IN THE SUPREME COURT OF OHIO
2024

STATE OF OHIO, Plaintiff-Appellant, -vs- ISAIAH MORRIS, Defendant-Appellee.	Case No. 23-1614 On Appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals No. C-230108

MERIT BRIEF
OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION
IN SUPPORT OF APPELLANT STATE OF OHIO

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STATEMENT OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports the state's 88 elected county prosecutors. Its mission is to assist county prosecuting attorneys to pursue truth and justice as well as promote public safety. OPAA advocates for public policies that strengthen prosecuting attorneys' ability to secure justice for crime victims and sponsors continuing legal education programs that encourage best practices in law enforcement and community safety.

In light of these considerations, OPAA has significant concerns about the First District's decision here. It is basic American Civics 101 that the Ohio Constitution would work independently of, and in addition to, and alongside, the federal constitution. Federalism works that way. But, given the independence of the Ohio Constitution, the process of comparing a state constitutional provision to a federal constitutional provision is not a one-way ratchet only going in the direction of providing the criminal defendant with greater protection than its federal counterpart. The state constitution can, obviously, provide less protection. That is the nature of independence, and it is a result of the fact that state courts have the final say on the meaning of the state constitution. When criminal defendants invoke state constitutional protections, the state constitutional provision might be found by the state courts to provide more protection, or to provide less protection, or to provide the same amount of protection as the federal counterpart.

An important part of state constitutionalism would be to pay close attention to the actual text of Article I, Section 10, of the Ohio Constitution, which provides that, "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel * * *." Courts should engage in a process of parsing the actual text of that

provision, rather than engaging in an act of raw policymaking. The lower courts here went far afield, especially when they cited non-constitutional sources like statutes and rules as somehow weighing in favor of their "defendant wins" interpretation. The only judge below who sought to grapple with the actual text of Section 10 was the dissenter in the First District, who emphasized that the Section 10 provision by all indications is narrower than the federal Sixth Amendment.

The focus of Section 10 is on having a right to counsel "[i]n any trial, in any court," language which, on its face, would make the right inapplicable to a pretrial interrogation occurring outside of court. On its face, Section 10 is narrower, not broader than the Sixth Amendment.

It is also worth noting that the defendant's dissatisfaction with the federal constitutional analysis under the Sixth Amendment is very limited. To be sure, the defendant disagrees with the conclusion in *Montejo v. Louisiana*, 556 U.S. 778 (2009), that there is no absolute bar to the police approaching a defendant for an interrogation who has had his initial appearance and who has requested or been appointed counsel. But *Montejo* still leaves the basic infrastructure of the federal Sixth Amendment analysis in place, and the defendant welcomes the vast majority of that federal approach. The defense criticism of *Montejo* represents a selective dissatisfaction with the Sixth Amendment analysis, since, otherwise, the defense is hoping that this Court accepts every other premise of that analysis in "interpreting" the Section 10 right to counsel.

But if the state constitutional provision is truly independent, then this Court would bring an independent eye to *every* part of the federal analysis in determining whether the predicates of that analysis would fit the actual text of the Section 10

provision. Every predicate, and every premise, must be questioned, not just the one part that the defense selectively criticizes.

First, would this Court accept the premise that the Section 10 right to counsel attached upon the filing of a criminal complaint and the occurrence of the initial appearance? Given that Section 10 is plainly described as a "trial" right, there is doubt that the Section 10 right to counsel would have attached on the basis of a criminal complaint which, by itself, does not even allow a felony trial.

Second, would this Court accept the further premise that the Section 10 right to counsel would employ a "critical stage" approach that would encompass a pretrial police interrogation occurring outside of court? Again, the Section 10 right to counsel is focused on court and trial, and such in-trial and in-court language strongly points away from a pretrial "critical stages" analysis encompassing a pretrial interrogation.

Third, would this Court accept the further premise that the Section 10 right to counsel requires the use of the regime of *Miranda* warnings and waiver in a "critical stage" pretrial interrogation? While the defense might think that *Montejo* is subject to various criticisms, most such criticisms would likely flow from the view that the *Miranda* warnings-and-waiver regime must be enforced more strictly than *Montejo* requires. But, even while *Montejo* is criticized, it is also true that *Miranda* and its progeny have been subject to even more criticism over the years from the opposite direction as being a judicial invention out of whole cloth. Even now, the United States Supreme Court continues to characterize that the *Miranda* regime as being merely "prophylactic." *Vega v. Tekoh*, 142 S.Ct. 2106 (2022). It "was a bold and controversial claim of authority" for *Miranda* and its progeny to create such prophylactic rules. Id. at

106. Given the questionable pedigree underlying *Miranda* and its progeny, a state supreme court need not import the *Miranda* regime wholesale into the legal analysis of a state constitutional provision.

Fourth, would this Court accept the further premise that the Section 10 right to counsel would treat the appointment of counsel at an initial appearance as amounting to an invocation of the right to counsel for purposes of barring a subsequent pretrial interrogation by police? *Montejo* rejected that conclusion for Sixth Amendment purposes, and rightly so, but, in construing Ohio's independent Section 10 provision, one must wonder whether the state constitutional analysis would even get this far given the in-trial and in-court limitations on the Section 10 right, which, on its face, would be inapplicable to pretrial interrogations.

Fifth, would this Court accept the further premise that the Section 10 right to counsel would require the adoption of an exclusionary rule as an enforcement mechanism? The claimed controversy over *Montejo* pales in comparison to the controversy that attends a court's creation of an exclusionary rule, given the usual absence of any constitutional language supporting such a remedy.

Finally, even if this Court would create and enforce an exclusionary rule, would this Court also recognize a "good faith exception" to that exclusionary rule? The lower courts conceded that this was a matter of first impression under Section 10, and so, necessarily, the officer complying with *Montejo* had no reason to think that the Section 10 right went further than *Montejo*. Indeed, given the express in-trial and in-court predicates for the Section 10 right, a reasonable officer devoting attention to the question would think that the Section 10 right would *not* be broader than the Sixth Amendment

right and would not even apply to a pretrial interrogation. By complying with *Montejo* and by thereby *Mirandizing* the defendant and reminding him of his right to counsel, the officer by all indications was going beyond anything that Section 10 would have demanded. An after-the-fact decision giving a "first impression" interpretation does not justify suppression, especially when it is considered that, even with notice of such an interpretation, the police could have adjusted the timing of their approach for the interrogation to a time before the defendant's initial appearance anyway.

In the interest of aiding this Court's review herein, amicus curiae OPAA offers the present amicus brief in support of the State of Ohio.

STATEMENT OF FACTS

Amicus OPAA adopts by reference the procedural and factual history as set forth in the State's merit brief.

ARGUMENT

> **Amicus Proposition of Law**: In determining the reach of a state constitutional guarantee, state courts are not limited to determining whether the state guarantee provides the same as or broader protection than its federal counterpart as interpreted by the United States Supreme Court. The question is what the state's constitutional provision means and how it applies to the case at hand. The state's guarantee may prove to be more protective or less protective than federal law. If less protective, the court must go on to decide any claim that the defendant would be raising under the federal counterpart.

The defendant's suppression claim as to his May 16, 2022, interrogation has three parts. Based on the appointment of counsel at the initial appearance, the defendant contends that the police were absolutely barred from even approaching him for the 5-16-22 interrogation. The United States Supreme Court in *Montejo* rejected this claim of an absolute bar under the Sixth Amendment analysis, but the defendant presses the point

that Ohio courts should recognize an absolute bar under the Section 10 right to counsel.

For Sixth Amendment purposes, there are two related claims. While *Montejo* rejected an absolute bar, it does recognize that the defendant's uncounseled statements in the 5-16-22 interrogation can avoid suppression only if an effective *Miranda* waiver is proven, and the defense disputes the occurrence of a valid initial waiver. And then, 45 minutes or so into the interrogation, the defense claims that the defendant invoked his right to counsel, thereby cutting off the ability of police to continue the interrogation for another 75 minutes.

Given the connections between these various claims, it is helpful to discuss first why the defendant's arguments fail under the federal Sixth Amendment analysis. Then the scope of the independent Section 10 provision can be compared and analyzed.

