Supreme Court of Ohio Clerk of Court - Filed May 17, 2024 - Case No. 2023-1614

IN THE

SUPREME COURT OF OHIO

STATE OF OHIO,	:	**NO. 2023-1614**
Plaintiff-Appellant,	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District, Case Number C-230108
vs.	:	
ISAIAH MORRIS,	:	
Defendant-Appellee.	:	

MERIT BRIEF OF PLAINTIFF-APPELLANT

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STATEMENT OF THE CASE AND FACTS

The First District went 0-for-3 in this case. It invented a broadened right to counsel under Ohio's constitution without any reference to its text. It failed to recognize the fundamental distinction between the attachment of the right to counsel and what constitutes a critical stage in the proceedings. And it altogether failed to address the critical issue, squarely before it, of whether defendant-appellee Isaiah Morris unequivocally invoked his right to counsel during a pre-indictment interview with police.

Multiple criminal complaints were filed against Morris between January 31, 2021, and April 25, 2022. (T.d. 60, p. 2) Morris was arrested on May 15, 2022. On the morning of May 16, 2022, Morris first appeared in Hamilton County Municipal Court before a judge in Courtroom "A." (T.d. 60, p. 2-3, T.p. 30-33, 68). This was Morris's first court appearance following his arrest (his "initial appearance," pursuant to Crim.R. 5). At this initial appearance, bond was set and Morris was designated an attorney from the Hamilton County Public Defender's Office, pursuant to Sup.R. 36 and Hamilton County Municipal Court Loc.R. 2. A form entitled "Designation of Trial Attorney" specifically designated Courtney DeVincenzo to represent Morris. (T.d. 36, Exhibit A; T.d. 60, p. 2-3) Morris did not expressly assert either his right to counsel or invoke his *Miranda* rights at his initial appearance.

On the afternoon of May 16th, Cincinnati Police Detectives Brett Gleckler and Stephen Bender conducted a recorded interview with Morris at the Hamilton County Justice Center. (T.p. 13, 24) Detective Gleckler asked Morris his education level, and whether Morris had "any drugs or alcohol in his system," to which Morris said no. Next, Detective Gleckler carefully read Morris his *Miranda* rights line-by-line from a standardized form used by the Cincinnati Police Department. Morris verbally indicated that he understood each of the *Miranda* rights and signed a written waiver of those rights, which included the right to counsel. Once Morris signed the

waiver-of-rights form, Detective Gleckler began questioning Morris about an alleged felonious-assault charge. (T.p. 12-20, State's Exhibit 2)

Approximately 45 minutes into the interview, Morris said, "I can't see a lawyer?" Detective Gleckler responded, "Anybody can talk to a lawyer." After this exchange, Morris continued answering Detective Gleckler's questions and never invoked counsel or terminated the interview. (T.p. 19, 44-48, 50-51, 62)

On May 24, 2022, a Hamilton County Grand Jury returned a 14-count indictment against Morris that involved five separate victims. The charges relevant to this appeal involve counts three through five and are related to victim Silas Parker. These charges include aggravated robbery, robbery, having weapons while under a disability, and multiple gun specifications. (T.d. 1) At his arraignment before a magistrate of the Hamilton County Common Pleas Court on June 2, 2022, Morris entered a plea of not guilty. (T.d. 5)

On November 21, 2023, Morris filed a motion to suppress the statements he made during the May 16, 2022, interview with Detectives Gleckler and Bender. As a threshold issue, Morris argued that the Sixth Amendment right to counsel had attached at the time of his interrogation. (T.d. 36)

Morris's argument, however, faced a significant obstacle under the United States Supreme Court's holding in *Montejo v. Louisiana*, 556 U.S. 778, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009). *Montejo* allows law enforcement to initiate questioning even if a defendant's Sixth Amendment right to counsel attaches at the initial appearance after defendant's arrest, provided that (1) defendant does not assert his right to counsel, and (2) defendant voluntarily waives *Miranda* rights before police-initiated questioning. *See id.* Under *Montejo*, Detectives Gleckler

and Bender had every right to initiate the May 16th interview with Morris at the Hamilton County Justice Center. *Montejo*, supra.

In his effort to avoid the holding in *Montejo*, Morris's counsel urged the trial court ***not*** to follow *Montejo* under the principle of federalism. (T.d. 36, T.p. 73) Because *Montejo* was decided on federal constitutional grounds under the Sixth Amendment right to counsel, Morris advocated for a more expansive right to counsel under Article I, Section 10 of Ohio's Constitution. Morris maintained that the trial court should interpret Article I, Section 10 to prohibit law-enforcement-initiated questioning of a defendant following his initial appearance. (T.d. 36)

In addition, Morris's suppression motion raised the issue of whether Morris had invoked his right to counsel during his interview with Detectives Gleckler and Bender. (T.d. 36)

The state countered with a memorandum in response to Morris's suppression motion. (T.d. 44) The state argued that the trial court should follow *Montejo* because it is directly on point. The state maintained that since Morris had not been formally charged, the trial court should analyze this issue as a Fifth Amendment, rather than a Sixth Amendment right-to-counsel case. Additionally, the state addressed the issues of whether Morris voluntarily waived his rights under *Miranda* and whether he invoked the right to counsel under the Fifth Amendment during his interview with Detectives Gleckler and Bender. (T.d. 44) The state emphasized these same points at the suppression hearing and noted that the First District had cited *Montejo* with approval in its own decision in *State v. Furr*, 1st Dist. Hamilton No. C-170046, 2018-Ohio-2205, ¶ 6 (holding that a defendant's decision to waive the right to counsel need not itself be counseled). (T.p. 7-10)

After taking Morris's suppression motion under advisement, the trial court issued a written decision, and granted the motion on March 10, 2023. (T.d. 60, p. 2) In its decision, the trial court concluded that *Montejo* does not apply under Ohio's Constitution, finding that the right to counsel in Article I, Section 10 provides greater protection than the right to counsel under the Sixth Amendment. (T.d. 60, p. 12-13) In so ruling, the trial court did not rely on any supporting persuasive Ohio authority or acknowledge that other Ohio appellate courts and a majority of state courts have followed *Montejo*. (T.d. 60) The trial court also concluded that Morris exercised his right to counsel during his interview. (T.d. 60, p. 13-14)

The First Appellate District, over a strong dissent, affirmed the trial court's decision. The First District agreed that Morris's statements made to Detectives Gleckler and Bender on May 16th were properly suppressed.

The majority agreed that *Montejo*, which has been followed by Ohio law enforcement authorities for the last 15 years, is no longer applicable in Ohio under the principle of federalism. The majority interpreted the right to counsel under Article I, Section 10 of Ohio's Constitution as providing more expansive protections to a criminal defendant's right to counsel than the Sixth Amendment.

Second, the majority held that the Sixth Amendment right to counsel attached at Morris's initial appearance following arrest, relying on dicta from another district. In referring to the hearing as Morris's "arraignment," the majority laid bare its fundamental misunderstanding of an initial appearance under Crim.R. 5 and of its significant distinction from a post-indictment "arraignment" under Crim.R. 10 and a "critical stage" in the proceedings. *See State v. Morris*, 1st Dist. Hamilton No. C-230108, 2023-Ohio-4105, ¶ 22, 24.

The majority, however, declined to address whether Morris invoked counsel during questioning when a detective informed Morris that "anybody can talk to a lawyer" in response to Morris asking the question, "I can't see a lawyer?" (T.d. 60, pp. 13-14)

This Court accepted the state's appeal on all three of the constitutional issues raised by the state.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1: COURTS MUST BE CAUTIOUS AND CONSERVATIVE WHEN ASKED TO EXPAND CONSTITUTIONAL RIGHTS UNDER THE OHIO CONSTITUTION. UNDER THIS STANDARD, THE CASE OF *MONTEJO V. LOUISIANA*, 556 U.S. 778, 786, 129 S. CT. 2979, 2085, 173 L.ED.2D 955 (2009), APPLIES UNDER OHIO'S CONSTITUTION.

The First Appellate District, applying the principle of federalism, determined that the United States Supreme Court case of *Montejo v. Louisiana*, 556 U.S. 778, 797, 129 S.Ct. 2079, 173 L.Ed.2d 955, does not apply under Ohio's Constitution. In sum, *Montejo* allows police-initiated interrogation of a criminal defendant under the Sixth Amendment after a defendant has been assigned counsel at arraignment or similar proceeding, provided the defendant did not expressly request counsel at the initial appearance and voluntarily waived *Miranda* rights prior to the interrogation. *Montejo*, supra.

Montejo clarifies the boundaries of police-initiated interrogations and reinforces the right to counsel. As such, *Montejo*'s holding does not run afoul of the right to counsel under Article I, Section 10 of Ohio's Constitution, which contains language that a criminal defendant's right to counsel is no broader than that right under the Sixth Amendment. The more restrictive right-to-counsel language in Ohio's Constitution easily defeats Morris's federalism argument and provides no reason to discard case precedent that Ohio law enforcement officers have followed over the last 15 years.

Montejo v. Louisiana overrules *Michigan v. Jackson*

In *Michigan v. Jackson*, a divided United States Supreme Court held that once a defendant asserted his right to counsel at an arraignment or similar proceeding, any waiver of his right to counsel for a later police-initiated interrogation is invalid. *Michigan v. Jackson*, 475 U.S. 625, 641, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986). In his dissenting opinion, Justice Rehnquist (joined by Justices Powell and O'Connor) recognized the problem with the presumption announced by the majority: "The problem with the limitation the Court places on the Sixth Amendment version of the *Edwards* rule is that, unlike a defendant's "right to counsel" under *Miranda*, which does not arise until affirmatively invoked by the defendant during custodial interrogation, *a defendant's Sixth Amendment right does not depend at all on whether the defendant has requested counsel.*" (Emphasis added.) *Id.* at 641 (Rehnquist, J., dissenting). Even Chief Justice Burger, in his concurring opinion, recognized that the *Jackson* decision would produce "bad law" that would need to be reexamined:

> We must, of course, protect persons in custody from coercion, but step by step we have carried this concept well beyond sound, common-sense boundaries. The Court's treatment of this subject is an example of the infirmity of trying to perform the rulemaking function on a case-by-case basis, ignoring the reality that the criminal cases coming to this Court, far from typical, are the "hard" cases. *Stare decisis* calls for my following the rule of *Edwards* in this context, but plainly the subject calls for reexamination. Increasingly, to borrow from Justice Cardozo, more and more "[criminals] . . . go free because the constable has blundered."

Jackson at 637 (Burger, C.J., concurring in judgment), quoting *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

Chief Justice Burger's call for reexamination was answered in *Montejo*, which found "that the marginal benefits of *Jackson* (viz., the number of confessions obtained coercively that are suppressed by its bright-line rule and would otherwise have been admitted) are dwarfed by its substantial costs (viz., hindering 'society's compelling interest in finding, convicting, and punishing those who violate the law,' *Moran v. Burbine*, 475 U.S. 412, 426, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)])." *Montejo* at 793.

The *Montejo* court held that *Jackson*'s presumption was unwarranted and "superfluous" because its pre-*Jackson* decisions[1] had already enshrined and ensured "'a suspect's voluntary choice not to speak outside his lawyer's presence' before his arraignment," which "suffice[d] to protect that same choice after arraignment." *Id.* at 795. In addition, the court recognized that there was no need to presume that an indigent defendant who never asked for counsel but was appointed counsel anyway would not voluntarily waive his right to counsel. *See id.* at 789 ("No reason exists to assume that a defendant like Montejo, who has done *nothing at all* to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present." (Emphasis sic.)

The *Montejo* court pointed out the unworkability of *Jackson* in states (like Ohio) where "the appointment of counsel is automatic upon a finding of indigency." *Id.* at 783. States like Michigan, on the other hand, "whose scheme produced the factual background for [the] decision in *Michigan v. Jackson*," "require the indigent defendant formally to request counsel before any appointment is made, which usually occurs after the court has informed him that he will receive counsel if he asks for it." *Id.* at 783. So the *Montejo* court found that *Jackson*'s bright-line rule was unnecessary because "when a court appoints counsel for an indigent defendant in the

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); and *Minnick v. Mississippi*, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990).

absence of any request on his part, there is no basis for a presumption that any subsequent waiver of the right to counsel will be involuntary." *Montejo* at 789.

In Ohio, an indigent criminal defendant facing more than six months in jail must be assigned counsel to represent the defendant "at every stage of the proceedings from their initial appearance before a court through appeal as of right, unless the defendant, after being fully advised of their right to assigned counsel, knowingly, intelligently, and voluntarily waives their right to counsel." *See* Crim.R. 44(A); Crim.R. 2(A). The "initial appearance" referred to in Crim.R. 44(A) is found in Crim.R. 5(A) and applies, unsurprisingly, "[w]hen a defendant first appears before a judge or magistrate[.]" *See* Crim.R. 5(A). The purpose of the initial appearance set forth in the rule is to "advise the accused of his constitutional rights and to inform him of the nature of the charge against him." *State v. Riddle*, 1st Dist. Hamilton No. C-220506, 2023-Ohio-296, ¶ 18, quoting *City of Akron v. Berenato*, 9th Dist. Summit No. 30089, 2023-Ohio-296, ¶ 14, citing *State v. Trice*, 9th Dist. Summit Nos. 29258 and 29283, 2019-Ohio-5098, ¶ 7, quoting *Hamilton v. Brown*, 1 Ohio App.3d 165, 168, 440 N.E.2d 554 (12th Dist.1981). Importantly, Crim.R. 5(A) specifically provides: "In felony cases the defendant shall not be called upon to plead either at the initial appearance or at a preliminary hearing." *See also* R.C. 2937.02, codifying Crim.R. 5(A).

