IN THE SUPREME COURT OF THE STATE OF OREGON

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

BRIEF ON THE MERITS OF AMICUS CURIAE OREGON JUSTICE RESOURCE CENTER

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

Opinion Filed: May 19, 2021
Author of Opinion: LAGESEN, P. J.

Before: Lagesen, Presiding Judge, and Egan, Chief Judge, and Powers, Judge

Continued….

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BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER IN SUPPORT OF RESPONDENT ON REVIEW

INTRODUCTION

Amicus Curiae, Oregon Justice Resource Center (OJRC), is a Portland-based non-profit organization founded in 2011. OJRC works to dismantle systemic discrimination in the administration of justice by promoting civil rights and by enhancing the quality of legal representation to traditionally underserved communities. OJRC serves this mission by focusing on the principle that our criminal-justice system should be founded on fairness, accountability, and evidence-based practices. OJRC Amicus Committee is comprised of Oregon attorneys from multiple disciplines and practice areas.

SUMMARY OF ARGUMENT

The reasonable foreseeability rule set forth in *State v. Prieto-Rubio,* 359 Or 16, 376 P3d 255 (2016), protects the personal right to counsel that is guaranteed by Article I, section 11, of the Oregon Constitution. The exception carved out in *State v. Savinskiy*, 364 Or 802, 441 P3d 557 (2019), is misguided because it does not comport with this court's prior precedents and has already created confusion and uncertainty. Accordingly, this court should either

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dispense with the exception by overruling *Savinskiy* or explicitly limit it to the narrow and specific circumstances at issue in that case.

ARGUMENT

I. The Oregon Constitution protects individual rights.

The Oregon Constitution protects individual rights. *State v. Davis*, 313 Or 246, 254, 834 P2d 1008 (1992) ("[T]he constitutional rights that we are required to vindicate belong to the individual defendant."); *State v. Savinskiy*, 364 Or 802, 828, 441 P3d 557 (2019) (Duncan, J., dissenting) ("The constitution guarantees individuals rights and those rights can—and were intended to—restrict the scope of government actions, including actions taken to investigate and prosecute crimes.").

Article I, section 11, of the Oregon Constitution provides an individual with the right "to be heard by himself and counsel." This "right to counsel is not a hollow right; it does more than merely guarantee a defendant that a lawyer will be present in court when a case is called for trial" but "includes the right to have counsel present during adversarial investigative proceedings that are reasonably likely to elicit evidence that the state could use against the defendant in the prosecution of the charged crimes." *Savinskiy*, 364 Or at 828 (Duncan, J., dissenting).

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The importance of the individual right to counsel cannot be understated. *See, e.g.*, *People v. Lopez*, 16 NY3d 375, 380, 947 NE2d 1155 (2011) ("[T]he right to counsel [is] a cherished and valuable protection that must be guarded with the utmost vigilance."). The presence of counsel helps "secure the right to be free from compelled self incrimination" and dispel "the coercive atmosphere of police interrogation[.]" *State v. Sparklin*, 296 Or 85, 89, 672 P2d 1182 (1983); *People v. Rogers*, 48 NY2d 167, 173, 397 NE2d 709 (1979) ("The presence of counsel confers no undue advantage to the accused. Rather, the attorney's presence serves to equalize the positions of the accused and sovereign, mitigating the coercive influence of the State and rendering it less overwhelming.").[1]

Under the personal-rights model of the Oregon constitution, evidence obtained by the state in violation of an individual's right to counsel under Article I, section 11, must be suppressed. *State v. Prieto-Rubio*, 359 Or 16, 38, 376 P3d 255 (2016) ("The remedy for a violation of Article I, section 11, is the exclusion of any prejudicial evidence obtained as a result of that violation."); *State v. Davis*, 295 Or 227, 237, 666 P2d 802 (1983) (holding that the primary

[1] "Article I, section 12, is an additional source of a right to counsel during custodial interrogation." *Savinsky*, 364 Or at 819 n 12.

purpose of Oregon's exclusionary rule is to vindicate the individual's personal rights "by denying the state the use of evidence secured in violation of those rules against the persons whose rights were violated, or, in effect, by restoring the parties to their position as if the state's officers had remained within the limits of their authority").

