IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff–Adverse Party, v. RANDY GRAY, Defendant–Relator.	Case No. S068673 Multnomah County Circuit Court No. 21CR19107 MANDAMUS PROCEEDING Challenging constitutionality of ORS 132.090 when defendants exercise right under ORS 132.320(12)

Defendant–Relator's Opening Brief

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Table of Contents

Table of Authorities

Cases

Statutes

Constitutional Provisions

Legislative History

Other Authorities

November 12, 2021

Index to Appendix[1]

[1] Defendant does not resubmit the Appendix and Excerpt of Record he already submitted in support of his mandamus petition, but he includes the Indexes to them here for the Court's convenience.

Index to Excerpt of Record

I. STATEMENT OF THE CASE

A. Nature of the Proceedings and Relief Sought

This is a mandamus proceeding under this Court's original jurisdiction, as provided by ORS 34.105–34.250 and Article VII (amended), section 2, of the Oregon Constitution. Relator Randy Gray is the defendant in the underlying case in Multnomah County. He has been arraigned on an information, in which the state charges him with assaulting a public safety officer—a felony—ORS 163.208, and with the misdemeanors of resisting arrest, ORS 162.315, and disorderly conduct in the second degree, ORS 166.025. ER-1; ER-53.

Because the state accuses defendant of a felony, he has the constitutional right to have a grand jury review the state's evidence and determine whether it is sufficient to permit the state to move forward with its prosecution. US Const, Amd V; Or Const, Art VII (Amended), § 3. A grand jury has not done that, however, because the trial court's ruling (from which defendant now seeks relief) bears on how a relatively new Oregon statute, ORS 132.320(12), affects grand jury proceedings. ER-27.

Defendant petitioned this Court to exercise its original jurisdiction and to issue an alternative writ of mandamus, ordering the trial court to vacate its order prohibiting defense counsel from being with defendant when he testifies to the grand jury—as is now his right under ORS 132.320(12)—or to show cause for why it would not do so. Defendant also moved this Court for an order staying the trial court proceedings so that defendant's right to testify to the grand jury is preserved pending final resolution of this mandamus proceeding.

This Court granted defendant's motion to stay the trial court proceedings, allowed defendant's petition, and issued the alternative writ he sought. The trial court did not timely return the writ, and so defendant now requests that this Court issue a peremptory writ of mandamus confirming defendant's entitlement to his requested relief.

B. Nature of the Order Below

The order that defendant petitioned this Court to review is the trial court's order denying defendant's amended motion to allow defense counsel to be present during defendant's grand jury

testimony. ER-10 to ER-16 (motion); ER-27 (order). This Court has already granted defendant's motion to stay the trial court proceedings, a request the trial court also denied. ER-27.

C. Basis for this Court's Jurisdiction

This Court has original jurisdiction to review mandamus proceedings that challenge the actions of circuit court judges in cases like this one. ORS 34.105–34.250; Or Const, Art VII (Amended), § 2. Because this Court already issued an alternative writ of mandamus that the trial court did not return, a peremptory writ is now appropriate. ORS 34.160.

D. Questions Presented and Proposed Rules of Law

Question one. Does the constitutional right to *presence* of counsel apply when criminal defendants avail themselves of the right the Oregon legislature granted them, under ORS 132.320(12), to testify before the grand jury deciding whether to indict them on a felony charge?

Question two. Does ORS 132.090(1)—which, with few exceptions, prohibits anyone other than the district attorney and the testifying witness to be present during the sitting of the grand

jury—deprive defendants of their constitutional right to presence of counsel when they exercise their right to testify before the grand jury?

E. Summary of Argument

This mandamus proceeding is about a statute the Oregon legislature passed in 2015 as part of its ongoing efforts to reform Oregon's grand jury practices and its criminal justice system more broadly.[2] The statute, ORS 132.320(12), gives a small group of people the *right* to testify before a grand jury. That group: criminal defendants who have been arraigned on an information that alleges they committed a felony. Or, put another way: criminal defendants whose constitutional right to counsel has already attached. *See Rothgery v. Gillespie Cnty.*, 554 US 191,

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[2] Representative Williamson testified before the Senate Committee on Judiciary about the critical need for those reforms, noting that the Brennan Center had recently highlighted Oregon as having the "dubious distinction" of being sorely behind the times as to grand jury fairness and transparency. Video recording, Senate Committee on Judiciary, SB 825, March 31, 2015, at 3:35–4:31 (comments of Rep Williamson), https://olis.oregonlegislature.gov/liz/mediaplayer?clientID=4879615486&eventID=2015031047&startStreamAt=204 (accessed Nov 12, 2021).

198 (2008) (Sixth Amendment right to counsel attaches at arraignment); *State v. Davis*, 350 Or 440, 470–72, 475–76 (2011) (same for Article I, section 11, right to counsel).

