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

REPLY BRIEF FOR APPELLANT, SHERMAN KEYSOR

Submitted by:

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The undersigned does certify that copies of this Reply Brief were mailed, first class postage prepaid, to the Hon. Timothy C. Stark, Judge, Courthouse Box 5, 100 E. Broadway, Mayfield, Kentucky 42066,; the Hon. David Hargrove, Commonwealth's Attorney, P.O. Box 315, Mayfield, Kentucky 42066; the Hon. David J. Perlow, Asst. Public Advocate, 503 N. 16th Street, Murray, Kentucky 42071; and served by messenger mail to Hon. Jack Conway, Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on November 7, 2014.

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> Here, we are talking about the suppression of drugs. **When the issue appears squarely before us in full bloom, it could mean the suppression of a murder weapon. Hopefully, this writing will help us avoid that more critical situation.** *Id.* [emphasis added].

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

Technological advances have not rendered the bright line rule in *Michigan v. Jackson* superfluous

The Commonwealth asserts that the rule articulated in *Michigan v. Jackson,* 475 U.S. 625 (1986) is unnecessary in light of technological advances. Without citing any authority, the Appellee notes that "rare is the interview that is not video and audio recorded", thus, "[t]he fourth layer of prophylaxis from *Jackson* may have made good policy sense in the 1980's and 1990's , but we are now in the era of dashcams, body cameras, stand up photographs and touch DNA." Appellee's Brief p. 14-15.

In fact, there is ample evidence that a substantial number of interviews are not recorded-even those dealing with defendants particularly susceptible to coercion. See *N.C. v. Commonwealth,* 396 S.W.3d 852, 854 (Ky. 2013) (juvenile interview by principal and police officer at school not recorded); *C.W.C.S. v. Commonwealth,* 282 S.W.3d 818, 820 (Ky. Ct. App. 2009) (Shortly after arraignment, juvenile moved to suppress the unrecorded incriminating statements made during the interrogation at the school, arguing that he was in custody for *Miranda* purposes and as such his statements were inadmissible); *Buster v. Commonwealth,* 364 S.W.3d 157, 160 (Ky. 2012) (in case of

intellectually disabled defendant, "[t]here are no video or audio recordings of any of the interviews at the police station.")

Moreover, efforts to mandate recording of interactions between law enforcement and the public have had mixed results, at best. http://www.nola.com/crime/index.ssf/2014/09/cameras_not_on_most_of_the_tim.html. "When New Orleans police officers exert force in the field, most of those interactions still are not being recorded despite new department protocols to activate body-worn cameras and the court-ordered deployment of cameras inside most NOPD vehicles, a report released this week found." In 2014, the Louisville Police Department failed to meet a July 1 goal for "one-fourth of patrol officers to start wearing the cameras, delaying the rollout because of concerns over storage costs of up to $1 million a year on a 'cloud' system.'" http://www.wdrb.com/story/27059847/louisville-police-taking-second-look-at-cop-camera-plan. And, in a formal policy dated March, 2006, the FBI barred *any* recordings unless authorized by a senior supervisor. "The presence of recording equipment may interfere with and undermine the successful rapport building interviewing technique which the FBI practices." Later, that FBI policy notes that "perfectly lawful and acceptable interviewing techniques do not always come across in recorded fashion to lay persons as proper means of obtaining information from defendants." http://www.npr.org/blogs/thetwo-way/2014/05/21/314616254/new-doj-policy-calls-for-videotaping-the-questioning-of-suspects. While the FBI now "encourages" videotaping interviews, federal agents and U.S Attorneys may override the policy if they "have good cause to set it aside," or require "urgent national security-related information. *Id.*

While more recorded interactions between law enforcement and defendants is welcomed, technology has not been embraced to the extent that bright line rules regarding the Sixth Amendment are superfluous. Even when interviews are recorded, an officer could visit a defendant every day, badger him into waiving Miranda, and hit the record button once the defendant's will was overborne.

Adoption of Montejo leads to Absurd Results.

The Appellee asserts that *Pecina v. State*, 361 S.W.3d 68, 72 (Tex.Crim.App. 20120, is not an extreme case. Mr. Keysor and the Appellee agree that 1)Mr. Pecina said he would speak to the police but also wanted a lawyer and 2) the magistrate took the request to mean Mr. Pecina only wished to have counsel for the purpose of trial, rather than reaching the rational conclusion that Pecina wanted to speak with police with the assistance of counsel, and 3) this was upheld on appeal.

The Appellee asserts that *Montejo* levels the playing field for defendants since the timing of an indictment effects when Fifth and Sixth Amendment rights come into play. Mr. Keysor reiterates that under federal ethics rules, an attorney (or his agent) may not contact a party represented by counsel, while a law enforcement officer working hand in hand with the prosecution could approach an incarcerated defendant and ask him to waive Miranda on a repeated basis. See Appellant's Brief p. 16. The Commonwealth concedes that this very scenario would be permissible if *Montejo* is adopted. Appellee's Brief at 18. The Commonwealth asserts that there would be a "limit on how many times a prosecutor could do this before running afoul of obtaining a waiver voluntarily

and without coercion; i.e. without badgering the defendant." *Id.* The Commonwealth does not offer any suggestions as to when these repeated attempts to speak to an incarcerated defendant would run afoul of the constitution and how the courts would determine a line had been crossed.

Adherence to the *Jackson* rule protects the defendant from any police-initiated interrogation without notice to his counsel, not just from "badgering." *Montejo*, 805-806. *Moreover, it ensures that that any waiver of counsel will be valid.* *Id.* at 814[emphasis added]. 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.

Conclusion

For these reasons, and those stated in the Brief for Appellant Sherman Keysor, respectfully requests this Court to reverse the trial court order overruling his motion to suppress. He also welcomes any and all other relief this Court determines is appropriate.

Respectfully submitted,

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