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Commonwealth of Kentucky
Supreme Court

No. 2013-SC-000531-DR
(KYCA No. 2009-CA-1639-MR)

SHERMAN KEYSOR — **APPELLANT**

v.

Appeal from Graves Circuit Court
Hon. Timothy C. Stark, Judge
Indictment No. 08 CR 00268

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

Submitted by,

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been served on this day, October 15, 2014, as follows: by mailing to the trial judge, Hon. Timothy C. Stark, Judge, Courthouse Box 5, 100 E. Broadway, Mayfield, Kentucky 42066; by sending electronic mail to Hon. David Hargrove, Commonwealth Attorney; and by delivery through state messenger mail to Hon. Erin Hoffman Yang, Assistant Public Advocate, Department of Public Advocacy, Suite 302, 100 Fair Oaks Lane, Frankfort, Kentucy 40601.

Leilani K. M. Martin
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INTRODUCTION

Appellant entered conditional Alford guilty pleas to two (2) counts of Sex Abuse in the First Degree. The trial court followed the recommendation of the Commonwealth and sentenced Appellant to seven (7) years for each count, to run concurrently. Appellant preserved for appeal the issue of whether his incriminating statement, obtained after he was appointed counsel, could be lawfully used against him under the Supreme Court decision of Montejo v. Louisiana, 556 U.S. 778 (2009).

The Court of Appeals affirmed the trial court's decision to allow admission of Appellant's incriminating statement under Montejo. This Court granted discretionary review on the Court of Appeal's ruling on Appellant's suppression motion; which subsists of two (2) issues; whether Appellant's incriminating statements were properly admitted and whether the rule of Montejo is properly incorporated into Kentucky law.

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth believes that the issues raised on discretionary review may be adequately addressed by the parties' briefs. The Commonwealth does not request oral argument.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Commonwealth agrees that there was an initial approach of Appellant by the police while Appellant was in custody in Marshall County, that this approach occurred after Appellant had been appointed counsel for his case in Graves County and that Appellant subsequently made an incriminating statement related to the Graves County case. While much is discussed of the facts by both parties in their briefs to the Court of Appeals, the trial record reflects that the parties agreed to the facts of the case in the trial court on 4 June 2009; excepting the issue of whether Appellant gave proper Miranda waivers, which was litigated at a later suppression hearing. (Suppression Hearing One, 6/4/09 at 10:12:51)

No witnesses testified during the suppression hearing on 4 June 2009. However, Appellant preserved the interview recordings themselves as an exhibit at trial level. Appellant's citations in his instant "Statement of the Case" are to his counsel's arguments before the trial court, and not to the exhibit at trial level. The parties' "Statement of the Case" and "Counterstatement of the Case" did contain discrepancies with one another, but agreed upon the essential fact that the police approached Appellant after a Sixth Amendment right to counsel had attached. For these reasons, the Commonwealth respectfully directs this Court to the trial court's findings of fact in its first ruling on Appellant's *Motion to Suppress*:

> Counsel were present and stipulated that the facts contained in the "FACTS" section of the Defendant's Motion to Suppress, were correct. To summarize the facts: The Defendant was arrested on October 24, 2008, on two (2) counts of Sexual Abuse 1st Degree. He was arraigned on October 29, 2009, entered a plea of not guilty, and asked for counsel. The Department of Public Advocacy was appointed to represent him. On November 12, 2008, a preliminary hearing was conducted, and the case was bound over to the

> Grand Jury. He was indicted on December 18, 2008, and his attorney filed an appearance on December 22, 2008.
>
> On December 10, 2008, the Defendant was interviewed by a Marshall County Sheriff's Department employee concerning allegations regarding the same victim, occurring in Marshall County, Kentucky. On January 6, 2009, the Defendant was again interviewed by a detective from the Marshall County Sheriff's office, and also the detective that had worked the Graves County case, and the Graves County social worker.
>
> As a result of that interview, on January 14, 2009, the Defendant submitted to a polygraph examination at the Marshall County Sherriff's [sic] office, and an additional statement was then made [by Defendant].

(Trial Record at 85-86 ("TR")) After the Commonwealth filed a motion to reconsider the trial court's granting of Appellant's motion to suppress based on Montejo v. Louisiana. *supra*, a second suppression/evidentiary hearing was held to flesh out the facts about whether Appellant had been properly administered his Miranda warnings. This hearing occurred on 30 June 2009.

