IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. DEBORAH LYNN REED, Defendant-Appellant, Petitioner on Review.	Lincoln County Circuit Court No. 19CR12088, 18CR64481 CA A170999 (Control), A171000 SC S069360

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals on Appeal from a Judgment of the Circuit Court for Lincoln County
Honorable SHERYL BACHART, Judge

Opinion Filed: February 9, 2022
Author of Opinion: SHORR, J.
Concurring Judge: ORTEGA, P. J.
Before: Ortega, Presiding Judge, and Shorr, Judge, and Powers, Judge

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

INTRODUCTION

Defendant argues that compelling circumstances arose within two minutes after two police officers interrupted a probation meeting to speak with her about suspected drug crimes. In her view, the simple fact that she was at a probation office meant that she was under compelling circumstances, such that the officers could not talk to her about suspected crimes without first providing *Miranda* warnings. But this court has never held that any single fact is determinative of the compelling-circumstances inquiry, which typically requires consideration of *all* the circumstances of an encounter. This case presents no reason to depart from that well-settled approach. A rule treating all questioning at a police station or probation office as compelling would be just as disconnected from reality as a rule that no questioning in a person's home can ever be compelling.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

When a suspect is in custody or compelling circumstances, police must provide a *Miranda* warning before commencing interrogation. Do compelling circumstances automatically arise when police speak with someone at a police station or probation office?

Proposed Rule of Law

No. The presence of compelling circumstances depends on the totality of the circumstances, rather than the application of any mechanical rule turning on individual facts such as the location of an encounter.

FACTUAL BACKGROUND

This appeal arises from defendant's convictions, following a bench trial, for unlawful possession, manufacture, and delivery of methamphetamine, as well as for unlawful possession of heroin. (*See* Tr 287–93). Those convictions rest in large part on evidence—methamphetamine, heroin, scales, and materials for cutting and packaging drugs—found when searching her car. (Tr 101–31; *see also* Tr 287–93 (trial court's speaking verdict)).

The police searched defendant's car based on consent she granted within two minutes after they contacted her during a meeting with her parole officer. (Tr 101, 148–51; ER 23 ¶ 6). The question on review is whether evidence developed during those initial two minutes—including defendant's statements to police and her consent to the vehicle search—should be suppressed. Below, the state sets forth the factual and procedural history relevant to that question.

1. Police interrupt defendant's meeting with her parole officer to speak with her about drug crimes.

Police became interested in speaking to defendant based on a report that she was selling narcotics. (Tr 20–21, 28–29; ER 23 ¶ 2). Two police officers were familiar with defendant from previous encounters with her, (Tr 145–46),

and they began looking for her by looking for her vehicle, which they found at the Lincoln County Parole and Probation Office, (Tr 29; ER 23 ¶ 2).

Defendant was at the probation office for a regularly scheduled "general meeting" to talk about her "general compliance" with the terms of her probation. (Tr 8, 13–14; ER 23 ¶ 3). When the police officers found defendant sitting across from her probation officer at his desk, they asked both defendant and the probation officer for permission to speak with both of them, and both agreed. (Tr 8, 30–31; ER 23 ¶ 4). The probation officer asked the police officers whether they wanted him to "dismiss" defendant so that the police officers could speak with her or the probation officer alone. (Tr 46). The police officers answered in the negative, explaining that they wanted to speak with both defendant and her parole officer. (Tr 46). The officers entered the probation officer's eight-by-ten-foot office, and one stood at the doorway while the other took a seat in a chair at the end of the desk that was between defendant and probation officer. (Tr 9–10, 46–47).

The police officers then explained that they were looking to speak with defendant because they "had information" that defendant was "selling narcotics, as recently as" that day and that she may have "some with her." (Tr 31; ER 23 ¶ 5). As the officers offered that explanation, defendant acted "surprised," denied having "anything" on her, and volunteered to let the police officers search her purse and her person. (Tr 31; ER 23 ¶ 5). When the officer who was

standing responded to defendant's offer by asking whether he could search her car, defendant agreed and handed over her keys. (Tr 31; ER 23 ¶ 5).