A. No Attachment of Sixth Amendment Right to Counsel

The defense's Sixth Amendment arguments face a significant threshold issue. The initial question is whether the Sixth Amendment right to counsel had attached before the 5-16-22 interrogation. The State is contending that only an indictment or information would rise to the level of qualifying as a formal charge that triggers the right to counsel. Under the State's argument, the filing of a criminal complaint and the occurrence of an initial appearance is too preliminary to trigger the right to counsel. OPAA defers to the State's briefing on that question.

OPAA also notes that there is another flaw in the defense claim that the right to counsel had attached. The State's appeal is only addressing counts three through five of the indictment because the State could not make the destroy-the-case certification in order to appeal as to the other counts under Crim.R. 12(K). Upon review, though, it

becomes apparent that the aggravated robbery, robbery, and weapon-under-disability charges in counts three through five involved an incident that was separate from the incidents involved in the complaints that were pending at the time of the 5-16-22 interrogation. The then-pending complaints related to carrying a concealed weapon and WUD as to events occurring on January 28, 2021, and further related to acts of felonious assault in shooting four different people on April 22, 2022. Counts three through five only pertained to events occurring on February 21, 2022. As to these 2-21-22 events, the defense did not show that any complaint was pending as of the 5-16-22 interrogation.

As this Court has noted, "initiation of adversary proceedings with respect to one charge causes the right to attach only as to that charge." *State v. Clark*, 38 Ohio St.3d 252, 260 (1988); *State v. Tench*, 156 Ohio St.3d 85, 2018-Ohio-5205, ¶ 115; *State v. Sapp*, 105 Ohio St.3d 104, 2004-Ohio-7008, ¶ 93. Because the Sixth Amendment right to counsel is "offense specific," attachment of the right to counsel as to one offense generally does not extend to other uncharged offenses, even if the other offenses are "closely related factually" to the charged offense. *Texas v. Cobb*, 532 U.S. 162, 165 (2001); *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991).

There is a narrow exception to this general rule. The right to counsel will be considered to have attached to an uncharged offense only if, in relation to a charged offense, the uncharged offense meets the "same offense" test as used in double jeopardy analysis under *Blockburger v. United States*, 284 U.S. 299 (1932). "[W]e hold that when the Sixth Amendment right to counsel attaches, it does encompass offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test." *Cobb*, 532 U.S. at 173. Under *Blockburger*, "[t]he test * * * for determining whether two

offenses are the same for double jeopardy purposes is whether each offense requires proof of an element that the other does not." *Blockburger*, 284 U.S. at 304. In addition, each of several crimes separated in time will constitute a distinct offense "however closely they may follow each other" and will be considered "distinct and separate" for these purposes. *Blockburger*, 284 U.S. at 301, 302; *Alston v. Commonwealth*, 264 Va. 433, 438, 570 S.E.2d 801 (2002) ("burglaries were separate and distinct offenses, committed at different times and locations and against different victims"). To be the "same offense," the actus reus being prosecuted must be the same, and the separation of time between the criminal acts will be enough to show that the crimes being prosecuted are not the "same offense."

In the present case, the interrogation occurred when there was no charge pending as to the 2-21-22 incident that underlay counts three through five. As to those counts, no Sixth Amendment right to counsel could have attached before the interrogation.

The defense might point to the later indictment in which the charges related to the 2-21-22 incident were joined with the charges related to the 1-28-21 and 4-22-22 incidents. But pointing to the later joinder of the charges is merely another form of "factually related" argument that stands rejected under *Cobb*.

In addition, counts three through five would not meet the narrow same-offense *Blockburger* test in relation to the complaints that were pending on 5-16-22. Counts three through five arose out of entirely different criminal acts on a different date and therefore could not qualify as the same offense as the offenses charged in the complaints. Moreover, the elements of the aggravated robbery and robbery offenses in counts three and four were substantially different than the charges in the criminal complaints.

The Sixth Amendment right to counsel had not attached to counts three through five at the time of the 5-16-22 interrogation, and, as a result, the defendant's statements in that interrogation could not be suppressed on that basis as to those counts.

B. Valid Waiver of Sixth Amendment Right to Counsel During Pretrial Interrogation

Under the federal analysis, when the right to counsel has attached, it applies not only during trial but also at "critical stages" that occur before trial, and a pretrial police interrogation is treated as a "critical stage." But the federal analysis also recognizes that the defendant can waive the right to counsel during such interrogations and that compliance with the *Miranda* warnings-and-waiver regime will satisfy the Sixth Amendment right to counsel too. *Patterson v. Illinois*, 487 U.S 285, 296 (1988).

In *State v. Taylor*, ___ Ohio St.3d ___, 2024-Ohio-1752, this Court recently concluded that the right to counsel had not attached at the time of the interrogation, but, even if it had, the defendant had waived the Sixth Amendment right to counsel through the *Miranda* warnings-and-waiver process.

> {¶ 23} Taylor was taken into custody and interrogated on December 12, 2016. His criminal prosecution commenced after that interrogation – at the earliest, with the filing of the juvenile complaint, which occurred several hours after the interrogation ended. Because a criminal prosecution had not been commenced before the December 12, 2016 interrogation that resulted in Taylor's statements to police, the Sixth Amendment right to have counsel present at all critical stages of the proceedings had not yet attached.
>
> {¶ 24} But even if the Sixth Amendment right to counsel had attached, Taylor waived it. "[T]he Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent. The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled." (Citations omitted.)

> *Montejo* at 786. "And when a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick" to waive the Sixth Amendment right to counsel. *Id.*
>
> {¶ 25} The court of appeals concluded that Taylor had validly waived his Fifth Amendment right to counsel, 2022-Ohio-2877, 194 N.E.3d 867, at ¶ 26, a holding that Taylor has not challenged in this court and that is now the law of the case. His waiver of his Fifth Amendment right to counsel also relinquished any Sixth Amendment right to counsel he may have had.

While the defense has complained about the adequacy of the initial waiver in this case, it is unclear what, exactly, the defense is complaining about vis-à-vis the initial waiver. The defense appears to be contending that the waiver was invalid because the "notification" form signed by the defendant did not have "waiver" language. Instead, the defendant's signing of the form indicated that he understood his rights. But this defense complaint wrongly assumes that a written waiver or express oral waiver is necessary.

The *Miranda* waiver need not be in writing. *North Carolina v. Butler*, 441 U.S. 369 (1979). Moreover, "[i]t is settled law that a *Miranda* waiver need not be expressly made in order to be valid. A court may infer a waiver from the suspect's behavior, viewed in light of all the surrounding circumstances." *State v. Murphy*, 91 Ohio St.3d 516, 518 (2001). "[A] suspect need not be asked directly whether he or she understands the *Miranda* warnings before an understanding waiver of *Miranda* rights may be inferred from the totality of the circumstances." *State v. Lather*, 110 Ohio St.3d 270, 2006-Ohio-4477, ¶ 5. "A court must review the totality of the circumstances in the case to determine whether a waiver of rights has occurred. These circumstances may include the suspect's level of education, previous contact with police, and any other factor deemed by the court

to be relevant, including the substance of the statement itself." Id. ¶ 13.

In *Berghuis v. Thompkins*, 560 U.S. 370 (2010), the Court discussed at length the standard for the waiver of *Miranda* rights and concluded that an "implied waiver" or "implicit waiver" will be enough. Id. at 384-85. A defendant's waiver will be sufficiently demonstrated by circumstances showing that the defendant spoke at considerable length after warnings. In such circumstances, it can be inferred that the suspect understood the warnings and chose to talk. "There is no basis in this case to conclude that he did not understand his rights; and on these facts it follows that he chose not to invoke or rely on those rights when he did speak." Id. at 385.

> In sum, a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police. Thompkins did not invoke his right to remain silent and stop the questioning. Understanding his rights in full, he waived his right to remain silent by making a voluntary statement to the police. The police, moreover, were not required to obtain a waiver of Thompkins' right to remain silent before interrogating him. * * *

Berghuis, 560 U.S. at 388-89.

This Court has followed the main point from *Berghuis*. An express or written waiver is not required, and the knowing, voluntary, and intelligent waiver of *Miranda* rights can be implied from all of the surrounding circumstances showing he understood his rights and then proceeded to speak with the police.

