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IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Appellant, Cross-Respondent, v. STEVEN P. WAGNER NICHOLS, Defendant-Respondent, Cross-Appellant.	Hood River County Circuit Court No. 140066CR SC S063985 **EXPEDITED APPEAL UNDER ORS 138.060(2)**

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Circuit Court
for Hood River County
Honorable JOHN A. OLSON, Judge

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APPELLANT'S OPENING BRIEF

INTRODUCTION

In a line of cases beginning with *Miranda v. Arizona*, the United States Supreme Court articulated a series of procedural requirements that apply to custodial interrogations to protect and to effectuate the constitutional right against compelled self-incrimination. This court has adopted those requirements for purposes of Article I, section 12, of the Oregon Constitution. This case involves the *Miranda* requirement that the police must honor a suspect's invocation of the right to cut off questioning.

Defendant was arrested in the San Francisco Airport on a warrant for an Oregon murder charge and interviewed for roughly three hours by a California detective. At the outset, defendant was advised of his *Miranda* rights, and he stated that he understood those rights and proceeded to answer some questions. A short while later, when asked about the circumstances of the victim's death, defendant stated "It's not something I want to talk about." The detective replied that he wanted to make sure that he did not have a murderer walking into the jail, defendant stated that he was not a killer, and the interview continued. The trial court suppressed everything beginning with the statement quoted above, concluding that defendant equivocally invoked his right to cut off

questioning, and that the detective violated Article I, section 12, by continuing the interrogation without clarifying defendant's intent.

The threshold question is whether defendant invoked his right to cut off questioning. The answer is that he did not. Defendant's statement was, at most, an exercise of his right not to answer a particular question, but it was not an invocation of the right to cut off all questioning. Because defendant's statement was not even an equivocal request that the interrogation cease, it was no invocation at all.

If defendant equivocally invoked his right to cut off questioning, however, the next question is whether Article I, section 12, requires the police to clarify equivocal invocations before proceeding. Although this court has assumed that that duty exists, the court never has directly addressed and resolved that issue. This court should adopt the federal rule—which is the rule followed by the vast majority of states—and decline to impose a "duty to clarify." The federal *Miranda* rules are the source of the Article I, section 12, rules, and there is no state constitutional basis for a different rule governing equivocal invocations. The existing *Miranda* rules are sufficient, provide workable bright-line requirements that police officers can apply (even when, as here, the interrogation is conducted by officers in other states), and strike the appropriate balance between protecting suspects' rights against compelled self-

incrimination during custodial interrogations and preserving society's legitimate interest in conducting interrogations to investigate crimes.

STATEMENT OF THE CASE

Nature of the Proceeding

This is a criminal case. Defendant was indicted with one count of murder under ORS 163.115. (ER-1, Indictment).

Nature of the Order to be Reviewed

The state seeks review of the trial court's pretrial order granting defendant's motion to suppress statements he made to the police. (ER-35 to ER-37, Order).

Statutory Basis of Appellate Jurisdiction

ORS 138.060(1)(c) authorizes the state to appeal pretrial orders suppressing evidence. ORS 138.060(2)(a) requires that that appeal be taken directly to this court, because defendant is charged with murder.

Timeliness of Appeal

The order appealed from was entered on March 15, 2016. The state timely served and filed its notice of appeal on March 29, 2016.

STATEMENT OF FACTS

A. Defendant was indicted for murder and subsequently arrested and interviewed in California.

In 2014, a Hood River County grand jury issued a secret indictment charging defendant with the murder of his girlfriend, (ER-1,

Indictment). The victim died in 2009 when she fell roughly 100 feet during a hike with defendant on the Eagle Creek trail in the Columbia River Gorge. After the victim's death, defendant attempted to collect on a million-dollar life-insurance policy that he had taken out on the victim. The state's theory is that defendant intentionally caused the victim to fall from the cliff. A judge issued a warrant for defendant's arrest.

On February 2, 2015, defendant was arrested on the warrant in the San Francisco International Airport after law-enforcement authorities were notified that defendant would be arriving on a flight from China with a connection to Medford. Before placing him in the airport jail, San Mateo County Detective Matsuura interviewed defendant. The detective began the interview by reading defendant his *Miranda* rights, and defendant indicated that he understood his rights:

> [Detective]: You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. And if you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish. Do you understand?
>
> [Defendant]: Uh, yes.

(TCF, 7/15/15 Declaration, Ex B, Transcript, 1-2). The interview then proceeded as follows:

> [Detective]: Okay. Here's why we're here. Okay? Everybody that comes into this airport, while it says "San

Francisco," it actually sits in the city and county of San Mateo, two completely separate jurisdictions.

[Defendant]: Uh-huh.

[Detective]: Are you from the Bay Area?

[Defendant]: No.

[Detective]: No. Okay. So if I'm telling you anything you already know, you let me know. People do get arrested in—in the airport. We come and interview them before they hit our jail. We want to know who they are, what they're doing, why they're here, things like that. We want to make sure our facility is safe and the airport is safe. Okay?

Have you been told why you're in custody?

[Defendant]: No.

[Detective]: Okay. You have a warrant for your arrest.

[Defendant]: From where?

[Detective]: The state of Oregon.

[Defendant]: For?

[Detective]: Homicide.

[Defendant]: Homicide?

[Detective]: Homicide. Do you have any idea what that's about?

[Defendant]: No.

[Detective]: Okay.

[Defendant]: What's the name of the person?

[Detective]:

[Defendant]:

[Detective]: I— Do you know a

[Defendant]: That's my mother's—or that's my child's mom.

[Detective]: Okay. Were you guys dating at all or was it just like a one-night stand thing where you guys—you guys hooked up?

[Defendant]: No.

[Detective]: Or were you guys having a relationship?

[Defendant]: No. We were together for a long time.

[Detective]: Okay. Do you have any idea why there's a warrant for your arrest for a homicide for your daughter's—the mother of your daughter?

[Defendant]: I don't.

[Detective]: None at all?

[Defendant]: No.

Detective: Well, obviously something happened. Do you know the circumstances behind her death?

[Defendant]: Yeah.

[Detective]: Can you tell me about it.

[Defendant]: *It's not something I want to talk about. It's* --

[Detective]: Well, I want to make sure I don't have a serial murderer walking into my jail.

[Defendant]: I'm not—

[Detective]: You know what I mean.

[Defendant]: I'm not a killer.

[Detective]: I –

[Defendant]: I'm –

[Detective]: I don't know that.

(*Id*. at 2-4; emphasis added). The interview continued for roughly three hours. Defendant later was transported back to Oregon and arraigned on the murder charge.

B. Defendant moved to suppress his statements.

Defendant filed a motion to suppress his statements from the interview, asserting that the detective violated *Miranda* procedural requirements in interrogating him. (ER-2 to ER-14, Motion). Defendant contended that he invoked his right to cut off questioning[1] when he stated "[i]t's not something I would like to talk about" in response to the detective's question about the

[1] Although defendant ostensibly asserted that he invoked his "right to remain silent"—which is the right not to be compelled to speak—defendant's argument actually was that he invoked the right to cut off questioning. (ER-5 & ER-7 to ER-8, Motion). As will be discussed later, much of the caselaw uses imprecise language, conflating the right to end interrogation with the right not to be compelled to speak (the "right to remain silent"). Defendant relied on the *Miranda* prophylactic requirement that the police must honor a suspect's invocation of the right to cut off questioning, and that requirement was the basis for the trial court's ruling.

circumstances of the victim's death. Defendant argued that that was an unequivocal invocation, and that the detective violated Article I, section 12, and the Fifth Amendment by failing to terminate the interrogation at that point. (ER-4 to ER-8, Motion; 8/12/15 Tr 4-17).

Alternatively, defendant argued that his statement was an equivocal invocation, and that the detective violated Article I, section 12, by continuing with interrogation without clarifying whether defendant intended to invoke his right to cut off questioning. (ER-8 to ER-9, Motion; 8/12/15 Tr 4-17). Although *Berghuis v. Thompkins*, 560 US 370, 130 S Ct 2250, 176 L Ed 2d 1098 (2010), establishes that the federal constitution does not require the police to clarify equivocal invocations of the right to cut off questioning, defendant argued that *State v. Harding*, 221 Or App 294, 189 P3d 1259, *rev den*, 345 Or 503 (2008), establishes that Article I, section 12, imposes that requirement. (ER-8, Motion; 8/12/15 Tr 19-20, 38-39; ER-23 to ER-26, Supplemental Memorandum). In *Harding*, the Court of Appeals cited to *State v. Charboneau*, 323 Or 38, 54, 913 P2d 308 (1996)—which involved a claimed invocation of the right to have counsel present for questioning—for the proposition that "[w]hen a suspect makes an equivocal invocation of the right to silence, police are required to ask follow-up questions to clarify what the suspect meant before proceeding with interrogation." 221 Or App at 301.