II. The *Prieto-Rubio* rule is consistent with the personal-rights model of the Oregon Constitution.

In *Prieto-Rubio*,[2] the defendant was charged with sexual abuse of a child, A. 359 Or at 19. While incarcerated and awaiting trial, the defendant was questioned without counsel about newly disclosed, uncharged allegations of

[2] *Amicus curiae* filed a brief in *Prieto-Rubio* asking this court to adopt the "New York rule," which states that "a defendant in custody in connection with a criminal matter for which he is represented by counsel may not be interrogated in the absence of his attorney with respect to that matter or an unrelated matter unless he waives the right to counsel in the presence of his attorney." *Lopez*, 16 NY3d at 377. *Amicus* continues to urge this court to adopt such a rule. A rule prohibiting any questioning of a defendant known by police to be represented by counsel provides clear guidance to law enforcement and adequately protects the invaluable and fundamental right to counsel guaranteed by Article I, section 11, of the Oregon Constitution. While this court cited the *Lopez* concurrence, which described the New York rule as overly complicated, the *Lopez* majority characterized the decades-old rule as "eminently straightforward," requiring inquiry on "objectively verifiable elements." *Id.* at 382. In New York, the proposition that "once a defendant in custody on a particular matter is represented by or requests counsel, custodial interrogation on any subject, whether related or unrelated to the charge upon which representation is sought or obtained, must cease" remains good law. *People v. Young*, 181 AD3d 1266, 1267 (4th Dep't 2020), *appeal den*, 35 NY3d 1071, 152 NE3d 1193 (2020) (citation omitted).

sexual abuse against two other children, K and L. *Id.* Before trial, the defendant moved to suppress the statements he made about K and L. *Id.* at 20. That motion was denied, and the defendant appealed. *Id.* at 21.

On review, this court reiterated that

> "the purpose of the Article I, section 11, right is to ensure that a defendant charged with a crime has the benefit of an attorney's presence, advice, and expertise 'in any situation where the state *may* glean involuntary and incriminating evidence or statements for use in the prosecution of its case against defendant.' Just because police ask questions carefully avoiding the facts immediately surrounding the criminal episode of the charged offense does not necessarily mean that those questions will not elicit information that is incriminating about that charged offense."

Id. at 36 (quoting *Sparklin*, 296 Or at 93).

The court therefore concluded that to protect the integrity of the Article I, section 11, right to counsel, the state may not question a represented defendant on uncharged offenses when "it is objectively reasonably foreseeable that the questioning will lead to incriminating evidence concerning the offense for which the defendant has obtained counsel." *Id.* at 18. Thus, under the facts at issue, the state violated the defendant's right to counsel when he was questioned about the allegations related to K and L. *Id.*

In order to vindicate the defendant's personal rights—violated by the state at the time of questioning—the court suppressed all uncounseled statements, including those related to the allegations against K and L. *Id.* at 38.

In doing so, the court restored defendant to the position he would have been in had the state's officers remained within the limits of their authority.

III. *Savinskiy* is confusing and misguided.

Savinskiy presented the court with a unique and extreme set of facts. While awaiting trial following a shootout with police and an extended, high speed car chase, the defendant reportedly offered another inmate money and weapons "to assault the prosecutor and to murder two of the state's witnesses." *Savinskiy*, 364 Or at 804. Without informing the defendant's attorney, the state obtained an *ex parte* court order authorizing officers to record additional conversations between the defendant and the informant. *Id.* During those recorded conversations, the defendant discussed his plans for the new criminal activity as well as the originating case. *Id.*

The defendant argued that this uncounseled questioning violated his Article I, section 11, right to counsel. *Id.* at 805. On review, the state conceded that "the questioning violated the *Prieto-Rubio* rule, because it was reasonably foreseeable that questioning about defendant's new * * *crimes would incriminate him for the originally charged crimes." *Id.* at 821 (Duncan, J., dissenting). Nevertheless, this court held, in a 4-3 decision, that "the Article I, section 11, right to counsel on pending charges does not guarantee that the state will provide notice to a defendant's attorney before questioning the defendant

about a *new, uncharged and ongoing conspiracy to harm witnesses to a pending prosecution.*" *Id.* at 819 (emphasis added). In doing so, the court created a narrow exception to the *Prieto-Rubio* rule.

In creating this narrow exception, the court departed from its prior decisions by relying on irrelevant factual differences. With no principled reason for its result, the *Savinskiy* exception—crafted for unique and extreme facts—is confusing and misguided.

A. *Savinskiy* does not comport with either *Sparklin* or *Prieto-Rubio*.

Savinskiy's narrow exception to the *Prieto-Rubio* rule is inconsistent with established precedent.