After she gave her keys to the officer but before the officer left to search her car, defendant volunteered some additional statements that "she was trying very hard" to "get her child back" and that "[i]t was hard to get work," which the officer understood as "offering up reasons of why that she was exhibiting that behavior of selling" drugs. (Tr 32; ER 23 ¶ 5). The police officer then left to search her car, advising defendant that if she wanted to revoke her consent, she could do so by notifying the second police officer—the one who had sat down earlier and remained in the room while the first officer conducted the search. (Tr 32–33; ER 23 ¶ 6).

At that point—when the first officer left to search defendant's car—approximately two minutes had elapsed since the police officers first made contact with defendant. (Tr 33; ER 23 ¶ 6).

During those two minutes, the probation officer asked no questions, and he never ordered defendant to answer the police officers' questions. (Tr 8–9; ER 24 ¶ 9). Indeed, about 15 minutes later, the probation officer asked defendant and the second police officer to leave his office and go to a conference room so that the probation officer could conduct other business. (Tr 11, 49, 51; ER 24 ¶ 9). The probation officer also testified that his meeting with defendant was still not complete at that point, that defendant was not free to

leave until the meeting was complete, and that defendant could not have left at any point without an escort. (ER 24–25 ¶ 14). But defendant never asked or tried to leave, and she never refused to talk to the police. (Tr 13, 37; ER 25 ¶ 15).

After those initial two minutes, the second police officer asked defendant further questions about her drug activity and conducted a consent search of her person and her cellphone. (Tr 47–52; ER 24 ¶¶ 9–11). The police also searched defendant's vehicle based on the consent that she had provided and found drugs and drug paraphernalia. (ER 24 ¶ 8; Tr 21–24). As explained below, the trial court suppressed all evidence developed after the initial two minutes, except for the drugs and drug paraphernalia found in the vehicle search to which defendant had consented in the first two minutes. (ER 30).

Based on what the police officers learned from their searches and their interview of defendant, they arrested her. (*See* Tr 36, 52).

2. The trial court suppresses all evidence not developed within the first two minutes of contacting defendant.

In an ensuing trial for crimes involving the drugs found in her car, defendant sought to suppress all statements she made during the interview at the probation office, as well as all evidence obtained from the search of her vehicle. (ER 22). She argued that she was impermissibly interrogated under compelling

circumstances without receiving adequate *Miranda* warnings, and that both her statements and her consent to search were products of that violation. (ER 22).

The trial court granted the motion in part, concluding that the state could carry its burden of proving the absence of compelling circumstances only for the first two minutes of the police officers' encounter with defendant—essentially, until the first officer left with defendant's keys to search her car. (ER 29–30). Accordingly, the trial court suppressed all statements and evidence developed during the second officer's interview and search of defendant, but it did not suppress any evidence found in the search of her car or any statements she made before the first officer left to conduct that search. (ER 29–30).

Defendant appealed that partial denial of her motion to suppress, and the Court of Appeals affirmed. *State v. Reed*, 317 Or App 453, 455, 505 P3d 444, *rev allowed*, 370 Or 197 (2022). In so ruling, the Court of Appeals acknowledged that the location of the encounter here—a probation office—"would seemingly weigh in favor of a compelling circumstances determination." *Id*. at 460. But it concluded that this factor was not "significant" given the probation officer's "lack of involvement," "the fact that defendant was there for a routine meeting," and the lack of any suggestion that defendant's refusal to speak to the officers "could subject her to a violation." *Id*. at 460, 464.

SUMMARY OF ARGUMENT

This court determines whether an encounter is sufficiently "compelling" to require *Miranda* warnings by considering all the circumstances of the encounter, including length of the encounter, location of the encounter, pressure exerted on the suspect during the encounter, and whether the encounter could be terminated by the suspect. A straightforward application of that framework here establishes that the first two minutes of the encounter between defendant and the police officers did not give rise to compelling circumstances. Indeed, each of those factors in this case were no more compelling than they were in other cases where this court has declined to conclude that circumstances were compelling.

