

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2023-1614
Plaintiff-Appellant,	:	
v.	:	On Appeal from the
	:	Hamilton County Court of Appeals,
ISIAIAH MORRIS,	:	First Appellate District
	:	
Defendant-Appellee.	:	COA Case No. C-230108

**MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLEE ISIAIAH MORRIS**

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STATEMENT OF THE CASE AND FACTS

Amicus curiae, the Office of the Ohio Public Defender (OPD), adopts the statement of the case and facts set forth in the merit brief of Appellee Isaiah Morris.

**STATEMENT OF INTEREST OF AMICUS CURIAE,
OFFICE OF THE OHIO PUBLIC DEFENDER**

The OPD is a state agency that represents indigent criminal defendants and coordinates criminal-defense efforts throughout Ohio. The OPD has an interest in this case because it involves issues of first impression that implicate the right to counsel. The resolution of those issues will determine the ability of the OPD and other Ohio criminal-defense practitioners to serve as effective intermediaries between their clients and the state. The OPD urges this court to affirm the First District's well-reasoned decision and to reject the propositions of law set forth by the State.

INTRODUCTION

Mr. Morris, the other amici supporting him, the trial court, and the First District have collectively shown that the Ohio Constitution prohibits the State from initiating an interrogation of a criminal defendant who is represented by counsel without their counsel present. That right was violated here when Mr. Morris was appointed counsel but then whisked away by two detectives to an interrogation room, where he was questioned without his attorney for nearly two hours. Given that violation, the trial court and First District were right to suppress Mr. Morris's statements.

The State and its amici argue that the United States Supreme Court's decision in *Montejo v. Louisiana* compels a different result. That argument should be rejected for two reasons. First, the argument is forfeited. Despite Mr. Morris's consistent invocation of the Ohio Constitution, the State did not address that document until its briefing in this court. Second, the State's argument is wrong. Ohio courts are free to interpret the Ohio Constitution without regard to how the federal high court interprets the federal constitution, and there are many reasons why Ohio should chart its own course here. *Montejo* should not govern here not only for the reasons identified by Mr. Morris and the other amici, but also because the decision is inconsistent with how Ohio ordinarily treats the attorney-client relationship and because it imposes an unjust burden on indigent Ohioans.

This court should ensure that the Ohio Constitution is given full and independent meaning by rejecting the State's propositions of law and affirming the First District's judgment below.

ARGUMENT

APPELLANT’S PROPOSITION OF LAW NO. 1: 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, 129 S.Ct. 2979, 2085, 173 L.Ed.2d 955 (2009), applies under Ohio’s Constitution.

I. The State and its amici have forfeited their state constitutional arguments

Mr. Morris has argued since the early stages of this case that his right to counsel under the Ohio Constitution was violated when he was interrogated without his counsel present. Despite Mr. Morris’s consistent invocation of his rights under the Ohio Constitution, the State did not address that document or the independent rights it confers in the trial court or in the First District. Yet the State and its amici now seek to raise arguments that could have been—but were not—presented and ruled on below. This court should hold that the State and its amici forfeited their arguments.

In Mr. Morris’s suppression motion, after observing that this court has determined, in *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 35 (1993), that “[t]he Ohio Constitution is a document of independent force,” Mr. Morris asserted that “[u]nder Article 1, Section 10 of the Ohio Constitution Mr. Morris’ statement must be suppressed.” (Apr. 24, 2023, Motion to Suppress Statements, at 7-8.) After this explicit invocation of Mr. Morris’s state constitutional rights, did the State file a memorandum in opposition, challenging that assertion? No, it did not. (Supp. Tr. Vol. 1, p. 7.) (“The Court: So I should say for the record, I’ve read the Motion to Suppress. The State has not filed a Memo in Op[osition]. Ms. Fischer: Correct.”)

Then, at the suppression hearing, counsel for Mr. Morris explicitly reiterated that the right-to-counsel claim being asserted by Mr. Morris derived from the state constitution. (Supp. Tr. Vol. 2, p. 73.) (“We are asking the Court to consider the Ohio Constitution and how that affects this

case. The Ohio Constitution provides greater protections than the federal constitution.”) The State made no oral counter-argument to that assertion in front of the trial judge.

Next, posthearing briefing was allowed by the trial court, which had indicated before testimony even began that such briefing would occur. (Supp. Tr. Vol. 1, p. 7.) (“The Court: [] I will offer it to all parties to file additional supplemental briefing after the hearing if you would like.”) Again, Mr. Morris asserted his state constitutional claim, with the posthearing memorandum for the defense explaining why the rule set forth in *Montejo v. Louisiana* must be followed when the Sixth Amendment is being applied, but not when the state constitution is being applied. Did the State’s posthearing memorandum address the state constitution *at all* in its posthearing memorandum? No, it did not.

