IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. DEBORAH LYNN REED, Defendant-Appellant Petitioner on Review.	Lincoln County Circuit Court Case Nos. 19CR12088, 18CR64481 CA A170999 (Control), A171000 S069360

PETITIONER'S BRIEF ON THE MERITS

Petition to review the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Lincoln County
Honorable Sheryl Bachart, Judge

Opinion Filed: February 9, 2022
Author of Opinion: SHORR, J.
Concurring Judge: Ortega, P. J.
Before: Ortega, Presiding Judge, and Shorr, Judge, and Powers, Judge

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PETITIONER'S BRIEF ON THE MERITS

Statement of the Case

In this criminal case, petitioner (defendant hereafter) seeks reversal of her convictions for various drug crimes, because the trial court should have suppressed evidence obtained in violation of the Oregon Constitution's protection against compelled self-incrimination.

Specifically, defendant asks this court to hold that Article I, section 12, required that police officers, who interrupted defendant's mandatory supervision appointment in her probation officer's secure office, give defendant *Miranda* warnings[1] before questioning her about their stated knowledge that she was selling drugs and likely possessed drugs on her person or in her car at that moment. A person on probation's continued liberty is contingent on their obedience to and cooperation with law enforcement, especially during a mandatory in-office meeting concerning the probationer's compliance with the conditions of supervision. Police officers cannot overlook the implicit coercive effect of that setting by accusing the probationer of criminal activity and

[1] For ease of reference, defendant refers to the warnings required under Article I, section 12, of the Oregon Constitution, as *Miranda* warnings because they are essentially the same as those required under the Fifth Amendment to the United States Constitution as described in *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966).

questioning them in front of their probation officer during such an appointment, as if the officers happened upon the probationer on a public street.

The question here is whether a police-dominated atmosphere existed when two police officers accused defendant of and questioned her about drug crimes in the presence of her probation officer at the parole and probation office without providing *Miranda* warnings or otherwise telling her that refusal to cooperate or to answer their questions would not subject her to liability for a probation violation or revocation. The trial court and the Court of Appeals concluded that the totality of those circumstances did not amount to a police-dominated atmosphere that required *Miranda* warnings.

Defendant's case also presents an opportunity to explain (1) that the "reasonable person" standard for evaluating whether a police-dominated atmosphere necessitating *Miranda* warnings exists must consider traits held by the person questioned that would bear on their understanding of the situation, such as being on probation, and (2) that a police officer's uncommunicated belief that the person is free to leave the encounter, is free to refuse to answer police questions, and will incur no penalty for exercising those freedoms is not properly part of the totality of the circumstances determination.

Questions Presented and Proposed Rules of Law

First Question Presented. In evaluating whether police questioning of a probationer at a probation office in the presence of her probation officer constitutes interrogation under compelling circumstances, must courts consider the *implicit* coercive effect that the person's status as a probationer, the location, and the probation officer's presence, taken together with police questioning, would have on a reasonable probationer's understanding of her situation?

Proposed Rule of Law. Yes. Implicit coercion compels as effectively as explicit coercion. To discern how a reasonable person on probation who was being questioned about new crimes while at the probation office in the company of police and her probation officer would understand her circumstances, the inquiry must take into account the implicitly coercive potential of the circumstances, regardless of whether any state actor explicitly made threats or applied pressure to gain the probationer's compliance with the investigation.

Second Question Presented. During police questioning, does the fact that the police deem the person under interrogation free to leave and free not to answer their questions factor in the determination of whether a police-dominated atmosphere exists if the police do not inform the person that they are free to leave and need not answer their questions?

Proposed Rule of Law. No. The subjective belief or intent of an interrogating officer concerning a person's freedom of decision and action are irrelevant to the determination of whether a police-dominated atmosphere requiring *Miranda* exists, unless those views are expressly communicated to the interrogated person under conditions that demonstrate that the person's purported freedom is genuine.

Historical Facts

Defendant pleaded guilty to delivery of methamphetamine and first-degree child neglect. *See 2018 Judgment*, A171000 TCF. The trial court placed defendant on supervised probation with the proviso that, if defendant's probation were revoked, the court would sentence her to 19-20 months in prison on the delivery count. *Id.*

Defendant's probation conditions commanded that defendant "VIOLATE NO LAW[,]" and placed her under a probation officer's supervision by requiring her to, among other things:

- "permit the parole and probation officer to visit the probationer or the probationer's work site or residence and to conduct a walk-through of the common areas and of the rooms in the residence occupied by or under control of the probationer[,]"
- "consent to the search of person, vehicle or premises upon the request of a representative of the supervising officer if the supervising officer has a reasonable grounds to believe that evidence of a violation will be found,"
- report by a certain date to her probation officer, and

- "[a]bide by the rules and regulations of the Department of Corrections, including the general conditions of probation."[2]

Id.

Defendant had a meeting with her probation officer, Eoff, on February 19, 2019. Tr 8. The purpose of the meeting was to have defendant "come in and talk about her compliance" with the conditions of her probation. *Id.*

She attended the meeting as required. Tr 8, 14. If defendant had not reported to that appointment or had left early without an approved reason, Eoff could have initiated a probation violation proceeding against her. Tr 14. Eoff's office is about 80 square feet in size. Tr 9.

The same day, Bales, a Newport police officer, received information from a "confidential informant" that defendant had been selling drugs. Tr 20. Bales "had been receiving some of that information for a while, and then [he] received information that [defendant] had drugs on her at that time." *Id.* Bales passed that information to Officer Humphreys and Sergeant Haynes while he was on another call. *Id.*

Humphreys and Haynes found defendant's car parked at the Lincoln County Parole and Probation Office. Tr 29, 45. They went inside and found

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[2] The general probation-conditions statute provides, *inter alia*, "The probationer shall "[p]romptly and truthfully answer all reasonable inquiries by the Department of Corrections or a county community corrections agency." ORS 137.540(1)(k).

defendant meeting with Eoff. Tr 30, 45-46. Eoff's door was "mostly closed," but Haynes could hear them inside talking. Tr 30. Haynes knocked on the door and asked if the officers could talk to Eoff and defendant. Tr 30.

