IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2023-1614
Appellant,	:	On Appeal from the Hamilton County Court of Appeals,
vs.	:	First Appellate District
ISAIAH MORRIS,	:	C.A. Case Nos. C-230108
Appellee.	:	

MERIT BRIEF OF APPELLEE ISAIAH MORRIS

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INTRODUCTION

In this case, the First District Court of Appeals correctly upheld the trial court's decision to suppress the statements made by Isaiah Morris to police detectives as his right to counsel under Ohio Const. art. I, § 10 was violated. In doing so, the lower courts recognized the Ohio Constitution afforded greater protection to individuals accused of committing criminal offenses than what is provided by the Fifth and Sixth Amendments to the United States Constitution.

For the reasons argued herein, this Court should affirm the decision below. In the alternative, this matter should be remanded to the First District Court of Appeals for it to determine whether Mr. Morris unambiguously invoked his right to counsel during the interrogation.

STATEMENT OF FACTS

The Cincinnati Police Department ("CPD") investigated Isaiah Morris for allegedly committing various offenses between January 2021 and April 2022 and caused multiple criminal complaints to be filed against him. (T.d. 60 at 2). On May 3, 2022, while visiting his sister in Virginia, Mr. Morris was arrested. (Vol. 1 T.p. 14, State Ex. 2 at 27:36 - 27:50). He was transported to Ohio and booked into the Hamilton County Justice Center ("HCJC") on May 15, 2022. (T.p. 14, 30).

The following morning, Mr. Morris appeared in Courtroom A ("Room A"). (Vol. 2 T.p. 68-69, Defendant Ex. B; T.d. 60 at 2). At this hearing, Assistant Public Defender Courtney DiVincenzo was appointed to represent him. (Vol. 2 T.p. 68-69, Defendant Ex. A; T.d. 60 at 2-3).

Hours later, CPD Detectives Brett Gleckler and Stephen Bender summoned Mr. Morris from his cell at the HCJC to a small interrogation room behind Room A. (Vol. 1 T.p. 13; Vol. 2

T.p. 41-42). Det. Gleckler sat behind a desk, and Mr. Morris was seated across from him. (Vol. 2 T.p. 42). Det. Bender's chair was situated in front of the door. (Vol. 2 T.p. 42). Prior to commencing the interview, Det. Gleckler did not check whether Mr. Morris had appeared in Room A or been appointed counsel. (Vol. 2 T.p. 45-46, 55, 60).

Det. Gleckler began the interrogation by inquiring into the 22-year-old's educational background and his ability to read and write. (Vol. 1 T.p. 13, 16, 28; State Ex. 2 at 1:23 – 2:00). Mr. Morris acknowledged he had been read his rights before as a juvenile. (Vol. 1 T.p. 20, 23; State Ex. 2 at 1:12 – 1:22). Referencing the CPD's Notification of Rights form, Det. Gleckler read Mr. Morris' *Miranda* rights aloud line by line. (Vol. 1 T.p. 13-15; State Ex. 1; State Ex. 2 at 2:24 – 2:53). When asked if he understood the rights, Mr. Morris responded in the affirmative. (Vol. 1 T.p. 13; State Ex. 2 at 2:54 – 2:57).

Det. Gleckler handed the notification form to Mr. Morris and indicated Mr. Morris' signature "demonstrated that [the detective] read his rights to him [and] that's it." (State Ex. 2 at 2:59 – 3:01). Mr. Morris signed the Notification of Rights form. (Vol. 1 T.p. 13, 16; State Ex. 2 at 3:00). The form was worded in terms of the signatory understanding his rights and did not contain any language about waiving those rights. (Vol. 2 T.p. 46; State Ex. 1).

The officers proceeded to ask Mr. Morris questions pertaining to the charges on which he had just appeared in court and for which Attorney DiVincenzo had just been appointed. (State Ex. 2 at 3:38). Approximately 45 minutes into the interview when the detectives insisted Mr. Morris had also been involved in a different shooting at a pizza restaurant, Mr. Morris exclaimed they were trying to pin something on him that had nothing to do with him. (State Ex. 2 at 44:45 – 45:10). He then queried, "Like, I can't talk to a lawyer?" (Vol. 2 T.p. 43-44; State Ex. 2 at 45:17 – 45:20). Det. Gleckler twice responded, "Anybody can talk to a lawyer." (Vol. 2 T.p. 43-

44; State Ex. 2 at 45:19 – 45:25). Mr. Morris replied, "Yeah, cause that's – you know, we goin' to do that cause I don't know what you're talking about." (State Ex. 2 at 45:25 – 45:29). Rather than halt the interview to permit Mr. Morris to confer with counsel, however, Det. Gleckler raised the specter of federal charges. (Id. at 45:30 – 45:51). The interrogation continued. (Id. at 45:58 – 01:59:05).

On May 24, 2022, the Hamilton County Grand Jury returned a 14-count indictment charging Mr. Morris with carrying concealed weapons, having weapons while under disability, felonious assault with specifications, and aggravated robbery and robbery with specifications. (T.d. 1). Mr. Morris moved to suppress statements garnered in connection with the police interview conducted shortly after he appeared in Room A on May 16, 2022.[1] (T.d. 36). He argued the oral statements were taken in violation of his rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution. (T.d. 36).

Det. Gleckler was the sole witness to testify at the suppression hearing. He relayed to the trial court he had been employed as a detective with CPD District 4 for 20 years and as a police officer for 27 years. (Vol. 1 T.p. 11). He testified he was familiar with Room A procedures and knew Room A was an accused's initial appearance before the court. (Vol. 1 T.p. 31). The detective further indicated an accused's appearance in Room A was typically preceded by the filing of a complaint and affidavit. (Vol. 1 T.p. 32). Det. Gleckler understood that during a Room A hearing, bond was typically set, and the accused appointed counsel. (Vol. 1 T.p. 31). Despite

[1] Mr. Morris was also interviewed by Detectives Gleckler and Bender on May 17, 2022. (Vol. 1 T.p. 2-3). The motion to suppress sought to exclude those statements as well. (T.d. 36). At the suppression hearing, the prosecutor represented to the trial court that the State did not plan to use the May 17th interview in its case-in-chief. (Vol. 1 T.p. 3). The State agreed to stipulate that the May 17th would be excluded from its case-in-chief. (Vol. 1 T.p. 4-5). Therefore, the hearing on the motion to suppress was limited to the May 16, 2022 interview. (Vol. 1 T.p 5).

knowing how to look up the docket for Room A and how to check the judge's sheets, Det. Gleckler admitted it was not his practice to determine whether an accused has been to Room A or been appointed counsel before questioning that person. (Vol. 2 T.p. 59-60, 62). He further acknowledged that CPD's investigation manual instructs officers to interrogate suspects as soon as possible to reduce the opportunity for the suspect to engage or confer with legal counsel. (Vol. 2 T.p. 40-41). Even if he had been aware Mr. Morris was represented by counsel, Det. Gleckler testified he would still have gone to interrogate him. (Vol. 2 T.p. 60).

