IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellant, vs. ISAIAH MORRIS, Defendant-Appellee.	:	SUPREME COURT CASE NO. 2023-1614 Appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals Case No. C-230108

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF OHIO IN SUPPORT OF APPELLEE ISAIAH MORRIS

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INTRODUCTION

On the morning of May 16, 2022, a court appointed counsel for Isaiah Morris during his initial appearance on criminal charges. Mr. Morris met his attorney but was not able to confer with her privately. Shortly thereafter, police retrieved Mr. Morris from his cell for an interrogation. They had him sign a "Notification of Rights" form indicating that he had the right to an attorney. But neither the form nor the police mentioned that counsel had already been appointed to represent Mr. Morris, nor did they ask Mr. Morris to waive his right to that attorney or any other attorney. Nevertheless, after Mr. Morris signed the form, the police proceeded to question him. Midway through the questioning, and manifestly confused, Mr. Morris asked, "I can't talk to a lawyer?"

The courts below held that this uncounseled, police-initiated interrogation violated Mr. Morris's right to counsel under Article I, Section 10 of the Ohio Constitution. In particular, the First District held that "when an accused's right to counsel has attached and an attorney has been secured, any uncounseled waiver of the defendant's right to counsel in a state-initiated interrogation is deemed invalid." *State v. Morris*, 2023-Ohio-4105, ¶ 55 (1st Dist.) (hereinafter "1st Dist. Op."). That holding was consistent with the U.S. Supreme Court's interpretation of the federal right to counsel in *Michigan v. Jackson*, 475 U.S. 625 (1986), which it later overruled in *Montejo v. Louisiana*, 556 U.S. 778 (2009). *Montejo* held that the federal right to counsel does not prohibit police-initiated interrogations of defendants represented by counsel, and the defendants' statements are admissible as long as they waive their right to counsel.

Amici curiae the American Civil Liberties Union ("ACLU") and the ACLU of Ohio agree that the Ohio Constitution mandates the rule in *Jackson*, not *Montejo*. But we write separately because, even if this Court concludes that the Ohio Constitution does not categorically prohibit the introduction of statements by counseled defendants in response to police-initiated interrogations, the interrogation of Mr. Morris still violated the Ohio Constitution.

When police interrogate a defendant for whom counsel has been appointed, without that counsel present, they risk tricking the defendant into believing that their lawyer is *not* available to help them with the interrogation. For example, the Notification of Rights form given to Mr. Morris said that if he "[could not] afford a lawyer, one will be appointed for you," which implied that Mr. Morris would need a new lawyer, rather than his existing lawyer, if he wanted representation during the interrogation. Given that acute risk of confusion, the Ohio Constitution should be interpreted to require, at a minimum, a robust explanation and waiver of the defendant's rights when the police initiate an uncounseled interrogation of a defendant for whom counsel has been appointed. Here, the police merely provided Mr. Morris with a *notice* of his *Miranda* rights. That notice was not an express waiver of any kind, let alone a waiver that adequately explained Mr. Morris's rights relative to the lawyer who had already been appointed for him. Accordingly, as explained below, the police actions in this case fell far short of the bare minimum required by the Ohio Constitution.

STATEMENT OF INTEREST OF AMICI CURIAE

Amicus curiae ACLU is a nonprofit, nonpartisan membership organization devoted to protecting the basic civil rights and liberties of all Americans. For over a century, the ACLU has litigated questions involving civil liberties in the state and federal courts, helping to establish dozens of precedents that today form part of the basic framework of constitutional jurisprudence. The American Civil Liberties Union of Ohio (together, "ACLU") is its statewide affiliate. Among the liberty interests crucial to the ACLU and its membership are the right to counsel and the right against self-incrimination provided by the United States Constitution and the Ohio Constitution.

STATEMENT OF THE CASE AND THE FACTS

The ACLU adopts Appellee's statement of the case and the facts.