That is because in a felony case, a defendant is not called upon to enter a plea to an indictment, information, or complaint until "arraignment." *See* Crim.R. 10(A); *see also* R.C. 2943.02. "The purpose of arraignment is to inform the defendant of the charges against him and ask that he plead to those charges." *State v. Morgan*, 2d Dist. Clark No. 2294, 1987 Ohio App. LEXIS 7221, *24 (May 28, 1987). Crim.R. 10(A) explains the arraignment procedure:

> Arraignment shall be conducted in open court, and shall consist of reading the indictment, information or complaint to the defendant, or stating to the defendant the substance of the charge, and calling on the defendant to plead thereto. The defendant may in open court waive the reading of the indictment, information, or complaint. The defendant shall be given a copy of the indictment, information, or complaint, or shall acknowledge receipt thereof, before being called upon to plead.

Often an "initial appearance," governed by Crim.R. 5(A), is conflated with an "arraignment," governed by Crim.R. 10(A).

In this case, for example, the First District referred to the proceeding under Crim.R. 5(A) as Morris's "arraignment." *Morris* at ¶ 22 (stating, "During his arraignment, the judge established bond, apprised Morris of the nature of the charge, determined probable cause, and appointed counsel. *See* Crim.R. 5(A)."). This is no surprise given that the local rules in Hamilton County Municipal Court, also cited by the First District, refer to a defendant's initial appearance as an arraignment:

> 9.11(b). Scheduling of Events: The Scheduling begins with arraignment.
>
> 1. Arraignment: shall be scheduled on the first working day after a physical arrest and/or lock-up. * * *

See Hamilton County Municipal Court Loc.R. 9.11(b)(1). Hamilton County is not the only jurisdiction to use those terms interchangeably although they refer to different proceedings. The Twelfth District has observed: "This court is certainly not the only court that has overlooked the fact that Crim.R. 5(A) applies to just initial appearances and preliminary hearings." (Citations omitted.) *State v. Bunch*, 12th Dist. Butler No. CA2022-12-124, 2023-Ohio-1602, ¶ 8, 6 (the

plain language of Crim.R. 5(A) makes clear that its procedure does not apply to arraignments but only to initial appearances and preliminary hearings).

In this case, over a strong dissent, two judges of the First District affirmed a trial judge's decision to jettison this Court's longstanding right-to-counsel precedent by inventing a broader right to counsel under Ohio's Constitution, with zero consideration of the significant textual difference between the right-to-counsel provisions in the federal and Ohio Constitutions.

The Sixth Amendment to the United States Constitution states, in pertinent part, "In all criminal prosecutions, the accused shall * * * have the Assistance of Counsel for his defence." Article I, Section 10 of the Ohio Constitution uses markedly different language in providing that "[i]n any *trial*, in any court, the party accused shall be allowed to appear and defend in person and with counsel." (Emphasis added.)

This Court's "interpretation of Section 10, Article I has paralleled the United States Supreme Court's interpretation of the Sixth Amendment[.]" *State v. Self*, 56 Ohio St.3d 73, 78, 564 N.E.2d 446 (1990); *see also State v. Milligan*, 40 Ohio St.3d 341, 533 N.E.2d 724 (1988) ("the right to counsel afforded by Section 10, Article I of the Ohio Constitution is comparable to but independent of similar guarantees provided by the Sixth Amendment to the United States Constitution"). This Court has "intertwined a defendant's right to counsel under the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution." *State v. Hackett*, 164 Ohio St.3d 74, 2020-Ohio-6699, 172 N.E.3d 75, ¶ 25 (Fischer, J., concurring).

This Court has long recognized its singular role in interpreting provisions of the Ohio Constitution that are coextensive with its federal counterpart: "[W]e are not bound to walk in lockstep with the federal courts when it comes to our interpretation of the Ohio Constitution."

State v. Smith, 162 Ohio St.3d 353, 2020-Ohio-4441, 165 N.E.3d 1123, ¶ 28. And this Court doesn't always do so. *See State v. Brown*, 143 Ohio St.3d 444, 2015-Ohio-2438, 39 N.E.3d 496, ¶ 23 (interpreting Article I, Section 14 to provide greater protection against the Fourth Amendment); *State v. Bode*, 144 Ohio St.3d 155, 2015-Ohio-1519, 41 N.E.3d 1156, ¶ 23-27 (Ohio's right-to-counsel provision provides greater protection than the right to counsel protected by the Due Process Clause of the Fourteenth Amendment with respect to certain juvenile delinquency adjudications).

However, while it is true that "the Ohio Constitution is a document of independent force," *Arnold v. Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993), this Court has "sworn not to create new, Ohio-specific constitutional doctrines absent 'compelling reasons why Ohio constitutional law should differ from the federal law.'" *Bode* at ¶ 33 (French, J., dissenting), quoting *State v. Wogenstahl*, 75 Ohio St.3d 344, 363, 662 N.E.2d 311 (1996); *Arnold* at fn. 8 (this Court "has not, on most occasions, used the Ohio Constitution as an independent source of constitutional rights"). Instead, this Court has acknowledged that it "must be cautious and conservative when we are asked to expand constitutional rights under the Ohio Constitution, particularly when the provision in the Ohio Constitution is akin to a provision in the U.S. Constitution that has been reasonably interpreted by the Supreme Court." *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶ 76, citing *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, ¶ 28-29 (O'Connor, J., dissenting).

But this Court recognizes that the first step in construing the Ohio Constitution in relation to its federal counterpart is to "look first to the text of the document as understood in light of our history and traditions." *Smith* at ¶ 29.Only the dissenting judge in the court below bothered to

consider the significant difference between the text of the federal and Ohio right-to-counsel provisions:

> I find it hard to reconcile the view that Article I, Section 10 has a history and tradition of being more expansive than the Sixth Amendment with the actual text of the two provisions. Article I, Section 10 of the Ohio Constitution provides, in relevant part, "[i]n *any trial in any court*, the party accused shall be allowed to appear and defend in person and with counsel." (Emphasis added.) The Sixth Amendment provides, in relevant part, "[i]n *all criminal prosecutions*, the accused shall enjoy the right to * * * have the [a]ssistance of [c]ounsel for his defense." (Emphasis added.) In my view, the words of the Sixth Amendment are broader, applying to "all criminal prosecutions" while Article 1, Section 10 requires not only a "trial" but a "trial in any court." This difference in the Ohio Constitution is particularly notable because the inaugural Ohio Constitution of 1802 used the phrase "in all criminal prosecutions" found in the federal Constitution. Article VIII, Section 11, Ohio Constitution (1802). This change to narrower language cuts against the view that Article 1, Section 10 is supposedly broader.

Morris at ¶ 69 (Winkler, J., dissenting).

Even though this Court has consistently "intertwined" a defendant's right to counsel under the state and federal Constitutions, the First District tried to unzip the two to avoid the federal court's interpretation of the Sixth Amendment right to counsel in *Montejo*. This approach may have been justified had it been tethered to the history or unique language of the Ohio Constitution's right-to-counsel provision. Instead, the First District invented a broader

right under the state Constitution, only to re-zip the state and federal provisions by clinging to the federal court's earlier and no-longer valid interpretation of the Sixth Amendment right to counsel in *Jackson*. *See Morris* at ¶ 49, 55 ("We follow the bright-line rule announced in *Jackson*."). In other words, for all its bluster about "Ohio's jurisprudence finding more robust rights for criminal defendants under the Ohio Constitution than the United States Constitution," *id.* at ¶ 54, the First District's analysis of the state and federal right-to-counsel provisions was "driven simply by disagreement with the result reached by the federal courts' interpretation" of the Sixth Amendment in *Montejo*, an approach to constitutional analysis flatly rejected by this Court in *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, at ¶ 76.

This Court recently followed *Montejo* in *State v. Taylor*, ___ Ohio St.3d ___, 2024-Ohio-1752, ___ N.E.3d ___, ¶ 22-24 (Sixth Amendment did not require the suppression of a defendant's statements to police made before a criminal prosecution commenced—and, even if the right to counsel attached, the defendant waived it). Until the majority's ruling in this case, all Ohio appellate districts, including the First District itself, followed *Montejo* in interpreting the right to counsel. *See State v. Furr*, 1st Dist. Hamilton No. C-170046, 2018-Ohio-2205, at ¶ 6; *State v. Ojile*, 1st Dist. Hamilton No. C-160425, 2017-Ohio-9319, ¶ 31; *State v. Kyles*, 12th Dist. Butler No. CA2023-07-083, 2024-Ohio-998, ¶ 42 (decided after *Morris*); *State v. Motalvo*, 5th Dist. Knox No. 17 CA 000019, 2018-Ohio-3142, ¶ 34; *State v. Crawford*, 2d Dist. Montgomery No. 24833, 2012-Ohio-3595, ¶ 23; *State v. Yoder*, 5th Dist. Stark No. 2011-CA-00027, 2011-Ohio-4975, ¶ 65-67; *State v. Tyler*, 6th Dist. Lucas No. L-06-1326, 2010-Ohio-1368, ¶ 33.

Montejo's interpretation of the Sixth Amendment preserves the right to counsel at police-initiated interrogation after the initial court appearance. The more restrictive right-to-counsel language contained in Article I, Section 10 of Ohio's Constitution undercuts Morris's position

that a criminal defendant should be afforded broader right-to-counsel protection at the initial appearance in Ohio.

Consequently, there is no support in Ohio's Constitution to abrogate *Montejo* and wipe out 15-years of Ohio court precedent. Returning to *Jackson* would once again alter the rules of police-initiated interrogation in Ohio. Such a result would undermine the confidence and predictability of the law so desperately needed by law enforcement and Ohio's citizens. The state urges this Court to uphold longstanding Ohio court precedent that the United States Supreme Court's decision in *Montejo* applies to the interpretation of the right to counsel under both the federal and Ohio Constitutions.

PROPOSITION OF LAW NO. 2: THE SIXTH AMENDMENT RIGHT TO COUNSEL DOES NOT APPLY UNTIL A DEFENDANT HAS BEEN FORMALLY CHARGED. THE FILING OF A CRIMINAL COMPLAINT, AND THE APPOINTMENT OF COUNSEL AT ARRAIGNMENT WHERE BOND IS CONSIDERED, DOES NOT CONSTITUTE FORMAL CHARGES TRIGGERING THE SIXTH AMENDMENT. FORMAL CHARGES COMMENCE AT A PRELIMINARY HEARING, BECAUSE THE STATE HAD NOT INDICTED MORRIS AT THE TIME OF HIS MAY 16, 2022, POLICE INTERVIEW, MORRIS'S SIXTH AMENDMENT RIGHT TO COUNSEL HAD NOT YET ATTACHED.[2]

Once the Sixth Amendment right to counsel attaches, a criminal defendant has the right to the assistance of counsel during "critical stages" of the prosecution. *Missouri v. Frye*, 566 U.S. 134, 140, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012); *Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009). "Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea." (Emphasis added.) *Frye* at 140, citing *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961) (arraignment requiring the assertion of defenses that could be irretrievably lost); *Massiah* v. *United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) (postindictment

[2] The state's proposition of law mirrors the language used by the trial court and the First District, and it describes Morris's initial appearance on May 16, 2022 as an arraignment.

interrogation); *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d (1966) (postindictment lineup); *Argersinger* v. *Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) (guilty plea).

The First District's confusion about the terminology used to describe a defendant's initial appearance was compounded by its failure to grasp the distinction between the "attachment" of a defendant's Sixth Amendment right to counsel[3] and what constitutes a "critical stage" in the proceedings, requiring the presence of counsel. *See Rothgery v. Gillespie County*, 554 U.S. 191, 212, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008) (the government made "an analytical mistake in its assumption that attachment necessarily requires the occurrence or imminence of a critical stage.") As Justice Alito explained in *Rothgery*, "[T]he term 'attachment' signifies nothing more than the beginning of the defendant's prosecution. It does not mark the beginning of a substantive entitlement to the assistance of counsel." *Id.* at 213-214 (Alito, J., concurring, joined by Roberts, C.J., and Scalia, J.)

In *Rothgery*, the United States Supreme Court held that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *Id.* at 213. The court recognized that such an initial appearance "plainly signals attachment, even if it is not itself a critical stage." *Id.* at 212.

Even if an Ohio criminal defendant's right to counsel attaches at a Crim.R. 5 initial appearance, neither the initial appearance itself nor the Crim.R. 10 arraignment is a critical stage in the prosecution requiring the assistance of counsel. Unlike the Alabama "arraignment" procedure found by the United States Supreme Court to be a critical stage in *Hamilton*, Ohio's

[3] Despite its newly-proclaimed broadened right to counsel under the state constitution, the First District supported its holding as to when Morris's right to counsel attached, with cases that interpreted the federal right to counsel.