At the 30 June 2009 hearing, Detective Hillbrecht ("Hillbrecht") from the Marshall County Sheriff's office testified that on 6 January 2009 Appellant had been read his Miranda warnings and had signed a waiver of his rights under Miranda, and that both of these acts had been recorded. (Suppression Hearing Two, 6/30/09 at 09:35:40) After this waiver, Appellant consistently denied any wrong doing and asked for a polygraph examination. (Id. at 09:36:05) On 14 January 2009, the polygraph examiner and Appellant were alone in a room, and the polygraph examiner administered Miranda warnings to Appellant before beginning the examination. (Id. at 09:36:50) The polygraph examiner concluded the exam, exited the room and advised Hillbrecht that Appellant failed the examination - this took two (2) to three (3) minutes - then Hillbrecht entered the room and advised Appellant about his results and questioned Appellant. (Id. at

09:40:45, 09:38:00) For this questioning, Hillbrecht relied on the polygraph examiner's Miranda warnings and did not administer them again. (Id. at 09:38:00) Hillbrecht knew that Appellant had received proper Miranda warnings because he observed the polygraph examiner administer them via closed circuit television feed in his office. (Id. at 09:38:27) Hillbrecht testified that in addition to observing the Miranda warnings, he also observed the polygraph examiner advise Appellant that Appellant's participation in the examination was voluntary and that Appellant could stop at any time. (Id. at 09:44:30)

In the Court of Appeals opinion, the facts were stated thusly:

> This appeal arises out of two [2] sets of charges against the appellant, Sherman Keysor. The first charge arose on October 14, 2008, in Graves County. On October 29, 2008, Keysor requested and was appointed counsel to represent him on the Graves County charges. Keysor was indicted on these charges on December 18, 2008.
>
> On January 6, 2009, Deputy Harrison, Detective Matt Hillbrecht and social worker Jodey Baumen interviewed Keysor regarding incidents which occurred in Marshall County concerning the same victim involved in the Graves County charges. Without the advice of counsel, Keysor talked to the above members of law enforcement and agreed to take a polygraph test. Keysor later took a polygraph test and was questioned further by law enforcement without his counsel present.

(2009-CA-0011639, Appendix A) Clearly, the trial court and the Court of Appeals agreed on the pertinent facts. The Commonwealth submits that those are the relevant facts for the purposes of this Court's review because it is undisputed that Appellant had a Sixth Amendment right to counsel in place at the time that the police approached him after appointment of counsel, during the polygraph examination and during the interview after the polygraph examination.

Additional facts may be developed below as necessary.

ARGUMENT

Appellant filed a motion to suppress alleging violation of his Sixth Amendment right to counsel and relied upon Linehan v. Commonwealth, 878 S.W.2d 8 (1994), which in turn cited Michigan v. Jackson, 475 U.S. 625 (1986). The trial court first granted Appellant's motion to suppress under Linehan, and then denied Appellant's motion to suppress due to the Supreme Court's issuance of Montejo v. Louisiana, 556 U.S. 778 (2009), which overruled Jackson. Appellant entered a conditional Alford guilty plea to two (2) counts of Sexual Abuse in the First Degree and preserved this specific issue for appeal. The Court of Appeals affirmed the trial court, and this Court granted discretionary review.

The bright line rule of Jackson was the only legal way that Appellant's incriminating statement could be excluded. His Sixth Amendment right had attached when counsel was appointed at his arraignment, and the police had initiated contact with him. Appellant was administered his Miranda warnings correctly; but for the police initiating the contact, Appellant's statement was voluntary and uncoerced. Montejo captures Appellant by his appointment to counsel being attributable to an automatic passive appointment by the district judge and because his waiver of counsel was voluntary, and uncoerced.

Montejo should be implemented throughout Kentucky for several reasons. There are many appointments of counsel that occur by rote by diligent district court judges who do not want their defendants to face a preliminary hearing without an attorney. Also, because felony cases can arise from cases being bound over to the grand jury from a preliminary hearing or from a direct submittal to a grand jury, defendants facing the same

charges may vary in whether they have Fifth and Sixth Amendment rights to counsel or just one. This difference is unfair and there is no reasoned policy behind it.

Additionally, this Court has issued holdings throughout the years that have emphasized that Section 11 of the Kentucky Constitution will not be used to expand the Sixth Amendment other for than the sole instance of hybrid representation. Hybrid representation is uniquely and singularly different because the very words that give rise to it in Section 11 of the Kentucky Constitution are the only ones that markedly differ from the wording of the Sixth Amendment itself.

Further, Montejo's holding was due to the United States Supreme Court's decision that the policy driven rule of Jackson was costing more than it was worth. The bright line rule of Jackson had shown itself to reduce society's ability to solve crimes and also increase risk of dangerous criminals going free. The fourth layer of prophylaxis of Jackson is unnecessary due to the trifecta protections already granted under Miranda-Edwards-Minnick, and also due to the bounds and leaps in improvements of the technologies available to the police since 1986. These improvements have allowed interviews and Miranda advisements to be recorded as a matter of course. Montejo did not take away a defendant's Sixth Amendment right to counsel; a defendant remains free to assert it and to be free from contact from the police.

