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

REPLY 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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REPLY BRIEF ON THE MERITS OF
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INTRODUCTION

In *State v. Savinskiy*, 364 Or 802, 441 P3d 557 (2019), this court concluded that Article I, section 11, did not shield the defendant in a pending prosecution from being questioned about new, uncharged criminal conduct targeting individuals involved in the prosecution. Defendant argues for a different result here because, unlike the defendant in *Savinskiy*, defendant had accomplished his objective: The shooting was over, and the victim was dead. Defendant thus argues that since there was no longer an ongoing crime, there was no longer a sufficiently compelling reason that could "justify" infringing his right to counsel in the pending prosecution by questioning him about the murder. This court should reject that argument. Defendant's proposed rule not only would perversely reward him for completing his crime, it is also contrary to the reasoning and analysis in *Savinskiy*.

In *Savinskiy*, this court did not balance the defendant's right to counsel against the state's need for evidence, nor did this court suggest that stopping an ongoing crime outweighed the right to counsel and justified an exception allowing police to violate the right. Rather, this court looked to the relevant text, history, and case law and concluded that the police questioning was *lawful* because the right to counsel had not attached to the new and fundamentally

different criminal conduct the police were investigating. This court also concluded that the right to counsel in the existing prosecution could be fully protected by excluding the evidence from that prosecution. Those conclusions are firmly rooted in the case law and in longstanding attachment principles that have nothing to do with whether police are investigating an "ongoing" crime.

Both defendant and *amicus* contend that applying the rule from *Savinskiy* to completed crimes would diminish the right to counsel, but that is not so. The attachment rule that this court applied in *Savinskiy* and that state advocates here is *more* protective of the right to counsel than that which nearly all other courts, state and federal, follow. Yet even Oregon's broader attachment rule does not stretch so far as to shield a person from investigation when that person decides to murder someone whom he blames for a pending prosecution.

A. *Savinskiy* is not limited to "ongoing" crimes.

1. *Savinskiy* clarified the scope of *Prieto-Rubio* based on longstanding attachment principles that have nothing to do with whether a crime is ongoing.

In *Savinskiy*, this court clarified the "reasonable foreseeability" rule that this court articulated in *State v. Prieto-Rubio*, 359 Or 16, 376 P3d 255 (2016). In doing so, this court emphasized that the scope of *Prieto-Rubio* must be understood in the context of the principles and framework governing the right to counsel that *Prieto-Rubio* was attempting to effectuate.

Both *Prieto-Rubio* and *Savinskiy* start from the recognition that the right to counsel under Article I, section 11, is, by its terms, specific to a particular prosecution. 359 Or at 24; 364 Or at 808. The right attaches when a person has been charged with a crime and serves to protect the fairness of the prosecution for that crime. 359 Or at 24-25; 364 Or at 808. To determine whether police may lawfully question a person without counsel about a crime, therefore, the operative inquiry is whether the police are questioning the person about a crime to which the right to counsel has attached.

In determining whether the right to counsel has attached to the crime that police are attempting to investigate, Oregon takes a broader approach—one that is more protective of a defendant's right to counsel—than that of almost all other courts. In *Texas v. Cobb*, 532 US 162, 121 S Ct 1335, 149 L Ed 2d 321 (2001), the United States Supreme Court adopted a narrow attachment test under which the right to counsel that has attached to a charged crime also attaches to an uncharged crime (and prohibits police questioning about that uncharged crime) only if the uncharged crime is the "same offense" as the charged crime for purposes of double jeopardy. After *Cobb*, most states followed suit and abandoned broader attachment rules. *See Prieto-Rubio*, 359 Or at 29-33 (explaining history). But in *Prieto-Rubio* and *Savinskiy* this court rejected the *Cobb* test and instead adopted the reasoning of the dissent in *Cobb*. *Savinskiy*, 364 Or at 813-14; *Prieto-Rubio*, 359 Or at 28.

The *Cobb* dissent explained that the majority's attachment rule was unduly narrow and did not comport with an ordinary understanding of the scope of a criminal defense attorney's representation. When an attorney has been appointed or retained to represent a defendant in a particular prosecution, the scope of that representation is not ordinarily understood to be limited strictly to the crimes charged; it also extends to uncharged crimes arising from the same factual circumstances or otherwise intertwined with the charged offenses. Yet under the *Cobb* test, police officers can avoid having to communicate through counsel by strategically refraining from charging closely related offenses, and then questioning the person as to those closely related crimes. *See Cobb*, 532 US at 182–83 (Breyer, J., dissenting) (criticizing majority's test).