Eoff asked if they wanted him to dismiss defendant so that the officers could talk to her, and Haynes said "[N]o, we want to talk to both of you." Tr 46. Haynes and Humphreys walked into the room; Humphreys "slid by" Haynes and "took a seat in the chair" at the end of Eoff's desk while Haynes "stood and talked" in the doorway. *Id.*

Eoff did not order defendant to answer the police officers' questions. Tr 9. Haynes questioned defendant while Humphries listened. Tr 47. Haynes announced, "we're here because we had information that [defendant] was selling narcotics, as recently as today[,] that * * * she possibly may have some with her." Tr 31. Haynes told defendant that they knew she was still selling drugs and they wanted to talk to her about it. Tr 38. He asked her whether she currently possessed drugs and what quantities she possessed. *Id.*

Defendant acted "[v]ery surprised" and "said [Haynes] could search her purse, search her person * * *." Tr 31. Haynes asked if there were drugs in her car and if he could search it; defendant handed him her car keys. Tr 31-32.

Defendant "didn't deny the selling drugs part. [She] [m]ade a statement that she was trying very hard. That she was trying to get her child back. It was

hard to get work. Kind of almost * * * offering up reasons why that she was exhibiting that behavior of selling * * *." Tr 32.

Haynes told defendant that he would be outside searching her car but that Humphreys would remain inside "if she needed to contact [Haynes] to revoke consent * * *." *Id.* Haynes said that his contact with defendant lasted "under two minutes." Tr 33.

After Haynes left, Humphreys started questioning defendant. Tr 47-50. Eoff asked them to move so that he could get back to his work, and Humphreys continued questioning defendant in a probation-office conference room. Tr 11, 49. Defendant made additional incriminating statements. Tr 47-50. Humphreys searched her phone and her purse and discovered evidence of drug dealing. Tr 49. [3]

Humphreys characterized his interaction with defendant as "low key" and "calm." Tr 50. Eoff stated that the officers did not threaten or pressure defendant: they were "just explaining what information they had received about her conduct, and—and just asking her if it was—if it was true." Tr 12.

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[3] The trial court concluded that the state did not carry its burden to prove that the circumstances were *not* compelling after Haynes left to search defendant's car. Consequently, the trial court suppressed defendant's subsequent statements and evidence derived from the continuing interrogation. Although that ruling is not on review, defendant provides those facts to give a complete account of the proceedings below.

Neither Humphreys, Haynes, nor Eoff provided defendant with *Miranda* warnings. Tr 50. No one ordered her to answer questions or advised her that she could remain silent. Tr 9, 50. Humphreys testified at the suppression hearing that defendant was free to leave and did not have to talk to him. Tr 50. No one told defendant that she was free to leave. Tr 36-37. She would not have been allowed to leave without Eoff's permission. Tr 9. Defendant did not ask Haynes or Humphreys to stop searching her car. Tr 51.

Haynes and Bales searched defendant's car. Tr 22-26, 151-59. They found 45 grams of methamphetamine, a small but usable amount of heroin, a scale, baggies, and other items associated with drug possession, manufacture, and delivery, including "a small glass bottle which had been closed off with a piece of wadded up paper with a little bit of blood on it." *Id.* (quote at Tr 24). The whole interaction lasted about thirty minutes. Tr 51.

Procedural Facts

The Court of Appeals summarized the suppression hearing:

> "Defendant moved to suppress the statements she made in response to the officers' questioning and the evidence discovered in her car, purse, and phone. She argued that the officers had violated her Article I, section 12, right by interrogating her in compelling circumstances without first advising her of her *Miranda* rights. She further argued that her consent to the search of her car, purse, and phone was the product of that *Miranda* violation. The state argued, in response, that *Miranda* warnings were not required because defendant was not in compelling

> circumstances during any part of the 30-minute encounter with Haynes and Humphreys.
>
> "The trial court determined that 'the officers did not exert the type of pressure that results in a finding of compelling circumstances within the first [two] minutes of the encounter.' Therefore, the court declined to suppress defendant's statements during her initial interaction with Haynes 'up to the time that [Haynes] left the room with defendant's car keys,' as well as the evidence discovered during the search of her car. However, the court concluded that the state had failed to prove that circumstances were not compelling during the later questioning. As a result, the court granted defendant's motion to suppress all of the statements that defendant made after Haynes left Eoff's office, and the evidence discovered during Humphrey's searches of defendant's purse and phone."

State v. Reed, 317 Or App 453, 457, 505 P3d 444, *rev allowed*, 370 Or 197 (2022) .

On appeal, defendant argued that the officers created a police-dominated atmosphere from the beginning of the encounter when they confronted her at the parole and probation office in the presence of her probation officer, told her that they knew she was selling drugs and currently possessed drugs, and began questioning her. *Appellant's Opening Brief* (*AOB*) 11-15. She highlighted the fact that her status as a probationer "placed her in a position wherein she had to remain and consent to the officers' requests in order to comply with her probation." *AOB* 13. She argued that

> "A reasonable person in defendant's position, that is, a reasonable probationer who wished to comply with the conditions of her probation, would likely understand herself to be compelled to answer police questions and comply with police requests while at

> the parole and probation office under the eye of her [probation officer]."

AOB 14. *Miranda* warnings were thus required at the beginning of the encounter, defendant argued *AOB* 14-15.

Because the police failed to administer the required warnings, defendant argued that all of defendant's statements and derivative evidence should have been suppressed. *AOB* 15.

The state responded that the circumstances of defendant's interrogation were not compelling and that, even if they were, defendant's consent to search her car attenuated the taint of any violation of defendant's right against compelled self-incrimination such that the evidence discovered in her car was admissible against her. *Respondent's Answering Brief* 2-11.

