IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Adverse Party, v. RANDY GRAY, Defendant-Relator.	Multnomah County Circuit Court No. 21CR19107 SC S068673 **MANDAMUS PROCEEDING**

ADVERSE PARTY, STATE OR OREGON'S ANSWERING BRIEF

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ADVERSE PARTY'S ANSWERING BRIEF

STATEMENT OF THE CASE

Adverse party, the State of Oregon, accepts relator-defendant's (hereinafter defendant) statement of the case as adequate for this court's review, with the exception of the questions presented. The state provides an alternate question presented—along with a proposed rule of law—below.

Question Presented

Do criminal defendants exercising their statutory right to appear before a grand jury as a witness thereby vest themselves with a state or federal constitutional right to have counsel present in the grand jury proceedings while they testify?

Proposed Rule of Law

No. Criminal defendants have no constitutional rights to have counsel personally present when they elect to testify before a grand jury.

SUMMARY OF ARGUMENT

A criminal defendant who has been arraigned on a district attorney's information charging the defendant with a felony, and who is represented by counsel, has a statutory right to appear as a witness before a grand jury considering whether to indorse an indictment. Although a criminal defendant who has been charged with a crime by information has a constitutional right to counsel that has attached by the time the defendant elects to voluntarily appear

before the grand jury, the scope of that constitutional right does not include permitting the defendant's counsel to be present before the grand jury. Instead, the scope of the constitutional right is limited to advising the defendant whether to appear before the grand jury, preparing the defendant for the appearance, and having counsel readily available to answer any questions during the course of the grand jury proceedings. Such a limited scope is justified by the strict statutory limitations on who may be present before the grand jury, the confidentiality requirements of the grand jury statutes, and the nonadversarial nature and purpose of the grand jury.

Here, the trial court did not commit a legal error in denying defendant's motion to have his attorneys present during his grand jury testimony. Although defendant's state and federal constitutional rights to counsel attached when he was arraigned on the district attorney's information charging him with assaulting a public safety officer—a felony—and two related misdemeanors, the scope of that right varies based upon whether the proceeding involves a "critical stage" of the prosecution. Because a grand jury proceeding is not such a "critical stage," the right to counsel does not include the right to have counsel personally present in the grand jury room while defendant is voluntarily testifying. Consequently, this court should decline to issue a peremptory writ of mandamus that would recognize such a right. Alternatively, this court should clarify that even if defendant's right to counsel includes the right to have

counsel present during his grand jury testimony, it is not so broad as to permit counsel to object, speak to the grand jury, or otherwise disrupt the grand jury's receipt of evidence.

BACKGROUND

A. The Oregon grand jury process is primarily prescribed by statute.

The Oregon Constitution authorizes the existence and empaneling of grand juries, and it specifies a grand jury's size. *See* Or Const, Art VII (Am), § 5(1) (permitting Oregon Legislature to provide statutes for the "[d]rawing and summoning grand jurors," "[e]mpaneling more than one grand jury in a county," and allowing a grand jury to sit "during vacation as well as session of the court"); Or Const, Art VII (Am), § 5(2) ("A grand jury shall consist of seven jurors chosen by lot from the whole number of jurors in attendance at the court, five of whom must concur to find an indictment."); Or Const, Art VII (Am), § 5(3) (a person may be charged with a felony "only on indictment by a grand jury" unless the person waives indictment or, after a preliminary hearing a magistrate finds probable cause that the person committed a crime punishable as a felony). The structure and the scope of the grand jury process is otherwise governed by statute. *See* ORS 132.010 – 132.440.

1. Grand jury proceedings are inquisitorial—not adversarial.

"Although the role of the grand jury has developed over centuries and its origins are somewhat obscure, * * * its function as an accusatory body serves a

crucial role in protecting individual liberties." *State v. Burleson*, 342 Or 697, 703, 160 P3d 624 (2007). "A grand jury is a body of seven persons drawn from the jurors in attendance upon the circuit court at a particular jury service term, having the qualifications prescribed by ORS 10.030 and sworn to inquire of crimes committed or triable within the county from which they are selected." ORS 132.010. A grand jury proceeding "is a closed and nonadversary proceeding." *State v. Miller*, 254 Or 244, 249, 458 P2d 1017 (1969). It is "an institution in which a group of ordinary citizens must approve of the initiation of the state power to accuse citizens of major crimes." *Burleson*, 342 Or at 703. Consequently, it "serves as a brake on the state's potential abuse of the accusatory process." *Id.*

When a defendant has been charged by information with a felony, and if the defendant does not waive indictment or preliminary hearing, the preliminary hearing must be held—or the case presented to the grand jury—"as soon as practicable but in any event within five judicial days if the defendant is in custody or within 30 days if the defendant is not in custody." ORS 135.070(2). Although those timelines can be extended "for good cause shown," *id.*, especially for in-custody defendants the state must present the case to the grand jury on a very compressed timeline.