To avoid that problem and more fully protect the right to counsel, the *Cobb* dissent advocated for a broader attachment rule under which the right to counsel extends beyond the charged offenses to also include uncharged crimes that are "closely related to" or "inextricably intertwined with" the particular crime set forth in the charging instrument." *Cobb*, 532 US at 186-87 (Breyer, J., dissenting). To determine whether cases are "closely related," courts look to whether there is a sufficient congruence in the "time, location, or factual circumstances" of the charged and uncharged crimes. *Id.* The test depends on the facts and circumstances of a particular case, focusing on whether the

charges involved "the same victim, set of acts, evidence, or motivation." *Id.*[1] It was that constructive attachment test advocated by the *Cobb* dissent that this court embraced in *Savinskiy* and *Prieto-Rubio* and that explains the different outcomes in each case. *See Savinskiy*, 364 Or at 813-14 (Oregon's attachment rule adopted in *State v. Sparklin*, 296 Or 85, 672 P2d 1182 (1983) is "of equal scope" to that of rule described by *Cobb* dissent). *See also*, Wayne R. LaFave *et al*, 2 *Criminal Procedure* §6.4(e), n 102 (4th ed 2021) (citing *Prieto-Rubio* as adopting closely-related test).

2. *Savinskiy* involved a circumstance in which the *Prieto-Rubio* test would not be consistent with the attachment principles that *Prieto-Rubio* was attempting to effectuate.

When charged and uncharged crimes are intertwined in time, place, and circumstance—as they were in *Prieto-Rubio*—it is reasonably foreseeable that questioning about one crime will elicit incriminating evidence regarding the other. And most of the time, the converse will also be true: when it is reasonably foreseeable that questioning about an uncharged offense is likely to elicit evidence about a charged offense, it is because the two offenses are

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[1] Defendant suggests that this court's reliance on the reasoning of the *Cobb* dissent was misguided because *Cobb* involved an application of the *federal* exclusionary rule and thus focused on deterrence of police misconduct. (Resp BOM 13-14). Defendant is mistaken. *Cobb* was about the scope of the right to counsel itself, and not about the appropriate remedy to apply when the right is violated.

intertwined in time, place, and circumstance. While that is *usually* true, *Savinskiy* shows it is not *always* true.

Savinskiy recognized that there are some circumstances—circumstances that were not present in *Prieto-Rubio*—in which it is reasonably foreseeable that questioning about an uncharged offense will elicit incriminating evidence about the charged offense, and yet the representation that has attached to the charged offenses does not constructively attach to the uncharged ones. One scenario in which that can happen is when a defendant facing criminal charges commits new crimes targeting those who are involved in the prosecution—*i.e.*, when the existing criminal charges are the motive for a defendant to commit new criminal conduct. That was the situation in *Savinskiy*, and that is the situation here.

When a pending criminal charge is itself the motive for the new crime, it is reasonably foreseeable that questioning the defendant about the new crime will elicit incriminating evidence regarding the charged offense, including evidence of the defendant's consciousness of guilt. Yet the two crimes are not so closely related in time, place, and circumstance that the scope of legal representation on the charged offense also extends to the new crimes. When a person has retained or is appointed counsel to defend them against a criminal charge, the scope of that lawyer's representation is not presumed to also include future violent crimes against those whom the person holds responsible for the

charge having been brought. Nor is there any possibility, in that circumstance, that police could be engaged in strategic charging to avoid having to communicate through counsel. *See Savinskiy*, 364 Or at 815-16 (noting that fact). For those reasons, there is no constitutional basis for treating the right to counsel on the charged offense as also having constructively attached to the new crime. *Cobb*, 532 US at 178-79 (Breyer, J., dissenting) (stressing that, under the dissent's proposed rule, the right to counsel would not have attached to "new" uncharged crimes).

Savinskiy thus clarified that the questioning in *Prieto-Rubio* was unlawful not *merely* because it was reasonably foreseeable that it would elicit incriminating evidence on the charged offenses, but also because of *why* that was reasonably foreseeable, *i.e.*, the close relationship between the offenses in time, place, and circumstance. Because the charged and uncharged crimes in *Savinskiy* were *not* closely related in that way, the questioning in that case was lawful.

