In the
Supreme Court of Ohio

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

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLANT STATE OF OHIO

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INTRODUCTION

Isaiah Morris wanted to suppress statements that he made to the police after he had been arrested and after a court had appointed counsel to represent him. But he had no basis to do so under the U.S. Constitution. Although criminal defendants have a right to counsel that is guaranteed by both the Fifth and Sixth Amendments to the U.S. Constitution, the U.S. Supreme Court has held that a defendant waives his rights under *both* Amendments, when, after receiving the warning required by *Miranda v. Arizona*, 384 U.S. 436 (1966), he voluntarily chooses to speak with police officers. *Montejo v. Louisiana*, 556 U.S. 778, 794–95 (2009); *see also State v. Taylor*, 2024-Ohio-1752, ¶24. Morris had done just that. He voluntarily spoke with Cincinnati police officers after the officers informed Morris of his rights, and after Morris signed a waiver form in which he acknowledged those rights. Because Morris could not dispute that he validly waived his rights to counsel under the U.S. Constitution, he argued instead that he did not waive his right to counsel under the *Ohio* Constitution.

The Ohio Constitution provides in relevant part that "[i]n any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel." Ohio Const. art. I, §10. Some of the earliest decisions interpreting that provision noted that the right to counsel guaranteed by the Ohio Constitution is similar to the right to counsel that is guaranteed by the Sixth Amendment to the U.S. Constitution. *See Dille v. State*, 34 Ohio St. 617, 619 (1878); *Ford v. State*, 121 Ohio St. 292, 295 (1929). The Court has consistently

held since then that the "right to counsel afforded by Section 10, Article I of the Ohio Constitution is 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, syl.¶1 (1988).

Disregarding this Court's longstanding precedent, the Hamilton County Court of Common Pleas and the First District Court of Appeals both agreed with Morris and held that Article I, Section 10 of the Ohio Constitution provides a more expansive right to counsel than does the Sixth Amendment to the U.S. Constitution. *See State v. Morris*, 2023-Ohio-4105, ¶¶11, 54–55 (1st Dist.) ("App.Op."). They were wrong. If the Court decides to revisit its prior decisions, which held that the protections each constitution provides are similar, then it should hold that the protections that the Ohio Constitution provides are *narrower* than those provided by its federal counterpart. The Sixth Amendment guarantees a right to counsel in "all criminal prosecutions," *see* U.S. Const. amend. VI, which the U.S. Supreme Court has interpreted to encompass not just trials but all "critical" stages of criminal proceedings, *Powell v. Alabama*, 287 U.S. 45, 57 (1932). The Ohio Constitution, by contrast, guarantees a defendant a right to counsel only in "any trial in any court." Ohio Const. art. I, §10. And even then, defendants only have a right to have counsel "appear and defend." *Id.* As the dissent in the First District emphasized, the textual difference is significant. *See* App.Op.¶69 (Winkler, J., dissenting). Because preliminary proceedings are not "trials" at which a defendant "defend[s]" himself, the

Ohio Constitution does not guarantee *any* right to counsel in preliminary court proceedings—let alone in police interrogations.

The difference between the language in the Ohio and U.S. Constitutions also explains why Morris's right to counsel did not attach during his first court appearance in May 2022. Even if that appearance qualified as the commencement of criminal proceedings for purposes of the Sixth Amendment, it was not a trial. Nor were the events that followed. So, regardless of whether Morris's right to counsel attached for purposes of the Sixth Amendment, it did not attach for purposes of Article I, Section 10 of the Ohio Constitution.

Finally, the common pleas court erred when it held that Morris invoked his Fifth Amendment right to counsel part way through his interrogation. The Court should address that question even though the First District did not. *See* App.Op.¶57. It is well-settled that a defendant must clearly and unequivocally invoke his Fifth Amendment right to counsel. *See Davis v. United States*, 512 U.S. 452, 459 (1994). Morris did not. His question, "I can't talk to a lawyer?" was similar to other statements that the Court has held were not unequivocal requests for counsel. *See, e.g., State v. Henness*, 79 Ohio St. 3d 53, 62–63 (1997) (holding that a defendant's statement that "I think I need a lawyer" was not an unequivocal request for counsel). Precedent therefore clearly forecloses Morris's argument and, rather than further delay this case by remanding it to the First District to

consider the question, the Court should resolve the issue now and allow this case to proceed to trial.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law enforcement officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. He is interested in a correct interpretation of the right to counsel afforded to criminal defendants by Article I, Section 10 of the Ohio Constitution.

STATEMENT OF THE CASE AND FACTS

I. Isaiah Morris was charged with committing multiple felonies with a firearm that, because of a prior juvenile adjudication, he was not allowed to possess.

Isaiah Morris was arrested in May 2022 and charged with committing multiple felonies. Among other things, Morris had a prior juvenile adjudication that prevented him from possessing a firearm. *See* R.21, Bill of Particulars at 1. He was charged with possessing one anyway. *Id.* He was charged with using a firearm to commit robbery. *Id.* And he was charged with committing several felonious assaults. *Id.* at 2. Specifically, he was charged with firing a gun at a group of people, striking four of them. *Id.* At Morris's initial appearance following his arrest, a municipal court appointed counsel to represent him. *See* R.36, Motion to Suppress, Ex.A, Designations of Trial Attorney.