In *Sparklin*, this court concluded that the state may not question a represented defendant about uncharged crimes when the charged and uncharged offenses are "related in such a way that questioning about the latter is likely to compromise the right to counsel as to the former." *Prieto-Rubio*, 359 Or at 36 (summarizing the *Sparklin* holding). In *Prieto-Rubio*, this court clarified that "whether charged and uncharged offenses are sufficiently related as to implicate the state constitutional right to counsel will depend on the facts and circumstances of each case and whether they establish that it is reasonably foreseeable to a person in the position of the questioner that questioning will

elicit incriminating information involving the charged offense for which the defendant has obtained counsel." *Id.* at 36-37.

Applying *Sparklin* and *Prieto-Rubio* to the facts of *Savinskiy*, the court should have concluded that the questioning was improper. "When a police officer questions a defendant about whether he has taken steps to conceal a charged crime it is objectively reasonably foreseeable that the questioning will lead to incriminating evidence about the charged crime." *Savinskiy*, 364 Or at 823 (Duncan, J., dissenting) (internal quotation marks omitted).[3] But the *Savinskiy* court did not engage with the question of "reasonable foreseeability." Instead, in crafting its narrow exception to the *Prieto-Rubio* rule, the court focused only on the first half of the analysis—whether the "facts and circumstances" of the two criminal episodes were sufficiently related.

The *Savinskiy* decision also fails to comport with the clear, objective test set forth in *Prieto-Rubio*. As the dissent explains,

> "The Article I, section 11, prohibition on questioning without counsel does not depend on an officer's motivation for asking the question. Nevertheless, the majority appears to hold that whether questioning violates a defendant's Article I, section 11, rights depends on the subjective intent of the officer. It reasons that the questioning in this case did not violate defendant's Article I, section 11, rights on the charged

[3] Again, even the state acknowledged that "it was reasonably foreseeable that the questioning would lead to incriminating evidence concerning the pending charges." *Id.* at 806, 821.

> crimes because the state was seeking information from defendant to disrupt or prosecute his new criminal activity. Thus, the majority appears to hold that whether a question violates a defendant's Article I, section 11, rights depends on the purpose of the questioning. That approach is inconsistent with this court's precedent, which is concerned with the content, not the purpose of questioning. *Prieto-Rubio*, 359 Or at 37, 376 P3d 255 (stating that the test for whether questioning violates Article I, section 11, is an objective test)."

Id. at 829 (first citation omitted).

A subjective approach remains "subject to strategic manipulation" and "suffers the same flaw as other tests that this court has rejected for determining whether questioning violates a defendant's right to counsel." *Id.* at 830.

B. The factual distinctions this court relied on in *Savinskiy* to distinguish *Prieto-Rubio* are irrelevant to whether an Article I, section 11, violation has occurred.

In creating the *Savinskiy* exception, the court distinguished the case from *Prieto-Rubio* by pointing out that "the new criminal activity occurred in a different setting, involved different conduct, and involved victims who were targeted for a very different reason [from the charged crimes]." *Id.* at 813.

Because it was reasonably foreseeable that the questioning was likely to elicit incriminating statements about the charged crime, these factual distinctions are irrelevant. In *Prieto-Rubio*, the court highlighted the similarities between the setting, the conduct, and the types of victims because, in that *particular scenario*, those similarities made it reasonably foreseeable that

questioning about the uncharged crimes would elicit statements about the charged crime. In *Savinskiy*, the reasonable foreseeability test was satisfied for different reasons: the defendant's new criminal activity was committed in an attempt to subvert the prosecution of the existing charges, creating an undeniable factual relationship between the existing charges and the new criminal activity. *Any* inculpatory statements about the new conspiracy would also inculpate defendant on the original charges because, for example, evidence of an attempt to hinder a prosecution may demonstrate consciousness of guilt.

In other words, "similarity between two crimes is not *required* for questioning about one to be incriminating about the other." *Id.* at 827 n 2 (Duncan, J., dissenting) (emphasis added). In *Sparklin*, for example, the court concluded that an "uncharged assault was related to [a] charged forgery, even though the crimes occurred in different locations, at different times, and involved different types of conduct." *Id.* at 826.

> "The issue is [therefore] *whether* the defendant's answers regarding the uncharged crimes could incriminate him on the charged crime, not *how* they could incriminate him. It does not matter whether the evidence of the uncharged crime is, for example, evidence of a defendant's *modus operandi* or evidence of the defendant's consciousness of guilt."

Id. at 826-27.

It also does not matter whether the uncharged crimes were new. As the *Savinskiy* dissent again points out,

> "*Prieto-Rubio* would not have come out differently if the crimes against K and L had occurred after the crimes against A or even after the defendant had been charged with the crimes against A, because what mattered was whether the questioning about the crimes against K and L was reasonably likely to elicit information that would incriminate the defendant on the charged offense, which did not depend on the relative timing of the crimes."

