IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. CHRISTOPHER SHANE RALSTON, aka Christopher Wayne Ralston, Defendant-Appellant Petitioner on Review.	Multnomah County Circuit Court Case No. 16CR33180 CA A165924 S068727

PETITIONER'S REPLY BRIEF

Petition to review the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Multnomah County
Honorable Richard C. Baldwin, Judge

Opinion Filed: April 7, 2021
Author of Opinion: James, Judge
Before: Powers, Presiding Judge, and Egan, Chief Judge, and James, Judge

Brief on Merits will be filed if review is allowed.

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PETITIONER'S REPLY BRIEF

Introduction

The state has narrowed the questions on review to two, and defendant agrees that this case largely calls on this court to resolve two issues. First, whether the state's duty to administer justice "without delay" under Article I, section 10, of the Oregon Constitution continues during a period in which the state has voluntarily dismissed charges that it intends to refile. Second, whether defendant made a nonspeculative showing that the destruction of his jail booking video prejudiced him. In this brief, defendant addresses some of the state's arguments on those two issues.

Summary of Argument

Article I, section 10, requires the state to administer justice "without delay." Its language is wholly different from the narrower Speedy Trial Clause of the Sixth Amendment. Although this court has drawn from Sixth Amendment case law in interpreting Article I, section 10, it has also departed from the federal analysis in multiple ways.

This court should once again reject the federal analysis, which excludes all periods during which charges have been dismissed from the protections of the Sixth Amendment. Federal analysis relies on the availability of due process to protect against such delay, but the Oregon Constitution contains no due

process clause. And, in 1857, no federal due process protections applied to state actions. Consequently, due process cannot constitute context for interpreting Article I, section 10. To the contrary, the lack of a state due process clause, the injustice that can result from prosecutorial delay in refiling dismissed charges, and the broad language of Article I, section 10, all show that it can and should be interpreted to protect against such delay.

The state also argues that statutes of limitations provide adequate protection during periods in which charges have been dismissed. But the existence of a statute is no reason to water down a constitutional right. And statutes of limitations provide little protection against the kinds of delay and prejudice that this case presents. Finally, defendant has proposed an easy to administer rule that is consistent with this court's existing constitutional framework, whereas the state's rule would leave unanswered questions about what delay does and does not count.

Regarding prejudice, the state's arguments fail to distinguish between speculation and reasonable inferences. Defendant did not guess about what the deleted video might show; his attorney drew logical inferences based on her experience trying DUII cases. Contrary to the state's assertion that defendant needed more evidence to corroborate defense counsel's experience, the trial court credited her representations. And those representations amply support the inference that the video likely would have been favorable.

The state also errs in asserting that one cannot assess prejudice to the defense without knowing the details of the state's trial evidence. Regardless of what the arresting said about defendant's balance, the video would have been powerful evidence that defendant could offer during his case-in-chief—not merely for impeachment. And the fact that the video was taken two hours after defendant drove is not unusual for evidence in a DUII prosecution, nor does it negate the exculpatory or impeachment value of the evidence.

Finally, the state faults defendant for failing to obtain the video himself. But the state points to nothing in the record that shows how an indigent, unrepresented person who is not even a party to an open case could secure such evidence—let alone why he should be blamed for it. In contrast, the state had a police officer and multiple prosecutors assigned to the case who easily could have secured the video yet took no action for a month. The state, not defendant, had the duty to administer justice without delay. It did not fulfill that duty.

Argument

I. The state's narrow reading of Article I, section 10, is untethered to its text and context, would make Oregon dependent on federal law, and would leave many open questions requiring future litigation.