Police officers interrogated Morris by himself after he was arrested and after a court had appointed counsel to represent him, but before he was indicted or arraigned. *See*

Suppression Hearing Tr. at 12–14; *see also* R.1, Indictment. The officers informed Morris of his rights, and Morris signed a form indicating that he was aware of those rights. Suppression Hearing Tr.13–15, 48–50. Morris spoke with the officers anyway. Suppression Hearing Tr.19. Partway through that conversation, Morris asked, "I can't talk to a lawyer?" and the officers informed him that "anyone can talk to a lawyer." Suppression Hearing Tr.44, 50. Morris continued to speak with the officers and did not ask for an attorney or pursue the issue any further. Suppression Hearing Tr.50–51.

A grand jury eventually indicted Morris on many of the same charges that had been included in the complaints that provided the basis for his arrest. R.1, Indictment; *see also* R.21, Bill of Particulars. Consistent with those complaints, the grand jury indicted Morris for one count of carrying a concealed weapon, one count of robbery, one count of aggravated robbery, three counts of having a weapon under disability, and eight counts of felonious assault. R.1, Indictment; *see also* R.21, Bill of Particulars. Morris pleaded not guilty to all of the charges. R.5, Plea.

II. The Hamilton County Court of Common Pleas suppressed Morris's statements, reasoning that the Ohio Constitution provides defendants with greater rights than the Sixth Amendment to the U.S. Constitution, and the First District affirmed.

Morris moved to suppress the statements he made to the police during his interrogation. R.36, Motion to Suppress. Although he had validly waived his rights to counsel under the Fifth and Sixth Amendments to the U.S. Constitution, Morris argued that Article I, Section 10 of the Ohio Constitution affords defendants a greater right to

counsel than the U.S. Constitution does. *Id. That* right, Morris argued, he had not waived. *Id.*

The Hamilton County Court of Common Pleas agreed with Morris. Citing, among other things, Ohio's Rules of Professional Conduct, the common pleas court held that Article I, Section 10 of the Ohio Constitution affords defendants a greater right to counsel than the U.S Constitution does. R.60, Mar. 10, 2023 Entry and Decision at 11–12. The common pleas court further held that Morris had invoked his Fifth Amendment right to counsel when he asked about the possibility of talking to a lawyer. *Id.* at 13–14. It therefore granted Morris's Motion to Suppress. *Id.* at 14.

The State appealed and the First District Court of Appeals affirmed in a two-to-one decision. App.Op.¶57. Like the common pleas court, the appellate court cited Ohio's Rules of Professional Conduct, as well as defendants' statutory right to counsel, as evidence that the Ohio Constitution provides a greater right to counsel than the Sixth Amendment to the U.S. Constitution does. App.Op.¶¶39, 42, 54. The Court of Appeals further held that the greater constitutional right it recognized was needed to encourage respect for Ohio law and to deter unlawful police conduct. *See* App.Op.¶¶47–49. It therefore held that "when an accused's right to counsel has attached and an attorney has been secured, any uncounseled waiver of the defendant's right to counsel in a state-initiated interrogation is deemed invalid." App.Op.¶55. Because it had already determined that the Ohio Constitution required the suppression of Morris's statements

in their entirety, the appellate court did not address whether Morris had properly invoked his right to counsel part way through his interrogation. App.Op.¶56.

Judge Winkler dissented. He noted that a court's "analysis of similar provisions in the Ohio Constitution and the United States Constitution 'should not be driven simply by disagreement with the results reached by the federal courts' interpretation.'" App.Op.¶66 (Winkler, J., dissenting) (quoting *State v. Gardner*, 2008-Ohio-2787, ¶76). Because he believed that the trial court's analysis reflected little more than disagreement with controlling U.S. Supreme Court precedent, he would have reversed. *See* App.Op.¶¶66, 73–74. The dissent noted that the "actual text" of the Ohio Constitution is narrower than that of the Sixth Amendment. App.Op.¶69. But rather than grapple with that text, the dissent argued, the majority had instead improperly relied on the Ohio Rules of Professional Conduct and on Morris's *statutory* right to counsel—neither of which would have provided a basis to suppress Morris's statements. App.Op.¶¶70–71.

ARGUMENT

Proposition of Law 1:

A defendant who validly waives his right to counsel for purposes of the Fifth Amendment to the U.S. Constitution also waives his right to counsel for purposes of Article I, Section 10 of the Ohio Constitution.

Criminal defendants have a right to counsel under both the Ohio Constitution and the U.S. Constitution. Although the Court has long taken the position that the right to counsel guaranteed by each document is similar, *see Dille*, 34 Ohio St. at 619; *Ford*, 121

Ohio St. at 295, the Ohio Constitution is a document of independent force that can provide different protections than the U.S. Constitution does, *State v. Arnold*, 67 Ohio St. 3d 35, syl.1 (1993). The courts below concluded that the Ohio Constitution provides a greater right to counsel than does the U.S. Constitution. They were wrong. If anything, the right to counsel that the Ohio Constitution guarantees to criminal defendants is narrower than the right to counsel guaranteed by the U.S. Constitution.

True, the Court has at times stated that the State "may not provide a criminal defendant with fewer rights than the United States Constitution grants." *State v. McAlpin*, 2022-Ohio-1567, ¶60; *see also Arnold*, 65 Ohio St. 3d at syl.1; *State v. Carter*, 2024-Ohio-1247, ¶59 (Fischer, J., concurring). But all that means is that courts cannot *deprive* defendants of rights that are guaranteed to them by the U.S. Constitution. It does not mean that those rights must flow to them from both the U.S Constitution *and* the Ohio Constitution. *See* Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. Kan. L. Rev. 687, 712 (2011) (It is "wrong" to say that "state courts cannot construe their constitutions to offer less protection than the federal guarantee."). It also does not mean that defendants can never forfeit their federal rights. Just like defendants can forfeit state constitutional rights by not raising them, *see State v. Quarterman*, 2014-Ohio-4034, ¶¶18–20, they can similarly forfeit federal rights by failing to independently assert them, *see United States v. Olano*, 507 U.S. 725, 731 (1993) (federal constitutional rights may be forfeited if not raised).

