556 U.S. at 802(Stevens, J.; Souter, J., Ginsburg, J.; and Breyer, J dissenting). The dissent maintained that police interrogation of a defendant represented by counsel violates the Sixth Amendment. *Id.*

The *Montejo* majority insisted that protection from police badgering is the only evil the *Jackson* rule might guard against. *Id.* at 805, fn. 2. To the contrary, the *Jackson* rule protects the defendant from any police-initiated interrogation without notice to his counsel, not just from "badgering" which is not necessarily a part of police questioning. *Id.* 805-806. Moreover, it ensures that that any waiver of counsel will be valid. *Id.* at 814. The assistance offered by counsel protects a defendant from surrendering his rights without a full understanding of what those rights are and how the decision to respond to interrogation might impact his rights throughout the course of criminal proceedings. *Id.* at 814. A lawyer can inform her client of "the legal and practical options available to him; the potential consequences, both good and bad, of choosing to discuss his case with police; the likely effect of such a conversation on the resolution of the charges against him; and an informed assessment of the best course of action under the circumstances." *Id.* at 806, fn 2. The benefits of counsel go far beyond mere protection against police badgering. *Id.*

Adherence to the *Jackson* rule benefits attorneys, judges and defendants. *Id.* at 808. The bright line rule of *Jackson* offers clear guidance to law enforcement officers. *Id.* It assisted prosecutors and judges to easily determine whether confessions would be admissible in court. *Id.* While the dissent

acknowledged that the bright line rule of Jackson could require exclusion of evidence, amici for *Montejo* argued "it is a rare case where this rule lets a guilty defendant go free." ***Notably, these representations are not contradicted by the State of Louisiana or other amici, including the United States.*** *Id.*, citing United States Brief conceding that the *Jackson* rule has not "resulted in the suppression of significant numbers of statements in federal prosecutions in the past" [emphasis added]. Basically, there is significant evidence suggesting that *Jackson's* rule is not only feasible, but also desirable from the perspective of law enforcement. *Id.*

The *Montejo* decision erroneously conflates the Fifth and Sixth Amendment. The right to counsel means more than freedom from police badgering. The United States Supreme Court acknowledged that once the right to counsel has attached, "it follows that the police may not interfere with the efforts of a defendant's attorney to act as a ' 'medium' between [the suspect] and the State' during the interrogation." *Moran v. Burbine*, 475 U.S. 412, 428 (1986) citing *Maine v. Moulton*, 474 U.S. 159, 176 (1985). The state's exploitation of the right to confront the accused without counsel is a breach of the obligation not to interfere with the right to counsel. *Moulton,* 474 U.S. at 176. Criminal defendants are "inherently less capable of coping with the legal process than their governmental opponents." Mims, *A Trap for the Unwary: The Sixth Amendment Right to Counsel After Montejo v. Louisiana*, 71 Fla. L. Rev. 345, 348 (2010). Thus, the framers of the Constitution gave defendants an "equalizing presence intended to prevent outcomes more dependent on might than right" by guaranteeing the right to counsel. *Id.*

Adoption of Montejo leads to Absurd Results.

The state of Texas has not only embraced *Montejo*, but extended the holding to further erode the rights of defendants. *Pecina v. State*, 361 S.W.3d 68, 72 (Tex. Crim. App. 2012), reh'g denied (Mar. 21, 2012), cert. denied, 133 S. Ct. 256 (U.S. 2012).

In *Pecina*, the defendant and his wife were found bleeding from stab wounds. *Id.* at 71. A magistrate judge who spoke Spanish came to the hospital room to arraign him. Pecina, who did not speak English, was told that detectives wanted to speak with him. He "either said yes or nodded." *Id.* at 72. They left the room and stood outside while a judge arraigned Pecina and read him a Spanish version of the Article 15.17 "Adult Warning Form." *Id.* The judge only had an English version for Pecina to sign. *Id.* After reading appellant his rights, the judge asked Pecina if he wanted a state appointed attorney, and he stated that he did. *Id.* Despite his invocation of rights, the judge asked appellant, "Do you still want to talk to [the detectives]?" *Id.* Pecina said that he did and signed the Article 15.17 form acknowledging that he understood his rights. *Id.* Later, he received Miranda warnings in Spanish. *Id.*

Despite Pecina's request for the judge stated that, in her opinion, appellant's decision to speak with the detectives was free and voluntary and there was "absolutely no coercion." *Id. "She believed that, when appellant asked for counsel, he was asking for trial counsel. She said that appellant never indicated that he wanted a lawyer to be present when detectives questioned him." Id.* [emphasis added].