Arguing for a different conclusion, defendant asks this court to focus its inquiry only on the location of the encounter or on the fact that she was on probation. But this court has consistently rejected attempts to limit the compelling-circumstances inquiry to a single fact. And, to the extent that probation status is at all relevant to the inquiry, it was accounted for here by factors such as location and the pressure exerted on defendant. Thus, defendant's probation status requires no special analysis here, where the totality of the circumstances necessarily includes that fact. And when that probation status is included in the analysis, the totality of the circumstances establishes no compulsion during the two minutes at issue.

ARGUMENT

The only question in this case is whether compelling circumstances arose during the first two minutes of the police officers' encounter with defendant at the probation office. This court should answer that question in the negative under a straightforward application of its compelling-circumstances caselaw, which requires considering the totality of the circumstances rather than focusing on any one fact such as the location of the encounter. And this court should reject defendant's novel approach to that inquiry for the same reason—it would require abandoning the totality-of-the-circumstances test that has always been the focus of the compelling-circumstances standard.

A. Under this court's well-settled approach to the issue, compelling circumstances did not arise during the first two minutes of the encounter here.

Miranda warnings are required under Article I, section 12, when a suspect is interrogated either in custody or in compelling circumstances. *See State v. Davis*, 350 Or 440, 459, 256 P3d 1075 (2011) ("This court has never recognized an obligation under Article I, section 12, of police to inform a person of a right to remain silent in the absence of custody or other compelling circumstances."). Here, the question focuses on the "compelling circumstances" part of that standard.

To be so "compelling" as to require *Miranda* warnings, the circumstances of an encounter must amount to the sort of "'incommunicado

police-dominated atmosphere'" that *Miranda* warnings "were intended to counteract." *State v. Roble-Baker*, 340 Or 631, 641, 136 P3d 22 (2006) (quoting *Miranda*, 384 US at 455–57). The presence of such circumstances "does not turn on either the officer's or the suspect's subjective belief or intent; rather, it turns on how a reasonable person in the suspect's position would have understood his or her situation." *State v. Shaff*, 343 Or 639, 645, 175 P3d 454 (2007).

So understood, compelling circumstances require restraints equally significant to those associated with custody. The categories are distinct only in approaching the same standard—again, the kind of "police-dominated atmosphere that *Miranda* warnings were intended to counteract," *Shaff*, 343 Or at 646—from different angles. Custody provides a formal, bright-line definition for that standard, whereas compelling circumstances provides a more functional definition for that same standard. *See State v. Magee*, 304 Or 261, 265, 744 P2d 250 (1987) (explaining that "the concept of 'full custody' is important and useful" in describing a "sufficient but not a necessary condition" for providing *Miranda* warnings; cautioning that the usefulness of a "full

custody" standard "ends when it shifts attention away from the effect of questioning" and into a "debate" about the definition of "full custody"),[1]

To guide application of the functional compelling-circumstances standard, this court has identified four non-exclusive factors:

(1) the location of the encounter;

(2) the length of the encounter;

(3) the amount of pressure exerted on the defendant; and

(4) the defendant's ability to terminate the encounter.

Shaff, 343 Or at 645.

Those factors—particularly the fourth one, which contemplates that compelling circumstances may not arise even in some situations where a suspect is not free to leave—reveal that the compelling-circumstances standard sets a higher threshold than the similar totality-of-the-circumstances test for a seizure under Article I, section 9. *See Shaff*, 343 Or at 647 (explaining that this court "has never held that" the "minimal level of restraint" involved in a

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[1] In this way, Oregon law is similar to—but clearer than—federal law, which employs a single "custody" test that conflates formal and functional standards. *See Thompson v. Keohane*, 516 US 99, 112, 116 S Ct 457 (1995) (describing the "in custody" determination as turning on "the ultimate inquiry: was there a formal arrest *or* restraint on freedom of movement of the degree associated with a formal arrest" (emphasis added; internal brackets and quotation marks omitted)); *see also Berkemer v. McCarty*, 468 US 420, 440, 104 S Ct 3138 (1984) (accepting a test that asks whether a person is "'in custody' for practical purposes").