I. Under the U.S. Constitution, a defendant who waives the right to counsel guaranteed to him by the Fifth Amendment also waives his Sixth Amendment right to counsel.

The U.S. Constitution mentions a right to counsel only once—in the Sixth Amendment. *See* U.S. Const. amend. VI. But the U.S. Supreme Court has recognized a second, separate, right to counsel that flows from the Fifth Amendment. *See Miranda*, 384 U.S. 436. Despite the fact that the Fifth Amendment makes no mention of a right to counsel, the U.S. Supreme Court has held that, to protect a criminal defendant's Fifth Amendment right against self-incrimination, a defendant is entitled, as a prophylactic matter, to have counsel present during custodial police interrogations. *See id.*; *see also Vega v. Tekoh*, 597 U.S. 134, 143 (2022). A defendant's *Sixth* Amendment right to counsel, by comparison, is an offense-specific right that is, in many ways, narrower than his Fifth Amendment right. *See McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991). Unlike the prophylactic right to counsel guaranteed by *Miranda* and the Fifth Amendment, a defendant's Sixth Amendment right to counsel attaches only "at or after the time that adversary judicial proceedings have been initiated against him." *United States v. Gouveia*, 467 U.S. 180, 187 (1984) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality op.)). After the Sixth Amendment right attaches, a defendant is entitled to counsel at all "critical" stages of a criminal proceeding. *Powell*, 287 U.S. at 57; *see also McNeil*, 501 U.S. at 177.

The U.S. Supreme Court has at times struggled to harmonize defendants' Fifth and Sixth Amendment rights to counsel. *See McNeil*, 501 U.S. at 175–82. It held in *Michigan v. Jackson*, for example, that police officers could not interrogate a criminal defendant who, at his arraignment, invoked his Sixth Amendment right to counsel by requesting that counsel be provided to him. *See* 475 U.S. 625, 626 (1985). Once a defendant had invoked his Sixth Amendment right to counsel, the *Jackson* court held, any subsequent waiver of that right during an interrogation was invalid. *Id. Jackson* did not address what to do with a defendant who had not affirmatively requested counsel but had been assigned counsel automatically. *See* Montejo, 556 U.S. 778.

When the U.S. Supreme Court finally did confront that question, it overruled *Jackson* as unworkable. *Id.* at 792, 797. *Jackson*, the Court held, had improperly imported into the Sixth Amendment context the reasoning and rationale on which the Court had relied in the Fifth Amendment context. *Id.* at 787–91. While the Fifth Amendment required a prophylactic rule to "prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *id.* at 787 (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)), the Sixth Amendment, the Court held, did not demand *additional* prophylaxis on top of that which the Fifth Amendment already required, *see id.* at 794–95. But that is just what *Jackson* required. "*Jackson*," the Court held, "was policy driven, and if that policy is being adequately served through other means, there is no reason to retain its rule." *Id.* at 795–96. *Miranda* and related cases already required "voluntariness with a

vengeance," so there was no need to require *Jackson*'s "voluntariness on stilts." *Id.* at 796. Now, under controlling U.S. Supreme Court precedent, a defendant may waive his Sixth Amendment right to counsel at the same time, and in the same manner, that he waives his Fifth Amendment right. *See id.*; *see also Taylor*, 2024-Ohio-1752 at ¶24.

II. The Ohio Constitution does not provide greater protections than does the Sixth Amendment and a defendant who waives his Fifth Amendment right to counsel waives his rights under the Ohio Constitution as well.

The First District rejected the U.S. Supreme Court's decision in *Montejo* and held that *Jackson* still controls for purposes of Ohio law. Once a defendant's right to counsel has attached, the First District held, the defendant cannot waive his right to counsel under the Ohio Constitution. *See* App.Op.¶55. It held, in other words, that the Ohio Constitution afforded Morris a greater right to counsel than did the Sixth Amendment. The First District erred, in two meaningful ways. *First*, the appellate court lacked the authority to disregard this Court's controlling precedent about how to interpret Article I, Section 10 of the Ohio Constitution. *Second*, even if the First District had the power to recognize new rights under the Ohio Constitution, it was wrong about the scope of a defendant's right to counsel under Article I, Section 10.

A. The First District lacked the authority to recognize new rights under the Ohio Constitution.

Had the court below followed this Court's decisions in *Ford* and *Milligan*—that is, had it applied *Montejo* as a matter of both federal *and* state constitutional law—then there would have been no reason to suppress Morris's statements to the police. Under *Montejo*,

when Morris executed a valid waiver of his *Miranda* right to counsel, he waived any rights he had under the Sixth Amendment as well. *See Montejo*, 556 U.S. at 795–96. And at least for purposes of proceedings below, *Ford* and *Milligan* should have dictated that Morris waived his rights under the Ohio Constitution, too. That is for a simple reason: This Court has treated the right to counsel guaranteed by Article I, Section 10 of the Ohio Constitution as coextensive with the right guaranteed by the Sixth Amendment to the U.S. Constitution. *See Milligan*, 40 Ohio St. 3d 341 at syl.¶1; *also State ex rel. Boyd v. Tone*, 2023-Ohio-3832, ¶12; *State v. Martin*, 2004-Ohio-5471, ¶22.

