IN THE SUPREME COURT OF THE STATE OF OREGON

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

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

Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Umatilla County
Honorable RUSSELL B. WEST, Judge

Opinion Filed: May 19, 2021
Author of Opinion: LAGESEN, P. J.
Before: Lagesen, Presiding Judge, and Egan, Chief Judge, and Powers, Judge

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Continued…

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INTRODUCTION

This case concerns the ability of police officers investigating new, uncharged criminal activity to question a suspect who is already represented by counsel in an existing criminal proceeding. Here, while defendant was out of custody pending a trial on charges of felon in possession (FIP) for which he had retained counsel, defendant murdered his neighbor. After he was arrested, defendant waived his *Miranda* rights and agreed to talk to officers who were investigating the murder about what had happened. During that interview, defendant cited many reasons why he had killed the victim, one of which was that he believed the victim had orchestrated defendant's arrest for FIP.

The issue is whether the officers violated Article I, section 11, by continuing the interview after defendant revealed that the FIP prosecution was one of his motives for killing the victim. Relying on *State v. Prieto-Rubio*, 359 Or 16, 376 P3d 255 (2016), the Court of Appeals concluded that continuing the questioning was unlawful because it was "reasonably foreseeable" that it would elicit incriminating statements about the FIP offense. Although this court held in *State v. Savinskiy*, 364 Or 802, 441 P3d 557 (2019), that Article I, section 11 did not prevent police from questioning the defendant in that case about his new criminal conduct, the Court of Appeals interpreted *Savinskiy* as creating an

exceedingly narrow exception to *Prieto-Rubio* that applies only when police are investigating an "ongoing" crime.

The Court of Appeals' narrow "ongoing crimes" exception is not a workable rule and would unduly hinder criminal investigations, and it also is not consistent with the reasoning of either *Prieto-Rubio* or *Savinskiy*. This court reached different results in *Prieto-Rubio* and *Savinskiy* not because one involved questioning about a completed crime and the other questioning about an "ongoing" offense, but because *Prieto-Rubio* involved questioning about past uncharged crimes that were closely related to the charged offenses, whereas *Savinskiy* involved questioning about new crimes that were very different than the charged offense. The reasoning of both cases makes clear that Article I, section 11, does not shield a represented defendant from investigations into criminal activity—ongoing or not—that is of a fundamentally different nature than the charged offense and that was committed after the defendant had already been charged. As this court recognized in *Savinskiy*, to protect the defendant's right to counsel in such circumstances it is sufficient to prohibit the state from using the evidence in the prosecution of the already-charged offense.

In this case, because the murder took place more than seven months *after* defendant had been charged in the FIP cases and involved a different crime

committed under different circumstances, continuing the questioning about the murder did not violate Article I, section 11.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

This case presents the following issues to which the state proposes the following answers:

> **Question presented**: When a defendant is already facing charges in an existing prosecution, under what circumstances does Article I, section 11, permit police to question the defendant without counsel about an uncharged crime?
>
> **Proposed rule of law**: Article I, section 11, permits the questioning if the uncharged crime occurred after the defendant was charged and is not closely related to the already-charged offenses. If it is reasonably foreseeable that the questioning will also yield incriminating information about the charged crimes, the evidence may not be used in the existing prosecution.

LEGAL AND FACTUAL BACKGROUND

A. Legal Background

At issue is whether Article I, section 11, precluded the police in this case from questioning defendant about the murder that was just committed because he was already under indictment for a felon-in-possession offense. That issue is framed by three of this court's decisions: *State v. Sparklin*, 296 Or 85, 672 P2d 1182 (1983), *Prieto-Rubio*, and *Savinskiy*.

1. *Sparklin* concluded that officers did not violate Article I, section 11, by questioning a defendant about an uncharged murder arising from a factually unrelated criminal episode.

In *Sparklin*, the defendant was charged with forgery for using a stolen credit card. 296 Or at 87. While that case was pending, police learned that the credit card had been stolen from a man who was assaulted in Portland. Police also learned that the defendant might have been involved in an unrelated murder of another man. Without notifying the defendant's lawyer, the police questioned him about both the assault and the murder. The defendant waived his *Miranda* rights, confessed to the murder, and was charged and convicted of the murder. *Id*. On appeal, the defendant argued that the officers had violated his right to counsel in the forgery case in conducting the interview.

This court rejected that argument, concluding that the right to counsel did not extend to the murder because it arose from a factually unrelated criminal episode. This court explained, "the [A]rticle I, section 11 right to an attorney is specific to the criminal episode in which the accused is charged. The prohibitions placed on the state's contact with a represented defendant do not extend to the investigation of factually unrelated criminal episodes." *Id.* at 94. This court acknowledged that the right to counsel was not strictly limited to charged offenses but could preclude questioning about "events surrounding the crime charged." *Id.* at 93. But this court held that "the state is not prohibited from seeking a waiver from defendant without notice to his attorney where

defendant is represented by an attorney on a charge factually unrelated to the events about which defendant is to be interrogated." *Id.* at 98.

2. *Prieto-Rubio* held that officers violated Article I, section 11, when it was "reasonably foreseeable" that questioning about past uncharged sex abuse would elicit incriminating evidence about the closely related charged offense.

In *Prieto-Rubio*, the defendant was charged with sexually abusing a young girl in his extended family. 359 Or at 19-22. After those charges were filed, two other girls in the defendant's family also disclosed to the detective on the case that they had been abused. Without notifying the defendant's counsel, the detective questioned the defendant about the new allegations. *Id*. The defendant waived his *Miranda* rights and made incriminating admissions. The defendant was subsequently charged with abusing the other girls, and all of the charges were joined for a single trial. At trial, the incriminating statements by defendant to the detective were admitted over the defendant's objection. *Id.* at 22-23.

On review, the question was whether the detective violated the defendant's right to counsel under Article I, section 11 by questioning the defendant about the uncharged abuse allegations, and more specifically whether the charged offenses and the uncharged allegations arose from factually unrelated criminal episodes as in *Sparklin*. Answering that question, this court emphasized that the underlying purpose of Article I, section 11, is "to ensure

that a defendant charged with a crime has the benefit of an attorney's presence, advice, and expertise 'in any situation where the state may glean involuntary and incriminating evidence or statements for use in the prosecution of its case against defendant.'" *Id*. at 36 (*quoting Sparklin*, 296 Or at 93). This court further noted that limiting the right to events immediately surrounding the charged crime would create the risk that police officers could "circumvent" the Article I, section 11, by "carefully avoid the facts surrounding the episode" while still attempting to elicit information about the charged offense. *Id.* Given those concerns, this court reasoned that "it seems to follow from *Sparklin*" that the correct inquiry is whether the given facts and circumstances the charged and uncharged conduct a sufficiently related that it is "reasonably foreseeable to a person in the position of the questioner that questioning will elicit incriminating information involving the charged offense for which the defendant has obtained counsel." *Id.*

Applying that test, this court this noted that charged and uncharged crimes were "interrelated from the beginning" and were closely related in several ways—all of the crimes took place in the defendant's home, involved the same physical conduct, and all were committed against members of the defendant's family. *Id*. at 37. This court concluded that the charged and uncharged crimes were thus "sufficiently factually related" that it was foreseeable that the questioning would elicit incriminating statements about the

charged offenses. *Id.* This court thus concluded the detective had violated the defendant's right to counsel by questioning the defendant about uncharged sexual abuse allegations. *Id*. But this court explicitly refrained from expressing any opinion on whether the violation of a defendant's Article I, section 11, right to counsel on pending, charged offenses in that case could justify exclusion of the evidence as to uncharged offenses for which the right to counsel had not attached. *Id*. at 38 n 5.

3. *Savinskiy* concluded that officers did not violate Article I, section 11, by questioning a defendant about a plan to murder individuals involved his prosecution.

In *Savinskiy*, officers recorded the defendant discussing with a jailhouse informant a plan to murder witnesses and harm the prosecutor in a pending prosecution. 364 Or at 804-806. At issue was whether the state violated Article I, section 11, by failing to notify defendant's counsel in the pending prosecution before questioning the defendant about the murder plot. *Id.* This court concluded that the questioning did not violate Article I, section 11.