The *Pecina* court agreed with the magistrate's finding that a defendant must separately invoke the right to trial counsel and counsel for the purpose of interrogation. *Id.* at 78. Despite Pecina's request for counsel at arraignment, "the time and place to either invoke or waive the right to counsel for purposes of police questioning" was after the detectives approached him that same day. *Id.*

Taken to the extreme, a court could interpret *Montejo* as placing a burden on criminal defendant to go beyond requesting counsel to specifying which services he or she wishes counsel to perform. Could law enforcement confront an incarcerated defendant on a daily basis, and place the onus on defendant to clearly re-invoke his right to counsel?

Moreover, the *Montejo* Court dismissed the ethical problems arising from approaching defendants represented by counsel by simply stating that police officers are not subject to the Code of Professional Responsibility. 129 S.Ct. 2087; see also *Hayes v. Commonwealth*, 25 S.W.3d 463, 466 (Ky. 2000)(accord). Under state and federal ethics rules:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. SCR 3.130(4.2), Communication with person represented by counsel.

Yet under *Montejo*, a prosecutor could skirt the Code of Professional Responsibility adopted in Kentucky and cite no lesser source than the nation's Highest Court as support for such violations. A defendant unable to make bond becomes increasingly vulnerable with each passing day he sits in jail. A prosecutor need only lay in wait and send any agent of law enforcement not

admitted to the bar to question the defendant without the knowledge or presence of counsel to skirt the professional rules. Perhaps most disturbing, *Montejo* essentially gives criminal defendants facing loss of liberty and potential financial penalties *less* protection than a civil litigant.

In the present case, there was no allegation that the officers were dispatched by the Commonwealth. Nonetheless, Deputy Harrison knew Keysor was represented by Perlow yet made no attempt to contact counsel before approaching Keysor in jail, in the company of another officer and a social worker, asking him to waive his *Miranda* rights.

The *Montejo* decision violates Section 11 of the Kentucky Constitution.

"States are free to afford defendants greater rights than those afforded by the federal constitution." *Oregon v. Hass*, 420 U.S. 714, 719 (1975). The Commonwealth will no doubt argue that Section 11 of the Kentucky Constitution offers no greater protection than the Fifth and Sixth Amendment to the United States Constitution. *See Commonwealth v. Cooper*, 899 S.W.2d 75, 7-77 (Ky. 1995).

> On the contrary, under our system of dual sovereignty, it is our responsibility to interpret and apply our state constitution independently. We are not bound by decisions of the United States Supreme Court when deciding whether a state statute impermissibly infringes upon individual rights guaranteed in the State Constitution so long as state constitutional protection does not fall below the federal floor, meaning the minimum guarantee of individual rights under the United States Constitution as interpreted by the United States Supreme Court.
> *Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992) citing *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 [United States Supreme] Court holds to be necessary upon federal constitutional standards." *Id.*, [Emphasis original.] In *Wasson*, this Court "view[ed] the United States Supreme Court decision in *Bowers v. Hardwick*,[3] as a misdirected application of the theory of original intent." *Id.* at 497.

This Court has interpreted Section 11 of the Kentucky Constitution as granting greater rights than its federal counterparts. Section 11 states:

> *In all criminal prosecutions the accused has the right to be heard by himself and counsel;* to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land; and in prosecutions by indictment or information, he shall have a speedy public trial by an impartial jury of the vicinage; but the General Assembly may provide by a general law for a change of venue in such prosecutions for both the defendant and the Commonwealth, the change to be made to the most convenient county in which a fair trial can be obtained.
> Ky. Const. § 11[emphasis added].

