IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. GEORGE WEST CRAIGEN, Defendant-Appellant Respondent on Review.	Umatilla County Circuit Court Case No. CF140169 CA A158112 SC S068736

BRIEF ON THE MERITS OF RESPONENT ON REVIEW, DEFENDANT-APPELLANT

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Umatilla County
Honorable Russell B. West, Judge

Opinion Filed: May 19, 2021
Author of Opinion: LAGESEN, P. J.
Before: Lagesen, Presiding Judge, and Egan, Chief Judge, and Powers, Judge

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INTRODUCTION

The state asks this court to expand the *Savinskiy* exception to the *Prieto-Rubio* rule in ways that would undermine defendants' reliance on counsel, remove defendants' traditional remedy for a constitutional violation, and both dim and blur the bright-line rule that guides current practices. But it doesn't offer a rationale that justifies restricting defendants' rights.

Prieto-Rubio requires that police work through counsel whenever it is reasonably foreseeable that interrogation of a represented defendant will lead to evidence of a crime for which the defendant is represented. *Prieto-Rubio* thus presents a common-sense, bright-line rule to guide police officers' interrogation of suspects, and the rule respects the constitutionally-protected reliance on counsel in criminal investigatory processes.

Savinskiy hewed a limited exception to that rule, permitting the state to bypass counsel and question a represented defendant about ongoing criminal activity targeting the prosecutor and witnesses in the represented case. This court reasoned that the constitutional right to counsel does not include the right to be assisted by counsel in his conspiracy to defeat the pending charges by harming or killing the prosecutor or witnesses.

The state seeks to expand the *Savinskiy* exception in two ways. First, it asks this court to relax the protections of counsel whenever officers believe that the defendant committed additional crimes after he is charged with a crime for which he sought the assistance of counsel—regardless of whether the new activity is ongoing or presents any threat to the prosecution, the people connected therewith, or—in fact—anyone. Second, it seeks a new suppression rule such that, whenever officers rely on this "new criminal activity" rule to invade the right to counsel regarding the crimes for which the defendant is represented, that invasion does not taint evidence *vis-à-vis* any prosecution other than the represented case.

The first proposal would erode defendants' constitutional protections by undermining any assurance that a defendant charged with a crime has the benefit of an attorney's presence, advice, and expertise in any situation where the state may glean involuntary and incriminating evidence or statements that could be used in his prosecution. Rather, the state could shift the prosecution to any "new" and, potentially, greater criminal activity—the very risk identified in both *Prieto-Rubio* and *Savinskiy*. And the second would limit the right to suppression in an unprecedented way—removing from defendants the right to be returned to the position they should have been in absent a violation of their constitutional rights.

However, unlike in *Savinskiy*, the state has not identified a legitimate justification to flout the constitutional rights of represented defendants that it seeks to curtail. Accordingly, this court should deny the invitation to do so.

Questions Presented and Proposed Rules of Law

First Question Presented: Article I, section 11, requires the state to contact counsel before interrogating a represented defendant when it is reasonably foreseeable that interrogation will lead to evidence of the represented crime. An exception permits interrogation into ongoing criminal conduct that threatens violence to frustrate prosecution even when it may divulge incriminating evidence of the charged offense. Does the exception permit interrogation regarding *any* criminal conduct that occurred after the represented crime was charged?

Proposed Rule: No. The exception is limited to the investigation of ongoing criminal conduct that threatens future harm to the very criminal prosecution for which the constitution afforded the defendant the protection of counsel. The fact that the police want to investigate a crime committed after the right to counsel has attached, without more, does not justify jettisoning a defendant's Article I, section 11, right to rely on counsel.

Second Question Presented: When the state violates the *Prieto-Rubio* rule while investigating new criminal conduct, can the state use evidence derived from that violation in a prosecution of that new conduct?

Proposed Rule: No. The purpose of the exclusionary rule requiring suppression of evidence obtained when the state violates a constitutional right is to return the defendant to the position he would have been in had the violation not occurred. The right to counsel deserves the same protections as other constitutionally protected rights, and therefore the exclusionary rule applies to its violation. Thus, when police question a defendant in violation of the right to counsel, the defendant is restored to his position only if all evidence obtained is suppressed in all prosecutions, unless the state establishes independent source, inevitable discovery, or attenuation.