On direct examination at the suppression hearing, Det. Gleckler testified Mr. Morris did not ask for an attorney or attempt to halt questioning for the duration of the two-hour interview. (Vol. 1 T.p. 19; Vol. 2 T.p. 42-43, 54; State Ex. 2). On cross, defense counsel cued up the body worn camera footage commemorating the interrogation. (Vol. 2 T.p. 43-44; State Ex. 2 at 45:18). Det. Gleckler acknowledged that Mr. Morris queried, "Like, I can't talk to a lawyer?" (T.p. 43-44; State Ex. 2 at 45:17 – 45:20). He disputed that Mr. Morris's statement was an attempt to invoke his right to counsel. (Vol. 2 T.p. 48). The detective asserted Mr. Morris was asking a question, so he gave a general response that "Anybody can talk to a lawyer" to keep the dialogue going. (Vol. 2 T.p. 43-44, 57, 62; State Ex. 2 at 45:19 – 45:25). Det. Gleckler testified he did not believe he had to tell Mr. Morris at that point during the interrogation "Yes, you may talk with an attorney." (Vol. 2 T.p. 57). According to the officer, Mr. Morris failed to say the appropriate "trigger words" to cause the termination of the interrogation. (Vol. 2 T.p. 57-58).

The trial court grants the motion to suppress the May 16, 2022 interview.

The trial court began its analysis by recognizing that the Sixth Amendment to the United States Constitution guarantees defendants the right to counsel at all critical stages of the criminal proceeding. (T.d. 60 at 4). It further acknowledged that the United States Supreme Court

expressly overruled precedent prohibiting police from initiating an interrogation of a criminal defendant once his Sixth Amendment right to counsel attaches. (T.d. 60 at 5-6, citing *Montejo v. Louisiana*, 556 U.S. 778 (2009), overruling *Michigan v. Jackson*, 475 U.S. 625 (1986)). In the wake of *Montejo*, police may interrogate a defendant without the knowledge or presence of counsel without offending his Sixth Amendment rights. (T.d. 60 at 6, citing *Montejo*). The trial court noted that pursuant to *Montejo* one's Sixth Amendment right to counsel is sufficiently waived by the reading and waiver of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). (T.d. 60 at 6, citing *Montejo* at 786). The accused's waiver of his right to counsel must still be knowing, intelligent, and voluntary, however. (T.d. 60 at 6, citing *Montejo* at 786).

Next, the trial court delved into the parameters surrounding the right to counsel under the Ohio Constitution. (T.d. 60 at 7-9). Acknowledging the issue as one of first impression, the trial court ultimately held that the right to counsel housed in Ohio Const. art. I, § 10 was broader than that found in the Sixth Amendment to the United States Constitution. (T.d. 60 at 1-2, 9-13). That is, the "plain language" of Article I, Section 10 "prohibits the State from introducing at trial the State's interrogation of a Defendant who was represented by counsel, when the interrogation proceeded without counsel present." (T.d. 60 at 9-10).

Applying this broader protection, the trial court reasoned that Detectives Gleckler and Bender were foreclosed from initiating the interrogation of Mr. Morris on May 16, 2022, after his right to counsel had attached and after he was appointed counsel at his initial appearance. (Id. at 12). The court thus ruled that Mr. Morris was entitled to have his statements during the May 16 interview suppressed in their entirety. (Id. at 12-13). The court alternatively ruled that Mr. Morris' statements from the 45:18-minute mark onward were subject to suppression due to the fact that Mr. Morris clearly invoked his right to counsel at that time. (Id. at 13-14).

The First District Court of Appeals upholds the trial court's decision.

The State filed an interlocutory notice of appeal from the trial court's decision. (A.d. 1). However, its Crim.R. 12(K) certification was limited to counts three through five. (A.d. 3). Other than mentioning this fact in its procedural posture (State's Brief at 2), the State's brief does not contain any argument why these counts should have been treated any differently by the trial court in comparison to the other eleven counts.

The First District commenced its analysis by distinguishing between the rights to counsel grounded in the Fifth and Sixth Amendments, respectively. *State v. Morris*, 2023-Ohio-4105, ¶¶ 16-21 (1st Dist.). The appellate court rejected the State's argument that Morris' right to counsel had not attached because he had not yet been formally indicted. *Id*. at ¶¶ 14-24. The majority noted that the judge established bond, apprised Morris of the nature of the charge, determined probable cause, and appointed counsel. *Id*. at ¶ 22. Because this appearance marked the start of adversarial judicial proceedings, Mr. Morris' Sixth Amendment right to counsel attached. *Id*. at ¶ 24.

Next, the First District eschewed the limitations of *Montejo* by ruling that the right to counsel guaranteed by Ohio Const., art. I, § 10 was broader than the right to counsel in the federal Constitution. *Id*. at ¶¶ 25-57. The majority acknowledged that, in the wake of *Montejo* expressly overruling *Jackson*, police may approach represented defendants and initiate questioning so long as they obtain a valid waiver of the right. *Id*. at ¶¶ 29-30. The appellate court further noted that no Ohio court had yet squarely ruled on the issue; indeed, the Fifth District mentioned but sidestepped the state constitutional issue in *State v. Yoder*, 2011-Ohio-4975 (5th Dist.). *See Morris* at ¶¶ 31-32.

Reaching the heart of its analysis, the First District reasoned that the text of Ohio Const., art. I, § 10 "plainly guarantees a criminal defendant the right to present a defense with counsel." *Id*. at ¶ 37. The provision was designed to "safeguard[ ] the integrity and fairness of a criminal trial." *Id*. The court went on to examine how, toward these aims, the attorney-client relationship was central in the longstanding history of Ohio's criminal legal system. *Id*. at ¶¶ 38-41. Moreover, counsel must be afforded the opportunity to provide effective assistance. *Id.* at ¶¶ 42-43. In this vein, attorneys have a crucial role in presenting their client's defense and ensuring a fair trial by advising and advocating for their client. *Id*. at ¶ 43. This is why the accused is entitled to legal representation when questioned by government authorities once adversarial proceedings have commenced. *Id*., quoting *Brewer v. Williams*, 430 U.S. 387, 401 (1977).

The majority went on to reason that the *Jackson* rule aligned with Ohio's policies protecting the attorney-client relationship and discouraging unlawful police conduct. *Morris* at ¶¶ 44-49. The rule respects the attorney-client relationship which, the appellate court noted, was protected by certain parameters set forth in the Ohio Rules of Professional Conduct and the Ohio Revised Code. *Morris* at ¶ 45, citing Prof.Cond.R. 4.2, 5.3(c)(2), R.C. 2935.20, 2935.14. Finally, the Court of Appeals reviewed how Kentucky, West Virginia, and Kansas had rejected *Montejo* and thereby expanded their respective rights to counsel under state law. *Morris* at ¶¶ 50-53.

The majority marshaled each of these justifications to hold that *Montejo* "[did] not align with the nature of the right to counsel in Ohio" and to hold that "Article I, Section 10 of the Ohio Constitution provides greater protection of a criminal defendant's right to counsel than the Sixth Amendment to the United States Constitution." *Id*. at ¶ 54. The First District thus upheld the trial court's suppression of the statements made during Mr. Morris' interrogation. *Id*. at ¶ 57.

The concurring opinion encouraged litigants to continue pursuing state constitutional claims. *Id*. at ¶¶ 58-65. The concurrence opined that the *Montejo* Court "certainly underenforced the right to counsel guarantee when it chose to overrule *Jackson*" and noted that *Montejo* had been relentlessly panned by scholars since its release. *Id*. at ¶¶ 61, 64.

One member of the panel dissented, noting they "would apply the United States Supreme Court's reasoned opinion in *Montejo* interpreting the Sixth Amendment right to counsel to the coextensive right to counsel in Article 1, Section 10 as written." *See id*. at ¶¶ 66-74.