For example, Section Eleven of the Kentucky Constitution, confers the right to hybrid representations, whereas as the federal Constitution does not similarly afford criminal defendants the right to act as co-counsel. *Stone v. Commonwealth*, 217 S.W.3d 233, 236-37 (Ky. 2007) citing *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984).

> It is true that Section 11 of the Kentucky Constitution guarantees to a defendant the right to be heard 'by himself and counsel' (our

[3] Kentucky rejected *Bowers v. Hardwick*, 478 U.S. 186 (1986) holding that the federal constitutional protection of the right of privacy was not implicated in laws penalizing homosexual sodomy, finding a greater right to privacy in the Kentucky constitution. *Bowers* was subsequently overturned on federal constitutional grounds by *Lawrence v. Texas*, 539 U.S. 558 (2003).

> emphasis), but in view of the historical background of the constitutional guarantees of the right to counsel we think there is no valid basis for interpreting those words as meaning that the only right guaranteed is to appear with counsel.

Wake v. Barker, 514 S.W.2d 692, 695 (Ky. 1974).

Likewise, this Court has granted greater confrontation rights than the federal minimum under Section 11 of the Kentucky Constitution. In *Dean v. Commonwealth*, this court held that because the right to be present and to confront is personal to the accused under Section 11 of the Kentucky Constitution, and more particularly under RCr 7.12, only the defendant can waive this right. 777 S.W.2d 900, 903 (Ky. 1989) *overruled on other grounds by Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky. 2003).

In fact, other jurisdictions have broken the tradition of interpreting the right to counsel as identical under the state constitution and federal constitution in order to reject *Montejo*. Prior to *Montejo,* Wisconsin held that "the scope, extent, and interpretation of the right to assistance of counsel is identical under both the Wisconsin and United States Constitution." *Forbush*, 796 N.W.2d at 754 (internal citations omitted). However, while the majority in *Forbush* held the defendant's statement should be suppressed based on factual distinctions between that case and Montejo; see Argument 1, *supra*, the concurrence reached the same decision based on the state constitution.

The defendant's right to counsel was protected under Article I, Section 7 of the Wisconsin Constitution, which provides: "In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel...." *Id.* 758. "The well-established law enforcement practice in Wisconsin has been to refrain from

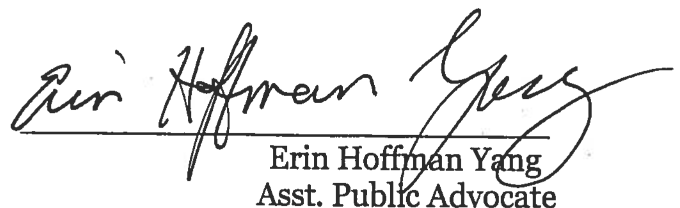
interrogating charged and represented defendants." *Id.* at 759. A defendant's right to counsel in pre-trial interrogation is imperative to protect the trial rights of an accused and to enhance the integrity of the fact-finding process. *Id.* at 762.

Likewise, West Virginia recently decided to break with its long standing tradition of following federal constitutional law and reject *Montejo* under the state Constitution:

> Although we did not mention the West Virginia Constitution explicitly, it is clear from the Court's opinions that until now, the right to counsel guaranteed by the Constitution of West Virginia mirrored the right guaranteed by the Sixth Amendment. We now explicitly hold that if police initiate interrogation after a defendant asserts his right to counsel at an arraignment or similar proceeding, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid as being taken in violation of the defendant's right to counsel under article III, section 14 of the Constitution of West Virginia. Our holding today does not change what the right to counsel has entailed pursuant to this state's constitution since 1987, including the ability of a defendant by his or her initiation to knowingly and intelligently waive the right to counsel after the right has previously been invoked.
> *State v. Bevel*, 745 S.W.2d 237, 247 (W.Va 2013).

Kentucky should follow West Virginia in rejecting *Montejo* under the state constitution. Keysor's right "to be heard by himself and with counsel" rings hollow if his right to counsel could be so easily subverted. Mr. Keysor's confession must be suppressed pursuant to Section 11 of the Kentucky Constitution.

Respectfully submitted,



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