Id. at 827. Moreover, the timing alone does not, as the majority suggests, obviate the risk of strategic manipulation. *See id.* at 830 (relying on the purpose, rather than the content, of questioning renders the approach subject to strategic manipulation).

C. Because an Article I, section 11, violation occurs at the time of questioning, how the state uses the statements and derivative evidence is irrelevant.

Under Article I, section 11, an accused person has the right to counsel during any pretrial adversarial contact "at which the state's case may be enhanced and the defense impaired due to the absence of counsel." *Sparklin*, 296 Or at 95 (quoting *State v. Newton*, 291 Or 788, 802-03 (1981)). This includes pretrial interrogations. *Id.* at 94.

A violation of the Article I, section 11, right to counsel occurs at the time of questioning. *Savinskiy*, 364 Or at 824 (Duncan, J., dissenting) ("The prohibition is of the questioning itself."). "'[T]here can be no interrogation' related to the charged crime without first notifying counsel and affording counsel a reasonable opportunity to be present." *Id.* (quoting *Sparklin*, 296 Or at

93). This prohibition is intended to protect the attorney-client relationship. *Sparklin*, 296 Or at 93 ("To permit officers to question a represented suspect in the absence of counsel encourages them to undermine the suspect's decision to rely upon counsel. Such interrogation subverts the attorney-client relationship.").

Because the violation occurs at the time of questioning, it "does not depend on whether or how the state later uses any evidence resulting from that violation." *Savinskiy*, 364 Or at 824 (Duncan, J., dissenting). In order to protect a defendant's personal rights, the court must "restore a defendant to the same position as if the government's officers had stayed within the law by suppressing evidence obtained in violation of the defendant's rights." *State v. Unger*, 356 Or 59, 67, 333 P3d 1009 (2014) (citation omitted); *see also Davis*, 295 Or at 237 (stating that Oregon's exclusionary rule gives effect to citizens' constitutional right to be free from unlawful searches or seizures "by restoring the parties to their position as if the state's officers had remained within the limits of their authority."). Thus, the state may not use any statements or derivative evidence obtained through questioning that violates the Article I, section 11, right to counsel.

IV. *Savinskiy* should be overruled, disavowed, or strictly limited to its facts.

Savinskiy creates a narrow exception that is inconsistent with the constitutional principles set forth in *Sparklin* and *Prieto-Rubio*. This court should therefore (1) discard the exception by overruling *Savinskiy* or (2) explicitly limit the *Savinskiy* exception to the narrow and specific circumstances at issue in that case.

A. *Savinskiy* should be overruled or disavowed.

"*Stare decisis* is not absolute. It is a prudential doctrine that is defined by the competing needs for stability and flexibility in Oregon law." *State v. McCarthy*, 369 Or 129, 144, 501 P3d 478 (2021) (internal quotations marks omitted). In cases involving questions of state constitutional law, in particular, "the value of stability that is served by adhering to precedent may be outweighed by the need to correct past errors because this court is the body with the ultimate responsibility for construing our constitution, and, if [it] err[s], no other reviewing body can remedy that error." *Id.* (internal quotations marks omitted).

"The answer to the question whether a case should be overruled cannot be reduced to the mechanical application of a formula but requires instead an exercise of judgment that takes all appropriate factors into consideration." *Id.*

While the list of factors to consider is not fixed, it may include: "(1) whether the case was inadequately considered or wrong when it was decided; (2) whether the case conflicts with other decisions; and (3) whether the factual or legal underpinnings of the case have changed, including whether the case was based on a significant assumption that has proven to be erroneous." *Id.* at 145 (footnotes omitted). In *McCarthy*, for example, the court concluded that the exception at issue "was not well founded or clearly reasoned; it was not intended to be permanent; it has not provided stability or clarity; it is inconsistent with other, more recent cases; given technological changes, it is no longer justified; and maintaining it might well diminish the incentives for jurisdictions to improve warrant processes and for officers to seek warrants when practicable." *Id.* at 177.

Savinskiy involves a foundational question of state constitutional law. It also (1) carves out an exception that is not well founded or clearly reasoned and is inconsistent with the court's past precedent, and (2) lacks the clarity needed to prevent confusion and strategic manipulation. *Savinskiy* should therefore be overruled.

1. *Savinskiy* is not well founded or clearly reasoned.

As discussed above, *Savinskiy* does not comport with the analysis set forth in *Prieto-Rubio* and relies on irrelevant factual distinctions. *Savinskiy*, 364

Or at 822 (Duncan, J., dissenting) (stating that *Savinskiy* "departs from this court's prior cases and the constitutional principles that underlie them in order reach its preferred result given the particular facts of this case.").