The State now seeks review in this Court.

ARGUMENT IN RESPONSE TO THE STATE'S PROPOSITIONS OF LAW

Before addressing the State's propositions of law, there two preliminary matter Mr. Morris wants to address.

The state failed to raise its arguments regarding the Ohio Constitution to the trial court and therefore forfeited them.

Defense counsel expressly raised the Ohio Constitutional issue both in her motion to suppress and during opening statements and closing arguments at the suppression hearing. (T.d. 36 at 7; Vol. 1T.p. 10; Vol. 2 T.p. 73-75). The state elected to sidestep the state constitutional issue at the hearing. (See Vol. 1 T.p. 7-9; Vol. 2 T.p. 75-78). It similarly elected to forego addressing the state constitutional issue in its post-suppression-hearing brief. (See T.d. 60 at 2; See also T.d. 44).

It is beyond cavil that arguments not raised in the trial court are typically deemed forfeited. *See State v. Castagnola*, 2015-Ohio-1565, ¶ 67, quoting *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 279 (1993) (observing that, "[generally,] this court will not consider arguments that were not raised in the courts below"). Accordingly, because the trial court was never presented with the State's arguments on this

matter, this Court may decline to address the prosecution's arguments pertaining to the Ohio Constitution and dismiss the appeal as improvidently accepted.

OPAA questions the scope of the appeal.

The OPAA alleges there is a fatal flaw to Mr. Morris's claim that his right to counsel had attached as to counts three through five, the only counts for which the State provided a Crim.R. 12(K) certification. (OPAA's Brief at 6). It contends that counts three through five arose from an incident in February 2022 and were not included in the criminal felony complaints pending on May 16, 2022, when Mr. Morris had his initial hearing and was interrogated by Detectives Gleckler and Bender. (OPAA Brief at 7). OPAA concludes that the Sixth Amendment right to counsel did not attach to counts three through five and therefore Mr. Morris's statements should not have been suppressed on that basis. (OPAA Brief at 9).

First, the felony complaints are not a part of the trial record in this case. The transcript of the docket begins with the indictment. Therefore, the record is silent as to what charges were pending on May 16, 2022.

Second, as part of the Crim.R. 5 hearing held on May 16, 2022, Mr. Morris was entitled to be read the complaints and be informed of the nature of all charges pending against him. Crim.R. 5(A)(1). The transcript of the May 16, 2022 hearing, however, is not part of the appellate record. Therefore, it is unknown what charges Mr. Morris was informed of that day. As the appellant, the State was the party responsible for ordering the transcripts of the proceedings relevant to the appeal. App.R. 9(B). The trial court's decision to treat counts 3 through five as pending charges as the time of the interrogation is entitled to a presumption of regularity. *State ex rel. Bardwell v. Cuyahoga County Bd. of Comm'rs*, 2010-Ohio-5073, ¶ 14.

Third, the case law cited by OPAA applies to the attachment of the Sixth Amendment right to counsel. In this case, we are concerned with the right to counsel under the Ohio Const., art. I, § 10.

Finally, the State did not raise this argument to the trial court, the First District, or this Court. In the courts below, the State's argument against the attachment of the right to counsel focused on the fact that Mr. Morris had not yet been indicted at the time of the interrogation. It never raised the specter that the right to counsel did not attach because there were no criminal complaints filed. Therefore, any argument on this ground has been forfeited.

State's Proposition of Law No. I: Courts must be cautious and conservative when asked to expand constitutional rights under the Ohio Constitution. Under this standard, the case of *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009), applies under Ohio's Constitution.

In the first proposition of law, the State urges this Court to declare that the right to counsel contained in the Ohio Const., art. I, § 10 should be read in lockstep with the United States Supreme Court's decision in *Montejo v. Louisiana*. This lockstep approach would permit police-initiated interrogation of a criminal defendant even though the defendant may be represented by counsel as long as the defendant voluntarily waives his or her *Miranda* rights prior to the interrogation. (State's Brief at 5). The State contends that the right to counsel language in the Ohio Constitution is more restrictive than the right to counsel in Sixth Amendment. (State's Brief at 5). The State further criticizes the First District decision to adopt the bright-line rule espoused in *Michigan v. Jackson* as simple disagreement with the federal court's interpretation of the Sixth Amendment and inconsistent with this Court's decision in *State v. Taylor*, 2024-Ohio-1752, and rulings from other courts of appeals. *See State v. Kyles*, 2024-Ohio-998, ¶ 42 (12th Dist.); *State v. Motalvo*, 2018-Ohio-3142, ¶ 34 (5th Dist.); *State v.*

Crawford, 2012-Ohio-3595, ¶ 23 (2d Dist.); *Yoder*, 2011-Ohio-4975 at ¶ 65-67; *State v. Tyler*, 2010-Ohio-1368, ¶ 33 (6th Dist.). (State's Brief at 13).

The right to counsel under Ohio Const., art. I, § 10, is not narrower than the Sixth Amendment.

Ohio enjoys over two centuries of statehood and, in that time, has ratified only two constitutions. Steinglass & Scarselli, The Ohio State Constitution 3-5, 20 (2d ed.2022). The right-to-counsel provision in the inaugural Ohio Constitution of 1802 provided, "in all criminal prosecutions, the accused hath a right to be heard by himself and counsel[.]" Article VIII, Section 11, Ohio Constitution (1802). Widespread dissatisfaction with economic and structural problems of the day prompted a radical overhaul of the Ohio Constitution in the mid-1800s. Steinglass & Scarselli at 33-34, 39. The right-to-counsel provision in the Ohio Constitution of 1851, which stands undisturbed to this day, is set forth in Article I, Section 10, which provides,

> Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. **In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel**; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to

> testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

(Emphasis added.)

Ohio's Constitution underwent significant amendment as a result of the Constitutional Convention of 1912, but the right-to-counsel provision remained intact. See Article I, Section 10, Ohio Constitution (1851, am. 1912). See also Steinglass, Constitutional Revision: Ohio Style, 77 Ohio St. L.J. 281, 285 (2016).

Arguably, the revised right-to-counsel provision of 1851 employed even broader language in changing from "in all criminal prosecutions" to "in any trial, in any court." *See State v. Jackson*, 2004-Ohio-3206, ¶ 14 (noting that the rules of statutory construction generally apply to construing the Constitution, and that the intent of the framers and plain language are primary considerations). Moreover, the fact that the right to counsel was enshrined in Ohio's Constitution from its inception in 1802 suggests it is a right of paramount importance and longstanding tradition in this state. By contrast, it was not until 1963 that the Sixth Amendment's guarantee of counsel was fully recognized as a fundamental right applicable to the states. *Gideon v. Wainwright*, 372 U.S. 335 (1963), syllabus. These observations lend further credence to the trial court's reasoning that the plain language of Ohio's right-to-counsel provision safeguards the accused's right to the assistance of counsel to defend in trial. (T.d. 60 at 9-10). It is significant, then, that Ohio chose to include the counsel guarantee from the very first incarnation of its constitution despite some of its predecessors having omitted the right. Whether this was an oversight or inadvertent omission on the part of earlier constitutions, the fact remains that Ohio specifically protected the right at its first opportunity in 1802.