While Morris was required to argue below that the Ohio Constitution provides greater rights to counsel in order to preserve that argument for this Court's review, *see Quarterman*, 2014-Ohio-4034 at ¶¶18–20, only *this* Court has the authority to revisit its long-standing precedent, *see State v. Fips*, 2020-Ohio-1449. The lower courts therefore exceeded their authority when they took it upon themselves to recognize new rights under the Ohio Constitution. The most they were empowered to do was note that Morris had preserved his argument for purposes of this Court's review, before applying controlling precedent and rejecting that argument. *Cf. Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of [the U.S. Supreme Court] has direct application in a case … the Court of Appeals should follow the case which directly controls, leaving to [the U.S. Supreme Court] the prerogative of overruling its own decisions.").

B. The Ohio Constitution's right to counsel is narrower than the Sixth Amendment right.

Even if the lower courts had the power to address Morris's argument based on the Ohio Constitution, they erred when they held that the Ohio Constitution guarantees criminal defendants a greater right to counsel than does the Sixth Amendment. The right to counsel guaranteed by Article I, Section 10 of the Ohio Constitution is exclusively a trial right. That much is clear from the text of the Constitution itself. It provides in relevant part that "[i]n any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel." Ohio Const. art. I, §10. There are two key phrases in that guarantee: "in any trial, in any court" and "appear and defend." The first phrase, "in any trial, in any court" limits where and when a defendant is entitled to counsel: in court, at trial. The second phrase, "appear and defend" limits the type and scope of assistance to which a defendant is entitled. The words "appear" and "defend" are verbs, and together they describe the actions that defense counsel takes *in court*. The Ohio Constitution is therefore best understood as guaranteeing only that a defendant will have counsel with him at trial and that that counsel will be entitled to put on a defense.

In that respect, the right to counsel guaranteed by the Ohio Constitution is much narrower than the right that the U.S. Constitution provides. Under the Sixth Amendment, a defendant is entitled "[i]n all criminal prosecutions … to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Sixth Amendment right to counsel and Article I, Section 10 of the Ohio Constitution both "require[] the

existence of … a 'criminal prosecution,'" *Gouveia*, 467 U.S. at 188 (alteration accepted), but that is where the similarities end. A defendant's Sixth Amendment right differs from his right under the Ohio Constitution because the federal right extends beyond the trial itself. Under the Sixth Amendment a defendant is entitled to counsel who will "assist[]" in the "defence," not just counsel who will "appear and defend" in court and at trial. Focusing on this broader language, the U.S. Supreme Court has held that an "accused's right to the 'Assistance of Counsel' has meant just that, namely, the right of the accused to have counsel acting as his assistant," and that counsel's "'Assistance' would be less meaningful if it were limited to the formal trial itself." *United States v. Ash*, 413 U.S. 300, 309–10, 312 (1973). It has therefore held that the Sixth Amendment guarantees counsel at all "'critical' stages of the proceedings." *United States v. Wade*, 388 U.S. 218, 224–25 (1967).

The difference in language between the two constitutions is no accident. Ohio's original 1802 constitution used the same "in all criminal prosecutions" language that appears in the Sixth Amendment. Article VIII, Section 11 of the 1802 version of the Ohio Constitution, stated that "in all criminal prosecutions the accused hath a right to be heard by himself and his counsel." Ohio Const. art. VIII, §11 (1802); *see also Decker v. State*, 113 Ohio St. 512, 518 (1925). But when Ohio voters amended the Constitution in 1851, they modified that guarantee and adopted the language that currently appears in Article I, Section 10. True, they broadened the existing right somewhat; by stating that the right to counsel applies in "any trial in any court," Ohio voters emphasized that defendants have

the right to counsel in *all* criminal proceedings, including misdemeanor cases, and not just cases involving more serious charges that require a jury. *See Decker*, 113 Ohio St. at 520–23. But for the most part, and for the reasons discussed above, the amended version of the right to counsel is now narrower than the right that previously existed.

Some of the earliest decisions interpreting Article I, Section 10's right to counsel confirm that the right is exclusively a trial right. The Court in *Thomas v. Mills* was asked to decide whether a defendant's right to counsel was violated when a prison warden refused to permit a meeting between counsel and the defendant. It held that it was not. Interpreting Article I, Section 10, the Court held that:

> [i]n its strict definition, the word 'trial' in criminal procedure means the proceedings in open court after the pleadings are finished and the prosecution is otherwise ready, down to and including the rendition of the verdict; and the term 'trial' does not extend to such preliminary steps as the arraignment and giving of the pleas, nor does it comprehend a hearing in error.

Thomas v. Mills, 117 Ohio St. 114, 119 (1927). The "privilege meant to be given to an accused person" under Article I, Section 10 of the Ohio Constitution, the Court held, "was that of defending himself against the charges and testimony of witnesses *as made in the trial court*." *Id.* at 120 (emphasis added). (The Court in *Thomas* ultimately held that a different provision, Article I, Section 16 of the Ohio Constitution, required the warden to allow the meeting in question to take place. *Id.* at 126. Morris, however, has not made or preserved any arguments under that Section.)