Though the statute requires those defendants to have counsel before they can enjoy its benefits, it is silent about whether their defense counsel are permitted in the grand jury room when they testify. But that silence is of little consequence: The state and federal constitutional rights to *presence* of counsel fill in the gaps the legislature left.

Under both constitutions, defendants whose right to counsel has already attached have the right to have counsel at their side during "critical stages." *Coleman v. Alabama*, 399 US 1, 7, 9 (1970). Critical stages are "proceedings between [the accused] and agents of the State (whether formal or informal, in court or out) that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or meeting his adversary." *Rothgery*, 554 US at 212, n 16 (citations omitted).

Criminal proceedings that may affect a defendant's trial rights are not the only ones that qualify as "critical stages," for

which defendants have the right to the presence of counsel. *Coleman*, 399 US at 9. Indeed, the Court in *Coleman* expressly rejected such a narrow interpretation when it determined that "the guiding hand of counsel at [a] preliminary hearing is essential to protect the indigent accused *against an erroneous or improper prosecution*." *Id.* (Emphasis added.)

No one here disputes that the only people to whom ORS 132.320(12) applies are criminal defendants whose constitutional right to counsel has attached. Nor does the state dispute that defendants who exercise their right to testify before the grand jury will be under oath, subject to examination by the prosecutor and grand jurors.

The contested questions are thus two-fold. First, whether those criminal defendants who will be examined by the prosecutor and grand jurors are in a "critical stage." And second, whether legislative silence about the right to counsel in ORS 132.320(12) somehow authorizes prosecutors and lower courts to ignore the right altogether, subjecting criminal defendants to one of the most "trial-like confrontations" they could ever face—questioning from

the prosecutor while under oath—without their lawyers by their side. The statute must be interpreted consistently with Article I, section 11, and the Sixth Amendment. A statute's silence, resulting from the legislature's indecision about *how* a constitutional right will be carried out, does not erase the right altogether.

Defendant therefore requests that this Court issue a peremptory writ.

F. Background

B.1. Defendant wants to exercise his statutory right to testify before the grand jury but ultimately is not willing to do so if it means forfeiting his right to counsel.

Defendant was arraigned on an information alleging a felony charge (Assaulting a Public Safety Officer) on April 23, 2021. ER-1; 53. A little over a week later, defense counsel gave the district attorney's office and the court written notice that defendant intended to exercise his statutory *right*, under ORS 132.320(12),[3]

[3] It is a right, not a mere opportunity: "A defendant who has been arraigned on an information alleging a felony charge that is the subject of a grand jury proceeding and who

to appear before the grand jury. ER-3. As the parties were discussing scheduling, defense counsel wrote the prosecutor to inform him that defendant was not willing to waive his right to counsel—a right that had attached when he was arraigned on an information. ER-6.

In their view, defendant's testimony before the grand jury was a "critical stage" in his proceedings: Defendant would be subject to examination by the prosecutor and questioning from the lay members of the grand jury; his testimony would be recorded and could be used against him at trial; and, ultimately, the grand jury would be deciding, based in part on his testimony, whether he should be indicted on a felony charge. *Id.*

Defense counsel concluded: "[I]t is difficult to imagine a proceeding where the presence of defense counsel would be more crucial[.]" They thus argued that they were constitutionally

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is represented by an attorney *has a right* to appear before the grand jury as a witness * * *." ORS 132.320(12) (emphasis added).

required to be with defendant when he testified in front of the grand jury. ER-7.

The prosecutor responded: "I cannot agree to that." Then, without engaging defense counsel's argument on defendant's constitutional right to counsel, he proposed June 23 as the date for defendant to appear and testify before the grand jury. ER-9.

B.2. The trial court denied defendant's motion, concluding that Oregon's statutes controlled.

The prosecutor's position left defendant with two unattractive (and involuntary) options. One: Defendant could forfeit his statutory right to appear and testify before the grand jury, knowing indictment was sure to follow. Or, two: He could shed his right to counsel when he stepped into the grand jury room, subjecting himself to the prosecutor's examination and the seven lay grand jurors' questioning.

Defendant chose a third option. He moved the trial court for an order allowing his counsel to appear with him during his grand jury testimony or, failing that, for an order staying the trial court proceedings pending this petition. ER-10.

The trial court heard the parties' arguments about defendant's motion on June 23, the morning that defendant was supposed to testify before the grand jury. It denied both of defendant's motions. ER-48 (Tr at 21:4–22:16).

On the right to counsel issue, defense counsel argued that the framework for analyzing the question was simple. Courts first ask whether the right to counsel has *attached*. If it has, they next analyze whether the defendant is in a "critical stage" of their proceedings. If yes, the defendant has the right to *presence* of counsel.

There was no question that defendant's right to counsel had attached under both the federal and state constitutions. Thus, the only question before the court was whether defendant would be in a "critical stage" of his proceedings when he testified before the grand jury.