Summary of the Argument

Article I, section 11, provides a right to counsel for suspects charged with crimes. It was designed to ensure that individuals caught up in criminal processes and facing skilled, professional interrogators have the benefit of professional assistance to maintain the fairness of those processes.

To serve the purposes of Article I, section 11, this court devised rules intended to prevent the state from undermining the reliance on counsel by charged individuals. But its early rules were ambiguous and not easily applied.

In *Prieto-Rubio*, this court crafted a bright-line rule to provide needed guidance to trial courts and the police seeking to question represented defendant's without counsel present. That rule operates in a straightforward manner—if it is reasonably foreseeable that such questioning will lead to evidence relevant to a matter for which a defendant is represented, then the questioning violates the Oregon constitution because it undermines the defendant's right to counsel. When the state obtains evidence from such a constitutional violation, the exclusionary rule applies in order to return the defendant to the position he would have been in but-for the violation.

In *Savinskiy*, this court recognized *Prieto-Rubio*'s bright-line but identified a particular circumstance by which defendant's own actions deflect the beacon limning that line.[1] Namely, a represented defendant's criminal endeavor to sabotage the prosecution is antithetical to, and cannot be ensconced by, the right to the protection of counsel in that criminal prosecution. The state may pass through counsel and reach the defendant because the defendant's own

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[1] Defendant does not request reconsideration of *Savinskiy* because the Court of Appeals correctly held that it did not render the interrogation of defendant constitutional. Accordingly, defendant argues that this court should apply the current rule, and reject the state's effort to expand the *Savinskiy* exception to that rule beyond what this court found warranted under its particular circumstances.

continuing efforts seek to obscure the line that would otherwise bar the questioning.

But, in this case, the state ignores all subtlety and seeks to dim or blur the bright-line rule by rewriting *Savinskiy* as an exception for any new criminal activity, including activity that has been completed. That revision would untether the exception from its justification. The constitution cannot tolerate such a subversion of the rights it affords without equally compelling state interests that outweigh the constitutional rights at issue. Because there is no such justification for the state's proposed exception, it would be unconstitutional. Moreover, because the state proposes to hinge the expanded exception on a fact that has no bearing on whether a defendant's right to counsel would be undermined by the interrogation sought, the state's rule is not a logical extension of this court's Article I, section 11, jurisprudence.

The state argues that the Court of Appeals "narrowed" the *Savinskiy* exception to ongoing crimes, because limiting the exception to ongoing crimes is inconsistent with the reasoning in *Savinskiy* and not necessary to protect Article I, section 11, rights. But the state is mistaken. *Savinskiy* does not have to be "narrowed"—by its own terms, the court crafted the exception to apply only to ongoing threats to derail the prosecution for which the constitution afforded the defendant counsel. Although *Savinskiy* discusses federal precedents, it did not import the federal standards in those precedents into

Oregon's jurisprudence. It would be inappropriate to do so because Article I, section 11 provides its own protections based on a personal rights model, not the deterrence-based protections of the federal rights. Finally, broadening the exception to any criminal act after attachment of counsel would undermine the protections of Article I, section 11.

In its drive to reduce its protections, the state largely overlooks the purposes of Article I, section 11. As this court explained in *Sparklin*, Article I, section 11, is intended to protect a defendant's decision to rely upon counsel—a necessary component of a fair adversary system. Criminal cases pit the vast array of resources available to the state against individuals accused of a crime. The drafters therefore created a right to rely upon the assistance of professional counsel to provide some counterbalance to the power arrayed against them in order to facilitate fair and just procedures.

Finally, the state also argues that, even if questioning violates *Prieto-Rubio*, suppression is only required in the prosecution for the case in which the defendant was represented. But the state's argument ignores settled law and the most fundamental principles of Oregon's exclusionary rule—suppression is the tool used to properly protect the personal rights of defendants as set out in the constitution. That is, in order to protect a defendant's personal rights, suppression must be used when necessary to return the defendant to the position he would have been in had the state not violated his rights.

That mechanism for protecting constitutional rights is well-established, and the state presents no compelling reason to complicate the law or drift from the time-tested procedures. If a court finds that the state violated a defendant's constitutional rights, then evidence discovered because of that violation must be suppressed in all future proceedings unless the state establishes either an independent source, inevitable discovery, or attenuation.