2. Grand jury proceedings are conducted in private, but are subject to an audio recording that can be released in only very limited circumstances.

With very limited statutory exceptions, grand jury proceedings are conducted in private. *See State ex rel Johnson v. Roth*, 276 Or 883, 885, 557 P2d 230 (1976) ("Historically, the courts have always recognized that there is a 'long-established policy that maintains the secrecy of the grand jury proceedings.'" (quoting *United States v. Procter & Gamble*, 356 US 677, 681, 78 S Ct 983, 2 L Ed 2d 1077 (1958))). The only persons who may be present in the grand jury room when evidence is being presented are the grand jurors, the prosecutor, "a witness actually under examination," a qualified interpreter when necessary, and a parent or guardian of a witness under the age of 12 or with an intellectual disability if approved by the court. ORS 132.090.[1] When

[1] The Federal Rules of Criminal Procedure contain a similar restriction on who may be present during grand jury testimony. *See* Fed R Cr P 6(d) (only "attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device" "may be present while the grand jury is in session"). The United States Supreme Court has interpreted that rule as meaning that a "witness may not insist upon the presence of his attorney in the grand jury room." *United States v. Mandujano*, 425 US 564, 581, 96 S Ct 1768, 48 L Ed 2d 212 (1976). *See also In re Grand Jury Subpoena*, 97 F3d 1090, 1093 (8th Cir 1996) (involving Independent Counsel's investigation of President Clinton); *United States v. Fitch*, 472 F2d 548, 549, *cert den sub nom*, *Meisel v. United States*, 412 US 954 (9th Cir 1973) ("The point is well settled that a witness is not entitled to take his counsel along" when appearing before the grand jury.).

Footnote continued…

deliberating, only the grand jurors may be present. *See* ORS 132.310 ("The grand jury shall retire into a private room and may inquire into crimes committed or triable in the county and present them to the court, either by presentment or indictment, as provided in ORS 132.310 to 132.390."). Moreover, grand jurors must take an oath to "keep secret the proceedings before" them. ORS 132.060.

In 2017, the legislature enacted provisions requiring the audio of all grand jury proceedings other than private deliberations to be recorded. ORS 132.250, ORS 132.260. The audio recordings of the grand jury proceedings are confidential and may be disclosed only in limited circumstances—including to the prosecutor and the defense attorney in cases where the grand jury has indorsed an indictment as "a true bill." ORS 132.270. But, absent a court order, the prosecuting attorney and the defense attorney are required to maintain the confidentiality of that recording and may not copy, disseminate, or republish the recording. ORS 132.270(2)(c). *See also Roth*,

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Most states that utilize grand juries also limit who may be present during grand jury testimony to the grand jurors, prosecutors, the witness under examination, interpreters, and court reporters. *See, e.g.*, Beale, *et al*, *Grand Jury Law and Practice* § 4:10 n 12 (2d ed) (2020) (identifying 21 states with similar limitations to the federal rule). However, other states by statute or court rule permit counsel for witnesses to be present in the grand jury room while the witness is under examination. *See, e.g., id.* at n 13 (identifying 17 states).

276 Or at 885 ("When disclosure is permitted, it is to be done 'discretely and limitedly.'" (*Quoting Procter & Gamble*, 356 US at 683.)).

3. Statutory changes in 2015 allowed some defendants the right to testify before the grand jury.

In 2015, the Legislature amended ORS 132.320 to provide some defendants with a right and a mechanism to appear before the grand jury as a witness. Or Laws 2015, ch 586, § 1. The amendment added the following subsection to ORS 132.320:

> (12)(a) A defendant who has been arraigned on an information alleging a felony charge that is the subject of a grand jury proceeding and who is represented by an attorney has a right to appear before the grand jury as a witness if, prior to the filing of an indictment, the defense attorney serves upon the district attorney written notice requesting the appearance. The notice shall include an electronic mail address at which the defense attorney may be contacted.
>
> (b) A district attorney is not obligated to inform a defendant that a grand jury proceeding investigating charges against the defendant is pending, in progress or about to occur.
>
> (c) Upon receipt of the written notice described in paragraph (a) of this subsection, the district attorney shall provide in writing the date, time and location of the defendant's appearance before the grand jury to the defense attorney at the indicated electronic mail address. In the event of a scheduling conflict, the district attorney shall reasonably accommodate the schedules of the defendant and the defense attorney if the accommodation does not delay the grand jury proceeding beyond the time limit for holding a preliminary hearing described in ORS 135.070(2).
>
> (d) Notwithstanding ORS 135.070 and paragraph (c) of this subsection, in order to accommodate a scheduling conflict, upon the request of the defendant the time limit for holding a

> preliminary hearing described in ORS 135.070(2) may be extended by a maximum of an additional five judicial days and the district attorney and the defendant may stipulate to an extension of greater duration. During a period of delay caused by a scheduling conflict under this subsection, ORS 135.230 to 135.290 shall continue to apply concerning the custody status of the defendant.