In defense counsel's view, other than trial, it was hard to imagine a more critical stage than one in which a defendant is under oath, examined by the prosecutor, and questioned by lay members of the grand jury—all of which would be recorded and

could be used against the defendant at trial. What is more, defendant's testimony could mean the difference between near-certain indictment (based on the prosecutor's evidence alone) or avoiding that consequence altogether (the whole point behind the legislature passing ORS 132.320(12)).

Defense counsel's presence would also make a difference. If there, defense counsel could object to admissibility or the form of questions, ensure defendant understood questions, or advise defendant not to answer clearly improper questions. More simply, defense counsel would serve as moral support, a benefit that should not be underestimated when considering the dynamics at play—*viz.*, without counsel, defendant would be sitting by himself, with the prosecutor whose role is to convict him for a felony and seven strangers deciding whether the prosecutor can try to do so. Defense counsel's mere presence would work to decrease that intimidating atmosphere. ER-30 to ER-36.

For its part, the prosecution argued that the state statutes controlled, and those statutes did not permit defense counsel to be inside the grand jury room. Defendant's testimony before the

grand jury would not be a "critical stage," according to the prosecutor, because he was not required to do so. That defendant's testimony would be recorded was of little concern, because the recording could be used at trial only if the rules of evidence permitted it. Finally, the prosecutor observed that, in his own experience, no defense counsel had ever tried to be with their client during grand jury testimony; instead, they sat outside the grand jury room and the client could leave to ask questions if needed. ER-37 to ER-44.

In the end, the trial court denied defendant's motion to allow defense counsel to be present in the grand jury room. The court agreed with the prosecution that "our current statutory scheme does not allow for an attorney to be present in the grand jury." ER-48 (Tr at 21:7–8). Instead, "the defense attorney can * * * be directly outside. And, if they want to – and the defendant would be free to ask about a question that was just put to them or maybe about what the answer might be." *Id.* at 21:9–13. The court also "believe[d] that, just as in a trial, if the defendant goes to a grand jury proceeding they are, in fact, waiving their right against *self-*

incrimination. Otherwise, they wouldn't be there in the first place." *Id.* at 21:14–18 (emphasis added). After that, the court also denied defendant's alternative motion for stay. *Id.* at 21:21–22:16.

II. ARGUMENT

A. Defendant's right to counsel has attached.

This part of the Court's analysis will be easy. That said, the point bears emphasis: Defendant's right to counsel has attached under both the Sixth Amendment to the United States Constitution and Article I, section 11, of the Oregon Constitution.[4]

Starting in the mid-twentieth century, the right to counsel under both the federal and state constitutions underwent "something of a transformation in response to changes in law enforcement and criminal prosecution." *State v. Davis*, 350 Or 440, 470 (2011). That right had originally been limited to guaranteeing that criminal defendants had counsel during trial. *See id.* at 464–77 (explaining history). Now, the right to counsel

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[4] Though defendant's written briefing at first focused on the Sixth Amendment to the United States Constitution, he raised arguments under Article I, section 11, during the hearing on his motion. ER-31 (Tr 44:4–8); ER-32 (Tr 5:19–22).

applies during pretrial, investigative stages, too. *See id.* at 470–72, 475–76 (post-"transformation" right to counsel).[5]

In the post-"transformation" era, the right to counsel under the federal and state constitutions differs slightly. Under the Sixth Amendment, the right attaches at "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Rothgery v. Gillespie Cnty.*, 554 US 191, 198 (2008) (citation omitted). Under Article I, section 11, the right attaches "once criminal proceedings have begun, which, at the earliest, is the time of a suspect's arrest." *Davis*, 350 Or at 442.

That difference is of no consequence in defendant's case. Adversary judicial criminal proceedings against him began on April 23, 2021, the day he was arraigned on an information. He

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[5] Indeed, the United States Supreme Court has said the pretrial, investigative stage can "perhaps be the most critical period" of a criminal prosecution. *Powell v. Alabama*, 287 US 45, 57 (1932). That makes sense: Without investigation and preparation, trial would be devoid of evidence and argument, or at least skeletal in those departments.

has the right to counsel under both the Sixth Amendment and Article I, section 11.

B. Because defendant's right to counsel has attached, the court must analyze whether his testimony before the grand jury is a stage of his criminal proceedings that requires counsel to be present.

Whether the right to counsel has attached is only the first stage of the constitutional analysis: Under both the federal and state constitutions, the Court must analyze the scope of that right. *See, e.g.*, *Rothgery*, 554 US at 211 (parties should avoid "the mistake of merging the attachment question (whether formal judicial proceedings have begun) with the distinct 'critical stage' question (whether counsel must be present * * *)"); *Davis*, 350 Or at 478 (adopting same attachment-versus-scope distinction). On top of (and as part of) having the right to counsel, defendant has the right to the presence of counsel when he invokes his statutory right to testify before the grand jury that is deciding whether to indict him on a felony charge.