In sum, the proper test to be applied under Article I, section 11, is the one set out in *Prieto-Rubio* with only a limited exception: the police may not interrogate a represented defendant when it is reasonably foreseeable that they might obtain evidence relevant to the crime for which he is represented, except that they may contact a represented defendant to investigate ongoing efforts that threaten to harm those involved in that prosecution. Any evidence obtained in violation of that rule must be suppressed.

Here, the Court of Appeals properly applied the *Prieto-Rubio* test to the circumstances of defendant's case, held that the state violated his rights, and ordered suppression of the evidence discovered as a result of that violation. This court should affirm.

Argument

I. The Oregon Constitution requires protection of the right to counsel in order to "counteract[] the handicaps of a suspect enmeshed in the machinery of criminal process," which further requires prohibiting procedures that undermine such a suspect's reliance on counsel.

Article I, section 11, of the Oregon Constitution provides, in part, that a criminal defendant has the right "[i]n all criminal prosecutions * * * to be heard by himself and counsel." That right applies to pretrial interrogations because "[t]here can be no question that the right to an attorney during the investigative stage is at least as important as the right to counsel during the trial itself." *State v. Sparklin*, 296 Or 85, 92 n 9, 672 P2d 1182 (1983).

In *Sparklin*, this court explained the purposes served by Article I, section 11:

> "The constitutional right to counsel is meant to counteract the handicaps of a suspect enmeshed in the machinery of criminal process. Once accused has sought the safeguard of counsel, it is unfair to let skilled interrogators lure him from behind the shield into an unequal encounter. To permit officers to question a represented suspect in the absence of counsel encourages them to undermine the suspect's decision to rely upon counsel. Such interrogation subverts the attorney-client relationship."

296 Or at 93 (quoting from commentator, citation omitted). Further, "development of the right to an attorney at pretrial confrontations between the state and the individual reflects a concern for the preservation of the fairness of trial and counsel's effectiveness in defending against the charge." *Id.* at 94.

Accordingly, under Article I, section 11, "once a person is charged with a crime[,] he or she is entitled to the benefit of an attorney's presence, advice[,] and expertise in any situation where the state may glean involuntary and incriminating evidence or statements for use in the prosecution of its case against [the] defendant." *Id.* at 93. That protection is provided to litigants "in the smallest civil matter," and "[w]e can certainly require no less of prosecutors or police in criminal matters." *Id.*

Despite that clarity of purpose and understanding of the need for the protection, the ever-evolving nature of federal Sixth Amendment law and ambiguities in the rules applying Oregon's right to counsel have led to significant litigation. *Sparklin* was one of this court's first attempts to provide a practical rule for governing general interrogations of represented defendants. *Sparklin* adopted the "factually unrelated" test that permitted interrogation as long the defendant was represented only "on a charge factually unrelated to the events about which defendant is to be interrogated." *Id.* at 98. But even when adopting that test, concurring justices voiced continued "misgivings" because of the belief that it, too, would "prove difficult to administer." *Id.* at 99 (Linde, J, concurring).

II. This court in *Prieto-Rubio* rejected efforts to narrow the Oregon right to counsel similar to federal limitations on the Sixth Amendment, and opted instead for an objective "reasonably foreseeable" test.

After *Sparklin*, federal caselaw concerning the right to counsel under the Sixth Amendment narrowed considerably, culminating in an offense-specific-only rule announced in *Texas v. Cobb*, 532 US 162, 168, 121 S Ct 1335, 149 L Ed 2d 321 (2001). The state here argues again that this court should move Oregon's law towards *Cobb*. But this court has expressly rejected similar arguments as inconsistent with Article I, section 11. *State v. Prieto-Rubio*, 359 Or 16, 34-35, 376 P3d 255 (2016).

In *Prieto-Rubio*, this court noted the temptation to "follow the lead" of *Cobb* in the context of the state's request to similarly narrow Article I, section 11, such that it applies only to interrogations regarding the charges on which the defendant was represented and "the facts immediately preceding or immediately succeeding the events that form the basis for the charge." 359 Or at 34-35. But after a thorough discussion of *Cobb*'s Sixth Amendment ruling, this court rejected the state's proposed narrowing as inconsistent with the protections of Article I, section 11. *Id.* at 35.

This court was not done with its rejection of the state's too-narrow test, however. *Prieto-Rubio* also acknowledged that the test the defense requested—

a "factually related" test based on its reading of *Sparklin*—was "too amorphous to be of any value." *Id.* at 35.