For its part, the state contended that no constitutional violation occurred, because defendant did not invoke—unequivocally or equivocally—his right to cut off questioning. (ER-15 to ER-22, Response; 8/12/15 Tr 29-30, 36-37; ER-27 to ER-29, Supplemental Response). The state argued that defendant's statement was not an unequivocal invocation, because defendant "did not make an affirmative statement that he was done and would not talk, which would constitute an unequivocal invocation of the right to remain silent." (ER-19, Response). And the state asserted that "the statement was [not[2]] an equivocal invocation because [defendant] was simply stating the obvious: a general discomfort about discussing the topic." (*Id*.). The state argued that defendant's statement was not "a declaration that he [was] unwilling to talk" and that "[g]enerally, no one likes to talk about the death of a loved one, so this statement [was] really only an acknowledgement of the obvious." (ER-16 to ER-17, Response).

The state emphasized that the right at issue is the right to cut off questioning as a whole as opposed to a suspect's desire to avoid answering a particular question or discussing a particular topic. (ER-19 to ER-20, Response, quoting *State v. Rogers*, 277 Neb 37, 760 NW 2d 35 (2009)). And

[2] At the suppression hearing, the prosecutor explained that her written response had inadvertently omitted the "not," but the trial court and defense counsel explained that they had understood the state's "no invocation" position. (8/12/15 Tr 29).

the state relied on *State v. Smith*, 310 Or 1, 791 P2d 836 (1990), which held that a defendant's statement "I have nothing to say" in response to a hypothetical question about how he murdered his wife was not an invocation at all. (ER-17, Response; 8/12/15 Tr 36-37).

Alternatively, the state argued that, even if defendant equivocally invoked the right to cut off questioning, the detective could have—but was not required to—clarify defendant's intent before continuing with interrogation. (ER-20, Response; 8/12/15 Tr 30-38; ER-27 to ER-29, Supplemental Response). The state argued that the Court of Appeals' *Harding* decision was based on an incorrect reading of *Charboneau*, both because *Charboneau* held only that officers *may*—rather than must—ask clarifying questions, and because *Charboneau* involved the right to have counsel present for questioning, rather than the right to cut off questioning, which is significant because the former right involves greater procedural protections. (ER-18 & ER-20, Response; ER-27 to ER-29, Supplemental Response).

The trial court held a hearing. (8/12/15 Tr 2-44). The evidence consisted of a transcript and audio recording of the interview, which had been forwarded to the court before the hearing. (TCF, 7/15/15 Declaration, Ex B, Transcript & Ex C, Recording). At the hearing, the court indicated that it had reviewed the transcript while listening contemporaneously to the recording, and that the court likely was going to conclude that defendant made an equivocal invocation.

(8/12/15 Tr 3). But the court was unsure whether Article I, section 12, imposed a duty to clarify or whether the state constitutional rule, instead, would be the same as the federal constitutional rule announced in *Berghuis*. (8/12/15 Tr 18-19). At the close of the suppression hearing, the court took defendant's motion under advisement.[3]

C. The trial court granted the motion and suppressed the evidence.

The trial court granted defendant's motion, detailing its reasoning in a memorandum opinion. (ER-30 to ER-34, Memorandum Opinion; ER-35 to ER-37, Order). The court rejected both defendant's argument that he unequivocally invoked his right to cut off questioning, and the state's argument that no invocation occurred. The court explained that the statement was "ambiguous": the statement "could be a way of signaling that the topic is still emotionally charged for the speaker, but that the speaker is nonetheless willing to discuss it" or it "could also be an invocation of the right to remain silent." (ER-33, Memorandum Opinion). But, in the court's view, the statement could not "reasonably [be] construed as no invocation at all." (*Id*.).

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[3] After the hearing, defendant filed a supplemental memorandum further addressing whether Article I, section 12, imposed a duty to clarify ambiguous invocations of the right to cut off questioning, and the state filed a response. (ER-23 to ER-26, Supplemental Memorandum; ER-27 to ER-29 Supplemental Response). The parties' positions are included as part of the above summary of the parties' arguments.

The trial court also concluded that Article I, section 12, imposes a duty to clarify ambiguous invocations of the right to cut off questioning. Although the court viewed *Charboneau* as imposing a duty to clarify ambiguous invocations of the right to have counsel present, the court noted that "the Oregon Supreme Court has never held that officers are required to ask clarifying questions in the face of an equivocal invocation of the right to remain silent." (ER-33 to ER-34, Memorandum Opinion). But the court nonetheless deemed itself bound by *Harding*, even though "[t]he Court of Appeals in *Harding* never explained why the *Charboneau* mandate to ask clarifying questions in response to an equivocal request for counsel was also constitutionally mandated in the face of an equivocal invocation of the right to silence." (ER-34, Memorandum Opinion).

Based on that understanding, the trial court concluded that the detective violated Article I, section 12, by continuing the interview without clarifying whether defendant intended to invoke his right to terminate the interview. (ER-33, Memorandum Opinion). The court explained that, rather than clarifying defendant's intent, the detective's "response was to put psychological pressure on the defendant to speak by positing he had no way of knowing the defendant wasn't a serial murderer if the defendant didn't talk to him." (ER-33 n 1, Memorandum Opinion). Accordingly, the court suppressed evidence of defendant's invocation and all his subsequent statements. (ER-34, Memorandum Opinion; ER-35, Order).

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First question presented: Did defendant invoke his right to cut off questioning?

First proposed answer: Defendant's statement was not an invocation—unequivocal or equivocal—of his right to cut off questioning.

Second question presented: If a suspect has waived his *Miranda* rights but later makes an equivocal invocation of his right to cut off questioning, does Article I, section 12, require the police to ask clarifying questions before continuing with the interview?

Second proposed answer: No, the police may continue with the interview unless and until the suspect unequivocally invokes his right to cut off questioning.

SUMMARY OF ARGUMENT

Under *Miranda*, the police must honor a suspect's invocation of the right to cut off questioning by immediately ending the interrogation. Yet defendant did not invoke that right. Defendant did not unequivocally invoke that right, because a reasonable officer would not have understood defendant's statement that he did not want to discuss the circumstances of the victim's death as a request to end the interrogation. That is so both because it was unclear whether defendant was unwilling to answer that question or to discuss that subject, and because defendant's statement was not directed at ending the interrogation. Nor did defendant equivocally invoke the right. The key point is that the right at issue is the right to cut off questioning, and defendant's statement expressing reluctance to discuss the circumstances of the victim's death was not—even

arguably—a request to cut off questioning. Because there was no invocation, the detective properly proceeded with the interview.

If defendant equivocally invoked his right to cut off questioning, this court must decide whether Article I, section 12, requires the police to clarify ambiguous invocations of that right before proceeding with the interview. Although this court recently has assumed that there would be a duty to clarify in those circumstances—and although this court appears to have long assumed that there is a duty to clarify equivocal invocations of the right to have counsel present for questioning—this court never has directly addressed and resolved those issues. The United States Supreme Court has done so, however, holding that there is no duty to clarify in either instance.

This court should adopt the same rule for purposes of Article I, section 12. There is no state constitutional basis for a duty to clarify. At least after a suspect has waived his *Miranda* rights, it should be incumbent on him to unequivocally invoke his right to cut off questioning and his right to have counsel present for interrogation. The existing *Miranda* rules are sufficient and provide workable bright-line requirements that police officers can apply here and in other states in which the interrogations may occur. A duty to clarify would be particularly unwarranted for the right to cut off questioning, both because of the nature of that right and because of the difficulties that officers would face in determining whether each and every refusal or reluctance to

answer, silence, and evasiveness amounted to an equivocal invocation. Finally, in no event would the police have a duty to halt questioning or seek clarification when a suspect merely exercises his selective right not to answer a particular question.

ASSIGNMENT OF ERROR

The trial court erred by granting defendant's motion to suppress his statements.

