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

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

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> **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.

OPAA stands by its merit brief but wishes to make a few additional points in reply.

Initially, it must be emphasized that the defendant and his amici are not only seeking an expansive "interpretation" of the constitutional provision. They are also seeking the application of an exclusionary rule, all in the service of a serial violent offender. Deploying a suppression remedy here would offend justice as this Court considers the wisdom of adopting a "first impression" expansive "interpretation." The police had no reason to anticipate such an interpretation when they approached the defendant for an interrogation that complied with *Montejo v. Louisiana*, 556 U.S. 778 (2009).

According to the bill of particulars, counts one and two related to a 1-28-21 incident in which the defendant committed CCW and WUD by having "a loaded S&W 38 caliber firearm concealed on his person." (10-11-22 Bill of Particulars) Counts three through five arose from the defendant's commission of an armed robbery on 2-21-22. (Id.) Counts six through fourteen arose from the defendant accosting a group of victims on 4-22-22 and firing numerous shots. (Id.) He shot one victim in the stomach, the second and third victims in their shoulders, and the fourth victim in the hand. (Id.)

Given such violence, this prosecution would afford a prime opportunity to take a menace off the streets for a significant period of time.

Letting the guilty go free is something that offends basic concepts of the criminal justice system. (See OPAA Merit Brief, at 35-38) This result is all-the-more unpalatable when it would be done in the service of a violent felon based on an expansive "interpretation" of the Ohio Constitution that the police had zero reason to think they were violating.

The defendant and his amici offer various policy reasons for interpreting the Section 10 right-to-counsel provision more broadly than the federal right-to-counsel protection in the Sixth Amendment. But no one appears to dispute that the independent state constitutional protection *can* be interpreted to afford the same or *lesser* protection than the federal constitutional protection. When a state constitutional protection is being compared to its federal counterpart, the independence of the state protection means that it might afford less protection. State constitutionalism is not a one-way ratchet that only favors criminal defendants; it can go in both directions.

Given the premise that the Section 10 right to counsel might afford less protection than the Sixth Amendment, the question becomes what the constitutional text in Section 10 actually supports, and this is where the arguments of the defendant and his amici fall far short. The text of the Section 10 right to counsel expressly limits its reach by using "[i]n any trial, in any court" language which, on its face, would make the right inapplicable to a pretrial police interrogation occurring outside of court. On its face, Section 10 is narrower, not broader than the Sixth Amendment, and yet the defendant and his amici seek not only to apply this provision to pretrial interrogations but also to

expand it even beyond the interpretation that has been given to the Sixth Amendment right.

The defendant and his amici offer various policy rationales. One such rationale is that police are wiley and defendants can be vulnerable and inexperienced and can be tricked or coerced into giving false confessions. Another rationale is that the right to counsel is important and has been supplemented by statutes and rules that confirm the right is important. But being important is not a reason to glide over the express limitations on this right as approved by the voters, and courts do not have a carte blanche to disregard express constitutional text. "It is not the province of a court to write constitutions or to give to the language used such forced construction as would warp the meaning to coincide with the court's notion of what should have been written therein. On the contrary, the language used must be given its usual and ordinary meaning." *Cleveland Tel. Co. v. Cleveland*, 98 Ohio St. 358, 368 (1918). In terms of statutory construction, this Court has often emphasized that "[t]he question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact." See, e.g., *State v. Fork*, 174 Ohio St.3d 224, 2024-Ohio-1016, ¶ 13. "This applies with equal force to the construction of a constitutional provision." *Cleveland Tel. Co.*, 98 Ohio St. at 369. The asserted policy contentions do not justify rewriting the Section 10 language, which limits the right to counsel to in-trial and in-court contexts.

Also, as a matter of policy, the chance of a false confession is amply countered by the value of truthful confessions in many cases. "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). The possibility of a false confession also is fully addressed by the rights to jury trial, confrontation, and compulsory process, by which the defendant is afforded the ability to challenge the accuracy of the confession. Suppression is supposed to be a remedy of last resort, see *State v. Hoffman*, 141 Ohio St.3d 428, 2014-Ohio-4795, ¶ 25, but the defense and its amici seek to make it a first resort, based on policy rationales that are not tethered to the pertinent constitutional text.

The briefs of the defendant and his amici also confirm that they are being highly selective in their disagreement with the federal analysis. Indeed, they welcome several premises of the federal analysis, and they especially demand that the *Miranda* warnings-and-waiver regime be applied with a dogmatic vengeance in the Section 10 right-to-counsel context, even though there is no constitutional text supporting that regime as a state constitutional matter. Given the independence of the Ohio Constitution, there is nothing requiring that this Court adopt every flawed premise from the federal analysis, and, in several respects, there are good reasons not to adopt those premises as a state constitutional matter.

Amicus ACLU argues that the initial *Miranda* waiver is problematic because the *Miranda* warnings referred to the possibility that counsel could be appointed for the defendant, and the defendant may have been confused since counsel had already been appointed during the initial appearance. But one struggles to understand this logic. The warnings were comprehensive and would not have been confusing:

> Before we ask you any questions, you must understand your rights.