B.1. *The Sixth Amendment guarantees the right to have counsel present at all "critical stages" of the criminal proceedings.*

After the Sixth Amendment right attaches, the accused has the right to "the guiding hand of counsel at every step in the

proceedings against him," *Powell v. Alabama*, 287 US 45, 69 (1932). The core principle of the right to counsel is that "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Coleman v. Alabama*, 399 US 1, 7 (1970) (internal quotation marks omitted).

Thus, under the Sixth Amendment, "the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings[.]" *Rothgery*, 554 US at 212."The determination whether the hearing is a 'critical stage' requiring the provision of counsel depends * * * upon an analysis whether potential substantial prejudice to defendant's rights inheres in the confrontation and the ability of counsel to help avoid that prejudice." *Coleman*, 399 US at 9 (internal quotation marks omitted).

That is, if a defendant's rights might be prejudiced at a given proceeding, and if counsel's presence would help guard against that prejudice, then the proceeding is a "critical stage." Or, as the

Court put it succinctly: "[W]hat makes a stage critical is what shows the need for counsel's presence." *Id.* at 212.

The kinds of proceedings the Court has deemed sufficient to "show[] the need for counsel's presence"--because of the "potential substantial prejudice [that] inheres in the confrontation and the ability of counsel to help avoid that prejudice"--include:

- An arraignment hearing, where counsel can protect a defendant's rights, which rights might otherwise be sacrificed or lost. *Hamilton v. Alabama*, 368 US 52, 54 (1963);
- A pretrial lineup, where counsel can detect "[i]mproper influences [that may otherwise] go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers," *United States v. Wade*, 388 US 218, 231 (1967); and
- A preliminary hearing, where "the guiding hand of counsel * * * is essential to protect the indigent accused against an erroneous or improper prosecution." *Coleman*, 399 at 9.

The Court has found that the "guiding hand of counsel" may be required when a lawyer can:

- Make "effective arguments for the accused on such matters as the necessity for an early psychiatric examination," *Coleman v. Alabama*, 399 US 1, 9 (1970);
- Make arguments to influence a court's bail decision, *id.*;
- Preserve testimony favorable to the accused, *id.*;

- "[M]ore effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case," *id.*; and
- Detect "[i]mproper influences [that may otherwise] go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers," *United States v. Wade*, 388 US 218, 231 (1967).

Thus, the Sixth Amendment right to have counsel present at a proceeding between the accused and the state is not limited to proceedings that affect what will happen at trial. It also applies to proceedings that weigh on pretrial consequences attendant to criminal proceedings (such as an arraignment) and to proceedings that may result in the defendant avoiding a trial altogether (such as a preliminary hearing) or, as will be discussed later, the defendant testifying before the grand jury.

B.2. *Article I, section 11, guarantees the right to have counsel present at all points in the proceedings in which the defendant will be "heard."*

The right under Article I, section 11, is similar—and potentially broader. That is, Article I, section 11, provides: "In all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel." A "criminal prosecution" is the

entire process by which the government seeks "to bring a supposed offender to justice and punishment by due course of law," including, as pertinent to this case, the grand jury hearing and indictment. *Davis*, 350 Or at 463 (citing John Bouvier, 2 *A Law Dictionary Adapted to the Constitution and Laws of the United States of America* 306 (1839) (reprint 1993); Noah Webster, 2 *An American Dictionary of the English Language* (1828) (reprint 1970)). Under that right, "counsel cannot be excluded from any stage of the criminal prosecution at which a defendant is to be 'heard'[.]" *State ex rel. Russell v. Jones*, 293 Or 312, 315 (1982).

This court's decision in *Russell*—a mandamus proceeding like this one—is instructive. In that case, the defendant pleaded guilty, and the trial court ordered a presentence interview to aid in its sentencing decision. *Id.* at 314. The defendant had to attend the interview, but he did not have to cooperate—his participation was essentially voluntary (though doing so might inure to his benefit). *Id.* at 318–19. He wanted his lawyer to attend the presentence interview with him "for essentially moral support

rather than legal service." *Id.* at 320. The trial court denied the defendant's request, barring his lawyer from going to the presentence interview with him. *Id.* at 314.

This court issued a peremptory writ, holding that the presentencing interview was functionally part of the sentencing process, sentencing is part of a "criminal prosecution," and, as a result, counsel could not be excluded—to do so would violate the defendant's right to the presence of counsel under Article I, section 11. *Id.* at 317–20. The Court could not identify any reason why defense counsel would be particularly helpful at the presentence interview, other than the defendant's stated reason to offer moral support. *Id.* at 320. Even still, the defendant would be questioned by an arm of the state, and the presentence report resulting from the interview would be used by the judge, provided to the prosecution, and could be challenged by both parties during the sentencing hearing. *Id.* at 316–17.

In those circumstances, the presentence interview was part of the "criminal prosecution" at which defendant would be "heard" because, just like with sentencing, the presentence interview had

an effect on determining the defendant's "future liberty." *Id.* at 317. The result was that, if the defendant wanted his lawyer to be there with him, the court could not deprive him of that right. *Id.* at 320.