While this court acknowledged that the "reasonably foreseeable" test articulated in *Prieto-Rubio* test was "phrased broadly enough" that it would apply to the evidence in *Savinskiy*, it concluded that the applicability of the test in *Prieto-Rubio* depended on the particular circumstances that were present in that case and that reasonable foreseeability alone is not dispositive. *Id.* at 812. This court emphasized that, unlike in *Prieto-Rubio*, the new criminal activity in

Savinskiy "occurred in a different setting, involved different conduct, and involved victims who were targeted for a very different reason." *Id.* In addition, unlike in *Prieto-Rubio*, the defendant in *Savinskiy* did not commit the uncharged criminal conduct until *after* he had already been charged with the original offenses, and his conduct was aimed at disrupting the pending trial. *Id.* Under those circumstance, this court concluded, questioning the defendant without notifying his counsel was not unlawful, even though it was reasonably foreseeable that the questioning would elicit incriminating evidence regarding the charged offenses.

In particular, this court concluded that the Article I, section 11, right to counsel on pending charges does not require the state to "provide notice to a defendant's attorney before questioning the defendant about a new, uncharged and ongoing conspiracy to harm witnesses to a pending prosecution." *Id.* at 819. The court then went on to note, however, that although defendant's right to counsel on the existing charges did not prevent the state from questioning him about the new charges, it *did* prevent the state from using defendant's statements obtained during that questioning in the prosecution of the existing charges. *Id.* at 820.

B. Factual Background

1. Defendant murdered his neighbor, then hid from police.

On the morning of December 30, 2011, defendant walked next door and shot and killed his neighbor, Carter. At the time, Carter was working at the plumbing business that he ran on his property. Carter's co-workers witnessed the shooting and identified defendant as the assailant. *See State v. Craigen*, 295 Or App 17, 20-23, 432 P3d 274 (2018) (explaining incident).

On the morning of the murder, defendant was supposed to appear at a status hearing on four cases in which he had been charged with being a felon in possession of firearm, based on incidents as far back as 1991. He had been indicted on the most recent charge seven months earlier and retained counsel on all of the cases. *Id.* After defendant failed to appear for the December 30 status conference, however, his counsel, Gushwa, informed the court that absent a "disastrous car wreck" that might explain his client's absence, he would be moving to withdraw. Unbeknownst to Gushwa, defendant was at that moment hiding from police after having killed the victim. *Id.*

After the hearing, Gushwa tried to reach defendant by phone. A person who was staying at defendant's home, Brooks, answered the phone. Brooks was aware that police officers—who were next door at the victim's property investigating the shooting—were looking for defendant, so he went and gave the phone to one of the officers, Detective Guerrero. Gushwa informed the

detective that he had withdrawn from the FIP cases and gave Guerrero phone numbers for the officer to use to try to contact defendant. (*Id.*; Tr 157-58). Gushwa also stated that, if he spoke to defendant, he would tell him that the police wanted to contact him. *Id.*

Defendant hid from police for two days before he was arrested and taken to the Walla Walla County Jail. *Id.*

2. Defendant waived his *Miranda* rights and talked to detectives about why he committed the murder.

At the jail, defendant was interviewed by Detectives Gunter and Guerrero for approximately two hours after waiving his *Miranda* rights. He made several incriminating admissions, including "the fact that he did not regret anything he had done, the location of the gun he had used, and the fact that he would also have shot [the victim's] daughter, had he had the opportunity to do so." (*Trial Court's Opinion on Motion to Suppress*, ER-11).[1]

During the interview, the detectives asked questions related to defendant's state of mind and his reasons for killing the victim. (State's Ex 86; *Interview Transcript*, eTCF-957-1075). Defendant offered several reasons, one of which he mentioned early on in the interview and which was related to the FIP prosecution. Defendant said that one of his friends, Aaron Carper, had

[1] The trial court made detailed factual findings in a letter opinion denying defendant's motion to suppress. (ER-8 to ER-29; eTCF-346 to eTCF-367)

turned in defendant's guns to police. Defendant believed that Carter and his family were responsible for persuading Carper to "set [defendant] up" on the FIP charges. (*Interview Transcript* at 20-23). Defendant also believed that Carter plotted to ensure that defendant's house payments were not made while he was incarcerated, which was part a larger plot that would allow Carter to take defendant's property. *Id.* at 32.

After defendant initially broached the topic of the FIP cases and explained his theory about how Carter's family had orchestrated his arrest, the detectives asked him about that issue to clarify what he meant:

> [Gunter:] Did they give you the firearms? Where did you get those firearms?
>
> [Defendant:] They were in the house when my dad died.
>
> [Gunter:] And you just kind of inherited them?
>
> [Defendant:] Yeah. They were family guns.
>
> [Gunter:] Okay.
>
> [Defendant:] I took them up to a friend's house, and then [the victim] fucking—his brother works for him—and [the victim] kind of wouldn't let [the friend] take them to another friend's house. They wanted to keep them there so they could turn them into the cops so I could get more time.

Id. at 21. At that point, Guerrero observed, "Oh, so they set you up that way." Defendant agreed that "[t]hat's one way they did it." *Id.*

The detectives continued the interview, further exploring defendant's motives for shooting the victim. Defendant identified several other reasons for killing Carter. He blamed Carter for the fact that defendant's estranged domestic partner, Reed, and their young child had left him, and for the fact that Reed had then made public accusations that defendant had been holding her against her will. *Id.* at 23-31; 110-13.[2] He also suggested that Reed had received money from Carter in exchange for sex and alleged that Carter had in the past offered to pay to have sex with his her. *Id.* at 62-63; 108-109. At yet another point, defendant said that the night before the murder he had been up all night looking at pictures of his family, and that in the morning he had looked out his window and saw Carter outside, shaking his head while looking at fence post holes that defendant recently dug. Defendant said seeing Carter's reaction to the fence post holes enraged him, causing him to "go off just crazy." *Id.* at 34. Asked what was going through his mind, defendant responded, "My family not talking to me, some backstabbing, and a smart-ass mother fucker who thinks he's an arrogant mother fucker and got too much money and can do whatever he wants to anybody." *Id.* at 34-35.

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[2] Defendant referred to Reed as his "wife." The two had met when she was a minor, and they had been living together for several years and had a child, but they were never actually married. (Tr 1169-70). After leaving defendant, she contended that defendant had held her captive her against her will. (Tr 1986-87).

The detectives also asked defendant about the location of the gun he had used to kill Carter, *Id.* at 29-30, as well about some improvised explosive devices that police had found in defendant's possession when he was arrested, *Id*. at 18-19.

3. Relying on *Sparklin*, the trial court denied defendant's motion to suppress his statements.

Before trial, defendant moved to suppress the interview. Citing *Sparklin*, defendant contended that suppression was required because the officers had questioned him without counsel about a matter that was "factually related" to the FIP cases in which defendant was "still being represented by retained counsel." (*Defendant's Motion to Suppress*, ER-1 to ER-7). Defendant argued that the cases were "factually related" because the FIP case was alleged to be a motive for the murder.[3]

The state responded that the Article I, section 11, right to counsel did not attach to the uncharged murder because the murder and FIP were not factually related. (eTCF-181 to eTCF-188). Relying on multi-factor test articulated by

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[3] In his motion, defendant incorrectly claimed that, at a November 3, 2011, release hearing on the FIP cases, the prosecutor had warned that defendant should not be released because he would be a danger to Carter "due to his perception that Mr. Carter was responsible for the [FIP] charges having been filed." (ER-4). As defendant's counsel later conceded, however, the prosecutor had not referred to Mr. Carter at all during the release hearing or suggested that he was connected to the FIP. (ER-22).

the Court of Appeals in the wake of *Sparklin*,[4] the state stressed the different nature of the offenses, the lack of overlapping evidence, the separation in time (more than seven months), and the separate investigations (different officers investigated the crimes). *Id.* The state also stipulated that none of the information from the interview could be used in the FIP case, including at sentencing. *Id.*

Both detectives testified at the hearing. Both detectives explained that they had investigated the murder as members of the Umatilla/Morrow Counties Major Crimes Team and did not have any meaningful involvement in the FIP cases.[5] (Tr 94; 100-101; 132-35). They testified that at the outset of the

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[4] In the wake of *Sparklin*, the Court of Appeals identified several factors relevant to determine whether uncharged crimes were sufficiently "factually related" to charged offenses to preclude police from questioning a suspect about the uncharged offenses without consent from counsel. *See State v. Potter*, 245 Or App 1, 11, 260 P3d 815 (2011), *rev den*, 351 Or 586 (2012)(considering similarity of criminal conduct, extent of overlapping evidence, whether committed in same jurisdiction, temporal proximity, and overlap in police personnel investigating the cases); *State v. Plew*, 255 Or App 581, 588-89, 298 P3d 45 (2013)(holding that two burglaries were factually related, because they were committed by the same two suspects eight days apart in the same neighborhood, because the same detective investigated both cases, because the crimes involved overlapping evidence).