Crim.R. 10 arraignment does not require a defendant to raise certain defenses or risk forfeiture of those defenses. *See Hamilton*, 368 U.S. at 54.

Applying these well-settled principles, Morris's preindictment interrogation by police was not a critical stage. The United States Supreme Court specifically rejected a defendant's argument that "[t]he right to noninterference with an attorney's dealings with a criminal suspect * * * arises the moment that the relationship is formed, or at the very least, once the defendant is placed in custodial interrogation." *Moran v. Burbine*, 475 U.S. 412, 429, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). In *Moran*, the Supreme Court held that, "For an interrogation, no more or less than for any other 'critical' pretrial event, the possibility that the encounter may have important consequences at trial, standing alone, is insufficient to trigger the Sixth Amendment right to counsel." *Id.* at 432.

In this case, the First District made the fundamental "mistake" of confusing the "critical stage question" with the "attachment question." *See Rothgery*, 554 U.S. at 211. As the Sixth Circuit Court of Appeals has explained:

> These questions must be kept "distinct." [*Rothgery*] at 212 (citation omitted). That is why the Supreme Court has repeatedly rejected attempts by criminal defendants to extend the Sixth Amendment right to counsel to preindictment proceedings, even where the same proceedings are critical stages when they occur postindictment.

Turner v. United States, 885 F.3d 949, 953 (2018). Even if the First District correctly concluded that Morris's right to counsel attached at the initial appearance, the court erred by holding that his uncounseled waiver preceding his pre-indictment interrogation by police was invalid.

Therefore, the state did not violate Morris's rights to counsel under either the federal or Ohio Constitutions when they interviewed him in the absence of his attorney. *See Taylor*, 2024-Ohio-1752, at ¶ 30. And even if his right to counsel had attached, Morris validly waived them "when he relinquished his Fifth Amendment right to counsel after he received the *Miranda* warnings." *See id.*

PROPOSITION OF LAW NO. 3: A SUSPECT MUST UNAMBIGUOUSLY REQUEST COUNSEL, MEANING A SUSPECT MUST ARTICULATE A DESIRE TO HAVE COUNSEL PRESENT WITH SUFFICIENT CLARITY THAT A REASONABLE POLICE OFFICER IN THE CIRCUMSTANCES WOULD UNDERSTAND THE STATEMENT TO BE A REQUEST FOR AN ATTORNEY.

The issue of whether Morris invoked his right to counsel during his May 16th interview with detectives was squarely before the appellate court, and that court was derelict in failing to address it. *See Morris* at ¶ 56. Had the appellate court addressed the issue, the law would have been clear that Morris had neither clearly nor unequivocally invoked his right to counsel.

The state argued below that the trial court erred when it ruled that Morris invoked his right to counsel in the May 16, 2022, interview he had with Detectives Gleckler and Bender. About 45 minutes into the interview, Morris said, "I can't see a lawyer?" (T.p. 60, p. 13; State's Exhibit 2) Detective Gleckler responded, "anybody can talk to a lawyer." (T.p. 60, p. 13; State's Exhibit 2) After a few seconds, Detective Gleckler repeated, "anybody can talk to a lawyer," and Morris replied, "yeah cause that's – we goin' to do that because I don't know what you're talking about." (T.d. 60, p. 13; State's Exhibit 2) After this exchange, Morris continued answering Detective Gleckler's questions and never expressed a desire for an attorney or termination of the interview. (T.p. 19, 44-48, 50-51, 62, State's Exhibit 2)

The police must "scrupulously honor the defendant's exercise of his right to cut off questioning." *State v. Murphy*, 91 Ohio St.3d 516, 519, 2001-Ohio-112, 747 N.E.2d 765 (2001),

citing *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), and *Miranda* at 479. However, "police must honor an invocation of the right to cut off questioning only if it is unambiguous." *Id.*, citing *Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994).

The question whether an accused has "actually invoked his right to counsel" requires "an objective inquiry." *Davis* at 458-459. The United States Supreme Court has stressed that its precedent does not require cessation "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel." *Id.* at 459. In addition, if a suspect makes an ambiguous or equivocal statement concerning counsel, "the police are not required to end the interrogation" or "ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights." *Berghuis v. Thompkins*, 560 U.S. 370, 381, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010), citing *Davis* at 461-462. A defendant's words must also be examined "not in isolation but in context." *Murphy* at 520-521.

Under the Fifth Amendment, an accused must clearly invoke his constitutional right to counsel in order to raise a claim of deprivation of counsel. "[T]he suspect must unambiguously request counsel. * * * [H]e must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), does not require that the officers stop questioning the subject." *Davis*, 512 U.S. at 459.

In *State v. Jackson*, 107 Ohio St.3d 300, 2006-Ohio-1, 839 N.E.2d 362, this Court found that because the defendant's statements, "'I talked to a lawyer or something' or 'when I talk to

my lawyer' did not amount to a clear, unambiguous, or unequivocal invocation of the right to counsel, and the trial court did not abuse its discretion in overruling his motion to suppress." *Jackson* at ¶ 95. This Court went on to examine other cases where courts have found a request for counsel was neither clear nor unambiguous:

> In *State v. Henness* (1997), 79 Ohio St.3d 53, 62-63, 1997 Ohio 405, 679 N.E.2d 686, we held that "I think I need a lawyer" is not an unequivocal assertion of the right to counsel. In *State v. Brown*, 100 Ohio St.3d 51, 2003 Ohio 5059, 796 N.E.2d 506, ¶ 19, we held that "don't I supposed to have a lawyer present" was "at best ambiguous." Other courts have found similar remarks to be ambiguous and thus not invoking the constitutional right to counsel. *See, e.g., Mueller v. Angelone* (C.A.4, 1999), 181 F.3d 557, 573-574 (defendant's question to police, "do you think I need an attorney here" answered by headshaking, a shrug, and the statement "You're just talking to us," was not an unequivocal request); *Dormire v. Wilkinson* (C.A.8, 2001) 249 F.3d 801 ("Could I call my lawyer?" followed by police response of "yes" did not invoke the right to counsel); *United States v. Zamora* (C.A. 10, 2000), 222 F.3d 756, 766 ("I might want to talk to an attorney" was not "an unequivocal request for counsel").

Id. at ¶ 94.

Here, as the state argued below, Morris's statement questioning whether he could see his lawyer is similar to the above cases in which appellate courts have found there was not an unequivocal invocation of the right to counsel. *See also State v. Wooten*, 11th Dist. Ashtabula No. 2012-A-0021, 2013-Ohio-1841, ¶ 24-25 (because appellant's statement "maybe I should talk to my attorney" failed to meet the requisite level of clarity, the officers were not required to stop

questioning him.). Morris's statement is nearly identical to the case of *Dormire v. Wilkinson, Dormire v. Wilkinson,* 249 F.3d 801 (8th Cir.2001), cited by this Court in *Jackson*, supra, where defendant said "Could I call my lawyer?," followed by a police response of "yes." Morris's question "I can't see a lawyer?" was followed immediately by Detective Gleckler responding yes when he said, "anyone can talk to a lawyer."

Further, Morris's question "I can't see a lawyer?" followed immediately by Detective Gleckler responding "anyone can talk to a lawyer" is not an unambiguous statement that Morris did not want to talk with police without a lawyer present. Morris simply asked police a question whether he *could* see his lawyer, not that he wanted to see his lawyer. *See Obershaw v. Lanman*, 453 F.3d 56, 64-65 (1st Cir.2006) (when the suspect asked, "Can I talk to a lawyer first?," he merely "inquired whether he could talk to a lawyer, rather than expressly asserting that he in fact wanted to do so.") Any ambiguity in Morris's question led Detective Gleckler to clarify that "anybody can talk to a lawyer." Detective Gleckler acted reasonably in an attempt to clarify that Morris absolutely had the right to talk to a lawyer. Once it was explicitly clarified for Morris that he could talk to a lawyer, Morris continued with the interview and never asked to see or talk to a lawyer during the remainder of the interview.

If the appellate court had considered the issue squarely before it, it would have had to conclude that Morris did not make a clear, unambiguous, or unequivocal invocation of the right to counsel. Accordingly, the appellate court should have held that the trial court erred when it suppressed Morris's statements on the ground that he invoked his right to counsel.

CONCLUSION

The state asks this Court to clarify that the scope of Ohio's right to counsel is no broader than its federal counterpart, and that there is no reason to deviate from the holding in *Montejo.* Even if Morris's right to counsel "attached" at the initial appearance, his pre-indictment

interrogation by detectives was not a "critical stage," requiring the presence of counsel. And even if it was, Morris waived that right prior to the interrogation. Finally, Morris failed to clearly and unequivocally invoke his right to counsel during the interrogation, so the trial court erred by suppressing Morris's statements in the interview, and the First District erred by failing to address the issue altogether. The state asks this Court to reverse the judgment of the First District, and to hold that the trial court erred by granting Morris's motion to suppress, and remanding this matter to the trial court for further proceedings.

Respectfully,

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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Merit Brief, by e-mail, addressed to Krista Gieske (0080141), Assistant Public Defender, at *kgieske@hamiltoncountypd.org*, this 17th day of May, 2024.

/s/ Ronald W. Springman, Jr.
Ronald W. Springman, Jr. (0041413P)
Chief Assistant Prosecuting Attorney

IN THE

SUPREME COURT OF OHIO

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

NOTICE OF APPEAL OF PLAINTIFF-APPELLANT, STATE OF OHIO

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IN THE

SUPREME COURT OF OHIO

STATE OF OHIO	:	NO.
Plaintiff-Appellant	:	
vs.	:	NOTICE OF APPEAL OF PLAINTIFF-APPELLANT, STATE OF OHIO
ISAIAH MORRIS	:	
Defendant-Appellee	:	

Plaintiff-Appellant, State of Ohio, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals case number C-230108 rendered on November 15, 2023. This case involves a felony and is of public or great general interest.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Notice of Appeal of Appellant, State of Ohio, by email, addressed to Krista Gieske (0080141), Attorney at Law, at *kgieske@hamiltoncountypd.org*, Courtney DiVincenzo (0101639), Attorney at Law, at *CDiVincenzo@hamiltoncountypd.org,* and by U.S. mail, addressed to Timothy Young, Ohio Public Defender, at 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215-2998, this 19th day of December, 2023.

/s/Ronald W. Springman, Jr.
Ronald W. Springman, Jr., 0041413P
Chief Assistant Prosecuting Attorney

ENTERED
NOV 15 2023

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-230108 TRIAL NO. B-2202366
Plaintiff-Appellant,	:	
vs.	:	*JUDGMENT ENTRY.*
ISAIAH MORRIS,	:	
Defendant-Appellee.	:	

This cause was heard upon the appeal, the record, the arguments, and the briefs.

The judgment of the trial court is affirmed for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty, and orders that costs are taxed under App.R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App.R. 27.

To The Clerk:
Enter upon the Journal of the Court on 11/15/2023 per Order of the Court.

By:

Administrative Judge

D139832948

ENTERED
NOV 15 2023

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO, Plaintiff-Appellant, vs. ISAIAH MORRIS, Defendant-Appellee.	: : : :	APPEAL NO. C-230108 TRIAL NO. B-2202366 *OPINION.*

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: November 15, 2023

Melissa A. Powers, Hamilton County Prosecuting Attorney, and *Ronald W. Springman, Jr.*, Chief Assistant Prosecuting Attorney, for Plaintiff-Appellant,

Raymond T. Faller, Hamilton County Public Defender, and *Krista Gieske*, Assistant Public Defender, for Defendant-Appellee.

PRESENTED TO THE CLERK
OF COURTS FOR FILING

NOV 15 2023

COURT OF APPEALS

ENTERED
NOV 15 2023

BOCK, Judge.

{¶1} Under Article I, Section 10 of the Ohio Constitution, a person accused of a crime in Ohio is guaranteed the right to counsel. This appeal concerns that state constitutional right and the admissibility of a defendant's uncounseled statements made in a police-initiated interrogation, where the defendant had been arrested, arraigned, and appointed counsel, and after the defendant signed a "Notification of Rights" form without counsel present. We hold that, in these circumstances, the defendant's purported waiver is invalid and therefore, we affirm the trial court's suppression of defendant-appellee Isaiah Morris's statements.

I. Facts and Procedure

{¶2} In May 2023, Morris was arrested and jailed for multiple counts of felonious assault and other offenses unrelated to this appeal. The following morning, Morris was brought to "Room A" at the Hamilton County Justice Center for an arraignment. At his arraignment, the judge reviewed the complaint, determined probable cause, set bond, and appointed counsel to represent Morris.

{¶3} That afternoon, and before Morris had an opportunity to speak with his attorney, Detectives Glecker and Bender of the Cincinnati Police Department interrogated Morris in the Justice Center. The interrogation began with Detective Glecker's word-for-word reading of a "Notification of Rights" form, which provided, in relevant part:

> You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during the 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

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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.

* * *

I understand my rights.

Signed____________________

{¶4} Morris signed the form. The interrogation lasted roughly two hours.