> {¶ 67} The 10:02 a.m. and 1:30 p.m. interviews of Myers were preceded by *Miranda* warnings. Myers nevertheless claims that the statements he made in those interviews should have been suppressed. He argues that he never validly waived his rights because (1) he was not given the *Miranda* warnings in written form (Wyatt read them

> from a card he carried), (2) Wyatt did not expressly ask him whether he wished to waive his rights, and (3) he never signed a written waiver.
>
> {¶ 68} None of these objections are well taken. A *Miranda* waiver need not be in writing to be valid. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). Nor must the accused specifically state that he waives his rights. *Id.* at 375-376; *Treesh v. Bagley*, 612 F.3d 424, 434 (6th Cir.2010). "Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." *Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010); *see also State v. Martin*, 151 Ohio St.3d 470, 2017-Ohio-7556, ¶ 100-101.

State v. Myers, 154 Ohio St.3d 405, 2018-Ohio-1903, ¶¶ 67-68 (parallel citations omitted); see, also, *State v. Tench*, 156 Ohio St.3d 85, 2018-Ohio-5205, ¶ 108; *State v. Ford*, 158 Ohio St.3d 139, 2019-Ohio-4539, ¶ 188; *State v. Martin*, 151 Ohio St.3d 470, 2017-Ohio-7556, ¶ 101; *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, ¶ 177.

The absence of a written waiver, and the absence of an express oral waiver, do not vitiate the validity of the defendant's waiver of counsel. With the knowledge and understanding of that right, the defendant chose to participate in the interrogation. "That [the defendant] indicated that he understood his rights and that he spoke with detectives after being informed of his rights shows that he waived them." *In re T.D.S.*, ___ Ohio St.3d ___, 2024-Ohio-595, ¶ 19. This was a sufficient waiver for Fifth Amendment purposes and, as this Court recently acknowledged in *Taylor*, it follows that the waiver was sufficient for Sixth Amendment purposes as well. *Taylor*, ¶ 25.

C. Equivocal References to Counsel Insufficient to Cut Off Interrogation

The defense also misses the mark in contending that the defendant invoked his right to counsel around 45 minutes into the 5-16-22 interrogation. As the State argues, a

statement will not qualify as an interrogation-ending invocation of counsel unless the statement is unambiguous in that respect. *State v. Jackson*, 107 Ohio St.3d 300, 2006-Ohio-1, ¶¶ 94-95, citing *Davis v. United States*, 512 U.S. 452 (1994). And the statements here were ambiguous.

As summarized by the trial court, the defendant said, "Like I can't talk to my lawyer?" When the officer responded that "anybody can talk to a lawyer," the defendant then said, "yeah cause that's – we goin' to do that because I don't know what you're talking about."

The first statement was phrased as a question, and it was accurately answered that anybody can talk to a lawyer. By its nature, a mere question usually would be equivocal and uncertain as to actually invoking counsel for the interrogation. *Jackson*, ¶ 94 (citing case discussing ambiguity of question, "Could I call my lawyer?"). A question of "don't I supposed to have a lawyer present" was deemed ambiguous in *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, ¶ 19. Adding the word "[l]ike" at the start of the question confirms the uncertainty. The defendant was not demanding or asserting his right to talk to a lawyer; he was merely seeking to confirm that he could do so.

The defendant's next statement was just as unclear. His statement that "we goin' to do that" reflected an intent or desire to talk to a lawyer at some future time, not necessarily now. *Jackson*, ¶ 95 ("when I talk to my lawyer" was ambiguous); *State v. Williamson*, 8th Dist. No. 95732, 2011-Ohio-4095, ¶ 33 ("Williamson's statement, 'I'm going to need a lawyer, ain't I?' and inquiry regarding when a lawyer could be available, did not constitute unambiguous requests for an attorney."). This kind of "going to" statement "could indicate [the defendant's] intention to obtain counsel in the future, and a

future-oriented reference to counsel is not a clear request for an attorney that requires law enforcement officers to immediately end an interview." *Kirby v. State*, 304 Ga. 472, 475, 819 S.E.2d 468 (2018).

D. Request for Counsel or Appointment of Counsel at Initial Appearance do not Create Absolute Bar to Later Interrogation under Sixth Amendment

As the foregoing discussion shows, the defendant had no Sixth Amendment right to counsel on counts three through five. Even if he did, he waived the right to counsel pursuant to the *Miranda* process in which he received and understood the *Miranda* warnings and thereafter voluntarily participated in the interrogation without counsel. The *Miranda* waiver was valid, and the defendant's later statements did not invoke the right to counsel so as to cut off the police from continuing with the interrogation.

The defendant's Sixth Amendment right to counsel claim ultimately would have depended on the courts applying an absolute rule barring the police from even approaching the defendant for the interrogation. Under *Michigan v. Jackson*, 475 U.S. 625 (1986), a defendant requesting the appointment of counsel at an initial appearance was considered to have invoked counsel as to any subsequent police interrogation, thereby cutting off the ability of police to approach the defendant to initiate an interrogation. That was the holding of *Jackson* in 1986, but the Court in *Montejo* overruled *Jackson* in 2009. After *Montejo*, the police can make the approach and can obtain a voluntary *Miranda* waiver that allows them to interrogate without counsel.

The *Montejo* Court cited several grounds for rejecting the absolute *Jackson* rule. While the Court acknowledged that the police pretrial interrogation was a "critical stage," it also recognized that the right to counsel is waivable. "Our precedents also place

beyond doubt that the Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent." *Montejo*, 556 U.S. at 786. "[W]hen a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick, even though the *Miranda* rights purportedly have their source in the Fifth Amendment * * *." *Montejo*, 556 U.S. at 786. Moreover, "[t]he defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled." *Montejo*, 556 U.S. at 786. "[N]either the advice nor the presence of counsel is needed in order to effectuate a knowing waiver of the Sixth Amendment right. Our cases make clear that the *Miranda* waivers typically suffice; indeed, even an *unrepresented* defendant can waive his right to counsel." *Montejo*, 556 U.S. at 788 n. 2 (emphasis sic). Precluding the defendant altogether from waiving his right to counsel would be "to 'imprison a man in his privileges and call it the Constitution,' a view having zero support in reason, history, or case law * * *." *Montejo*, 556 U.S. at 788 (citation omitted).

The defendant in *Montejo* could only prevail by justifying a mandatory presumption that the defendant would be unable to validly waive counsel. "We created such a presumption in *Jackson* by analogy to a similar prophylactic rule established to protect the Fifth Amendment-based *Miranda* right to have counsel present at any custodial interrogation." *Montejo*, 556 U.S. at 787. Under *Edwards* v. *Arizona*, 451 U.S. 477 (1981), "once 'an accused has invoked his right to have counsel present during custodial interrogation . . . [he] is not subject to further interrogation by the authorities until counsel has been made available,' unless he initiates the contact." *Montejo*, 556

U.S. at 787. But in the *Jackson* context, there is basic doubt whether any request by the defendant at the initial appearance was meant to apply to a future interrogation. Id. at 787-88. The prophylactic *Edwards* rule is based on an anti-badgering rationale flowing from the defendant's invocation of counsel *within the context* of the interrogation itself, and it does not apply to any supposed anticipatory invocation before the interrogation. "'We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation'. . . ." *McNeil*, 501 U.S., at 182, n 3 * * *. What matters for *Miranda* and *Edwards* is what happens when the defendant is approached for interrogation, and (if he consents) what happens during the interrogation – not what happened at any preliminary hearing." *Montejo*, 556 U.S. at 797. "Since the right under both sources is waived using the same procedure, doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver." Id. at 795.

The *Montejo* Court rejected the absolute bar imposed by *Jackson* because the multiple layers of *Miranda* prophylactic rules sufficiently protect the defendant's right to counsel without the need for an absolute bar.