The Court of Appeals considered the four factors that this court identified in *State v. Roble-Baker*, 340 Or 631, 640-41, 136 P3d 22 (2006) (location of the encounter, length of the encounter, amount of pressure exerted on the defendant, and the defendant's ability to terminate the encounter), and held that the circumstances were not compelling during the first few minutes of defendant's encounter with Haynes and Humphreys. *Reed*, 317 Or App at 459-65.

In assessing the first and third *Roble-Baker* factors (the location and pressure exerted), the court relied heavily on its decision in *State v. Dunlap*, 215

Or App 46, 168 P3d 295 (2007). With respect to the location, the court reasoned that, although a probation office "would seemingly weigh in favor of a compelling circumstances determination," it had "not treated a probation office as particularly compelling in our caselaw." *Reed*, 317 Or App at 460 (discussing *Dunlap*). The court observed that the *Dunlap* court had concluded that the overlay of a police investigation when a probationer was in the presence of his or her probation officer was particularly innocuous—or "not a significant factor"—when "the police did not tell the defendant that he would be penalized in terms of his probation status for invoking his constitutional privilege against self-incrimination." *Id.* The court reasoned that the setting in defendant's case was thus not significant. *Id.*

Turning to the "pressure exerted," the court again relied on *Dunlap*'s conclusion that a probation officer's presence is not significant to the analysis when the police do not *expressly* threaten that the defendant's failure to cooperate would jeopardize their probation:

> "[I]n *Dunlap* the probation officer participated in questioning and called meetings in his office specifically to address criminal allegations. Although we acknowledged that a defendant in those circumstances may feel pressure to not violate probation conditions, we did not consider that pressure particularly coercive *in the absence of some indication by the officers that the defendant would be penalized in terms of his probation status for invoking his constitutional privilege against self-incrimination*. * * *
>
> "Here, Eoff's engagement was less than that of the probation officer's in *Dunlap*. * * * And, as in *Dunlap*, *the officers did not*

> *tell defendant that her refusal to speak with them could subject her to a violation*. * * * [G]iven the purpose of the meeting, Eoff's nonparticipation, the lack of an express threat or reference to defendant's probation status, in addition to the other factors discussed above, Eoff's presence does not persuade us that the officers exerted pressure on defendant. Overall, the lack of pressure exerted by the officers during the brief encounter weighs significantly against a determination of compelling circumstances."

Reed, 317 Or App at 463-64 (emphases added) (internal quotation marks and citation omitted). The court held that "[i]n sum, the circumstances of the initial interaction, viewed in their totality, did not produce the sort of police-dominated atmosphere that *Miranda* warnings were intended to counteract." *Id.* at 465 (internal citation omitted).

In a concurring opinion, Judge Ortega explained that, in her view, *Dunlap* was flawed in two important ways: (1) *Dunlap* focused exclusively on "what the state actors *expressly* communicated to the defendant regarding his probation status[,]" with the result that the opinion "failed to account for the impact of a state actor's *implicit* communications on what a defendant understands." *Reed*, 317 Or App at 469 (first emphasis in the original; second emphasis added); and (2) the *Dunlap* analysis "failed to appreciate the realities of how a reasonable *probationer* in the defendant's circumstances" as opposed to a person not subject to the strictures of probation, would have understood their situation. *Id.* at 471 (emphasis added).

Summary of Arguments

Article I, section 12, provides people in Oregon with the right against compelled self-incrimination. To protect that right, the courts require state actors to inform individuals that they have the right to an attorney and the right to remain silent when they are questioned in compelling circumstances. Whether a setting is compelling for purposes of requiring *Miranda* warnings before questioning turns on the totality of the circumstances including the nature and location of the encounter. The impact or effect of those circumstances is judged from the perspective of a reasonable person in the suspect's position. In this context, as in others, the Oregon Constitution provides the people a stronger bulwark against state intrusion than does the federal constitution. This court should use defendant's case to describe further how particular dynamics—here, that between law enforcement and probationers—require *Miranda* warnings during noncustodial police encounters.

A police station, probation office, or other comparable law enforcement facility is not a facially neutral location. When police accuse someone of criminal activity and interrogate them at a law enforcement facility, absent any mitigating factors, courts and law enforcement officers should recognize that the atmosphere is police-dominated such that *Miranda* warnings are required. Other circumstances may mitigate an encounter so as to render it not

compelling. But a recognition that interrogation at a law enforcement office favors a conclusion that circumstances are compelling would help to ensure the vindication of the people's constitutional right against compelled self-incrimination.

Here, the police confronted and questioned defendant at the parole and probation office in the company of her probation officer. Defendant knew that she was not free to leave the probation officer's office or to dictate what transpired at the mandatory check in. The officers should have recognized the compelling nature of the circumstances when they accused defendant of criminal activity. Accordingly, they should have advised her of her rights before they began questioning her. They did not do so, and suppression of her statements and all evidence derived from the constitutional violation is required.

Whether a police-dominated atmosphere exists that necessitates *Miranda* warnings turns on how a reasonable person in the interrogated person's position would have understood their situation. Would a reasonable person in the defendant's position have felt compelled to answer police questions? To ensure that the "reasonable person" inquiry is precise, practical, and fair, pertinent characteristics specific to the defendant must be taken into account. The "reasonable person" must share pertinent traits of identity or status with the defendant that bear on how a reasonable person would experience the atmosphere of the interaction.

In defendant's case, the pertinent trait that should have been considered differently was defendant's probation status. Defendant was on probation at the time of her encounter with police. The police confronted her with evidence of new crimes in front of her probation officer at the parole and probation office. As a matter of law, a reasonable person would have understood that they were not free to leave the mandatory probation meeting without facing significant legal consequences. Neither the trial court nor the Court of Appeals majority gave appropriate weight to defendant's status as a probationer in evaluating whether the circumstances of her interrogation were compelling: neither court asked whether a reasonable person on probation would have felt compelled to cooperate with police dictates under the circumstances in which defendant was questioned. That status, which likely would have been determinative, should have been a key part of the inquiry.