Without offering a principled reason for this departure, the court risks undermining the foundational constitutional principles underlying a defendant's Article I, section 11, right to counsel. A principled analysis protects the constitutional guarantee of individual rights; an exception with *no* principled basis subverts clarity and stability in the law. *See McCarthy*, 369 Or at 146 (overruling the *per se* "automobile exception" to the Article I, section 9, warrant requirement because it was "disconnected from its rationale: The rule is based on the asserted risk that contraband or evidence will be lost, but it applies even when there is no such risk. Because there is little logic to the rule, it is difficult to apply and has not led to clarity or stability in the law.").

2. *Savinskiy* is unclear and will result in confusion and uncertainty.

Without clarity, the *Savinskiy* exception will result in confusion and uncertainty. By suggesting "that whether questioning violates a defendant's Article I, section 11, rights depends on the subjective intent of the officer," *Savinskiy* endorses an approach that "is subject to strategic manipulation." 364 Or at 829-30 (Duncan, J., dissenting). Not only are inquiries into an officer's

subjective motivation subject to strategic manipulation, but they require the courts to engage in a much more difficult and confusing analysis.

This case—where the state seeks to expand the exception only three years after this court created it—illustrates the uncertainty surrounding the scope of the exception and the instability it introduced into a settled landscape. *See also State v. Allen*, 314 Or App 248, 497 P3d 761 (2021) (petition for review filed). By overruling *Savinskiy*, this court can avoid policing the contours of a misguided exception to the fundamental constitutional right to counsel. *See McCarthy*, 369 Or at 144 (stating that "adher[ing] to erroneous and conflicting decisions produces its own threats to stability and predictability—the very virtues that *stare decisis* is supposed to promote" (internal quotation marks omitted)).

To summarize, "[t]he state cannot profit from the violation of a person's rights. That constitutional principle is foundational; it is not to be ignored." *Id.* at 827 (Duncan, J., dissenting) (citation omitted). *Savinskiy* endangers that principle by carving out an exception that is not well founded or clearly reasoned; is inconsistent with the court's reasoning in *Sparklin* and *Prieto-Rubio*; lacks clarity; and creates incentives for strategic manipulation. *Savinskiy* should therefore be overruled.

B. In the alternative, *Savinskiy* should be strictly limited to its facts.

Given the concerns addressed above, and the importance of the constitutional principles at issue, the court should, at a minimum, strictly and explicitly limit *Savinskiy* to its facts.

As discussed above, *Savinskiy* involved a unique and extreme set of facts. The court therefore repeatedly emphasized the narrow scope of the exception:

- "The question we ultimately must answer is whether Article I, section 11, guarantees a right to counsel during police questioning about the *kind of new, uncharged criminal activity in which defendant was engaged*." *Savinskiy*, 364 Or at 806-07 (emphasis added).

- "*Given the nature of defendant's new criminal activity*, we conclude that police were not required to provide notice to the attorney representing defendant on the pending charges before inquiring about his *new, uncharged and ongoing conspiracy to illegally undermine the pending charges*." *Id.* at 807 (emphases added).

- "We use the phrase 'new criminal activity' as a shorthand to describe the circumstances of defendant's *post-charging conspiracy to commit new crimes against the prosecutor and witnesses in the pending prosecution.* We do not decide how Article I, section 11, would apply to other post-charging criminal activity." *Id.* at 804 n 1 (emphasis added).

- "We, thus, conclude that the Article I, section 11, right to counsel on pending charges does not guarantee that the state will provide notice to a defendant's attorney before questioning the defendant about a *new, uncharged and ongoing conspiracy to harm witnesses to a pending prosecution*." *Id.* at 819 (emphasis added).

For the reasons set forth in *Prieto-Rubio*, and the issues identified by the dissent in *Savinskiy*, this court should therefore strictly and explicitly limit the *Savinskiy* exception to its facts.

CONCLUSION

Amicus Curiae respectfully asks this court to affirm the decision of the Court of Appeals and reverse the judgment of the trial court.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that, on February 2, 2022, I electronically filed the foregoing Brief of *Amicus Curiae*, Oregon Justice Resource Center, with the Appellate Court Administrator, Appellate Records Section, and electronically served upon David O. Ferry, attorney for Respondent on Review, and Michael A. Casper, attorney for Petitioner on Review, by using the appellate electronic filing system.

CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief, as described in ORAP 5.05(2)(a), is 3956 words.

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 as required by ORAP 5.05(4)(f).

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