> What does the *Jackson* rule actually achieve by way of preventing unconstitutional conduct? Recall that the purpose of the rule is to preclude the State from badgering defendants into waiving their previously asserted rights. See *Harvey*, 494 U.S., at 350; see also *McNeil*, 501 U.S., at 177. The effect of this badgering might be to coerce a waiver, which would render the subsequent interrogation a violation of the Sixth Amendment. See *Massiah*, 377 U.S., at 204. Even though involuntary waivers are invalid even apart from *Jackson*, see *Patterson*, 487 U.S., at 292, n. 4, mistakes are of course possible when courts conduct case-by-case voluntariness review. A bright-line rule like that adopted in *Jackson* ensures that no fruits of interrogations

> made possible by badgering-induced involuntary waivers are ever erroneously admitted at trial.
>
> But without *Jackson*, how many would be? The answer is few if any. The principal reason is that the Court has already taken substantial other, overlapping measures toward the same end. Under *Miranda*'s prophylactic protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right. 384 U.S., at 474. Under *Edwards*' prophylactic protection of the *Miranda* right, once such a defendant "has invoked his right to have counsel present," interrogation must stop. 451 U.S., at 484. And under *Minnick*'s prophylactic protection of the *Edwards* right, no subsequent interrogation may take place until counsel is present, "whether or not the accused has consulted with his attorney." 498 U.S., at 153.
>
> These three layers of prophylaxis are sufficient. Under the *Miranda-Edwards-Minnick* line of cases (which is not in doubt), a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but "badgering" by later requests is prohibited. If that regime suffices to protect the integrity of "a suspect's voluntary choice not to speak outside his lawyer's presence" before his arraignment, *Cobb*, 532 U.S., at 175 (Kennedy, J., concurring), it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached. And if so, then *Jackson* is simply superfluous.

Montejo, 556 U.S. at 794-95 (parallel citations omitted). "*Jackson* was policy driven, and if that policy is being adequately served through other means, there is no reason to retain its rule." *Montejo*, 556 U.S. at 795-96. "In sum, when the marginal benefits of the *Jackson* rule are weighed against its substantial costs to the truth-seeking process and the criminal justice system, we readily conclude that the rule does not 'pay its way,'* * *. *Michigan* v. *Jackson* should be and now is overruled." *Montejo*, 556 U.S. at 797.

The *Montejo* Court also rejected the dissent's revisionist attempt to characterize *Jackson* as a case that was addressing the knowing and voluntary nature of the defendant's waiver at the outset of the interrogation.

> In determining whether a Sixth Amendment waiver was knowing and voluntary, there is no reason categorically to distinguish an unrepresented defendant from a represented one. It is equally true for each that, as we held in *Patterson*, the *Miranda* warnings adequately inform him "of his right to have counsel present during the questioning," and make him "aware of the consequences of a decision by him to waive his Sixth Amendment rights," 487 U.S., at 293. Somewhat surprisingly for an opinion that extols the virtues of *stare decisis*, the dissent complains that our "treatment of the waiver question rests entirely on the dubious decision in *Patterson*," *post*, at 812. The Court in *Patterson* did not consider the result dubious, nor does the Court today.

Montejo, 556 U.S. at 798-99 (parallel citations omitted).

Given the discussion in *Montejo*, any claim that the Sixth Amendment erects an absolute bar to police interrogation after an initial appearance must be rejected. This Court is bound to adhere to *Montejo* in addressing Sixth Amendment suppression claims. *State v. Burnett*, 93 Ohio St.3d 419, 422 (2001). The defendant cannot obtain suppression under the Sixth Amendment claim for these reasons and because, as already indicated, the Sixth Amendment right to counsel had not even attached as to any charge arising from the 2-21-22 incident that underlay counts three through five.

E. State Constitutionalism Goes in Both Directions

At this point, the defense argument seeks to resurrect the overruled *Jackson* absolute bar as part of "interpreting" the right to counsel under Article I, Section 10, of the Ohio Constitution. But this invocation of the Ohio Constitution seems to assume a

one-way street, in which the Ohio constitutional right will only be construed to provide equal or greater protection than the federal Sixth Amendment. The concept of a "new federalism" is frequently suggested to be a choice that can only move in a direction toward affording a greater protection to the defendant under the state constitution.

Even so, such an approach to state constitutionalism would defy the basic premise that Ohio has a constitution of *independent* force. Such independence necessarily means that Ohio courts must accept their independent responsibility to construe the state constitutional provision in a manner consonant with its text, and, in the search for state constitutional meaning, the state courts could construe a state constitutional provision to provide *lesser* protection than its federal counterpart.

As stated by the Texas Court of Criminal Appeals:

> We understand that our holding means that Section 9 of our Bill of Rights does not offer greater protection to the individual than the Fourth Amendment to the United States Constitution, and it may offer less protection. But our holding is the construction that is faithful to the Constitution which our people have adopted, and it is our duty to interpret that Constitution independent of the interpretations of federal courts.
>
> As the Court of Appeals noted in this case, *Heitman* does not mean that the Texas Constitution cannot be interpreted to give less protection than the federal constitution. It only means that the Texas Constitution will be interpreted independently. Its protections may be lesser, greater, or the same as those of the federal constitution.

Hulit v. State, 982 S.W.2d 431, 436-437 (Tex.Crim.App.1998) (citations omitted).

> The dissent is mistaken in saying that this court cannot interpret our state constitution as affording less protection than the federal constitution. As a distinguished state jurist and leader of the new federalism said, "The right question, is not whether a state's guarantee is the

> same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies to the case at hand. The answer may turn out the same as it would under federal law. The state's law may prove to be more protective than federal law. The state law also may be less protective. In that case the court must go on to decide the claim under federal law, assuming it has been raised." Hans A. Linde, *E Pluribus – Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984).

Hulit, 982 S.W.2d at 437 n. 11 (citation omitted).

> In *Heitman*, we repeated the dictum of our sister court: "The federal constitution sets the floor for individual rights; state constitutions establish the ceiling." With all respect to our Sister Court, we think its metaphor is wrong. The state constitution and the federal constitution are not parts of one legal building; each is its own structure. Their shapes may be different, as may their parts. Each may shield rights that the other does not. The ceiling of one may be lower than the floor of the other. Because of the Supremacy Clause of the United States Constitution, a defendant who is entitled to claim * * * the protection of a federal provision may receive a greater protection from that floor than the greatest protection that the ceiling of the Texas Constitution would give him. But that does not mean that the Texas Constitution has no ceilings that are lower than those of the federal constitution.
>
> In our holding there is no violation of the Supremacy Clause of Article VI of the United States Constitution.
>
> > State courts are the final interpreters of state law even though their actions are reviewable under the federal constitution, treaties, or laws. The supreme court of a state is truly the highest court in terms of this body of law and it is not a "lower court" even in relation to the Supreme Court of the United States. It must follow the Supreme Court's rulings on the meaning of the Constitution of the United States or federal law, but it is free to interpret state

> laws or the state constitution in any way that does not violate principles of federal law.
>
> John E. Nowak, Ronald D. Rotunda, J. Nelson Young, 1 Treatise on Constitutional Law 31 1986). We do not make any holding about the appellant's rights under federal law. In this case, the appellant has chosen not to seek any shelter in the federal constitution. (In our architectural metaphor, he may not be able to fit his facts under the federal ceiling.) This case has called on us to decide whether our constitution will give him the shelter he wants. It does not.
>
> The Supremacy Clause means that, in practical terms, persons will always be able to avail themselves of the greater right. This is very important to litigants and their counsel, who are naturally and properly result-oriented. But it does not mean that a court, faithfully interpreting state laws, can only find in them protections that equal or exceed federal laws.

Hulit, 982 S.W.2d at 437 (citations and footnote omitted).

The United States Supreme Court cannot engage the state courts in a forced march into construing a state constitutional provision in only one direction. The United States Supreme Court cannot overturn a state supreme court's ruling on a matter of state law, and it has no say at all in the matter. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("[T]he views of the State's highest court with respect to state law are binding on the federal courts"); *Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Assn.*, 426 U.S. 482, 488 (1976) ("We are, of course, bound to accept the interpretation of Wisconsin law by the highest court of the State."); *Howard v. Kentucky*, 200 U.S. 164, 173 (1906) ("We accept [the state-court decision], as we are bound to do, as a correct exposition of the law of the State – common, statutory and constitutional."). If the state constitutional provision does not go as far as the federal counterpart, the federal courts would simply

apply the federal counterpart. But they cannot change the outcome under the state constitutional provision.

In his book, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018), Judge Jeffrey Sutton explores state constitutionalism in various respects, including when and how state constitutional claims should be presented and decided in relation to federal claims. He emphasizes that the state constitutional protection can be less than the protection provided under the federal counterpart.