The Court has also long held that a defendant can waive his rights under the Ohio Constitution. The rights guaranteed by the Ohio Constitution, the Court wrote, exist "for the benefit of the accused" and if "he regards [the right] in the particular case as a burden, a hardship … why in the name of reason should he not be permitted to waive it…?" *Hoffman v. State*, 98 Ohio St. 137, 146–47 (1918). It has specifically noted, at least in dicta, that a defendant can waive his right to counsel and has rejected the idea that if a defendant "does not wish the assistance of counsel and waives it, the trial is invalid[.]" *Id.* at 146 (quotation omitted). The Court has similarly held that a defendant may waive *other* rights guaranteed by Article I, Section 10. Interpreting the right to a jury trial guaranteed by that Section, for example, the Court held that the Ohio Constitution's Bill of Rights "merely declares … right[s] which may be waived," and that Article I, Section 10 "merely guarantee[s] a right or privilege." *State ex rel. Warner v. Baer*, 103 Ohio St. 585, 607, 609 (1921). Had the drafters of the Ohio Constitution wanted to issue an unwaivable command, rather than confer a waivable right, the Court wrote, they would have used mandatory language, like the language that appears in other sections of the Constitution. *Id.* at 609.

The plain language of Article I, Section 10, taken together with the Court's precedent interpreting that Section, shows why Morris was wrong when he argued that his waiver of his right to counsel was invalid under the Ohio Constitution. Most significantly, nothing in Article I, Section 10 prevents a defendant from waiving the right to counsel

that that Section guarantees. Thus, even assuming that Article I, Section 10 granted Morris a right to have counsel present during his interrogation (an assumption that is incorrect, as is explained more fully in Proposition of Law 2), nothing in the Ohio Constitution rendered his waiver of his right to counsel invalid. And because Morris validly waived his right to counsel, there was no reason to interpret the Ohio Constitution in a way that was inconsistent with the U.S. Supreme Court's key holding in *Montejo*. The U.S. Supreme Court, recall, held in that case that a defendant's waiver of his Fifth Amendment right to counsel also waives his Sixth Amendment right to counsel. *Montejo*, 556 U.S. at 795–96. Neither Morris nor the First District identified anything in Article I, Section 10's language or history that would make such a waiver any less effective when it comes to a defendant's rights under the Ohio Constitution.

III. The reasons that the First District gave for recognizing greater rights under the Ohio Constitution do not support its decision.

The First District adopted the U.S. Supreme Court's *Jackson* decision as controlling for purposes of Ohio Constitutional law. But while it held that the Ohio Constitution provides a greater right to counsel, it ignored "differences in the relevant texts" between Article I, Section 10 and the Sixth Amendment, and did not analyze "their original public meanings." *State v. Downing*, 2024-Ohio-381, ¶64 (12th Dist.) (Byrne, J., concurring). Most significantly, it never explained why *Jackson*, which interpreted the text of the Sixth Amendment, should control for purposes of the differently worded Ohio Constitution. That alone is reason enough to reject the First District's decision.

The First District's decision suffers from at least three additional flaws. *First*, the First District misunderstood U.S. Supreme Court precedent, specifically *Montejo*, *Jackson*, and the cases on which those decisions relied. *Second*, the state authorities on which the First District relied do not support its decision to create new rights as a matter of Ohio law. *Third*, the out-of-state cases that the First District cited are irrelevant and say nothing about the meaning of the *Ohio* constitution.

A. The First District misunderstood and misapplied *Jackson* and *Montejo*.

The U.S. Supreme Court in *Montejo* overruled its earlier decision in *Jackson* because it concluded that *Jackson* was unworkable as a matter of federal constitutional law. Among other things, it noted that *Jackson* involved a defendant who had affirmatively requested at his arraignment that counsel be appointed for him. *See Montejo*, 556 U.S. at 783. Some States, however, appoint counsel for defendants automatically—even if the defendants never request it. *See id.* These differences, the U.S. Supreme Court wrote, made *Jackson*'s rule unworkable. The Sixth Amendment's right to counsel should not turn on the process by which a State assigns counsel to a defendant. *Id.* at 785. Nor should it turn on a "particular defendant's reaction to the appointment of counsel." *Id.* But because the defendant's affirmative request for counsel was essential to *Jackson*'s holding, that decision could not simply be extended to cases involving counsel that was proactively appointed by the court. *Id.* at 786, 792. The only solution, the Court held, was to abandon *Jackson*. *See id.* at 792, 797.

This very case demonstrates why *Jackson*'s rule was so problematic. "[E]ven on *Jackson*'s own terms, it would be completely unjustified to presume that a defendant's consent to police-initiated interrogation was involuntary or coerced simply because he had previously been appointed a lawyer." *Montejo*, 556 U.S. at 792. But it is unclear from the facts of this case whether Morris ever invoked his right to counsel under the Ohio Constitution. The First District did not indicate that Morris requested counsel at his first court appearance. *See, generally*, App.Op. And Morris has never claimed in any of the briefs he filed below that he did. *See generally*, R.36, Motion to Suppress; App.Ct.R.11, Ape.Br. So, before they could apply *Jackson* under the Ohio Constitution, the lower courts would have needed to engage in the type of "*ex post* … fact-intensive and burdensome" inquiry that the U.S. Supreme Court rejected in *Montejo*. *See Montejo*, 556 U.S. at 784–85. They did not.

The First District's failure to address whether Morris had personally invoked his right to counsel means that it did not apply *Jackson* so much as extend it. In doing so, the First District ran headlong into another one of the problems with *Jackson* that the U.S. Supreme Court identified in *Montejo*: it "entirely untethered" its interpretation of the right to counsel "from the original rationale of *Jackson*." *Montejo*, 556 U.S. at 786. *Jackson* was meant to "prevent police from badgering defendants into changing their mind about their rights, but a defendant who never asked for counsel has not yet made up his mind in the first instance." *Id.* at 789. *Jackson* "most assuredly [did] not hold that the … *per se* rule

prohibiting all police-initiated interrogations applies from the moment the defendant's Sixth Amendment right to counsel attaches, with or without a request for counsel by the defendant." *Jackson*, 475 U.S. at 640 (Rehnquist, J., dissenting). That, however, is how the First District interpreted and applied the *Jackson* decision.