[5] Detective Guerrero had a brief and tangential role in the FIP case. When deputies were planning to arrest defendant on the FIP charges in May 2014, they had requested backup. Guerrero had gone to defendant's home after being asked to assist with the arrest. But Guerrero had not known why defendant was being arrested, and he ended up leaving the scene before the arrest took place. (Tr 142-43).

interview they knew that defendant had been facing other charges but were not aware of what they were or of any connection between them and the murder. (Tr 100-101; 132-35). Both officers believed that defendant was no longer represented by counsel based on what Gushwa had told police. (Tr 113; 159; *Opinion* at *Motion to Suppress*, ER-9 to ER-10). Neither officer had ever spoken to anyone about the FIP cases and neither had any intention of obtaining evidence related to those cases. (Tr 112, 140; *Opinion on Motion to Suppress*, ER-18 to ER-19). They described the interview, and the litany of reasons that defendant had given for killing Carter.

Gushwa also testified. He explained that, despite what he had told Detective Guererro on the phone on December 30, he had not actually formally withdrawn from representing defendant in the FIP cases at that point. Gushwa had prepared his motion to withdraw on December 30, but the court did not grant the motion until Wednesday, January 4. (Tr 157-59, *Opinion on Motion to Suppress*, ER-9).

The trial court denied defendant's motion. Applying the Court of Appeals' caselaw, the trial court concluded that the murder was not so closely related to the FIP charges that the right to counsel that had attached in the FIP case also attached to murder charge. (*Opinion on Motion to Suppress*, ER-17 to ER-25).

4. Defendant was convicted of murder.

At trial, the state presented the tape of the police interview to the jury, along with testimony from witnesses to the shooting and the officers who had investigated it. Defendant did not dispute that he had shot and killed Carter. Defendant's theory of the case was that he was paranoid and delusional because he had suffered damage to the frontal lobes of his brain due to occupational exposure to lead paint. (Tr 1243-45, 1936, 2060). He claimed that, as a result of his paranoid state, he became erroneously convinced that Carter—who had been his friend and neighbor—was responsible for his troubles, and that he shot Carter because of the extreme emotional disturbance, or alternatively, was guilty except for insanity. (Tr 1243-45). After a lengthy trial, the jury rejected both defenses and found him guilty of murder and several other charges. (Tr 2811-12).

5. The Court of Appeals reversed, relying on *Prieto-Rubio* and distinguishing *Savinskiy*.

Defendant appealed, challenging the denial of his motion to suppress the interrogation. Meanwhile, this court decided *Prieto-Rubio*. Applying the test this court had articulated in that case, the Court of Appeals reasoned that defendant's disclosure made it objectively foreseeable that continuing with the interview would elicit incriminating evidence related to the FIP charges and, therefore, continuing to question defendant about the murder without consent of

defendant's counsel was unlawful. *State v. Craigen*, 295 Or App 17, 432 P3d 274 (2018).

Soon thereafter, this court decided *Savinskiy*. Following *Savinskiy*, this court vacated the Court of Appeals decision in this case and remanded the case back that court for further consideration. *State v. Craigen*, 365 Or 721, 453 P3d 551 (2019). On remand, the Court of Appeals again concluded that the state violated defendant's Article I, section 11, right to counsel and adhered to its earlier decision reversing defendant's murder conviction. *State v. Craigen*, 311 Or App 478, 489 P3d 1071 (2021). In reaching that conclusion, the court expressed uncertainty about the scope of the rule from *Prieto-Rubio* in the wake of *Savinskiy* but ultimately reconciled the two cases by concluded that *Savinskiy* created a narrow exception to the "reasonably foreseeable" rule from *Prieto-Rubio* that applies only to questioning "about a crime believed to be *ongoing*." 311 Or App at 483-84 (emphasis added.)

SUMMARY OF ARGUMENT

The Court of Appeals concluded that *Savinskiy* created an exception to *Prieto-Rubio*'s "reasonable foreseeability" test that applies only when police are investigating "ongoing" crimes. But the principles underlying the right to counsel, and the way this court applied those principles in *Prieto-Rubio* and *Savinskiy*, demonstrates that Article I, section 11, does not shield a defendant from police questioning regarding new and fundamentally different criminal

activity. If it is reasonably foreseeable that the questions will yield incriminating evidence about the charged crimes, the answers to those questions may be not used in the prosecution of those crimes, but they may be used in a separate criminal prosecution of the new crimes.

Savinskiy and *Prieto-Rubio* drew on two well-established rules. First, police generally may question suspects about uncharged crimes even if it is foreseeable that the questions will elicit incriminating information about a charged offense, but in that circumstance the government is prohibited from using the answers in the prosecution of the charged offense. Second, if, however, the charged and uncharged offense arose out of the same criminal episode or are otherwise so closely related or inextricably intertwined that the scope of representation fairly extends to both, then the right to counsel attaches to both. In that circumstance, the officers may not question the suspect about the uncharged crimes, and any evidence obtained is inadmissible to prove *either* the charged *or* the uncharged crimes.

Although *Prieto-Rubio* did not clearly distinguish between those two rules, in *Savinskiy* this court clarified that the "reasonable foreseeability" test does not prevent police from questioning a suspect about new criminal activity merely because it is foreseeable that the questioning will elicit evidence that is incriminating on charged offenses. Reasonable foreseeability, in other words, always requires exclusion of evidence in the prosecution of the *charged*

offenses, but exclusion in a separate prosecution of the uncharged offenses is not required unless the charged and uncharged offenses are so intertwined that the right to counsel fairly extends to both. Read together, *Prieto-Rubio* and *Savinskiy* make it clear that (1) Article I, section 11, does not prohibit police from questioning a charged suspect about categorically different, post-charging criminal conduct, even if it is foreseeable that questioning will lead to incriminating evidence as to the charged offense, but (2) to protect the suspect's right to counsel on the charged offense the state is prohibited from using the evidence in the prosecution of that offense.

Here, the officers did not violate defendant's Article I, section 11, right to counsel by continuing the interview after defendant revealed that the FIP case was one of the reasons he killed the victim. Just as in *Savinskiy*, the police were investigating a fundamentally different kind of crime—murder—that took place long after the FIP charges had been filed. As a result, there is no basis to conclude that the right to counsel that had attached to the FIP charges also constructively attached to the murder. Consequently, the police were entitled to continue with the questioning, even though it was foreseeable that they would elicit statements that were incriminating as to the FIP cases. Defendant's Article I, section 11, rights in the FIP case were sufficiently protected by the prophylactic rule that prohibited the state from using the interview to prosecute the FIP cases.

ARGUMENT

Article I, section 11, does not prohibit the police from questioning a charged suspect about fundamentally different, post-charging criminal conduct, even if it is foreseeable that questioning will lead to incriminating evidence as to the charged offense. As will be explained, that proposition is firmly rooted in case law that has developed over decades to ensure that the police are able to investigate new, uncharged crimes while also ensuring that police cannot misuse that ability to circumvent the right to counsel that has attached.

A. A represented defendant's right to counsel restricts the extent to which the police can question the defendant without counsel present, even when the questioning is about uncharged crimes.