> Some say that federal claims should be resolved first in dual-claim cases because state courts cannot construe their constitutions to offer *less* protection than the federal guarantee. Wrong. State courts remain free to construe their constitutional guarantees to offer as little protection as they think appropriate, and only a state constitutional amendment can alter that decision. A few state courts have said as much. The only thing state courts may not do is ignore the independent federal claim. It may be true that a state constitutional ruling that asks less of the government than existing federal constitutional law requires will not impact the parties before the court. But that does not make the ruling inconsequential. Once a state court establishes the interrelation between the two guarantees, it has established that no state constitutional inquiry is needed, a not-unhelpful development for future litigants and courts and assuredly an efficient one.

Id. at 183 (emphasis sic; footnotes omitted). Judge Sutton continues:

> To date, most state supreme courts willing to express their disagreement with precedents of the U.S. Supreme Court in construing their own constitutions do so only in explaining why the state constitution covers *more* ground. That is difficult to justify. A healthy form of comparative law – and that's just what this is – should attend to all comparisons, not just some. The state courts thus should explain the interrelation between the two sets of charters in both directions, whether the state guarantee covers more ground or less. Anything less reinforces a ratchet approach to state constitutionalism, one destined to

fail over the long term.

Id. at 184.

One of the topics addressed by Judge Sutton is the evolution of law relating to whether evidence would be excluded for a constitutional search-and-seizure violation. At common law, the remedy for an illegal search and seizure was a civil suit for damages for trespass and seeking the return of the illegally-seized non-contraband property. The courts rejected any exclusionary rule in relation to the criminal trial, although that possibility later developed in the federal courts. In *51 Imperfect Solutions*, Judge Sutton makes the point that a state constitutional provision might be construed not to have any exclusionary remedy at all, even despite the existence of that remedy at the federal level. "Just as a state court's authority to construe its own constitution allows the court to extend greater protections than the Federal Constitution, so too it allows a court to extend less protection under its own constitution, even none at all beyond the common law remedies." Id. at 66.

Judge Sutton's discussion of whether an exclusionary rule would apply under a state constitutional search-and-seizure provision has particular relevance in Ohio. At a time when the federal exclusionary rule did not apply to the states, this Court held in syllabus law that there is no exclusionary rule for violations of Article I, Section 14, of the Ohio Constitution. *State v. Lindway*, 131 Ohio St. 166 (1936), paragraphs four, five, and six of the syllabus. Even after *Mapp v. Ohio*, 367 U.S. 643 (1961), applied the federal exclusionary rule to the states, *Lindway* was not overruled as a matter of state constitutional law. *Cincinnati v. Alexander*, 54 Ohio St.2d 248, 255-56 n. 6 (1978). While a number of subsequent cases have referenced Section 14 as a basis for finding a

search or seizure invalid and as a basis for granting a motion to suppress, none of these cases directly and discretely addressed and decided whether *Lindway* would be overruled. This trail of cases involves the parties and the courts merely assuming the applicability of an exclusionary rule under the state constitution, and, as a result, failing to squarely address the *Lindway* non-exclusionary rule. The "perceived implications" of an earlier decision are not precedential when the decision in question did not "definitively resolve" the issue and "never addressed the discrete issue * * *." See, e.g., *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶¶ 10-12; *State ex rel. Gordon v. Rhodes*, 158 Ohio St. 129 (1952); *B.F. Goodrich v. Peck*, 161 Ohio St. 202 (1954); *In re Bruce S.*, 134 Ohio St.3d 477, 2012-Ohio-5696, ¶ 6.

It remains an open question whether this Court would actually overrule *Lindway* and enforce an exclusionary rule for state constitutional search-and-seizure violations. But, as of now, *Lindway* remains on the books. As discussed in briefing by the Office of the Ohio Attorney General, neither the text of Section 14 nor its history support having an exclusionary rule. See *Brief of Amicus Curiae Ohio Attorney General in State v. Bembry*, 2016 WL 5867510 (2016).

The exclusionary rule issue provides a powerful example of how a state constitutional provision might provide lesser protection than its federal counterpart. Given this history, when an Ohio court is faced with a defendant invoking a suppression remedy under a state constitutional provision, one of the issues to be decided would be whether an exclusionary rule would apply to the claimed constitutional violation.

As discussed by the Texas court, the analogy to "floors" and "ceilings" is inapt. The federal and state constitutions each provide their own independent structure of

constitutional protections. But it is possible to use the "floor" analogy to some degree.

For example, in the context of search-and-seizure suppression claims, it can be said that federal law provides a "floor" because the state courts are bound to apply the Fourth Amendment and to exclude evidence if the federal exclusionary rule requires it. Ohio courts cannot rely on state law to admit evidence that the federal exclusionary rule compels to be excluded. In that way, federal law is a "floor" below which Ohio courts cannot go in particular cases.

It is also true that state courts under their state constitutions can go above the basic "floor" of federal law by providing greater constitutional search-and-seizure protections. Even if the search was lawful under the Fourth Amendment, and even if the federal exclusionary rule does not compel exclusion, a state court might determine that its own state constitutional provision was violated and/or that such evidence should be excluded. The cases discussing a federal-law "floor" often can be understood as discussing this scenario of the defendant winning on a state-law suppression claim even though he loses under his federal-law suppression claim.

But the cases discussing a federal "floor" should not be mistaken for the view that the "new federalism" is a one-way street in which state law must always be construed to afford the same or greater suppression rights as federal law. State law can afford fewer or no suppression rights, and, because it is a matter of state law, the federal courts are bound to accept such a state-law construction. As this Court recognized in *Arnold v. Cleveland*, 67 Ohio St.3d 35 (1993), paragraph one of the syllabus, the Ohio Constitution "is a document of *independent* force." (Emphasis added). "[S]tate courts' interpretations of state constitutions are to be accepted as final" in the federal courts. Id. at 42. "It is

fundamental that state courts be left free and unfettered by [the United States Supreme Court] in interpreting their state constitutions." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (quoting another case). Federalism "does not necessarily mean that state constitutional guarantees always are more stringent than decisions of the Supreme Court under their federal counterparts. A state's view of its own guarantee may indeed be less stringent, in which case the state remains bound to whatever is the contemporary federal rule." *State v. Kennedy*, 295 Ore. 260, 270-71, 666 P.2d 1316, 1323 (1983).

Construing state law to preclude suppression under state law merely deprives the defendant of a state-law suppression basis for a motion to suppress. The defendant can still proceed on whatever federal-law suppression claim he might have, i.e., he can still rely on the federal "floor" of protection. This is the nature of suppression claims. The defendant will cite state law and/or federal law. The fact that one fails does not mean that the other fails, and, likewise, the fact that one succeeds does not mean that the other must succeed as well.

In *California v. Greenwood*, 486 U.S. 35, 43 (1988), the Court recognized that "[i]ndividual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution." But the Court also specifically recognized that the States may *eliminate* the exclusionary rule for a violation of state law, as California had done through constitutional amendment: "California could amend its Constitution to negate the [California Supreme Court] holding in *Krivda* that state law forbids warrantless searches of trash. We are convinced that the State may likewise eliminate the exclusionary rule as a remedy for violations of that right." Id. at 44. "[T]he people of California could permissibly conclude that the

benefits of excluding relevant evidence of criminal activity do not outweigh the costs when the police conduct at issue does not violate federal law." Id. at 45.

This Court should reject any notion that state constitutionalism is a one-way ratchet only moving in the direction of greater protections under the state provision.

F. Suppression Claim Fails under the Section 10 Right-to-Counsel Provision

When one parses the actual text of the Section 10 right to counsel provision, it is difficult to see how the provision can support the defendant's arguments. The provision states, as follows: "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel * * *."

1.

What stands out initially is the contrast with the Sixth Amendment, which applies "[i]n all criminal prosecutions." Section 10 emphasizes from the outset that it applies "[i]n any trial, in any court." And the "with counsel" language is plainly referring to the in-court and in-trial contexts, since it is combined with the concept of the party accused defending "*in person* and with counsel."

The defense welcomes the federal approach of applying the Sixth Amendment right to counsel to "critical stages" occurring out of court and well before any trial is occurring. This "critical stage" approach is how the Sixth Amendment has been found to apply to a pretrial police interrogation occurring outside of court and after the right to counsel has attached. But this approach would be largely based on the Sixth Amendment's "[i]n all criminal prosecutions" language, which could be seen as being broad enough to extend to pretrial events while the prosecution is pending.