{¶5} Morris moved to suppress the statements made during the interrogation as a violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and his rights under Article I, Section 10 of the Ohio Constitution. In his motion and at the suppression hearing, Morris argued that the right to counsel under the Ohio Constitution affords greater protections than the right under the United States Constitution.

{¶6} At the suppression hearing, Detective Glecker recalled advising Morris of his *Miranda* rights before Morris signed the "Notification of Rights" form. Glecker acknowledged that the form omits any mention of a "waiver." The state entered into evidence Detective Glecker's bodycam footage from the interrogation and the "Notification of Rights" form. His testimony covered his experience as an officer, his familiarity with the arraignment process, and the interrogation.

{¶7} At the close of the hearing, Morris argued that the signed "Notification of Rights" form did not constitute a waiver of his rights, and reiterated his stance that the state constitutional right to counsel provides more robust protections than the federal right. In response, the state contended that Morris had waived his rights under the Fifth and Sixth Amendments to the United States Constitution. Subsequently, both parties submitted supplemental memoranda reiterating these very arguments.

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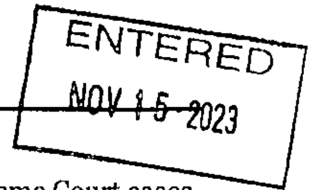
{¶8} The trial court suppressed Morris's statements. The trial court explained that it offered the parties an opportunity to file supplemental briefing and that the state "did not address the Ohio Constitutional issues." The trial court found that the designation-of-counsel form was docketed the morning of Morris's interrogation, Morris's counsel was not notified of the interrogation, the detectives "did not ask Mr. Morris to sign a waiver or acknowledge orally that he was waiving his *Miranda* rights," and the detectives asked Morris about the offense for which Morris was arrested and appointed counsel hours before the interrogation.

{¶9} Additionally, the trial court found that Morris asked, "I can't see a lawyer?" roughly 45 minutes into the interrogation. Detective Glecker replied, "[A]nybody can talk to a lawyer." And Morris responded, "[Y]eah, cause that's, we goin' to do that cause I don't know what you are talking about." Detective Glecker continued the interrogation.

{¶10} The trial court found that Morris's right to counsel had attached at the arraignment. It acknowledged the United States Supreme Court's opinion in *Montejo v. Louisiana*, 556 U.S. 778, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009), which held that the state does not violate an accused's right to counsel under the United States Constitution when law enforcement initiates an interrogation after a defendant secures counsel at arraignment.

{¶11} The trial court, however, relied on the right to counsel under the Ohio Constitution as the basis for suppressing Morris's statements. The trial court conducted an extensive inquiry into the right to counsel under the Ohio Constitution and identified persuasive reasons to find that the Ohio Constitution offers broader right-to-counsel protections than the United States Constitution. It cited the constitutional text, state precedent, the centrality of the right to counsel in Ohio's



criminal legal system, and Kentucky, West Virginia, and Kansas Supreme Court cases, which rejected *Montejo*. Because it found that Ohio's Constitution prohibits the state from initiating uncounseled interrogations after an accused has secured counsel, the trial court suppressed all uncounseled statements made by Morris during the interrogation.

{¶12} Alternatively, the trial court found that Morris's remarks to the detective, "can't I talk to a lawyer?" and "yeah cause that's – we goin' to do that because I don't know what you're talking about," constituted an unequivocal request for an attorney during the interrogation. Therefore, the trial court also found that all statements following that request must be suppressed under the Sixth Amendment to the United States Constitution.

{¶13} The state appeals the trial court's suppression of Morris's statements.

II. Law and Analysis

{¶14} The state's sole assignment of error asserts that the trial court erred as a matter of law by granting Morris's motion to suppress. It offers four issues for review. First, the state argues that Morris's right to counsel had not attached because he had not been formally indicted. Next, the state contends that *Montejo v. Louisiana* governs Morris's right to counsel. Third, the state asserts that the Ohio Constitution does not guarantee a broader right to counsel than the federal Constitution. Finally, the state maintains that Morris did not unambiguously request counsel at the 45-minute mark of the interrogation.

{¶15} The state's appeal of the trial court's decision to grant Morris's motion to suppress "presents a mixed question of law and fact." *State v. Hampton*, 1st Dist. Hamilton No. C-210423, 2022-Ohio-1380, ¶ 5, citing *State v. Winfrey*, 1st Dist. Hamilton No. C-070490, 2008-Ohio-3160, ¶ 19. We "must accept the trial court's

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findings of fact if they are supported by competent and credible evidence." *Id.*, quoting *Winfrey* at ¶ 19. But we "must independently determine, without deference to the trial court, whether the facts satisfy the applicable legal standard." *State v. Bell*, 1st Dist. Hamilton Nos. C-050537 and C-050539, 2007-Ohio-310, ¶ 50.

A. The Right to Counsel Attached at Morris's Arraignment

{¶16} The state first asserts that the trial court mistakenly analyzed Morris's right to counsel under the Sixth Amendment to the United States Constitution. Instead, the state insists, Morris's interrogation and confession must be analyzed under the Fifth Amendment to the United States Constitution.

{¶17} Both Article I, Section 10 of the Ohio Constitution and the Fifth Amendment to the United States Constitution guarantee to individuals a right against compulsory self-incrimination during police interrogations. *See New York v. Quarles*, 467 U.S. 649, 654, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984); *see also State v. Goff*, 128 Ohio St.3d 169, 2010-Ohio-6317, 942 N.E.2d 1075, ¶ 43. To protect that right, the United States Supreme Court "established a set of specific protective guidelines, now commonly known as the *Miranda* rules." *Michigan v. Tucker*, 417 U.S. 433, 443, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974). These protective guidelines, or prophylactic rules, require law enforcement to warn an individual in custody "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 443-444, quoting *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

{¶18} Absent these warnings, "statements obtained during a custodial interrogation are inadmissible." *State v. Montgomery*, 1st Dist. Hamilton No. C-220063, 2022-Ohio-4030, ¶ 17, citing *State v. Hill*, 1st Dist. Hamilton No. C-170507,

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2018-Ohio-3130, ¶ 45. *Miranda* warnings are not required unless the individual is in custody and subjected to an interrogation. *See State v. Strozier*, 172 Ohio App.3d 780, 2007-Ohio-4575, 876 N.E.2d 1304, ¶ 16 (2d Dist.); *see also Hill* at ¶ 46.

{¶19} Beyond *Miranda*'s prophylactic protection of the right to counsel, under Article I, Section 10 of the Ohio Constitution and the Sixth Amendment to the United States Constitution, a person accused of a crime is guaranteed the right to counsel. This right "is a necessary and cherished aspect of our adversarial system of justice." *State v. Chinn*, 2d Dist. Montgomery No. 11835, 1991 Ohio App. LEXIS 6497, 42-43 (Dec. 27, 1991). This right is both broader and narrower than the right under *Miranda*. It is broader as it applies outside of custodial interrogations—it applies to all "critical stages of criminal proceedings." *State v. Wright*, 4th Dist. Highland No. 19CA14, 2020-Ohio-275, ¶ 6; *United States v. Wade*, 388 U.S. 218, 224, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

{¶20} The right is narrower because it "does not attach until a prosecution is commenced." *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996, ¶ 64. This is because it is an *accused's* right to counsel. In other words, the right "becomes applicable only when the government's role shifts from investigation to accusation." *Moran v. Burbine*, 475 U.S. 412, 430, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). So what matters is the initiation of "adversarial judicial proceedings * * * 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " *State v. Norman*, 137 Ohio App.3d 184, 198, 738 N.E.2d 403 (1st Dist.1999), quoting *Kirby v. Illinois*, 406 U.S. 682, 688-690, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). Adversarial criminal proceedings may commence at "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, [which] marks the start of

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adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 208, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008).

{¶21} Ohio courts have recognized that the right "attaches at 'the initiation of adversary judicial criminal proceedings' such as a preliminary examination." *State v. Yoder*, 5th Dist. Stark No. 2011-CA-00027, 2011-Ohio-4975, ¶ 64 (right to counsel attached when defendant "was arraigned and appointed counsel"), quoting *Moore v. Illinois*, 434 U.S. 220, 231, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977); *see State v. Dell*, 2022-Ohio-2483, 192 N.E.3d 1288, ¶ 41 (5th Dist.) ("A preliminary hearing is a critical stage of the criminal process during which a defendant's fundamental right to counsel is protected.").

{¶22} The state acknowledges that, hours before the interrogation, Morris was brought before a judicial officer for his arraignment. *See* Hamilton County Municipal Court Loc.R. 9.11(b)(1). During his arraignment, the judge established bond, apprised Morris of the nature of the charge, determined probable cause, and appointed counsel. *See* Crim.R. 5(A).

{¶23} But the state invokes our opinion in *Bell* to argue that Morris's right did not attach without a formal indictment. In *Bell*, we held that the defendant's Sixth Amendment right to counsel had not attached before an interrogation because attachment requires the initiation of formal charges and "the state had not indicted Bell at the time of the January 15 interview." *Bell*, 1st Dist. Hamilton Nos. C-050537 and C-050539, 2007-Ohio-310, at ¶ 54. Unlike Morris, Bell had not been brought before a judge for his arraignment before police interviewed him. Instead, that interview occurred after officers arrested Bell, "took him to the Springfield Township Police Department, where he was advised of his *Miranda* rights and placed in an

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interview room with Detective Kemper." *Id.* at ¶ 27. Therefore, *Bell* is properly understood to stand for the principle that a defendant's right to counsel does not attach at arrest. *See State v. McBride*, 2d Dist. Montgomery No. 8914, 1985 Ohio App. LEXIS 5936, 25 (Feb. 27, 1985) ("Formal charging, filing a complaint, a court appearance, preliminary hearing, indictment, information or arraignment will activate the right, however, an arrest warrant alone is probably insufficient.").

{¶24} Because Morris's arraignment marked the start of adversarial judicial proceedings, his right to counsel attached.

B. Right to Counsel in Ohio

{¶25} The state challenges the trial court's decision to suppress Morris's statements as a violation of his right to counsel under the Ohio Constitution.

1. Waiver

{¶26} As an initial matter, Morris argues that the state forfeited its state constitutional argument. Morris raised the state constitutional violation in his motion and at the suppression hearing, but the state failed to argue why *Montejo* controls the right to counsel under Article I, Section 10 of the Ohio Constitution. In fact, the trial court requested supplemental briefing and the state failed to reference the Ohio Constitution. The trial court recognized this fact in its decision. Now, for the first time, the state argues that the right to counsel under the Ohio Constitution is no greater than the right under the United States Constitution.

{¶27} We recognize the well-established principle "that a party ordinarily may not present an argument on appeal that it failed to raise below." *State v. Wintermeyer*, 158 Ohio St.3d 513, 2019-Ohio-5156, 145 N.E.3d 278, ¶ 10. This contemporaneous-objection rule is a principle of "fair administration of justice" and relates to "the true relation between court and counsel which enjoins upon counsel the duty to exercise

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diligence and to aid the court, [] not by silence to mislead the court into the commission of error." *State v. Tudor*, 154 Ohio St. 249, 257-258, 95 N.E.2d 385 (1950). This principle, of course, applies to the state's appeal of a decision granting a motion to suppress. *See Wintermeyer* at ¶ 25 ("when the state does not assert in the trial court that a defendant lacks Fourth Amendment standing to challenge a contested search or seizure, the state may not assert that argument in its own appeal from a judgment granting a motion to suppress."). Nevertheless, Morris raised the state constitutional issue in his motion to suppress and the state insisted that the United States Supreme Court's interpretation of the federal constitutional right controls. Therefore, we will address the merits of the parties' arguments.

2. Sixth Amendment Right to Counsel

{¶28} The parties agree that a criminal defendant may waive the right to counsel under the Sixth Amendment to the United States Constitution at an interrogation. *See Montejo,* 556 U.S. at 787, 129 S.Ct. 2079, 173 L.Ed.2d 955. The issue here is whether the right to counsel under Article I, Section 10 of the Ohio Constitution is bound by *Montejo*'s interpretation of the Sixth Amendment.

{¶29} The state argues that the signed "Notification of Rights" form constitutes a valid waiver of his Sixth Amendment right to counsel under *Montejo.*[1] The trial court recognized that in *Montejo,* the United States Supreme Court expressly overruled *Michigan v. Jackson,* 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986). In *Jackson,* the United States Supreme Court held that "if police initiate interrogation

[1] While the state recognizes that the trial court "did not rule on whether Morris, *before* questioning had begun, voluntarily waived his *Miranda* rights," the state contends that "the trial court implicitly ruled that Morris voluntarily waived his *Miranda* rights *before* police questioning. Otherwise, it would not have maintained that the *Montejo* decision was on point." But the trial court's decision makes clear that the Ohio Constitution prohibited the detectives "from initiating an interrogation." Thus, there was no need for the trial court to analyze the validity of the "Notification of Rights" form as a *Miranda* waiver.