1. Under Article I, section 11, and the Sixth Amendment, the right to counsel is offense-specific.

Article I, section 11, of the Oregon Constitution provides that, "[i]n all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel." In explaining the scope of Article I, section 11, this court has—with one notable exception, as discussed below—generally treated the right to counsel as co-extensive with the right to counsel protected by the Sixth Amendment.[6] Under both Article I, section 11, and the Sixth Amendment, the right to counsel is fundamentally a trial right that attaches at the time of

[6] The Sixth Amendment to the United States Constitution similarly provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

charging and is "offense specific," meaning that "counsel is deemed to represent a person on a particular charge or criminal episode." *State v. Davis*, 313 Or 246, 258-59, 834 P2d 1008 (1992). Once it attaches to a specific offense, however, the right to counsel is not limited to the trial but instead also applies to "certain evidence-gathering processes which are deemed 'critical stages' of the prosecution as an extension of a defendant's right to representation by counsel in court." *Sparklin*, 296 Or at 94 (internal quotation marks omitted). Therefore, "[o]nce an attorney is appointed or retained, there can be no interrogation of a defendant concerning the events surrounding the crime charged unless the attorney representing the defendant on that charge is notified and afforded a reasonable opportunity to attend." *Id*.[7]

2. To balance the need to protect the right to counsel and the state's need to investigate new crimes, the United States Supreme Court has fashioned two rules.

Although the right to counsel is specific to a charged offense, investigations ostensibly aimed at uncharged criminal activity have the potential, at least, to undermine the right to counsel that has attached to a

[7] Further, once a defendant has retained an attorney, a person cannot validly waive his Article I, section 11 right to an attorney without having an opportunity to consult with his attorney. *Sparklin*, 296 Or at 94. That had been the rule under the Sixth Amendment until the Court abrogated the rule. *See Montejo v. Louisiana*, 556 US 778, 129 S Ct 2079, 173 L Ed 2d 955 (2009) (*overruling Michigan v. Jackson*, 475 US 625, 626, 106 S Ct 1404, 1406, 89 L Ed 2d 631 (1986)).

charged offense in either of two different ways. The Supreme Court developed two different rules to address those problems.

a. Under the circumvention rule, police questioning a charged suspect about uncharged criminal activity may not use the evidence in the prosecution for the charged offense.

The first problem, and the most obvious one, arises any time officers are investigating uncharged criminal activity, but it is foreseeable that questioning a suspect could elicit incriminating evidence of a crime for which the suspect has already been charged. That circumstance creates a risk that officers could use the new investigation as a pretense or an opportunity to also gather evidence for use in the existing prosecution without contacting counsel. If officers ostensibly gathering evidence for a new crime were able to obtain evidence for use in the charged offense, they would effectively circumvent defendant's right to counsel in the existing prosecution.

That problem—and the rule that the Court adopted to address it—is exemplified by *Maine v. Moulton*, 474 US 159, 178-80, 106 S Ct 477, 88 L Ed 2d 481 (1985). In that case, the defendant and a co-defendant, Colson, were charged with theft based on incidents in which they had obtained stolen vehicles and parts. Before trial, Colson alerted police that the defendant had suggested killing one of the state's witnesses. Colson agreed to cooperate with police and wear a wire while he met with the defendant to discuss their plans

for the upcoming trial. *Id.* at 161-68. During the course of subsequent meetings, the state obtained incriminating statements related to the thefts with which the defendant had been charged. The state used recordings of those statements at defendant's trial, which result in his conviction for theft and burglary. *Id.*

The Supreme Court reversed, concluding that the police violated the defendant's right to counsel by recording conversations in which the police knew the defendant would make constitutionally protected statements related to the charged offenses. In reaching that conclusion, the Court emphasized that it was not questioning the legitimacy or lawfulness of the wiretapping investigation and acknowledged that it was proper even though the defendant had already been indicted. *Id.* at 179. The court explained that it was holding merely that the state could not *use* that evidence as evidence against the defendant at his trial *on the charged offenses. Id.* at 180. However, the Court deemed it obvious that the statements would be admissible at a trial of the uncharged crimes. *Id*. at 180 n 16 ("[i]ncriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached are, of course, admissible at a trial of those offenses"). "[T[o exclude evidence pertaining to charges as to which the * * * right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities." *Id*. at 180. The court characterized this

approach—in which the court excluded the evidence to prove the charged offenses despite the legitimacy of the questioning to investigate new criminal activity—as a "sensible solution to a difficult problem." *Id.* at 179.

Moulton thus created a prophylactic rule to prevent police investigating new criminal activity from circumventing the right to counsel when it is foreseeable that questioning could elicit incriminating information about a charged offense: When a police investigation yields evidence pertinent to uncharged crimes and charged crimes, the evidence is admissible to prove the uncharged crimes at a trial limited to the new charges but inadmissible to prove the charged crimes. *See Moran v. Burbine*, 475 US 412, 431, 106 S Ct 1135, 1146, 89 L Ed 2d 410 (1986) (explaining *Moulton* rule and applying to *Mirandized* police questioning regarding murder of suspect already charged with different crime). *See generally*, 2 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure*, § 2.9(h) (4d ed. 2021) (describing nature and purpose of *Moulton*'s prophylactic rule).

Under *Moulton*, "[i]t does not matter how" the statements are incriminating as to the charged crime; the rule is not limited to "direct statements by the defendant about the crime with which he has been charged"; it also includes indirectly incriminating statements. *United States v. Bender*, 221 F3d 265, 269 (1st Cir 2000). Accordingly, evidence that a defendant committed obstruction or killed witnesses in retribution would be incriminating

as to the charged crime, because it supports a consciousness-of-guilt inference for the charged crime. *Id*. Suppression is required in the trial on the charged offenses even though the government does "nothing wrong" in conducting questioning of defendants regarding the new criminal activity. *Id*. at 270. The rule is a pragmatic one that exists to preserve the right to counsel for the pending case and the fairness of that prosecution. *See generally* Michael J. Howe, *Tomorrow's Massiah: Towards a "Prosecution Specific" Understanding of the Sixth Amendment Right to Counsel*, 104 Colum L Rev 134, 151-60 (2004) (explaining justification for broad rule that applies regardless of how the statements are incriminating, regardless of good faith, and regardless of whether the statements pertain to uncharged crimes).

b. Under the constructive attachment rule, police are prohibited from questioning about uncharged offenses at all in certain narrow circumstances.

Although the prophylactic risk-of-circumvention rule from *Moulton* is sufficient to protect the right to counsel in the context of most police investigations of uncharged criminal activity, there is one exception. In some circumstances, a charged and uncharged offense are so closely related that the right to counsel is triggered for both offenses once one of them is charged. A quintessential example is an uncharged assault that was committed during a charged burglary of a home, where both offenses arose out the same criminal episode.

If the risk-of-circumvention rule from *Moulton* were the only rule that applied in such an example, police could question the suspect about the uncharged assault, and the evidence obtained could not be used to prosecute the charged burglary but could be used to prosecute the assault. That would protect the right to counsel attached as to the *charged* burglary offense, but it does not address a different problem. A burglary and assault arising from a single episode are so closely related that representation by counsel as to one offense would be understood to extend to the other. Yet if the right to counsel was always limited strictly to the charged offense, police could strategically use their charging power to skirt the right to counsel and continue investigating an uncharged offense that is effectively part of the same prosecution. *See Texas v. Cobb*, 532 US 162, 182-86, 121 S Ct 1335, 149 L Ed 2d 321 (2001) (Breyer, J., dissenting) (explaining that concern). The problem, in other words, is not simply that police could use the uncharged assault to gather information about the charged burglary, but rather that police should not be questioning the suspect about *either* crime. *Id*.

The answer to that problem is a constructive attachment rule, which is an exception to the principle that the right to attaches only to charged offenses. Under that test, if an uncharged crime is sufficiently related to an already charged offense, then the right to counsel that attached to the charged offense also attaches to the uncharged offense.