Whether or not Montejo conflates the Fifth and Sixth Amendment rights to counsel is a study in academia, because the willing and voluntary waiver of either looks exactly the same for the police and for defendants. This is why it is inherently appropriate to continue to rely on Miranda-Edwards-Minnick as legal precedent for law enforcement and also for deterrence of law enforcement when they run afoul of their

protections of defendants.

Essentially, the bright rule of Jackson is an unnecessary, burdensome addition to the Sixth Amendment constitutional law that made the faulty presumption to begin with that such iron-clad protection was necessary, and its application required the cost of reducing accurate law enforcement. Voluntary and uncoerced confessions are a goal that constitutional jurisprudence should embrace.

I.

APPELLANT'S STATEMENTS SHOULD NOT BE SUPPRESSED UNDER MONTEJO BECAUSE HIS APPOINTMENT OF COUNSEL WAS DONE BY ROTE, AND HE WAS PROPERLY ADMINISTERED MIRANDA WARNINGS.

Appellant claims that he is not factually akin to the defendant in Montejo, and due to this difference, if Montejo is applied, his statement should be suppressed. The Commonwealth disagrees. The holding of Montejo is whether the police can lawfully approach a custodial defendant after counsel has been appointed; not that future defendants captured by Montejo share explicit factual sameness as the Montejo defendant. For this reason, whether the minute facts of Appellant's case match up with the defendant in Montejo is not the correct analysis, but rather whether Appellant was given proper Miranda warnings upon contact initialized by the police after he was already appointed counsel is the correct analysis.

The undisputed facts in chronological order are that: 1) Appellant was appointed counsel in Graves County; 2) Appellant was held in Marshall County; 3) Appellant was approached by the police in Marshall County, given Miranda warnings and denied any wrongdoing; 4) Appellant asked for a polygraph examination; 5) Appellant was given

Miranda warnings by the polygrapher; 6) Appellant failed the polygraph examination, and finally; 7) Appellant made an incriminating statement after he was told that he failed the polygraph.

Appellant admits that he is "strikingly similar" to the defendant in Linehan v.Commonwealth, 878 S.W.2d 8 (Ky.1994). (See Red Brief, page 5) The Commonwealth agrees. The commonalities are: 1) the same victim in both offenses; 2) appointment of counsel to Appellant/Defendant in the first offense; 3) incriminating statements made about the first offense by Appellant/Defendant during interrogation about second offense after proper administration of Miranda warnings; 4) Commonwealth seeking to use statements about the first offense made during the interrogation of the second offense in the trial of the first offense.

Appellant cannot admit to be like Linehan, and then at the same time posit that he is not captured if the rule in Montejo is applied. This is because Appellant agrees that he was approached by the police after the appointment of counsel and Hillbrecht's testimony at the second suppression clearly establish that Appellant was given proper Miranda warnings. Proper warning by the police is what is dispositive to determine whether Montejo properly applies, not the voluntariness of spontaneous admissions. Voluntary spontaneous admissions fall under a different analysis.

Appellant was approached by the police sixty-nine (69) days after the appointment of counsel; counsel was appointed on 29 October 2008, the approach by police occurred on 6 January 2009. Under both Linehan and Montejo Appellant's Sixth Amendment right to counsel had attached prior to when the police had approached Appellant. Montejo requires only that Appellant was administered proper Miranda warnings. Appellant did

receive proper Miranda warnings.

Notwithstanding the Miranda warnings, if question remains about whether Appellant's incriminating statement was voluntary and uncoerced, it becomes highly relevant that Appellant asked for the polygraph examination, because his incriminating statement was made after the examination was completed, and there was a significant delay between Appellant's request for the polygraph examination and when it was administered. Whatever tactics or questions the police may have implemented on 6 January 2009 failed because Appellant never admitted anything on that day. Therefore, Appellant's ability to exercise the benefits of his Sixth Amendment right to counsel remained fully intact until 14 January 2009; seventy-eight (78) days after appointment of counsel.

Both parties agree that Appellant initiated the request for the polygraph examination after consistently denying any wrongdoing during his police questioning on 6 January 2009. (See Red Brief, page 3) Significantly, the polygraph was not until eight (8) days later, on 14 January 2009. Appellant had eight (8) days to change his mind about participating in the polygraph examination. Appellant had eight (8) days to contact his attorney and request his assistance in preparation for the polygraph examination. Appellant had eight (8) days to ask his attorney if taking a polygraph examination would be in his best interest relative to preserving his Sixth Amendment right to a fair adversarial judicial system. At the end of the eight (8) days, Appellant was again administered his Miranda warnings, and was additionally advised that he could change his mind then about cooperating with the polygraph examination or at any point during the polygraph examination. Appellant chose to proceed.