LAW AND ARGUMENT

I. This Court Should Interpret Ohio's Constitution In Light Of Ohio's Practices

"The Ohio Constitution is a document of independent force." *State v. Mole*, 2016-Ohio-5124, ¶ 14. Both the United States and Ohio Supreme Courts have acknowledged that state courts "are free to construe their state constitutions as providing different or even broader individual liberties than those provided under the federal constitution." *Arnold v. Cleveland*, 67 Ohio St.3d 35, 41 (1993); *see City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982) ("[A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."). "In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall." *Arnold* at 42; *State v. McAlpin*, 2022-Ohio-1567, ¶ 60. So long as they do not go below that floor, "state courts are unrestricted in according greater civil liberties and protections." *Arnold* at 42; *see also* Jonathan R. Marshfield, *State Constitutional Rights, State Courts, and the Future of Substantive Due Process Protections*, 76 S.M.U.L.Rev. 519, 521 (2023). And states often have good reason to do so: "one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv.L.Rev. 489, 503 (1977).

One reason to interpret a state constitution to offer more expansive rights than the U.S. Constitution is that, unlike the U.S. Supreme Court, state courts can tailor protections to a state's own specific needs and practices. The U.S. Supreme Court must provide general rules for every jurisdiction in the country. Because each state has different practices, the U.S. Supreme Court is more inclined to provide the lowest possible guarantees to avoid unnecessarily constraining state

behavior. As Judge Sutton of the U.S. Court of Appeals for the Sixth Circuit has explained: "Federalism considerations may lead the U.S. Supreme Court to underenforce (or at least not to overenforce) constitutional guarantees in view of the number of people affected and the range of jurisdictions implicated." Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 175 (2018). In contrast, a state supreme court has no "reason to apply a 'federalism discount' to its decisions." *Id.*; *see also Stolz v. J&B Steel Erectors*, 2018-Ohio-5088, ¶ 42 (Fischer, J., concurring) (to treat the federal Equal Protection Clause as congruent to Ohio's is "improper under our federal system and unconstitutional under the Ohio Constitution," as it constitutes "'upward delegation'" of the duty to interpret the Ohio Constitution"). State supreme courts are instead equipped to tailor constitutional rights to the unique circumstances present in their state. *See, e.g.*, *State v. Gunwall*, 106 Wash.2d 54, 58 (1986) (en banc) (noting that the State should consider "matters of particular state or local concern" when determining whether its constitution should be read more broadly than the U.S. Constitution); *State v. Hunt*, 9 N.J. 338, 357 (1982) (Pashman, J., concurring) (explaining that the U.S. Supreme Court serves "as final arbiter of at least the minimum scope of constitutional rights for a vastly diverse nation," whereas "the Court's lack of familiarity with local conditions … do[es] not similarly limit state courts"); Hon. Gregory C. Cook, *The Rising Importance of State Courts*, 2023 Harv.J.L.& Pub.Pol'y.Per.Curiam 27, 4 (2023) ("[A] state court can rule more broadly because it has a more homogeneous population and circumstances. … State courts are much better positioned to recognize local conditions and traditions which bear on what those citizens perceive as truly fundamental rights worthy of constitutional protection.").

This responsibility for state courts is not merely theoretical; state supreme courts regularly interpret their constitutions more broadly than the U.S. Constitution, based on the unique

perspectives and experiences of their residents. For example, the Texas Court of Criminal Appeals decided that Texas's state constitution prohibits use of a suspect's post-arrest, pre-*Miranda* silence as impeachment evidence before the U.S. Supreme Court reached the same conclusion under the federal Fifth Amendment. *See Sanchez v. State*, 707 S.W.2d 575, 580 (Tex.Crim.App. 1986). The court separately explained that the State's prohibition on self-incrimination may in certain instances be more protective than the Fifth Amendment, based on "an independent examination of the history, policy, and precedent surrounding relevant state law." *Thomas v. State*, 723 S.W.2d 696, 702 (Tex.Crim.App. 1986) (en banc). Similarly, the Washington Supreme Court determined that its constitution provides more protection for the privacy of electronic communications than the U.S. Constitution, citing the State's "long history and tradition of strict legislative protection of telephonic and other electronic communications." *Gunwall*, 106 Wash.2d at 66. The court explained that "[t]he objective of national uniformity of rules … is outweighed in this case by overwhelming state policy considerations to the contrary." *Id.* at 67.