C. When defendant testifies before the grand jury under ORS 132.320(12), he will be in a stage of his criminal proceedings that constitutionally requires the presence of counsel.

With that constitutional backdrop, post-attachment criminal defendants' right to have defense counsel present during their grand jury testimony is readily apparent upon even a facial review of the current statutory framework governing Oregon's grand jury proceedings.

C.1. How grand jury proceedings work in Oregon

In 2015, the Oregon legislature decided to grant one group of people the right to testify before the grand jury that is deciding whether to indict them for a felony charge. ORS 132.320(12). That group of people is limited to criminal defendants whose right to counsel has attached—*viz.*, defendants who have been arraigned on an information alleging a felony charge and who are represented by counsel. *Id.*

The legislature also described the process through which defendants invoke that right. Their attorney needs to send notice, in writing, to the prosecutor. ORS 132.320(12)(a). After that, the prosecutor and defense counsel work together to schedule the defendant's appearance, and the prosecutor must "reasonably accommodate" the schedule of both the defendant and defense counsel. ORS 132.320(12)(c). The defendant's appearance should be scheduled before the time required to hold a preliminary hearing unless the parties agree otherwise. ORS 132.320(12)(c), (d).

When defendants exercise that statutory right, they are giving sworn testimony. ORS 132.100. They can be examined by the prosecutor and questioned by lay members of the grand jury. ORS 132.310; 132.340. Their testimony is recorded and can be used as evidence against them if their case proceeds to trial.[6] ORS 132.250; 132.270(7)(a).

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[6] This is true even if the grand jury rejects the felony charge but true-bills a misdemeanor, in which case a defendant's grand jury testimony could be especially misleading to a trial jury if admitted.

For the grand jury's part, the jurors are not supposed to hear inadmissible evidence.[7] The grand jury is supposed to issue a true bill only if "the evidence before it, taken together, is such as in its judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury." ORS 132.390. If the grand jury issues a true bill on the indictment, the audio recordings cannot be used to challenge the sufficiency of that indictment. ORS 132.070(7)(b).

Grand jury proceedings are secret in Oregon, save for the few ways in which grand jury audio recordings can be used. ORS 132.090; 132.070. One of those uses is to provide a copy to defense counsel if a "true bill" issues. ORS 132.070(2)(b).

As part of that secrecy, the grand jury statutes prohibit anyone except prosecutors, the witness being examined, and necessary witness aids, such as interpreters, from attending a grand jury sitting. ORS 132.090. ORS 132.320(12) does not expressly permit defense counsel in the grand jury room despite

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[7] But it happens. *See, e.g.*, *State v. Swope*, Petition for Writ of Mandamus (S068586) (filed June 1, 2021) (seeking alternative writ when only evidence connecting putative defendant to alleged crime is hearsay testimony).

ORS 132.090. But nor does it include any text that would support an inference that the legislature intended for defendants to give up their constitutional right to counsel if they wanted to exercise their right to testify. It merely remains silent on that point.

C.2. Both the federal and state constitutions compel the same conclusion: defense counsel cannot be excluded from attending their clients' grand jury testimony offered under ORS 132.320(12).

ORS 132.320(12) applies only to criminal defendants who have been arraigned on an information—*viz.*, criminal defendants whose right to counsel has attached under the federal and state constitutions. That issue is not in dispute.

The next step is for the court to analyze whether, when defendants exercise their right to testify before the grand jury to offer exculpatory evidence that might help them avoid indictment altogether (and the pains and restrictions of liberty flowing from a felony charge and prosecution), they are in a "critical stage" of their prosecution, under the Sixth Amendment, or are being "heard" as part of their "criminal prosecution," under Article I, section 11. The answer to both is yes.

As for the "critical stage" analysis, the legislature created a "trial-like confrontation" between post-attachment criminal defendants and their skilled adversaries when it enacted ORS 132.320(12). Even more, it created a statutory right for criminal defendants to present their own side of the story, hoping to avoid indictment altogether. The right to have counsel present might be circumscribed in some respects, given the function of the grand jury as opposed to a trial jury.[8] But counsel can still play a meaningful role in helping the criminal defendant "cop[e] with legal problems or meet[] his adversary." *Rothgery*, 554 US at n 16.

To begin with, the right to testify before the grand jury should be read in tandem with the legislature's mandate that the grand jury hear only admissible evidence when considering whether to indict. ORS 132.320(1). Defendants are not qualified to

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[8] For instance, Colorado's grand jury provisions permit *any subpoenaed witness* to have counsel in the room with them, but counsel may not object, make arguments, or address the grand jury; counsel is permitted only to "counsel with the witness." Colo Rev Stat § 16-5-204(4)(d). Defendant does not concede that those same limitations are appropriate when the *constitutional* right to counsel applies, but they are helpful guidance.

make that determination on their own, nor should they be forced to rely on similarly unskilled grand jurors or a skilled but adverse prosecutor to make that determination for them. Only the "guiding hand" of their counsel will do. Additionally, defense counsel will serve as:

- **An expert on their side**. Defense counsel will understand the nuances of mens rea, the elements of the crimes for which the defendant is charged, and the applicable defenses. Defense counsel, in real time and before the grand jury votes, can hear whether the defendant has covered everything they need to cover in their attempt to refute the charges against them. Before the conclusion of testimony, defense counsel can request a brief break, confer with the defendant, and have them clarify answers to questions it was apparent they did not fully comprehend or supplement the record with important information they forgot to include.