Appellant's subsequent incriminating statement to Hillbrecht is exactly the situation that the Montejo decision was designed to capture:

> The upshot is that even on *Jackson*'s own terms, it would be completely unjustified to presume that a defendant's consent to police-initiated interrogation was involuntary or coerced simply because he had previously been appointed a lawyer.

Id. at 792. And also:

> We think that the marginal benefits of *Jackson* (viz., the number of confessions obtained coercively that are suppressed by its bright-line rule and would otherwise have been admitted) are dwarfed by its substantial costs (viz., hindering "society's compelling interest in finding, convicting, and punishing those who violate the law" [citing Moran v. Burbine, 475 U.S. 412, 426 (1986)]).

Id. at 793. Just as anticipated by Montejo at 796 (*internal citation omitted*), Appellant's "uncoerced confession is not an evil but an unmitigated good."

When Montejo is applied to Appellant's incriminating statement, the incriminating statement is admissible because Appellant was given proper Miranda warnings before the polygraph examination began and because the delay between the conclusion of the examination and Hillbrecht's questioning was only two (2) to three (3) minutes - a short delay that the Miranda warnings from the polygrapher continue to suffice for Hillbrecht's questioning.

Further, the record does not reflect the level of Appellant's participation in his appointment of counsel for his preliminary hearing at the district court level. The record shows that an appointment for counsel was made due to Appellant's indigency and that an entry of appearance was entered by an attorney from the Department of Public Advocacy. (TR at 19, Appendix B, TR at 31, Appendix C) However, Appellant's affidavit of

indigency, filed on 22 October 2008 in the record, marked that he desired *not* to have counsel appointed. (TR at 10, Appendix D) In sum, the record reflects a passive, automatic appointment of counsel, of which Montejo at 789-790 stated, "even if it is reasonable to presume from a defendant's request for counsel that any subsequent waiver of the right was coerced, no such presumption can seriously be entertained when a lawyer was merely 'secured' on the defendant's behalf, by the State itself, as a matter of course."

Because Appellant was administered proper Miranda warnings, and because the record reflects an appointment of counsel by the initiative of the district judge, the trial court correctly ruled under the rule of Montejo v. Louisiana, *supra*, when it denied Appellant's motion to suppress his incriminating statement under Linehan, *supra*. Should this Court decide to follow Montejo, the trial court's decision should stand.

II.

KENTUCKY SHOULD INCORPORATE AND IMPLEMENT THE RULE OF MONTEJO; NOT ONLY IS IT IN ACCORDANCE WITH SECTION 11 OF THE KENTUCKY CONSTITUTION, IMPLEMENTATION OF MONTEJO IS CONSISTENT WITH THIS COURTS OTHER APPLICATIONS OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION TO KENTUCKY LAW

Appellant argues multiple bases for why Montejo should not be adopted in Kentucky. To paraphrase from Appellant's brief, they are: 1) it abrogates the doctrine of *stare decisis*; 2) it fails to protect a defendant from the consequences of later interrogations; 3) it eliminates an easily followed bright line rule about subsequent interrogations; 4) it conflates the Fifth and Sixth Amendments; 5) it comes with a slippery slope of absurd end results; and 6) it violates Section 11 of the Kentucky Constitution.

The Commonwealth disagrees on each and will address them in turn below.

A. The *stare decisis* doctrine should not be strictly applied here because the matter is constitutional.

The doctrine of *stare decisis* should not be accorded with undue weight here because the matter for interpretation is constitutional. Because it is constitutional, it is uniquely within the province of the highest court, and it is "less rigid in its application to constitutional precedents." Cook v. Popplewell, 394 S.W.3d 323, 330 (Ky.2011)(*citing* Harmelin v. Michigan, 501 U.S. 957, 965 (1991)).

Particularly, it is not clear that *stare decisis* would require a yield of the Montejo decision in the opposite direction as Appellant suggests. While it is true that there was a reliance upon the Jackson rule since approximately 1986, Jackson conflicted with Patterson v. Illinois, 487 U.S. 285 (1988), issued a scant two (2) years later, in whether:

> Sixth Amendment waiver cases should apply an abstract Sixth Amendment right to counsel - limiting defendant's ability to waive the right to protect the attorney-client relationship absent a determination that the waiver was involuntary - or a voluntariness analysis similar to that conducted under the Fifth Amendment.