3. The arguments of *amicus curiae* and defendant disregard the reasoning of *Savinskiy*.

Defendant would have this court look past the actual reasoning of *Savinskiy* and to recharacterize its holding as one creating a narrow, ongoing crimes exception justified by the state's interests in preventing the commission of a crime. (Resp Br 13-15). *Amicus curiae* take a more straightforward

approach and ask this court to overrule *Savinskiy*. (*Amicus* Br 13-14). This court should do neither.

Defendant's suggestion that *Savinskiy* applied a balancing test to create a narrow ongoing-crimes exception cannot be squared with the analysis in that case. The court did not suggest that the questioning violated Article I, section 11, and yet was justified by compelling state interests. To the contrary, this court stated that the questioning was lawful. 364 Or at 819. Nor did this court suggest that it was balancing the right to counsel against a compelling need to prevent commission of a crime.[2] This court instead applied the reasoning of the *Cobb* dissent and thus reaffirmed the longstanding principle that the right to counsel is limited to charged crimes and closely related uncharged crimes, which must be treated as within the scope of representation for the pending prosecution. *See State v. Davis*, 313 Or 246, 258-59, 834 P2d 1008 (1992) (under Article I, section 11, "counsel is deemed to represent a person on a particular charge or criminal episode"); *Sparklin*, 296 Or at 95 (applying "closely related" attachment rule); *Prieto-Rubio*, 359 Or (endorsing "closely related" attachment rule of *Cobb* dissent); *Savinskiy*, 364 Or 813-16 (applying

[2] That *Savinskiy* did not engage in "balancing" is unsurprising. This court has long criticized that approach to state constitutional interpretation. *See* Thomas A. Balmer & Katherine Thomas, *In the Balance: Thoughts on Balancing and Alternative Approaches in State Constitutional Interpretation*, 76 Alb L Rev 2027, 2040 (2013) (discussing cases).

reasoning of *Cobb* dissent to facts of that case). That principle has nothing to do with whether the new crimes that police are investigating are ongoing.

For similar reasons, *amicus curiae*'s argument that *Savinskiy* conflicts with *Prieto-Rubio* and should be overruled is without merit. Both decisions apply the same attachment principles and embrace the *Cobb* dissent's "closely related" rule but reached different results because of factual distinctions that triggered that rule in one case but not the other. In *Prieto-Rubio*, the charged and uncharged crimes were "interrelated from the beginning" and were closely related in several ways—all of the crimes were committed before defendant was charged, all took place in the defendant's home, involved the same physical conduct, and all were committed against members of the defendant's family. 359 Or at 37. In *Savinskiy*, by contrast, the defendant did not commit the new criminal conduct until after he had already been charged, and the new crimes "occurred in a different setting, involved different conduct, and involved victims who were targeted for a very different reason." 364 Or at 813. The factual distinctions explain why the right to counsel did attach in *Prieto-Rubio* but did not in *Savinskiy* even though in both cases it was reasonably foreseeable

that questioning about uncharged crimes would lead to incriminating evidence regarding the charged offenses.[3]

B. The prophylactic rule adopted in *Savinskiy* is grounded in established case law and is consistent with Oregon's exclusionary rule.

Although the questioning in *Savinskiy* was lawful, this court also recognized that, to ensure the defendant's right to counsel in the pending prosecution was protected, no evidence obtained during the questioning could be used in that prosecution. 364 Or at 820. That is the same prophylactic, risk-of-circumvention use rule that federal courts have long followed. *See Maine v. Moulton*, 474 US 159, 178-80, 106 S Ct 477, 88 L Ed 2d 481 (1985) (applying that rule). The right to counsel extends to any "critical stage" of a prosecution and serves to protect the fairness of that prosecution by ensuring a right to counsel's presence "'in any situation where the state may glean involuntary and incriminating evidence or statements *for use in the prosecution*.'" *Savinskiy*, 364 Or at 808 (quoting *Sparklin*, 296 Or at 93) (Emphasis added.). The risk-of-