A totality of the circumstances inquiry examines *all* available pertinent information. In the context of determining whether *Miranda* warnings were required in a given police encounter, the inquiry must encompass the implicit communications of the police as well as their explicit communications. The fact that police did not explicitly threaten or pressure a suspect during interrogation does not amount to a showing that no threat or pressure existed during the encounter. The inquiry must assess what the police's conduct and statements *implicitly* communicated to the questioned person.

But that totality inquiry, which is objective and often *post hoc*, only permissibly considers information discernible to an external observer. The fact that a law enforcement officer may view the interrogated person as free to leave at any time or free to refuse to answer questions at any time is not properly part of the compelling-circumstances calculus, unless the officer expressly communicates that freedom to the person in a way that demonstrates that the freedom is genuine. After-the-fact police testimony that the person was free to leave can have no bearing on the determination whether *Miranda* warnings were required when the police did not effectively communicate that freedom to the person during the encounter.

In defendant's case, the police implicitly communicated to her that she could be subject to negative consequences to her probation status if she did not answer their questions. They did so when they told defendant's probation officer that they wanted to talk to *both* defendant and the probation officer about defendant's new crimes, rather than defendant alone. The police also traded on the control that the probation officer had over defendant by doing so. A reasonable person in her circumstances would have understood them to be telling her that not only could she be subject to a violation if she refused to talk, but that her probation officer could insist that she do so under the conditions of her probation. Those implicit communications constituted pressure that created

a police-dominated atmosphere. The officers were obligated to administer *Miranda* warnings before beginning to interrogate defendant.

Argument

I. Under Article I, section 12, of the Oregon Constitution, the police must give *Miranda* warnings before interrogating a person who is in full custody or in a police-dominated atmosphere.

Article I, section 12, of the Oregon Constitution prohibits compelled self-incrimination: "No person shall be * * * compelled in any criminal prosecution to testify against himself." Article I, section 12, is "an independent source for warnings similar to those required under the Fifth Amendment to the United States Constitution, as described in *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966)." *Roble-Baker*, 340 Or at 633 n 1 (citing *State v. Magee*, 304 Or 261, 265-66, 744 P2d 250 (1987)). When police carry out unwarned custodial interrogation or unwarned interrogation in a police-dominated atmosphere, they violate Article I, section 12. *State v. Vondehn*, 348 Or 462, 467, 236 P3d 691 (2010). Evidence gained through such interrogation must be suppressed. *Id.*

The Fifth-Amendment privilege against self-incrimination is a core procedural protection afforded people facing criminal investigation.[4] *Miranda*,

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[4] The Fifth Amendment provides that "No person * * * shall be compelled in any criminal case to be a witness against himself."

384 US at 460. It is intertwined with "the proper scope of governmental power over the citizen." *Id.* At bottom, "the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens."[5] *Id.*

> "To maintain a fair state-individual balance, to require the government to shoulder the entire load, * * * to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."

Id. at 461 (internal quotation marks and citations omitted). As a necessary function of that respect, the privilege "protect[s] persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Id.* at 467.

At common law, the privilege against compelled self-incrimination protected people against forced sworn testimony but did not necessarily provide a safeguard against agents of the state seeking to compel incriminating statements in a non-testimonial setting. *Miranda*, 384 US at 459-61. The

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[5] "[T]the constitutional limits on police powers define the relationship of government to *all* citizens[,]" not just those under investigation. Susan F. Mandiberg, *Reasonable Officers vs. Reasonable Lay Persons in the Supreme Court's Miranda and Fourth Amendment Cases*, 14 Lewis and Clark L Rev 1481, 1530 (2010) (emphasis added). "[T]he rest of us must rely on those charged with crimes to be our surrogates in asserting the limits of government power." *Id.*

Miranda Court held that the privilege against self-incrimination extended beyond the walls of the courtroom to protect against the "informal compulsion exerted by law-enforcement officers during in-custody questioning[,]" and required that, before the state could use statements gained during custodial interrogation, procedural safeguards must be put in place. *Id.* at 444, 461.

The now classic language resulted:

> "Prior to any questioning, the person must be warned 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 444. Under *Miranda*, such warnings must be provided to any person undergoing "custodial interrogation," *viz*., any person undergoing "questioning initiated by law enforcement officers after [the] person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444.

The Oregon Constitution extends further. Vindication of the Article I, section 12, right against self-incrimination requires police to administer *Miranda* warnings not only to those questioned in custody, but also when the form or setting of police questioning creates circumstances "that judges would and officers should recognize to be 'compelling.'" *State v. Smith*, 310 Or 1, 7, 791 P2d 836 (1990) (quoting *Magee*, 304 Or at 265). Oregon courts have come to call such conditions "compelling circumstances." *See*, *e.g.*, *State v. Shaff*, 343

Or 639, 646, 175 P3d 454 (2007). The Oregon Constitution thus provides more robust protection to individuals in their encounters with the police than the federal constitution. The issue in defendant's case implicates the boundaries of Article I, section 12's protection and the proper scope of the analysis that courts should use in assessing the extent of Article I, section 12's protection.

A. Whether a police-dominated atmosphere exists such that a reasonable person would feel compelled to answer police questions is a totality of the circumstances inquiry that requires consideration of *all* available pertinent information.

The rationale underlying the *Miranda* rule is the need to protect the dignity and free choice of the people in their interactions with the most coercive arm of the state, the police power. *Miranda*, 384 US at 450-55 (describing psychologically oriented interrogation techniques designed to erode the will of criminal suspects during police questioning). An interrogated person's dignity and capacity for free choice can be undermined not only during custodial interrogation, but also in "compelling circumstances."