Sixth Amendment - Right to Counsel - Interrogation without Counsel Present, 123 Harv. L.Rev 182, 187-188 (2009) By overturning Jackson, Montejo resolved this tension in the Sixth Amendment waiver doctrine. (Id. at 187) Patterson emphasized that the Sixth Amendment only protects the voluntariness of a waiver of the right to counsel, whereas pursuant to Jackson, once a criminal defendant invokes his Sixth Amendment right to counsel, any subsequent waiver due to police initiated contact was invalid. (Id. at 183-184) Even though the bright line rule of Jackson had the practical consequence of trumping Patterson, that did not make the reasoning in Patterson disposable or ineffective.

It simply made Patterson impossible to follow because Jackson required rigid compliance with a bright line rule, rather than deliberately overruling Patterson due to faulty or erroneous reasoning and law or another policy reason.

Because both Jackson and Patterson have been extant for approximately the same amount of time, *stare decisis* can be argued to support a subsequent decision that buttresses either, and adherence to *stare decicis* itself is not as critical in constitutional interpretation and implementation.

B. The additional bright line protection of Jackson is superfluous because of the Miranda-Edwards-Minnick rules.

The Miranda-Edwards-Minnick rules have been implemented in Kentucky by this Court. Miranda v. Arizona, 384 U.S. 436 (1966); Edwards v. Arizona, 451 U.S. 477 (1981); Minnick v. Mississippi, 498 U.S. (1990). In Ragland v. Commonwealth, 191 S.W. 3d 569, 585 (Ky.2006)(*citing* Miranda, *other internal citations omitted*), this Court stated, "Miranda does not require a 'talismanic incantation' as long as the warnings adequately advise the suspect of his Miranda rights." And this Court further stated, "if at any time during a police interrogation the suspect has 'clearly asserted' his right to counsel, the interrogation must cease until an attorney is present" (Ragland. at 586 (*citing* Edwards, *other internal citations omitted*)). In Cummings v. Commonwealth, 226 S.W.3d 62, 65 (Ky.2007)(*citing* McNeil v. Wisconsin, 501 U.S. 171, 177 (1991)); Minnick v. Mississippi, 498 U.S. 146 (1990)), this Court stated, "once a suspect invokes the Miranda right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present."

Because these three (3) layers of protection are available to all custodial defendants in Kentucky:

> Under the Miranda-Edwards-Minnick line of cases (which is not in doubt), a defendant who does not want to speak to the police without consel present need only say as much when he is first approached and given the Miranda warnings. At that point, not only must the immediate contact end, but "badgering" by later requests is prohibited. If 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. And if so, then Jackson is simply superfluous.

Montejo. at 794-795. Prior to arraignment, or appointment of counsel, the identity of an appointed attorney is a nebulous concept; it is an unknown person with no name. After appointment of counsel, this is no longer true. After appointment and entry of appearance, a defendant knows that s/he is represented, and who that attorney is, which elevates representation from a nebulous concept into a flesh and blood human being with a name and a means of contact. With regard to choosing to act through a medium between him/herself and the state, a defendant who eschews the concept of representation by an unknown person is not as deliberate as a defendant who eschews a realized attorney.

Under this trifecta of cases, a defendant still has the ability to pursue suppression of a statement due to it being obtained involuntarily, by coercion or badgering, but the same defendant also has the ability to choose to shield her or himself with an identified attorney. Presentment of this choice does not mean that the Sixth Amendment right to assistance of counsel has been obviated. A defendant may still get a favorable plea

agreement offered by the Commonwealth, as Appellant did in the instant case when the prosecuting attorney extended an offer on a plea of guilty to two (2) terms of seven (7) years to run concurrently with one another. Appellant's minimum with convictions at a jury trial would have been ten (10) years, and a maximum of twenty (20) years. A defendant's ability to be master of his/her fate and society's dual interests in having crimes solved, and dangerous criminals apprehended, are all served well by giving defendants this additional opportunity to give a voluntary statement.

C. That Jackson's bright line rule has been easy to follow is irrelevant because a rule being easy to implement does not make it a correct rule.

Preservation of a bright line rule at too high of a cost is not a goal that any wise jurisprudence values. While it is true that Jackson had a bright line rule forbidding police initiated contact after attachment of an offense -specific Sixth Amendment right, the more complicated and nuanced Miranda-Edwards-Minnick prophylactics have been around for nearly as long and have been relied upon by law enforcement, attorneys and courts in Kentucky. Reversal of Jackson does not affect that.

Rather, Montejo. at 795-796, 797(*internal citations omitted*), stated that Jackson was "policy driven, and if that policy is being adequately served through other means, there is no reason to retain its rule," and that "in sum, when the marginal benefits of the Jackson rule are weighed against its substantial costs to the truth-seeking process and the criminal justice system, we readily conclude that the rule does not pay its way."