Finally, the passage of time has made *Jackson* more problematic, not less. *Jackson* relied heavily on the U.S. Supreme Court's earlier decision in *Edwards v. Arizona*, 451 U.S. 477 (1981). And under *Edwards*, the police could not approach a defendant who invoked his prophylactic Fifth Amendment right to counsel "until counsel [had] been made available to him." 451 U.S. at 484–85; *see also Minnick v. Mississippi*, 498 U.S. 146, 153 (1990). *Jackson*'s incorporation of *Edwards* was questionable even at the time. *Edwards* explicitly did not address the scope of a defendant's Sixth Amendment right. *Edwards*, 451 U.S. at 480 n.7. And "[t]o invoke the Sixth Amendment interest is, as a matter of *fact, not* to invoke the *Miranda-Edwards* interest." *McNeil*, 501 U.S. at 178 (emphasis in original).

The U.S. Supreme Court has since abandoned *Edwards*'s bright-line rule, making *Jackson*'s reliance on that decision even more untenable. *See Maryland v. Shatzer*, 559 U.S. 98 (2010). *Edwards*, the Court has held, "is not a constitutional mandate, but judicially prescribed prophylaxis." *Id.* at 105. *Jackson*, in other words, added an additional prophylactic gloss on top of what was *itself* a prophylactic rule. That rule was designed to protect the *Fifth* Amendment right to counsel, not the Sixth, *Edwards*, 451 U.S. at 480 n.7, and the *Edwards* gloss on which much of *Jackson* relied now has been largely

abandoned, *Shatzer*, 559 U.S. at 109. The First District addressed none of this when it incorporated *Jackson* into Ohio law.

B. The state-law authorities that the First District cited do not support its decision.

The First District cited three types of state-law authorities in support of its conclusion that *Jackson* controls the scope of the right to counsel guaranteed by Article I, Section 10 of the Ohio Constitution. It cited case law, the Revised Code, and the Rules of Professional Conduct. None of them support its decision.

Case law. The First District was wrong when it stated that "the right to counsel under Article I, Section 10 has been construed more broadly than its federal counterpart." *See* App.Op.¶36. The case that it cited, *State v. Bode*, 2015-Ohio-1519, did not discuss Article I, Section 10 at all, let alone construe it more broadly than the Sixth Amendment. *Bode* involved an individual who had not been represented by counsel when, as a juvenile, he was adjudicated as delinquent. *Id.* at ¶2. The question before the Court in that case was whether the defendant had a right to counsel as a juvenile. *See id.* at ¶12. A juvenile's right to counsel flows from the Due Process Clause, however, *not* the Sixth Amendment (or Article I, Section 10 of the Ohio Constitution). *See In re Gault*, 387 U.S. 1, 36–37 (1967); *In re C.S.*, 2007-Ohio-4919, ¶79; *see also Taylor*, 2024-Ohio-1752 at ¶27. *Bode*, whatever its merits, therefore involved the scope of the Ohio Constitution's due-process protections, not Article I, Section 10's right to counsel. *See* 2015-Ohio-1519 at ¶¶24, 28.

The remaining cases that the First District cited are of no more help. True, those cases were slightly closer to the target than *Bode*; they at least interpreted the right section of the Ohio Constitution. But only one of them, *State v. Hester*, 45 Ohio St. 2d 71 (1976), even mentioned the right to counsel. The Court did not independently interpret Article I, Section 10 in *Hester*, however. The defendant in that case alleged that "he was denied rights guaranteed under the Sixth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment," *id.* at 74, and the only time that the Court discussed Article I, Section 10 was in conjunction with the Sixth Amendment, *id.* at 79. *Hester* also involved an entirely different question than the one at issue here. It focused on how to determine whether counsel was effective, not on the scope of a defendant's right to counsel. *See id.* *Hester* has also since been largely superseded by the now-familiar test for effective counsel that the U.S. Supreme Court announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *See State v. Smith*, 17 Ohio St. 3d 98, 100 (1985) ("The test enunciated in *Strickland* is essentially the same as the one [the Court] adopted in [*Hester*].")

The remaining cases the First District cited did not discuss the right to counsel at all, making them even less relevant than *Hester* or *Bode*. *State v. Petro*, for example, focused on the right of a defendant "to demand the nature and cause of the accusation against him, and to have a copy thereof." Ohio Const. art. I §10; *State v. Petro*, 148 Ohio St. 473, 485–86 (1947) (applying Ohio Const. art. I §10). The remaining cases, by comparison,

focused primarily on the right to a public trial. *See State v. Hensley*, 75 Ohio St. 255, 262–64 (1906); *State v. Lane*, 60 Ohio St. 2d 112 (1979); *Kirk v. State*, 14 Ohio 511 (1846). The First District cited these cases for the general principle that "when read as a whole, Article I, Section 10 of the Ohio Constitution safeguards the integrity and fairness of a criminal trial." App.Op.¶37. But while it is true that many of the rights guaranteed by Article I, Section 10 protect a defendant's right to a fair trial, constitutional rights are not measured by "personal and private notions of fairness." *Cf. Dowling v. United States*, 493 U.S. 342, 353 (1990) (quotation omitted). So even though Morris might believe that his interrogation was unfair, none of the cases that he cites support his argument that the Ohio Constitution gives him a greater *constitutional* right to counsel.