ORS 132.320(12).

The statutory right to appear as a witness before the grand jury applies only to defendants who have been charged by information with a felony, who have been arraigned on that information, and who are represented by counsel who provides written notice to the district attorney of the defendant's request to appear before the grand jury. The statute does not require the district attorney to submit felony charges to a grand jury—they could still elect to proceed via preliminary hearing—and it does not require them to notify a defendant when a grand jury proceeding is pending, in progress, or about to occur. When it enacted this section, the legislature made no other changes to any other statutes concerning grand jury confidentiality or specifying who was permitted to be present in the grand jury room. Or Laws 2015, ch 586, §§ 1-2.

B. After being arraigned on a district attorney's information charging defendant with a felony, the trial court denied defendant's motion to have his attorneys present while he exercised his statutory right to testify before the grand jury.

In this case, defendant was charged by district attorney's information with assaulting a public safety officer, ORS 163.208, resisting arrest,

ORS 162.315, and second-degree disorderly conduct, ORS 166.025. (ER 1).[2] Defendant was arraigned on the information, and he was appointed counsel. (ER 2). Because assaulting a public safety officer is a felony, the district attorney was required to either conduct a preliminary hearing or to seek a grand jury indictment to proceed with that charge. Here, the district attorney elected to seek an indictment.

Pursuant to ORS 132.320(12)(a), defendant's counsel provided the prosecutor with written notice that defendant intended to exercise his statutory right to appear as a witness before the grand jury. (ER 3-5). Before defendant's case was presented to the grand jury, defense counsel sent a letter to the assigned prosecutor to inform him that defendant's two attorneys "intend[ed] to appear with [defendant] inside the grand jury room during his testimony." (ER 6). Counsel's letter asserted that defendant had a Sixth Amendment right "to have counsel present with him in the grand jury room." (ER 7). The prosecutor responded to the letter with an email stating that he "cannot agree" to counsel's request to be present in the grand jury room during defendant's testimony. (ER 9). Thereafter, defendant moved the trial court for an order allowing "his attorneys to be present with him inside the grand jury

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[2] Unless otherwise noted, all ER cites are to the Excerpt of Record filed with relator's petition for a writ of mandamus.

room during his testimony, in accordance with [his] Sixth Amendment right to counsel." (ER 10).

Two days before defendant's scheduled time to appear before the grand jury, the trial court held a hearing on defendant's motion. (ER 29). During the hearing, defendant invoked the Sixth Amendment to the United States Constitution and Article I, section 11, of the Oregon Constitution, in asserting that he had a right to counsel when he testified before the grand jury because that was "a critical stage of the proceedings."[3] (ER 31). Specifically, defendant argued that counsel's presence was necessary so that "counsel can object to questions from the grand jury," "instruct the client not to answer questions," and "advise the client to end testimony." (ER 32).

The prosecutor argued that the law in Oregon was settled that defense counsel could not be present in the grand jury room. (ER 39-41). However, the prosecutor assured the court that defense counsel was permitted to wait outside of the grand jury room while their client testified, and that he had never "had a defendant testify who was represented that did not have their attorney sitting

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[3] Although defendant made passing reference to Article I, section 11, at the hearing, he did not develop any argument differentiating the scope of the Article I, section 11, right from the Sixth Amendment right that was the basis for his written motion. (ER 30-49).

outside the room, available, or at least available by phone * * * for consultation if the need arose." (ER 42).

At the conclusion of the hearing, the trial court denied defendant's motion to permit his attorneys to be present in the grand jury room during his testimony, and it denied defendant's motion for a stay. (ER 27). Defendant then filed a mandamus petition in this court asking it to issue a peremptory writ to the trial court to direct it to order that defendant's attorneys be permitted to accompany defendant when he testified before the grand jury. This court stayed the trial court proceedings, and it issued an alternative writ. The trial court ultimately adhered to its decision denying defendant's motion to allow his attorneys to be present in the grand jury room with him when he testified.

ARGUMENT

Before this court, defendant renews his argument that his constitutional right to counsel requires that his attorneys be permitted to accompany him into the grand jury room despite the statutory limitations on who may be present for grand jury proceedings. In addition to the Sixth Amendment argument that he advanced in the trial court, defendant argues that he also has a separate—and more robust—right to the presence of his attorneys pursuant to Article I, section 11, of the Oregon Constitution.[4] (Pet Br 18). For the reasons explained below,

[4] As explained below, defendant's Article I, section 11, argument fails on the merits for the same reasons that his Sixth Amendment claim fails.