Accordingly, this court sought to address the "conundrum" presented by the proposed, unworkable tests, and concluded that the proper test under Article I, section 11 must prevent questioning about uncharged offenses that "is likely to compromise the right to counsel as to [the represented case]." *Id.* at 36. Such questioning "is foreclosed by the state constitutional right to counsel," and any test that would permit such questioning would circumvent the constitutional guarantee. *Id.*

This court concluded that the rule required by Article I, section 11, is an objective test that considers the facts and circumstances of each case to determine whether "it is reasonably foreseeable to a person in the position of the questioner that questioning will elicit incriminating information involving the charged offense for which the defendant has obtained counsel." *Id.* at 37. If it is, the questioning violates Article I, section 11, and "any prejudicial evidence obtained as a result of that violation" must be excluded from future proceedings. *Id.* at 38.

III. *Savinskiy* carved out a limited exception to the *Prieto-Rubio* rule, but in doing so did *not* overrule *Prieto-Rubio*, which continues to provide the general rule required to protect the right to counsel under Article I, section 11.

In *State v. Savinskiy*, 364 Or 802, 441 P3d 557 (2019), this court again addressed the scope of Article I, section 11, protections. Like *Prieto-Rubio* before it, the *Savinskiy* court discussed the history of Article I, section 11, jurisprudence in Oregon, and noted the backdrop presented by developments in federal law, including *Cobb*. *Savinskiy*, 364 Or at 808-09, 813-15. In doing so, this court highlighted "concern[s]" noted by the *Cobb* dissent that were not present for the defendant in *Savinskiy* because of the ongoing nature of the new crimes the state sought to investigate. *Id.* at 814-15. Because the concerns were based on the federal right, and federal constitutional protections are based on a deterrence-of-state-misconduct model, those concerns were unsurprisingly focused on the potential for police misconduct under the federal rule. *Id.*[2]

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[2] The court noted that the "risk of strategic initial charging is not presented when a defendant who has already been charged decides to engage in new criminal activity. Although there remains an opportunity for the state to delay charging new criminal activity in order to investigate the new activity without the obstacle of counsel, it is not the kind of strategic manipulation about which we expressed concern in *Prieto-Rubio*." *Savinskiy*, 364 Or at 815. Although the court does not explain *why* strategic manipulation would not continue to be a risk with post-charge misconduct, it is plain that that concern is focused on deterring state misconduct, the goal of federal cases, and not primarily concerned with ensuring that a defendant's reliance on counsel is not undermined, as Article I, section 11, requires.

Notably, however, nothing in *Savinskiy* negates, or could negate, the purposes served by Article I, section 11, above, which are viewed through a personal rights model, not a deterrence model.[3] And *Savinskiy* did not suggest it would be appropriate to do so. In fact, it pointed out that "*Sparklin* emphasized and *Prieto Rubio* reiterated that"

> "the purpose of the Article I, section 11, right is to ensure that a defendant charged with a crime has the benefit of an attorney's presence, advice, and expertise 'in any situation where the state may glean involuntary and incriminating evidence or statements for use in the prosecution of its case against defendant.' *Sparklin* explained that '[t]he development of the right to an attorney at pretrial confrontations between the state and the individual reflects a concern for the preservation of the fairness of trial and counsel's effectiveness in defending against the charge.'"

Id. at 818 (citations omitted).

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[3] This court's jurisprudence regarding Oregon's constitutional protections of criminal defendants follow a personal rights model, not the deterrence model of their federal counterparts. *See, e.g.*, *State v. Unger*, 356 Or 59, 67, 333 P3d 1009 (2014) ("The [Article I, section 9,] exclusionary rule is constitutionally mandated and serves to vindicate a defendant's personal right to be free from unreasonable searches and seizures. The federal exclusionary rule, by contrast, is premised on deterring police misconduct.") (Citation omitted); *State ex rel Juvenile Dep't v. Rogers*, 314 Or 114, 119, n 3, 836 P2d 127 (1992) ("This court has consistently reaffirmed that personal rights underlie the Oregon exclusionary rule," not the deterrence rationale adopted by modern federal caselaw); *State v. Davis*, 313 Or 246, 253–54, 854 P2d 1008 (1992) (Oregon's exclusionary rule is based on personal rights theory, not deterrence); *see also State v. Mills*, 354 Or 350, 371, 312 P3d 515, 528 (2013) (Constitutional guarantees in Article I, section 11, are "a matter of personal right"). Oregon's right to counsel under Article I, section 11, represents "a guarantee of individual rights" that protects "personal freedom against oppressive governmental power." *State ex rel. Oregonian Pub. Co*. v. *Deiz*, 289 Or 277, 283, 288, 613 P2d 23 (1980) (Linde, J., concurring).