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after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." *Jackson* at 636. In *Montejo,* a divided United States Supreme Court reversed course, finding *Jackson* "unworkable" and that its benefits are limited to "preclud[ing] the state from badgering defendants into waiving their previously asserted right." *Montejo* at 793. Plus, the *Montejo* court weighed "the marginal benefits of the *Jackson* rule * * * against its substantial costs to the truth-seeking process and the justice system" and concluded that *Jackson* "does not 'pay its way.' " *Montejo* at 795. Accordingly, the *Montejo* court held that its Fifth Amendment prophylactic rules adequately protect the right to counsel under the Sixth Amendment and ensure the voluntariness of a defendant's waiver. *Id.* at 793.

{¶30} The trial court recognized that under *Montejo,* police may approach represented defendants for interrogation. The trial court then turned to whether Morris's uncounseled statements during the interrogation must be suppressed under the Ohio Constitution.

3. Issue of first impression

{¶31} We must determine, as a matter of first impression in this state, whether *Montejo* is consistent with the right to counsel under Article I, Section 10 of the Ohio Constitution. The state argues that the Fifth District considered this issue in *Yoder* and held that *Montejo's* interpretation of the federal right to counsel conforms to the right under the Ohio Constitution. We note that decisions of our sister state appellate courts are not controlling authority, though "we afford those decisions due consideration and respect." *Phillips v. Phillips,* 2014-Ohio-5439, 25 N.E.3d 371, ¶ 32 (5th Dist.). And without question, "the reasoning of other districts is persuasive." *State v. Thompson,* 1st Dist. Hamilton No. C-120516, 2013-Ohio-1981, ¶ 10.

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{¶32} In *Yoder*, the court recognized that *Montejo* expressly overruled *Jackson* and "eliminated the per se invalidation of *Miranda* waiver once counsel was requested." *Yoder*, 5th Dist. Stark No. 2011-CA-00027, 2011-Ohio-4975, at ¶ 65. Like Morris, Yoder argued that the Ohio Constitution required the suppression of any uncounseled statements made to law enforcement after his arraignment. *Id.* at ¶ 67. While *Yoder* recited the Ohio Supreme Court's admonition for caution when interpreting rights under our state Constitution, a closer reading of *Yoder* reveals that the court did not address the state constitutional issue. *See id.* at ¶ 68, quoting *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶ 76. The court provided no analysis of Yoder's state constitutional claim. Instead, in affirming the trial court's decision denying his motion to suppress, the court relied on the fact that Yoder had stipulated that he "validly waive[d] his *Miranda* rights" before his interrogation. *Id.* at ¶ 69. As such, the court addressed the assignment of error in a manner that avoided the constitutional question. And *Yoder* is distinguishable as Morris has never stipulated that he validly waived his rights.

4. State Constitutionalism

{¶33} We begin with the principle that Ohio, and other states, are "free to construe their state constitutions as providing different or even broader individual liberties than those provided under the federal Constitution." *Arnold v. City of Cleveland*, 67 Ohio St.3d 35, 41, 616 N.E.2d 163 (1993). Indeed, "state constitutions are a vital and independent source of law." *Gardner* at ¶ 76, citing William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U.L.Rev. 535 (1986). This principle is well recognized in this state: "it is well to remember that Ohio is a sovereign state and that the fundamental guaranties of the Ohio Bill of Rights have undiminished vitality." *Direct*

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Plumbing Supply Co. v. Dayton, 138 Ohio St. 540, 545, 38 N.E.2d 70 (1941). Therefore, courts may interpret the Ohio Constitution as affording greater rights if "such an interpretation is both prudent and not inconsistent with the intent of the framers." That is not to say that our state Constitution is wholly incongruous with its federal counterpart; rather, "[w]e can and should borrow from well-reasoned and persuasive precedent from other states and the federal courts." *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 22, citing *Davenport v. Garcia*, 834 S.W.2d 4, 20-21 (Tex.1992); *see Arnold* at 42.

{¶34} Our interpretation of the right to counsel under Article I, Section 10 of the Ohio Constitution "should not be driven simply by disagreement with the result reached by the federal courts' interpretation." *Gardner* at ¶ 20. When the language of the Ohio and United States Constitutions are coextensive, there should be "compelling reasons why Ohio constitutional law should differ from the federal law." *State v. Wogenstahl*, 75 Ohio St.3d 344, 363, 662 N.E.2d 311 (1996). But coextensive provisions under the Ohio and United States Constitutions do not foreclose the possibility that "[i]n some circumstances, rights afforded to people under the Ohio Constitution are greater than those afforded under the United States Constitution." *State v. Hackett*, 164 Ohio St.3d 74, 2020-Ohio-6699, 172 N.E.3d 75, ¶ 26 (Fisher, J., concurring).

5. *Article I, Section 10 of the Ohio Constitution*

{¶35} Beginning with the constitutional text, Article I, Section 10 of the Ohio Constitution provides, in relevant part:

> *In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel*; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the

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> witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court.

(Emphasis added.)

{¶36} The Ohio Supreme Court has found this guaranty "comparable to[,] but independent of similar guarantees provided by the Sixth Amendment to the United States Constitution." *State v. Milligan*, 40 Ohio St.3d 341, 533 N.E.2d 724 (1988), paragraph one of the syllabus. Nevertheless, the right to counsel under Article I, Section 10 has been construed more broadly than its federal counterpart. *See State v. Bode*, 144 Ohio St.3d 155, 2015-Ohio-1519, 41 N.E.3d 1156, ¶ 23-27.

{¶37} Ohio's constitutional text plainly guarantees a criminal defendant the right to present a defense with counsel. And when read as a whole, Article I, Section 10 of the Ohio Constitution safeguards the integrity and fairness of a criminal trial. *See State v. Hester*, 45 Ohio St.2d 71, 79, 341 N.E.2d 304 (1976) (defendant must receive a fair trial and substantial justice); *see also State v. Petro*, 148 Ohio St. 473, 486, 76 N.E.2d 355 (1947) (right to demand the nature and cause of accusation ensures a fair trial); *State v. Hensley*, 75 Ohio St. 255, 264, 79 N.E. 462 (1906) (right to a public trial ensures fairness and justice); *State v. Lane*, 60 Ohio St.2d 112, 118-119, 397 N.E.2d

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1338 (1979) (integrity of the trial process requires a neutral setting). Indeed, "careful has been the constitution to secure the pure and impartial administration of criminal justice, and to guard the accused from the possibility of oppression and wrong, under the forms of a criminal prosecution." *Kirk v. State*, 14 Ohio 511, 512 (1846).

6. Ohio's Long-Standing History

{¶38} Consistent with the purposes stated above, the attorney-client relationship is central to Ohio's criminal legal system. As early as 1816, indigent Ohioans were appointed counsel without cost. *See Conlan v. Haskins*, 177 Ohio St. 65, 68, 202 N.E.2d 419 (1964). In fact, the first General Assembly guaranteed that counsel would "have access to the accused at all reasonable hours." *Dille v. State*, 34 Ohio St. 617, 620 (1878). And a defendant in Ohio has long been afforded "a right to a reasonable opportunity to consult privately with his counsel without having other persons present." *Ford v. State*, 121 Ohio St. 292, 297, 168 N.E. 139 (1929), citing *Thomas v. Mills*, 117 Ohio St. 114, 121, 157 N.E. 488 (1927); *see Milligan* at 343.

{¶39} For the past 70 years, criminal defendants in Ohio have enjoyed "statutory rights to contact and consult with counsel beyond comparable rights which the federal and Ohio Constitutions guarantee." *Varnacini v. Registrar*, 59 Ohio App.3d 28, 30, 570 N.E.2d 296 (10th Dist.1989). Under R.C. 2935.20, after an arrest, an individual must be provided opportunities to communicate and consult with an attorney. The statute further provides that "[n]o officer or any other agent of this state shall prevent, attempt to prevent, or advise such person against the communication, visit, or consultation" with an attorney. R.C. 2935.20.[2] Likewise, any "person arrest[ed

[2] Violations of R.C. 2935.20 or 2935.14 result in a financial penalty for the officer or state agent and are not grounds for suppressing evidence. *See State v. Griffith*, 74 Ohio St.3d 554, 555, 660 N.E.2d 710 (1996). Nevertheless, these statutes may inform our analysis.

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who] 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." R.C. 2935.14. That statute specifically prohibits confinement or removal of that person "until such attorney has had reasonable opportunity to confer with him privately, or other person to arrange bail."

{¶40} These policy choices are consistent with the guarantee that a defendant " 'need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.' " *State v. Schleiger*, 141 Ohio St.3d 67, 2014-Ohio-3970, 21 N.E.3d 1033, ¶ 13, quoting *Wade*, 388 U.S. at 224, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). Counsel is needed at any stage requiring "legal advice-giving or truth-testing function that only a lawyer can perform." *State v. Childs*, 14 Ohio St.2d 56, 59, 236 N.E.2d 545 (1968). And counsel is necessary where the defendant has a "right to rely on counsel as a 'medium' between him and the State." *State v. Fite*, 9th Dist. Summit No. 25318, 2011-Ohio-2500, ¶ 15, quoting *Maine v. Moulton*, 474 U.S. 159, 176, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). Counsel is necessary at these critical pretrial stages because "depriv[ing] a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." *Moulton* at 170.

{¶41} For more than a century, the right to counsel in Ohio has meant the right to effective counsel. Absent effective counsel, a defendant is deprived of a fair trial and substantial justice. *Cornwell v. State*, 106 Ohio St. 626, 628, 140 N.E. 363 (1922); *see State v. Cutcher*, 17 Ohio App.2d 107, 115, 244 N.E.2d 767 (8th Dist.1969); *see also State v. Hester*, 45 Ohio St.2d 71, 80, 341 N.E.2d 304 (1976). Following these state constitutional decisions, the United States Supreme Court recognized that the Sixth

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Amendment right to counsel "is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). And the right to counsel "is indispensable to the fair administration of our adversary system of criminal justice." *Brewer v. Williams*, 430 U.S. 387, 398, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).

7. Counsel's Obligations

{¶42} For Morris's counsel to provide effective assistance, she must fulfill certain duties to ensure that Morris receives a fair trial. *Strickland* at 689. She must pursue her client's defense with "reasonable diligence and promptness." Prof.Cond.R. 1.3. In doing so, she must "consult with [her] client as to the means by which" her client's objectives are pursued. Prof.Cond.R. 1.2. She must establish reasonable communication with her client. Prof.Cond.R. 1.4(a). She must "explain a matter to the extent *reasonably* necessary to permit the client to make informed decisions." Prof.Cond.R. 1.4(b). She must "conduct a reasonable pre-trial investigation sufficient to develop appropriate defense strategies." *State v. Hartman*, 2016-Ohio-2883, 64 N.E.3d 519, ¶ 54 (2d Dist.) (collecting cases).

{¶43} These obligations reflect the crucial role that attorneys play in presenting a defense and ensuring a fair trial. Attorneys "act as a spokes[person] for, or advisor to, the accused." *United States v. Ash*, 413 U.S. 300, 312, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973). Their presence " 'protect[s] the unaided layman at critical confrontations' with his 'expert adversary,' the government, *after* 'the adverse positions of government and defendants have solidified' with respect to a particular alleged crime." (Emphasis in *McNeil*.) *McNeil v. Wisconsin*, 501 U.S. 171, 178, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991), quoting *United States v. Gouveia*, 467 U.S. 180, 189, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984). This is why, "once adversary proceedings have

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commenced against an individual, he has a right to legal representation when the government interrogates him." *Brewer*, 430 U.S. at 401, 97 S.Ct. 1232, 51 L.Ed.2d 424. Therefore, the right precludes "governmental conduct [that] has rendered counsel's assistance to the defendant ineffective." *United States v. Morrison*, 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981) (collecting cases).

8. <u>Jackson Reflects Ohio Law</u>

{¶44} To promote the protections guaranteed by the right to counsel, *Jackson* crafted a bright line rule–after "the right to counsel attaches and is invoked, any statements obtained from the accused during subsequent police-initiated custodial questioning regarding the charge at issue (even if the accused purports to waive his rights) are inadmissible." *McNeil v. Wisconsin*, 501 U.S. 171, 179, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991), citing *Jackson*, 475 U.S. at 625, 106 S.Ct. 1404, 89 L.Ed.2d 631.

{¶45} When *Montejo* overruled *Jackson*, it rejected the notion that all state agents, rather than just attorneys, must respect the attorney-client relationship once a defendant has secured an attorney. *Montejo*, 556 U.S. at 783, 129 S.Ct. 2079, 173 L.Ed.2d 955. But in 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). Further, all state agents, not merely state attorneys, are prohibited from interfering with a defendant's ability to consult or communicate with his attorney. *See* R.C. 2935.20 and 2935.14. As such, the attachment of the right to counsel triggers a series of obligations applicable to most state agents.