Footnote continued…

defendant's argument conflates issues of the attachment of the constitutional rights to counsel with issues of the scope of those rights once they have attached. Although defendant's rights to counsel have attached, the scope of those rights does not include overriding Oregon's statutory limitations on who may be present during grand jury proceedings. Consequently, this court should deny the writ of mandamus and dismiss defendant's petition.

A. A defendant's constitutional right to the presence of counsel applies only at trial and to other "critical stages" of the criminal prosecution.

Defendants possess constitutional rights to counsel after they have been accused of crimes. Although those rights "attach" once a formal accusation has been made, the scope of those rights varies depending on what stage of the criminal proceeding is occurring. Only during "critical stages," of the criminal proceeding does a defendant have the constitutional right to have counsel personally present. As explained below, when assessing whether a particular hearing or event is a "critical stage" such that a criminal defendant has a right to the presence of counsel, courts must assess how likely it is that the proceeding

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Beyond that, though, defendant's argument that his Article I, section 11, right to counsel is "potentially broader," (Pet Br 18), is unpreserved, and this court should not address it. *See State v. Langley*, 363 Or 482, 492 n 4, 424 P3d 688 (2018), *adh'd to as mod on recons*, 365 Or 418 (2019), *cert den*, 141 S Ct 138 (2020) (declining to consider unpreserved argument on review in mandamus proceeding).

will produce new, incriminating evidence against the defendant and whether or not the proceeding is adversarial in nature.

Both Article I, section 11, of the Oregon Constitution and the Sixth Amendment to the United States Constitution provide a right of counsel to persons accused of crimes.[5] Both of those constitutional provisions were "originally understood to apply only to the conduct of criminal trials." *State v. Prieto-Rubio*, 359 Or 16, 24, 376 P3d 255 (2016); *see also State v. Davis*, 350 Or 440, 464, 256 P3d 1075 (2011) (noting that "each of the rights listed in [Article I,] section 11[,] pertains to the conduct of a criminal trial"); *id.* at 467 ("There is, in fact, general agreement among historians that the Sixth

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[5] Article I, section 11, of the Oregon Constitution provides, in part:

> "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor[.]"

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Amendment and its state constitutional counterparts were understood to have a limited scope—they were originally understood to apply to the conduct of the criminal trial only and, even then, as a guarantee only of the right to *retained* counsel." (Emphasis in original)). "But, as the nature of law enforcement and criminal prosecution changed, both the state and federal courts expanded their views of the 'criminal prosecution' that triggered the right to counsel, so that the constitutional guarantee applied as early as the commencement of criminal proceedings by indictment or other formal charge." *Prieto-Rubio*, 359 Or at 24; *see also United States v. Ash*, 413 US 300, 310, 93 S Ct 2568, 37 L Ed 2d 619 (1973) ("This extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself.").

Although this court and the United States Supreme Court have held that the constitutional rights to counsel "'attached' as of the time of charging," they also have held that the scope of that right varies depending on the stage of the criminal proceedings that are occurring. *Prieto-Rubio*, 359 Or at 24. Specifically, this court and the United States Supreme Court have held that the right to the pretrial presence of counsel "was limited to certain 'critical stages' of the criminal prosecution." *Id.* Under the Sixth Amendment, a pretrial event is considered a "critical stage" if counsel's absence "could derogate from the

defendant's right to a fair trial." *United States v. Wade*, 388 US 218, 226, 87 S Ct 1926, 18 L Ed 2d 1149 (1967). "More specifically, the right applies if 'potential substantial prejudice to [the] defendant's rights inheres in the particular confrontation' and counsel's presence would help avoid that prejudice." *Prieto-Rubio*, 359 Or at 24 (quoting *Wade*, 388 US at 227). The United States Supreme Court has described a "critical stage" as an event that is both adversarial in nature and whose results are potentially binding so as to potentially "settle the accused's fate and reduce the trial itself to a mere formality." *Maine v. Moulton*, 474 US 159, 170, 106 S Ct 477, 88 L Ed 2d 481 (1985) (quoting *Wade*, 388 US at 224).

Under Article I, section 11, the scope of the right to counsel includes the right to counsel's presence during "stages in criminal proceedings in which counsel's presence could prevent prejudice to a defendant." *Prieto-Rubio*, 359 Or at 25. Contrary to defendant's suggestion that the right under the Oregon Constitution is "potentially broader," (Pet Br 18), this court consistently has applied the same "critical stage" analysis in interpreting the scope of the Article I, section 11, right to counsel as the United States Supreme Court has with respect to the Sixth Amendment right. *See State v. Sparklin*, 296 Or 85, 94-95, 672 P2d 1182 (1983) (applying "critical stage" analysis under Article I, section 11); *State v. Newton*, 291 Or 788, 802-03, 636 P2d 393 (1981) (same); *see also*

Prieto-Rubio, 359 Or at 24 (state and federal courts have held that the scope of the right to counsel is limited to "critical stages" of the criminal prosecution).