Rather, *Savinskiy* found that a narrow exception from *Prieto-Rubio* was warranted because Article I, section 11, should not include "a right to be assisted by counsel in [a] conspiracy to defeat the pending charges by committing murder and assault." *Id.* at 819. Accordingly, it held that "the Article I, section 11, right to counsel on pending charges does not guarantee that the state will provide notice to a defendant's attorney before questioning the defendant about a new, uncharged and ongoing conspiracy to harm witnesses to a pending prosecution." *Id.*

IV. The state's proposed expansion of the *Savinskiy* exception would impermissibly undermine Article I, section 11.

A. The state is correct that a defendant's constitutional rights are not absolute; but *Savinskiy* did not rely on balancing a defendant's rights against state interests and, in any event, the state fails to muster a compelling interest to justify having the *Savinskiy* exception swallow the *Prieto-Rubio* rule.

There is some tension between the exception carved out in *Savinskiy*, and the Article I, section 11, rule and its underlying purposes discussed in cases from *Sparklin* to *Prieto-Rubio*. There will be cases in which the defendant's constitutional right to counsel is established under the *Prieto-Rubio* test—when it will be reasonably foreseeable that interrogation will produce evidence of the represented crime—yet the circumstances fit within the *Savinskiy* exception. In such cases, *Savinskiy*'s exception will prevail over the constitutional principles set out in *Prieto-Rubio*.

In other contexts, it is widely recognized that a defendant's constitutional rights must, upon occasion, be balanced against countervailing state interests. *See*, *e.g.*, *Rock v. Arkansas*, 483 US 44, 55-56, 107 S Ct 2704, 97 L Ed 2d 37 (1987) (restrictions on a defendant's constitutional rights may be necessary to accommodate other interests, but interests must be carefully evaluated to make sure they justify any such limitations); *Shapiro v. Thompson*, 394 US 618, 634, 89 S Ct 1322, 22 L 3d 2d 600 (1969) (restriction that limits exercise of constitutional right is unconstitutional "unless shown to be necessary to promote compelling governmental interest"); *State v. Spencer*, 305 Or 59, 74-75, 750 P2d 147 (1988) (balancing state's interest in obtaining evanescent evidence against defendants' Article I, section 11, right to counsel).

Implicitly argued, when a defendant's constitutional right to counsel may be infringed in circumstances that fit within the *Savinskiy* exception, the exception may be constitutional as long as the state's interests that necessitate it outweigh the constitutional right. Here, the state's proposal shrinks a defendant's Article I, section 11, right to counsel to its most limited, offense-specific variant to serve the state's important interest in solving crime. State's BOM at 44-47. But the exception cannot be expanded in a manner that increases the infringement on defendants' rights unless that expansion is justified by counterbalancing state interests. *Spencer*, 305 Or at 74-76. The state's expansion is not so justified.

B. There is no justification for the state's proposed limitations on defendants' Article I, section 11, rights.

The *Savinskiy* exception for investigating "new criminal activity in progress" involving "ongoing effort[s] to harm the prosecutor and witnesses against him" approximates other permissible exceptions created because of compelling state interests. 364 Or at 807, 817. For example, because "evidence of an arrested driver's blood alcohol dissipates over time" creates an exigent need to obtain the such evidence quickly, a defendant's Article I, section 11, right to counsel may be limited such that it must be exercised in a short period of time, perhaps no longer than 15 minutes. *Spencer*, 305 Or at 74-75, 75 n 5. Similarly, Article I, section 9, rights have long been balanced with exigency exceptions that justify avoiding the delay that would be caused by full protection of a constitutional right in order to protect officers and others. *See e.g.*, *State v. Stevens*, 311 Or 119, 126, 806 P 2d 92 (1991) (describing exception to warrant requirement when "a situation [] requires the police to act swiftly to prevent danger to life or serious damage to property, or to forestall a suspect's escape or the destruction of evidence"); *United States v. McConney*, 728 F 2d 1195, 1199 (9th Cir), *cert den*, 469 U S 824, 105 SCt 101, 83 L Ed 2d 46 (1984) (exigent circumstances are "those circumstances that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officer of other persons, the

destruction of relevant evidence, the escape of a suspect, or some other consequence improperly frustrating legitimate law enforcement efforts").