Statutes. The First District also cited the Revised Code's statutory guarantees of counsel as support for its conclusion that the Ohio Constitution required suppression of Morris's statements to the police. *See* App.Op.¶39 (citing R.C. 2935.20 and R.C. 2935.14). The Court has already held, however, that suppression of a defendant's statement is not appropriate when the police violate a defendant's statutory right to counsel. *State v. Griffith*, 74 Ohio St. 3d 554, 555 (1996) (*per curiam*); *City of Fairborn v. Mattachione*, 72 Ohio St. 3d 345, 346 (1995) (*per curiam*); *see also* App.Op.¶70 (Winkler, J., dissenting). By holding, even if indirectly, that those statutes required the suppression of Morris's statements, the First District worked an end run around this Court's precedent and improperly constitutionalized a defendant's statutory rights. *Cf. State v. Geraldo*, 68 Ohio

St. 2d 120, 124 (1981) (rejecting a defendant's effort to constitutionalize state statutory law).

Rules of Professional Conduct. The final body of state authority on which the First District relied was the Ohio Rules of Professional Conduct. But while "[e]very profession is competent to define the standards of conduct for its members, … such standards are obviously not controlling in interpretation of constitutional provisions." *Texas v. Cobb*, 532 U.S. 162, 171 n.2 (2001). The First District's decision in that respect suffers from the same flaws as the defendant's argument in *Montejo*. There too, the defendant argued that his right to counsel should be defined by the American Bar Association's model ethics rules that governed lawyers' conduct. *See Montejo*, 556 U.S. at 790–91. The U.S. Supreme Court rejected that argument because "the constitution does not codify the ABA's model rules, and does not make investigating police officers lawyers." *Id.* at 790. The same is true here. Article I, Section 10 of the Ohio Constitution did not constitutionalize the Ohio Rules of Professional Conduct; the rules postdate Article I, Section 10 by over a century. *See* Prof. Cond., Form of citation, Effective date, Application (showing effective date of Feb. 1, 2007). And, even on their own terms, they would not apply here. The rules apply only to lawyers, not the police officers who interrogated Morris. *See* Prof. Cond., Preamble: A Lawyer's Responsibilities.

C. The out-of-state cases the First District cited do not shed any light on the meaning of the Ohio Constitution.

The First District cited three out-of-state cases that, it claimed, supported its interpretation of Article I, Section 10. None do. One of them was a statutory decision, not a constitutional one. The other two interpreted state constitutions that had different text and a different history than the Ohio Constitution.

Begin with *State v. Lawson*, 296 Kan. 1084 (2013). Of the out-of-state cases that the First District cited, that decision provides the least support for the appellate court's decision. That is because the Kansas Supreme Court in that case *rejected* the defendant's argument that the Kansas Constitution affords criminal defendants a greater right to counsel than does the Sixth Amendment. It instead suppressed the defendant's statement on the basis of state statutory law. *See id.* at 1093–99. As discussed above, however, this Court has already held that Ohio's statutory right to counsel *does not* require the suppression of improperly obtained statements. *See Griffith*, 74 Ohio St. 3d at 555; *City of Fairborn*, 72 Ohio St. 3d at 346.

Unlike *Lawson*, the other two out-of-state cases that the First District cited at least interpreted their relevant state constitutions. Neither case supports the First District's interpretation of the *Ohio* Constitution, however. To begin with, neither case was the first to address the scope of a defendant's right to counsel. That fact was dispositive for the purposes of the West Virginia Supreme Court's decision in *State v. Bevel*, 231 W. Va. 346 (2013). The West Virgina Supreme Court noted that it had already held that the police

could interrogate a defendant after the defendant had asserted his Sixth Amendment right to counsel only if the defendant initiated the conversation. *Id.* at 353. Abandoning that precedent, the court wrote, would "produce instability in West Virginia's right-to-counsel jurisprudence." *Id.* at 355.

Although *stare decisis* played less of a role in the Kentucky Supreme Court's decision in *Keysor v. Commonwealth*, that court had also already held that *Jackson* defined the scope of a defendant's right to counsel. *See* 486 S.W. 3d 273, 278, 280 (Ky. 2016) (citing *Linehan v. Commonwealth*, 878 S.W. 2d 8 (Ky. 1994)). But even if the Kentucky Supreme Court had been writing on a blank slate, its decision in *Keysor* would offer minimal insight into the meaning of the Ohio Constitution. This Court is not "confined by other states' high courts' interpretations of similar provisions in their states' constitutions" any more than it is "confined by the federal courts' interpretations of similar provisions in the federal Constitution." *State v. Mole*, 2016-Ohio-5124, ¶21. *Keysor* is therefore relevant only to the extent that its reasoning is persuasive. But the First District did not identify any significant similarities between the Kentucky Constitution and Article I, Section 10 of the Ohio Constitution that would support its reliance on *Keysor*.

Lawson and *Bevel* are distinguishable for at least one more reason. In both cases the defendant—like the defendant in *Jackson*—had explicitly invoked his Sixth Amendment right to counsel (or the state equivalent). The defendant in *Lawson* "definitely asserted his right to counsel at a court proceeding when he submitted an application for court-

appointed counsel at the first appearance." *Lawson*, 296 Kan. at 1089. The defendant in *Bevel* did the same; he too affirmatively requested counsel to assist in his defense. *Bevel*, 231 W.Va. at 349. Morris, by comparison, has never argued that he asserted his right to counsel under Article I, Section 10. He also has not pointed to any evidence that he requested counsel, rather than simply having counsel automatically assigned to him. *Cf. United States v. Rodriguez-Suazo*, 346 F.3d 637, 643 (6th Cir. 2003) (defendant filing a motion to suppress bears the burden of establishing a constitutional violation); *Davis*, 512 U.S. at 460 (a defendant bears the burden of clearly invoking his right to counsel). Not only does that make *Jackson* inapplicable here, *see* 18–21, it undermines any persuasive value of *Lawson* and *Bevel* as well.