Yet now the State and its amici seek to challenge the application of the state constitution by the trial court and by the court of appeals below. Simply put, their challenge is too late and should be barred.

That is because “an appellate court will not consider any error which counsel for a party complaining of the trial court’s judgment could have called but did not call to the trial court’s attention at a time when such error could have been avoided or corrected by the trial court.” *State v. Glaros*, 170 Ohio St. 471 (1960), paragraph one of the syllabus. And this “appellate rule of forfeiture applies to any party claiming error, including the state.” *State v. Gwynne*, 2019-Ohio-4761, ¶ 11.

Due to the State’s limited arguments in the trial court, which arguments literally did not even attempt to explain why the Ohio Constitution—a document of independent force vis-à-vis the federal constitution—does not afford represented defendants different and greater protection than is provided by the *Montejo* rule, the application of the state constitution by the courts below

must be allowed to stand. In the alternative, should this court reach the merits of the State's claims, the OPD sets forth the following analysis and argument as a friend of the court.

II. This court should reject the *Montejo* rule and affirm that the Ohio Constitution confers an independent and broader right to counsel than its federal counterpart

In addition to being forfeited, the State's reliance on *Montejo* is misplaced. Although *Montejo* should be rejected for several reasons, the OPD focuses on just two here. First, the decision is inconsistent with how Ohio ordinarily treats the right to counsel. Next, it imposes an unequal burden on indigent Ohioans. For those reasons, this court should hold that the First District's careful state constitutional analysis, not *Montejo*'s contested reading of the federal constitution, is the appropriate interpretation of the right to counsel under the Ohio Constitution.

A. The United States Supreme Court's interpretation of the federal constitution does not dictate this court's interpretation of the Ohio Constitution

Most provisions in the federal Bill of Rights have parallel provisions in Ohio's Bill of Rights. Often, courts have interpreted those state guarantees in line with how the United States Supreme Court has interpreted their federal counterparts. But if United States Supreme Court precedent regarding a federal constitutional provision is wrong, then Ohio should not repeat that error in construing its own constitution. This case presents such a scenario.

As recognized by the parties and by the trial and appellate courts below, in *Montejo v. Louisiana*, 556 U.S. 778 (2009), the United States Supreme Court created a rule regarding what police detectives must do before interrogating a defendant who is in jail, who has been formally charged, and who has already been provided counsel by the court. In short, the *Montejo* rule is that it suffices to give a represented defendant a *Miranda* warning before beginning a custodial interrogation, and the result is that such an interrogation can proceed without the defendant's counsel being aware that it is occurring. *Id.* at 786-788, 797.

But *Montejo* itself makes it clear that no state has to follow this approach: “If a State wishes to abstain from requesting interviews with represented defendants when counsel is not present, it obviously may continue to do so.” *Id.* at 793; *see also*, *State v. Mole*, 2016-Ohio-5124, ¶ 21 (“we are not confined by the federal courts’ interpretations of similar provisions in the federal Constitution any more than we are confined by other states’ high courts’ interpretations of similar provisions in their states’ constitutions.”). And, for the reasons that will be set forth below, the *Montejo* rule should be rejected by this court, in order to ensure that effective representation by counsel occurs at *every* critical stage of a criminal proceeding.

B. *Montejo* is inconsistent with how Ohio ordinarily treats the right to counsel

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court recognized that an *unrepresented and uncharged suspect*, before a custodial interrogation may properly be conducted, must be informed of their right not to make self-incriminating statements, and must be afforded the right to speak with an attorney if they choose to do so before proceeding further with the interrogation. But at issue here are the protections that must be afforded to a *represented defendant who has already been charged*, before a custodial interrogation may properly proceed. Patently, the *Miranda* scenario is fundamentally different from the scenario presented here. And the *Montejo* rule—which simply takes the *Miranda* protections that are afforded to mere suspects and applies them also to those who have already become defendants—is in derogation of the right to the effective assistance of counsel, and should not guide this court’s interpretation of the state constitution in this area.

A key initial matter to address, one that this court very recently acknowledged, is that custodial interrogation of an individual who has been formally charged and who has been jailed while awaiting trial is a “critical stage” of a criminal proceeding. *See State v. Taylor*, 2024-Ohio-

1752, ¶ 22, quoting *Montejo*, 556 U.S. at 786 (“[O]nce the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all ‘critical’ stages of the criminal proceedings. * * * Interrogation by the State is such a stage.”); accord *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008) (a defendant “is entitled to the presence of appointed counsel during any ‘critical stage’ of the postattachment proceedings”). Thus, because custodial interrogation of an already-charged, represented defendant is a critical stage—a term that also includes pretrials, trials, sentencing hearings, etc.—it is clear that the relevant frame of reference in this case is the adversary criminal process. Again, that is a scenario which is markedly different from the backdrop in *Miranda*, which was a pre-charge police investigation of the sort that has never been deemed a critical stage.