Although the focus of the constitutional rights to counsel has shifted in recent years away from being exclusively trial rights, the touchstone of those constitutional guarantees remains ensuring that "once a person is charged with a crime he or she is entitled to 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 [the] defendant." *Sparklin*, 296 Or at 93 (emphasis added). "[T]he [A]rticle I, section 11 guarantee of an attorney, like the federal counterpart, remains focused on the trial; that is, it is the protection of rights to which a defendant is entitled in the trial itself which the guarantee is intended to preserve." *Id.* at 94. In other words, the purpose of the Article I, section 11, right pretrial was more closely aligned with the purpose of the Article I, section 12, prophylactic right to counsel—to protect the defendant during the executive's investigation of the defendant's possible criminal activity as it seeks to develop evidence against the defendant for use at a trial.

Defendant relies on *State ex rel Russell v. Jones*, 293 Or 312, 647 P2d 904 (1982), to argue that criminal defendants have a right to the presence of counsel in *any* forum in which the defendant is "to be heard." (Pet Br 19-21). *Russell* does not embrace such a sweeping rule, however. There, the question

was whether a convicted defendant is entitled to have counsel present during a court-ordered presentence interview by non-judicial personnel. This court began by stating what it called the "obvious[]" proposition that the constitutional text—which describes the defendant's right "to be heard by himself and counsel" in a criminal prosecution—guarantees that counsel is entitled to be present at any stage *of the criminal prosecution* at which a defendant "is to be heard," which includes the sentencing stage. 293 Or at 315. But this court did not hold that a defendant has a constitutional right to have counsel present merely because he has an opportunity to be "heard" in a particular forum. Rather, it held that, because a defendant has a constitutional right to be heard and to have counsel present at *sentencing*—a proposition that does not appear to have been in dispute—the right to counsel extends to a presentencing interview by a non-judicial officer to gather information from the defendant for the purpose of sentencing. *Id.* at 315-16.

Indeed, defendant's understanding of the scope of the right cannot be squared with this court's decision in *Miller*, where this court found no constitutional right to the presence of counsel at a proceeding where the defendant waived his constitutional right to a grand jury. 254 Or at 246-49. In concluding that such a proceeding was not a critical stage, this court noted that a defendant's decision to waive indictment would not be "actually determinative of whether criminal proceedings could or would be brought." *Id.*

at 249. Even if the defendant had insisted on an indictment, there was "nothing that a lawyer could have done to represent him before the grand jury." *Id.* "All that a lawyer could have done for him was warn him not to voluntarily testify in front of the grand jury where, *while unrepresented*, he would have been subject to questioning by the district attorney and the grand jurors." *Id.* (emphasis added). Because a lawyer could not have appeared with the defendant if he chose to testify before a grand jury, this court held that the defendant's predicate decision to waive indictment was not a critical stage. Although *Miller* did not squarely address whether a defendant's testimony before a grand jury is a critical stage at which a defendant has the right to the presence of counsel, the holding in that case relies on the assumption that it is not. If a defendant had a right to the presence of counsel while voluntarily testifying before a grand jury, this court's holding in *Miller* that the indictment waiver was not a critical stage would likely have come out a different way even though the defendant was "to be heard" at the waiver hearing.

B. Because a grand jury proceeding is neither adversarial nor used primarily to develop evidence for trial, it is not a "critical stage"—even when a defendant voluntarily testifies before the grand jury.

As noted, the core of the constitutional right to counsel is to protect defendants at trial. Consequently, the scope of that right is at its zenith during the trial and during stages of the criminal prosecution that will have a direct and consequential effect on the trial. These non-trial stages of the prosecution

where the scope of the counsel rights are particularly broad—and may include the right to have counsel present—are those stages where the state is actively investigating and gathering evidence to use against the defendant at trial or other proceedings that are primarily adversarial in nature, such as identification lineups, post-attachment police interviews with the defendant, and pre-trial evidentiary hearings.

But the purpose of the grand jury proceeding is not to develop evidence of criminal activity in the same way that law enforcement does when it conducts an investigation or when it questions individuals. Instead, the grand jury's primary task is to review the evidence that has already been gathered by the executive branch and to make a determination whether there is enough evidence to require a defendant to stand trial. *See* ORS 8.670 ("The district attorney shall institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses, when the district attorney has information that any such offense has been committed, and attend upon and advise the grand jury when required."); ORS 132.330 ("The district attorney may submit an indictment to the grand jury in any case when the district attorney has good reason to believe that a crime has been committed which is triable within the county."). If there is not sufficient evidence, the grand jury can ask the prosecutor to gather more, or it can issue a "not true bill" on the proposed indictment. *See Burleson*, 342 Or at 705 ("Although * * * the