The Jackson rule also fails to reflect the technological advances that police have made. Rare is the interview that is not video and audio recorded. Seldom is there not a recorded and signed Miranda waiver. The 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. An archaic and rigid rule eliminating all contact between a defendant and the police no longer makes sense because nowadays, courts and attorneys can observe recordings of the interviews, whereas before such recordings were not available. And the police, knowing that recordings are expected and reviewed, can be expected to be mindful that a defendant's waiver must withstand judicial scrutiny.

D. The Montejo decision does not erroneously conflate the Fifth and Sixth Amendment, alternatively, if Montejo does erroneously conflate the Fifth Amendment with the Sixth Amendment, it does not matter because the same procedure is used to waive either, and deterrence to the police is present regardless of whether such conflation exists.

The issue of whether or not the Montejo opinion erred in the constitutional underpinnings of its holdings was addressed by the opinion itself:

> It is true, as Montejo points out in his supplemental brief, that the doctrine established by Miranda and Edwards is designed to protect Fifth Amendment, not Sixth Amendment, rights. But that is irrelevant. What matters is that these cases, like Jackson protect the right to have counsel during custodial interrogation - which right happens to be guaranteed (once the adversary judicial process has begun) by *two* [2] sources of law. Since the right under both sources is waived using the same procedure, doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver.

Id. at 795 (*internal citation omitted*) Because the right at issue is one to counsel, language waiving that right voluntarily and willingly will necessarily be the same. It would be nonsensical to require that the police ask a defendant whether he/she waives his Fifth Amendment right to counsel or his/her Sixth Amendment right to counsel or both. This

is because the police are not attorneys, and they should not be required to give legal interpretations or advice.

Also, the same deterrent effect to police to get a waiver only by voluntary, uncoerced and non-badgering means, or otherwise risk suppression of the statement, is still in play regardless of whether they are violating a defendant's Fifth or Sixth Amendment. Defense counsel are still going to be looking for properly executed waivers of counsel, as they always have been.

The Montejo decision clearly stated that it was reversing Jackson so that more efficient and accurate law enforcement can ensue by putting the defendant in the driver's seat about when to employ the shield of appointed counsel, and not for reasons having to do with equating the Fifth and Sixth Amendment rights to counsel. The decision to remove an additional protection from waiving counsel only due to the Sixth Amendment right to counsel was deliberate to prevent it from "imprison[ing] a man in his privileges and call it the 'Constitution.'" Montejo. at 788 (*internal citation omitted*).

E. Adaptation of Montejo does not invariably lead to absurd results, and Appellant's proffered case of Pecina from Texas is not an extreme case.

In Appellant's own words, if Kentucky adopts Montejo, it could lead to frightening results if this Court "takes it to the extreme," as he purports a Texas court did in Pecina v. State, 361 S.W.3d 68, 72 (Tex.Crim.App.2012) (See Red Brief, page 14) The Commonwealth does not dispute that any rule of law, when thus derived, poses disastrous possibilities. The Commonwealth disagrees that Pecina led to an absurd result; the opinion stated:

> In this case, there were two separate events: magistration followed by a custodial interrogation. Judge Maddock conducted the magistration and gave appellant his Article 15.17 warnings in Spanish. Appellant told her, "I want a lawyer, but I also want to speak with the Arlington Police." In her opinion, appellant asked for the appointment of a trial attorney, but he wanted to talk to the police who were standing right outside the hospital door. She did not believe that appellant invoked his right to counsel for purposes of custodial interrogation. As a neutral magistrate, acting in her judicial capacity, she concluded that appellant was willing to talk to the police officers without counsel. The detectives then entered and gave appellant his Miranda warnings in Spanish three separate times. At no time did he hesitate, invoke his right to an attorney at that interview, or ask the officers to stop their questioning. The officers concluded that appellant freely, voluntarily, and intelligently waived his right to counsel during their questioning. There is nothing in the record that would contradict their conclusion.
>
> Under the totality of these circumstances, we agree with the trial judge that an objective and reasonable police officer, conducting a custodial interrogation, would conclude that appellant had voluntarily waived both his Fifth and Sixth Amendment rights to counsel for purposes of the custodial questioning by Detectives Frias and Nutt. Because appellant was in custody at the time the police questioned him, he had a Fifth Amendment right to counsel if he wished to invoke it. Because formal adversary proceedings had begun against appellant and were triggered by Judge Maddock's magistration, he had a Sixth Amendment right to counsel if he wished to invoke it. He could invoke either or both in precisely the same manner—by telling the officers, after they gave him the Miranda warnings, that he wished to have an attorney before speaking to them. He did not do so. He, therefore, waived both his Fifth and Sixth Amendment rights to counsel during custodial interrogation.