Article I, section 10, requires that "justice shall be administered, openly and without purchase, completely and without delay." Although often referred as a "speedy trial" clause, it does not use those words. The Sixth Amendment

and Article I, section 10, say different things and have different meanings. *See, e.g.*, *State ex rel Oregonian Pub. Co. v. Deiz*, 289 Or 277, 282, 613 P2d 23 (1980) (explaining that the "sweeping language" of Article I, section 10, distinguishes it from the Sixth Amendment). This court has drawn from federal case law in interpreting Article I, section 10, but it has not hesitated to chart its own course. *State v. Harberts*, 331 Or 72, 87, 11 P3d 641 (2000) (noting that this court once adopted federal speedy trial factors under Article I, section 10, but later rejected some of the federal analysis); *cf. Watson v. State*, 155 NE3d 608, 614 n 2 (Ind 2020) (noting distinction between the Sixth Amendment and the text of the Indiana Constitution that Oregon's Article I, section 10, was based on).

In short, this court has long recognized its "duty to interpret the protections afforded Oregonians by our state constitution independently from the federal constitution." *State v. Owens*, 302 Or 196, 201, 729 P2d 524 (1986). It does so by examining text, context, history, and case law to determine what the drafters likely meant—and to identify "relevant underlying principles that may inform our application of the constitutional text to modern circumstances." *State v. Davis*, 350 Or 440, 446, 256 P3d 1075 (2011). With that standard in mind, defendant responds to some of the state's arguments for its narrower construction of Article I, section 10.

A. This court should not adopt or defer to federal case law in deciding the scope of Article I, section 10, which has vastly different text, context, and history.

In arguing that this court should exempt a period during which the state has voluntarily dismissed criminal charges from the requirements of Article I, section 10, the state relies heavily on federal case law that interprets the Sixth Amendment narrowly due to the availability of due process to protect against precharging delay.[1]

One problem with that argument is that the Due Process Clause of the Fourteenth Amendment was drafted ten years after the Oregon Constitution. Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 Or L Rev 125, 146 (1970). In other words, when Article I, section 10, was enacted, no due process protection applied to state actions. And the framers of the Oregon Constitution did not include a state due process clause.

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[1] The state refers to the delay here as "preindictment." Although that label is technically correct—the delay occurred before the issuance of an indictment—it is potentially misleading. The delay occurred *after* the state issued an information, which was legally sufficient to bring defendant to trial. That distinction did not exist in the 19th century when indictments were required for all criminal prosecutions. Today, however, a District Attorney's information usually suffices to commence a prosecution and will therefore start the "without delay" clock under Article I, section 10. *Cf. State v. Keys*, 368 Or 171, 202-03, 489 P3d 83 (2021) (holding that an information gives the court jurisdiction to try a felony). Accordingly, this case does not implicate delay that occurs before the state files a legally sufficient charging instrument. A better label for such delay might be "precharging" instead of "preindictment."

Given those facts, one can draw competing inferences. The framers of the Oregon Constitution may have believed there should be no protection against prosecutorial delay between dismissal and reindictment (except, perhaps, statutes of limitations). It is also possible the framers specifically intended for Article I, section 10, to protect against such delay.

Or the framers may have simply meant to create a broad, powerful proscription against the maladministration of justice—one that future Oregon courts could adapt as needed. And the text, context, and history of Article I, section 10, suggest that that is its most likely meaning. The provision's "ancient roots, broad application, and contemporary importance" make it a "great ordinance"—*viz.*, one of "those broadly, and somewhat vaguely, phrased provisions by which constitution writers attempted to circumscribe government actions that they could not (or did not want to) identify with specificity." Thomas A. Balmer, *Does Oregon's Constitution Need a Due Process Clause*, 91 Wash L Rev Online 157, 169, 172 (2016).

Of course, the fact that Article I, section 10, is written broadly does not make it an empty vessel. Its text is still paramount. But defendant submits that "justice shall be administered * * * without delay" means what it says. If a prosecutor files criminal charges, voluntarily dismisses the charges to advance the state's interests, and then takes no action for a month—during which time potentially important evidence is destroyed—a commonsense reading is that

justice *has* been delayed. In contrast, nothing supports the view that the applicability of section 10 was meant to turn on technicalities like whether a prosecutor dismisses an information to seek an indictment or, instead, files an amended information charging a felony.