"typical traffic stop" is—"without more"—"sufficient to make the setting a compelling one").

When those factors are applied here, they support concluding that the circumstances of the police officers' contact with defendant did not become compelling during the first two minutes of that encounter.

1. The length of the relevant contact was short.

Again, the relevant period here is the approximately two minutes that elapsed from when the police officers first contacted defendant until the first police officer left with defendant's keys to search her car. (*See* Tr 33; ER 23 ¶ 6). In the context of other compelling-circumstances cases, that is quite brief. Indeed, the circumstances in *Roble-Baker*—discussed in more detail below in connection with the next *Shaff* factor—became compelling only after *five to six hours* of questioning at a police station. 340 Or at 643.

Thus, this factor weighs strongly against compelling circumstances, which therefore arose here only if some or all of the other factors tend so strongly in the other direction as to outweigh the brevity of the contact here.

2. Although the contact took place in a probation office, the probation officer's offer to dismiss defendant mitigated any compelling effect created by that location.

In isolation, the location of the contact here—a probation office—weighs in favor of compelling circumstances. But, as this court's analysis in *Roble-Baker* shows, that fact alone does not weigh heavily in the totality of the

circumstances. In *Roble-Baker*, police detectives contacted the defendant at her place of employment and convinced her to come with them to the police station, where they proceeded to question her from 10:00 a.m. until at least 6:00 p.m. *Roble-Baker*, 340 Or at 634–37. But this court held that compelling circumstances did not arise until after she had "spent five to six hours" at the police station, after the detectives had twice stymied her attempts to end the questioning, after the detectives had followed her as she tried to leave the interview room for a break, and after they had continued to press the defendant by asking questions that assumed her guilt. *Id*. at 643 (requiring suppression only of statements made by the defendant after a detective asked her, hours into her interview, "Did [the victim] deserve that?").

If the first five to six hours of police-station questioning did not give rise to compelling circumstances in *Roble-Baker*, neither did the two minutes of speaking to defendant in a probation office here.

If anything, the location here had less significance than it might in other cases. Although defendant was at the probation office for a scheduled meeting about the terms of her probation, the circumstances dispelled any perception that the police officers' questions bore some connection to her probation or her continued compliance with its conditions.

As defendant correctly recognizes, the compelling-circumstances inquiry turns as much on implicit communication as it does on explicit communication.

(Pet Br 30–33). Such implicit communications can cut both ways—sometimes they will increase the compulsion, but other times they will decrease it.

Here, both the police officers and the probation officer implicitly communicated to defendant that the contact was unrelated to her scheduled probation meeting. First, the police officers asked *both* defendant and the probation officer for permission to speak with both of them, and *both* agreed. (Tr 8, 30–31; ER 23 ¶ 4). That request for consent communicated to defendant that the police officers' contact with her was not mandatory like her probation meeting. Second, the probation officer asked the police officers whether they wanted him to "dismiss" defendant so that the police officers could speak with her or with the probation officer alone. (Tr 46). That question further confirmed for defendant that the purpose of the contact was unrelated to and separate from the probation meeting.

The implicit message of those communications thus diminished any compelling effect that might otherwise arise during a police contact that occurs at a probation office. In some circumstances, a person might reasonably assume that, when law-enforcement officers contact the person at a probation office during a scheduled probation meeting, their purpose is related to the terms and conditions of probation, requiring cooperation in order to comply with those terms and conditions. But that assumption is not reasonable when, as here, officers signal that cooperation is not mandatory and that it is separate

from the purposes of the probation meeting. Thus, even if location could weigh more heavily in the totality of circumstances in some situations, it did not here.

3. The police officers did not apply any meaningful pressure to defendant.

Given the short duration of the contact here, the officers had little opportunity to exert much pressure on defendant, and what little they said to her resulted in no meaningful pressure.