The proper scope of the constructive attachment rule has been a subject of significant disagreement, as the Court's divided opinion in *Cobb* illustrates. In that case, the defendant had robbed a home and, in the process, murdered a woman and child who lived there. The victims were initially reported only to be missing. After the defendant was charged with robbery and appointed counsel to represent him on that charge, police questioned the defendant about the missing woman and child without notifying his attorney. During that interview, defendant ultimately obtained his confession to the murders. *Cobb*, 532 U.S. at 165-67. The circuit court concluded that the right to counsel attached to the murder because it was "very closely related" to the robbery and "factually interwoven" with that charge and therefore suppressed the confession. *Id.* But the Supreme Court reversed, abrogating the "closely related" test and instead adopted a much narrower attachment test. The appropriate test, the Court concluded, was the one that the court had set forth in *Blockburger v. United States*, 284 US 299, 301, 52 S Ct 180, 181, 76 L Ed 306 (1932) in deciding whether two offenses were the "same offense" for purposes of double jeopardy.[8] Because the murders and the robbery would not be considered the "same offense" under the *Blockburger* test, the Supreme Court majority held

[8] Under *Blockburger*, to determine whether there are two different offenses or only one the test is whether each provision requires proof of a fact which the other does not. 284 US at 304.

that the right to counsel in the robbery prosecution did not extend to the murders, and the defendant's confession to the murders was admissible in his trial for those crimes. *Id.* at 174.

Four justices dissented. Justice Breyer, writing for the dissent, argued that the majority's narrow attachment rule was insufficient to protect the defendant's right to counsel. The dissent would have adopted the test that lower courts had been following, defining the "offense" for purposes of the right to counsel "in terms of the conduct that constitutes the crime that the offender committed on a particular occasion, including criminal acts that are "closely related to" or "inextricably intertwined with" the particular crime set forth in the charging instrument." Under that test, courts deem offenses to be insufficiently related if "time, location, or factual circumstances significantly separated the one from the other." *See Cobb*, 532 US at 186-87 (Breyer, J., dissenting). The test depends on the facts and circumstances of a particular case, but focuses on whether the charges involved "the same victim, set of acts, evidence, or motivation," *id.*, and includes factors such as whether they were based on an identical course of conduct, *United States v. Cooper*, 949 F2d 737, 743-44 (5th Cir 1991)); hinge on proof of identical evidence, *Whittlesey v. State*, 665 A2d 223, 235-36 (Md 1995); involve the same time, place, and persons, *United States v. Hines*, 963 F2d 255, 257-58 (9th Cir 1992); or hinge

on the same factual predicate, *United States v. Kidd*, 12 F3d 30, 33-34 (4th Cir 1993).[9]

Explaining the need for that broader rule, the dissent noted that a single criminal episode could provide a basis for many different charges, and that the majority's rule would allow to police to engage in strategic charging to avoid triggering the right to counsel:

> The majority's rule would permit law enforcement officials to question anyone charged with any crime * * * about his or her conduct on the single relevant occasion without notifying counsel unless the prosecutor has charged every possible crime arising out of that same brief course of conduct. What Sixth Amendment sense—what common sense—does such a rule make? What is left of the "communicate through counsel" rule? The majority's approach is inconsistent with any common understanding of the scope of counsel's representation.

532 US at 182-83.

The *Cobb* dissent thus would have adopted a broader attachment rule that would more accurately reflect "common understanding of the scope of counsel's representation" in a particular case. Yet the Cobb dissent also was careful to emphasize that "the rule that the police ordinarily must communicate with the defendant through counsel * * * has important limits." 532 US at 178 (Breyer, J., dissenting). Citing *Moulton*, the dissent emphasized "the need for law enforcement officials to investigate 'new or additional crimes' not the

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[9] The test is essentially the one that Court of Appeals adopted following *Sparklin* to determine whether cases factually related, *see supra note* 3.

subject of current proceedings," and that the right to counsel was still "offense specific." *Id.* at 178.

c. The two rules serve different purposes and are different in scope.

As the discussion above shows, the risk-of-circumvention rule and the constructive-attachment rule are both attempts to protect the right to counsel while recognizing the need for police to investigate new criminal activity. Yet the two rules are different in scope, are based on different concerns, and have different implications for the legality of police questioning and the use of evidence.

The risk-of-circumvention rule is a broad prophylactic rule concerned about ensuring the fairness of the prosecution on the charged crime while allowing for police to investigate new crimes. Under it, questioning a charged suspect about new criminal activity is lawful, but if it is foreseeable that it might elicit incriminating evidence on the charged offense, then the evidence may not be used in the prosecution of the charged offense. The constructive-attachment rule, by contrast, is a narrow exception to the principle that the right to counsel is "offense specific" and attaches only to a charged offense. It is concerned with the state strategically charging cases to attempt to avoid the requirement that it communicate through counsel. Questioning a suspect about an uncharged offense to which the right to counsel has constructively attached

is unlawful, and any evidence obtained from such questioning must be excluded in the prosecution of both the charged and uncharged crimes.

B. Under *Prieto-Rubio* and *Savinskiy*, Article I, section 11 does not require police to obtain consent from counsel before questioning a suspect previously charged with a crime about new and fundamentally different criminal activity.

In *Prieto-Rubio*, as noted above, this court held that the police officer violated Article I, section 11, by questioning the suspect about uncharged sexual abuse allegations because it was "reasonably foreseeable" that the questioning would elicit incriminating evidence as to the charged offense. At first blush, *Prieto-Rubio* could be read to articulate an extremely broad *attachment* rule that would prevent police from questioning a suspect without counsel any time it is reasonably foreseeable that the questioning will elicit incriminating evidence about a charged offense. But as this court made clear in *Savinskiy*, Oregon's attachment rule does not stretch that far. Read together, *Prieto-Rubio* and *Savinskiy* demonstrate that (1) Article I, section 11, does not prohibit police from questioning a charged suspect about categorically different, post-charging criminal conduct, even if it is foreseeable that questioning will lead to incriminating evidence as to the charged offense, but (2) to protect the suspect's right to counsel in the charged offense the state is prohibited from using the evidence in the prosecution of that offense.

1. Both *Prieto-Rubio* and *Savinskiy* embraced the attachment rule advocated by the *Cobb* dissent.

As this court emphasized in both *Prieto-Rubio* and *Savinskiy*, the legality of police questioning must be evaluated within the context of the particular facts and circumstance of the case. 359 Or at 37; 364 Or at 813.

In *Prieto-Rubio*, the defendant had been charged with sexually abusing a young girl who was a member of his extended family, and he was represented by counsel in that prosecution. While those charges were pending, the same detective who had investigated the charged incidents learned of additional allegations of sex abuse by two other girls who were also in defendant's extended family. The charged and uncharged crimes were investigated by the same officer, involved the same crime, were committed in the same location (the defendant's home), involved victims who were all members of the defendant's family and—of particular significance—all occurred before defendant had been charged. 364 Or at 813.

At issue was whether under those circumstances, *Sparklin*'s test—which prohibited police from questioning a suspect about uncharged offenses arising from the same "criminal episode" but allowed police to question about "factually unrelated" offenses—prohibited the detective from questioning the defendant about the new charges without consent of counsel. In concluding that it did, this court rejected the state's argument that *Sparklin*'s prohibition on

questioning about charges from the same "criminal episode" was intended to prohibit questioning only as to events that were "immediately preceding or immediately succeeding the events that form the basis for the charge." 359 Or at 22. Rather, this court concluded that *Sparklin* had a broader understanding of "criminal episode" in mind.

In particular, this court explained the state's narrow understanding of "criminal episode" would make *Sparklin*'s test essentially the same as the narrow "double jeopardy" attachment test that the majority adopted in *Cobb.* But this court explained that *Sparklin*'s test was intended to mirror the broader "closely related" or "inextricably intertwined" tests that courts had adopted before *Cobb*. *Id.* at 34-35. This court discussed with approval the dissenting opinion in *Cobb*, which had criticized the majority's attachment test as too narrow, and had advocated for the "closely related" and "inextricably intertwined" tests to ensure that police did not evade the right to counsel through strategic charging crimes arises for a single course of events. This court also cited with approval a case from the Indiana Supreme Court, *Jewell v. State*, 957 NE 2d 625 (Ind 2011). 359 Or at 32-37. In that case, Indiana's supreme court adhered to its "inextricably intertwined" attachment rule despite *Cobb*. *See Jewell*, 957 NE 2d at 632-33 (police questioning about an uncharged crime unlawful when a charged offense was "so inextricably intertwined with the offense under investigation that the right to counsel for the pending offense

could not be constitutionally isolated from the right to counsel for the offense under investigation.")