Preservation of Error

The state preserved its arguments that defendant did not invoke—unequivocally or equivocally—his right to cut off questioning. (ER-15 to ER-22, Response; 8/12/15 Tr 28-30, 34, 36-37; ER-29, Supplemental Response). The state also preserved its arguments that, if defendant equivocally invoked that right, the detective could proceed without clarifying defendant's intent, and that Article I, section 12, did not impose a duty to clarify. (ER-15 to ER-22, Response; 8/12/15 Tr 30-38; ER-27 to ER-29, Supplemental Response).

Standard of Review

This court is bound by the trial court's factual findings that are supported by the record and reviews that court's application of the law for errors of law. *State v. Avila-Nava*, 356 Or 600, 609, 341 P3d 714 (2014). "[W]hether a defendant's statement amounted to an unequivocal invocation of the right against self-incrimination, an equivocal invocation, or no invocation at all, is a

question of law." *Id.* Similarly, whether Article I, section 12, imposes a duty to clarify is a question of law.

ARGUMENT

Article I, section 12, of the Oregon Constitution provides that "[n]o person shall * * * be compelled in any criminal prosecution to testify against himself." To protect that right, this court has required that, before questioning, the police must give *Miranda* warnings to a person who is in full custody or in compelling circumstances. *Avila-Nava*, 356 Or at 608. Therefore, the suspect must be warned prior to any questioning:

> that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda v. Arizona, 384 US 436, 479, 86 S Ct 1602, 16 L Ed 2d 694 (1966). Article I, section 12, mandates those warnings to ensure that a person's waiver of his right against self-incrimination is knowing and voluntary. *State v. Vondehn*, 348 Or 462, 474, 236 P3d 691 (2010). The police violate Article I, section 12, by conducting custodial interrogation without first obtaining a valid waiver from the suspect of his *Miranda* rights, and the state will be precluded from using evidence that is derived from the constitutional violation. *Avila-Nava*, 356 Or at 608.

In this case, the detective advised defendant of his *Miranda* rights at the

beginning of the interview, and defendant responded by waiving those rights. Defendant's waiver was knowingly made, because the detective advised him of his *Miranda* rights and asked him whether he understood, and defendant replied "yes." And defendant's waiver was voluntarily made, because he answered questions only after receiving and understanding *Miranda* warnings. *See State v. Matt*, 251 Or 134, 137-38, 444 P2d 914 (1968) (applying principle); *State v. Wright*, 251 Or 121, 122-25, 444 P2d 912 (1968) (same); *Berghuis*, 560 US at 382-87 (same). "[A] defendant's decision to speak with an officer after being advised of his * * * *Miranda* rights provides a basis for inferring that the defendant intentionally chose to relinquish those rights." *State v. Gilmore*, 350 Or 380, 387, 256 P3d 95 (2011).

But the issue is whether the detective properly continued the interrogation without clarifying defendant's intent after defendant made the statement about not wanting to discuss the circumstances of the victim's death. "[U]nder Article I, section 12, police must cease interrogation when a person in police custody unequivocally invokes the right against self incrimination." *Avila-Nava*, 356 Or at 609. "The reason for that requirement is that, '[w]hen the police honor [a person's rights under Article I, section 12], if [the] [person] chooses to assert them, the coercive atmosphere of police interrogation is to some degree dispelled.'" *Id.* "When a person unequivocally invokes [his] right against self-incrimination, police may reinitiate contact after a reasonable time,

provide new *Miranda* warnings, and obtain a valid waiver." *Id*. at 609 n 3. Moreover, if the person "reopen[s] the dialogue with the officers by making unprompted statements that indicate[] a willingness to have a generalized discussion about the investigation," police are allowed to proceed with further questioning. *Id*. at 618-19.

Whether Article I, section 12, imposes a duty to clarify a person's intent following an "equivocal invocation" of the right to cut off questioning is a disputed issue presented by this appeal. This court has assumed that such a duty exists. The state will explore the basis for that assumption in detail and urge this court to decline to adopt a duty to clarify under Article I, section 12.

This case thus potentially presents two main issues. The first issue is whether defendant's statement was no invocation, an equivocal invocation, or an unequivocal invocation of his right to cut off questioning. The consequences of a determination that there was either "no invocation" or an "unequivocal invocation" are well-settled and straightforward: no invocation would mean that no *Miranda* violation occurred, and an unequivocal invocation would mean that a *Miranda* violation occurred. If defendant made an equivocal invocation, then the second issue is whether Article I, section 12, imposed a duty to clarify before the detective could proceed with the interview.

A. Defendant did not invoke his Article I, section 12, right to cut off questioning.

1. The right at issue is the *Miranda*-based right to cut off questioning.

At the outset, it bears emphasis that the right at issue is the *Miranda*-based right to cut off custodial interrogation.

The Court adopted the *Miranda* requirements to adopt "fully effective means * * * to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored." *Miranda*, 384 US at 479. One of those requirements—which is the one at issue here—is the "right to cut off questioning," which the Court described as follows:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, *the interrogation must cease.* At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. *Without the right to cut off questioning*, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. * * *

384 US 473-74 (emphasis added). The Court has explained that the obligation of the police to honor an invocation of the "right to cut off questioning" is a critical safeguard that is necessary to counteract the coercive pressures in custodial interrogation:

> The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." Through the exercise of his

> option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his "right to cut off questioning" was "scrupulously honored."

Michigan v. Mosley, 423 US 96, 103-04, 96 S Ct 321, 46 L Ed 2d 313 (1975) (internal citation and footnote omitted).

This court similarly has characterized the right as the right to end the interrogation. *See Avila-Nava*, 356 Or at 602 ("police must cease custodial interrogation"); *State v. McAnulty*, 356 Or 432, 455, 338 P3d 653 (2014) ("police must honor th[e] [suspect's] request and stop questioning"). This court has explained that "if there is a right to remain silent that is guaranteed by Article I, section 12, it is a right to insist that the police *refrain from interrogation* after a person who is in custody or otherwise in compelling circumstances has invoked the right to remain silent." *State v. Davis*, 350 Or 440, 459, 256 P3d 1075 (2011) (emphasis added). The pertinent "right" thus is defendant's Article I, section 12, right to cut off custodial interrogation.

2. The right to cut off questioning is different from the right to remain silent, which is the right not to be compelled to speak.

The proper identification of the right takes on heightened importance given the existence of a related but distinct "right to remain silent." After a

suspect has waived his *Miranda* rights and chooses to speak with the police, the suspect has the right not to be compelled to speak and may selectively choose to answer some questions and decline to answer others. *Cf. State v. Kell*, 303 Or 89, 99, 734 P2d 334 (1987) (in context of partial waiver following invocation of right to have counsel present; a suspect is "entitled to pick and choose what he wishe[s] to talk about"). But when a suspect does so, he does not invoke the right to cut off questioning.

Many of the cases that will be discussed in this section fail to clearly distinguish between the right to cut off questioning, and the right to remain silent, the latter of which includes the right not to be compelled to answer a particular question (which encompasses the principle that a person is free "to pick and choose" what to say). But this court should clarify that those are separate, albeit related, rights. The "right to remain silent" is the right not to be compelled to speak. *See Miranda*, 384 US at 460 (characterizing right as the right "'to remain silent unless [the suspect] chooses to speak in the unfettered exercise of his own free will'"). The right to cut off questioning is a procedural right—or perhaps is more aptly characterized as a duty placed on police officers—that protects a suspect's right against self incrimination (the "right to remain silent") by giving the suspect the power to terminate the custodial interrogation. But the key point is that a suspect's selective refusal or resistance

to answering particular questions is not an invocation of the right to cut off questioning.

A person has the right to remain silent unless he chooses to speak. That right is simply the Article I, section 12, right not to be compelled to answer questions. In *Davis*, this court clarified that that provision does not "state a broad 'right to remain silent'"; instead, "it states a much more specific right not to be 'compelled' to testify" against oneself. 350 Or at 447. To ensure that a suspect who is subjected to custodial interrogation is making a voluntary and knowing choice to speak with the police, *Miranda* requires that police officers advise the suspect that he has the right to remain silent (as part of the *Miranda* warnings) and to obtain a waiver of that right before any interrogation. But a suspect who has waived his *Miranda* rights retains his constitutional right to remain silent (not to be compelled to speak) throughout the interrogation. *See Davis*, 350 Or at 446 (distinguishing right to remain silent from *Miranda* requirements and stressing that a person may always exercise the former).