In the two minutes at issue, the police officers did little more than explain that they were looking to speak with defendant because they "had information" that defendant was "selling narcotics, as recently as" that day and that she may have "some with her." (Tr 31; ER 23 ¶ 5). Beyond that, they simply asked, without threatening defendant or encouraging her in any way, for permission to search her car—and even then, only after defendant herself raised the prospect of a search by volunteering to let them search her purse and her person. (Tr 31; ER 23 ¶ 5).

At most, that conduct amounted to advising defendant that the officers had evidence—and weak, non-specific evidence at that—that she had committed a crime. But a suspect is not under compelling circumstances every time they become aware during questioning that police possess evidence of guilt. *See Shaff*, 343 Or at 649. For example, compelling circumstances do not arise when police question a DUII suspect after the suspect has performed

poorly on field-sobriety tests, which amounts to evidence much stronger and more specific than the second-hand "information" that the police officers here purported to have. *See Shaff*, 343 Or at 649–50 (discussing *State v. Prickett*, 324 Or 489, 930 P2d 221 (1997)).

The police officers' tactics here also exerted less pressure than the interview tactics that this court concluded were insufficient to create compelling circumstances in *Shaff*. In *Shaff*, an officer asked the defendant twice whether an argument between the victim and himself had "become physical," which amounted to a question about possible criminal conduct such as assault. 343 Or at 642–43. The second time that the officer in *Shaff* asked the question about criminal conduct, he suggested to the defendant that the victim "'obviously had been assaulted'" and he falsely told the defendant that the victim had told another officer that she had been assaulted. *Id*. at 643 (brackets omitted). Here, by contrast, the officers did not ask any questions about the criminal conduct they were investigating, they never disputed any statement that defendant offered, and they never expressed any view that they believed the reports they were investigating or thought that defendant had committed any crime.

Nor did the presence of defendant's probation officer contribute any significant pressure. Again, when the probation officer offered to dismiss defendant so she could speak to the police officers alone, he implicitly communicated that he had no interest in the matter raised by the police officers.

Further, during the two minutes at issue, the probation officer asked no questions, did not meaningfully participate in the questioning, and never ordered defendant to answer the police officers' questions. (Tr 8–9; ER 24 ¶ 9). The probation officer's conduct thus undermined any tendency to create pressure that his presence might otherwise have caused.

In that respect, the facts of this case weigh more strongly against compelling circumstances than in cases where the probation officer personally directs or conducts questioning on an unrelated crime. The probation officer's presence might have created some pressure if he had himself been investigating the reported narcotics crimes, or had engineered or actively participated in the police officers' contact with defendant. *Contrast State v. Dunlap*, 215 Or App 46, 49–50, 168 P3d 295 (2007) (describing an investigation in which a probation officer scheduled a meeting, used the meeting to ask about criminal conduct, took defendant to his home where a police officer met them to conduct a consent search, and then participated in a follow-on visit where he and another police officer questioned the defendant together). Put differently, if police effectively leverage a person's probation status to encourage cooperation, that fact is relevant to the amount-of-pressure factor. But given the probation officer's affirmative suggestion that he dismiss defendant, defendant would have understood that the probation officer's presence did *not* suggest that her cooperation was necessary to comply with probation.

In short, neither the police officers nor the probation officer engaged in conduct that independently created any pressure, and their conduct could not have combined to create pressure when the probation officer's conduct communicated to defendant that he was not working in concert with the police officers.

4. Although defendant was not free to leave, the contact here was functionally no different from an investigative detention.

Finally, although defendant was not free to leave, that fact is no more significant here than it is in a typical investigatory detention. In part because they are often as brief as the two-minute period at issue here, such routine investigatory detentions do not typically give rise to compelling circumstances. *See Shaff*, 343 Or at 647 (holding that compelling circumstances did not arise even when a defendant was not free to leave; explaining that this court "has never held that" the "minimal level of restraint" involved in a typical stop is—"without more"—"sufficient to make the setting a compelling one").