And the right to counsel once the adversary process has commenced means something very different than the right to counsel to help avoid self-incrimination when one is merely an uncharged suspect. As has long been recognized, the right to counsel at every critical stage once a formal case has been initiated by the State “embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is represented by experienced and learned counsel.” *Johnson v. Zerbst*, 304 U.S. 458, 462-463 (1938). Further, the United States Supreme Court has recognized that “the most critical period” for defendants during criminal proceedings is “from the time of their arraignment until the beginning of their trial.” *Powell v. Alabama*, 287 U.S. 45, 57 (1932). Thus, a defendant “requires the guiding hand of counsel at every step in the proceedings against him.” (Emphasis added.) *Id.* at 69; accord *Maine v. Moulton*, 474 U.S. 159, 176 (1985) (“The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a ‘medium’ between him and

the State.”). (Emphasis added.) The rule created in *Montejo*, simply put, wholly and improperly disregards these considerations.

The incorrectness of the *Montejo* rule can also be demonstrated by looking to longstanding guidance from the United States Supreme Court regarding the right to the effective assistance of counsel. Of course, *Strickland v. Washington*, 466 U.S. 668 (1984), established the now-familiar framework for assessing whether counsel provided constitutionally effective representation for a criminal defendant. But it is a different case released the same day, *United States v. Cronin*, that shows how the *Montejo* approach is not appropriate when a defendant has been formally charged and is represented by counsel.

In *Cronin*, the court ruled that deprivation of counsel at a critical stage is structural error, requiring reversal. *United States v. Cronin*, 466 U.S. 648, 659 (1984) (“The presumption that counsel’s assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.”). Here, as has already been established immediately above, post-charge custodial interrogation is a critical stage. But the *Montejo* rule, allowing police detectives during an adversarial proceeding to interrogate a defendant without the defendant’s counsel ever being notified, creates a scenario where a defendant is requested to participate in a critical stage of the proceedings without the assistance of counsel. Applying the *Montejo/Miranda* approach after adversarial proceedings have begun and counsel has been appointed, and when such counsel is not involved in or informed of a custodial interrogation, leads inexorably to *Cronin* violations or, at minimum, creates a grave risk of such violations, under circumstances where they could easily be avoided.

Lastly, the inaptness of the *Montejo* rule in a situation where formal adversarial proceedings have begun can be shown by considering what would happen at any in-court pretrial

proceeding—again, also a critical stage—where defense counsel was not present. The trial court, quite simply, would not allow the pretrial to occur until defense counsel was present. And if the pretrial did take place, a reviewing court would be required by *Cronic* to find that the defendant’s right to counsel had been violated. Further, even if the defendant sought to affirmatively waive their right to counsel for purposes of the pretrial, the trial court would be obligated to conduct the inquiry required by *Faretta v. California*, to ensure that the defendant was knowingly and voluntarily waiving their right to the presence of the attorney who had already been appointed for them. See *Faretta v. California*, 422 U.S. 806, 835 (1975), quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942) (defendant “should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’”) The *Miranda* warning that *Montejo* deems adequate for custodial interrogation of a represented defendant does not approach the level of protection afforded by the *Faretta* inquiry, and could never properly be employed at any other critical stage of a criminal proceeding. And it must be noted the wording of the *Miranda* warning itself demonstrates the inadequacy of the *Montejo* approach with respect to represented, formally-charged defendants: under the standard *Miranda* warning, defendants are told that counsel *may be* appointed for them if they wish, when in fact counsel *has already been* appointed for them in the scenario giving rise to this case.

C. *Montejo* imposes unequal burdens on indigent and otherwise disadvantaged defendants

Montejo not only clashes with the attorney-client relationship, it also imposes unequal and unjust burdens. Indeed, what happened to Isaiah Morris only happens to indigent accused persons who cannot afford to leave jail or retain their own attorneys while their criminal cases are pending. It does not happen to wealthy accused persons who post bond and retain their own attorneys.

A person who can afford to post bond is released into their own environment, typically free to move about their community, while their criminal case is pending. That means that the police must come to them—at their home or place of employment—to try to talk with them. Additionally, if the police show up, that wealthy accused person has access to their own cell phone. They can call their retained lawyer, who will then advise them in real time not to speak to the police at all or wait until the attorney is present. At that stressful moment, the wealthy accused person can rely on their attorney to help them navigate the interaction. Then, the attorney and the police will schedule a time for the accused person to be interviewed.