grand jury works with the prosecutor, this court has determined that the grand jury, not the prosecutor, is the actor that drives the investigative process of the grand jury."). Moreover, a grand jury proceeding is not an adversarial proceeding where parties are making factual or legal arguments in anticipation of rulings by a neutral third party in the way that hearings on pretrial motions or trials are. *See Miller*, 254 Or at 249 (describing grand jury as "a closed and nonadversary proceeding"). Consequently, a grand jury proceeding is not a "critical stage" of the criminal proceeding for Sixth Amendment and Article I, section 11, purposes. *See* Beale, *et. al.*, § 6.28 ("There is no generally recognized constitutional right to have counsel present in the grand jury room to assist a witness during his testimony.").

Moreover, not even all *investigatory* stages of a prosecution rise to the level of a "critical stage" requiring the *presence* of counsel. In *State v. Spencer*, 305 Or 59, 74-75, 750 P2d 147 (1988), for instance, this court recognized that a defendant had an Article I, section 11, right only *to consult* by telephone with counsel before deciding with to submit to a breath test during a DUII investigation. It did not hold that the scope of the Article I, section 11, right included the right to have counsel present when deciding whether to provide a breathalyzer sample. And the United States Supreme Court has recognized the Sixth Amendment does not require counsel's personal presence even for some appearances in front of a judge. *See Rothgery v Gillespie County, Tex.*, 554 US

191, 212, 128 S Ct 2578, 171 L Ed 2d 366 (2008) ("[W]hether arraignment signals the initiation of adversary judicial proceedings is distinct from the question whether the arraignment itself is a critical stage requiring the presence of counsel." (Quoting *Michigan v. Jackson*, 475 US 625, 630 n 3, 106 S Ct 1404, 89 L Ed 2d 631 (1986))); *see also Gerstein v. Pugh*, 420 US 103, 122, 95 S Ct 854, 43 L Ed 2d 54 (1975) ("Because of its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel.").

Defendant's argument that his decision to voluntarily testify before the grand jury vests him with a constitutional right to have counsel present with him in the grand jury proceeding conflates the question of whether his right to counsel had attached at that point of the criminal proceeding with what the scope of that right was. To be sure, as soon as defendant was charged with a crime via a district attorney's information and arraigned on that information, his state and federal constitutional rights to counsel had *attached*. In other words, the state could not deprive him of counsel after that point. But just because his right to counsel had attached, does not mean that defendant had a right to have counsel present in the grand jury room. The scope of the right for that particular event is not so broad.

Defendant further argues that the grand jury proceeding at issue here is akin to the Alabama preliminary hearing at issue in *Coleman v. Alabama*, 399

US 1, 90 S Ct 1999, 26 L Ed 2d 387 (1970), where the Supreme Court recognized a Sixth Amendment right to have counsel present. (Pet Br 16-18, 29-32). The basis for the Court's holding, however, is unique to the characteristics of the preliminary hearing under Alabama law. The Court noted that "the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution" for four reasons. *Id.* at 9.

> "First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail."

Id. The reason the Supreme Court recognized the Sixth Amendment right to counsel at these hearings is inextricably tied to how the case against the defendant would later be tried. The benefits of counsel involved counsel playing an active role in cross-examining witnesses, clarifying witness testimony for potential future use as impeachment evidence, and developing favorable evidence for the defendant. Because of the adversarial nature of preliminary hearings under Alabama law, it is easy to understand why the Court

held that the defendant had a Sixth Amendment right to have counsel participating in that hearing.[6]

Grand jury proceedings under Oregon law, however, are significantly different. There is no right of the defendant to cross-examine grand jury witnesses. And other than the defendant's limited right to testify under ORS 132.320(12), there is no procedural mechanism for a defendant to subpoena witnesses to the grand jury or otherwise develop favorable evidence. Again, that is simply not the purpose of the grand jury.

If defendant is correct that a grand jury proceeding where he is voluntarily testifying requires the presence of counsel, it is difficult to discern how other stages of the criminal proceeding would not also become "critical" and require the presence of counsel. For instance, the rationale for defendant's proposed rule would not be limited to just the portion of the grand jury proceeding when he was testifying. His counsel's presence during the presentation of other evidence certainly would also be helpful to defendant's ability to mount a defense and possibly convince the grand jury not to indict. In fact, defendant's proposed rule would mean that a constitutional right to

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[6] For the same reasons, a defendant would likely have a Sixth Amendment right to counsel at a preliminary hearing under Oregon law, and Oregon's preliminary hearing statutes specifically provide that a defendant has the "right to the aid of counsel." ORS 135.070(1).

counsel's presence would exist for all post-charging police investigation and interviews—even if defendants, themselves, were not the subjects of the interviews. This court has never recognized such a broad right to counsel. Because it is without a constitutional basis, this court should reject defendant's proposed rule and hold that his voluntary testimony before a grand jury is not a "critical stage" of the criminal proceeding imbuing him with a constitutional right to have counsel present.