And the lack of a state due process clause is important context, too. The United States Supreme Court has recognized that precharging delay can cause serious injustice that offends due process. *See generally State v. Stokes*, 350 Or 44, 55-56, 248 P3d 953 (2011). It therefore made sense to the Court to hold that the Due Process Clause of the Fifth Amendment protects against delay after charges are dismissed while the Sixth Amendment protects only against delay in going to trial on the final charging instrument. Those provisions exist at the same level in the same document and were enacted at the same time. They can comfortably apply to different parts of the process.

But the Oregon Constitution is different. It has only one applicable provision, not two, so there is nothing to divide. Either both parts of the process are protected by the same broad provision, or one is left unprotected. And if a prosecutor's unreasonable delay in refiling charges hinders the administration of justice, then it makes sense to invoke a provision that refers to delays in the administration of justice—not to hold that the state constitution affords no relief whatsoever. *Cf.* Linde, 49 Or L Rev at 182 ("To begin with the federal claim * * * implicitly admits that the guarantees of the state's constitution are

ineffective to protect the asserted right and that only the intervention of the federal constitution stands between the claimant and the state.").

Moreover, holding that federal law is the only remedy would require this court to cede its authority to make law for Oregonians. Under the state constitution, this court and the Court of Appeals can easily provide guidance and clarification to the bench and bar. *Cf.* Balmer, 91 Wash L Rev Online at 168 (noting that relying on state constitutions is "more satisfactory generally because they provide more direct guidance to the courts"). In contrast, relying solely on federal law would leave us subject to the whims of the United States Supreme Court—which has been content to leave this area of law in disrepair. *See Stokes*, 350 Or at 56-57 (noting unresolved, decades-old split over the due process standard for precharging delay).

B. Statutes of limitations are neither an adequate substitute for constitutional protections nor a reason to limit the applicability of Article I, section 10.

The state argues that statutes of limitations provide adequate protection such that Article I, section 10, need not apply to periods in which charges have been dismissed. But the potential availability of a statutory remedy is no reason to water down a constitutional right. Indeed, Oregon has long had speedy trial statutes that differ significantly in their application from state and federal constitutional requirements, but this court still gives full consideration and effect to the constitutional command.

And statutes of limitations often are inadequate for the kinds of delay and prejudice that this case presents. Statutes of limitations provide clear deadlines that serve a valuable purpose, but those bright lines allow no room to weigh competing interests. A prosecutor's delay in reviewing her file for a month will rarely matter under a statute of limitations measured in years, but such neglect can result in the loss of important evidence. Under the state's rule, justice can be delayed, and therefore denied, with no remedy under state law.

C. *State v. Nichols* is consistent with defendant's position because it emphasizes the importance of an arrest, the continuity of a prosecution, and principles of fairness.

The state quotes *State v. Nichols*, 236 Or 521, 527, 388 P2d 739 (1964), for the proposition that, "[W]here an indictment is dismissed and the matter is resubmitted to the grand jury[,] the prosecution is in the same posture in which it would have been if the defendant had never been indicted." But *Nichols*—which did not implicate Article I, section 10—does not support the state's position. In that case, the defendant was indicted for manslaughter. *Id.* at 526. He demurred, and the trial court dismissed the indictment but gave the state leave to return to the grand jury. *Id.* The grand jury returned an indictment for second-degree murder, and the defendant was tried and convicted. *Id.* On appeal, he argued that the grand jury could not indict him for a greater offense than it had charged in the original indictment.

This court rejected that argument. But this court's analysis supports defendant's position. First, this court noted that after the dismissal the *defendant* was still in the position of having "been arrested and held to answer." *Id.* at 527. And being in that position triggered the requirements of Article I, section 10. *State v. Vasquez*, 336 Or 598, 604, 88 P3d 271 (2004). Accordingly, *Nichols* is consistent with the position that dismissal does not necessarily stop the "without delay" clock.

Second, this court noted that after the dismissal the state could uncover new evidence and that the grand jury should be permitted to consider that evidence. *Nichols*, 236 Or at 527-28. That reflects this court's understanding that the dismissal did not grind the gears of justice to a halt, but that the state's administration of justice—including investigation and court proceedings—continued. Merely because the state was not bound by the grand jury's prior charging decisions did not mean that the dismissal would excuse any *delays* in the state's administration of justice.

