IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. WALTER PERRY LILE, Defendant-Appellant, Respondent on Review.	Curry County Circuit Court No. 11CR0023 CA A148884 SC S063031

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 Curry County
Honorable JESSE C. MARGOLIS, Judge

Opinion Filed: December 24, 2014
Before: Duncan, Presiding Judge
Concurring Judges: Haselton, Chief Judge, Wollheim, Senior Judge

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

INTRODUCTION AND STATEMENT OF THE CASE

In *State v. Spencer*, 305 Or 59, 750 P2d 147 (1988), this court held that an individual who has been arrested for—but not yet charged with—driving under the influence of intoxicants (DUII) has an Article I, section 11, right to consult with counsel before deciding whether to submit to a breath test. However, as this court explained more recently in *State v. Davis*, 350 Or 440, 477, 256 P3d 1075 (2011), *Spencer* "is difficult to reconcile with the text of Article I, section 11," and the "historical context" within which that provision was adopted. Although *Davis* did not need to reach the question of whether the Article I, section 11, right to counsel attaches upon arrest—and whether *Spencer* was correctly decided—this case squarely presents that issue. As explained below, *Spencer* was wrongly decided, and this court should overrule the decision from that case.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

Does Article I, section 11, of the Oregon Constitution provide a person arrested for—but not yet charged with—DUII a right to consult with counsel before deciding whether to submit to a breath test?

Proposed Rule of Law

Article I, section 11, of the Oregon Constitution provides an accused person with the right to counsel in "all criminal prosecutions." "Criminal prosecutions"—as understood when that provision of the Oregon Constitution was enacted in 1859, and as it remains understood today—begin with the filing of formal criminal charges. Consequently, a person who has been only arrested for DUII—but not yet charged by information or indictment—has no Article I, section 11, right to counsel.

SUMMARY OF ARGUMENT

This court should re-visit and overrule *Spencer*. *Spencer*'s application of the Article I, section 11, right to counsel is not grounded in history or a thorough analysis of that clause. And, this court in *Spencer* certainly did not apply the rigorous methodology for interpreting constitutional provisions it has since articulated in *Priest v. Pearce*, 314 Or 411, 840 P2d 65 (1992). Employing the *Priest* methodology demonstrates that *Spencer* was wrongly decided.

Under a correct understanding of Article I, section 11, this court should hold that the right to counsel does not attach until a district attorney's information or an indictment is filed. The right to counsel clause of Article I, section 11, provides that, "[i]n all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel[.]" By its terms, that right to counsel applies in only a "criminal prosecution." As the drafters of Article I, section 11, would have

understood that term, a "criminal prosecution" begins with the formal filing of criminal charges—not with an arrest. Additionally, the historical context within which Article I, section 11, was enacted is consistent with that understanding of when a "criminal prosecution" began and when the right to counsel attached. Furthermore, aside from *Spencer* and its limited progeny, this court's case law confirms that the Article I, section 11, right to counsel attaches only with the formal filing of criminal charges against the accused. *Spencer* is an anomaly and this court should overrule it.

FACTUAL AND PROCEDURAL BACKGROUND

A. The state charged defendant with DUII, and the trial court denied his motion to suppress the results of his breath test.

Gold Beach Police Officer Jeff Wood arrested defendant for DUII following a minor collision in a parking lot. (Tr 15-23). The officer twice advised defendant of his *Miranda* rights. (Tr 17-23). Upon arriving at the police station, the officer read defendant the implied consent rights and consequences and began the 15-minute observation period before administering a breath test. (Tr 24). Thereafter, Officer Wood requested that defendant submit to a breath test; defendant replied that he wanted to call his attorney. (Tr 25).

Officer Wood provided defendant a list that the jail maintains of local attorneys and their phone numbers. (Tr 26). Defendant had trouble reading the list and asked the officer to read him attorney Gardner's phone number, which he did.

(Tr 26, 59, 62). At that point, a jail staffer told them that he just had seen Gardner in court and that defendant would not be able to contact Gardner at his office. (Tr 26, 40-41). Defendant nevertheless persisted and steadfastly indicated that he did not want to call another attorney but wanted to contact only Gardner. (Tr 26-29).

Defendant made several calls; he eventually reached Gardner's receptionist, who told him that Gardner was in court. (Tr 27, 58, 62). Officer Wood was within earshot while defendant spoke to Gardner's receptionist. (Tr 27-28, 41-42). Defendant did not ask to call another attorney after he could not contact Gardner. (Tr 62). After 20 minutes—during which defendant had the opportunity to contact any attorney—Officer Wood asked defendant to take the breath test, and defendant did so. (Tr 28-30). The test yielded a blood alcohol content (BAC) of .155. (Tr 30).