Synthesizing related concepts from its earlier cases, this court described the "compelling circumstances" paradigm in *Roble-Baker*, 340 Or 640-41 (citing *Smith*, 310 Or at 7; *State v. Prickett*, 324 Or 489, 495, 930 P2d 221 (1997); and *State v. Carlson*, 311 Or 201, 205, 808 P2d 1002 (1991)). This court explained that determining whether *Miranda* warnings are required in a noncustodial police encounter is a totality of the circumstances inquiry that

requires examination of factors such as the location of the encounter, the length of the encounter, the amount of pressure exerted on the suspect during the encounter, and the defendant's ability to terminate the encounter. *Id.* This court emphasized that "[t]hose factors are neither the exclusive factors that this court will consider, nor are they to be applied mechanically." *Id.* at 641. Rather, this court stated, the "overarching inquiry is whether the officers created the sort of police-dominated atmosphere that *Miranda* warnings were intended to counteract." *Id.* (citing *Magee*, 304 Or at 264-65).

That inquiry is an objective one that requires nuanced and non-mechanistic assessment of the totality of the circumstances to determine "how a reasonable person in the suspect's position would have understood his or her situation." *Shaff*, 343 Or at 645. Would a reasonable person in the suspect's position have felt obliged to answer police questions? To answer that question entails consideration of all available information, including the person's status vis-à-vis law enforcement, the particular context in which questioning occurs, and any explicit and implicit law enforcement communications to the person being questioned.

1. When the police question a person at a police station or other law enforcement facility, the circumstances are more likely to be police-dominated such that *Miranda* warnings are required than during questioning at a more neutral location.

To effectuate Article I, section 12's protection against compelled self-incrimination at a practical level, this court should acknowledge that questioning at a police department or similar law enforcement setting strongly indicates that the questioning occurred in a police-dominated atmosphere. Under those circumstances, it should not matter that the police did not (1) inform the person either by words or conduct that they are not free to leave or are under arrest, or (2) employ overt coercive pressure against the person during the interaction. *But see Roble-Baker*, 340 Or at 643-44 (holding that circumstances became compelling only after the defendant, a murder suspect who was dependent on the police for transportation to and from the police station, had been under interrogation at the station for five to six hours, had twice expressed the desire to leave, and had not been permitted to leave). As this case exemplifies, courts have misinterpreted *Roble-Baker* as standing for the proposition that, in the absence of either of those two factors, interrogation at a police station is inherently *not* compelling.

That legal fiction ignores the practical reality of police-station or probation-office interrogation. Both locations are likely to have an inherently coercive effect on most "reasonable people" simply by virtue of their nature and

purpose. Each place is a site of state authority that, by its existence, wields coercive power over the people who must engage in dealings there. Nearly every person whom a suspect might encounter at the station house or the probation office is someone with the power of the state at their back and a gun and handcuffs at their belt.[6] No matter how cordial they are, when someone with a gun seeks cooperation, most people comply. That likelihood of compliance is only amplified when the encounter occurs within a law enforcement facility. To discount that reality in favor of the notion that such places are neutral and that reasonable people generally understand that they are free to leave unless they are arrested or otherwise expressly informed that they

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[6] Multnomah County probation officers in the Department of Community Justice Mental Health Unit outfitted for a day at work. https://www.multco.us/multnomah-county/news/there%E2%80%99s-no-such-thing-typical-day-patience-problem-solving-skilled (accessed August 29, 2022).

cannot leave values an expedient legal fiction more highly than the rights guaranteed by the Oregon Constitution.

This court has already recognized that Article I, section 12, protects people who are not in full custody. This court should make that protection fully operational by announcing that police interrogation at a police station or probation office—absent circumstances that affirmatively mitigate the police-dominated atmosphere of such a setting—requires *Miranda* warnings. Such an announcement would be a common-sense way to acknowledge and account for the inherently coercive setting that results from the imbalance of power, control, and information between the police on their "home turf" and an individual under investigation who is questioned at a law enforcement facility. It would also be a useful tool for cutting through the gordian knot of disputed interpretation of facts in a situation where the facts are commonly too close to call with reliable (or fair) accuracy. *See* Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L J 1299, 1300-01 (1977) (discussing the utility and allocation of burdens of persuasion in close factual cases: "[A] rule fixing the weight of the burden defines the zone in which the factfinder is to regard the dispute as too close for decision, and a rule fixing the location [of the burden] tells the factfinder who wins when the case is in that zone.") (footnote omitted).

2. For purposes of determining whether a police-dominated atmosphere exists such that a "reasonable person" would feel compelled to answer police questions, the "reasonable person" standard must take into account pertinent defendant-specific facts.

The trope of the "reasonable person" figures prominently in many areas of the law. *See* Mayo Moran, *The Reasonable Person: a Conceptual Biography in Comparative Perspective*, 14 Lewis and Clark L Rev 1233 (2010) ("As the common law's most enduring fiction, the reasonable person fulfills a great many different roles across very different bodies of law."). Often (and as pertinent here), the "reasonable person" represents a legal-system attempt to render certain inquiries objective and generally applicable rather than individually subjective, overly particular, and therefore of limited utility. The "reasonable person" standard is thus commonly intended to serve interests of objectivity and predictability.

But in the context of evaluating encounters with law enforcement, reliance on that purportedly objective standard can result in systemic blindness to the practical realities that face many people who come into contact with the police. The standard fails to account adequately for the various power imbalances and inherent biases that undergird people's interactions with law enforcement. It is undeniable, for instance, that a "reasonable person" who is Black will likely experience an interaction with police far differently than one

who is white.[7] A reasonable person who does not speak English will experience a police interaction differently than one who does. Likewise, a reasonable person who is system-involved for any of numerous reasons—on criminal probation or parole, for instance, or under Department of Human Services or Psychiatric Security Review Board jurisdiction—will perceive police questioning differently than a person who does not have to contend with frequent intrusions of state authority into their life. It makes sense for the "reasonable person" standard to account for such individual-specific facts. The failure to consider them can result in unjust outcomes.