Finally, this court invoked the principle of "fair treatment." *Id.* at 529. It explained that "[t]here is nothing fundamentally unfair about permitting the state in a criminal case to make the best case it can when the matter is placed at large by the defendant's demurrer to an indictment." *Id.* at 530. Here, however, fairness supports defendant's position. Indeed, in this case, the dismissal was not the result of a demurrer but the state's voluntary decision to dismiss the

charges—a decision the state made for its own benefit. And that decision made things unfair. Prosecutors remained assigned to the case, so the state had the ability to collect and preserve the evidence that *it* wanted. But defendant was indigent and unrepresented, so he was not able to preserve evidence that may have been favorable to *him*. That inequality stands in contrast to a situation where a represented defendant successfully moves for dismissal and, perhaps, remains on comparable footing with the state.

The unfairness that can result from the state's voluntary dismissal shows why Article I, section 10, should apply to such a period—when the delay disadvantages only one party in an adversarial proceeding, justice itself can be compromised. Of course, that does not mean the state violates Article I, section 10, every time it dismisses charges. It merely requires courts to apply the same balancing test that applies to any other delay.[2]

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[2] *Abbott v. Baldwin*, 178 Or App 289, 36 P3d 516 (2001), *rev den*, 334 Or 75, *cert den*, 537 US 901 (2002), also does not support the state's position. That case involved whether subsequent indictments related back to previously dismissed indictments for statute of limitations purposes. In resolving the question, the court repeatedly emphasized the significance of the indictments being filed in different cases with different case numbers. *Id.* at 298-99, 301. Here, however, the information and indictment were both filed in the same case with the same case number—which, under the Court of Appeals' analysis, would make them a single "action." *Id.* at 298.

D. Defendant's proposed rule is simple and easy to administer, whereas the state's rule is vague and ripe for future litigation.

Defendant offers this court a clear standard that is easy to administer—indeed, a standard this court has followed for many years. Once the state arrests a defendant and holds them to answer or obtains a charging instrument that is sufficient to bring the defendant to trial, the state incurs the constitutional duty to administer justice without delay. *Vasquez*, 336 Or at 604, 610. A period in which that charging instrument has been voluntarily dismissed still counts, but the reasons for that delay and prejudice resulting from the delay still count, too, under the amply developed case law from this court and the Court of Appeals.

In contrast, the state's proposed rule is unclear and may (as the state acknowledges) require future litigation. Will dismissal always toll the "without delay" clock, or may other circumstances—such as the defendant continuing to be held—mean the clock keeps ticking? If the state unreasonably delays a proceeding, voluntarily dismisses it, and refiles the charges, are the refiled charges subject to dismissal? Does it make a difference if the prosecutor acts in good faith? If the earlier delay is reasonable, does it still count toward the total delay in the new case or is the slate wiped clean?

It would make little sense—and cause future headaches—to say that the state's duty to administer justice "without delay" is a duty that the state can pause and unpause whenever it wishes. Such a holding would be untethered to

any text, context, history, or Oregon case law. And even if the courts crafted rules to protect against deliberate end-runs around Article I, section 10, the state would still have an incentive for more subtle gamesmanship in deciding when and whether to dismiss charges. *Cf. United States v. Marion*, 404 US 307, 331-32, 92 S Ct 455, 30 L Ed 2d 468 (1971) (Douglas, J., concurring) ("The duty which the Sixth Amendment places on Government officials to proceed expeditiously with criminal prosecutions would have little meaning if those officials could determine when that duty was to commence.").

Article I, section 10, is written broadly enough to include periods during which charges have been dismissed. Context, case law, and practicality all support such a rule. And the state has offered no compelling reason *not* to count such periods, other than a misguided effort to synchronize Oregon law with federal law. This court should hold that the state's voluntary dismissal of charges that it intends to refile does not relieve it of its duty to administer justice without delay.

II. Defendant's showing of prejudice is based on reasonable inferences, and the video would have been helpful to the defense no matter what the arresting officer testified.