Id. at 78-80. Additionally, Pecina was given a card by the detectives with his Miranda rights in Spanish, and his interview by the detectives was recorded. Id. at 72. Clearly, Pecina was not disadvantaged by being Spanish speaking, as both his magistrate and a

detective were Spanish speaking. Rather, Pecina sought to undo his admission that he murdered his wife by stabbing her fifty-five (55) times by attempting to seek safe harbor under Jackson's rule of exclusion. Id. at 71.

Further, Appellant is not accurate in positing that police approaching defendants are not subject to an ethical code simply because they are not subject to the same rules as attorneys. They have specific protocol, standards, and training requirements, and they are still bound by having to obtain a voluntary, uncoerced and non-badgered waiver of counsel. And regardless of their internal protocol, standards and training, a defendant can still seek review of his/her waiver by a trial court, which will then employ a legally sophisticated rubric to the totality of the circumstances, as the Texas court did in Pecina.

As to the spector of prosecutors sending the police to approach a defendant after appointment of counsel, the Commonwealth submits that so long as the prosecutor him or herself does not participate, this is exactly what Montejo expects and condones. But again, there is still a limit on how many times a prosecutor can do this before running afoul of obtaining a waiver voluntarily and without coercion; i.e. without badgering the defendant.

Just as Pecina's opinion applied the requirements of Miranda-Edwards-Minnick as specified in Montejo, so too, can the courts in Kentucky. Because of the limitations and requirements of the trifecta of cases, the danger of unfair or absurd results is nonexistent. Pecina serves to illustrate that the Montejo holding achieved just what it hoped to insofar as Texas is concerned; it eliminated an archaic and unnecessary fourth layer of prophylaxis and stopped a dangerous criminal from going free.

F. Adoption of Montejo is completely in accordance with Section 11 of the Kentucky Constitution and this Court's prior implementations of the Sixth Amendment

The Commonwealth clearly agrees that Section 11 of the Kentucky Constitution has been interpreted by this Court to allow hybrid representation. "Kentucky is within the minority of jurisdictions that recognize a criminal defendant's right to make a limited waiver of counsel and accept representation in certain matters," and "the majority of federal and state courts hold that there is no constitutional right to hybrid representation." Commonwealth v. Ayers, 435 S.W.3d 625, 627-628 (Ky.2013)(*internal citations omitted*) In so doing, this Court deliberately gave criminal defendants a greater degree of control over their trial proceedings than other jurisdictions, notwithstanding whether any given defendant who chooses hybrid representation has any legal acumen.

However, aside from this singular deviation, this Court has reiterated time and time again that it would not interpret Section 11 of the Kentucky Constitution more broadly than the United States Supreme Court interprets the Sixth Amendment. In Cain v. Abramson, 220 S.W.3d 276, 280 (Ky.2007), this Court stated that it would not do so in the context of psychiatric evaluations ordered pursuant to Kentucky Rule of Criminal Procedure 7.24(3)(B). In Cane v. Commonwealth, 556 S.W.2d 902, 906 (Ky.1977), this Court stated it would not do so in the context of photographic line-ups. In See v. Commonwealth, 746 S.W.2d 401 (Ky.1988), this Court stated it would not do so in the context of hearings to determine the competency of a minor accuser. In See, this Court actually reversed a prior ruling in so holding in order to comport with a new rule of law from the Supreme Court of the United States. Id. at 402. In Brown v. Commonwealth,

416 S.W.3d 302 (Ky.2013), this Court stated it would not do so in the context of seizure of privileged material from a defendant's jail cell.

The upshot of all these prior holdings from this Court is that the tapestries of the Sixth Amendment and Section 11 of the Kentucky Constitution are firmly woven in parallel structure save for the one exception of hybrid representation. Clearly, the police initiating contact with a defendant after the attachment of the Sixth Amendment right to counsel does not undermine hybrid representation. In fact, if anything, it supports it, because it is in keeping with allowing a defendant to be the captain of his ship through the legal seas.

Criticisms to hybrid representation are that it may not be the wisest course for a defendant to choose, that it may hinder judicial expediency with additional litigation in suppression hearings, or prolong the adversarial judicial process itself. However, when this Court issued its rulings on hybrid representation, it was already cognizant of these fallacies and decided for policy reasons that the higher goal was to allow it because of the unique deviation in language in Section 11 of the Kentucky Constitution from the Sixth Amendment. In Mitchell v. Commonwealth, 423 S.W.3d 152, 158 (Ky.2014)(*citing* Wake v. Barker, 514 S.W.2d 692, 696 (Ky.1974), *other internal citations omitted*), this Court stated:

> Both the Sixth Amendment to the United States Constitution and Section Eleven of the Kentucky Constitution guarantee a defendant the right to assistance of counsel. Accompanying this state and federal constitutional right is a concomitant right to waive counsel and proceed without representation. Additionally, the Kentucky Constitution, unlike the Constitution of the United States, affords criminal defendants the right to

> hybrid representation. Kentucky courts view hybrid representation as a limited waiver of counsel whereby the defendant acts as co-counsel with a licensed attorney.