In *State v. Reyes-Herrera*, 369 Or 54, 59-60, 500 P3d 1 (2021), the defendant asked this court to make the "reasonable person" standard more equitable and realistic by altering it to include specific facts about a person encountering the police that would bear on how the person understood the nature of the interaction. He urged this court to consider "his language, race, and culture in deciding what a 'reasonable person' in [the] defendant's position

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[7] *See*, *e.g.*, Graham Cronogue, Note, *Race and the Fourth Amendment, Why the Reasonable Person Analysis Should Include Race as a Factor*, 20 Tex J on CL & CR 55 (2015) (reviewing social science research, discussing the impact of race in police interactions, and arguing that Fourth Amendment seizure analysis should explicitly take a person's race into account); and Moran, 14 Lewis and Clark L Rev at 1249-54 (discussing the interplay between the typical "reasonable person" standard and gender in the context of self-defense and the "battered woman syndrome" defense).

would believe about whether the person's liberty was constrained."[8] *Id.* at 60. He argued that "a reasonable minority person" who did not speak English might have a different view of an encounter that police characterized as calm and nonconfrontational. *Id.* This court declined the defendant's invitation because it resolved that case by looking to other aspects of the totality of the circumstances, but this court noted, "[w]e do not foreclose [that] argument[]." *Id.*; *see also State v. K.A.M.*, 361 Or 805, 809, 401 P3d 774 (2017) (declining to consider the 17-year-old defendant's youth in evaluating the circumstances in that case, but not foreclosing "age as part of the reasonableness inquiry.").

Defendant's case presents this court an opportunity to bring the "reasonable person" standard up to date in the compelling-circumstances context by explaining that specific facts about the person to whose situation the standard is being applied must be included in the inquiry. Oregon courts should acknowledge that what a "reasonable person" in a defendant's circumstances might understand in a given police interaction may depend on salient traits specific to the defendant that can be generalized to the "reasonable person." The question of whether a police-dominated atmosphere exists for *Miranda* purposes should thus be, "What would a reasonable person *possessing the*

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[8] The *Reyes-Herrera* defendant was a Hispanic person who did not speak English. 369 Or at 59-60.

questioned person's attributes and in that person's circumstances understand about their situation?" *See Shaff*, 343 Or at 645 (the question "turns on how a reasonable person in the suspect's position would have understood his or her situation."). Accordingly, if, for instance, an interrogated person is on probation at the time of questioning, their status *qua* probationer must figure front and center in answering the reasonable-person question upon which the compelling-circumstances determination is based. How would a reasonable probationer understand her situation?

A person's probation status could impact how the person understood the circumstances of their interrogation in many ways. To begin, a general sense of obligation and limited freedom likely colors the probationer's interactions with law enforcement. The person is bound by court order to obey their supervisory authority and its delegates and to comply with a lengthy and detailed set of conditions. Furthermore, the probationer is subject to a heightened requirement to obey all laws. To be sure, all are constrained by the law, but by virtue of their criminal conviction and probationary status, the person on probation has forfeited the full protection that shields the rest of us in dealings with state power. That person cannot freely say no in the face of police authority.

A probationer is therefore uniquely vulnerable to law enforcement compulsion. Most significantly, the person would be all too aware of the fact that their continued liberty is contingent on their compliance with the conditions

of their probation. Police questioning threatens a deprivation of liberty. A refusal to answer questions could result in probation violation or revocation. A refusal to permit a search could result in violation or revocation. Answering questions falsely could result in violation or revocation. Answering questions truthfully or consenting to a search could result in evidence that incriminated the person in new crimes, which in turn could result not only in new charges but also in a probation violation or revocation.

The "choice" that a probationer has in such circumstances is a classic Hobson's choice. *See State v. Fish*, 321 Or 48, 58, 893 P2d 1021 (1995) (describing the Hobson's choice a person would face if they were required to take the stand in their own criminal prosecution and were thus required to choose either to subject themselves to punishment (for refusing to testify) or to forego their constitutional right against compelled self-incrimination by "engag[ing] in conduct that the state has no right to compel (produc[ing] incriminating testimony)"). If the interrogating officers do not or cannot explicitly dispel the threat of probation violation or revocation, certainly a reasonable person on probation would feel that they must submit to interrogation: "It makes sense that the probationer would [understand], whether the words are spoken or not, that she could be found in violation of her probation if she asserted her constitutional rights not to cooperate with the investigation." *Reed*, 317 Or App at 469 (Ortega, J., concurring). It follows that

it makes sense to consider that suspect-specific fact in evaluating what a reasonable person would make of her situation.

The "reasonable-person" inquiry is not rendered problematically subjective by adding suspect-specific facts to the calculus—the question "does not turn on either the officer's or the suspect's subjective belief or intent; rather it turns on how a reasonable person *in the suspect's position* would have understood his or her situation." *Shaff*, 343 Or at 645 (emphasis added). Suspect-specific facts make the objective inquiry more precise and, as a result, more fair. A reasonable person "in the suspect's position" is a reasonable person who shares with the suspect characteristics of identity or status of the sort that bear on a person's understanding of their situation. This court should explain that suspect-specific traits can be an important factor in the compelling-circumstances inquiry.

3. The inquiry concerning whether a police-dominated atmosphere necessitating *Miranda* warnings exists must account for the impact of a state actor's explicit *and* implicit communications on what the person under questioning understands about their circumstances.

In defendant's case, the officers did not tell defendant that "her refusal to speak to them could subject her to a [probation] violation" or other negative consequence to her probation status. *Reed*, 317 Or App at 464. The Court of Appeals majority affirmed in large part because of its *Dunlap*-based conclusion that the lack of an *express* threat or reference to defendant's probationary status

during the interaction showed that the officers did not exert pressure on defendant. *Id*. The court stated, "Overall, the lack of pressure exerted by the officers during the brief encounter weighs significantly against a determination of compelling circumstances." *Id.* What is more, again relying on *Dunlap*, the court also concluded that the presence of defendant's probation officer and the fact that the interview took place in his office did not add to the compelling nature of the circumstances: "[T]he fact that an interview takes place in a probation office or in the presence of a probation officer, without more, is not treated as compelling." *Id.* at 463-64.