However, the state's proposed expansion of the *Savinskiy* exception cannot be similarly justified. The state proposes to expand *Savinskiy* to apply the exception even when no criminal conduct is in progress—when there are no ongoing efforts to harm the prosecutor, witnesses, or the case more generally. It proposes that a defendant's rights should give way simply because the additional investigation concerns crimes committed *after* the charged offense. And it proposes to do so even if such an interrogation is likely to lead to evidence of the charged offense—that is, even if it is an interrogation that clearly violates a defendant's right to counsel for all of the reasons discussed in *Prieto-Rubio*. Yet the state provides no state interest created by the mere timing of the new offense that justifies such a violation.

But there is no inherent difference in the state's need for evidence of a defendant's involvement in a completed crime that occurred before he was charged and one that was completed after. In either situation, the state has precisely the same interest in interrogating the defendant to obtain evidence of an additional offense. Thus, there is no difference in the state's interests that can justify applying a different test to reduce defendants' Article I, section 11, rights in the latter situation. Accordingly, when the *Prieto-Rubio* test establishes that the interrogation *does* invade a defendant's right to counsel,

there is no reason to permit the state to undermine the defendant's reliance on his counsel because of the timing of a new offense that has no bearing on the right-to-counsel issue. And because it is plain that Article I, section 11, prohibits interrogation that bypasses counsel when the offense was committed before or at the same time as the charged offense (whenever it is reasonably foreseeable that evidence of the charged offense will be discovered), that same rule should apply with equal force when the new offense occurred after the charged offense.

The critical inquiry is the one relied on by *Prieto-Rubio*—whether the interrogation is likely to invade the matters on which the defendant is represented—not when the new offense was committed.

Thus, the state offers no compelling justification for expanding the *Savinskiy* exception in a way that undermines defendants' reliance on counsel in such situations. The state's mere desire to conduct additional investigation does not provide a counterbalance to defendants' rights, because that desire is no different in cases on either side of the state's proposed line. That is, the state's "need" is no different when the additional investigation concerns crimes completed after the charged offense as it is for crimes committed before or at around the same time. Thus, not only does the constitution *not* create a right for the state to avoid frustration by the need to work through counsel, but there is no special need to avoid that frustration that can outweigh defendants' rights

when the state wishes to investigate later-in-time offenses. The proper place for the line remains centered on whether the *questioning* will produce evidence of the represented charges—where *Prieto-Rubio* put it—not on the arbitrary timing of the offense ostensibly being investigated.

Considering the effects on defendant's right to counsel of interrogations that fall on both sides of the state's line demonstrates the problem. If there is *no* inherent difference in the impact on the right to counsel between an interrogation involving a crime committed after a charged offense and one involving a crime committed before the charged offense, then using that line to separate violative from non-violative interrogations does not protect the constitutional interests. Put another way, because it can be reasonably foreseeable for interrogations concerning crimes committed both before and after the charged offense to be likely to lead to evidence regarding the charged offense, the timing of the crimes is not a determinative factor relative to the impact of the interrogation on the right to counsel. Consequently, there is no logical basis for using the timing of the offense as a bright line in the application of an Article I, section 11, test.

This case is illustrative. Here, after officers learned that defendant was represented in a related matter and started questioning defendant about the charges *in that matter*, it would have been perfectly clear to any reasonable person in defendant's position that any reliance he had placed upon counsel for

assistance in that matter was at least temporarily irrelevant. And his reliance on counsel was undermined. The interrogation at that point involved charges for which he was represented, but that counsel was not present, and his reliance on counsel was thereby undermined in precisely the same way as it would have been if the interrogation was initially focused on crimes committed *before* his original charge. Thus, as soon as the police started questioning defendant about his firearms charges, all of the reasons addressed in *Sparklin* and *Prieto-Rubio* for protecting defendant's right to counsel applied.