This court also rejected the defendant's argument that *Sparklin*'s rule extended much more broadly to any factually related offenses. Turning to the broader principles that underlie the risk-of-circumvention rule, this court emphasized that the underlying purpose of Article I, section 11 right is "to ensure that a defendant charged with a crime has the benefit of an attorney's presence, advice, and expertise 'in any situation where the state may glean involuntary and incriminating evidence or statements for use in the prosecution of its case against defendant.'" *Prieto-Rubio*, 359 Or at 36 (quoting *Sparklin*, 296 Or at 93). The court further noted that limiting the right to a criminal episode in the narrow sense advocated by the state would create the risk that police officers could "circumvent" the Article I, section 11, by "carefully avoid the facts surrounding the episode" while still attempting it elicit information about the charged offense. *Id.* Based on those risk-of-circumvention concerns, this court concluded that whether Article I, section 11 is "implicated" by police questioning will "depend on the facts and circumstances of each case and whether they establish that it is reasonably foreseeable to a person in the position of the questioner that questioning will elicit incriminating information involving the charged offense for which the defendant has obtained counsel." *Id.* at 36. In applying that test, this court turned back to the factors cited by the

Cobb dissent and concluded that the charges were "sufficiently factually related." This court noted that charged and uncharged crimes were "interrelated from the beginning" and were closely related in several ways—all of the crimes took place in the defendant's home, involved the same physical conduct, and all were committed against members of the defendant's family. *Id.* at 37.

In *Savinskiy*, this court applied the same principles to very different circumstances and arrived at a different result. In that case, officers recorded the defendant discussing with a jailhouse informant a plan to murder witnesses and harm the prosecutor in a pending prosecution. During that the discussion, the informant questioned the defendant about the existing prosecution and the plans to thwart it. While this court acknowledged that *Prieto-Rubio*'s "reasonably foreseeable" holding was "phrased broadly enough" that it would indicate the questioning violated Article I, section 11, this court emphasized that the scope of this court's holding in *Prieto-Rubio* must be understood within the context of the particular facts of the case and the principles that this court was effectuating. Applying those principles, this court concluded that the questioning did not violate Article I, section 11.

In explaining why the *Prieto-Rubio* test did not apply, this court identified three differences between the circumstances in the two cases. First, the court emphasized that, unlike in *Prieto-Rubio*, the nature of the defendant's new criminal conduct in *Savinskiy* was very different than the conduct for

which he was already facing charges. Thus, unlike the uncharged sexual abuse allegations in *Prieto-Rubio*, in *Savinskiy* "the new criminal activity occurred in a different setting, involved different conduct, and involved victims who were targeted for a very different reason." 364 Or at 813. Second, unlike in *Prieto-Rubio*, the defendant in *Savinskiy* did not commit the uncharged criminal conduct until after he had already been charged with the original offenses. *Id.* Third, the new conduct in *Savinskiy* was aimed at disrupting the pending trial and "involved his ongoing effort to harm the prosecutor and witnesses against him to obstruct the pending prosecution." *Id*.

Explaining the significance of those factual distinctions, the court emphasized the overarching principles that "emerge from [the court's] discussion in *Prieto-Rubio*" and that the "reasonable foreseeability" test was intended to effectuate. *Id*. at 813-14. This court stressed that in *Prieto-Rubio*, this court had explained that *Sparklin*'s test was intended to be "of equal scope" to the "closely related" or "inextricably intertwined" tests that other courts around the country had adopted before *Cobb*. *Id.* (*quoting Prieto-Rubio*, 359 Or at 28). In particular, this court emphasized, in *Prieto-Rubio* it had "endors[ed] the reasoning and conclusion" of the *Cobb* dissent, including its concern that narrower attachment rule would allow officers to circumvent that right by engaging in "strategic initial charging." 364 Or at 814-15 (citing *Cobb*, 532 US at 183). At the same time, however, this court recognized the "the need for law

enforcement officials to investigate 'new or additional crimes' not the subject of current proceedings." 364 Or at 816 (quoting *Cobb*, 532 US at 178).

Applying those same principles to the facts in *Savinskiy*, this court reasoned that the risk of strategic charging "is not presented when a defendant who has already been charged decides to engage in new criminal activity" that police need to investigate. 364 Or at 811. The *Savinskiy* court thus noted that questioning a defendant about such new and different criminal activity—even where such questioning will elicit incriminating evidence on the charged offenses—was consistent with the broader right to counsel advocated by the *Cobb* dissent. To protect the right to counsel on the existing charges in such circumstances, it is sufficient to exclude evidence thus obtained in the prosecution of those charges. *Savinskiy*, 364 Or at 817 (discussing *Cobb* and *Moulton*).[10]

2. Three key principles emerge from *Prieto-Rubio* and *Savinskiy*.

Read together, *Prieto-Rubio* and *Savinskiy* clarify the scope of Oregon's attachment rule, establish a risk-of-circumvention rule, and provide guidance on

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[10] The *Savinskiy* court also discussed with approval an Indiana case in which the defendant had asserted that officers violated his right to counsel under the state constitution by questioning him about a plan to murder witnesses is a pending prosecution. In that case, the Indiana Court of Appeals concluded that "the defendant's right to counsel on the pending charges did not shield him from questioning about his new criminal activity." *Savinskiy*, 364 Or at 817 (discussing *Leonard v. State*, 86 NE3d 406, 413 (Ind Ct App 2017), *transfer den*, 95 NE3d 1293 (Ind 2018)).

when the police may question a charged suspect without his counsel about uncharged offenses and what the state may do with the evidence. In particular, three key principles emerge from those opinions.

a. More than "reasonable foreseeability" is required for attachment.

First, *Savinskiy* clarifies that a defendant's Article I, section 11, right to counsel on pending charges does not necessarily prohibit police officers from questioning the defendant without counsel about uncharged criminal activity, even if it is reasonably foreseeable that the questioning will elicit incriminating information involving the charged offenses. In other words, the "reasonably foreseeable" test is not a complete statement of Oregon's attachment rule. The questioning in *Prieto-Rubio* was not unlawful *merely* because it was reasonably foreseeable that it would elicit incriminating evidence on the charged offenses but also because of *why* it was reasonably foreseeable, *i.e.*, the extremely close relationship between the offenses in time, place, and circumstance. *Prieto-Rubio* affirmed *Sparklin*'s holding that Article I, section 11 is specific to a "criminal episode" but clarified that a criminal episode can stretch beyond the "events that were "immediately preceding or immediately succeeding the events that form the basis for the charge." The similarity of the conduct and circumstances of the charged and uncharged crimes, the fact that both the charged and uncharged crimes were committed before defendant had been

charged, and the fact that the same law enforcement officer was involved in what was a single, continuing investigation were all reasons why that the questioning would elicit incriminating evidence as to the charged offense. In that circumstance, and consistently with the "closely related" attachment rule endorsed by the *Cobb* dissent, the right to counsel that attached to the charged offense also constructively attached to the uncharged offenses.

In *Savinskiy*, it was also reasonably foreseeable that the questioning elicit incriminating evidence as to the charged offense, but for a very different reason. In that case, it was foreseeable simply because the charged offense happened to be the motive for the uncharged crime. The mere fact that a charged crime might be the motive for new criminal conduct does not mean that they are part of the same "criminal episode," even in the broad sense of the term recognized in *Prieto-Rubio*. The charged and uncharged offenses in that circumstance are not so closely related and inextricably intertwined that the scope of representation on the charged offense would fairly be understood to extend to the uncharged offense, nor is there any possibility that police could be engaged in strategic charging. As a result, there is no constitutional basis for treating the right to counsel on the charged offense as also having constructively attached to the new crime.

b. Questioning a represented suspect about new and fundamentally different crimes committed after the suspect was charged does not violate Article I, section 11.