A defendant may selectively waive his right to remain silent by responding to some questions but not others, and those selective refusals to answer specific questions do not assert an "'overall right to remain silent.'" *State v. Cummings*, 357 Wis 2d 1, 850 NW 2d 915, 928 (2014). "A defendant may express an unwillingness to discuss certain subjects without indicating a desire to terminate an interrogation already in progress." *State v. Bacon*, 163 Vt

279, 658 A2d 54, 66 (1995). "Statements which indicate only the suspect's desire to avoid answering a particular question or to avoid speaking about particular themes have * * * been held, under the circumstances, not to trigger *Miranda* protections," because "an invocation of the right to remain silent is a communication that the suspect wishes questioning as a whole to cease." *State v. Rogers*, 277 Neb 37, 760 NW 2d 35, 59-60 (2009) (footnotes omitted).

Consequently, a suspect's refusal to answer a particular question or discuss a particular topic is not an invocation of the right to cut off questioning. For example, in *State v. Longo*, 341 Or 580, 592-93, 148 P3d 892 (2006), the defendant's "refus[al] to answer particular questions or to discuss certain subjects" was not an invocation of his *Miranda* right to remain silent and cut off questioning but rather was the defendant exercising his right to pick and choose what he talked about in response to non-coercive questioning by the police. And in *Fare v. Michael C.*, 442 US 707, 727, 99 S Ct 2560, 61 L Ed 2d 197 (1979), the youth's various statements that "he did not know the answer to a question put to him or that he could not, or would not, answer the question" was not an invocation of his right to have questioning cease (as the youth had contended), because "th[o]se statements were not assertions of the right to remain silent."

State v. Smith, 310 Or 1, 791 P2d 836 (1990), also turned on the difference between the right not to answer a particular question and the right to

cut off questioning. In *Smith*, the defendant asserted that he invoked his Article I, section 12, and Fifth Amendment rights to cut off questioning[4] by stating "I have nothing to say" in response to a detective's hypothetical description of how the defendant might have killed his wife. 310 Or at 10. The defendant argued that "it [was] clear from the context that defendant told the officer he had nothing further to say about his wife's disappearance." Oregon Briefs 4401, *State v. Smith*, Appellant's Brief at 61. This court rejected the defendant's argument that he had invoked his right to cut off questioning and held, instead, that the defendant "merely exercised his right to answer some questions and not to answer others." 310 Or at 10. The court noted that it was not a case in which officers made persistent efforts to wear down the person's resistance and make him change his mind. *Id*. at 10-11.

Accordingly—as this court has at least implicitly recognized—"the right to cut off questioning" "is distinct from * * * the right to remain silent * * * during questioning." *Fifth Amendment—Invocation of the Right to Cut Off Questioning*, 124 Harv L Rev 189, 196 (Nov 2012). "The right to remain silent is invoked or waived by a suspect on a rolling basis during any questioning—it is exercised every time a suspect refuses to answer a question, and * * * it is

[4] The defendant in *Smith* asserted that he invoked his Article I, section 12, and Fifth Amendment "rights to silence" and that the detective violated those provisions by failing to terminate the interrogation. Oregon Briefs 4401, *State v. Smith*, Appellant's Brief at 57-61.

waived any time he gives an uncoerced answer to a question." *Id*. at 196-97. But that is "quite a different matter from the accused's right not to be asked any further questions at all," which presents a different issue and which "call[s] for [a] separate evaluation." *Id*. at 197. "Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together." *Smith v. Illinois*, 469 US 91, 98, 105 S Ct 490, 83 L Ed 2d 488 (1984) (footnote omitted). "In this context, 'waiver' refers to the accused's decision to answer any particular question put to him, whereas 'invocation' deals with the right to end all further questioning." *Fifth Amendment—Invocation of the Right to Cut Off Questioning*, 124 Harv L Rev at 197 n 74. And a "key distinction between the right to cut off questioning and the right not to answer questions is that the former requires action by another party—the police must end the interrogation—whereas the latter merely requires restraint—the suspect must refrain from answering questions." *Id.* at 197.

An invocation of the right to cut off questioning requires the police to end the interrogation. But a suspect's reluctance or refusal to answer a particular question, or to discuss a particular topic, does not have that effect. As the Eleventh Circuit Court of Appeals has explained, "a suspect's refusal to answer certain questions is not tantamount to the invocation, either equivocal or unequivocal, of the constitutional right to remain silent and that questioning may continue until the suspect articulates in some manner that he wishes the

questioning to cease." *United States v. Mikell*, 102 F3d 470, 477 (11th Cir 1996), *cert den*, 520 US 1181 (1997).

To be sure, at some point an exchange involving a suspect's refusal to answer a particular question could result in an invocation of the right to cut off questioning. Indeed, it is "[t]hrough the exercise of his option to terminate questioning" that a suspect can control "the subjects discussed." *Mosley*, 423 US at 103-04. But unless and until the suspect invokes the right to cut off interrogation, the police may continue with the interrogation.

The suspect always retains the right against compelled self-incrimination, however. If the suspect makes it clear that he does not want to answer a particular question, and the police nonetheless pressure him to answer, then the police run the risk that any statements the suspect makes in response may be deemed to have been compelled and will be inadmissible. But that is an application of the right not to be compelled to *answer* questions, which reduces to a question of voluntariness. *See State v. Acremant*, 338 Or 302, 324, 108 P3d 1139 (2005) (test is whether the defendant's will was overborne and his capacity for self-determination was critically impaired). There is not a rule—under *Miranda* or from some other source—that precludes the police from *asking particular* questions. A suspect has the right not to be compelled to answer any particular question, and a suspect has the right to cut off questioning as a whole. But he does not have the right not to be asked a particular question

or questions. *See Post-Miranda Selective Silence: A Constitutional Dilemma with an Evidentiary Answer*, 79 Brook L Rev 1771, 1782 (Summer 2014) (appears that *Miranda* contemplated only the right to cut off questioning, and that that right is inapplicable to person who "instead chooses to selectively answer * * * questions").[5]

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[5] *See also* Gerald Shiano, *Note, "You Have the Right to Remain Selectively Silent": The Impractical Effect of Selective Invocation of the Right to Remain Silent*, 38 New Eng J on Crime & Civ Confinement 177, 191-92, 195-96 (Winter 2012) (right to selectively limit questioning would not be principled or workable); Evelyn A. French, *When Silence Ought To Be Golden: Why the Supreme Court Should Uphold the Selective Silence Doctrine in the Wake of Salinas v. Texas*, 48 Ga L Rev 623, 650-51 (Winter 2014) (no duty to selectively limit scope of interrogation); *Burno v. United States*, 953 A2d 1095, 1102 (DC Cir 2008) (refusal to answer particular question pertinent only to extent that it operates at level of generality to amount to invocation of right to cut off all questioning); *but see Burno*, 953 A2d at 1105-06 (Ruiz, J., concurring) (asserting that a suspect has right to selectively limit questioning); *State v. Tiedemann*, 2007 UT 49, 162 P3d 1106, 1118 (2007) (same). Professor Wayne LaFave states—without any further amplification—that "if [a] defendant 'clearly and unequivocally invoked his *Miranda* rights selectively,' that is a sufficient invocation of *Miranda* with respect to the specific situation covered by the invocation." Wayne R. LaFave *et al*, 2 *Criminal Procedure* § 6.9(g) (4th ed 2015). For support, LaFave cites only a decision (*Arnold v. Rummels*, 421 F3d 859 (9th Cir 2005)) involving a selective invocation of a *mode of communication—viz*., a refusal to give a statement on tape. LaFave does not appear to assert that there is a right to selectively limit the scope of questioning, and regardless the state disputes the existence of such a right.

Whether the prosecution may present evidence of, and comment upon, a refusal to answer particular questions is a separate issue. *See Hurd v. Terhune*, 619 F3d 1080, 1087-88 (9th Cir 2010) (stressing point); *Burno*, 953 A2d at 1101-02 (DC Cir 2008) (same).

In sum, the right to cut off all questioning is distinct from the right not to be compelled to speak, and that latter right includes the right not to be compelled to answer a particular question. A suspect's refusal or reluctance to answer a particular question or to discuss a particular topic does not require the police to cease or narrow questioning (though a suspect's subsequent statements will, of course, only be admissible if he voluntarily makes them).