This broader approach is not supported under the Section 10 provision, with its

in-trial and in-court limitations. "As re-enacted in the Constitution of 1850-1851 (Art. I, Section 10), the provision 'in all criminal cases,' so far from being limited, was made more specific, namely, 'in every trial in every court.'" *Decker v. State*, 113 Ohio St. 512, 521 (1925). This specificity matters, since the 1851 Convention chose to clarify things by making it more specific in comparison to the earlier Ohio constitutional provision and the earlier Sixth Amendment, both of which used "in all criminal prosecutions" language. As the dissenter stated below, "This change to narrower language cuts against the view that Article I, Section 10 is supposedly broader." In affording broader protection under Section 10, the trial court and the First District majority gave scant if any attention to the actual text, and their broader conclusion was based solely on arguments and theories untethered to the actual text of the Section 10 provision.

The trial court was particularly off base in contending that the "plain language" of Section 10 leads to the broader conclusion. Far from it, and the actual text points in the direction of a narrower reach under Section 10.

The decision in *Thomas v. Mills,* 117 Ohio St. 114 (1927), tends to point in this narrower direction. The case was an injunction action in which an attorney was contending that his client was imprisoned in the state penitentiary and that the warden was refusing to allow private consultations by the attorney with the client, who was at that time pursuing an appeal from his conviction. This Court ultimately relied on Article I, Section 16, of the Ohio Constitution as affording the right for the attorney and client to consult in private to ensure his right under Section 16 to have justice administered without denial or delay. *Thomas,* 117 Ohio St. at 120. In relation to the Section 10 right-to-counsel provision, however, the Court held that the right to counsel did not apply

because the appeal was not a "trial" proceeding.

> It may be conceded that consultation with counsel is a necessary part of every defense, and such consultation rightly should take place not merely during the actual stages of the trial, but at every point in the proceedings. Moreover, such consultations should in all fairness be held in private. But does the specific provision of Article I, Section 10, guarantee the right privately to consult with an attorney except before and during the actual trial of the case in the trial court?
>
> In 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.
>
> In *Thompson* v. *Denton*, 95 Ohio St., 333, 116 N. E., 452, it was stated that the term "trial" in Article IV, Section 6 of the Ohio Constitution, is broad enough to include any judgment, finding, order, or decree, not interlocutory in its nature, affecting the substantial rights of a party to a chancery suit, and that holding was essential to the decision in the syllabus. The *Denton case* did not construe the word "trial" as used in Article I, Section 10, however, and the privilege extended under that section has never been held in this state to permit a sentenced convict to attend the hearing of error proceedings. We think that it was not intended that the word "trial" in that provision should be so all-inclusive. Certainly the privilege meant to be given to an accused person under this section of the Constitution was that of defending himself against the charges and testimony of witnesses as made in the trial court, and it was never contemplated that a convict should be dragged back and forth from the penitentiary to be present at mere arguments of law made by his counsel upon error proceedings. We therefore hold that no constitutional right was infringed under this section in refusing the interview.

Thomas, 117 Ohio St. at 119-120. While *Thomas* acknowledges that a precursor to

representation at trial would be private pretrial consultations between the client and counsel, *Thomas* also acknowledges that the word "trial" in Section 10 has limits and is not "so all-inclusive." The term "trial" does not apply until after the pleadings are finished and the prosecution is otherwise ready, which means "trial" does not generally reach pretrial matters as such, and "does not extend to such preliminary steps as the arraignment and giving of the pleas * * *." The definition of "trial" in *Thomas* is at odds with the notion that there is a general "critical stages" approach to pretrial matters under Section 10.

In *State v. Milligan*, 40 Ohio St.3d 341 (1988), this Court found that there was a violation of Section 10 when the jailer failed to afford the defendant the ability to engage in a private consultation with his counsel before trial and then secretly recorded the attorney-client conversation. The decision in *Milligan* confirms the protection of the right to private consultation, but *Milligan* also referenced the Section 16 access-to-courts concept as well.

In any event, protecting private attorney-client consultations from invasion is far different than the circumstances here of the police openly approaching the defendant, reminding him of his right to counsel, and thereby obtaining his waiver of counsel for purposes of the interrogation. Also, *Milligan*'s language stating that Section 10 is "comparable" to the Sixth Amendment, along with its citation to Sixth Amendment case law, suggests a lockstep parallelism with the Sixth Amendment and therefore does not support any call to interpret Section 10 more broadly than the Sixth Amendment.

In this regard, the *Milligan* Court's citation to *Ford v. State*, 121 Ohio St. 292 (1929), does not support a broader interpretation and would be consistent with a narrower

interpretation of the Section 10 right. *Ford* only referred to the defendant's right to engage in private consultations with counsel in the context of an on-going trial, see id. at 297, and thus *Ford* would not represent authority to use a "critical stages" inquiry as to out-of-court pretrial events.

Also of note is the fact that *Milligan* and *Thomas* were also referring to Article I, Section 16, of the Ohio Constitution, thereby treating the ability to consult with counsel privately as implicating the defendant's right to access to the courts to secure justice. There is no such implication in a police interrogation that does nothing to hinder the defendant's ability to gain access to counsel when desired.

The "critical stage" concept is one of the predicates on which the defendant's claim of broader protection could fail under Section 10. The in-trial and in-court language in Section 10 suggests that Section 10 does not use a "critical stage" approach, let alone an approach that would impose a right to counsel on an outside-court police interrogation. To the extent that *Milligan* relied on Section 10 to protect private pretrial consultations with counsel, the case law cited in that case appears to draw more from the Section 16 access-to-courts provision, and, in any event, protecting the privacy of pretrial consultations with counsel does not extend into a broader rule protecting all "critical stages" too or absolutely barring pretrial police interrogations. The text of the provision controls, and Section 10 does not apply to a pretrial police interrogation.

2.

There are other significant holes in the foundation for the defendant's state constitutional claim. The "party accused" language in Section 10 would likely be viewed as analogous to the "accused" language in the Sixth Amendment, and so a parallel

between the two provisions could exist in that regard. But, even so, the State is contending that the right to counsel had not attached upon the filing of a criminal complaint and the occurrence of an initial appearance. Moreover, as discussed supra, the defendant would not have been a "party accused" as to counts three through five, since the right to counsel only attaches on an "offense specific" basis. The defendant was not facing any charge related to the 2-21-22 incident, and, as a result, he could not have been an "accused" as to those counts at the time of the 5-16-22 police interrogation.

This Court has declined to read Section 10 more broadly in this respect.

> The fact that other charges were pending does not affect the determination of whether the statements regarding other acts are admissible. "Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses." *Maine v. Moulton* (1985), 474 U.S. 159, 180, fn. 16. We decline appellant's invitation to extend the protections of Section 10, Article I of the Ohio Constitution beyond those guaranteed by the Sixth Amendment. * * *

State v. Roe, 41 Ohio St.3d 18, 22 (1989).

3.

There is also the issue of whether the *Miranda* regime of warnings and waiver would apply to a pretrial police interrogation for purposes of the Section 10 right to counsel. Again, the applicability of the "critical stages" concept is in doubt in relation to the in-trial/in-court language underlying the Section 10 right to counsel. Applying the *Miranda* regime would be in even more doubt. If a defendant wishes to speak to counsel before answering questions, he can refuse to answer until he sees counsel. His ability to make such choices on his own is reinforced by the fact that the court conducting the initial appearance under Crim.R. 5(A)(2) will have already informed the defendant of his

right to counsel, his right to a reasonable continuance in the proceedings to secure counsel, and his right to have counsel assigned without cost if the defendant is unable to employ counsel. And the court will have also informed the defendant that he "need make no statement and any statement made may be used against the defendant". Crim.R. 5(A)(3). Super-imposing the wholly-invented and prophylactic *Miranda* regime onto the process of a pretrial interrogation under the Section 10 right to counsel finds no support in the constitutional text.

4.