The State and its amici would have this Court construe Ohio Const., art. 1, § 10 is a more narrow and limited fashion than the Sixth Amendment, which provides,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

This Court should reject such a notion. As noted above the right to counsel changed from language identical to the Sixth Amendment's "in all prosecution" to "in any trial, in any court." In *Decker v. State*, 113 Ohio St. 512 (1925), the reasons for that change were explored. This Court noted the purpose of the amendment was not to limit the right but rather to expand it to every trial and every court and ensure those charged with misdemeanors enjoyed the right to counsel. *Id.* at 520-521.

Two other states have right to counsel provisions in their state constitutions that are nearly identical to Ohio's. Nev. Const., art. I, § 8; NY Const., art. I, § 6. While there is precious little case law from Nevada that explores the right to counsel under its constitution. New York provides a wealth of case law in which is recognizes that its constitution provides a greater right to counsel than the Sixth Amendment. Indeed, once a defendant in custody requests the assistance, the right to counsel cannot be waived outside the presence of counsel. *People v. Glover*, 87 N.Y.2d 838, 839 (1995); *People v. Bing*, 76 N.Y.2d 331, 338-339 (1990) (right to counsel in New York is far more expansive that recognized in any other state or federal court).

There is no reason that Ohio cannot provide likewise under its constitution. As this Court has acknowledged, the federal constitution provides a "floor" upon which state constitutions are

free to build to safeguard the rights and liberties of their citizens. *See State v. McAlpin*, 2022-Ohio-1567, ¶ 60.

***Other jurisdictions have rejected Montejo*.**

three state high courts have expressly rejected Montejo and elevated the right to counsel on state law grounds – Kentucky, West Virginia, and Kansas. This Court should follow their lead and rule in kind.

In *Keysor v. Commonwealth*, 486 S.W.3d 273 (Ky.2016), the accused was represented by counsel when he was interrogated by police. *Id*. at 274-75. Sherman Keysor was arrested, appointed counsel, and indicted on sexual abuse charges in Graves County. *Id*. at 274. Local authorities informed police in neighboring Marshall County that the victim alleged she was abused in their jurisdiction as well. *Id*. at 275. Detectives from Marshall County travelled to the Graves County jail to interrogate Mr. Keysor without the knowledge of his counsel in the Graves County case. *Id*. Mr. Keysor waived his Miranda rights, and the detectives questioned him about the allegations in both cases. *Id*. Days later, he submitted to a polygraph examination by the Marshall County officials without the knowledge of counsel. *Id*. Mr. Keysor made incriminating statements to the police which prosecutors sought to use in the Graves County matter. *Id*.

The trial court granted Mr. Keysor's motion to suppress. *Id.* at 276. In reviewing that ruling, the Kentucky Supreme Court acknowledged that, in the wake of Montejo, police may approach and interrogate a person charged with a crime without the knowledge or presence of counsel. *Id*. This holding represented a "dramatic shift" in Sixth Amendment right-to-counsel jurisprudence. *Id*. at 277. The *Keysor* Court rejected the rationale espoused by Justice Antonin Scalia in the Montejo majority opinion discounting the social value of the right to counsel due to

the costs it extracted upon the criminal justice system. *Keysor* at 279. All constitutional protections tax the criminal justice system to some measure, the *Keysor* Court observed. Id. Even so,

> [c]onstitutional protections were put in place by the framers of the state and federal constitutions to hinder oppressive impulses by retarding the government's ability to incarcerate suspected offenders. Fairness, not expedience, is the touchstone of our criminal justice system. Few if any constitutional liberties will 'pay their way' in terms of prosecutorial efficiency; they exist to make criminal prosecutions fair and just, not cheap and easy.

Keysor at 279-80, paraphrasing *Montejo* at 797.

The Kentucky high court held that the *Jackson* rule more appropriately reflected the right to counsel as safeguarded by Section 11 of the Kentucky Constitution. *Keysor* at 280. The court reasoned that the fundamental importance of the right was demonstrated by the fact that the wording of the right-to-counsel provision was present in all preceding versions of the Kentucky Constitution since the founding of the Commonwealth in 1792. *Id*. The *Keysor* Court further found that state public policy supported the importance of "maintaining and protecting the integrity of the attorney-client relationship." *Id*., citing SCR 3.103 et seq., KRE 503, and K.R.S. 31.010 et seq.

The *Keysor* Court further warned that adept police officials may readily manipulate unsuspecting individuals "[a]way from the watchful eye and pragmatic advice of counsel[.]" *Keysor* at 281. "For example, the police may entice an unsuspecting defendant with favors his attorney cannot obtain, like alluring assurances of better outcomes and offers of leniency in exchange for cooperative waivers." *Id*. The Kentucky Supreme Court concluded that the "degradation of the right to counsel" perpetrated by *Montejo* was "antithetical to our perception of the right to counsel provided under Section 11 of the Kentucky Constitution." *Id*. The court

held that, "once the right to counsel has attached by the commencement of formal criminal charges, any subsequent waiver of that right during a police-initiated custodial interview is ineffective." *Id*. at 282.

In *State v. Bevel*, 231 W.Va. 346, 745 S.E.2d 237 (2013), the Supreme Court of Appeals of West Virginia similarly rejected *Montejo* and broadened the right to counsel under Article III, Section 14 of the West Virginia Constitution. William Bevel was arrested on sexual assault charges and requested appointed counsel at his initial appearance before a magistrate. *Id*. at 349. Similar to the instant case, he was questioned by police a few hours after his initial appearance before having the chance to confer with counsel. *Id*. Mr. Bevel signed a written waiver and made inculpatory statements to law enforcement. *Id*. at 350. He was subsequently indicted on a number of charges. *Id*.

The question before Supreme Court of Appeals of West Virginia was whether to follow *Montejo*. *Id*. at 349, 351. The court declined, noting "that the right to counsel that has been recognized in this state for more than a quarter century continues to be guaranteed by article III, section 14 of the West Virginia Constitution." *Id*. at 349, 355. *Montejo* was the only variable that had changed in the landscape comprising West Virginia's right-to-counsel jurisprudence. *Id*. at 355. The state high court declined to similarly stray from its own precedent safeguarding the right to counsel. *Id*. at 355-56. It explicitly held:

> [I]f 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.

Id. at 356. *See also In re Darryl P.*, 63 A.3d 1142 (Md.App.2013) (conducting a comprehensive review of federal case law on confessions and electing to enforce a broader protection under the Sixth Amendment despite *Montejo*).

In *State v. Lawson*, 296 Kan. 1084, 297 P.3d 1164 (2013), the Kansas Supreme Court relied upon a state statute to elevate the right to counsel beyond *Montejo*. Lester Lawson was arrested for aggravated criminal sodomy of a child. *Id*. at 1085-86. He entered his initial appearance before the court and requested appointed counsel. *Id*. at 1086. The next day, he signed a waiver form and made incriminating statements to police without his attorney present. *Id*.

The Kansas Supreme Court sidestepped the issue of whether Section 10 of the Kansas Constitution afforded a greater right to counsel than the Sixth Amendment to the United States Constitution. *Id*. at 1089-94. Rather, the court noted that "the Kansas Legislature has specifically codified the right to the assistance of counsel" in K.S.A. 22-4503. The court reviewed the history of this statutory right and concluded it afforded a greater level of protection consistent with the *Jackson* rule. *Lawson* at 1095-99. It included Mr. Lawson's police-induced interrogation and polygraph examination within the ambit of "critical stage" as contemplated by right-to-counsel jurisprudence. *Id*. at 1096. The *Lawson* Court thus held that the trial court "erred in refusing to suppress the uncounseled statement Lawson made during the police-initiated interrogation after *Lawson* had invoked his right to the assistance of counsel under K.S.A. 22-4503." *Id*. at 1099.