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[3] *Amicus* devote the bulk of their argument to reiterating the arguments made by the dissent in *Savinskiy*. But those arguments were rejected by the majority, and *Savinskiy* is now the law and assumed to have been correctly decided. *Farmers Ins. Co. of Oregon v. Mowry*, 350 Or 686, 698, 261 P3d 1, 8 (2011). *Amicus*—as the party seeking to overturn precedent—has a heavy burden of affirmatively establishing that that decision was wrong and should be overruled. *Id*. Merely repeating the arguments that the court considered and rejected in *Savinskiy* is not sufficient to carry that burden, and it does not constitute a "principled basis" to overrule it. *See id.* at 700 (recognizing principle).

circumvention rule that this court followed in *Savinskiy* prevents police who are lawfully questioning a suspect about new crimes from gleaning evidence for use in an existing prosecution. By preventing that use, the rule guarantees that any investigatory questioning into an uncharged crime will not become part of the prosecution to which the right to counsel has attached and does not impair the right to counsel in that prosecution.

Defendant and *amicus* argue that the prophylactic rule this court applied in *Savinskiy* is incompatible with Oregon's exclusionary rule because, in their view, a "violation" of the state constitutional right to counsel mandates suppression in all prosecutions in order to vindicate the defendant's right. (Resp BOM 25-27; Amicus Br 12). But those repeated assertions miss the mark because the questioning in *Savinskiy* was *lawful* and there was no Article I, section 11 violation. Consequently, there simply was no constitutional "violation" to trigger an exclusionary analysis.[4]

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[4] Defendant asserts that the prophylactic rule "directly contradicts" ORS 136.432, which prohibits excluding evidence on the ground that it was obtained in violation of a statute. But this case does not involve a statutory violation. Further, ORS 136.432 includes an exception for when exclusion "is required by" the federal or state constitution. A prophylactic rule like the one adopted in *Savinskiy* is required to ensure that Article I, section 11, is not violated. Notably, by contending that *Savinskiy* erred in concluding that the evidence should be suppressed in the existing prosecution, defendant's rule of law is *less* protective of the right to counsel than the rule that the state advocates. If defendant is correct that the prophylactic rule is unlawful, the evidence that the state obtained from the questioning in *Savinskiy* was

Footnote continued…

The right to counsel is an offense-specific right that, by its nature, simultaneously can be implicated in one case but not implicated in another. Consequently, it is logical that evidence obtained from lawful questioning about new crimes could be admissible in the prosecution of those new crimes but inadmissible in the prosecution of previously charged offenses. That is, as the Supreme Court has explained, "a sensible solution to a difficult problem." *Moulton*, 474 US at 179.

C. The state's proposed rule provides a clear standard that fully protects the defendant's right to counsel, while defendant's rule would reward criminal conduct and is unworkable.

Under *Prieto-Rubio,* Article I, section 11, generally prohibits police from questioning a defendant in a pending prosecution about uncharged offenses if the questioning is likely to elicit incriminating evidence regarding the charged offense. Under the state's proposed rule, however, such questioning is allowed if the uncharged crimes were committed after the defendant was charged and are not closely related to the already-charged offenses. In the latter case, any evidence obtained in the questioning may not be used in the existing prosecution. That rule provides a clear standard to guide law enforcement and

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(…continued)
admissible not only to prove the new, uncharged offense, but also to prove the charged offenses.

the courts, while at the same time fully protecting the right to counsel in an existing prosecution.

In arguing to the contrary, defendant misunderstands the rule that the state proposes. Defendant describes the state's proposed rule as "mov[ing] * * * toward" the federal rule that the Supreme Court adopted in *Cobb*, (Resp BOM 11), and he claims that the state's rule would "shrink[] a defendant's Article I, section 11, right to counsel to its most limited, offense-specific variant," (Resp BOM 16). That is not accurate. The state is not proposing that this court adopt the *Cobb* test or asking this court to move "toward" that test. On the contrary, the state's proposed rule reflects the attachment test that was espoused by the *Cobb dissent* and embraced in both *Prieto-Rubio* and *Savinskiy*. That rule is far more protective of the right to counsel than that which federal courts follow under the Sixth Amendment and that nearly all other states follow under their state constitutions.[5]

Defendant also mistakenly describes the state's proposed rule as one that diminishes a defendant's right to counsel based merely on the timing of the uncharged offense. He contends that the state is arguing that "defendant's rights should give way simply because the additional investigation concerns

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[5] One of the lone exceptions is Indiana, which also adheres to the "closely related" test of the *Cobb* dissent. *See Prieto-Rubio*, 359 Or at 32-37 (describing *Jewell v. State*, 957 NE 2d 625 (Ind 2011).

crimes committed *after* the charged offense." (Resp Br 18). That is wrong, in two respects.