{¶46} *Montejo* also rejected the view that *Jackson* is necessary to safeguard the right to rely on the assistance of counsel. *Montejo* at 787. Instead, it tethered *Jackson* to a right to be free from police pressure, or in the court's words, an

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"antibadgering rationale." *Id.* Assessing what it described as *Jackson*'s prophylactic rule, the court weighed the benefit of eliminating badgering-induced confessions against the "truth-seeking process and the criminal justice system." *Id.* at 793, quoting *Moran*, 475 U.S. at 426, 106 S.Ct. 1135, 89 L.Ed.2d 410. The Court concluded that *Jackson* prevented few, if any, badgering-induced confessions from being admitted at trial. *Id.* Thus, according to *Montejo, Jackson* was unnecessary because Fifth Amendment safeguards already protected a defendant's Sixth Amendment rights. *Id.*

{¶47} But in Ohio, *Jackson's* bright-line rule safeguards more than a defendant's right to be free from police pressure. One of the primary purposes of excluding evidence to remedy a constitutional violation is to " ' "deter future unlawful police conduct." ' " *State ex rel. Wright v. Ohio Adult Parole Auth.*, 75 Ohio St.3d 82, 89, 661 N.E.2d 728 (1996), quoting *United States v. Janis*, 428 U.S. 433, 446, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976), quoting *United States v. Calandra*, 414 U.S. 338, 347, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). When the Ohio Supreme Court held that the Ohio Constitution requires the suppression of "physical evidence seized as a result of [a suspect's] unwarned statements," it reasoned:

> We believe that to hold otherwise would encourage law-enforcement officers to withhold *Miranda* warnings and would thus weaken Section 10, Article I of the Ohio Constitution. In cases like this one, where possession is the basis for the crime and physical evidence is the keystone of the case, warning suspects of their rights can hinder the gathering of evidence. When physical evidence is central to a conviction and testimonial evidence is not, there can arise a virtual incentive to flout *Miranda*. We believe that the overall administration of justice in

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> Ohio requires a law-enforcement environment in which evidence is gathered in conjunction with *Miranda*, not in defiance of it.

State v. Farris, 109 Ohio St.3d 519, 2006-Ohio-3255, 849 N.E.2d 985, ¶ 49.

{¶48} Evidence gathering equally incentivizes disregard of a defendant's right to counsel. But the right to counsel "includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right." *Maine v. Moulton*, 474 U.S. 159, 176, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). To this end, the *Jackson* rule encourages adherence to Ohio law and respect for the right to counsel. *See* R.C. 2935.20; *see also* R.C. 2935.14.

{¶49} *Jackson's* bright-line rule is consistent with Ohio's policies protecting the attorney-client relationship and discouraging unlawful police conduct.

9. *Kentucky, West Virginia, and Kansas Reject Montejo*

{¶50} In *Keysor v. Commonwealth*, 486 S.W.3d 273 (Ky.2016), the Kentucky Supreme Court rejected *Montejo* and found a broader right to counsel under its state constitution. Discussing *Montejo*'s cost-benefit analysis, *Keysor* recognized additional purposes for the *Jackson* rule. The rule ensures that the defendant's waiver of the right to counsel is valid and reinforces the attorney-client relationship. *Keysor* at 279-280. The *Keysor* court noted,

> by discounting the social value of the attorney-client relationship in a cost-benefit analysis, [*Montejo*] completely disregarded the unavoidable deterioration of the right to counsel that results when prosecuting authorities are permitted to send police interrogators to conduct custodial interviews with accused persons about the pending charges without the knowledge of their attorneys.

Id. at 280.

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{¶51} Plus, *Keysor* reasoned, *Montejo* ignored the fact that the " 'substantial costs' " are "by design," and "[c]onstitutional protections were put in place by the framers of the state and federal constitutions to hinder oppressive impulses by retarding the government's ability to incarcerate suspected offenders." *Id.* Likewise, the Ohio Supreme Court has recognized that maintaining the "plain and valuable right vested in everyone accused of a crime" * * * "should not be weakened, invaded or destroyed" except for the best of reasons. *State v. Wing*, 66 Ohio St. 407, 425, 64 N.E. 514 (1902).

{¶52} Kentucky is not the only state to hold that *Montejo* is contrary to the right to counsel under state law. *See State v. Bevel*, 231 W.Va. 346, 745 S.E.2d 237 (W.Va.2013); *see also State v. Lawson*, 296 Kan. 1084, 297 P.3d 1164 (Kan.2013) (finding that *Jackson's* protections comport with state statutory protections for the right to counsel).

{¶53} Thus, in Kentucky, Kansas, and West Virginia, "if police initiate interrogation after a defendant asserts his right to counsel at an arraignment or similar proceeding, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid as being taken in violation of the defendant's right to counsel." *Bevel* at 356; *Keysor* at 282.

ii. The Ohio Constitution Affords a Broader Right to Counsel

{¶54} Considering Ohio's longstanding history of strongly protecting an accused's right to counsel, Ohio's jurisprudence finding more robust rights for criminal defendants under the Ohio Constitution than the United States Constitution, and state agencies' obligations under the Ohio Revised Code and the Rules of Professional Conduct, we hold that *Montejo's* reasoning does not align with the nature of the right to counsel in Ohio. As a result, we hold that Article I, Section 10 of the Ohio

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Constitution provides greater protection of a criminal defendant's right to counsel than the Sixth Amendment to the United States Constitution.

{¶55} We follow the bright-line rule announced in *Jackson,* that when an accused's right to counsel has attached and an attorney has been secured, any uncounseled waiver of the defendant's right to counsel in a state-initiated interrogation is deemed invalid. *See Jackson,* 475 U.S. at 636, 106 S.Ct. 1404, 89 L.Ed.2d 631.

III. Conclusion

{¶56} We note that the state's fourth issue for review disputes whether Morris requested an attorney around the 45-minute mark of the interrogation. Because we affirm the suppression of Morris's statements throughout the entire interrogation, we decline to address this argument.

{¶57} We overrule the state's assignment of error and affirm the trial court's suppression of all statements made during the interrogation.

Judgment affirmed.

CROUSE, P.J., concurs separately.
WINKLER, J., dissents.

CROUSE, P.J., concurring separately.

{¶58} I wholeheartedly concur in the foregoing opinion, but I write separately to encourage litigants to continue to develop constitutional arguments under the Ohio Constitution. Typically, the Ohio Constitution is mentioned only in passing, and constitutional arguments are made under the federal Constitution and in lock-step with United States Supreme Court decisions. *See, e.g., State v. Searight*, 1st Dist. Hamilton No. C-230060, 2023-Ohio-3584, ¶ 12 ("However, because he fails to explain how or why Section 10 [of the Ohio Constitution] would provide due process

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protections beyond those afforded to him by the federal Due Process Clause or by Ohio's Due Course of Law Clause, we decline to ponder these questions."); *State v. Thompson*, 1st Dist. Hamilton No. C-200388, 2021-Ohio-3184, ¶ 14, fn. 1 ("In his reply brief, Mr. Thompson makes a passing argument regarding the Ohio Constitution. It is too late in the day to advance that argument on reply, and thus we have no occasion to explore any potential distinctions between the inquiry under the Ohio and federal Constitutions.").

{¶59} To my knowledge, this is one of the very few times a separate argument under the Ohio Constitution has been developed and decided below and argued in this court. Notably, the state did not address the Ohio constitutional issues when it was invited to do so by the trial court, and it continued to argue to this court that we must follow United States Supreme Court precedent when interpreting our state Constitution.

{¶60} In his book, *51 Imperfect Solutions, States and the Making of American Constitutional Law*, Judge Jeffrey Sutton cautions against a lock-step approach to interpretating a state constitutional counterpart to the federal Constitution. He wrote:

> Why borrow in particular from the larger, far larger, jurisdiction? Federalism considerations may lead the U.S. Supreme Court to underenforce (or at least not to overenforce) constitutional guarantees in view of the number of people affected and the range of jurisdictions implicated. No state supreme court by contrast has any reason to apply a "federalism discount" to its decisions, making it odd for state courts to lean so heavily on the meaning of the Federal Constitution in construing their own.

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Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law*, 175 (2018).

{¶61} In the case of a criminal defendant's right to counsel, the Supreme Court in *Montejo* certainly underenforced the right to counsel guarantee when it chose to overrule *Jackson*. In noting that there was not a uniform rule among the states for the appointment of counsel, the Court stated, "Nothing in our *Jackson* opinion indicates whether we were then aware that not all States require that a defendant affirmatively request counsel before one is appointed; and of course we had no occasion there to decide how the rule we announced would apply to these other States." *Montejo*, 556 U.S. at 787, 129 S.Ct. 2079, 173 L.Ed.2d 955. In fact, the *Montejo* majority recognized that its holding may not apply to individual state constitutional rights when it declared, "If a State wishes to abstain from requesting interviews with represented defendants when counsel is not present, it obviously may continue to do so." (Emphasis deleted.) *Montejo* at 793.

{¶62} It makes sense that when considering a right of such importance as a criminal defendant's right to counsel, the United States Supreme Court would be concerned about enunciating a single national rule to be applicable to 50 states that have different rules, systems, and traditions. Thus, when the United States Supreme Court mentions leaving certain issues to the states, litigants should listen.

{¶63} Litigants should also listen to the numerous invitations that the Ohio Supreme Court itself has extended for the development of state constitutional arguments. In his article "A Tipping Point in Ohio: The Primacy Model as a Path to a Consistent Application of Judicial Federalism," Judge Pierre Bergeron observed:

> The Ohio Supreme Court has recently suggested an openness to some state constitutional claims—especially in the equal protection context.

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> Justice Fischer's assertions that the Ohio Supreme Court should "reexamine the Ohio and federal Equal Protection Clauses" and that "[p]arties should not presume that rights afforded to a person under the United States Constitution . . . are the same rights as those afforded to a person under the Ohio Constitution" are practically a flashing neon sign, saying: "Lawyers, bring your state equal protection claims here!" And it's not just Justice Fischer. Where the parties fail to properly raise an issue under the Ohio Constitution, it has become commonplace for the Ohio Supreme Court to explicitly "leave[] open the question whether the Ohio Constitution might offer greater rights and protections to our citizenry under these circumstances." Language of this nature may hint that the Ohio Supreme Court is interested in re-evaluating the protections provided by the Ohio Constitution and, perhaps, interpreting them with independent force. It is time for practitioners to respond to these hints and advance theories under state constitutional principles. Since courts generally do not address issues that the parties did not raise, courts need practitioners to develop these arguments in order to force courts to explore the protections provided by the state constitution.

Pierre H. Bergeron, *A Tipping Point in Ohio: The Primacy Model as a Path to a Consistent Application of Judicial Federalism*, 90 U.Cin.L.Rev. 1061, 1082-1083 (2022) (string citing numerous Ohio Supreme Court cases inviting arguments under the Ohio Constitution); *see also State v. Brunson*, Slip Opinion No. 2022-Ohio-4299, ¶ 67 ("And because Brunson has failed to develop his argument under the Ohio Constitution, we focus our analysis on whether the trial court violated Brunson's Fifth

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Amendment right to remain silent."); *State v. Jackson*, Slip Opinion No. 2022-Ohio-4365, ¶ 11 ("In the text of his propositions of law, Jackson also refers to Article I, Section 14 of the Ohio Constitution, which provides an independent protection against 'unreasonable searches and seizures.' In the proceedings below, however, Jackson did not argue that the Ohio Constitution provides him any greater protection than the Fourth Amendment. And Jackson has not presented any such argument to this court. Indeed, Jackson has not developed any argument under the Ohio Constitution. As a consequence, we are constrained to evaluate Jackson's claim under only the Fourth Amendment.").

{¶64} The *Montejo* decision has been relentlessly criticized by legal scholars since its release. In the article "*Montejo* and The New Judicial Federalism," Professor Laurent Sacharoff wrote:

> [T]he [*Montejo*] Court blurred the lines between [the Fifth and Sixth Amendment] right to counsel, at least when it comes to police interrogation. It essentially applied the weaker Fifth Amendment right to counsel protections to the Sixth Amendment right, eroding what had previously been an important distinction between the two rights. Numerous scholars and judges have criticized *Montejo*. The decision affords too little protection for criminal defendants, they argue, and it ignores the basic premises of the adversarial system.

Laurent Sacharoff, Montejo *and The New Judicial Federalism*, 50 Tex.Tech L.Rev. 599, 599-600 (2018); *see also* Eda Katharine Tinto, *Wavering on Waiver:* Montejo v. Louisiana *and the Sixth Amendment Right to Counsel*, 48 Am.Crim.L.Rev. 1335, 1369-1370 (2011) ("The Court erroneously focused on principles underlying Fifth Amendment jurisprudence and ignored the fundamental Sixth Amendment notions of

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the importance of the assistance of counsel and fairness in the adversarial process."); Geoffrey M. Sweeney, *If You Want It, You Had Better Ask for It: How* Montejo v. Louisiana *Permits Law Enforcement to Sidestep the Sixth Amendment*, 55 Loy.L.Rev. 619, 643 (2009) ("The Court failed to elucidate how these two distinct rights vary, if at all, in such a circumstance. As a result, the Sixth Amendment's guarantee of counsel's participation at all critical stages is stripped of both force and function."); Emily Bretz, *Don't Answer the Door:* Montejo v. Louisiana *Relaxes Police Restrictions for Questioning Non-Custodial Defendants*, 109 Mich.L.Rev. 221, 230 (2010) ("The rationale behind the Sixth Amendment, that which drove the *Jackson* rule and was disregarded in *Montejo*, is to protect the integrity of the attorney-client relationship throughout all pretrial critical stages when the state might take advantage of the accused or where the defendant requires advice on how best to confront his adversary."); Michael C. Mims, *A Trap for the Unwary: The Sixth Amendment Right to Counsel After* Montejo v. Louisiana, 71 La.L.Rev. 345, 369 (2010) ("The most unsettling element of the Court's ruling in *Montejo* is its complete disregard for the traditional rationale behind the Sixth Amendment."); *Keysor v. Commonwealth*, 486 S.W.3d 273, 281 (Ky.2016) ("While we respect the Supreme Court's authority for the interpretation of federal law, we cannot tether the Kentucky Constitution to the Supreme Court's evolving standards of Sixth Amendment protections.").