For the reasons that follow, it is appropriate for this Court to take a cue from these states to safeguard the right to counsel under Article I, Section 10 of the Ohio Constitution. *See State*

v. Mole, 2016-Ohio-5124, ¶ 22 (noting, "[w]e can and should borrow from well-reasoned and persuasive precedent from other states and the federal courts").

The courts below gave cogent reasons to apply a different rule under the Ohio Constitution.

The trial court prefaced its analysis with a review of the right-to-counsel language in the Ohio Constitutions of 1802 and 1851. (T.d. 60 at 7-8). Again, Article I, Section 10 states in pertinent part: "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel[.]" The trial court reasoned the plain language of this constitutional provision requires that the accused be allowed to defend with counsel in trial. (Id. at 9). The court further reasoned that the plain language of the provision "prohibits the State from introducing at trial the State's interrogation of a Defendant who was represented by counsel, when the interrogation proceeded without counsel present." (*Id*. at 9-10).

The trial court emphasized the fact that Mr. Morris had already been appointed counsel when he was questioned, and that counsel was unaware of the interrogation. (*Id*. at 10). Mr. Morris was thus forced to defend himself without his counsel present, and the state sought to introduce the fruits of that uncounseled interview into evidence for purposes of trial. (*Id*.). The trial court noted, "[t]he Ohio Supreme Court has guaranteed that the accused 'need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, when counsel's absence might derogate from the accused's right to a fair trial.'" (*Id*., quoting *State v. Schleiger*, 2014-Ohio-3970, ¶ 13). Allowing the state to utilize Mr. Morris' uncounseled statements at trial, the trial court reasoned, violated Mr. Morris' right to defend himself with counsel at trial in derogation of the plain language of Article I, Section 10 of the Ohio Constitution. (T.d. 60 at 10).

The trial court further opined that *Montejo* discounted the social value of the attorney-client relationship in casting aside the Jackson rule. (*Id.*, quoting *Keysor*, 486 S.W.3d at 281). It noted that the Ohio Rules of Professional Conduct prohibit prosecutors from communicating with a defendant in the absence of counsel. (T.d. 60 at 10-11, citing Prof.Cond.R. 4.2). Building upon this ethical prohibition, the trial court reasoned that agents of the state such as police officers working in concert with prosecutors should not be permitted to initiate an interrogation once an individual's right to counsel has attached. (T.d. 60 at 11). The trial court thus rejected Montejo as running counter to decades of Ohio law. (*Id*.).

Applying this broader protection under the Ohio Constitution, the trial court reasoned that Detectives Gleckler and Bender were foreclosed from initiating the interrogation of Mr. Morris on May 16, 2022, after his right to counsel had attached and after he was appointed counsel at his initial appearance. (*Id*. at 12). The court thus suppressed the interrogation in its entirety. (*Id*. at 12-13).

It bears further mention that, like Kansas, Ohio codified a broad right to counsel in R.C. 2935.14 and R.C. 2935.20. See *Lawson*, 296 Kan. at 1084. Like Kentucky, the Ohio Supreme Court promulgates and enforces the Ohio Rules of Professional Conduct which support and protect the attorney-client relationship. See Prof.Cond.R. 1.1 – 1.18, 4.2. See also *Keysor*, 486 S.W.3d at 280. In addition, Evid.R. 502 protects the confidentiality of attorney-client communications. See *Keysor* at 280-81. Finally, the Ohio General Assembly enacted Revised Code Chapter 120 to create the state and county public defender offices, which foster relationships between legal counsel and the criminally accused. See R.C. 120.01 et seq. See also *Keysor* at 281. These various enactments further support the constitutional underpinnings of the attorney-client relationship in the Ohio criminal legal system. See *id.*

In view of these aspects of Ohio's history, precedent, policy, and culture, this Court should uphold the trial court's finding that *Montejo* unjustly undervalues the attorney-client relationship in Ohio. By contrast, the *Jackson* rule, which *Montejo* abrogated, stringently protected the right to counsel in a context precisely contemplated by the case at bar:

> [A]fter a formal accusation has been made—and a person who had previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment—the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.

Jackson, 475 U.S. at 632. Mr. Morris respectfully urges this Court to hold that the Jackson rule more appropriately reflects the right to counsel as safeguarded by Article I, Section 10 of the Ohio Constitution. This Court should further hold that, once the right to counsel has attached, any subsequent waiver of that right during a police-initiated custodial interview is ineffective.

As the First District discussed, Kentucky, West Virginia, and Kansas have rejected *Montejo* on state law grounds. *Morris* at ¶¶ 50-53. Thus, the lower court decisions were not rendered in a total vacuum as the state would have this Court believe. Indeed, both courts offered numerous, substantive reasons to support affording the right to counsel greater sanctity under the Ohio Constitution. For example, the right-to-counsel provision in the Ohio Constitution of 1851, which stands undisturbed to this day, provides, "[i]n any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel[.]" Article I, Section 10, Ohio Constitution (1851). The trial court reasoned that the plain language of the provision "prohibits the State from introducing at trial the State's interrogation of a Defendant who was represented by counsel, when the interrogation proceeded without counsel present."

The First District emphasized how *Montejo* discounts the social value of the attorney-client relationship in casting aside the *Jackson* rule. Legal representation is a crucial facet of our criminal system. The state should not be permitted to circumvent this protection in the interest of affording the resource-rich state wider latitude to badger represented criminal defendants.

In view of these aspects of Ohio's history, precedent, policy, and culture, it stands that *Montejo* unjustly undervalues the attorney-client relationship in Ohio. By contrast, the *Jackson* rule, which *Montejo* abrogated, stringently protected the right to counsel in a context precisely contemplated by the case at bar:

> [A]fter a formal accusation has been made—and a person who had previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment—the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.

Jackson, 475 U.S. at 632. Accordingly, the First District properly held that the *Jackson* rule more appropriately reflects the right to counsel as safeguarded by Article I, Section 10.

No other court in Ohio has addressed whether Ohio Const., art. I, § 10, provides a greater right to counsel than what is provided for under Montejo's interpretation of the Sixth Amendment.

Contrary to the State's assertions, there are no decisions in Ohio that address the instant state constitutional issue except for the First District's decision below. While this Court recently cited *Montejo* with approval in *Taylor*, 2024-Ohio-1752 at ¶ 24, concerning the ability to waive the Sixth Amendment right to counsel, it did so without any reference to or discussion of the Ohio Const., art. I, § 10. The same can be said of the decisions in *State v. Furr*, 2018-Ohio-2205 (1st Dist.); *State v. Ojile*, 2017-Ohio-9319 (1st Dist.); *Kyles*, 2024-Ohio-998, *Motalvo*, 2018-Ohio-3142; *Crawford*, 2012-Ohio-3595; and *Tyler*, 2010-Ohio-1368. It appears only the Fifth

District in *Yoder*, 2011-Ohio-4975, was asked to entertain an argument under the Ohio Constitution. The court answered this invitation with a lengthy quote from *State v. Gardner*, 118 Ohio St.3d 420, 889 N.E.2d 995, 2008-Ohio-2787, ¶ 76 which merely recited the law on the possibility of expanding rights under the Ohio Constitution. But the Fifth District engaged in zero analysis of the issue. See *Yoder* at ¶ 69. *Yoder* thus does not conflict with Morris.