The state charged defendant with DUII and reckless driving, and defendant moved to suppress the results of the breath test. (ER 1-2). Citing *State v. Durbin*, 335 Or 183, 63 P3d 576 (2003), defendant argued that he was denied his right to speak privately to his attorney's receptionist, because Officer Wood remained within earshot during the phone call. The trial court denied the motion, concluding that the officer gave defendant a reasonable amount of time to contact an attorney and that it had "no reason * * * to believe that the officer wouldn't have left if [defendant] were going to contact his attorney." (Tr 91). Consequently, the court

ruled that defendant's right to consult privately with counsel was not infringed upon or chilled. (Tr 92).

B. Relying on *Spencer* and *Durbin*, the Court of Appeals reversed the trial court's denial of the motion to suppress.

Before the Court of Appeals, defendant assigned error to the trial court's denial of his motion to suppress and renewed his argument that the breath-test evidence was obtained in violation of his Article I, section 11, right to counsel. *State v. Lile*, 267 Or App 712, 714, 341 P3d 162 (2014), *rev allowed*, 357 Or 164 (2015). Relying on this court's decisions in *Spencer* and *Durbin*, the Court of Appeals held that defendant had an Article I, section 11, right to privately consult with counsel before deciding whether to submit to a breath test. *Id.* at 716. Further, the court held that confidential communications between an attorney and his or her client can be "direct or indirect"; therefore "the right to counsel under Article I, section 11, includes the right to privacy when communicating with an attorney, through the attorney's representative." *Id.* at 718. Consequently, the court held that Officer Wood violated defendant's Article I, section 11, right to counsel by remaining within earshot while defendant spoke with his attorney's receptionist, and it reversed defendant's convictions. *Id.* at 719-20.

ARGUMENT

A. This court will correct past constitutional holdings that were wrongly considered or wrongly decided.

This court is "willing to reconsider" its own state constitutional holdings "whenever a party presents * * * a principled argument" that the earlier decision "wrongly considered or wrongly decided the issue in question." *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 54, 11 P3d 228 (2000). Although constitutional decisions should be "'stable and reliable,'" "there is a 'similarly important need to be able to correct past errors' because '[t]his court is the body with the ultimate responsibility for construing our constitution, and if [it] err[s], no other reviewing body can remedy that error.'" *Farmers Ins. Co. v. Mowry*, 350 Or 686, 693-94, 261 P3d 1 (2011) (quoting *Stranahan*, 331 Or at 53). Because *Spencer* was based on an incomplete application of the pertinent analytical methodology, because it was wrongly decided, and because overruling it will clarify rather than complicate the law, this court should re-assess it.

Correctly understood, the Article I, section 11, right to counsel attaches only upon formal charging. Consequently, here, Officer Wood did not violate defendant's constitutional rights when he remained within earshot while defendant spoke with his lawyer's receptionist before deciding whether to submit to a breath test.

B. This court should re-visit and overrule *Spencer*.

1. This court applied the wrong methodology in *Spencer*.

Spencer was the third in a series of cases presenting "a classic fact pattern" of a defendant being arrested for DUII, being directed to submit to a breath test, asking whether he could call his attorney before deciding whether to submit to the test, and then being told he could not do so. 305 Or at 61, 70. Eight years earlier, in *State v. Scharf*, 288 Or 451, 605 P2d 690 (1980), this court had held that the implied consent law, *former* ORS 487.805 (1978), required that a DUII arrestee be given an opportunity to speak with counsel before deciding whether to take or refuse the test and that the failure of police to give that opportunity required suppression of the breath test results in a DUII prosecution. *Spencer*, 305 Or at 63-64. This court did not address, in *Scharf*, whether the state or federal constitutions also contained such a right to counsel in that situation.