Although defendant's freedom of movement was constrained primarily by the circumstances of her probation meeting, her probation officer had already suggested dismissing her. In that context, she would have understood that the real reason she was not free to leave was because of the police officers' interest in speaking to her about suspected crimes.

Functionally, then, defendant's detention would have appeared to her as no different from a typical investigatory detention. Thus, this factor should be weighed no differently than in other investigatory detention cases.

B. This court should reject defendant's novel approach to the compelling circumstances inquiry.

Because the foregoing analysis adequately captures all the relevant facts in this case, this court should reject defendant's *per se* rule that any interrogation "at a police station or a probation office" necessarily creates the kind of compelling circumstances that require *Miranda* warnings in almost all cases—even for "people who are not in full custody." (Pet Br 24). That kind of rule amounts to an unwarranted departure from this court's well-settled totality-of-the-circumstances test.

More specifically, defendant's rule would effectively overrule *Roble-Baker*. If defendant were correct that all questioning at a police station or probation office gives rise to compelling circumstances, then *Roble-Baker* was wrongly decided. Defendant's failure to ask this court to overrule that case reveals that she has not grappled with how difficult her proposed rule is to square with existing Oregon law. And the principles of *stare decisis* require adhering to *Roble-Baker* when defendant has made no attempt to identify any reason for overruling that case. *See generally Couey v. Atkins*, 357 Or 460, 485, 355 P3d 866 (2015) (identifying circumstances in which this court may overrule

precedent without violating *stare decisis* principle that this court may not "revisit a prior decision merely because the court's current members may hold a different view than its predecessors about a particular issue"); *see also Dobbs v. Jackson Women's Health Org.*, __ US __, 142 S Ct 2228, 2320 (2022) (explaining that *stare decisis* ensures that "decisions are founded in the law rather than in the proclivities of individuals" (internal quotation marks omitted)) (Breyer, J., dissenting).

Even if they did not require overruling precedent, defendant's novel arguments would be without merit. First, defendant is mistaken to suggest that her *per se* rule—that, absent special circumstances, all questioning at a police station or probation office requires *Miranda* warnings—would shift the burden to the state to "account for the inherently coercive setting that results from the imbalance of power, control, and information between the police on their 'home turf' and an individual under investigation who is questioned at a law enforcement facility." (Pet Br 24). The state *already* has the burden of proving the absence of compelling circumstances. *See, e.g.*, *Roble-Baker*, 340 Or at 639 (explaining that "it was the state's burden to show that defendant's unwarned statements were made before the circumstances became compelling"). Indeed, it was the state's failure to carry its burden that led the trial court to order partial suppression even when "[c]ompelling circumstances may have never existed."

(ER 29–30). Thus, any benefit to be gained from burden-shifting has already been captured, and no further burden-shifting is possible.

Next, defendant's *per se* rule does not comport with this court's admonishment that the *Shaff* factors are not "to be applied mechanically" in a way that fails to account for "all the circumstances." *Roble-Baker*, 340 Or at 640–41. Rather than allow consideration of all the circumstances, defendant's proposed rule would elevate one factor—location—above all others in a way that would mechanically dictate the outcome no matter the other circumstances, even when those other circumstances make the location less significant. For example, a person who comes on their own to a police station or probation office for business purposes—such as, for example, stocking vending machines—is not in a position very different from someone performing the same activity elsewhere. If someone has lost a purse at a probation office or police station, asking such a vendor if they know anything about the missing property does not amount to interrogation under compelling circumstances simply because it occurs in a police station. Such a rule would be as disconnected from reality as a rule that questioning in a person's home is never compelling. Both of those blanket rules incorrectly fail to account for the totality of the circumstances.