{¶65} Thus, I applaud Morris for raising this extremely important issue of a criminal defendant's right to counsel under Article I, Section 10 of the Ohio Constitution. And I hope to see litigants continue to develop their constitutional arguments under our state Constitution. "Lawyers and courts, working together, can restore the independent force of the Ohio Constitution that our founders intended." Bergeron, 90 U.Cin.L.Rev. at 1087.

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WINKLER, J., dissenting.

{¶66} A court's analysis of similar provisions in the Ohio Constitution and the United States Constitution "should not be driven simply by disagreement with the result reached by the federal courts' interpretation." *Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, at ¶ 76. I respectfully dissent because I believe that the trial court did just that.

{¶67} Article I, Section 10 "is comparable to but independent of similar guarantees provided by the Sixth Amendment to the United States Constitution." *Milligan*, 40 Ohio St.3d 341, 533 N.E.2d 724, at paragraph one of the syllabus. As the Ohio Supreme Court instructs, "[w]e must be cautious and conservative when we are asked to expand constitutional rights under the Ohio Constitution, particularly when the provision in the Ohio Constitution is akin to a provision in the U.S. Constitution that has been reasonably interpreted by the [United States] Supreme Court." *Gardner* at ¶ 76, citing *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175, ¶ 28-29 (O'Connor, J., dissenting) (where the language used by the federal and Ohio Constitutions is "virtually identical," it is "illogical" to suggest that the provisions should be interpreted differently). When the language of the Ohio and United States Constitutions are coextensive, there should be "compelling reasons why Ohio constitutional law should differ from the federal law." *Wogenstahl*, 75 Ohio St.3d at 363, 662 N.E.2d 311.

{¶68} The United States Constitution, as interpreted by *Montejo*, clearly permits the questioning here. The majority finds a compelling reason to disagree with the United States Supreme Court based in the history of the right, reflected in

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jurisprudence, sections of the Ohio Revised Code and the Rules of Professional Conduct.

{¶69} I find it hard to reconcile the view that Article I, Section 10 has a history and tradition of being more expansive than the Sixth Amendment with the actual text of the two provisions. Article I, Section 10 of the Ohio Constitution provides, in relevant part, "[i]n *any trial in any court*, the party accused shall be allowed to appear and defend in person and with counsel." (Emphasis added.) The Sixth Amendment provides, in relevant part, "[i]n *all criminal prosecutions*, the accused shall enjoy the right to * * * have the [a]ssistance of [c]ounsel for his defense." (Emphasis added.) In my view, the words of the Sixth Amendment are broader, applying to "all criminal prosecutions" while Article 1, Section 10 requires not only a "trial" but a "trial in any court." This difference in the Ohio Constitution is particularly notable because the inaugural Ohio Constitution of 1802 used the phrase "in all criminal prosecutions" found in the federal Constitution. Article VIII, Section 11, Ohio Constitution (1802). This change to narrower language cuts against the view that Article 1, Section 10 is supposedly broader.

{¶70} The references to the statutory right-to-counsel in R.C. 2935.20 are misplaced. This case concerns only Morris's constitutional right to counsel. Morris chose to raise the constitutional grounds to ask the court to invoke the Exclusionary Rule as a desired remedy. This is because Morris's statutory rights would not result in the suppression of his statements. *State v. Griffith*, 74 Ohio St.3d 554, 555, 660 N.E.2d 710 (1996). At most, R.C. 2935.20 would see Detective Glecker fined $25 to $100 and imprisoned for not more than 30 days, and Morris's statements admitted as evidence. Insofar as R.C. 2935.20 informs our reading of Article 1, Section 10, the presence of

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additional statutory protections implies that the General Assembly thought the available constitutional rights, and their applicable remedies, were narrow, not broad.

{¶71} Ohio's Rules of Professional Conduct would suggest applying *Montejo*, not rejecting it. The United States Supreme Court rejected in *Montejo* a similar invocation of the American Bar Association's Model Rules of Professional Conduct ("Model Rules") as a basis to uphold the rule in *Jackson* advanced today. *Montejo*, 556 U.S. at 790, 129 S.Ct. 2079, 173 L.Ed.2d 955. In the same way the Sixth Amendment does not codify the Model Rules, Ohio's Constitution does not codify the Rules of Professional Conduct, nor does it make investigating officers into lawyers. Model Rule 4.2, rejected as inapplicable in *Montejo*, and Ohio's Prof.Cond.R. 4.2 are identical. Prof.Cond.R. 4.2, Commentary ("Rule 4.2 is identical to Model Rule 4.2"). Model Rule 5.3(c)(2) and Ohio's Prof.Cond.R. 5.3(c)(2) are also similar. Prof.Cond.R. 5.3, Commentary ("Rule 5.3 is similar to the Model Rule"). While Ohio's rule expressly covers lawyers in government agencies and the Model Rule only covers "law firms," the Model Rules make clear that "law firms" include government legal departments. Model Rule 1, Comment 3 ("With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct."). Thus, both rules impute a prosecutor's professional obligations onto her nonlawyer government agents, so long as she has managerial or direct supervisory authority over the agent. *Compare* Prof.Cond.R. 5.3(c)(2) *with* Model Rule 5.3(c)(2).

{¶72} Because the two rules are the same, *Montejo*'s criticism of relying on Model Rule 4.2 applies here: the rule in *Jackson* advanced here is both narrower and broader than Ohio's Rules of Professional Conduct. *Jackson* is broader because Article

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1, Section 10 would apply to all government agents, while Ohio's Rules of Professional Conduct encompass lawyers and the government agents under the managerial or direct supervisory authority of a lawyer. The rule in *Jackson* is also narrower because if a represented party initiates contact with government agents, they may both talk freely, whereas a prosecutor could be sanctioned for interviewing a represented party even if that party initiates the communication and consents to the interview. Prof.Cond. R. 4.2, Comment 3. Ohio's use of similar language is not a compelling reason to reach a contrary outcome to *Montejo*.

{¶73} Accordingly, I would apply the United States Supreme Court's reasoned opinion in *Montejo* interpreting the Sixth Amendment right to counsel to the coextensive right to counsel in Article 1, Section 10 as written. To me, there is no compelling reason to dispense with the United States Supreme Court's interpretation except disagreement with the result. Consequently, I would have this court address the argument that Morris did not unambiguously invoke his right to counsel. But because the majority declines to address this argument, I will also decline to address it here.

{¶74} I respectfully dissent.

Please note:

The court has recorded its entry on the date of the release of this opinion.

Rules current through rule amendments received through May 1, 2024

OH - Ohio Local, State & Federal Court Rules > Ohio Rules Of Criminal Procedure

Rule 5. Initial appearance, Preliminary hearing

(A) Procedure upon initial appearance. When a defendant first appears before a judge or magistrate, the judge or magistrate shall permit the accused or the accused's counsel to read the complaint or a copy thereof, and shall inform the defendant:

(1) Of the nature of the charge against the defendant;

(2) That the defendant has a right to counsel and the right to a reasonable continuance in the proceedings to secure counsel, and, pursuant to Crim.R. 44, the right to have counsel assigned without cost if the defendant is unable to employ counsel;

(3) That the defendant need make no statement and any statement made may be used against the defendant;

(4) Of the right to a preliminary hearing in a felony case, when the defendant's initial appearance is not pursuant to indictment;

(5) Of the right, where appropriate, to jury trial and the necessity to make demand therefor in petty offense cases.

In addition, if the defendant has not been admitted to bail for a bailable offense, the judge or magistrate shall admit the defendant to bail as provided in these rules.

In felony cases the defendant shall not be called upon to plead either at the initial appearance or at a preliminary hearing.

In misdemeanor cases the defendant may be called upon to plead at the initial appearance. Where the defendant enters a plea the procedure established by Crim.R. 10 and Crim.R. 11 applies.

(B) Preliminary hearing in felony cases; Procedure.

(1) In felony cases a defendant is entitled to a preliminary hearing unless waived in writing. If the defendant waives preliminary hearing, the judge or magistrate shall forthwith order the defendant bound over to the court of common pleas. Except upon good cause shown, any misdemeanor, other than a minor misdemeanor, arising from the same act or transaction involving a felony shall be bound over or transferred with the felony case. If the defendant does not waive the preliminary hearing, the judge or magistrate shall schedule a preliminary hearing within a reasonable time, but in any event no later than ten consecutive days following arrest or service of summons if the defendant is in custody and not later than fifteen consecutive days following arrest or service of summons if the defendant is not in custody. The preliminary hearing shall not be held, however, if the defendant is indicted. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this division may be extended. In the absence of such consent by the defendant, time limits may be extended only as required by law, or upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

(2) At the preliminary hearing the prosecuting attorney may state orally the case for the state, and shall then proceed to examine witnesses and introduce exhibits for the state. The defendant and the judge or magistrate have full right of cross-examination, and the defendant has the right of inspection of exhibits

prior to their introduction. The hearing shall be conducted under the rules of evidence prevailing in criminal trials generally.

(3) At the conclusion of the presentation of the state's case, defendant may move for discharge for failure of proof, and may offer evidence on the defendant's own behalf. If the defendant is not represented by counsel, the court shall advise the defendant, prior to the offering of evidence on behalf of the defendant:

(a) That any such evidence, if unfavorable to the defendant in any particular, may be used against the defendant at later trial.

(b) That the defendant may make a statement, not under oath, regarding the charge, for the purpose of explaining the facts in evidence.

(c) That the defendant may refuse to make any statement, and such refusal may not be used against the defendant at trial.

(d) That any statement the defendant makes may be used against the defendant at trial.

(4) Upon conclusion of all the evidence and the statement, if any, of the accused, the court shall do one of the following:

(a) Find that there is probable cause to believe the crime alleged or another felony has been committed and that the defendant committed it, and bind the defendant over to the court of common pleas of the county or any other county in which venue appears.

(b) Find that there is probable cause to believe that a misdemeanor was committed and that the defendant committed it, and retain the case for trial or order the defendant to appear for trial before an appropriate court.

(c) Order the accused discharged.

(d) Except upon good cause shown, any misdemeanor, other than a minor misdemeanor, arising from the same act or transaction involving a felony shall be bound over or transferred with the felony case.

(5) Any finding requiring the accused to stand trial on any charge shall be based solely on the presence of substantial credible evidence thereof. No appeal shall lie from such decision and the discharge of defendant shall not be a bar to further prosecution.

(6) In any case in which the defendant is ordered to appear for trial for any offense other than the one charged the court shall cause a complaint charging such offense to be filed.

(7) Upon the conclusion of the hearing and finding, the court or the clerk of such court, shall, within seven days, complete all notations of appearance, motions, pleas, and findings on the criminal docket of the court, and shall transmit a record of the appearance docket entries, together with a copy of the original complaint and affidavits, if any, filed with the complaint, the journal or docket entry of reason for changes in the charge, if any, together with the order setting bail and the bail including any bail deposit, if any, filed, to the clerk of the court in which defendant is to appear. Such record shall contain an itemized account of the costs accrued.

(8) A municipal or county court retains jurisdiction on a felony case following the preliminary hearing, or a waiver thereof, until such time as a record of the appearance, docket entries, and other matters required for transmittal are filed with the clerk of the court in which the defendant is to appear.

History

Amended, eff 7-1-75; 7-1-76; 7-1-82; 7-1-90; 7-1-12; 7-1-14; 7-1-17.

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RULES OF SUPERINTENDENCE FOR THE COURTS OF OHIO

RULE 36. Designation of Trial Attorney. A court may require by local rule that the trial attorney individually responsible for trying a case be designated as trial attorney in the pleadings or by separate notice or entry

MUNICIPAL RULE 2

Local Rule 2 DUTIES OF TRIAL COUNSEL

2.01 DESIGNATION OF TRIAL ATTORNEY & ATTORNEY REGISTRATION

(SUP. R. 6)
(https://www.supremecourt.ohio.gov/docs/LegalResources/Rules/superintendence/Superintendence.pdf#|

Counsel shall, designate as trial attorney on all filings in civil and criminal cases. No defendant will be permitted to sign trial designation forms. No designation of a law firm, public or private, or governmental agency will be accepted.

The designation of trial attorney will be made on the appropriate form.

One (1) copy of the designation form must be filed per case number, unless the case numbers are sequential. If all case numbers are sequential, they must be placed on the form and one copy filed as if they were a single case. All attorneys shall designate their attorney registration number issued by the Supreme Court of Ohio on all documents filed with the court.

2.02 WITHDRAWAL OF TRIAL ATTORNEY

A. Counsel shall be allowed to withdraw from trial counsel responsibility only with the consent of the judge assigned to the case, either by oral motion on date of trial or written motion. If a request is made for a hearing prior to the next action date counsel must get permission from the Court to schedule the motion.