- **A familiar face**. When criminal defendants enter a grand jury room to testify, they face a prosecutor and seven grand jurors. The prosecutor will have almost certainly presented all of their evidence and witnesses. The prosecutor also will have likely developed a rapport with the grand jurors, who serve for a period of multiple weeks. Trial juries can be intimidating; that intimidation is no less severe when grand jurors can question them directly, have never seen the defendant in person, are familiar with the prosecutor, and have

> heard only the prosecutor's evidence about a crime they allegedly committed.[9]

The list of benefits could go on.

Again, "[w]hat makes a stage critical is what shows the need for counsel's presence." *Rothgery*, 554 US 412. Other than trial itself, it is hard to imagine a stage more critical than one in which criminal defendants will be examined by their accuser and seven people deciding their fate and future liberty. To add to those stakes, if the grand jury moves forward with an indictment, the defendant has testified under oath, and on record, with the

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[9] These reasons show why the trial court's proposed half-measure of having defense counsel available to answer questions outside the grand jury room will not work. Only counsel can catch some of the nuances that may make the difference between the grand jury issuing a true bill or no–true bill. What is more, defendants who face such stressful and intimidating circumstances cannot be relied on to remember verbatim the questions posed to them.

If, then, when playing the game of telephone with their counsel outside the grand jury room, they miscommunicate a crucial detail, counsel could render completely incompetent advice. For example, if the defendant misstates a question surrounding mens rea, the defendant may admit something about their mental state that is not true. There would be no way to exclude that unintentionally inaccurate admission if the prosecution later sought to admit it at trial—the misstatement that led to the disastrous outcome happened off the record.

potential that their testimony later could be used as evidence against them at trial.[10]

Article I, section 11, draws an even brighter line around ORS 132.320(12): Counsel "cannot be excluded" when a defendant is to be "heard" at any point in their "criminal prosecution." *Russell*, 293 Or at 315.

Defendant is there. The framers of Article I, section 11, understood the stages of "criminal prosecution" to include "presentment of a grand jury" and "indictment." *See Davis*, 354 Or at 463 (citing contemporaneous dictionary definitions of "prosecution"). And, to be "heard," in legal proceedings, means

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[10] *State v. Miller*, the sole case on which the prosecution relied before the trial court, is distinguishable. 254 Or 244 (1969).

First, the defendant's right to counsel had not attached, because he waived his right to indictment and an information had not yet been filed. As a result, the court's "critical stage" analysis of the defendant's indictment waiver was an "attachment" analysis, the mistake the Supreme Court later cautioned against in *Rothgery* . 554 US at 211.

Second, the court's analysis of the grand jury proceedings as they applied to Miller decades ago does not affect defendant's rights in grand jury proceedings today, given that the legislature only recently granted people in his position the right to testify before the grand jury under ORS 120.320(12).

more than just testifying (but it includes that, too). *See Russell*, 293 Or at 317 (whether the defendant is answering a judge's or probation officer's questions, the defendant is being heard at the sentencing stage of the prosecution). With those two circumstances satisfied, Article I, section 11, is authoritative: Neither the courts nor the legislature can exclude defense counsel when criminal defendants want them there.

In their memorandum in opposition to the petition, the government asserts, "because a defendant has no constitutional right to appear before the grand jury, the defendant has no constitutional right to the assistance of counsel in that proceeding." Memo in Opp'n to Pet., 15. This assertion, however, is directly contrary to and irreconcilable with the Court's holding in *Coleman*.

In *Coleman*, the Court held that a subconstitutional proceeding—a preliminary hearing under Alabama's statutory criminal procedure scheme—was a critical stage at which the defendant has a right to have counsel present. *Coleman*, 399 at 9-10. The Court, after first noting that the proceeding was not

required even under Alabama's statutory scheme, *id.* at 8 (noting that a prosecutor could circumscribe the hearing by obtaining an indictment directly from the grand jury), instructed that the "critical stage" determination focuses not on the source from which the proceeding is derived, but rather on what happens at the proceeding itself. "The determination whether the hearing is a 'critical stage' requiring the provision of counsel depends, as noted, upon an analysis 'whether potential substantial prejudice to defendant's rights inheres in the * * * confrontation and the ability of counsel to help avoid that prejudice.'" *Id.* at 9 (quoting *Wade*, 388 US at 227.)