3. Defendant's statement was not an invocation—unequivocal or otherwise—of the right to cut off questioning.

The issue thus is whether defendant invoked his right to cut off questioning. The answer is straightforward: defendant did not. Defendant's statement that he did not want to discuss the circumstances of the victim's death was not a request that the interrogation cease.

Defendant did not make an unequivocal invocation of the Article I, section 12, right to cut off questioning. The Article I, section 12, standard for an unequivocal invocation appears to mirror the Fifth Amendment standard. *See Avila-Nava*, 356 Or at 612-13 (suggesting as much). The defendant must articulate his desire with sufficient clarity—given the totality of circumstances—that "a reasonable officer would have understood that the defendant was invoking that right." *Id*. at 612. In making that determination, a court "may consider the preceding words spoken by the defendant and the interrogating officer, the demeanor, gestures, and speech patterns of the

defendant, the demeanor and tone of the interrogating officer, and the point at which the defendant allegedly invoked the right to remain silent." *Id*. at 614. But the court may not consider events that occurred after the alleged invocation. *Id*. at 613-14.

Under that test, a statement either is an assertion of the right to cut off questioning or it is not. *See Smith*, 469 US at 97-98. Although a defendant need not use magic words or a lawyer's precision to invoke the right, he nonetheless must make a reasonably clear statement expressing his desire to cut off all questioning. For example in *Avila-Nava*, the defendant made an unequivocal invocation by stating "I won't answer any questions." 356 Or App at 614-18. And in *McAnulty*, the defendant made unequivocal invocations on two occasions by "unambiguously communicat[ing] that she no longer desired to talk with detectives" and—in light of that preceding context—made a third unequivocal invocation when she later stated "I don't want to no more, please, I don't want." 356 Or at 456.

Nothing of that nature occurred here. After the detective read defendant his *Miranda* warnings and defendant waived his rights, defendant proceeded to answer some questions, and the following exchange then occurred:

> [Detective]: Well, obviously something happened. Do you know the circumstances behind her death?
>
> [Defendant]: Yeah.

[Detective]: Can you tell me about it.

[Defendant]: *It's not something I want to talk about. It's*

(TCF, 7/15/15 Declaration, Ex B, Transcript, emphasis added). And a review of the audio recording reveals that the exchange was extremely low-key. (TCF, 7/15/15 Declaration, Ex C, Recording).

A reasonable officer would not understand from defendant's statement "[i]t's not something I want to talk about" that defendant was requesting that the detective end the interrogation. To begin with, as the trial court concluded, one plausible interpretation was that defendant merely was expressing the reluctance that any person would express in discussing a painful or emotional memory, and that it was something that he would prefer not to do. That is entirely different from being unwilling to discuss the matter. Even with respect to the particular question asked (*viz.*, whether defendant would discuss the circumstances behind the victim's death), it was not clear that defendant was unwilling to answer the question or to discuss that topic. For that reason—standing alone—defendant's statement was not an unequivocal invocation.

More fundamentally, defendant's statement was not an unequivocal invocation, because it was not directed at ending the interrogation. Unlike the defendants in *Avila-Nava* and *McAnulty*, defendant did not say anything that could be construed as a request to end the interrogation. Instead, defendant only expressed an initial reluctance or desire not to discuss the circumstances of

the victim's death. At most, defendant's statement sought to alter the course of the interrogation but was not a request that the interrogation end. Because defendant's statement was not directed at cutting off all questioning, a reasonable officer would not take it as such. Defendant did not unequivocally invoke his *Miranda*-based right to terminate the interrogation.[6]

Nor was defendant's statement an equivocal invocation of that right. Defendant appeared to simply be conveying his reluctance to discuss an understandably emotional topic rather than stating that he was unwilling to do so. *See State v. Fritschen*, 247 Kan 592, 802 P2d 558, 607 (1990) (the defendant's statement "I don't want to talk about [the murders] any more, it hurts too much" did not rise to the level of equivocal invocation, because the defendant "was saying he was upset and having difficulty talking").

Beyond that and regardless, the dominant fact remains that a single refusal or reluctance to answer a particular question or to discuss a particular topic is not even arguably an invocation of the right to cut off all questioning. Professor Wayne LaFave has explained that, although "any declaration of a desire to terminate the [police] contact or inquiry * * * should suffice, * * * an unwillingness * * * to respond to a particular inquiry * * * is not a general

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[6] Because defendant failed to unequivocally invoke his right to cut off questioning, the trial court correctly rejected his claim that the detective violated the federal constitution by continuing with the interrogation. *See Berghuis*, 560 US at 381-82 (requiring unequivocal invocations).

claim of the privilege." Wayne R. LaFave *et al*, 2 *Criminal Procedure* § 6.9(g) (4th ed 2015) (footnotes omitted). Instead, a person's refusal to answer a particular question is just that and nothing more. A reasonable officer would not understand defendant's statement as—even arguably—constituting a demand that the interview be over. *See People v. Silva*, 45 Cal 3d 604, 247 Cal Rptr 573, 754 P2d 1070, 1083-84 (Cal 1988) (holding that the statement "I really don't want to talk about that" did not amount to an invocation of *Miranda*, but instead was an unwillingness to talk about certain subjects); *Commonwealth v. Roberts*, 407 Mass 731, 555 NE 2d 588, 590 (1990) (post-waiver refusal to answer certain questions was not invocation of the right to cut off questioning).

In *Smith*, this court rejected the defendant's argument that he invoked his right to cut off questioning by stating "I have nothing to say" when the detective asked him a hypothetical about how the defendant may have killed his wife. 310 Or at 10. Rather, the "defendant merely exercised his right to answer some questions and not to answer others." *Id*. In *Smith*, *Longo*, *Fare*, and in the other cases referenced above and referenced in the previous section, this court and other courts have recognized that a refusal to answer a particular question is not an invocation of the right to cut off questioning. *Accord State v. Doser*, 251 Or App 418, 423, 283 P3d 410 (2012) (citing *Longo* and *Smith* and holding that the defendant's refusals to answer particular questions were not

equivocal invocations of the right to cut off questioning; "[i]nstead, defendant chose to answer some questions and not others").

Consequently, even assuming that defendant's statement amounted to a refusal to answer questions about a particular subject (although—as discussed above—it was not), that was not an invocation of defendant's right to cut off questioning. Rather, at most, it might convey a desire to change the subject. The fact that defendant made an initial statement that expressed reluctance to discuss the circumstances behind the victim's death did not even rise to the level of an ambiguous request to terminate questioning. Therefore, the detective was not precluded from proceeding with the interview, and this court can and should end its analysis at this point and reverse the trial court's ruling.

B. Article I, section 12, does not impose a duty to clarify ambiguous invocations.

If defendant made an equivocal invocation of the right to cut off questioning, the detective nonetheless properly continued with the interview. The issue would become whether Article I, section 12, imposes a "duty to clarify" before further questioning. The *Miranda* decision suggested that officers would have discretion in deciding how to deal with ambiguous invocations:

> [i]f [a suspect] is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent.

Miranda, 384 US at 485 (quoting letter from Solicitor General).

The adoption of a duty to clarify would amount to a *third* layer of prophylaxis. The first layer is the warning and waiver procedure articulated in the *Miranda* decision itself. Before questioning, the police must provide the suspect with the *Miranda* warnings and then obtain a waiver that is measured under the knowing and voluntary standard. The second layer consists of the procedures that apply when a suspect makes an actual invocation of *Miranda* rights. If the suspect unequivocally requests the presence of counsel, the questioning must cease until counsel is provided. If the suspect unequivocally requests that questioning cease, the questioning must cease at least for a reasonable period of time. The issue here would be whether, on top of those protections, there should be another strict procedural *per se* rule that requires the police to clarify ambiguous invocations.

As will be discussed, this court appears to have assumed that such a duty exists but has never directly addressed and resolved the issue. The United States Supreme Court has resolved the issue, holding that there is no duty to clarify ambiguous invocations of either the right to have counsel present for questioning or the right to cut off questioning. *See Davis v. United States*, 512 US 452, 114 S Ct 2350, 129 L Ed 2d 362 (1994) (right to have counsel present); *Berghuis v. Thompson*, 560 US 370, 130 S Ct 2250, 176 L Ed 2d 1098 (2010)

(right to cut off questioning). This court should find the Court's reasoning persuasive and adopt the same rule for Article I, section 12 for ambiguous post-waiver *Miranda* invocations generally or at least for ambiguous post-waiver invocations of the right to cut off questioning, which is the right at issue here.