Those who are poor and remain jailed while their cases are pending do not have these same realities. A jailed accused person is not in their own environment or free to move about. Their placement and movement are always monitored. The police have full access to the jail. The jailed accused person does not have access to their own private cell phone. They can only use a phone as permitted by the jail. They do not have immediate and unfettered access to their appointed counsel. At the stressful moment when the police show up to question them, they must decide on their own how to navigate and handle the interaction.

Despite a promise of equal rights for indigent and wealthy accused persons, the difference in these two realities is stark.

Additionally, the government's requested outcome would negatively impact young defendants who have little experience with the legal system, especially minors who have been transferred from the juvenile to the adult legal system. In Ohio, children as young as 14 can be processed through the adult legal system. *See* R.C. 2152.10. In 2011, the United States Supreme Court reaffirmed the commonsense understanding that “children will often feel bound to submit to police questioning” when an adult might not. *J.D.B. v. North Carolina*, 564 U.S. 261, 264

(2011). In that case, the Supreme Court required police to consider age in the custody analysis to ensure that constitutional protections would be meaningful for children. *See id.* at 280-281.

Likewise, ignoring the realities of indigent persons who remained jailed, without immediate access to their defense lawyers, does not ensure that the right to counsel is meaningful. It reinforces a two-tiered system of justice.

D. The construction of the state constitution urged by Mr. Morris comports with the Rules of Professional Conduct

Rule 4.2 of the Ohio Rules of Professional Conduct, adopted by this court in 2007, prohibits a lawyer and the lawyer's agents from "communicat[ing] about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." That rule applies equally in civil and criminal cases, and is designed to prevent the unfairness that results when counsel for a represented person is circumvented. And the rule's comments specifically provide that "[w]hen communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused." *Id.*, Comment 5.

Indigent defendants must not be denied the benefit of this professional conduct rule simply because counsel was appointed for them by the court. Attorneys providing representation in criminal cases have long been bound by ethical rules prohibiting contact with represented parties. *See, e.g., State v. Byrd*, 2013-Ohio-3949 (6th Dist.) (applying Prof.Cond.R. 4.2, after trial court granted state's disqualification motion; appellate court agreed that counsel was barred from further representation of client, because counsel communicated directly with a represented codefendant). Here, the prosecution's suggested construction of the state constitution would lead to a purely one-sided application of Prof.Cond.R. 4.2, with the rule applying only to defense counsel. This result

should be avoided, and can readily be avoided by adopting the position of Mr. Morris and his amici.

It must be noted that the OPD—in recognition of a defendant’s constitutional right to represent him- or herself—does not contend that Article I, Section 10 of the state constitution must be read as being fully coextensive with Prof.Cond.R. 4.2. Defendants should not be barred from affirmatively initiating contact with the prosecution or their agents, because such a rule would be in derogation of the right to self-representation. But the state constitution must, at minimum, be construed so as to protect represented defendants against state-initiated interviews after formal charges have been filed. In scenarios where no competing constitutional interest is present—e.g., the right to engage in self-representation, which should not and cannot be infringed upon by the professional conduct rules—the OPD respectfully submits that it would be error to construe the state constitution as the prosecution would here: in a way that patently contravenes the plain language of the professional conduct rule promulgated by this court that explicitly prohibits contact of a represented client by an attorney or their agent.

CONCLUSION

This court has previously observed that “where [state and federal] provisions are similar and no persuasive reason for a differing interpretation is presented, this court has determined that protections afforded by Ohio’s Constitution are coextensive with those provided by the United States Constitution.” *State v. Robinette*, 80 Ohio St.3d 234, 238 (1997). But this general rule is just that—a general rule—one that recognizes dual sovereignty, and the fact that the language of the Ohio Constitution draws heavily from the federal constitution. But this court’s interpretation of the state constitution is merely *informed by* the United States Supreme Court’s interpretation of

the federal constitution. It is this court’s constitutional responsibility to independently construe the state constitution when called upon to do so.

It has been suggested that this court, in construing a state constitutional provision, may properly deviate from an existing federal interpretation of a parallel federal constitutional provision when there is a “compelling legal analysis” supporting such a deviation, that explains “Why would [the court] do this? Under what rationale? By what case law? For what purpose and to what end?” *State v. Bode*, 2015-Ohio-1519, ¶ 33 (French, J., dissenting.) The OPD respectfully submits that the foregoing arguments fully answer those four questions, and leave little doubt that the *Montejo* rule insufficiently protects the right to counsel of those who have been formally charged, who are in jail because of those charges, and who have counsel who are responsible for representing them and advancing their interests in the adversary criminal process.

Accordingly, and because “to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself,” this court should interpret art. I, § 10, of the state constitution in the manner urged by Mr. Morris herein. *Moulton*, 474 U.S. at 170.

Respectfully submitted,

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