Ohio precedent does not preclude the trial court or the First District from recognizing greater rights under the Ohio Constitution.

In its amicus brief, the Ohio Attorney General ("AG") offers a slightly different reason for its argument that the trial court and First District were precluded from affording Ohio citizens with a greater right to counsel. Instead of focusing on *Montejo* per se, the AG contends that because this Court has previously recognized Ohio Const., art. I, § 10, provides similar protections as the Sixth Amendment, this means lower courts cannot are not free to recognize new rights under the Ohio Constitution that stray from federal law. (AG's Brief at 11-12). Essentially, this means because *Montejo* controls how the Sixth Amendment is interpreted and because Ohio Const., art. I, § 10 is coextensive with the Sixth Amendment, *Montejo* controls how Ohio Const., art. I, § 10, is interpreted.

The AG's position is inconsistent with how this Court and others have urged jurists to expand rights under state constitutions. See, e.g., *State v. Brown*, 2003-Ohio-3931, ¶ 21; *Mole*, 2016-Ohio-5124 at ¶¶ 14-22; *State v. Brinkman*, 2022-Ohio-2550, ¶ 74. *Accord Michigan v. Long*, 463 U.S. 1032, 1041 (1983). For example, Justice Fischer wrote:

> Parties should not presume that the rights afforded to a person under the United States Constitution are the only rights or are the same rights as those afforded to a person under the Ohio Constitution. In some circumstances, rights afforded to people under the Ohio Constitution are greater than those afforded under the United States Constitution. See Mole at ¶ 20-21 (lead opinion). This is true even when this court has previously ruled that the state and federal

> Constitutions are coextensive. *See State v. Bode*, 144 Ohio St.3d 155, 2015-Ohio-1519, 41 N.E.3d 1156, ¶ 23-24 (majority opinion) and 31-33 (dissenting opinion).

State v. Hackett, 2020-Ohio-6699, ¶ 26 (Fischer, J. concurring).

For decades, the Ohio Supreme Court has extolled the Ohio Constitution as "a document of independent force." *See Arnold v. Cleveland*, 67 Ohio St.3d 35 (1993), paragraph one of the syllabus. The states are not as constrained in construing liberty and property rights for their respective citizens as is the federal government in construing comparable rights for the entire nation. The license to diverge can be grounded in differences in text and history, unique state traditions and customs, the smaller scope of state court jurisdictions, and disagreement with the United States Supreme Court's interpretation of similar language.

Indeed, one of the cases that the AG contends puts Ohio Const., art. I, § 10 in lockstep with the Sixth Amendment does the opposite. The guaranty of Ohio Const., art. I, § 10 has been found to be "comparable to[,] but independent of similar guarantees provided by the Sixth Amendment to the United States Constitution." *State v. Milligan*, 40 Ohio St.3d 341 (1988), paragraph one of the syllabus. *See also State v. Bode*, 2015-Ohio-1519 at ¶ 23-27. In *Milligan*, this Court recognized an accused enjoys the right to confer with counsel privately under the Ohio Constitution.

<u>State's Proposition of Law No. II</u>: The Sixth Amendment right to counsel does not apply until a defendant has been formally charged. The filing of a criminal complaint, and the appointment of counsel at arraignment where bond is considered, does not constitute formal charges triggering the Sixth Amendment. Formal charges commence at a preliminary hearing, because the State had not indicted Morris at the time of his May 16, 2022, police interview, Morris's Sixth Amendment right to counsel had not yet attached.

The state does not dispute that Mr. Morris appeared before a judge in Room A the morning after his arrest and was appointed counsel at that time. (State's Brief at 1). The

language of the second proposition of law, nonetheless, urges this Court to hold that because Mr. Morris had not been formally indicted by the Hamilton County Grand Jury and had not had his preliminary hearing when the detectives questioned him on May 16, 2022, his Sixth Amendment right to counsel had not yet attached. This is consistent with what the State argued to the trial court at the motion-to-suppress hearing (Vol. 2 T.p. 75), in its brief to the First District Court of Appeals (A.d. 9 at 5-6), and in its memorandum in support of jurisdiction. (State's MISJ at 8-10). In its merit brief, however, the State seems to raise a different argument.

For the first time, it contends that the First District confused the concept of whether the Sixth Amendment right to counsel had attached and what constitutes a "critical stage" for purposes of the Sixth Amendment. (State's Brief at 15). While seemingly acknowledging the right to counsel attaches at an initial appearance under Crim.R. 5, the State goes on to argue that this proceeding is not a critical stage requiring the assistance of counsel. (State's Brief at 15). It then concludes that the preindictment interrogation by police also was not a critical stage. (State's Brief at 16).

The Sixth Amendment right to counsel attaches when a prosecution has commenced via formal charge, preliminary hearing, indictment, information, or arraignment. *State v. Conway*, 2006-Ohio-791, ¶ 64, citing *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). The circumstances preceding Mr. Morris' interrogation on May 16 compel the conclusion that criminal proceedings against him had indeed commenced to a degree sufficient to trigger his right to counsel.

Mr. Morris was formally charged by way of felony complaints and arrested thereon in Virginia. As stated, he had his initial appearance before a judge or magistrate in Room A on the morning of May 16, 2022. This appearance was conducted pursuant to Crim.R. 5(A), which provides: "When a defendant first appears before a judge or magistrate, the judge or magistrate

shall permit the accused or the accused's counsel to read the complaint or a copy thereof." Of note, the Ohio Rules of Criminal Procedure are set up sequentially. Crim.R. 5, which governs the initial appearance and preliminary hearing, precedes indictment (Crim.R. 7) and arraignment (Crim.R. 10). The reference to counsel in Crim.R. 5 thus implies that the right attaches before indictment and arraignment.

Regardless, it is undisputed that counsel was appointed at Mr. Morris' initial appearance before the Room A judge. Bond was set, meaning his liberty was at stake. The fact that he had not yet been indicted by the grand jury did not obviate this restraint on his liberty and attendant right to counsel in this serious offense case. *See State v. Barnett*, 67 Ohio App.3d 760, 770-71 (4th Dist.1990) (right to counsel attached after complaint filed and arrest executed but before indictment returned). See also Crim.R. 44(A) (counsel must be appointed for an indigent defendant charged with a "serious offense ... from their initial appearance before a court through appeal as of right").

Such circumstances stand in contrast to those where criminal charges were filed but not yet actively pursued. See, e.g., *State v. Metter*, 2013-Ohio-2039, ¶¶ 20-26 (11th Dist.) (right to counsel not implicated where suspect questioned after complaint filed and arrest warrant issued but not yet executed); *State v. Cramer*, 2004-Ohio-1069, ¶ 18 (9th Dist.) (holding, "[t]he mere issuance of an arrest warrant and the filing of a complaint, however, do not initiate formal judicial proceedings"); *State v. McBride*, 1985 Ohio App. LEXIS 5936, *25 (2d Dist. Feb. 27, 1985) ("[f]ormal charging, filing a complaint, a court appearance, preliminary hearing, indictment, information or arraignment will activate the right, however, an arrest warrant alone is probably insufficient"). Once adversarial proceedings have been initiated in a court of law, the Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of

the criminal proceedings, which includes interrogation by the State. *Taylor*, 2024-Ohio-1752 at ¶ 22. In *Taylor*, this Court concluded the custodial interrogation of a juvenile did not run afoul of the Sixth Amendment because the complaint was filed after the interrogation. *Id*. at ¶ 23. In contrast, criminal complaints were pending against Mr. Morris, he had appeared before the court, he had bond set, and he had counsel appointed. This all occurred prior to the interrogation.