In order to protect those rights and serve the interests of Article I, section 11, the officers should have stopped the interrogation at that time. But they did not. And after over six years of litigation, the state still has not provided a reason why the state had any need to violate defendant's rights at that time. It has identified no need for the continued questioning beyond the same general "need" for evidence that exists in every case.

Even now, when the state asks this court to change the rules to permit such continued questioning based only on the timing of the new offense being investigated, it identifies no characteristic of the timing of that offense that has any bearing on the rights at issue. Defendant was represented by counsel regarding his firearm offenses, and officers questioned defendant and obtained evidence about those offenses without contacting that counsel in direct violation

of his rights. That would have been true whether they started the interrogation talking about a crime committed a decade ago or yesterday.

The reasoning of *Prieto-Rubio* establishes beyond any doubt that the officers violated and undermined defendant's right to counsel when they began interrogating him about a crime for which he was represented. There is no basis for creating a new rule that allows the state to ignore that actual violation of his rights simply because of the happenstance of the timing of the offense that ostensibly justified the initiation of the interrogation. Accordingly, this court should decline to expand *Savinskiy* beyond its announced scope.

V. The Court of Appeals correctly applied the *Prieto-Rubio* test here.

The Court of Appeals correctly applied the *Prieto-Rubio* test and found that the interrogation in this case made it reasonably foreseeable that defendant would provide evidence of the crime for which he was represented. That conclusion inescapably follows the record facts as noted by the Court of Appeals' first *Craigen* opinion, which it quoted below:

> "'not only was it foreseeable at that point that further questioning might elicit incriminating information about the firearm charges, [the officer] *explicitly questioned defendant about the firearms underlying those charges, eliciting incriminating information from defendant about how he came to possess those firearms,' in direct violation of defendant's Article I, section 11, right to counsel on the firearm charges*."

State v. Craigen, 311 Or App 478, 481, 489 P3d 1071 (2021) (emphasis added) (citation omitted).

VI. The Court of Appeals also applied the proper remedy.

Having established a violation of defendant's constitutional right to counsel, the Court of Appeals applied the proper remedy: ordering the "suppression of all of defendant's statements after the violation." *Id.* at 482. The Court of Appeals held that that remedy was required because "the state had not demonstrated that it obtained those statements in a manner independent from the unlawful portion of the interrogation." *Id.*

That remedy is a proper application of decades of exclusionary rule jurisprudence. The basic rule holds that when police officers obtain pretrial statements from a defendant in violation of the constitution, "such statements must be excluded at trial in order to restore the defendant to the position that he or she would have been in if police had not violated that constitutional right." *State v. Moore/Coen*, 349 Or 371, 383, 245 P3d 101 (2010), *cert den*, 563 US 996 (2011) (noting that the rationale for the exclusionary rule under Article I, section 12, was adopted from a case that had applied the same rule under Article I, section 9); *see also State v. Simonsen*, 319 Or 510, 518-19, 878 P2d 409 (1994) ("evidence is suppressed for violations of the Oregon Constitution 'to preserve * * * rights to the same extent as if the government's officers had stayed within the law.'"). The same remedy applies to violations of Article I, section 11. *Prieto-Rubio*, 359 Or at 38 ("The remedy for a violation of Article I, section 11, is the exclusion of any prejudicial evidence obtained as a result of

that violation."); *State v. Dinsmore*, 342 Or 1, 10, 147 P3d 1146 (2006) (violation of the defendant's constitutional right to counsel made the resulting evidence inadmissible "for all purposes," including in a subsequent prosecution on a different charge).

In *Simonsen*, this court explained that the trial court was required to suppress the defendant's confession because he was not informed that "he had a court-appointed lawyer or the fact that the lawyer had asked to consult with [him]," in violation of Article I, section 12. 319 Or at 512. This court rejected as irrelevant the state's argument that the confession should have been admitted because the interrogating officer lacked knowledge of the attorney, and explained that exclusion of the evidence was the required remedy:

> "In the context of a criminal prosecution, the focus then is on protecting the individual's rights vis-a-vis the government * * *.
>
> "This focus on individual protection under the exclusionary rule, a rule that operates to vindicate a constitutional right in the courts, supports the constitutional rule * * *. [T]he constitutionally significant fact is that the Oregon government seeks to use the evidence in an Oregon criminal prosecution. Where that is true, the Oregon constitutional protections apply."
>
> "Failure of the trial court to suppress the evidence is reversible error of constitutional magnitude."