Interpeting the right to counsel, in particular, the U.S. Supreme Court has explicitly acknowledged that it is constrained to supply a narrow, one-size-fits-all federal right that is capable of accommodating a wide variety of jurisdictional practices. In *Montejo*, the trial court ordered the appointment of counsel at the defendant's preliminary hearing, but, unlike in this case, no lawyer actually met with the defendant before the police subsequently interrogated him and elicited incriminatory statements. *Montejo* at 781–82. The Louisiana Supreme Court held that the incriminatory statements were admissible, on the theory that the defendant had not "actually requested a lawyer or … otherwise asserted his Sixth Amendment right to counsel." *Id.* at 782. In rejecting the Louisiana Supreme Court's approach, the U.S. Supreme Court emphasized that it could lead to "arbitrary and anomalous distinctions between defendants in different states." *Id.* at

783. The Court noted, for example, that the Louisiana rule "would apply well enough in States that require the indigent defendant formally to request counsel before any appointment is made," but "is exceedingly hazy when applied to States that appoint counsel absent request from the defendant." *Id.* at 783–84.

The U.S. Supreme Court also rejected the defendant's proposed rule in *Montejo*—which would have deemed waivers of the right to counsel invalid whenever counsel has been appointed—but, again, for reasons having to do with the range of states and situations to which it would have to be applied. The Court emphasized that "[n]o reason exists to assume that a defendant like Montejo, who has done *nothing at all* to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present." *Id.* at 789. The Court worried that, in states that appoint counsel promptly without any request from the defendant, "Montejo's rule would prevent police-initiated interrogation entirely once the Sixth Amendment right attaches, at least in those States that appoint counsel promptly without request from the defendant." *Id.* at 790.

The Court's decision in *Montejo* was necessarily constrained by the disparate practices across the country, and, of course, it did not consider Ohio's practices at all. It is therefore incumbent on this Court to consider Ohio's state-specific practices for appointing counsel and initiating interrogations. Ohio criminal procedure includes an initial appearance, where the defendant is permitted to read the charges against him, the court informs the defendant of the nature of these charges, and the court may appoint counsel if the defendant is unable to afford it. *See* Crim.R. 5; Crim.R. 44. And, as discussed below, this case provides an illustrative example of why the details of Ohio practice matter to the scope of the constitutional right, and why this Court should interpret the Ohio Constitution with these details in mind.

II. Where Counsel Has Already Been Appointed, The Ohio Constitution Requires Police To Provide A Robust Explanation Of A Defendant's Right To Counsel To Ensure That Any Waiver Is Knowing And Intelligent

There is good reason to hold that the Ohio Constitution provides a more expansive right to counsel than its federal counterpart. First, this State has *always* upheld a more robust right to counsel than the U.S. Supreme Court—recognizing both the right to free counsel for the indigent and the right to effective counsel under the Ohio Constitution long before the U.S. Supreme Court applied those rights nationwide. Second, the procedural circumstances that Mr. Morris and other defendants face in Ohio make their ability to exercise their right to counsel especially precarious. Accordingly, this Court should hold that the police must offer a thorough explanation of the right to counsel and extract a clear waiver before interrogating a represented defendant.