Thus, under *Coleman*, and despite the government's assertion to the contrary, the fact that an Oregon defendant's right to testify at the grand jury comes from a statute rather than the Constitution has no bearing on the critical stage analysis.

In an equally erroneous but even more brazen mischaracterization of the relevant caselaw, the government states in their memorandum, "In determining whether a pretrial event is a critical stage, both this court and the federal courts

have consistently emphasized that the constitutional right focuses on 'the protection of rights to which a defendant is entitled in the trial itself.'" Memo in Opp'n to Pet., 16.[11]

But, again, *Coleman* makes perfectly clear that the critical stage determination does not depend on the proceeding's potential effect on a future trial, and hence "critical stages" of the prosecution include proceedings beyond those hearings affecting the rights a defendant enjoys at trial. Indeed, *Coleman* specifically discussed and rejected this very notion: "However, from the fact that in cases where the accused has no lawyer at the hearing the Alabama courts prohibit the State's use at trial of anything that occurred at the hearing, it does not follow that the Alabama preliminary hearing is not a 'critical stage' of the State's criminal process." *Id.* at 9. That is, the Court would not end its critical stage analysis merely because an uncounseled preliminary

[11] In support of this assertion the government truncates a quote from this court's decision in *State v. Davis*, 350 Or 440, 475 (2011) concerning how the Sixth Amendment was historically understood *prior* to the United States Supreme Court's development of the critical stage analysis.

hearing could have no effect on any of defendant's rights at a later trial.

Instead, the interest the Court focused on in *Coleman* was the defendant's interest in avoiding "an erroneous or improper prosecution" altogether. *Id.* Because "the guiding hand of counsel" could help to "expose fatal weaknesses in the state's case," which in turn could cause the magistrate to "refuse to bind the accused over," the Court held that the preliminary hearing was, in fact, a critical stage. *Id.* at 9-10.

Exactly as the defendant appearing at the preliminary hearing *Coleman*, an Oregon defendant who opts to exercise their right to testify at the grand jury under ORS 132.320(12) does so in an effort to avoid an erroneous or improper prosecution altogether. And, as in *Coleman*, counsel's ability to protect that interest, and the substantial prejudice that is done to that interest by depriving the accused of counsel at the proceeding, is, standing alone, enough for this court to conclude that a defendant's grand jury testimony under ORS 132.320 is a critical stage.

D. Waiver of constitutional rights cannot be inferred from legislative silence or indecision.

This case does not require a tortured analysis of legislative intent. Aside from the statute's silence on the issue, the legislative history makes clear that the legislature did not intend for the text of ORS 132.320(12) to include an express statutory right to have defense counsel present during the defendant's testimony. In a hearing before the House Committee on Judiciary, Senator Thatcher, the bill's chief sponsor, told the Committee that the Senate was concerned about defendants testifying under oath without their lawyers there.[12] She said, though, that key stakeholders, including the defense and district attorneys' bars, were continuing to work on amendments to the bill.[13]

During the same House Committee on Judiciary hearing, Senator Thatcher told Representative Greenlick that the stakeholders were working together to draft an amendment that

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[12] Video recording, House Committee on Judiciary, SB 825, May 13, 2015, at 3:35–4:31 (comments of Sen Thatcher), https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2015051176 (accessed June 27, 2021).
[13] *Id.* at 2:11–29.

would provide a process by which defense counsel could be present to advise their clients inside the grand jury room:

> "REP. GREENLICK: This requires that the defendant be represented by an attorney. Would you support an amendment that would allow the defense attorney to – to represent the client in the proceedings?
>
> "SEN. THATCHER: Well, I'm open to what people – there are people who are working on amendments right now, who come from both sides of the issue, including the district attorneys and the defense lawyers, and if they would agree to that, then I would agree to that. I would like to have both parties be agreeable before I would weigh in on that."[14]

Apparently, the stakeholders could never agree on how that process would work, so that amendment never made it into the bill. What did happen appears to have been a compromise of sorts. The draft bill carried from the Senate to the House included a provision outlining how the defendant's testimony would go:

> "(d) When the defendant appears as a witness before the grand jury pursuant to this subsection, the defendant shall be permitted to give relevant and competent evidence concerning the charges under consideration and, after giving evidence, is subject to cross-examination by the district attorney and the grand jury."

[14] *Id.* at 3:35–4:31.