Such an approach ignores the effect of implicit communications. This court should make clear that, in evaluating law enforcement pressure, *implicit* communications are as significant as explicit ones. Put another way, the absence of overt threats of negative consequences (your probation will be revoked) or express limits on a person's freedom (you have to stay and talk to us) does not render the circumstances *not* compelling. That was the Court of Appeals' mistake in *Dunlap* and in defendant's case. This court should correct that course.

Roble-Baker illustrates the point. There, the police interrogated the defendant for five to six hours. 340 Or at 634-37 (describing the encounter). The police told her that she "had always been free to leave" throughout the interview. *Id.* at 635. The defendant stated that she wanted to go home to think

things over and come back the next day. *Id.* One of the detectives told her that he did not think that she would come back and "explain[ed] to her more of the facts that [they] knew." *Id.* at 636. Finally, the defendant confessed to killing her husband. *Id.* at 637. This court held that the defendant had been questioned under compelling circumstances. *Id.*

Central to that holding was the interviewing detectives' *implicit* communication to defendant. By essentially ignoring the defendant's desire to go home and failing to make it possible for her to leave, the police implicitly communicated to her that she was not free to end the encounter. *Id.* at 642-43. That was so even though the detectives explicitly told the defendant that she had been free to leave at any time.

As Judge Ortega explained in her concurrence in defendant's case, a focus, as in *Dunlap*, on what state actors *expressly* communicate to a person during an interaction is too limited. *Reed*, 317 Or App at 469 (Ortega, J., concurring). It does not account for the full reality of the circumstances at issue. *Id.* That is, whether state actors speak words of threat or pressure (or their opposite) aloud or not, those messages may nonetheless inhere in the circumstances in such a way that a reasonable person could not help but be impacted by them. Words and conduct can contain multiple levels of meaning. A truly effective totality of the circumstances inquiry must consider both the explicit and implicit. To focus on the explicit at the expense of the implicit is to

give short shrift to what should be a searching examination of specific circumstances, not a rote hunt for explicitly threatening statements or overtly pressing demands. *See Roble-Baker*, 340 Or at 641 (overarching inquiry whether the police placed a person in compelling circumstances is not to be conducted "mechanically.").

4. The unstated views of police that a person is free to leave a police encounter or free to refuse to answer police questions are not properly a factor in evaluating whether a police-dominated atmosphere exists.

Because the inquiry concerning whether a police-dominated atmosphere requiring *Miranda* warnings exists aims to determine what a "reasonable person" in the suspect's situation would understand, it is an objective analysis that must rely on factors discernible (even in hindsight) by any observer. Views held by law enforcement officers concerning the interrogated person's freedom or constraint are irrelevant to the inquiry unless the officers explicitly tell the person what those views are. There should be no presumption that people under interrogation somehow share a tacit understanding with the police that they are free to refuse to answer questions and free to walk away from the encounter unless expressly informed otherwise.

In defendant's case, in assessing the *Roble-Baker* factors, the trial court appeared to conclude that defendant was free to terminate her conversation with the police at any time. *Order RE: Defendant's Motion for an Omnibus Hearing*

8, A170999 TCF. The Court of Appeals in summarizing the record likewise noted that "the officers testified that defendant was not required to talk to them and was free to end the questioning at any time." *Reed*, 317 Or App at 457.

It seems possible, if not likely, that both the trial court and the Court of Appeals based their conclusions in part on the officers' testimony at the suppression hearing that defendant was free to leave and that if she had tried to leave they would not have prevented her from doing so. But Haynes and Humphreys never *told* defendant that she could end the encounter, that she was free to leave, or that she did not have to answer their questions. And defendant's probation officer affirmatively testified that defendant was *not* free to leave until he gave his say-so. *Id.* at 457; *Order* 3-4, A170999 TCF.

An objective assessment of a set of circumstances—particularly a *post hoc* one—cannot properly be based on consideration of information that is not apparent to an external observer. This court should clarify that the unspoken content of a law enforcement officer's mind is irrelevant in determining whether a reasonable person in a suspect's position would feel compelled to answer police questions.

II. The police here should have administered *Miranda* warnings at the beginning of their interaction with defendant because they created a police-dominated atmosphere at the parole and probation office: a reasonable person on probation who is confronted and interrogated by police about criminal activity in the presence of her probation officer would feel compelled to answer police questions.

Applying the principles discussed above, Humphreys and Haynes created a police-dominated atmosphere when they confronted and interrogated defendant about new criminal activity in the presence of her probation officer, at the parole and probation office. A reasonable probationer in those circumstances would have felt compelled to answer police questions because a reasonable person in the probationer's position would understand, as a matter of law, that they were not free to disregard questioning or to leave without facing potentially severe legal consequences. The officers should have administered *Miranda* warnings before questioning defendant.

To begin, the officers confronted and questioned defendant *inside* the parole and probation office. A reasonable person would view that setting as inherently more coercive than a neutral setting. In addition to the figurative restrictions imposed on her by her probation, defendant's freedom of movement and action was literally restricted so long as she was inside that building. The officers could just as easily have waited until defendant emerged from the building, then talked to her on the street. Certainly, there was no requirement that the officers confront defendant in a less compelling setting. But their choice

not to do so had ramifications: it upped the ante for defendant and gave the officers an advantage that they would not have had in a neutral location. A reasonable person confronted in those circumstances would have been compelled to stay, felt compelled to answer questions, and to otherwise cooperate with law enforcement directives. That is so even absent an explicit statement of threat or coercion from the officers.

Like *Roble-Baker*, defendant's case illustrates that implicit communications may have a significant effect on what decisions a person in compelling circumstances makes. The investigating officers here confronted defendant at the probation office during a legally required meeting with her probation officer. When the probation officer asked whether the police officers would like to talk to defendant alone, without the probation officer present, Haynes said expressly that they wanted to talk to both defendant *and* the probation officer. Haynes then confronted defendant with evidence of new crimes, asked her questions about the evidence, accused her of being *at that moment* red-handed in the process of committing drug crimes, and asked for consent to search her car.