In Mitchell. at 161, this Court noted that the defendant had "vacillations of opinion in the type of counsel he desired." When defendants who are not criminal attorneys desire hybrid representation, it is fair to say that such vacillations are bound to occur frequently and necessitate an increased number of pretrial hearings; resulting in a net cost and burden to the Kentucky judicial system. However, in Wake. at 695, this Court stated, "No one contends that an accused must be capable of adequately representing himself in order to make a valid waiver of counsel," and thereby acknowledged and accepted the cost.

Section 11 of the Kentucky Constitution by its very words of "and counsel" strictly requires that our system bear the cost of hybrid representation in its plain language. This is not true of the rule of Montejo, therefore the argument that Kentucky has a tradition of imbuing a greater right under the Sixth Amendment than the highest court in the land as exemplified in hybrid representation does not imply Montejo, because Montejo is not a case about hybrid representation.

While Commonwealth v Wasson, 842 S.W.2d 487 (Ky.1992) is an excellently written opinion, the Commonwealth respectfully submits that it is also not appropriate guidance for whether Montejo should be adapted. This is because Wasson deals with the right to privacy, and not the Sixth Amendment right to counsel. This distinction is key because this Court essentially engaged in the same historical valuation and common law consideration in both Wasson and the Wake line of cases to get to its results. Unlike Section 11 of the Kentucky Constitution and the Sixth Amendment, the right to privacy in

Kentucky has an incredibly richer and stauncher history:

> More significantly, Kentucky has a rich and compelling tradition of recognizing and protecting individual rights from state intrusion in cases similar in nature, found in the Debates of the Kentucky Constitutional Convention of 1890 and cases from the same era when that Constitution was adopted. The judges recognizing that tradition in their opinions wrote with a direct, firsthand knowledge of the mind set of the constitutional fathers, upholding the right of privacy against the intrusive police power of the state.

Wasson. at 492. Consequently, the modern state of the right to privacy in a federalism context cannot be considered to be analogous to the modern of the right to assistance of counsel in the same context.

There is also the practical matter of the inconsistent method of appointment of counsel in Kentucky, which includes the exact scenario of passive appointment of counsel by rote in Montejo. In Kentucky, there is no requirement that a defendant submit an affidavit to trigger appointment of counsel. It can be done that way, but is not required. This is illustrated in the instant case of Appellant. His affidavit of indigency waived counsel, and yet the district court entered an order for the appointment of counsel nonetheless. Due to the voluminous nature of a district court docket, it is a necessary reality that many appointments of counsel are done by rote by conscientious district court judges that recognize a preliminary hearing is an important proceeding for a defendant facing a felony case.

Also, there are defendants who face felony cases due to a direct submittal to a grand jury by a prosecutor. In those instances, a defendant's formal judicial proceeding will not begin prior to indictment, whereas for defendants who had a preliminary hearing,

this proceeding has already begun. For the direct submittal defendants, prior to indictment, only Fifth Amendment rights to counsel are in play. By statute, Kentucky Rules of Criminal Procedure 5.02-5.24, the prosecutor has control over whether felony cases are indicted by direct submittal to a grand jury rather than beginning with a preliminary hearing in district court. The result is that some defendants benefit from attachment of Fifth and Sixth Amendment rights to counsel and others do not for reasons that could distill down to an arbitrary one such as the scheduling of an available grand jury.

Implementation of Montejo will eliminate the possibility of this arbitrary difference by treating all defendants equally in accordance with a rule that gives all defendants the same ability to choose to proceed with a police-initialized interview or not. The police will have a much simpler framework of only obtaining a voluntary, uncoerced and non-badgered Miranda waiver and not having to puzzle out the legal distinction between Fifth and Sixth Amendment rights to counsel, and will not be expected to possess an understanding of the nuances between different rights of counsel. And this, in turn, will allow for Kentucky to have more efficient crime solving and also reduce the risk of dangerous criminals going free.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the convictions of Appellant.

Respectfully Submitted

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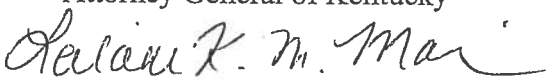

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