Finally, to the extent that out-of-state decisions *are* relevant when interpreting Article I, Section 10, Morris has offered no reason why this Court should look to the decisions he cites. At least one state Supreme Court, the Wisconsin Supreme Court, has rejected an argument very similar to the one that Morris makes here. *See State v. Delebreau*, 362 Wis. 2d 542 (2015). Because Morris has identified no textual or historical basis to prefer the approach favored by the out-of-state decisions he prefers, the only relevance of those decisions comes as a statement of policy—and the Wisconsin decision is equally persuasive on that point, if not more so.

Proposition of Law 2:

A defendant's right to counsel under Article I, Section 10 of the Ohio Constitution attaches at trial and not before.

Under the Sixth Amendment, "[t]he right to counsel … applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty." *Rothgery v. Gillespie County*, 554 U.S. 191, 194 (2008). The precise nature of that first appearance does not matter. The U.S. Supreme Court has "pegged commencement to 'the initiation of adversary judicial criminal proceedings--whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Id.* at 198 (quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984) (internal quotation omitted)).

None of that is relevant here. Morris claims that his interrogation violated his right to counsel under the Ohio Constitution, not the Sixth Amendment. Whether his right to counsel attached under the Sixth Amendment therefore does not matter. The only question is whether his right to counsel attached for purposes of the Ohio Constitution. It did not. As discussed above, *see* 14–16, the right to counsel guaranteed by Article I, Section 10 of the Ohio Constitution is a trial right. It attaches to "the proceedings in open court after the pleadings are finished and the prosecution is otherwise ready." *Thomas*, 117 Ohio St. at 119.

Morris cannot avoid the narrow scope of the Ohio Constitution's right to counsel by mixing and matching his constitutional claims. His constitutional claim must rise or fall

on text of the Ohio Constitution alone. He cannot on one hand, take advantage of the Sixth Amendment's favorable attachment standard while, on the other hand, maneuvering around *Montejo*'s waiver standard. His constitutional claim therefore fails either way. If his claim is based on the Sixth Amendment, then his claim fails because, even if his right to counsel attached, *Montejo* says that he waived that right at the beginning of his interrogation. If his claim is based on Article I, Section 10, then his claim fails because his right to counsel had not attached at the time of the interrogation. An interrogation is not a trial, after all.

Proposition of Law 3:

A defendant must clearly and unambiguously invoke his Fifth Amendment right to counsel.

In addition to holding that Morris had not waived his right to counsel under the Ohio Constitution, the trial court also held that Morris had invoked his Fifth Amendment right to counsel part way through his interrogation. *See* R.60, Mar. 10, 2023 Entry and Decision at 13–14. Although the State appealed both issues, the First District did not decide whether Morris had properly requested the assistance of counsel under the Fifth Amendment. Despite the lack of a decision below, this Court should nevertheless reverse the trial court's decision and hold that Morris did not invoke his Fifth Amendment right to counsel. The applicable law is sufficiently clear that remanding this case to the First District will do little more than further delay Morris's trial.

It is well-settled by now that under "the Fifth Amendment, an accused must clearly invoke his constitutional right to counsel in order to raise a claim of deprivation of counsel." *See State v. Jackson*, 2006-Ohio-1, ¶93. An accused "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." *Davis*, 512 U.S. at 459. An "ambiguous or equivocal reference to an attorney" will not suffice. *Id.* at 459–60. Officers who are confronted with an ambiguous statement are not required to ask clarifying questions to determine whether a defendant actually wants an attorney. *Id.* at 461–62.

Even references to a lawyer, or questions about obtaining one, do not suffice. The Court has held, for example, that the statement "I think I need a lawyer" was not an unequivocal request for counsel. *Henness*, 79 Ohio St. 3d at 62–63. It reached a similar conclusion when a defendant asked "don't I supposed to have a lawyer present?" *State v. Brown*, 2003-Ohio-5059, ¶19. Those decisions are consistent with precedent from around the country. Courts have held that questions such as "do you think I need an attorney here?" and "could I call my lawyer?" were not unequivocal assertions of the Fifth Amendment right to counsel. *See Jackson*, 2006-Ohio-1 at ¶94 (citing *Mueller v. Angelone*, 181 F.3d 557, 573–74 (4th Cir. 1999) and *Dormire v. Wilkinson*, 249 F.3d 801 (8th Cir. 2001)).

The trial court's determination that Morris had invoked his right to counsel contradicted the vast weight of this precedent. Morris did not make the type of unequivocal request for counsel that the Fifth Amendment demands. His only reference to an attorney was similar to the statements that this Court and others have held did not qualify as clear and unambiguous requests for counsel. Approximately forty-five minutes after officers informed Morris of his rights, he asked "so I can't talk to a lawyer?" Suppression Hearing Tr. at 50. Morris made no further reference to counsel, even when the officers responded to his question by informing him that anyone can talk to a lawyer. He instead continued speaking with the officers. *Id.* Under the circumstances, Morris did not unequivocally request the assistance of counsel and the trial court erred when it held otherwise.

CONCLUSION

For the foregoing reasons, the Court should reverse the First District's decision.

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I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellant State of Ohio was served this 16th day of May, 2024, by e-mail on the following:

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