First, the state is not contending that the defendant's right to counsel should "give way." If police are investigating new and fundamentally different crimes, the questioning is lawful because the right to counsel has not attached to the new crime. If it is reasonably foreseeable that questioning a defendant about the new crimes could incidentally elicit incriminating evidence about a crime for which a defendant is already being prosecuted, the prophylactic rule adopted in *Savinskiy* will protect against any risk of circumventing the right to counsel in that prosecution.

Second, the state's proposed rule is not based on timing alone. The "closely related" constructive attachment test turns not merely on timing but more broadly on whether the charged and uncharged crimes are closely related in time, place, and circumstance. Although timing alone may be dispositive in some circumstances, this court does not need to decide that question to decide this case. The uncharged crime at issue here was not merely committed long after the felon in possession charges were filed, it also was a fundamentally different offense—murder—involving a different victim and different investigators.

Defendant's proposed rule would create an unworkable standard and prevent police from investigating and apprehending suspects who commit

crimes targeting witnesses or other people involved in a criminal prosecution. Police often will not know, or be able to determine, whether a crime is "ongoing" and "threatens future harm" or whether the crime has been completed or the perpetrator has decided to abandon any further attempts. And defendant's rule would shield the perpetrators of violent completed crimes from the investigatory techniques that police ordinarily use to solve such crimes simply because the crime targeted a witness or other person involved in an existing prosecution. 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. "To hold that the government is prohibited from investigating the defendant's involvement in new crimes, simply because his right to counsel has attached for a separate offense, would be essentially to immunize a defendant from further prosecution." *United States v. Terzado-Madruga*, 897 F2d 1099, 1111-12 (11th Cir 1990).

On top of those substantial costs, defendant's proposed rule confers no benefit. If it is reasonably foreseeable that lawful questioning about new criminal conduct would elicit incriminating evidence about a charged crime, then the state must be prohibited from using those statements in the pending prosecution. That is the prophylactic rule that this court applied in *Savinskiy*, and that is all that is needed to ensure that the defendant's right to counsel in the existing prosecution is protected. Prohibiting police from questioning the

defendant about the new crimes would do nothing more to protect the defendant's right to counsel in the existing prosecution.

D. Under *Savinskiy*, the trial court correctly concluded that the officers did not violate defendant's right to counsel in this case.

Under *Savinskiy*, the detectives in this case did not violate Article I, section 11, by continuing to interview defendant about the murder. Just as in *Savinskiy*, the police were questioning the suspect about a new and fundamentally different crime, and the only relationship between the new crime and the existing charges was defendant's claim that existing prosecution was one of his motives for murdering the victim. 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 applies in this case and demonstrates that the officers did not violate Article I, section 11, by continuing with their questioning.

Indeed, the reasoning that led this court to conclude the questioning in *Savinskiy* was lawful applies with even greater force in this case, because the circumstances here conclusively demonstrate that the detectives were not circumventing defendant's right to counsel in the FIP prosecution. The detectives who interviewed defendant were not involved in the FIP cases and had no reason to be aware of any connection between the murder and the FIP prosecution when they interviewed defendant. In addition, defendant's attorney

in the FIP case had informed the officers that he had withdrawn and no longer represented defendant, and defendant waived his right to counsel at the outset of the interview. Although defendant claimed during the interview that the victim was responsible for setting him up on the FIP charges, that was only one among many facially dubious, and by defendant's own later admission false, allegations. Further, the state did not join the charged and uncharged crimes for trial. Rather, the cases were tried separately, and the state was prohibited from using any evidence in the prosecution of the FIP case. All of those circumstances demonstrate that the questioning was lawful and that defendant's right to counsel in the FIP case was fully protected.

CONCLUSION

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

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 17, 2022, I directed the original Reply 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, and Anna E. Belais and Claire M. Powers, attorneys for *amicus curiae* Oregon Justice Resource Center, by using the court's electronic filing system.

I further certify that on February 17, 2022, I directed the Reply Brief on the Merits of Petitioner on Review, State of Oregon to be served upon Malori M. Maloney, attorney for *amicus curiae* Oregon Justice Resource Center, by mailing two copies, with postage prepaid, in an envelope addressed to:

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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 3,979 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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