C. Because a grand jury proceeding is not a "critical stage" of the criminal proceeding, the scope of the constitutional right to counsel is more limited and does not necessarily include the right to have counsel personally present.

1. The scope of the right to counsel at a grand jury proceeding is limited to a reasonable opportunity to consult with counsel.

Outside of the criminal trial or pre-trial "critical stages" of the criminal proceeding, the scope of a defendant's right to counsel is limited and does not include the right to have counsel personally present. In *Spencer*, for instance, this court addressed when the Article I, section 11, right to counsel attached and what the scope of that right was with respect to an individual who had been arrested on suspicion of DUII, but not yet charged. This court first concluded that "the appropriate beginning point for the *existence* of the right to counsel is arrest, not formal charging." *Davis*, 350 Or at 476 (describing *Spencer*'s holding; emphasis added). It then explained that the ability to consult with counsel at this stage of a DUII prosecution was important because the police

were attempting to obtain evidence—in the nature of a blood-alcohol content—from the defendant. *Spencer*, 305 Or at 74.

Importantly, though, this court adhered to "the distinction between when the right to counsel commences, or 'attaches,' and the scope of that right after attachment has occurred." *Davis*, 350 Or at 476. "The court in *Spencer* clearly noted that, although the right to counsel under Article I, section 11, attaches upon arrest, the particular circumstances—'the evanescent nature of the evidence the police seek to obtain,' in the case of a DUII investigation—may justify limiting the exercise of the right." *Id.* (quoting *Spencer*, 305 Or at 74). In particular, this court held that under Article I, section 11, "an arrested driver has the right upon request to a reasonable opportunity to obtain legal advice before deciding whether to submit to a breath test." *Spencer*, 305 Or at 74-75; *see also State v. Durbin*, 335 Or 183, 189, 63 P3d 576 (2003) ("[T]he right to counsel at that stage of the criminal prosecution is not as broad as the right to counsel that an accused enjoys at trial."); *State v. Tiner*, 340 Or 551, 563-64, 135 P3d 305 (2006), *cert den*, 549 US 1169 (2007) (concluding that the scope of the right to counsel did not include a right to consult with counsel before police photographed a jailed defendant's tattoos, because the collection of such evidence "was not a critical stage in the prosecution"). But it did not hold that a defendant had the right to have counsel personally present during that stage of the proceedings. "*After the right attaches*, the court may evaluate the particular

circumstances, the nature of the evidence, and the like to determine the scope of the right to counsel." *Davis*, 350 Or at 478 (emphasis in original).

The particular circumstances of a grand jury proceeding—even one where a defendant is voluntarily testifying—justify limiting the scope of the right to in the same way as it was limited in *Spencer*: a right to consult with counsel, but not necessarily a right to have counsel present. This limitation recognizes that—as was the case in *Spencer*—the grand jury proceeding is a prelude to a formal charge. Although defendant in this case has been charged by a district attorney's information, absent an indictment or a probable cause finding after a preliminary hearing, the state cannot bring defendant to trial on any felony charges. Moreover, the historical and statutory confidentiality of grand jury proceedings and their nonadversarial nature justify a more limited scope of the right to counsel. Finally, and unlike *Spencer* where the defendant was under arrest and not free leave, defendant here is making a voluntary choice to testify before the grand jury.

2. Even if the scope of the right includes the right to have counsel present, it should not include a right to have counsel object, ask questions, or address the grand jury.

If this court disagrees and believes that defendant has a right to have counsel present, it should nonetheless provide clear guidance regarding what counsel can and cannot do before the grand jury; in other words, it should scrupulously define the scope of the constitutional right. As noted, a grand jury

proceeding is traditionally—and by statute in Oregon—not adversarial. Rather, the grand jury is a body of citizens from the community who review the evidence that the prosecutor presents to it. Its job is to evaluate whether that evidence, "is such as in its judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury." ORS 132.390. It is not a body that has the capacity to rule on evidentiary objections or claims of privilege. It is not a body that is tasked with making the ultimate conclusion of a defendant's guilt or innocence. Rather, it is a body that provides a check on the executive to ensure that no person is formally charged with a felony offense without there being minimally sufficient evidence of their guilt.