A. Ohio tradition provides strong protection of the right to counsel

As the appellate court below recognized, Ohio has a long history of protecting the right to counsel beyond the federal constitutional guarantees. *See* 1st Dist. Op., ¶¶ 38–41. Indeed, indigent Ohioans were guaranteed appointed counsel—through Ohio's "Constitution and statutes and by long established practice in all of its trial courts"—more than 100 years before the analogous right was recognized under the U.S. Constitution. *Conlan v. Haskins*, 177 Ohio St. 65, 68 (1964). And, in effect, Ohio safeguarded the right to *effective* assistance of counsel under the Ohio Constitution before the U.S. Supreme Court recognized that right under the federal Sixth Amendment. *Cornwell v. State*, 106 Ohio St. 626, 626, 628 (1922) (per curiam) (holding that, where counsel disagreed with each other in front of the court and jury, the defendant "did not have the fair trial that is guaranteed to him by the Constitution and the laws of the state").

More recently, Ohio has established stringent requirements for courts to ensure that defendants proceeding *pro se* genuinely wish to waive their right to counsel at trial. Under Crim. R. 44(B), "[w]hen a defendant charged with a petty offense is unable to obtain counsel, no sentence

of confinement may be imposed upon him, unless after being fully advised by the court, he knowingly, intelligently, and voluntarily waives assignment of counsel." Ohio courts have refused to accept implied waivers as sufficient for this requirement; rather, the trial court must make a record that the defendant in fact wishes to proceed without counsel and understands "the ramifications of the charges and other risks related to proceeding without counsel." *State v. Henley*, 138 Ohio App.3d 209, 218–20 (9th Dist. 2000); *see also State v. Brooke*, 2007-Ohio-1533, paragraph one of the syllabus (where defendant makes a prima facie showing that a previous conviction was uncounseled and not properly waived, the State has the burden to prove valid waiver or the conviction cannot be used as a penalty enhancement); *State v. Suber*, 2003-Ohio-5210, ¶¶ 22–27 (10th Dist.) (requiring a *written* waiver of the right to counsel, in accord with other districts). This Court has also held that the Ohio Constitution provides a more expansive right to counsel for juvenile defendants than the U.S. Constitution. *State v. Bode*, 2015-Ohio-1519, ¶¶ 23–24. Specifically, although the U.S. Constitution limits the right to counsel in cases where actual incarceration is imposed, Ohio looks to the mere "possibility of confinement" as the relevant factor. *Id.*

In light of the State's history of recognizing a capacious right to counsel, this Court should not hesitate to construe that right more broadly than the U.S. Supreme Court has construed a right that it must apply nationwide.

B. Waivers must be particularly clear when defendants have court-appointed counsel

Where a defendant is appointed counsel, and especially where a defendant has already met with their appointed counsel, police-initiated interrogations may be especially likely to confuse them. Giving the defendant a boilerplate *Miranda* warning about the right to counsel—with no mention of the defendant's actual attorney—may lead defendants to feel that the police are simply

negating their access to their lawyers, which is the opposite of a knowing and intelligent waiver of rights. Accordingly, in such circumstances, the police must provide robust and understandable explanations of defendants' rights and the implications of waiving them to comport with the Ohio Constitution.

This Court has not yet addressed the standard for a valid waiver of the right to counsel under the Ohio Constitution. But under United States and Ohio Supreme Court precedent interpreting the federal Constitution, a defendant's waiver of the right to counsel must be voluntary, knowing, and intelligent. *See Fare v. Michael C.*, 442 U.S. 707, 725 (1979); *State v. Clark*, 38 Ohio St.3d 252, 261 (1988). To be knowing and intelligent, "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). To prove the waiver's validity, the government must demonstrate by a preponderance of the evidence that it was made knowingly and voluntarily based on the totality of the circumstances. *State v. Wesson*, 2013-Ohio-4575, ¶ 35; *In re T.D.S.*, Slip Opinion No. 2024-Ohio-595, ¶ 17.