Although the First District mistakenly referred to the Crim.R. 5 hearing as an arraignment, it conducted the proper analysis by examining whether criminal proceedings had been initiated against Mr. Morris before he was interrogated by police. *Morris*, 2023-Ohio-4105 at ¶¶ 19-23. Thus, the appellate court's determination that Mr. Morris's right to counsel had attached was correct. *Id*.

Ultimately, however, Mr. Morris has to agree with the conclusion in the AG's amicus brief that the second proposition of law is not relevant to this matter. (AG's Brief at 28). Both the trial court and the First District held that it was Mr. Morris's right to counsel under the Ohio Constitution that had been violated and required suppression of the May 16, 2022 statement. This proposition of law addresses the right to counsel under the Sixth Amendment. This Court could easily dismiss this proposition as improvidently accepted.

State's Proposition of Law No. III: A suspect must unambiguously request counsel, meaning suspect must articulate a desire to have counsel present with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.

In its third proposition of law, the State contends that Mr. Morris did not unambiguously invoke his right to counsel around the 45-minute mark of the interview. (State's Brief at 17-20). The State insists that Mr. Morris' statement "Like, I can't see a lawyer" was not an unequivocal invocation of the right to counsel. (State's Brief at 19). It construes the statement as a question

of whether Mr. Morris could talk to a lawyer rather than Mr. Morris expressing a request to actually see his attorney. (State's Brief at 20).

This Court should decline to address the third proposition of law.

As an initial matter, this Court should decline to address the merits of the third proposition of law. First, if this Court agrees that the Ohio Constitution affords a greater right to counsel than the Fifth or Sixth Amendments and affirms that the entirety of the May 16, 2022 interview should be suppressed, then any decision on the third proposition of law would amount to an advisory opinion.

Second, as the State acknowledges in its merit brief, the First District Court of Appeals did not decide this issue. *Morris*, 2023-Ohio-4105 at ¶ 56. (State's Brief at 17, 20). Traditionally, reviewing courts refrain from addressing the merits of an argument in the first instance. *See Allen v. Bennett*, 2007-Ohio-5411, ¶ 21 (9th Dist.) ("Because this Court acts as a reviewing court, it should not consider for the first time on appeal issues that the trial court did not decide."). *See also State ex rel. Parisi v. Dayton Bar Ass'n Certified Griev. Comm.*, 2019-Ohio-5157, ¶ 36 (Kennedy, J., concurring in part and concurring in judgment only in part) ("Our review should [ ] be confined to the issue actually litigated by the parties and decided by the court of appeals in the first instance.")

Third, this proposition is already a well-established rule of law. *See, e.g., Davis v. United States*, 512 U.S. 452, 459 (1994); *State v. Brown*, 2003-Ohio-5059, ¶ 18. The AG's amicus brief essentially acknowledges this fact, stating the applicable law is "sufficiently clear" and "well-settled." (AG Brief at 29-30). The State is merely imploring this Court to engage in a fact-intensive analysis using this already-established rule of law. This amounts to error correction, a role historically disfavored at this advanced stage of appellate review. See *Baughman v. State*

Farm Mut. Auto. Ins. Co., 88 Ohio St.3d 480, 492 (2000) (Cook, J., concurring) ("According to Section 2, Article IV of the Ohio Constitution, this court sits to settle the law, not to settle cases").

Mr. Morris unequivocally invoked his right to counsel.

In the event this Court addresses the merits of the third proposition of law, it should determine Mr. Morris clearly invoked the right to counsel at approximately the 45-minute mark of the interview. Both the State and the AG acknowledge that Mr. Morris asked, "Like I can't talk to a lawyer," and limit their analysis under the Fifth Amendment to that query. (State's Brief at 19-20; AG Brief at 31). This is a mistake as the exchange did not end there. Mr. Morris followed up that statement by adding, "Yeah, cause that's – you know, we goin' to do that cause I don't know what you're talking about."

The threshold inquiry in this analysis is whether Mr. Morris unequivocally invoked his right to counsel. *State v. Madden*, 2022-Ohio-2638, ¶ 6 (1st Dist.). If he did, it was incumbent upon the detectives to stop all questioning and halt the interrogation immediately. *State v. Knuckles*, 65 Ohio St.3d 494, 495 (1992). *See also Edwards v. Arizona*, 451 U.S. 477 (1981). As this Court instructed, a suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *State v. Cepec*, 2016-Ohio-8076, ¶ 37, quoting *Davis*, 512 U.S. at 45. Mr. Morris' inquiry about talking to an attorney, combined with the directive "yeah * * * we goin' to do that," was sufficiently clear that a reasonable police officer would have understood it to be a request for counsel under the circumstances.

If the accused indeed invoked his right to counsel, subsequent statements may nonetheless be admitted into evidence if he initiated further discussion with the police and

waived the invoked right to counsel in a knowing, intelligent, and voluntary manner. *Madden*, 2022-Ohio-2638 at ¶ 6, citing *Smith v. Illinois*, 469 U.S. 91, 95 (1984) and *Knuckles* at 496. "The burden of showing that the defendant waived his rights remains on the prosecution." *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983).

In this case, Det. Gleckler's failure to halt the interrogation did not reflect a misunderstanding of Mr. Morris' clear invocation of his right to counsel. Rather, the detective raised the threat of federal charges to keep the conversation flowing per his police interrogator training. (State Ex. 2 at 45:30 – 45:51; See Vol. 2 T.p. 62). At the suppression hearing, Det. Gleckler acknowledged his status as a 27-year experienced police veteran interviewing a 22-year-old young man. (Vol. 1 T.p. 11, 28). The detective begrudgingly acknowledged on cross examination that the CPD's Investigations Manual instructed him to interrogate suspects as soon as possible to reduce their opportunity to engage legal counsel. (Vol. 2 T.p. 40). He also agreed that the manual and his training taught him to keep the dialogue flowing during an interrogation. (Vol. 2 T.p. 62). Accordingly, rather than stopping the interview when Mr. Morris asked if he could speak to an attorney, Det. Gleckler raised the threat of federal charges to keep the conversation going.

Det. Gleckler acknowledged Mr. Morris was in a jail uniform and booked into the Justice Center at the time of the interrogation. (Vol. 2 T.p. 44). The interview took place in the small room behind Room A housing a desk and three chairs. (Vol. 2T.p. 41-42). Det. Gleckler occupied a seat on one side of the desk and Mr. Morris occupied another seat across from them. (Vol. 2 T.p. 42). Mr. Morris' back was against the wall farthest from the doorway. (Id.). Det. Bender was seated between Mr. Morris and the doorway. (Id.).

Det. Gleckler denied that Det. Bender was seated in front of the doorway to block Mr. Morris from leaving the room, claiming there was nowhere else to sit. (Vol. 2 T.p. 47). When asked if Mr. Morris was free to leave the room, Detective Gleckler claimed Mr. Morris could have ended the interrogation and they would have let him leave. (Vol. 2 T.p. 47). When pressed by defense counsel on whether Mr. Morris asking "I can't talk to a lawyer?" was an attempt to end the interrogation, Det. Gleckler answered in the negative. (Vol. 2 T.p. 48).