In his arguments to the trial court, defendant asserted that he wanted counsel present so that counsel could object to questions, instruct their client not to answer questions, and instruct their client to end their testimony.[7] Such a role for counsel would turn a grand jury proceeding into an adversarial hearing

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[7] In briefing before this court, defendant does not specifically renew these arguments about what he believes that counsel can do for him before the grand jury. However, he does argue that his "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," and that "[o]nly the 'guiding hand' of counsel" can ensure that happens. (Pet Br 25-26). Additionally, defendant "does not concede" that limitations found in Colorado's grand jury statutes, which permit subpoenaed witnesses to have counsel in the room with them but does not permit them to "object, make arguments, or address the grand jury," would be applicable if he were to prevail here. (App Br 25 n 8).

where defense counsel and the prosecutor argued over the admissibility of evidence, without the presence of a judicial officer—or anyone—to resolve those disagreements.

In *Burleson*, this court explained what would happen if a grand jury witness asserted a privilege against testifying, producing other evidence, or responding to a particular question. Citing with approval the Court of Appeals decision in *State ex rel Grand Jury v. Bernier*, 64 Or App 378, 668 P2d 455 (1983), this court explained that the normal process for addressing a witness's refusal to answer a question on the ground of privilege would be for the witness to first assert the privilege before the grand jury. Then, if the grand jury concluded that it would like to compel the witness to testify or produce the questioned evidence, it should direct the prosecutor to seek a court order to compel the witness to answer the question. The witness's claim of privilege would then be evaluated by a judge who would determine whether to order the witness to answer the grand jury's question. If the court rejected the witness's assertion of privilege, it would order the witness to testify. And if the witness still refused to answer the question, the witness could be charged with contempt of court. *Burleson*, 342 Or at 706-08.

If defendant is correct that he has a constitutional right to have counsel present in the grand jury room with him when he voluntarily provides testimony to the grand jury—and if that right to counsel encompasses the right to have

counsel perform all of the functions that counsel would normally perform during an adversarial proceeding—one would expect a significant increase in the need to follow the process for resolving privilege and evidentiary disputes that this court outlined in *Burleson*. Because such a process would be highly disruptive to the ordinary course of grand jury proceedings—especially given the very tight timelines required to present cases to the grand jury for in-custody defendants—this court should narrowly construe the scope of the right to counsel at the grand jury stage.

Defendant and *amicus* also suggest that having counsel present for defendant's grand jury testimony would be a hedge against a host of alleged prosecutorial abuses of the grand jury system. (Pet Br 23 n7; *Amicus* Br 25-28). Even if such abuses were common—and they are not—defendant's proposal to allow counsel to be present during his testimony would provide a check only during the part of the proceeding when defendant was actually testifying. Moreover, almost all of the examples of abuse identified by *amicus* are taken from 2015 legislative testimony on a bill to require recording of grand jury proceedings.[8] Although the grand jury recording statute did not pass until 2017,

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[8] The Senate Judiciary Committee held a concurrent public hearing on both SB 822 and SB 825 in 2015. SB 825 was eventually passed and became ORS 132.320(12)(a), permitting defendants to testify before grand juries in limited circumstances. SB 822 was a comprehensive grand jury recordation bill, and it did not pass in 2015. Most of the public testimony

Footnote continued…

the alleged abuses have now been addressed by the legislature. Or Laws 2017, ch 650, §§ 1-19. To the extent that prosecutors are presenting inadmissible evidence to the grand jury or are otherwise mis-instructing the grand jury, those problems would be readily apparent on any recording. Moreover, even if evidence were presented to the grand jury that ultimately was deemed inadmissible, the trial jury would not be able to consider that evidence when assessing whether the state had met its burden of proving defendant's guilt beyond a reasonable doubt.

Because the ability of defense counsel to object, make arguments, or otherwise disrupt the grand jury proceedings would have significant practical impacts for how grand juries operate in Oregon, and because the legislature has already provided a clear mechanism for identifying grand jury abuse, this court should conclude that, if a defendant has a right to counsel's presence while voluntarily testifying before the grand jury, that right is limited. Specifically, this court should clarify that counsel may not object, ask questions of witnesses, or make arguments to the grand jury.

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before the Senate Judiciary Committee—and almost all of the testimony related to alleged abuse of the grand jury system—was on SB 822. Video Recording, Senate Committee on Judiciary, SB 822 and SB 825 (March 31, 2015).

CONCLUSION

For all of the foregoing reasons, this court should deny defendant's petition for writ of mandamus, and it should dismiss the alternative writ.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 6, 2022, I directed the original Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Rian Peck and Christopher Marin Hamilton, attorneys for relator, Cassidy Rice, Kelly Kathryn Simon, and Rosalind M. Lee, attorneys for amicus curiae, by using the electronic filing system.

I further certify that on January 6, 2022, I directed the Answering Brief to be served upon Honorable Angel Lopez, circuit court judge, by mailing two copies, with postage prepaid, in an envelope addressed to:

Hon. Angel Lopez
Circuit Court Judge
Multnomah County Courthouse
1200 SW 1st Ave
Portland, OR 97204

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

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 7,852 words. I further 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(2)(b).

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