There is good reason to find that the Ohio Constitution requires a strong showing for a valid waiver of a defendant's right to counsel. At baseline, defendants (and the general public) often do not understand *Miranda* rights. This problem is exacerbated by the widespread exposure to *Miranda* warnings—which leads defendants to *think* they understand their *Miranda* rights and fail to listen intently to officers' warnings—as well as the failure of the police to explain the rights well. *See* Richard Rogers, *Getting It Wrong About Miranda Rights: False Beliefs, Impaired Reasoning, and Professional Neglect*, 66 Am.Psychologist 728–36 (2011). Even people who are able to recall the basic description of a *Miranda* right often have misconceptions about what that right actually entails; for example, some individuals may understand that they have "the right to

remain silent" but mistakenly believe their silence can be used against them. Richard Rogers et al., *General Knowledge and Misknowledge of Miranda Rights: Are Effective Miranda Advisements Still Necessary?*, 19 Psych.Publ.Pol'y & L. 432–42 (2013). This lack of comprehension is particularly pronounced in vulnerable populations such as juveniles, the intellectually disabled, or the mentally disturbed—who make up a large portion of criminal defendants. *See* Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U.Chi L.Rev. 495, 532–34; Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 Cal.L.Rev. 1134, 1152 (1980); William C. Follette, Deborah Davis & Richard Leo, *Mental Health Status and Vulnerability to Police Interrogation Tactics*, 22 Crim.Just. 42, 45–46 (Fall 2007); Richard Rogers, et al., *Knowing and Intelligent: A Study of Miranda Warnings in Mentally Disordered Defendants*, 31 L. & Hum.Behav. 401, 407 (2007). Given this widespread lack of understanding, a defendant's statement that he understands his *Miranda* rights should not be dispositive of whether his waiver of those rights is knowing and intelligent.

The need for a clear, informed waiver of the right to counsel, and not just a boilerplate recitation of *Miranda* rights, is especially acute when police interrogate a suspect who has just been appointed and met with counsel. In Hamilton County, for example, the defendant learns that an attorney has been appointed to represent him at his initial appearance, and he may briefly meet that attorney. When that meeting occurs, as it did in this case, the situation is quite unlike the one that the U.S. Supreme Court considered in *Montejo*. There, the Court deemed the defendant to have "done *nothing at all* to express his intentions" with respect to his right to counsel. *Montejo* at 789. The Court thus saw "[n]o reason"—none—to assume that the defendant would not be "perfectly amenable to speaking with the police without counsel present." *Id.* But when a defendant has had a lawyer appointed, has met with that lawyer, and has not attempted to fire that

lawyer—as routinely occurs after initial appearances in Hamilton County—the defendant's actions amount to an expression of intent to exercise the constitutional right to counsel. And, again unlike in *Montejo*, there is *every reason* to assume that such a defendant may not be amenable to speaking with the police without that counsel present.

In those circumstances, a waiver of the right to counsel cannot be said to be voluntary, knowing, and intelligent unless it is geared to the circumstances of a defendant who has been appointed counsel and against whom the police seek to initiate an interrogation. That is, the police must provide an elaborate and clear explanation of "the nature of the right being abandoned and the consequences of the decision to abandon it," *Moran* at 421. For instance, waiver process should ensure, at a minimum, that the defendant understands that they *already* have a lawyer, and that they can confer with their *current* lawyer before deciding whether to answer any questions, sign any forms, or say even a single word to the police. Otherwise, the government cannot meet its burden of showing that the waiver was valid by a preponderance of the evidence.