These coercive circumstances are analogous to those in a recent case wherein the First District Court of Appeals upheld the suppression of statements similarly obtained. In *State v. Madden*, 2022-Ohio-2638, two detectives questioned Keajzuan Madden in connection with an armed burglary of a residence. *Id*. at ¶ 6. The man initially denied any involvement. *Id*. at ¶ 9. The detectives resorted to more aggressive tactics. *Id*. at ¶¶ 9-10. They claimed others had implicated Madden as the ringleader. *Id*. at ¶ 10. They implied those who cooperated would get favorable treatment. *Id*. Madden asked to see a lawyer three times. *Id*. at ¶¶ 10-12. The detectives threatened to charge him with aggravated robbery. *Id*. at ¶¶ 11-12. They likened the charge to murder. *Id*. at ¶ 13. They maintained they did not have time to wait for an attorney. *Id*. at ¶ 12. Eventually, Madden agreed to talk and confessed his role in the robbery. *Id*. at ¶ 14.

The court of appeals upheld the trial court's suppression of Madden's confession. *Id*. at ¶¶ 1, 19. The First District ruled the detectives continued to question Madden despite him unequivocally and unambiguously invoking his right to counsel. *Id*. at ¶ 16. The Court further agreed Madden did not waive the invoked right by initiating questioning of his own volition. *Id*. at ¶¶ 17-19. Rather, the detectives continued to urge him to talk and emphasized the severity of the charges. *Id*. Said circumstances did not "evince[ ] a willingness and a desire for generalized discussion about the investigation" without an attorney present. *Id*. at ¶ 18, quoting *State v.*

Williams, 2007-Ohio-5577, ¶ 36 (1st Dist.). Rather, they resembled the verboten situation where "the police[ ] wear[ ] down and confus[e] the defendant to obtain a waiver of his rights." *Madden* at ¶ 19, quoting *Knuckles*, 65 Ohio St.3d at 496.

The instant case presents a similarly coercive environment wherein Detectives Gleckler and Bender sought to intimidate and wear down Mr. Morris to coax a confession from him. While police are allowed to lie and use various deceptive tactics during an interrogation, that is true only up to a point. As one prominent Cincinnati attorney observed:

> If police, on the other hand, are committed to the prosecutorial agenda in their fact-collecting process, and develop evidence in a biased manner with the end of obtaining a conviction, then the formal adversary system starts off-kilter. The perceptions about the case held by the crucial actors in the real adversary system – prosecutors, defense lawyers, judges and juries – become distorted. This can lead to erroneous results through a "garbage in, garbage out" sequence.

Godsey, Shining the Bright Light on Police Interrogation in America, 6 Ohio St. J. Crim. L. 711, 714 (2009).

Such tactics were certainly employed here. For example, the detectives repeatedly maintained they were being honest and "keeping it 100" with Mr. Morris. (See, e.g., State Ex. 2 at 5:24, 8:44 – 8:57, 9:26, 18:53, 31:28, 45:30, 49:45, 1:44:11 – 1:44:49, 1:56:10 – 1:56:16). They repeatedly averred they had a DNA match between Mr. Morris and the Smith & Wesson pistol less than one month after the alleged shooting. (State Ex. 2 at 6:40 – 6:48, 12:38 – 13:06, 42:32 – 43:18). Those more experienced in criminal law know how long it takes for the crime lab to process DNA evidence. See Ohio Attorney General, Ohio Bureau of Criminal Investigation, https://www.ohioattorneygeneral.gov/Law-Enforcement/Bureau-of-Criminal-Investigation/Laboratory-Division (accessed June 20, 2023) (noting that BCI's Laboratory Division processes over 200,000 pieces of evidence each year).

The officers turned up the pressure over the course of the interview to goad Mr. Morris to implicate himself in various incidents and surrender the names of his affiliates. (See State Ex. 2 at 25:29 – 1:59:08). It was not until the detectives addressed how much prison time he was facing that the gravity of the situation visibly dawned upon a shocked Mr. Morris. (State Ex. 2 at 29:17 – 32:43).

The most effective pressure tactic was the officers' invocation of "the feds." The detectives repeatedly claimed federal law enforcement were looking into Mr. Morris because the gun in question was "white hot," i.e., used in many offenses around town. (State Ex. 2 at 40:22 – 40:52). Again, those more experienced in criminal law know the federal government has little concern for or resources to pursue small-time local gun cases. See, e.g., FBI, 2019 Crime Data, Table 5, at W-72, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/additional-data-collections/federal-crime-data (accessed June 20, 2023) (placing the number of arrests for weapons offenses in the Southern District of Ohio on federal warrants at a paltry 17 for the year 2019).

When the detectives proceeded to ask him about another shooting, Mr. Morris opined they were trying to put something else on him that he had nothing to do with. (State Ex. 2 at 44:45 – 45:10). He insisted he did not know anything about the incident, and that was when he demanded to speak to a lawyer. (State Ex. 2 at 45:14 – 45:20). It was after this clear invocation of counsel that the threat of "the feds" surfaced for the first time. (State Ex. 2 at 45:30 – 45:53). Det. Gleckler replied he was going to "be honest" with Mr. Morris and opined the young man's real worry was "the feds" picking up the case because the gun had been used in so many things. (Id.). Rather than halting the interview, Det. Gleckler began asking about another shooting in Walnut Hills and Mr. Morris continued answering questions. (State Ex. 2 at 45:58 – 48:30). The

detectives repeatedly returned to the specter of "the feds" to push Mr. Morris to talk throughout the interview. (See State Ex. 2 at 45:38 – 45:50, 48:40, 51:47, 1:37:10 – 1:44:09, 1:44:43, 1:45:20, 1:45:48, 1:47:02, 1:47:18, 1:55:18 – 1:55:50).

Mr. Morris attempted to terminate the interview by demanding to return to his cell no less than six times. (State Ex. 2 at 1:25:17, 1:34:11, 1:36:58, 1:56:45, 1:56:49, 1:57:24). Rather than do so, the detectives warned of consequences to come to keep the conversation flowing. (See *id*.). The interrogation only ended after Mr. Morris agreed to come back the next day. (State Ex. 2 at 1:58:40 – 1:59:08).

Under such circumstances, it cannot be said that Mr. Morris waived his invoked right to counsel in a knowing, intelligent, and voluntary manner by initiating questioning of his own volition. *Bradshaw*, 462 U.S. at 1044. On the contrary, Mr. Morris invoked his right to counsel and then repeatedly attempted to halt the interrogation. The detectives continued to question him anyway. They continued to urge him to talk and raised the specter of "the feds" to scare him. Mr. Morris' statements coaxed in this fashion were not the product of a willingness and a desire to talk, but the product of the detectives wearing down and confusing the young man to obtain a waiver of his rights. *Madden*, 2022-Ohio-2638 at ¶ 19. Accordingly, the trial court properly issued its alternative ruling suppressing all statements from the 45-minute mark on.

CONCLUSION

Mr. Morris respectfully requests that this Court affirm the First District's decision. At a minimum, Mr. Morris would request this Court to remand the matter to the First District Court of Appeals for that court to determine whether he unambiguously invoke his right to counsel at the 45-minute mark of the interview.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the Appellee's Merit Brief has been served on Ron Springman, Counsel of Record for Appellant, State of Ohio, via email delivery at Ron.Springman@hcpros.org, on on the 10th day of July 2024.

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