SB 825 (2015), A-Engrossed (Apr 15, 2015). Several weeks after Senator Thatcher's testimony, the House Committee on Judiciary amended the Senate's bill to remove that provision and include subsection (d) in its current form. SB 825 (2015), House Amendments to A-Engrossed (June 1, 2015). In other words, if the stakeholders cannot agree what role defense counsel may play in the grand jury room, the statute should simply not mention that the prosecutor and grand jury can cross-examine the defendant.[15]

This case shows the Court how the statute as passed is being interpreted and applied. No one disputes that a defendant appearing before the grand jury under ORS 132.320(12) will be examined by the prosecutor and grand jury. *See* ER-41 to 42 (Tr 14:14–15:11) (trial court and prosecutor talk about defendants having counsel outside room to advise on questions). But the prosecutor and trial court infer from the statute's silence about the presence of defense counsel that defendants must waive their

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[15] In other words, the statute *also* is silent about whether a prosecutor and grand jury can question defendants who exercise their right to testify. Yet neither the court nor the prosecutor interpreted that silence to mean the prosecutor or grand jury were deprived of their traditional ability to do so.

constitutional right to counsel if they cross the threshold into the grand jury room. ER-48 (Tr 21:14–18) (Trial court says, "just as in a trial, if the defendant goes to a grand jury proceeding, they are, in fact, waiving their right against *self-incrimination*. Otherwise, they wouldn't be there in the first place.") (Emphasis added.); *id.* at 14:20–15:14 (prosecutor says his personal practice, and that of his office in general, is to have defense counsel sit outside grand jury room because their testimony is voluntary).

Legislative silence does not speak so loudly. *See State Bar v. Security Escrows, Inc.*, 233 Or 80, 84–85 (1962) (declining to "divine legislative intent from an analysis of legislative silence"). That is especially true when, as here, legislative silence would work to deprive defendants of their constitutional right to counsel. Indeed, this Court has been "reluctant to infer from the legislature's silence *an intent to deprive the court* of its *traditional authority* to address procedural matters during trial * * *." *State v. Hess*, 342 Or 647, 660–61 (2007) (Emphases added.). If it is impermissible to infer through legislative silence that the courts' "traditional authority" will not be deprived, an inference that

would deprive criminal defendants of their constitutional rights is even less permissible.

In fact, when it passed ORS 132.320(12), the legislature knew that courts are reluctant to find that a defendant has waived fundamental constitutional rights, *see State v. Meyrick*, 313 Or 125, 131 (1992), and that, as a result, "[p]resuming waiver from a silent record is impermissible," *Burgett v. Texas*, 389 US 109, 114 (1967); *Meyrick*, 313 Or at 132. Given that longstanding precedent, it is no surprise that the legislature requires courts to advise defendants of their right to counsel on the record and confirm any waiver is voluntary, knowing, and intelligent, when it intends to allow criminal defendants to proceed without the presence of defense counsel. *See Meyrick*, 313 Or at n 7 (collecting statutes).[16]

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[16] The waiver analysis is fact-laden, to put it mildly. *See Meyrick*, 313 Or at n 8 (To be "intentional," defendant's waiver must be voluntary and not coerced, and to be "knowing and intelligent," defendant's "age, education, experience, and the complexity of the charges and possible defenses" may come into play.).

The legislature also knows how to write statutes that become void if the courts declare any part of them unconstitutional. *See* ORS 316.158 (providing "that no part of ORS 316.157 be the law if any part of ORS 316.157 is held to be invalid or unconstitutional"); ORS 743.864 (creating private right of action but saying that legislature does not want courts to alter how private right of action works—if courts find that statute unconstitutional as written, legislature intends for private right of action to be voided altogether). Had it intended for ORS 132.320(12) to self-combust if the Court ruled that defense counsel must be present in the grand jury room, it would have provided as much.

Simply put, the legislature was silent about how ORS 132.320(12) would interact with the constitutional right to counsel. The trial court inferred from that silence an intent to deprive defendants of that right.[17] To be sure, the legislature also

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[17] At least, that is the effect of the court's decision. When explaining its reasoning, though, the court said that it believed the legislature intended to require defendants to waive their Fifth Amendment right against self-incrimination. ER-48 (Tr 21:14–18).

remained silent, in the text of the statute, about defendants' right to have counsel present with them in the grand jury room. But when there are two ways to interpret silence—one that would deprive a defendant of their safeguarded fundamental constitutional rights, and the other that would align with those rights—the legislature's silence (whether the result of indecision, misunderstanding, or calculated risk) must give way to the constitution.

III. CONCLUSION

When a criminal defendant's right to counsel has attached under the Sixth Amendment or Article I, section 11, counsel must be present at all "critical stages" or points of the "criminal

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True enough. The right against self-incrimination is the right not to talk. Put another way, the right necessarily is waived by the very act of testifying. See *State v. Strickland*, 265 Or App 460, 463 (2014) ("It is well established that a defendant who elects to testify on his own behalf waives the constitutional protection against self-incrimination[.]"). Not so with the right to counsel after it has attached. Unlike the right against self-incrimination, waiver of the right to counsel post-attachment requires courts to take affirmative measures to confirm that defendants understand the consequences and still want to represent themselves.

prosecution" at which the defendant is to be "heard." Testifying before the grand jury is such a stage. The trial court erred as a matter of law when it excluded defendant's counsel from accompanying him during his testimony.

For the reasons above, defendant respectfully requests that this Court grant an alternative writ of mandamus, as described in his petition.

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Respectfully submitted,

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