Finally, this court should reject defendant's proposal to modify the compelling-circumstances inquiry to include individual "traits" or "attributes"

such as race or probation status. (*See* Pet Br 25–30). That kind of analysis has no place in the compelling-circumstances inquiry because this court has repeatedly emphasized the need for that inquiry to remain purely objective. *See Shaff*, 343 Or at 645. As defendant correctly recognizes, that inquiry must be limited to information that is "apparent to an external observer," and it is therefore unconcerned with the subjective views or intent of the police officers. (*See* Pet Br 33–34). But, by the same token, the inquiry is also unconcerned with the views or intent of a suspect. *Shaff*, 343 Or at 645 (explaining that the "question whether the circumstances were compelling does not turn on either the officer's or the suspect's subjective belief or intent"). The reason for such an objective focus, as defendant appears to implicitly recognize, is to give clear guidance to police about when *Miranda* warnings are required. *See generally Yarborough v. Alvarado*, 541 US 652, 654, 124 S Ct 2140 (2004) (recognizing that the purpose of the objective inquiry in this context is "to give clear guidance to the police").[2]

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[2] The compelling-circumstances inquiry is unique in this regard—it is one that officers are expected to perform on the spot, to determine whether to provide *Miranda* warnings, rather than an inquiry performed only after-the-fact by a court. In that way, it is different from the inquiry used to determine whether a police-citizen encounter rose to the level of a stop, where the limited consideration of individualized traits might present different concerns. *See, e.g.*, *State v. Reyes-Herrera*, 369 Or 54, 59–60, 500 P3d 1 (2021) (declining to "foreclose" the argument that a suspect's English proficiency might bear on whether an encounter rose to the level of a stop); *State v. K. A. M.*, 361 Or 805,

Footnote continued…

But the "attribute" or "trait" that defendant views as most salient here—probation status—is not one that is objectively apparent to an external observer. If defendant is correct, then police engaging with the public would need to adjust their conduct upon encountering someone who is on probation or otherwise "system-involved," (*see* Pet Br 26), no matter where or when that encounter occurs. Thus, police would be required to adjust their conduct even when encountering a probationer on a public street, despite no ready way to identify that probation status from a person's external, objective appearances. That kind of rule is destined to fail in its application.

Regardless, even if probation status can sometimes be relevant under the objective compelling-circumstances standard, the facts of this case do not require breaking new legal ground to say so, as defendant's probation status is already incorporated by two of the *Shaff* factors—the location and the pressure applied to defendant. *See Reed*, 317 Or App at 464 (explaining that "the pressure not to violate probation conditions may be accounted for in determining whether and how much pressure was exerted on a defendant"). Thus, this case does not require determining whether the mere fact of a suspect's probation status affects the analysis even in a case where that status

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809, 401 P3d 774 (2017) (similarly declining to "foreclose" the argument that a suspect's age might bear on whether an encounter rose to the level of a stop).

would not be apparent to an objective observer in a way that can be accounted for in the standard *Shaff* factors.[3]

For all those reasons, this court should adhere to its longstanding approach to the compelling-circumstances inquiry, as articulated in *Roble-Baker* and *Shaff*. And under that analysis, as explained above, the first two minutes of the encounter here did not give rise to compelling circumstances. Thus, the trial court and the Court of Appeals ruled correctly.

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[3] To the extent that defendant asks this court to conclude that *other* personal traits, such as race or age, bear on the compelling-circumstances analysis, she reaches well beyond the facts of this case. *See Dobbs*, 142 S Ct at 2311 ("If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more." (emphasis in original)) (Roberts, C.J., concurring in the judgment).

And although the United States Supreme Court has held that a suspect's age can be a relevant consideration for when an encounter becomes custodial, that decision was limited to child suspects, and it expressly disavowed any suggestion that any "other personal characteristics" could enter the analysis. *See J. D. B. v. North Carolina*, 564 US 261, 275, 131 S Ct 2394 (2011) (explaining that a reasonable-person standard can consider a "child's age" because a "child's age differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person's understanding of his freedom of action").

CONCLUSION

This court should affirm the judgment of the trial court and the decision of the Court of Appeals.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 26, 2022, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Morgen E. Daniels, attorneys for petitioner on review, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 5,496 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(3)(b).

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