Boilerplate *Miranda* warnings fall short of that standard and risk affirmatively misleading defendants. That is because *Miranda* warnings are addressed to an imagined arrestee who does not have a court-appointed lawyer. *Miranda v. Arizona*, 384 U.S. 436, 472–73 (1966) (observing that "[t]he cases before us as well as the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel," and therefore a defendant needed to be advised that "if he is indigent a lawyer will be appointed to represent him"). Thus, a defendant who is given a *Miranda* warning, as Mr. Morris was here, hears that he has the right to an attorney and that one "*will* be appointed" if he cannot afford one. *See* 1st Dist. Op., ¶ 3 (emphasis added). To a counseled defendant, these statements may imply that if he invokes his right to counsel, he will lose the counsel who has already been appointed. Likewise, a *Miranda* warning might tell a defendant, as

Mr. Morris was told here, "You have the right to stop answering at any time *until* you talk to a lawyer." *Id.* (emphasis added). Because Mr. Morris *had* talked to his lawyer, this statement might have led Mr. Morris to believe that he had already exhausted his right to "stop answering." Nor does the appointment of counsel mitigate this potential confusion. Mr. Morris, for example, met but did not privately confer with his appointed counsel, so the attorney may not have had an opportunity to advise Mr. Morris about the extent of his rights, including his right to decline further police questioning.

In sum, even if this Court holds that the Ohio Constitution does not prohibit police from initiating questioning after a defendant has been appointed counsel, the Court should make clear that this circumstance increases the need for police to explain the defendant's rights thoroughly and to ensure that the waiver is voluntary, knowing, and intelligent. And unlike in *Montejo*, where the U.S. Supreme Court crafted a one-size-fits-all rule that sought to accommodate cases in which defendants have expressed no desire to be represented by appointed counsel, this Court can and should require that any waiver process be tailored to the circumstances who have had expressed such a desire by meeting with their appointed counsel.

III. Mr. Morris's Notification Of Rights Form Fell Far Short Of The Requirements For A Valid Waiver

The "Notification of Rights" form provided to Mr. Morris was not enough to demonstrate that Mr. Morris voluntarily, knowingly, and intelligently waived his right to counsel and chose to speak, uncounseled, to the police. The form provided only a barebones recitation of the *Miranda* rights, some of which were inconsistent with Mr. Morris's experience of being recently appointed an attorney. *Supra* at 11–12. Neither the form nor the police, at any time, told Mr. Morris that he was waiving any rights; no version of the word "waiver" was ever used. And, for the reasons stated above, even assuming the form may have served some useful purpose for an arrestee who has not

been appointed counsel, it was likely to affirmatively confuse a defendant for whom counsel had already been appointed.

In fact, Mr. Morris was confused. Forty-five minutes into his interrogation, Mr. Morris asked, "I can't talk to a lawyer?" 1st Dist. Op., ¶ 9. The form of the question suggests that Mr. Morris was under the impression that he could not talk to a lawyer; he did not ask "can I talk to a lawyer," but rather appeared to ask the officer to confirm his understanding—caused by the police's conduct—that he could *not* talk to a lawyer. Accordingly, even if the police were permitted to initiate Mr. Morris's interrogation, they did not adequately explain his right to counsel, and he did not voluntarily, knowingly, and intelligently waive it. *Cf. State v. Ford*, 2019-Ohio-4539, ¶ 189 (2019) (holding that a waiver was knowing and intelligent because the defendant appeared to understand his rights and was able to express his thoughts and recall his actions).

CONCLUSION

Mr. Morris's interrogation provides a concerning case study in how police can fail to protect defendants' right to counsel when they interrogate defendants after counsel has been appointed. As Mr. Morris and other amici have argued, the Court can and should prevent similar violations of the right to counsel by rejecting the rule of *Montejo* and adopting the rule of *Jackson* as a matter of Ohio constitutional law. But, short of that, the Court should, at minimum, require the police to provide a robust, context-specific explanation of the rights of *counseled* defendants when they seek to initiate uncounseled interrogations of those defendants. The police did not do so here, and in consequences Mr. Morris's did not voluntarily, knowingly, or intelligently waive his right to counsel.

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 10, 2024, I filed the foregoing via the Court's electronic filing system and caused a copy to be served by email upon the following:

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