1. This court has not directly addressed and resolved this issue.

This court has long assumed that Article I, section 12, imposes a duty to clarify ambiguous *Miranda* invocations of the right to have counsel present and recently has assumed that the same rule exists for ambiguous invocations of the right to cut off questioning. But this court has never directly addressed and resolved those issues.

The assumption first appeared in *State v. Montez*, 309 Or 564, 789 P2d 1352 (1990). The defendant there argued that the police violated Article I, section 12, by continuing the interrogation after he made references to needing a lawyer. 309 Or at 571. The detective responded by clarifying that the defendant was not invoking his right to have counsel present for questioning. *Id*. at 568. This court concluded that the defendant did not unequivocally invoke his right to have counsel present, and that the detective's "questions seeking clarification of defendant's intent, therefore, were permissible and did not constitute further 'interrogation' or 'badgering.'" *Id*. at 572. The detective's "neutral questions, intended only to clarify whether and to what extent defendant was invoking his right to counsel, did not probe beyond that

limited and permissible inquiry." *Id*. at 572-73. The analysis was brief and did not explain the source of the apparent assumption that the police were limited to clarifying the defendant's intent.

The *Montez* court may have assumed that clarifying questions were required by the federal constitution. At the time of *Montez*, the United States Supreme Court twice had explicitly declined to rule on the permissible limits of interrogation following equivocal invocations of the right to have counsel present. *See Smith*, 469 US at 95-100, 96 n 3; *Connecticut v. Barrett*, 479 US 523, 529 n 3, 107 S Ct 828, 93 L Ed 2d 920 (1987). But many courts—including the Ninth Circuit—had held that the federal constitution required clarification before proceeding. *See e.g., United States v. Fouche*, 833 F2d 1284, 1287 (9th Cir 1987). It was not until four years after *Montez* that the United States Supreme Court resolved the issue. In *Davis*, the Court held that police officers are not required to suspend questioning to clarify ambiguous invocations of the right to have counsel present, although the Court also noted that "it will often be good police practice" to do so. 512 US at 461.

The assumption from *Montez* that a duty to clarify exists nonetheless was repeated by *State v. Charboneau*, 323 Or 38, 913 P2d 308 (1996). In *Charboneau*, this court rejected the defendant's argument that he unequivocally invoked his right to have counsel present and held that, even assuming that his statement amounted to an equivocal invocation, the detective responded

appropriately by asking neutral questions designed to clarify the defendant's intent. 323 Or at 53-56. In doing so, this court cited *Montez* for the proposition that "when a suspect's statement to an officer concerning counsel is equivocal or ambiguous, the officer *may* ask the suspect further questions 'seeking clarification of [the suspect's] intent.'" *Id*. at 54 (emphasis added). The analysis in *Charboneau* on the point was not lengthy and was equally consistent with the holding from *Davis* that officers may, but are not required to, ask clarifying questions. *See State v. Saylor*, 117 SW 3d 239, 245 n 4 (Tenn 2003) (citing *Charboneau* as case adopting *Davis* approach).

State v. Meade, 327 Or 335, 963 P2d 656 (1998), was the next notable decision in the series. In *Meade*, this court rejected the defendant's argument that the police improperly continued the interview after the defendant made what was assumed to be an equivocal invocation of the right to have counsel present. 327 Or at 339-42. The court cited to *Charboneau* and *Montez* for the proposition that, when a suspect makes an equivocal request to speak with counsel, "the police may follow up with questions intended to clarify whether the suspect meant to invoke his right to counsel." *Id*. at 339. But in *Meade*, the officers "were prevented from asking such neutral questions immediately by defendant's choice to launch into [a] monologue." *Id*. at 340.

The *Meade* court framed the issue as follows: "May the interrogating officers' obligation, discussed in [*Montez* and *Charboneau*], to clarify an

equivocal invocation of the right to counsel be obviated, if the suspect thereafter, and without prompting from the officers, initiates further substantive conversation concerning the charge under investigation?" *Id*. This court answered that question in the affirmative and held that, given the defendant's initiation of further conversation that demonstrated his desire and willingness to discuss the investigation, the officers in *Meade* did not need to clarify the defendant's intent. *Id*. at 341.[7]

The above discussion demonstrates that, although *Montez*, *Charboneau*, and *Meade* have been viewed by some as establishing a duty to clarify ambiguous invocations of the right to have counsel present, this court did not actually decide that issue in those cases. *See also* Jacyntha Vu, *Self-Incrimination—The Interrogating Officers' Obligation to Clarify an Equivocal Request for Counsel May be Obviated if the Suspect Independently Initiates Further Substantive Conversation Concerning the Charge Under Investigation. State v. Meade, 963 P2d 656 (1998)*, 31 Rutgers LJ 1272 (Summer, 2000) (favoring clarification approach but criticizing *Meade* for misinterpreting prior holdings and for failing to clearly explain whether Article I, section 12, imposes

[7] The *Meade* dissent discussed *Davis* and the various approaches to ambiguous invocations and asserted that the *Meade* majority "recognized" that Oregon law required clarifying questions. 327 Or at 342-49, 347 n 8 (Durham, J., dissenting opinion). But the majority's recognition merely consisted of a reference to *Montez* and *Charboneau* and its characterization of the clarification "discussed in those cases" as an "obligation." 327 Or at 340.

a duty to clarify). Rather in those cases—as well as those that have followed—it was unnecessary for this court to actually resolve whether a duty to clarify exists, because this court was able to resolve the claim of error even assuming that one does. *See e.g.*, *State v. James*, 339 Or 476, 480 n 2, 123 P3d 251 (2005) (assumption immaterial, because case involved unequivocal invocation).

Montez, *Charboneau*, and *Meade* all involved the right to have counsel present for questioning. But this court recently assumed that the same clarification requirement applies to ambiguous invocations of the right to cut off questioning. In *Avila-Nava*—which involved that right—this court cited to *Charboneau* for the proposition that "[w]hen [a] defendant makes an ambiguous or equivocal invocation of rights under Article I, section 12, * * the police are required to ask follow-up questions to clarify what the person meant before proceeding with interrogation." 356 Or at 609. But that statement was *dictum*, because the defendant there made an unequivocal invocation of the right to cut off questioning, which meant that the police officers were precluded from asking clarifying questions anyway. *Cf. McAnulty*, 356 Or at 456-57 (citing *Montez* and noting clarification efforts in case involving unequivocal invocation of right to cut off questioning followed by waiver based on the defendant's reinitiation).

In sum, this court has not squarely resolved whether Article I, section 12, imposes a duty to clarify when a suspect makes an ambiguous invocation of the

right to cut off questioning or—for that matter—an ambiguous invocation of the right to have counsel present for questioning.

2. The federal constitution does not impose a duty to clarify ambiguous invocations of *Miranda* rights.

To determine the correct rule, this court should review the rule under the federal constitution. The Article I, section 12, right against self-incrimination largely mirrors the Fifth Amendment right against self-incrimination, the United States Supreme Court is the source of the *Miranda* rules, and this court has adopted the core *Miranda* rule verbatim from the federal rule. In the past, this court has recognized that there is value in interpreting *Miranda* requirements the same for purposes of the state and federal constitutions and has done so on multiple occasions. *See State v. Sparklin*, 296 Or 85, 89, 672 P2d 1182 (1983) (content of *Miranda* warnings); *Kell*, 303 Or at 95 (waiver rule); *see also State v. Scott*, 343 Or 195, 203, 166 P3d 528 (2007) (definition of interrogation). The Court resolved these issues in *Davis* and *Berghuis*, holding that suspects must clearly invoke their *Miranda* rights, and that the police are not required to clarify ambiguous invocations. The state turns to a review of those decisions.

In *Davis*—the first of the two cases—the Court held that a suspect must "unambiguously request counsel" to invoke the right to have counsel present for questioning, and that the police are not required to cease the interrogation if the

suspect makes a reference to counsel that is "ambiguous or equivocal." 512 US at 459. The Court stressed the need for a bright-line rule for officers to apply:

> Although the courts ensure compliance with the *Miranda* requirements through the exclusionary rule, it is police officers who must actually decide whether or not they can question a suspect. The *Edwards*[8] rule—questioning must cease if the suspect asks for a lawyer—provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong. We therefore hold that, after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.

Id. at 461 (emphasis original).