The second issue is whether defendant showed that "the delay caused a reasonable possibility of prejudice to the defense" based on the destruction of the jail booking video. *State v. Harberts*, 331 Or 72, 94, 87, 11 P3d 641 (2000). Contrary to the state's arguments, defendant's showing of prejudice relies not

on speculation but on logical inferences. As this court has noted, the line between speculation and inference "is drawn by the laws of logic," and an inference is permissible "[i]f there is an experience of logical probability that an ultimate fact will follow a stated narrative or historical fact." *State v. Jesse*, 360 Or 584, 597 n 7, 385 P3d 1063 (2016) (quoting *Tose v. First Pennsylvania Bank, N.A.*, 648 F2d 879, 895 (3d Cir), *cert den*, 454 US 893 (1981), *abrogated on other grounds by Griggs v. Provident Consumer Discount Co.*, 459 US 56, 103 S Ct 400, 74 L Ed 2d 225 (1982).

Here, defendant established prejudice based on reasonable inferences. Indeed, although logical syllogisms are not essential for a valid inference, defendant's showing of prejudice follows a straightforward path of inductive reasoning. *State v. Hedgpeth*, 365 Or 724, 733, 452 P3d 948 (2019); *see also id.* at 746 (Balmer, J., dissenting) ("The Court of Appeals majority seemed to view inductive logic as an invalid means of reaching rational conclusions, when that plainly is not correct."). That reasoning can be illustrated by two syllogisms:

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1. *Major premise:* Police officers who make DUII arrests frequently note their observations of the defendant exhibiting poor balance or difficulty walking. (Defense counsel's declaration, ER-8.)

   Minor premise: The arresting officer in this case did not note any poor balance or difficulty walking. (*Id.*)

   Conclusion: Defendant likely exhibited normal balance and walking.

2. *Major premise:* Jail booking videos depict a defendant's balance and walking ability. (*Id.* at ER-9.)

   Minor premise: Defendant likely exhibited normal balance and walking. (Conclusion of first syllogism.)

   Conclusion: The jail booking video in this case likely showed defendant displaying normal balance and walking.

The state is also wrong to claim that defendant needed more evidence to support the historical facts that his inferences rely upon. For example, it is certainly possible that booking videos from other cases could help illustrate defendant's point. But the state fails to address the fact that the trial court *credited* defense counsel's representations about what such a video "would have shown normally for people." Tr 8.

If the trial court had been unpersuaded or wanted more evidence, it could have asked for more—and defendant could have responded. Or, if the state thought that other booking videos would undermine defendant's argument, the state was free to offer them. Indeed, the state likely had greater ability to present booking videos from other cases, given that defense counsel owed her other clients a duty of confidentiality and could not have shown their videos without their consent. Consequently, the state's argument before this court comes too late and contradicts the record.

The state's arguments about the effect of the video at trial also miss the mark. Defendant did not need to call the arresting officer and have him preview

his trial testimony—and, for all the reasons expressed in defendant's brief on the merits, this court should not encourage such tactics. Regardless of what the officer testified, the video would have been qualitatively different and more persuasive evidence of defendant exhibiting normal balance, which defendant could offer in his case-in-chief and not merely for impeachment.

And the video would have bolstered defendant's case no matter what the officer testified. If the officer testified that defendant's balance was poor, then he could certainly be impeached by the omission of that fact from his report—but the impeachment would not be affirmative evidence of good balance. And a video showing good balance would be more persuasive anyway. Conversely, in the unlikely event the officer testified that defendant had good balance, a video would still be qualitatively different and more powerful evidence of that fact.

But the most likely scenario is that the officer would not testify about balance at all. Because the officer did not mention balance in his report, he likely had nothing to say about it. Indeed, the state was in the best position to say whether his testimony would be relevant to the motion to dismiss, but it said the officer was not necessary for the motion hearing. And defense counsel certainly would not cross-examine the officer about balance when his report was silent on the matter—a cardinal rule of cross-examination is "[d]on't ask a question to which you do not know the answer." *Parker v. State*, 328 So 3d 111, 116 n 2 (Miss 2021) (quoting Irving Younger, *Trial Techniques* (1st ed 1978)).