Second, questioning a defendant who is already being prosecuted for criminal offense about new and fundamentally different crimes committed after the defendant was charged does not violate Article I, section 11. Oregon's attachment rule, like that of Indiana, extends beyond the narrow *Blockburger* test adopted by the majority in *Cobb*, and is instead "'of equal scope'" to the "closely related" and "inextricably intertwined" rule proposed by four dissenting justices in *Cobb*. 364 Or at 813)(quoting *Prieto-Rubio*, 359 Or at 28. Article I, section 11 right to counsel thus constructively attaches to an uncharged crime—and shields a defendant from being questioned about that crime—when the charged and uncharged crimes are so inextricably intertwined in time, place, circumstance, and motivation that the right to counsel cannot be isolated to the charged crime. *Jewell*, 957 NE 2d at 635. The rationale is that, at that point, the defendant effectively is facing a prosecution on the uncharged crimes and should have the same rights for those charges. It is based on concerns that the attachment of the right to counsel should not hinge solely on the state's charging decision, because that would allow the state to delay filing a charge to enable it to continue investigating that charge without being hampered by the right to counsel. *See Cobb*, 532 US at 182-83 (Breyer, J., dissenting).

Those concerns are not implicated when police are questioning a suspect about a new offense committed after the suspect was charged, and they are certainly not implicated when the nature and circumstances of the new crime are fundamentally different than the charged offense. Although application of Oregon's "closely related" attachment test depends on the facts and circumstances of a particular case, *Savinskiy* provides one clear line: If the nature and circumstances of the uncharged criminal activity are very different than the nature and circumstances underlying the existing charges, and if the uncharged activity occurs *after* the existing charges were already filed, then questioning the defendant about the new criminal activity without contacting counsel does not violate Article I, section 11.

c. Evidence obtained from such questioning may have to be excluded from the existing prosecution.

Third, even where the right to counsel does not constructively attach to new, uncharged criminal activity, protecting the right to counsel as to the charged offense may require prohibiting the state from using any evidence obtained by questioning in the prosecution of the charged offense. As this court emphasized in both *Prieto-Rubio* and *Savinskiy*, the purpose of Article I, section 11 right is to ensure that a defendant charged with a crime has the benefit of an attorney's presence, advice, and expertise in any critical stage of the prosecution for that offense. If it is reasonably foreseeable that questioning a

suspect about a new, uncharged crime will elicit evidence regarding a charged offense, police cannot be permitted to use the questioning to circumvent the right to counsel and gather evidence about the charged offense. As a prophylactic measure, therefore, the evidence obtained during such questioning may not be used by the state in the prosecution of the charged offense. 364 Or at 819-20. That is the same "sensible solution" that the Supreme Court applied in *Moulton* and that this court applied in *Savinskiy*. *See* 364 Or at 816-17 (discussing *Moulton*).

C. *Savinskiy* is not limited to investigation of "ongoing" crimes.

The Court of Appeals construed *Savinskiy* narrowly to allow for questioning a suspect only if police were investigating crime that was "ongoing." However, that is not consistent with the reasoning in *Savinskiy* or the principles that underlie the right to counsel.

1. Limiting *Savinskiy* to investigation of ongoing crime would not be consistent with the reasoning of the opinion.

It is true, of course, that *Savinskiy* involved an investigation into an ongoing conspiracy to disrupt a pending trial. This court framed thus framed the question at issue as whether, "Article I, section 11, protects a defendant from police inquiry into new criminal activity *in progress*," and this court ultimately concluded that "the right does not extend that far." 364 Or 807 (emphasis added). Yet the reasoning of the opinion extends beyond investigations into "ongoing" crimes.

As explained, *Savinskiy* emphasized in its discussion of *Prieto-Rubio* that the court "endors[ed] the reasoning and conclusion" of the *Cobb* dissent, and the scope of *Prieto-Rubio* had to be understood in that context. The *Cobb* dissent recognized that the right to counsel is still "offense specific" and extends to uncharged conduct only insofar as that conduct "closely related" or "inextricably intertwined" with the charged crime. The primary concern cited by the *Cobb* dissent in advocating for that attachment rule was to prevent police from engaging in strategic charging by ignoring similarities between charged and uncharged conduct that would bring both under "any common understanding of the scope of counsel's representation." 532 US at 183 (Breyer, J. dissenting).

But the "ongoing" nature of an uncharged crime simply has no relevance to that attachment analysis. Instead, what is relevant is the degree of duplication between the facts and circumstances of defendant's new criminal activity and the facts and circumstances of his charged crimes, and the timing of the charges and the new crimes. When, as in *Savinskiy*, the facts and circumstances of defendant's new criminal activity and the facts and circumstances of his charged crimes are fundamentally different, the scope of counsel's representation on the charged offense would not be presumed to extend to the uncharged crimes because the right to counsel is a trial right that is specific to an episode of factually related offenses. And the timing of the

charge and the new criminal conduct also is important, because if the new criminal conduct occurred after the charges were filed, there little or no risk that the state engaging in strategic charging.

This court also recognized in *Savinskiy* that the defendant's Article I, section 11, right to counsel was fully protected with a prophylactic rule that allows police to question a suspect about new criminal activity even if the questioning will lead to incriminating evidence about a charged offense, so long as the state is prohibited from using the evidence obtained to prosecute any crime for which the right to counsel has attached. Again, the "ongoing" nature of the crime at issue was not relevant to that conclusion. That prophylactic rule is fully protective of the defendant's right to counsel as to the charged offense regardless of whether police are investigating a crime that is ongoing or a new crime that is completed.

2. Limiting *Savinskiy* to the investigation of ongoing crimes is not workable and is not necessary to protect a suspect's rights under Article I, section 11.

Limiting the police to questioning about "ongoing" new crimes also makes no sense from either a legal or practical standpoint. That is so for four reasons.

First, the limitation has no support in the text or purpose of Article I, section 11. Article I, section 11, is an offense-specific right, the purpose of which is to ensure the fairness of the "prosecution" to which that right has

attached. If police are investigating new criminal conduct that is categorically different and *was committed after* a suspect was charged, then—regardless of whether the crime is ongoing—an investigation of the new conduct cannot fairly be regarded as part the "prosecution" of the charged offense, and the new criminal conduct would not be understood to fall within the scope of the representation on the charged offense. Simply put, nothing in the text or purpose of Article I, section 11 would justify extending the right to counsel that has attached to the charged offense to a completed crime committed after the charges were filed.

Second, allowing the police to question a suspect about new crimes only if they are "ongoing" is not a workable rule. Police often will not know, or be able to determine, whether a crime is "ongoing." Suppose, for example, that police are investigating a failed attempt by a represented defendant to assault a prosecutor or a judge in the defendant's pending prosecution. The police should not be precluded from questioning the defendant about the failed attempt merely because they have no way of knowing whether the defendant will make another attempt or decide to abandon the efforts. That is especially so given that it is often unclear as a legal matter whether or not a crime is "ongoing."

Third, a rule limiting questioning to "ongoing" crimes would hobble critically important law enforcement. Certainly, the need to stop an ongoing crime or to prevent a crime from occurring is compelling. But so too is the

need to solve a crime—particularly a very serious violent crime like murder—for the safety and protection of the public and to ensure that those who commit such acts are held to account. Society has a compelling need for police to investigate criminal activity whether it is ongoing or not. Depending on the circumstances of a particular case, society's interest in solving such a completed crime may be just as compelling, or much more so, than the need to investigate an ongoing crime. To take the previous example, suppose that police are investigating the murder of a prosecutor or the judge and they suspect a defendant in a pending trial committed the crime. The murder is a completed offense, but society has a compelling need for police to determine who committed that crime and to hold the person accountable. The mere fact that a defendant is the subject of a pending prosecution should not immunize him from the same investigative techniques that apply to everyone else.

Fourth, and perhaps most importantly, a rule under which the legality of police questioning about new criminal activity turns on whether the crime being investigated is "ongoing" is not *necessary* to ensure that a defendant's Article I, section 11 right to counsel is protected. The prophylactic rule that *Savinskiy* applied, which prohibits the state from using the evidence to prove any charge to which the right to counsel has attached, is sufficient to protect the right to counsel. But it still enables the police to question suspects about new criminal activity and to use the evidence in a separate prosecution for those new crimes.

That is a sensible solution that simultaneously protects the defendant's right to counsel while not unduly hindering legitimate efforts to investigate new crimes.

D. The detectives did not violate Article I, section 11, by continuing the interview after defendant referenced his FIP prosecution.

Applying the above principles, the trial court correctly denied defendant's motion to suppress because the detectives did not violate Article I, section 11, in interviewing defendant about the new uncharged murder.