In reaching that result, the Court acknowledged that a clear-invocation rule would disadvantage some suspects who actually want counsel but fail to clearly assert the right. *Id*. at 460. "But the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves," and "'[f]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process.'" *Id*. "A suspect who knowingly and voluntarily waives

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[8] *Edwards v. Arizona*, 451 US 477, 101 S Ct 1880, 68 L Ed 2d 378 (1981).

his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted." *Id*. at 460-61. And "although *Edwards* provides an additional protection—if a suspect subsequently requests an attorney, questioning must cease—it is one that must be affirmatively invoked by the suspect." *Id*. at 461. The Court was "unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer." *Id*. at 462 (emphasis original).

In *Berghuis*, the Court extended that clear-invocation rule to invocations of the right to cut off questioning. The Court emphasized that "[a] requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that 'avoid[s] difficulties of proof and * * * provide[s] guidance to officers' on how to proceed in the face of ambiguity." 560 US at 381. The Court further explained:

> If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression if they guess wrong. Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity. Treating an ambiguous or equivocal act, omission or statement as an invocation of *Miranda* rights might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation. But as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process.

Id. at 382 (quotation marks and citations omitted).[9]

The vast majority of states have adopted the same rules at least for the post-waiver context. *See e.g., People v. Martinez*, 47 Cal 4th 911, 105 Cal Rptr 3d 131, 224 P3d 877, 947-49, 949 n 9 (2010) (citing other jurisdictions); *State v. Climer*, 400 SW 3d 537, 558-62 (Tenn 2013); *State v. Jennings*, 252 Wis 2d 228, 647 NW 2d 142, 151-53 (2002); *Hadden v. State*, 2002 WY 41, 42 P3d 495, 503-04 (2002); *Harte v. State*, 166 Nev 1054, 13 P3d 420, 427-30 (2000); *People v. Arroya*, 988 P2d 1124, 1129-32 (Colo 1999); *State v. King*, 708 A2d 1014, 1016-17 (Me 1998); *State v. Donesay*, 265 Kan 60, 959 P2d 862, 871-72 (1998); *State v. Owen*, 696 So 2d 715, 716-20 (Fla 1997); Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right To Remain Silent Under Miranda*, 17 Wm & Mary Bill Rts J 773, 786-87, 825-29 (March 2009) [Strauss, *Silence*] (pre-*Berghuis* article; noting that "the vast majority of states that have considered the question have applied the *Davis* rule to the right to remain silent," and that only a "few states [have] rejected *Davis* altogether

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[9] The *Berghuis* Court stated that there are "no principled reason[s] to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*," because both rights "protect the privilege against compulsory self-incrimination by requiring an interrogation to cease when either right is invoked." 560 US at 381 (internal citation omitted). The state disagrees with that assertion to a point: as discussed later, there are additional reasons that a duty to clarify is unjustified and unwarranted for the right to cut off questioning.

under their state constitution"; providing appendix surveying state holdings; footnotes omitted); *see also Franklin v. State*, 170 So 3d 481, 486-91 (Miss 2015) (apparently reversing course and adopting *Davis* for at least post-waiver context); *State v. Dixon*, 369 Mont 359, 298 P3d 408, 413-16 (2013) (adopting *Berghuis*).

Massachusetts applies the clear-invocation rule but only to ambiguous invocations that occur after the defendant has waived his *Miranda* rights. *Commonwealth v. Clarke*, 461 Mass 336, 960 NE 2d 306, 345-52 (2012). Prior to *Berghuis*, "'the majority of [S]tate supreme courts to consider the issue'" limited *Davis* to the post-waiver context. 960 NE 2d at 347 n 9. The Massachusetts Supreme Court has explained that the fundamental purpose of *Miranda* is to assure that an individual's right to choose between speech and silence remains unfettered, and that "[i]n the postwaiver context, a suspect has already made [that] choice." *Id*. at 348. Consequently, "it makes sense to expect heightened clarity from a suspect who wants to change course and cease interrogation after having already indicated a desire to continue questioning." *Id*. at 349. Although *Berghuis* made it clear that the clear-articulation rule applies even if the suspect has not waived his *Miranda* rights, Massachusetts nonetheless imposes a clarification requirement for ambiguous invocations that a suspect makes in the pre-waiver context. *Id*. at 345-52.

A few states have imposed a duty to clarify in the post-waiver context. *See e.g.,* Strauss, *Silence*, 17 Wm & Mary Bill Rts J at 786 n 71 (noting few states); *State v. Hoey*, 77 Hawai'i 17, 881 P3d 504 (1994); *State v. Chew*, 150 NJ 35, 695 A2d 1301 (1997). Minnesota adopted a duty to clarify ambiguous invocations of the right to counsel, *State v. Risk*, 598 NW 2d 642, 649 (Minn 1999), but declined to impose that duty for ambiguous invocations of the right to cut off questioning. *State v. Williams*, 535 NW 2d 277, 284-85 (Minn 1995). And—rather than a duty to clarify—Alaska apparently has adopted a rule that precludes police responses to ambiguous counsel invocations that would discourage subsequent attempts at invocations—a rule that may extend to ambiguous invocations of the right to cut off questioning. *See Munson v. State*, 123 P3d 1042, 1064 n 18 (2005) (Matthews, J., dissenting) (discussing point). If it does, then the test would be that "[o]nce a statement is found to be equivocal," police officers must engage in "noncoercive conduct that does not imply that the right to silence has been lost and may no longer be exercised." *Id*. at 1064.

3. This court should adopt the federal rule and decline to impose a duty to clarify ambiguous invocations of *Miranda* rights.

This court should find the Court's reasoning persuasive and adopt the federal rule for ambiguous, post-waiver invocations of the right to cut off questioning.

The existing *Miranda* procedural protections are sufficient and strike the appropriate balance between protecting suspects' rights against compelled self-incrimination during custodial interrogations and preserving society's legitimate interest in conducting interrogations to investigate crimes. This court should not upset that balance and impose another prophylactic rule—a rule that would mandate the suppression of voluntary statements and derivative evidence merely because the police failed to clarify an ambiguous statement that did not qualify as an actual invocation.

The court should not blur the bright-line *Miranda* rules by imposing a duty to clarify. From its inception, one of the primary justifications for *Miranda* was that it provided "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Miranda*, 384 US at 442. *Miranda* "has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogations are not admissible." *Fare*, 442 US at 718. "This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis." *Id.*

The same cannot be said for an amorphous "duty to clarify" that applies whenever a suspect makes statements that "might," "arguably," reasonably be viewed by a police officer as "maybe" invoking his *Miranda* rights. The line between an "ambiguous invocation" and "no invocation" would be a fine, vague, ill-defined line that would be hard for officers to reliably and consistently identify and determine throughout the course of fluid, shifting interrogations. And even when that determination may be made, it is unclear what "proper clarification" would entail. *See State v. Hudson*, 253 Or App 327, 344, 290 P3d 868 (2012), *rev den*, 353 Or 562 (2013), (*Miranda* advisal and waiver proper clarification); *State v. Alarcon*, 259 Or App 462, 468-69, 314 P3d 364 (2013), *rev den*, 354 Or 838 (2014) (reaching opposite conclusion); *Fouche*, 833 F2d at 1288-89 (*Miranda* readvisal and waiver sometimes sufficient). "When a right entitles a suspect to action by another party—concluding the questioning—it seems only fair that the suspect be required to communicate a request for that action clearly." *Fifth Amendment*, 124 Harv L Rev at 197.

A duty to clarify would inappropriately place police officers in the role of counsel or judge. An interrogation is adversarial in nature. Although the Constitution mandates that officers respect a suspect's invocation, it does not require officers to interpret ambiguous statements as invocations of *Miranda* rights or to give a suspect further assistance in making or conveying that choice.

Furthermore, the imposition of a duty to clarify under Article I, section 12, would be problematic, because interrogations sometimes are conducted by officers in other states—the vast majority of which follow the federal rule. Yet the evidence nonetheless would be subject to suppression based on an additional prophylactic requirement under Article I, section 12. *State v. Davis*, 313 Or 246, 251-54, 834 P2d 1008 (1992). This case illustrates the problem with adopting another layer of prophylaxis for Article I, section 12. Defendant was interrogated in California by a California detective, and California law does not require the police to clarify ambiguous invocations of the right to cut off questioning. *Martinez*, 224 P3d at 949.