It is true that no one expressly told defendant that she had to answer questions or face negative consequences related to her probation. But what other reason could Haynes have had for wanting to speak to both defendant and her probation officer than to capitalize on the coercive effect of defendant's

status as a probationer in his interrogation of her? Haynes's explicit communication was, "We know you're dealing drugs, *right this minute*, and we want to talk to you about it." That in itself constitutes significant police pressure that would likely make a reasonable person feel compelled to answer. Under the circumstances of the interaction, those were practically words of arrest. Haynes compounded that pressure with implicit messages: "Not only do we know you're dealing, but we also want your probation officer involved in this questioning because he can make you talk to us, he can make you tell the truth, and he can make you submit to a search. And by the way, if you don't cooperate, your probation officer can make life really hard for you." Haynes did not have to say those things out loud because the circumstances stated them loud and clear. And the officers did nothing to mitigate that reasonable assessment of the exchange. They forged ahead by stating explicitly that the questioning was to involve defendant *and* her probation officer. A reasonable person on probation who does not know in advance that they have the right to remain silent or to seek counsel would be far less likely to exercise independent agency under those circumstances. In short, the officers created a police-dominated atmosphere from the start.

That the officers themselves deemed that defendant was free to terminate the encounter does not carry weight in defendant's case. The record shows that in actual fact defendant was not free to leave—she needed her probation

officer's permission to go, would not have been allowed to simply get up and walk out, and would have faced legal consequences had she attempted to do so. What is more, the officers did not communicate to defendant that she was free to leave or free not to answer their questions. Defendant could not read the officers' minds to figure out what she was and was not permitted to do during that interaction. Every explicit circumstance told her that she was manifestly not free to leave. Furthermore, notwithstanding the officers' testimony that defendant could have ended the encounter at any time, they had credible information that defendant was in the process of committing significant felony drug crimes at the very moment that they encountered her. It is likely that, had she attempted to leave, they would have stopped her. And the fact that the officers ramped up the pressure by seeking consent to search in the face of defendant's denials would have further cemented the notion that she was not free to terminate the encounter without cooperating.

In sum, defendant was in a police-dominated atmosphere from the moment Haynes and Humphreys first contacted her at her probation officer's office. A reasonable person in her position—that is, a reasonable person on probation, confronted with evidence of new crimes in the presence of her probation officer, and who was not free to end the encounter—would have felt compelled to answer police questions. The officers should have advised defendant of her right to remain silent and her right to counsel before they

began their interrogation. They violated defendant's constitutional rights when they failed to give *Miranda* warnings before questioning her.

III. Evidence gained as a direct result of or derived from a violation of the Article I, section 12, right against compelled self-incrimination must be suppressed; accordingly, all of the evidence that the police discovered during their encounter with defendant should have been suppressed.

Unwarned interrogation conducted in a police-dominated atmosphere violates Article I, section 12. The remedy for that violation is suppression of both "a defendant's unwarned responses to an officer's questions * * * [and] the physical and testimonial evidence that is the product of that violation." *State v. Jarnagin*, 351 Or 703, 716, 277 P3d 535 (2012) (citing *State v. Moore-Coen*, 349 Or 371 , 385, 245 P3d 101 (2010) and *Vondehn*, 348 Or at 476)). "This court looks to the totality of the circumstances in determining whether * * * evidence derives from or is the product of an earlier *Miranda* violation." *Id.* Relevant considerations include

> "the nature of the violation, the amount of time between the violation and any later statements, whether the suspect remained in custody before making any later statements, subsequent events that may have dissipated the taint of the earlier violation, and the use that the state has made of the unwarned statements."

Id. Unless the state can show a break in the causal chain between the *Miranda* violation and the disputed evidence, the evidence must be suppressed. *State v. Swan*, 363 Or 121, 131, 420 P3d 9 (2018) (citing *State v. Delong*, 357 Or 365, 373, 350 P3d 433 (2015), and *Jarnagin*, 351 Or at 716).

All of defendant's statements during her encounter with Haynes and Humphreys should have been suppressed. That is because all of her statements were unwarned responses to unlawful interrogation that violated her right against compelled self-incrimination. As described above, defendant was in compelling circumstances from the very beginning of her interaction with Haynes and Humphreys. They were thus obligated to provide her with *Miranda* warnings before they questioned her. Their failure to do so can only be remedied by suppression of every statement that she made in response to their interrogation.

The evidence discovered in defendant's car should also have been suppressed. That evidence derived from the constitutionally violative interrogation of defendant because defendant's consent to the search of her car was a product of that unlawful interrogation. Her consent did not attenuate the violation from the discovery of the evidence in the car; her consent resulted from the violation. To establish attenuation, the state was required to show by a preponderance of the evidence that defendant's consent was either "not affected by or was only tenuously connected to [the] prior illegality." *Delong*, 357 Or at 378. But no break in time or change in place or custody status separated defendant's consent from the *Miranda* violation. *Swan*, 363 Or at 131-32 (consent to a breath test was a product of preceding *Miranda* violation where "no break in time, place, or custody" existed between the violation and the

defendant's choice to consent to the breath test). Rather, the consent occurred in the midst of ongoing unlawful interrogation, and no intervening or mitigating circumstances lessened the impact of that interrogation such that the consent was independent of it. *See State v. Unger*, 356 Or 59 at 89-93, 333 P3d 1009 (2014) (in the Article I, section 9, context, discussing factors important in determining whether a defendant's consent to search derived from" prior police illegality). The evidence must be suppressed.

CONCLUSION

For the above reasons, defendant respectfully asks this court to reverse the decision of the Court of Appeals and remand her case to the circuit court.

Respectfully submitted,

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Signed
By Morgen E. Daniels at 2:28 pm, Sep 12, 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 9,505 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 Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on September 12, 2022.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 on Benjamin Gutman #160599, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

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