B. In the absence of judicial assignment, or in the absence of the assigned judge, such application shall be made to the Administrative Judge. No such application will be considered unless a written entry or oral motion is presented stating the reason for the application. The entry or motion will contain the following:

1. The time and date of trial, if set.

2. A certification of service to opposing counsel.

3. Certification that the client has been notified that the attorney is seeking to withdraw from the case. Counsel's professional statement that, if allowed, a copy of the entry will be mailed immediately to the last known address of the client.

2.03 CHANGE OF TRIAL COUNSEL

Once trial counsel has been designated, such designation shall remain until termination of the case. Change of trial counsel may be permitted by the judge assigned to the case upon the filing of an entry containing the designation of new trial counsel and the agreement of prior trial counsel and provided such change will not delay the trial of the case.

2.04 MOTIONS FOR CONTINUANCES

(Sup. R. 41)
(https://www.supremecourt.ohio.gov/docs/LegalResources/Rules/superintendence/Superintendence.pdf#

(https://www.supremecourt.ohio.gov/LegalResources/Rules/superintendence/Superintendence.pdf#page=

All requests for continuances of a criminal case must be made by motion on the appropriate form.

A copy of the original Judge's Journal Entry (Judge's sheet) must be attached for those cases which have been individually assigned.

The movant will state in the body of the motion the reason(s) justifying the continuance. If the opposing party does not object to the granting of the continuance, that fact will be noted on the form and filed with the Assignment Commissioner's Office which will select a new date and notify the prosecution and defense.

If the opposing party objects to the continuance, that fact will be noted on the motion and filed at the Assignment Commissioner's Office. The Assignment Commissioner's Office will schedule the motion for a hearing on the current date unless otherwise directed by the court. If the judge grants the motion, he or she will sign the entry portion of the form and refer the case to the Assignment Commissioner's Office for re-setting. If the motion is denied, the judge will note the denial in the space provided.

If the motion for continuance does not have the signature of the prosecutor and Judge, the motion will be scheduled for a hearing on the next action date.

The following information must accompany the filing of the motion for continuance:

1. Each motion shall contain the date, room and time of the present setting.

2. The reason for the continuance must clearly state within the body of the motion ("for good cause shown" does not suffice as a reason).

3. Each motion must be signed by the designated attorney and have their office telephone number contained therein.

2.05 JURY DEMANDS

Jury Demands shall be in writing.

When filing a Jury Demand there must be one (1) Jury Demand per case number, with the following information contained therein:

a. Case number

b. Defendant's name

c. The date, time, and courtroom in which the case is presently set for trial.

d. If the Jury Demand is filed by an attorney, the attorney's name and telephone number must also appear on each Jury Demand.

If the Jury Demand is filed by an defendant who is not represented, such defendant's name and telephone number must also appear on each Jury Demand.

The Assignment Commissioner's Office will set the case according to the Judge's directives.

2.06 PRE-TRIAL MOTIONS - CRIMINAL

1. All pleadings and motions will be filed with the Assignment Commissioner's Office in accordance with Criminal Rule 12 (https://www.supremecourt.ohio.gov/docs/LegalResources/Rules/criminal/CriminalProcedure.pdf#page=3 Pre-trial motions must be presented in triplicate for each case number. They must contain the following:

a. Case number

b. Next action setting (trial, pre-trial, etc.)

c. Name, telephone number and signature of the person presenting it.

d. The name of the assigned judge.

The motion date will be placed on the motion by the Assignment Commission's Office. Two copies will be retained by the Assignment Commissioner's Office. The third copy will be returned to the presenter to be filed with the prosecutor.

2. Instructions for setting a Motion to Suppress – Motion to Dismiss

a. If the case is scheduled for a pretrial, file the motion at the Assignment Commissioner's Office to be accepted for filing.

b. If the case is scheduled for trial, the Assignment Commissioner's staff will accept the filing and add the motion to the trial setting.

c. Attorney/Defendant must serve the City/County Prosecutor.

d. The Prosecutor will be responsible for canceling/re-notifying witnesses.

3. Instructions for setting a motion for Capias recall.

a. Go to Clerk's office, Room 113 for attorneys, Room 112 for pro se, of the Justice Center and obtain the appropriate form.

b. Return to the Duty Magistrate/ Duty Judge or Assigned Judge for his/her signature. If the assigned Judge is not available you may go to the Duty Judge.

c. Go back to the Clerk in Room 113 for attorneys, Room 112 for pro se, to pay the $25.00 Capias fee, if required. The Clerk will assign to arraignment or refer to the Assignment Commissioner's Office to assign for Pre-trial or Plea or Probation Violation.

d. Attorney/Defendant must serve City/County Prosecutor. If City, may serve in Room 263 of the Courthouse. If County, serve at 4th Floor, 230 East Ninth Street.

Note: If Defendant is eligible for Pre-trial Service, Failure to Appear (FTA) Unit, located in Room 116 of the Justice Center, will handle the recall.

2.07 POST-CONVICTION MOTIONS - CRIMINAL

1. All post-conviction motions will be filed at the Assignment Commissioner's Office. Hearings will be scheduled based upon the Judge's directives.

a. Post-conviction motions must be presented in triplicate for each case number. They must contain the following:

b. Case number.

c. Name of judge or magistrate who convicted the defendant.

d. Name, telephone number and signature of the person presenting the motion.

2.08 NOTICE OF APPEAL - CRIMINAL

All notices of appeal *must* be filed with the Clerk of Courts, Criminal Division.

2.09 ATTORNEYS RESPONSIBLE FOR TRIAL SETTINGS

Attorneys who accompany their clients to arraignment are expected to respond to the Assignment Commissioner's Office to assist in the selection of a trial setting date.

Attorneys not responding will have their cases set on the judge's next available trial date. It is the responsibility of the attorney to ascertain the trial setting date.

2.10 EXPUNGEMENT OF RECORD OF CONVICTION SEALING OF RECORDS:

The Hamilton County Municipal Court will accept applications for expungements/sealing of the record(s) pursuant to Sections 2953.32 and 2953.52, and schedule expungements for hearing at least 45 days from the date of filing for Probation Report. A statutory $50.00 fee shall be paid to the Clerk of

Courts, and proof of payment must be presented before the acceptance of any application for expungement/sealing of the record(s), except that motions to proceed in Forma Pauperis shall be accepted with the application for expungement/sealing of the record(s) without proof of payment of the RC $50.00 filing fee. No fee is required for a request to seal a non-conviction.

2.11 WRITTEN PLEAS OF NOT GUILTY - WPNG

1. Procedure

The attorney shall file the entry with the Clerk of Court's on the date of arraignment.

The Clerk will pull all jackets and take them to the Assignment Commissioner's Office, along with the attorney, who shall be responsible for obtaining the court dates and informing client(s).

2. Written Pleas of Not Guilty - Minor Misdemeanor

Procedure

a. Written plea forms will be available at the Clerk's office in Room 112.

b. The defendant shall go to the Clerk's office on the day of arraignment to request to file a written plea. Defendant will fill out the form and Clerk's office will pull the file and take it to the Assignment Commissioner. The Assignment Commissioner will schedule the trial date with the defendant.

3. OVI and related cases:

1. Written Pleas of not guilty and requests for continuance and waiver of arraignments will be accepted from attorneys only.

2. Waivers of Arraignment will be accepted on those defendants who have attorneys and and who are alleged to be first or second offenders and an ALS has been issued in the case. Conditions must be verified and the written plea form must be signed by the requisite prosecutor's office.

3. All forms must be filed on the dates of arraignment.

e. EXCEPTIONS:

Per Administrative Order and Agreement of the Joint Session, written pleas of Not Guilty will not be accepted for Domestic Violence (RC (https://codes.ohio.gov/ohio-revised-code/section-2919.25) 2919.25); Menacing by Stalking (RC (https://codes.ohio.gov/ohio-revised-code/section-2903.211) 2903.211); Violation of a TPO (RC (https://codes.ohio.gov/ohio-revised-code/section-2919.27)2919.27); Aggravated Trespass (RC (https://codes.ohio.gov/ohio-revised-code/section-2911.211) 2911.211); Vehicular Homicide (RC (https://codes.ohio.gov/ohio-revised-code/section-2903.06) 2903.06(C)) and Vehicular Manslaughter (RC (https://codes.ohio.gov/ohio-revised-code/section-2903.06) 2903.06(D)); Any violation of RC (https://codes.ohio.gov/ohio-revised-code/chapter-2907) 2907; or any other charge in which a Protection Order is requested; written pleas of not guilty may be

accepted for Domestic Violence cases in which a TPO has been previously addressed. Written Pleas will not be accepted on any cases in which the defendant is incarcerated unless a bond has been previously set.

Email the Municipal Court Webmaster (mailto:muni-webmaster@cms.hamilton-co.org)

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Rules current through rule amendments received through May 1, 2024

OH - Ohio Local, State & Federal Court Rules > Ohio Rules Of Criminal Procedure

Rule 10. Arraignment

(A) Arraignment procedure. Arraignment shall be conducted in open court, and shall consist of reading the indictment, information or complaint to the defendant, or stating to the defendant the substance of the charge, and calling on the defendant to plead thereto. The defendant may in open court waive the reading of the indictment, information, or complaint. The defendant shall be given a copy of the indictment, information, or complaint, or shall acknowledge receipt thereof, before being called upon to plead.

(B) Presence of defendant.

(1) The defendant must be present, except that the court, with the written consent of the defendant, may permit arraignment without the presence of the defendant, if a plea of not guilty is entered.

(2) In a felony or misdemeanor arraignment or a felony initial appearance, a court may permit the remote presence and participation of a defendant, provided the appearance complies with the requirements set out in Crim.R. 43(A)(2).

(C) Explanation of rights. When a defendant not represented by counsel is brought before a court and called upon to plead, the judge or magistrate shall cause the defendant to be informed and shall determine that the defendant understands all of the following:

(1) The defendant has a right to retain counsel even if the defendant intends to plead guilty, and has a right to a reasonable continuance in the proceedings to secure counsel.

(2) The defendant has a right to counsel, and the right to a reasonable continuance in the proceeding to secure counsel, and, pursuant to Crim.R. 44, the right to have counsel assigned without cost if the defendant is unable to employ counsel.

(3) The defendant has a right to bail, if the offense is bailable.

(4) The defendant need make no statement at any point in the proceeding, but any statement made can and may be used against the defendant.

(D) Joint arraignment. If there are multiple defendants to be arraigned, the judge or magistrate may by general announcement advise them of their rights as prescribed in this rule.

History

Amended, eff 7-1-90; 7-1-08; 7-1-23.

OHIO RULES OF COURT SERVICE
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End of Document

rule is consistent with the Ohio Supreme Court's Superintendence Rule 26 (https://www.supremecourt.ohio.gov/docs/LegalResources/Rules/superintendence/Superintendence.pdf#
and the adoption thereof by the Hamilton County Records Commission.

b. In accordance with division (a) of this rule, the Hamilton County Municipal Court hereby adopts Sup. R. 26
(https://www.supremecourt.ohio.gov/docs/LegalResources/Rules/superintendence/Superintendence.pdf#
in its entirety, and in special reference to the records of the Hamilton County Municipal Court, adopts Sup. R. 26.05
(https://www.supremecourt.ohio.gov/docs/LegalResources/Rules/superintendence/Superintendence.pdf#
which governs the administration of the records, created by the Municipal Court.

9.11 CASE MANAGEMENT SUP R. 5 (https://www.supremecourt.ohio.gov/docs/LegalResources/Rules/sup

Criminal Cases

a. The purpose of this rule is to establish, pursuant to Sup. R. 5 (https://www.supremecourt.ohio.gov/docs/LegalResources/Rules/superintendence/Superintendence.pdf#
a system for criminal case management which will provide for the fair and impartial administration of criminal cases. These rules shall be construed and applied to eliminate unnecessary delay and expense for all parties involved in the court system.>/p>

b. Scheduling of Events: The Scheduling begins with arraignment.

1. Arraignment: shall be scheduled on the first working day after a physical arrest and/or lock-up. Cited cases will be arraigned when scheduled by a citing agency.

2. Pretrials: After arraignment, a request for pretrial shall be set by the assignment commissioner within ten (10) days. All other cases shall be set for trial unless the judge orders a pretrial in said case within time limits set by law, but no sooner than seven (7) days after arraignment nor more than 45, unless otherwise ordered by court. Except in extraordinary cases, no case will be continued more than one time for arraignment. Any attorney who fails to appear for pretrial without just cause being shown may be punished for contempt of court.

3. Motions: All motions shall be made in writing and accompanied by a written memorandum containing the arguments of counsel. Motions must be filed within the time limits established by the
Ohio Rules of Criminal Procedure
(https://www.supremecourt.ohio.gov/docs/LegalResources/Rules/criminal/CriminalProcedure.pdf).
All motions shall be set for oral hearing.

4. Continuances: No continuance will be granted in the absence of written agreement by opposing counsel or without a hearing for continuance.

5. Trials: Each case not resolved at pretrial shall be set for trial by the Court. If a jury demand is timely filed, then the case shall be set for jury trial by direction of the court.