Uniformity is justified not only by practical considerations but also by principled constitutional analysis. "[W]hen construing provisions of the Oregon Constitution, it long has been the practice of this court 'to ascertain and give effect to the intent of the framers [of the provision at issue] and of the people who adopted it.'" *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 54, 11 P3d 228 (2000). To determine that intent, the court examines the provision's text, this court's caselaw, and the historical circumstances that led to the adoption of the provision. *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992). This court should refrain from further expansion of the *Miranda* requirements under the state constitution absent a sufficient justification under the *Priest* methodology. *See Vondehn*, 348 Or at 487 n 1 (Linder J., concurring)

(explaining that "[t]he pedigree" of *Miranda* under Article I, section 12, is "uncertain" and largely unexplored and suggesting that "novel questions about the scope or content of our state *Miranda* rules" should be resolved by applying *Priest* methodology); *Davis*, 350 Or at 445-60 (applying *Priest* methodology to limit scope of *Miranda* procedural rule).

Nothing in the text, history, or pertinent caselaw establishes that police officers have a duty to clarify ambiguous *Miranda* invocations. The framers of the Oregon Constitution would not have envisioned the *Miranda* requirements at all. *See State v. Smith*, 301 Or 681, 684-701, 725 P2d 894 (1986) (analyzing history and caselaw and explaining "there is no question that the Oregon Constitution does not require the giving of *Miranda*-type warnings"). There certainly is no reason to believe that the framers intended to incorporate the layer of *Miranda* procedural protection debated here—*viz*., a third-layer prophylactic rule directed at helping suspects invoke a second-layer prophylactic protection, which is the requirement that the police must honor a request to terminate the interrogation, which applies in addition to the first-layer prophylactic rule, which is the *Miranda* warnings and waiver requirement. The United States Supreme Court's *Miranda* decisions are the source of this court's *Miranda* rules, and there is no state constitutional basis for adopting a different rule.

This court has identified the following considerations as pertinent to the decision whether to interpret a provision in the state constitution differently than its counterpart in the federal constitution:

> (1) the similarity of the state and federal provisions; (2) relevant state precedents; (3) unique local conditions; and (4) the position taken by the United States Supreme Court. To these considerations we would add a fifth—the need for a uniform standard in the area of law under discussion.

State v. Flores, 280 Or 273, 279-80, 570 P2d 965 (1977) (citations omitted). Here, the text of the state and federal constitutional provisions are substantially identical[10] and stem from the same history. This court has not directly addressed whether a duty to clarify exists generally, much less for ambiguous invocations of the right to cut off questioning. The United States Supreme Court—which is the source of the Article I, section 12, *Miranda* rules—has held that there is no duty to clarify. And there is a substantial need for a uniform standard that officers can apply regardless of where the interrogation is conducted. *See Flores*, 280 Or at 281 (stressing benefit of uniform rule "to

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[10] Article I, section 12, of the Oregon Constitution provides, in relevant part, that "[n]o person shall * * * be compelled in any criminal prosecution to testify against himself." That text "is identical to, and presumed to have been based on" the self-incrimination provision in the Indiana Constitution, which in turn was taken from the Kentucky and Ohio bill of rights, which in turn were based on the "nearly identically worded" self-incrimination provision in the federal constitution. *Davis*, 350 Or at 447-48. The Fifth Amendment to the United States Constitution provides, in relevant, part, that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself."

promote effective law enforcement, particularly when state and federal law enforcement agencies collaborate"). This court should adopt the federal rule and hold that Article I, section 12, does not impose a duty to clarify ambiguous *Miranda* invocations.

In addition, even if Article I, section 12, imposes a duty to clarify for ambiguous counsel invocations, it should not impose that duty for equivocal invocations of the right to cut off questioning. "When an accused attempts to invoke his right to counsel, he indicates that he feels comfortable dealing with the authorities only with the assistance of counsel" but "[t]hat is not the case in the right to remain silent context, and therefore, fewer procedural safeguards are appropriate when the accused invokes the right to remain silent." *Williams,* 535 NW 2d at 284-85.[11] Moreover, unlike the right to counsel which generally can be invoked only by using words, a suspect may attempt to invoke his right to cut off questioning by words, silence, or behavior. *See State v. Ross*, 203 Wisc 2d 66, 552 NW 2d 428, 432 (1996). Police officers would face an unmanageable task if they had to decide whether each and every silence, evasiveness, refusal, resistance, or gesture amounted to an equivocal invocation

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[11] Different consequences flow from the invocations of the right to have counsel present for questioning (questioning must cease until lawyer is provided) and the right to cut off questioning (questioning must cease for a reasonable period of time). *Kell*, 303 Or at 95-100 (lawyer); *Avila-Nava*, 356 Or at 609 n 3 (cut off questioning).

of the right to cut off questioning. *Id*. (stressing that a duty to clarify would be unworkable); *see also* Strauss, *Silence*, 17 Wm & Mary Bill Rts J at 787 n 75 (asserting that an "almost infinite range of ideas, including requests to be elsewhere or silence" could possibly signal a desire to invoke the right to cut off questioning).

For all the above reasons, this court should adopt the following ruling: when a suspect waives his *Miranda* rights, and then later makes an ambiguous invocation of the right to cut off questioning, Article I, section 12, does not impose a duty to clarify, and the officer may proceed with the interview unless and until the suspect makes an unequivocal invocation of the right to cut off questioning.[12]

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[12] If this court rejects the state's proposed rule, the court should adopt the rule advocated for by the *Berghuis* dissent rather than a *per se* rule imposing a duty to clarify. The dissent in *Berghius* would have held that even ambiguous invocations must be measured against the requirement that police scrupulously honor a suspect's request to cut off questioning but that some equivocal invocations are sufficiently ambiguous to not require a response by the police. 560 US at 408 (Sotomayor, J., dissenting); *see also Munson v. State*, 123 P3d at 1064 (Matthews, J., dissenting) (police precluded from responding to equivocal invocations by suggesting that the right to silence has been lost). Under that rule, the detective properly proceeded with interrogation even if defendant made an equivocal invocation. Defendant's statement was sufficiently vague not to require the cessation of questioning, the detective did not impermissibly coerce or badger defendant or suggest that the right to silence had been lost, and did not violate the directive that the police must honor a suspect's request to cut off questioning.

4. If defendant equivocally invoked the right to cut off questioning, the detective did not have a duty to clarify.

Application of the state's proposed rule in this case is straightforward. Article I, section 12, does not mandate that police officers halt questioning to clarify ambiguous invocations of the right to cut off questioning. Consequently, even if defendant's statement amounted to an equivocal invocation of the right to cut off questioning, the detective properly proceeded with the interview without clarifying defendant's intent. Therefore, the trial court erred by concluding that the detective violated Article I, section 12, and erred by suppressing defendant's statements. This court should reverse and remand.[13]

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[13] Defendant did not claim—and the trial court did not rule—that he invoked a "right" not to be asked a particular question or questions. Hence, that issue does not appear to be before this court. And any such claim would have failed for two reasons. First, as discussed above (App Br 20-28), a person does not have that "right." Second, in no event would Article I, section 12, impose a duty to clarify ambiguous invocations of that right. That is so for all of the reasons discussed above. (App Br 33-52). But it bears special emphasis that a "duty to clarify" "ambiguous invocations" of the "right not to be asked a particular question or questions" would be completely unworkable: an officer would continually have to halt an interrogation and clarify whether each and every pause, silence, resistance, evasiveness, non-responsiveness, or refusal was an invocation of the right not to be asked a particular question or questions and, if it was, the precise scope of that invocation (*viz*., precisely what topics was the person barring the police from asking him about). In short, if such a novel right exists, it is one that a suspect would have to unequivocally invoke, and no such invocation occurred here.

CONCLUSION

This court should reverse the trial court's order suppressing defendant's statements and remand for further proceedings. The detective did not violate Article I, section 12, by continuing with the interrogation. Defendant's statement was not an invocation—unequivocal or otherwise—of the right to cut off questioning. But even if defendant's statement was an equivocal invocation, the detective properly proceeded with the interrogation. This court should decline to impose an additional, *Miranda*-based, prophylactic rule under Article I, section 12, that would require police officers to clarify ambiguous invocations of the right to cut off questioning. There is no state constitutional basis for a duty to clarify, the federal constitution is the source of the state constitutional *Miranda* requirements, and the rule should be the same.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on July 5, 2016, I directed the original Appellant's Opening Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Anne Fujita Munsey, attorneys for respondent, cross-appellant, by using the court's electronic filing system.

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 13,235 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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