Of course, the attempt to "interpret" the Section 10 right to counsel to incorporate a *Jackson* absolute bar on interrogation also raises the main question of whether *Jackson* or *Montejo* has the better of the argument. *Montejo* is most persuasive, especially when it is considered that this Court itself has recognized that the defendant cannot anticipatorily invoke the right to counsel under the *Miranda* warnings-and-waiver regime. *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, ¶¶ 48-50. When the defendant has requested counsel or accepts the appointment of counsel at the initial appearance, it is doubtful that he is indicating anything about his willingness to entertain approaches by the police for later interrogations, and such events usually would be equivocal in relation to whether the defendant is requesting counsel for a future interrogation. But even if the defendant did have a future interrogation in mind at the time of the initial appearance, the *Miranda* regime simply does not allow anticipatory invocations of counsel. *Montejo*, 556 U.S. at 797, citing *McNeil*, 501 U.S. at 182 n. 3. There is ample opportunity for the defendant to invoke counsel when he is actually approached, and, assuming he truly wanted the presence of counsel for such

interrogation, it will be easy enough for him to refuse to participate on the ground that he needs to consult with counsel.

Another reason to reject *Jackson* and to follow *Montejo* is the bottom-line fact that the right to counsel is the *defendant's* right, not counsel's right or the criminal-justice system's right. "The Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor." *Moran v. Burbine*, 475 U.S. 412, 430 (1986). A "defendant may waive the right [to counsel under the Sixth Amendment] whether or not he is already represented by counsel; the decision to waive need not itself be counseled." *Montejo*, 556 U.S. at 786, citing *Michigan v. Harvey*, 494 U.S. 344, 352-53 (1990). "Nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney." *Harvey*, 494 U.S. at 352. "[N]either the advice nor presence of counsel is needed in order to effectuate a knowing waiver of the Sixth Amendment right." *Montejo*, 556 U.S. at 788 n. 2. Even when counsel is actively trying to reach a suspect in police custody, police have no obligation to inform the suspect of counsel's efforts, and the suspect may voluntarily waive the right to counsel. *Moran*, 475 U.S. at 421-22; *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, ¶¶ 20-36.

This Court recently relied on *Montejo* to reaffirm that the decision to waive counsel can be uncounseled and that such waiver can be effective under the Sixth Amendment. *Taylor*, ¶¶ 24-25. Nothing in the actual text of Section 10 would countermand the notion of the waivability of the right to counsel. The defendant can voluntarily proceed without counsel, and the personal nature of the right naturally

negates the paternalism underlying the *Jackson* rule that would completely bar the defendant from making that choice at the time of the interrogation.

5.

The defendant's pursuit of a state constitutional claim seeking suppression also begs the question of whether an exclusionary rule exists as a remedy for a Section 10 right-to-counsel violation and whether such an exclusionary rule would have a good-faith exception that should be employed in this case of "first impression." The decision in *Milligan* expressly recognized that the remedy of suppression can apply under Section 10, but its facts are distinguishable. That case involved the unauthorized invasion of what should have been private attorney-client communications, and the exclusion of privileged information goes with the territory of invading a privilege. In sharp contrast, no possible claim of privilege could apply here, with the defendant obviously being aware of the police and being forewarned that his statements could be used against him.

Montejo was rightly concerned with the substantial social costs attending any exclusionary rule. An exclusionary rule "allows many who would otherwise be incarcerated to escape the consequences of their actions." *Pennsylvania Bd. of Probation v. Scott*, 524 U.S. 357, 364 (1998). "The principal cost of applying any exclusionary rule 'is, of course, letting guilty and possibly dangerous criminals go free * * *.'" *Montejo*, 556 U.S. at 796 (quoting *Herring v. United States*, 555 U.S. 135, 141 (2009)). Letting the guilty go free is "something that 'offends basic concepts of the criminal justice system.'" Id. at at 141, quoting *United States v. Leon*, 468 U.S. 897, 908 (1984); *Hudson v. Michigan*, 547 U.S. 586, 595 (2006) (discussing "the grave adverse consequence that exclusion of relevant incriminating evidence always entails (viz., the risk of releasing

dangerous criminals into society)"). "'[T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.'" *Herring*, 555 U.S. at 141, quoting *Scott*, 524 U.S. at 364-65.

This Court has echoed such concerns. "[T]he exclusionary rule and the concomitant suppression of evidence generate substantial social costs in permitting the guilty to go free and the dangerous to remain at large." *State v. Oliver*, 112 Ohio St.3d 447, 2007-Ohio-372, ¶ 12 (internal quotation marks omitted). "Exclusion exacts a heavy toll on both the judicial system and society at large." *State v. Hoffman*, 141 Ohio St.3d 428, 2014-Ohio-4795, ¶ 25 (quoting *Davis v. United States*, 564 U.S. 229, 237 (2011)). "It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence." Id. "And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment." Id.

In the context of Fourth Amendment violations, but equally relevant here, the existence of a constitutional violation should not "necessarily mean that the exclusionary rule applies." *Herring*, 555 U.S. at 140 (2009). "[E]xclusion 'has always been our last resort, not our first impulse' * * *." Id. (quoting another case). "[T]he exclusionary rule is not an individual right and applies only where it results in appreciable deterrence." Id. at 141 (quote marks & brackets omitted). "The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct." Id. at 143.

> To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or

> grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Id. at 144. "[T]he question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." Id. at 137.

This Court has favorably cited the *Herring* standard and thereby reinforced that exclusion is only meant to serve "as a deterrent against future violations" and that the deterrent benefits of the exclusionary rule are limited to deliberate, reckless, and grossly-negligent violations. *State v. Dibble*, 159 Ohio St.3d 322, 2020-Ohio-546, ¶¶ 15, 16.

This analysis is often referred to as the "good-faith exception," but, in fact, it is a predicate to the operation of the exclusionary rule generally. Absent police conduct that culpably violates the constitution, there is insufficient deterrence to justify suppression.

No deliberate, reckless, or grossly negligent disregard of the Section 10 right to counsel was involved here. Even if this Court would now conclude that the Section 10 right was violated, the violation at most would amount to a non-negligent "mistake" on the officer's part.

In fact, the present case is touted as a case of *first impression* as to the reach of the Section 10 right to counsel. But that means that a reasonable officer would have had no prior notice that this pretrial interrogation would violate the Section 10 right. The officer followed *Montejo*, which allowed the approach for the interrogation and approved of the interrogation upon the occurrence of a valid waiver under the *Miranda* regime.

A particularly strong form of "good faith" arises from reliance on existing case law, as shown by *Davis v. United States*, 564 U.S. 229 (2011). *Davis* applied the good-faith exception to prevent exclusion when the Court after the fact had changed the legal principle that had allowed the police to search the vehicle at the time the search occurred.

"[T]he good-faith exception should [not] be applied where new developments in the law have upended the settled rules on which the police relied." *State v. Johnson*, 141 Ohio St.3d 136, 2014-Ohio-5021, ¶ 48 (quote marks and citation omitted).

Applying an exclusionary rule here would contribute nothing to the goal of deterrence. The officer proceeded in conformance with existing case law, i.e., consistent with *Montejo*. The application of any exclusionary rule here would offend justice and would not pay its way.

G. Statutes Providing for Access to Counsel are Inapposite

The First District relied on statutes as somehow supporting the rejection of *Montejo* and the adoption of a broader interpretation of the Section 10 provision. The majority cited R.C. 2935.20, which states:

> After the arrest, detention, or any other taking into custody of a person, with or without a warrant, such person shall be permitted forthwith facilities to communicate with an attorney at law of his choice who is entitled to practice in the courts of this state, or to communicate with any other person of his choice for the purpose of obtaining counsel. Such communication may be made by a reasonable number of telephone calls or in any other reasonable manner. Such person shall have a right to be visited immediately by any attorney at law so obtained who is entitled to practice in the courts of this state, and to consult with him privately. No officer or any other agent of this state shall prevent, attempt to prevent, or advise such person against the communication, visit, or consultation provided for by this section.

The majority also cited R.C. 2935.14:

> If the person arrested is unable to offer sufficient bail or, if the offense charged be a felony, he shall, prior to being confined or removed from the county of arrest, as the case may be, be speedily permitted facilities to communicate with an attorney at law of his own choice, or

> to communicate with at least one relative or other person for the purpose of obtaining counsel (or in cases of misdemeanors or ordinance violation for the purpose of arranging bail). He shall not thereafter be confined or removed from the county or from the situs of initial detention until such attorney has had reasonable opportunity to confer with him privately, or other person to arrange bail, under such security measures as may be necessary under the circumstances.