Id. at 519.

Of course, the exclusionary rule does not require suppression if the state can prove that the evidence derived from some source other than the violation

or inevitably would have been obtained, because then suppression is *not* needed to return the defendant to the position he would have been in but-for the violation. *State v. Vondehn*, 348 Or 462, 476-77, 236 P3d 691 (2010); *see also State v. Unger*, 356 Or 59, 64-65, 333 P3d 1009 (2014) (violation of a defendant's rights under Article I, section 9, requires suppression unless the state can prove inevitable discovery, independent source, or attenuation).

Savinskiy did *not* hold that Article I, section 11, violations do not warrant the application of the established exclusionary rule, or that some new, hybrid rule is appropriate for Article I, section 11, cases. Some confusion may be generated by the suggestion in *dicta*—when discussing a Court of Appeals' ruling that this court had declined to review—that the Court of Appeals was correct to require suppression of statements concerning the new crimes from the trial of the original charges. *Id.* at 820. The confusion arises from the interplay of two of this court's statements: first, its conclusion that the police "did not violate [the] defendant's Article I, section 11, rights to counsel when they questioned him about the new criminal activity," and second, its stated agreement with the Court of Appeals that the trial court erred in failing to suppress the statements obtained therefrom in his prosecution on the original charges. *Id.* at 820. Taken together, those statements suggest an anomalous rule that suppression may be required even when no constitutional violation

occurs.[4] Such a rule directly contradicts Oregon's statute precluding suppression of evidence that is *not* derived from a constitutional violation. ORS 136.432.[5]

Savinskiy's dicta also should not be followed because it would both undermine the purpose of the exclusionary rule—to return defendants to the position that they would have been in without the violation of their rights—and create significant application challenges. It would suggest the possibility that *some* interrogation violates constitutional rights in *some* proceedings but not others, requiring trial courts to walk through individual lines of interrogations to ascertain admissibility despite obvious violations of defendants' rights. In defendant's case, it would permit use of evidence that was discovered *as a direct result of unconstitutional questioning* about the defendant's represented

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[4] The suggestion would be consistent with a view of the violation of a defendant's rights as having occurred when evidence was admitted in court, rather than when the police unlawfully question a defendant. But that view is *not* consistent with this court's Article I, section 11, jurisprudence.

[5] ORS 136.432 provides in relevant part:

"A court may not exclude relevant and otherwise admissible evidence in a criminal action on the grounds that it was obtained in violation of any statutory provision unless exclusion of the evidence is required by:

"(1) The United States Constitution or the Oregon Constitution;

"(2) The rules of evidence governing privileges and the admission of hearsay; or

"(3) The rights of the press."

crimes without any showing that the state would have obtained that evidence without the violation of defendant's rights.

No such complication of the applicable law is warranted. There is no reason to treat a violation of Article I, section 11, differently than violation of other constitutional protections of criminal defendants. Article I, section 11, creates no less of a personal right than the others. *State v. Mills*, 354 Or 350, 371, 312 P3d 515, 528 (2013) (Constitutional guarantees in Article I, section 11, are "a matter of personal right."); *State ex rel. Oregonian Pub. Co. v. Deiz*, 289 Or 277, 283, 288, 613 P2d 23 (1980) (Linde, J., concurring) (right to counsel represents "a guarantee of individual rights" that protects "personal freedom against oppressive governmental power"). Accordingly, the purpose of the exclusionary rule—returning defendants to the position that they would have been in absent the violation of their personal rights—applies equally to violations of Article I, section 11.

CONCLUSION

Because the state violated defendant's right to counsel, this court should affirm the decision of the Court of Appeals that reversed and remanded defendant's case and required suppression of all evidence obtained as a result of that violation.

Respectfully submitted,

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Signed
By David O. Ferry at 1:44 pm, Jan 27, 2022

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05 and (2) the word-count of this brief is 6,413 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Respondent's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on January 27, 2022.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Respondent's Brief on the Merits will be eServed pursuant to ORAP 16.45 on Michael Casper #062000, Senior Assistant Attorney General, attorney for Petitioner on Review, Plaintiff-Respondent, and Anna Belais #141046, Attorney for Amicus Curiae, Oregon Justice Resource Center.

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