The state argues that the video would have been less persuasive because defendant was booked two hours after he drove. But the state routinely—if not invariably—relies, at least in part, on post-driving evidence of impairment. *See, e.g.*, *State v. Sampson*, 167 Or App 489, 6 P3d 543, *rev den,* 331 Or 361 (2000) (describing process for investigating a controlled substances DUII, which includes administration of field sobriety tests (FSTs) after the defendant is arrested); *State v. Trujillo*, 271 Or App 785, 787, 353 P3d 609, *rev den,* 358 Or 146 (2015) (officers administered FSTs after arresting the defendant and taking him to the police station); *cf. State v. Ralston*, 310 Or App 470, 495, 486 P3d 822, *rev allowed,* 368 Or 597 (2021) (explaining that a video taken "only two hours after being pulled over * * * could be powerful impeachment evidence").[3]

Although the timeframe might reduce the persuasiveness of the video, it does not render the destruction of the video nonprejudicial. The video would still support an inference that defendant was not impaired that evening, and it would undermine any attempt by the state to claim that he exhibited poor

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[3] The state's invocation of *Hedgpeth* is inapposite. *Hedgpeth* concerned a prosecution *solely* on the theory that the defendant drove with a culpable blood-alcohol content (BAC)—the state declined to allege impairment. 365 Or at 728. And this court held only that a BAC test result above the legal limit two hours after driving, without more, did not establish that the defendant drove while over the legal limit, because the connection between the test result and BAC at the time of driving was a scientific question that went beyond common knowledge. *Id.* at 738-39. That has no bearing on the inferences a factfinder can draw from visible signs of impairment (or lack thereof).

balance. Even if the officer were to testify that defendant had poor balance during the stop but better balance at the jail, the video would help impeach that testimony as well—the absence of any mention of balance in the report, combined with the video, would support an inference that the officer was tailoring his testimony to the video and was therefore untrustworthy.

Ultimately, the inferences to draw from the video would have been for a jury to decide. The point is that the video would have been valuable to the defense as both exculpatory and impeachment evidence. And what the record shows about the state's case confirms the importance of the video. The state's evidence reflects that defendant consumed *some* alcohol that evening; but with few physical signs of intoxication, a jury could have doubted whether he consumed alcohol to the point of impairment. And the jail booking video would have been defendant's best evidence that he was not visibly impaired. Indeed, such a video would support his statement that he swerved because he dropped his phone, not because he was intoxicated. Although defense counsel could still make those arguments without the video, video evidence would be far more persuasive to a jury than mere argument.

Finally, the state faults defendant—personally—for failing to obtain and preserve the video after the charges were dismissed. But nothing in the record suggests that defendant had any ability to do so. For one thing, defendant was indigent and unrepresented. Moreover, once the charges were dismissed, he was

not even a party to an open case and therefore had no ability to issue subpoenas or request discovery. And the state has pointed to no evidence that the jail would provide or preserve a booking video for an unrepresented person who was not currently charged with any crime.

In contrast, it should have been easy for the police officer or any of the prosecutors assigned to the case to obtain or preserve the video. Yet the state did nothing for a critical month but let the file gather dust on a prosecutor's desk. That did not satisfy the state's duty to administer justice without delay and, in defendant's view, caused him such disadvantage as to warrant dismissal.

CONCLUSION

Defendant respectfully requests that this court reverse the decision of the Court of Appeals and the judgment of the trial court.

Respectfully submitted,

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Signed
By Kyle Krohn at 9:33 am, Feb 02, 2022

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that (1) this brief complies with the word limit in accordance to the court's order allowing an extended brief limitation of 5,000 words, filed on January 28, 2022. The word limit of ORAP 5.05(1)(b)(ii)(E) is waived and (2) the word-count of this brief is 4,696 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 on Review's Reply Brief to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on February 2, 2022.

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

Respectfully submitted,

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