These statutory citations certainly bear on the issue of the detainee's access to counsel and prohibit jailers and police from interfering with reasonable access. But these statutory provisions do not carry any weight in a fact pattern in which the police meet with the detainee and affirmatively remind the detainee of his right to counsel. There is no police "interference" with access to counsel under such circumstances when the defendant is affirmatively warned and thereby has the obvious wherewithal to stop the interrogation in order to consult with counsel if he wants. Such statutes are beside the point in making a choice between the *Jackson* and *Montejo* holdings.

In any event, it is questionable to rely on such statutes. The Ohio Constitution is very clear on how the Ohio Constitution can be amended. An amendment requires the approval of the people after the amendment process is initiated by petition, by the General Assembly, or by constitutional convention. Article II, Section 1a, Ohio Constitution; Article XVI, Sections 1 and 2, Ohio Constitution. "The Constitution is * * * subject to amendment only by the people, and neither the Legislature by legislative enactment, nor the courts by judicial interpretation, can repeal or modify such expression * * *." *Hoffman v. Knollman*, 135 Ohio St. 170, 181 (1939). The General Assembly cannot amend a constitutional provision by passing a mere statute.

In addition, as the dissent noted below, the citation of such statutes is particularly

out of place in pursuing a suppression remedy. This Court has held that there is no suppression remedy for violating R.C. 2935.20. *State v. Griffith*, 74 Ohio St.3d 554 (1996); *Fairborn v. Mattachione*, 72 Ohio St. 3d 345 (1995).

This conclusion aligns with the general rule that this Court will not apply any exclusionary rule to a statutory violation unless the General Assembly itself has provided a legislative mandate for such remedy. "In *State v. Myers* (1971), 26 Ohio St.2d 190, 196, * * * this court enunciated the policy that the exclusionary rule would not be applied to statutory violations falling short of constitutional violations, absent a legislative mandate requiring the application of the exclusionary rule." *Kettering v. Hollen*, 64 Ohio St.2d 232, 234 (1980). "This was, and is, a matter for the General Assembly. In our view, there is no judicial machinery available to produce the missing sanction." *Myers*, 26 Ohio St.2d at 197. "It is * * * clear that the General Assembly chose not to enact a statutory exclusionary rule that would come into play when evidence is obtained in violation of" the statute. *State v. Geraldo*, 68 Ohio St.2d 120, 128-29 (1981). "Generally, establishing a remedy for a violation of a statute remains in the province of the General Assembly, not the Ohio Supreme Court." *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, ¶ 22. Given the separation of powers, "we are not in the position to rectify this possible legislative oversight" by elevating a mere statutory violation to the level of a constitutional violation. Id. ¶ 21. "[A]ccordingly, we refuse to constitutionalize [the statute]. Nor, under the guise of construing the statute, do we choose to write into [the statute] a provision excluding probative evidence obtained in violation thereof." *Geraldo*, 68 Ohio St.2d at 128-29. At bottom, "this court has long held that the exclusionary rule applies 'to violations of a constitutional nature only.' [W]e will not

apply the exclusionary rule 'to statutory violations falling short of constitutional violations, absent a legislative mandate requiring the application of the exclusionary rule.'" *State v. Campbell*, 170 Ohio St.3d 278, 2022-Ohio-3626, ¶ 22 (quoting *Hollen*).

H. The Cited Ethics Rules Also Miss the Mark

The First District majority also cited ethics rules as supporting its conclusion. "[I]n Ohio, a lawyer 'shall not communicate about the subject of representation with a person the lawyer knows to be represented.' Prof.Cond.R. 4.2. Ohio also imputes professional obligations onto certain nonlawyer government agents. Prof.Cond.R. 5.3(c)(2)." *Morris*, ¶ 45.

These citations are misplaced. As with the statutes, they do not inform as to the meaning of the 1851 constitutional provision, and ethics rules by their nature are related to matters of attorney discipline, not judicial remedies. The "Scope" provision in the rules states that "[f]ailure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process." Prof.Cond.R. (Scope), at (19). In addition, it is questionable for opponents in court to rely on the rules in this way:

> (20) Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or

> transaction has standing to seek enforcement of the rule. Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of breach of the applicable standard of conduct.

Id. at (20). The ethics rules would not retroactively alter the meaning of a constitutional provision, and the rules themselves warn against using the rules as "procedural weapons" and therefore would not support applying an exclusionary rule.

The First District's conclusory arguments under the ethics rules miss the forest for the trees anyway. By definition, Prof.Cond.R. 4.2 is limited to lawyers. Non-lawyer police officers are not regulated by that rule, and a police interrogation would not qualify as the practice of law so as to be subject to this Court's authority to regulate the practice of law by rule.

The citation to Prof.Cond.R. 5.3(c)(2) is also misplaced. The First District majority cited this rule for the proposition that "Ohio also imputes professional obligations onto certain nonlawyer government agents." But, in fact, the rule is addressing the responsibilities of managerial and supervisory lawyers within a firm or governmental agency, and paragraph (c)(2) is addressing the lawyer's responsibility for nonlawyers *within* the firm or agency. The usual police-prosecutor relationship involves police and prosecutors being employed by different governmental agencies and being subject to different chains of supervisory authority, and a claim that police are under "direct supervisory authority" of the prosecutor defies the realities of this relationship. To be sure, the prosecutor cannot be complicit by inducing the police to take an action if that action would violate a rule if the prosecutor did so directly, see Prof.Cond.R. 8.4(a), but there was no evidence that any prosecutor instigated this interrogation. It would not

have taken any inducement by a prosecutor for the police to take this obvious next step of seeking to interview the defendant, who had only the day before been returned to the jurisdiction after his arrest in Virginia. "Voluntary confessions are not merely a proper element in law enforcement, they are an unmitigated good, essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Maryland v. Shatzer*, 559 U.S. 98, 108 (2010) (quote marks and citations omitted).

Montejo addressed a similar ethics rule and rejected its relevance as a constitutional matter.

> Montejo's rule appears to have its theoretical roots in codes of legal ethics, not the Sixth Amendment. The American Bar Association's Model Rules of Professional Conduct (which nearly all States have adopted into law in whole or in part) mandate that "a lawyer shall not communicate about the subject of [a] 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." Model Rule 4.2 (2008). But the Constitution does not codify the ABA's Model Rules, and does not make investigating police officers lawyers. Montejo's proposed rule is both broader and narrower than the Model Rule. Broader, because Montejo would apply it to all agents of the State, including the detectives who interrogated him, while the ethical rule governs only lawyers. And narrower, because he agrees that if a defendant initiates contact with the police, they may talk freely – whereas a lawyer could be sanctioned for interviewing a represented party even if that party "initiates" the communication and consents to the interview. Model Rule 4.2, Comment 3.

Montejo, 556 U.S. at 790-91. "Every profession is competent to define the standards of conduct for its members, but such standards are obviously not controlling in interpretation of constitutional provisions. The Sixth Amendment right to counsel is personal to the defendant and specific to the offense." *Cobb*, 532 U.S. at 171 n. 2.

I. Conclusion

When moving to suppress evidence, the defense must state with particularity the legal and factual bases for the motion to suppress. See *Xenia v. Wallace,* 37 Ohio St.3d 216 (1988); *State v. Shindler,* 70 Ohio St.3d 54, 58 (1994). In this process, each line of argument should be developed under the respective constitutional provisions.

In addition to encouraging distinct lines of argument, this Court can recognize the obvious point that there is no single answer that governs the comparative analysis of the respective federal and state constitutional provisions. The state constitutional provision may afford the same level of constitutional protection, or it may provide a greater level of protection, or, as applicable here, it may provide lesser protection than the federal counterpart. State constitutionalism is not a one-way ratchet leading in only one direction toward affording greater protections or greater suppression rights to the criminal defendant. State courts also can reject exclusionary rule remedies altogether or limit them as a matter of state constitutional law.

CONCLUSION

For the foregoing reasons, amicus curiae OPAA urges that this Court reverse the judgment of the First District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was e-mailed on May 20, 2024, to the following counsel of record: Krista M. Gieske, Assistant Public Defender, 230 East Ninth Street, 2nd Floor, Cincinnati, Ohio 45202, kgieske@hamiltoncountypd.org, counsel for defendant-appellee; T. Elliot Gaiser, Solicitor General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, thomas.gaiser@ohioago.gov, counsel for amicus curiae Ohio Attorney General Dave Yost; Ronald W. Springman, Chief Assistant Prosecuting Attorney, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202, ron.springman@hcpros.org, counsel for State of Ohio;.

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