IN THE SUPREME COURT THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. CATRICE PITTMAN, Defendant-Appellant.	Marion County Circuit Court Case No. 16CN03799 CA A162950 SC S067312

CORRECTED REPLY BRIEF OF PETITIONER ON REVIEW

Review of the Decision of the Court of Appeals on Appeal
from a Judgment of the Circuit Court for Marion County
Honorable Tracy A. Prall, Judge

Opinion Filed: October 16, 2019
Author of Opinion: Aoyagi, J.
Before Hadlock, Presiding Judge, and DeHoog, Judge, and Aoyagi, Judge

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INTRODUCTION

The parties agree that Article I, section 12, of the Oregon Constitution and the Fifth Amendment to the United States Constitution right against self-incrimination depends on whether a person's statement or conduct (1) is testimonial, (2) is compelled, and (3) provides evidence that could be used against the person in a criminal prosecution. State's Brief on the Merits (BOM) at 1. The state frames the issue in this case as "how to apply those longstanding requirements to circumstances that result from recent technological developments." BOM at 10. Moreover, the state wants to equate *the act* of opening a door with *the act* of entering a passcode, as divulged in its three-sentence abstract of argument:

> "The state sought to compel the act of password entry to open the door to the contents of the phone, which the state had a right to access and which were not testimony protected by the privilege against self-incrimination. The privilege was implicated only because of testimony that possibly could be gleaned from performing the act, and all that entry of the password conveyed was knowledge of the phone's password. But because the state showed that it already had independent evidence of that knowledge, the act of password entry did not provide the state with the incriminating testimony to use against defendant and thus did not violate her rights against self-incrimination."

State's Brief on the Merits (BOM) at 1.

But forget that this case concerns an iPhone password and digital data, which frankly should have no bearing on this case, except to punctuate the stakes riding on the state's rule. Imagine instead that the police have independent knowledge that a passcode-protected safe belongs to a suspect and that the safe probably contains drug-dealing records. The police obtain a warrant to search the safe, but officers' attempts to open it prove unsuccessful. The police resort to obtaining a court order that the suspect enter the passcode. This is *that* case:

> "The state sought to compel the act of pass[code] entry to open the door to the contents of the [safe], which the state had a right to access and which were not testimony protected by the privilege against self-incrimination. The privilege was implicated only because of testimony that possibly could be gleaned from performing the act, and all that entry of the pass[code] conveyed was knowledge of the [safe]'s pass[code]. But because the state showed that it already had independent evidence of that knowledge, the act of pass[code] entry did not provide the state with the incriminating testimony to use against defendant and thus did not violate her rights against self-incrimination."

The state's rule begs the question as to whether the police could compel the defendant to enter the safe's combination at gunpoint.

Indeed, it begs the question as to whether the police could compel a murder suspect to engage in *the act* of taking the police to the body, assuming the state has "independent evidence of that knowledge," *i.e.*, that the suspect knows where the body is. As such, the privilege is "implicated only because of testimony that possibly could be gleaned from performing the act." And, after

all, the state has "a right to access" the body and the act of taking is "not testimony protected by the privilege of self-incrimination." Therefore, the act of leading would "not provide the state with the incriminating testimony to use against defendant and thus [would] not violate her rights against self-incrimination."

If that is the law, this court should say so. Below, defendant attempts again to explain why it is not.

ARGUMENT

The state's reasoning draws a distinction from what an act "does" versus what it "says":

> "Entering the password on a phone is significant for what it does; it provides the state access to the phone's contents so that the state can execute a warrant. Yet there is a possibility that the state could rely on that act for what it says; when a person enters a password to unlock a phone, she also necessarily conveys that she knows the password. Accordingly, ordering password entry is constitutionally permissible when the state first demonstrates, to the court entering the order, that the person subject to the order knows the password. In doing so, the state demonstrates that it gains no testimonial advantage through performance of the act. The compelled act is significant only for what it does, not for what it says."

State's BOM at 7.

Of the three requirements to invoke the right against compelled self-incrimination, the state's distinction relates to whether an act or statement is "testimonial." However, the protections afforded by the right against

compelled self-incrimination reach farther than a determination as to whether the state could rely on an act "for what it says" but instead "only for what it does." That distinction does not limn the divide between what falls within the right and what falls outside its protection.

Any act—for what else is speech, writing, sign language, or entering a combination of numbers and letters but nuanced vocal or physical "acts"—that reveals a person's thoughts to the state *is* testimonial. *State v. Fish*, 321 Or 48, 56, 893 P2d 1023 (1995) (" Under Article I, section 12, of the Oregon Constitution, individuals may not be compelled to disclose their beliefs, knowledge, or state of mind, to be used in a criminal prosecution against them."); *see also Doe v. United States*, 487 US 201, 212, 108 S Ct 2341, 101 L Ed 2d 184 (1988) ("It is the extortion of information from the accused; the attempt to force him to disclose the contents of his own mind, that implicates the Self-Incrimination Clause.") (internal quotations and citations omitted). For that reason, donning a shirt or revealing tattoo marks are *not* testimonial. *See* State's BOM at 12-13 (providing examples of nontestimonial acts).

But—for the very same reason—recalling, revealing, conveying or entering a memorized password *is* testimonial. The password—like the combination for the safe or the location of the body—is knowledge held in the mind and conveyed through entering it in the iPhone (or working the combination or leading the police to the body). Because a compelled act of

entering a passcode is testimonial, and because the state will use that testimonial act to obtain evidence for defendant's prosecution, the state's rubric falls apart.

CONCLUSION

Because the state cannot compel a person to divulge what she holds in her mind for use in her own criminal prosecution, this court should reverse.

Respectfully submitted,

Signed
By Ernest G Lannet at 4:46 pm, Aug 25, 2020

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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 1,088 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 Reply Brief of Petitioner on Review to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on August 25, 2020.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Reply Brief of Petitioner on Review will be eServed on Benjamin Gutman #160599, Solicitor General, attorney for Plaintiff-Respondent and the following:

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