> You have the right to remain silent.
>
> Anything you say can be used against you in court.
>
> You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.
>
> If you cannot afford a lawyer, one will be appointed for you before any questioning, if you wish.
>
> If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

(State's Ex. 1) The warnings plainly referenced the right to talk to a lawyer, which would have included the lawyer already appointed. Even if the defendant understood the warnings to be offering the possibility of the appointment of a second lawyer for purposes of the interrogation, there would have been no dilemma for the defendant; he would merely have the benefit of a second lawyer in the case for purposes of the interrogation. Moreover, the defendant did not absolutely need to request a second counsel, since the reference to appointment was only "if you wish." The defendant could have exercised his rights in multiple ways, including by referring to his already-appointed counsel and by refusing to talk to the police until he spoke with her for the purpose of the interrogation. There was no dilemma, and the claim of confusion is yet another example of bending over backwards for the serial violent offender, especially in light of the fact that, by rule, the defendant also would have received advisements from the judge during the initial-appearance hearing regarding his right to remain silent and his right to counsel. Crim.R. 5(A)(2) & (A)(3). In this context of repeated advisements, finding a constitutional violation and ordering suppression would strain justice.

The defendant disputes OPAA's "offense specific" contention that the right to counsel had not attached as to counts three through five. Those counts related to the defendant's 2-21-22 armed robbery. As OPAA noted, the complaints pending at the time of the 5-16-22 interrogation only related to the 1-28-21 CCW-WUD incident and the 4-22-22 four-victim-shooting incident.

The defendant argues that the underlying complaints are not in the appellate record and that the appellate courts must presume the regularity of the trial court's suppression ruling by presuming that there must have been a pending complaint as to the 2-21-22 incident too. These are curious contentions, since the burden would have been on the defense to establish the predicate that the right to counsel had attached. See *United States v. Bates*, 850 F.3d 807, 810 (5th Cir.2017) ("criminal defendant must establish that: (1) a Sixth Amendment right to counsel had attached"); cf. *State v. Parham*, 9th Dist. No. 26872, 2013-Ohio-5229, ¶ 6 (defendant has "burden of demonstrating that he was subject to a custodial interrogation"); *State v. Muncy*, 2d Dist. No. 21563, 2007-Ohio-1675, ¶ 8 (same). If the identity of the charges in the pending complaint(s) was not established, then the defense did not provide sufficient evidence to justify an across-the-board suppression ruling as to all counts. The indictment plainly alleges three different criminal incidents, and the defense's motion to suppress conceded that the right to counsel is "offense specific." (11-21-22 Motion to Suppress, at 3) Vague proof that there was a "complaint" pending does not prove what charge was pending and would be insufficient to show that the right to counsel had attached to any of indicted charges. And such vague proof certainly would not support an across-the-board suppression remedy as to all counts as was ordered here.

Even though the complaints do not appear in the hard-copy trial-court record that was transmitted to the court of appeals, the common pleas court's online docket includes the complaints. The trial court apparently relied on the docket, or it took judicial notice of the complaints, because the trial court specifically referenced the five complaints on which the defendant had been arrested. As stated by the trial court:

> This matter arises from an interrogation between City of Cincinnati Police detectives and Defendant Isaiah Morris regarding multiple charges against Mr. Morris. On January 31, 2021, Isaiah Morris was charged with carrying a concealed weapon and having a weapon under disability. (Complaint 21 CRA 1836) On April 22, 2022, Isaiah Morris was charged with felonious assault on [A.S.]. (Complaint 22 CRA 6811) On April 25, 2022, Isaiah Morris was charged with felonious assault on [R.H.] (Complaint 22 CRA 6812), [D.G.] (shot in the stomach) (Complaint 22 CRA 6813), and [J.D.] (shot in the hand (Complaint 22 CRA 6814). Mr. Morris was arrested on May 15, 2022 for these charges.

(3-10-23 Entry and Decision, at 2) The trial court further noted that, at the time of the Courtroom A hearing, "bond was set on the charges in the five complaints and Mr. Morris was appointed counsel." (Id. 2)

As described by the trial court, none of the pending complaints related to the 2-21-22 armed-robbery incident. The 1-31-21 CCW-WUD complaint predated the 2-21-22 armed-robbery incident by over a year and therefore could not have included a charge related to the armed-robbery incident. The trial court's description of the four remaining complaints was plainly referring to charges of felonious assault as to the four victims in the 4-22-22 incident. If one presumes the regularity of the trial court's decision, this Court would presume the accuracy of the trial court's rendition of what complaints were pending.

In any event, the defense *conceded* the point on appeal by *attaching* the five complaints to its 6-27-23 appellate brief in the court of appeals. The defense stated: "This case commenced with the filing of five criminal complaints against Mr. Morris in January 2021 and April 2022, respectively. (Appendices A-E)." (6-27-23 Brief, at 1) The defense appendices confirmed that the five complaints only related to the 1-28-21 and 4-22-22 incidents.

It amounted to plain error for the trial court to suppress statements as to counts three through five based on a claimed right-to-counsel violation. The defense motion to suppress conceded the "offense specific" nature of the right to counsel, and, under such approach, the right to counsel simply had not attached as to counts three through five. The Section 10 right to counsel would readily align with this federal analysis, since both the federal and state right to counsel depend on the person being an "accused." This Court has followed the offense-specific concept and expressly *declined* to read Section 10 more broadly in this respect. *State v. Roe*, 41 Ohio St.3d 18, 22 (1989).

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

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