When the detectives first began the interview, they had no reason to believe that the murder and the FIP charges were connected. They did not know that defendant would make his various paranoid allegations involving the victim. And more to the point, they did not know that defendant would blame the victim for his prosecution in his FIP case. As result, the only question that is at issue in this case is whether the detectives were required to halt the interview and stop questioning about the murder after defendant revealed that he blamed the victim for "setting [him] up" in one of the FIP cases.

At that point, it was reasonably foreseeable that defendant would make incriminating statements about the charged FIP offenses, in just the same way the officials were aware in *Savinskiy* that the defendant would make statements that were incriminating on the charged offense. But, as in *Savinskiy*, that foreseeability does not mean the questioning was unlawful.

Here, just as *Savinskiy* and unlike *Prieto-Rubio*, the police were questioning the suspect about a new criminal activity. The new offense—murder—was committed long after defendant had been indicted and arranged on the charged offense. The oldest of the FIP charges related to conduct from 1991, and the newest was from seven months before the murder. As a result, the FIP investigations were already closed at the time of murder. As the trial court found, the investigation in the FIP cases was completed "months before the shooting, and "but for defendant's request for more time * * * in the [FIP] cases, three out of the four cases had already been set for trial, and would have been tried by this point." (ER-20).

The fact that the murder occurred well after the FIP charges were filed is itself a sufficient basis to conclude that defendant's right to counsel in the FIP charges did not constructively attach to the murder. When police are investigating a new crime committed after a defendant has been charged, there is there is no possibility that the police are engaged in strategic charging. *See Savinskiy*, 364 Or at 815 ("That risk of strategic initial charging is not presented when a defendant who has already been charged decides to engage in new criminal activity."). And if the new uncharged crime occurred after the defendant was already charged, the charged and uncharged crimes will not be so "closely related" or "inextricably intertwined" that the scope of representation as to the charged offense would also extend to new crimes that

the defendant chooses to commit later. Once a person is represented in a criminal prosecution, in other words, the scope of that representation would not and should not be understood remain open to encompass new criminal activity and to shield such new activity from police investigation. In short, the Article I, section 11, right to counsel that has attached because of an existing prosecution does not attach to new, uncharged crimes that a defendant than proceeds to commit.

In addition, beyond the fact that the murder occurred long after defendant had been charged in the FIP cases, the nature and circumstances of the crimes were completely different. The FIP charges were based on defendant's possession of firearm and his status as a felon—an ongoing, non-violent offense that is a Class C felony with no specific victim except the public at large. The intentional murder that the officers were investigating was a categorically different violent crime with a very different victim. The specific personnel involved in investigating the FIP cases was different than detectives who investigating the murder. Detective's Gunter and Guerrero had no meaningful role in investigating the FIP cases.

Nor was there any overlap in the evidence in the cases. The firearm with which defendant committed the murder was not involved the FIP cases.[11] Also, Carter, the victim of the murder, had not been mentioned in any hearing regarding the FIP cases. Further, as the trial court also noted, the FIP cases were, by their nature, open-and-shut: according to the trial court, the FIP cases were based on instances in which officers found defendant in possession of a firearm. (ER-22). Nothing about the murder that occurred could provide relevant evidence needed to buttress that kind of case.

Given the substantial differences in the nature and circumstances of the FIP offenses and the murder, there is no basis for concluding that the charged offenses and uncharged offenses are "closely related" or "inextricably intertwined." Indeed, just as in *Savinskiy*, the only salient connection between the charged and uncharged offenses in this case is that the charged offenses were the motive for the new uncharged crime. But that connection was not sufficient to support constructive attachment in *Savinskiy* and it is not sufficient here. In short, the same reasoning that led this court in *Savinskiy* to conclude that the officers had not violated the defendants right to counsel in that case

[11] In the most recent of the FIP cases a cooperating witness had turned over defendant's firearms. The evidence at trial showed that defendant obtained the firearm with which he committed the murder long after the last of the FIP charges were filed.

applies in this case and demonstrates that the officers did not violate Article I, section 11 by continuing with their questioning.

Indeed, the reasoning of *Savinskiy* applies with even greater strength here. Here, unlike *Savinskiy*, defendant lawfully waived his *Miranda* rights and agreed to discuss the murder well before he mentioned any connection between the FIP case and the murder. In addition, in *Savinskiy*, the factual relationship between the charged offense and the new criminal activity was readily apparent to officers before the operation began. But here it was not. Although defendant claimed during the interview that the victim was responsible for setting him up on the FIP charges, he made that claim amidst a sea of other paranoid (and facially dubious, and by defendant's own later admission false) allegations about the many ways that Carter had been out to destroy him. The police could not have anticipated at the outset that defendant would draw some connection between the murder and his pending charges.

It would make little sense for a defendant's paranoid and apparently false statements connecting new and uncharged conduct to otherwise unrelated charged offenses to cause the right to counsel to attach to the new conduct. That stretches the right to counsel, which the framers understood to be a trial right, to something wholly untethered from its constitutional moorings. The officers were lawfully investigating the murder, and to the extent that defendant raised the FIP charges as one possible motive, the detectives were not required to stop

the questioning. They were free to explore that motive as part of their legitimate murder investigation.

It is also significant that in this case the state was seeking to admit the evidence in a separate trial regarding only the new crimes and agreed the state could not use the evidence at any stage in the FIP prosecution. Both *Prieto-Rubio* and *Savinskiy* involved *joint* trials in which both the charged and uncharged crimes had ultimately been tried together. Separating the prosecution of the old and new charges and allowing the evidence in the new investigation to be admitted only in the trial on the new offenses ensured that the defendant's right to counsel is fully protected.[12]

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[12] One other circumstance about this case bears note. Here, before conducting the interview, the officers had been expressly informed by defendant's counsel, Gushwa, that he no longer represented defendant. That was not accurate, as Gushwa's motion to withdraw in the FIP cases had not yet been granted, and in any case what Gushwa said did not alter the fact that defendant's right to counsel had attached in the FIP case. But it does militate against constructively *extending* that attached right to the murder. The need for police not to talk to a represented defendant about a charged offense is sometimes analogized to the ethical rule requiring lawyers not to communicate directly with a represented party. But even that ethical rule does not apply where a lawyer has been mistakenly led to believe that the party is not represented. *Cf Rule of Professional Conduct,* 4.2 (" a lawyer shall not communicate or cause another to communicate on the subject of the representation with a person the lawyer *knows* to be represented by a lawyer on that subject unless * * * the lawyer has the prior consent of a lawyer representing such other person" (emphasis added)). Defendant, through counsel, led the officers to believe that defendant was no longer represented by counsel on the charged offenses, and defendant lawfully waived his *Miranda* rights and agreed to discuss the murder. The state is not aware of any jurisdiction where

Footnote continued…

Of course, unlike the defendant in *Savinskiy*, defendant in this case did more than just plan—he actually killed the victim. As a result, this case is different than *Savinskiy* in that the police here were not investigating an "ongoing conspiracy" to obstruct a prosecution, but a murder of someone whom defendant believed was involved in that case. Given the reasoning in *Savinskiy*, however, that distinction is immaterial. The nature and circumstances of the murder were fundamentally different than the FIP offenses for which he had been charged and the murder was committed well after defendant had already been charged. Under *Savinskiy*, and consistently with the approach of the *Cobb* dissent that *Prieto-Rubio* and *Savinskiy* endorsed, continuing to question defendant about the murder did not violate Article I, section 11.

As *Savinskiy* recognizes—and as the trial court also recognized in this case—protecting defendant's Article I, section 11 right to counsel on the pending FIP charges *does* require excluding evidence obtained during the questioning from being used in the prosecution of those FIP charges. But it does not require exclusion of that evidence in the prosecution for the murder. For that reason, the trial court correctly denied defendant's motion.

(…continued)
such questioning would be regarded as improper or would require suppression in the murder trial. *See People v. Lucarano*, 61 NY2d 138, 148, 460 NE2d 1328 (1984) (police are entitled to rely on defendant's disclaimer of representation an existing charge and question a defendant about an unrelated offense).

CONCLUSION

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

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 6, 2021, I directed the original Brief on the Merits of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and David Ferry, attorneys for Respondent 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 12,900 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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