Two years after *Scharf*, this court revisited the right-to-counsel issue in *State v. Newton*, 291 Or 788, 636 P2d 393 (1981). In *Newton*, a plurality of this court overruled *Scharf*'s holding that a violation of the implied consent law required suppression of evidence. *Spencer*, 305 Or at 66. The plurality also "found no violation of state or federal guarantees of the right to counsel." *Id.* at 68. "Because the defendant had not yet been charged with a crime, the plurality concluded that no right to counsel under the Sixth Amendment or Article I, section 11, had attached at the time of the breath test." *Id.* However, the plurality did rule that an

arrestee has a Fourteenth Amendment liberty interest to contact an attorney in such a circumstance, but that the violation of that liberty interest in that case did not require suppression because there was no "causal relationship between the denial of access to counsel and the obtaining of the breath sample." *Id.* at 69

Against that backdrop, this court decided *Spencer*. In *Spencer*, this court first held that the implied consent law—now codified at ORS 813.100—"does not require that a driver be given access to counsel before submitting to a breathalyzer exam." *Spencer*, 305 Or at 72. This court next turned to whether Article I, section 11, provided a DUII arrestee with a right to consult with counsel before submitting to a breath test.

This court began its Article I, section 11, analysis by discussing the *Newton* decision:

> The *Newton* plurality rejected the argument that Oregon's right to counsel provision, Article I, section 11, prohibits the denial of access to counsel before a suspect undergoes a breathalyzer exam. The plurality first discussed the right to counsel under the federal constitution and concluded that the breathalyzer exam was not a 'critical stage' in a criminal prosecution that would trigger protection under the Sixth Amendment because, when the breath test was administered, the defendant had not yet been formally charged. * * * The plurality then turned to the state constitutional question.
>
> * * * * *
>
> As the *Newton* plurality recognized, the key to the applicability of Article I, section 11, lies in the meaning of the term 'criminal prosecutions.' We have, in the past, given that term an expansive interpretation. For example, we have held that the rights guaranteed under Article I, section 11, apply to prosecutions for misdemeanors as

> well as felonies. * * * Those rights also apply to all offenses that have the character of criminal prosecutions, whether or not they are statutorily labeled crimes. * * * Moreover, a 'criminal prosecution' does not end with the verdict; it extends to a presentence psychiatric interview. * * *
>
> Before *Newton*, our caselaw interpreting Article I, section 11, did not define the point at which a 'criminal prosecution' begins.

Spencer, 305 Or at 72-73 (citations omitted).

Following that discussion, this court concluded that it was "not persuaded by the *Newton* plurality's reasons for concluding that the right to seek the advice or assistance of counsel under Article I, section 11, attaches only after a formal charge is filed." *Spencer*, 305 Or at 74. This court was concerned that the *Newton* "opinion blurred the distinction between a person's right to have reasonable access to legal advice with the state's obligation to provide an indigent suspect with an attorney at the state's expense." *Id.* Consequently, this court held that Article I, section 11, provides a DUII arrestee with the right to consult with counsel before deciding whether to submit to a breath test:

> A person taken into formal custody by the police on a potentially criminal charge is confronted with the full legal power of the state, regardless of whether a formal charge has been filed. Where such custody is complete, * * * the arrested person is, at that moment, ensnared in a 'criminal prosecution.' * * *

> We hold that, under the right to counsel clause in Article I, section 11, an arrested driver has the right upon request to a reasonable opportunity to obtain legal advice before deciding whether to submit to a breath test.

Id. at 74-75.[1]

Although decided four years after *Spencer*, this court in *Priest* provided an analytical framework for interpreting and applying constitutional provisions. "There are three levels on which that constitutional provision must be addressed: Its specific wording, the case law surrounding it, and the historical circumstances that led to its creation." *Priest*, 314 Or at 415-16. The court's "goal is to ascertain the meaning most likely understood by those who adopted the provision" and to thereby "identify, in light of the meaning understood by the framers, relevant underlying principles that may inform [this court's] application of the constitutional text to modern circumstances." *Davis*, 350 Or at 446.

In *Spencer*, this court did not follow that analytical framework. Rather, it simply stated that it was "not persuaded" by the *Newton* plurality's contrary application of the Article I, section 11, right to counsel clause. 305 Or at 74. From there, without significant explanation or any authority, it held that "[a] person taken into formal custody by the police" is "ensnared in a 'criminal prosecution,'"

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[1] This court then "express[ed] no opinion on the *Newton* plurality's conclusion that the denial of access to an attorney violated the Fourteenth Amendment." *Spencer*, 305 Or at 75 n 4.

and is entitled to counsel. *Id*. Beyond that, this court in *Spencer* offered no insight into its analysis. It "made no attempt to ascertain the intent" of the people who adopted that provision and it did not examine "the text, history, and case law surrounding" that provision. *Stranahan*, 331 Or at 55. Instead, this court "concluded in summary fashion," *id.*, that the Article I, section 11, right to counsel applied before formal charging.

Until this court's recent decision in *Davis*, it had "never examined Article I, section 11, in terms of the interpretive analysis set out in *Priest*," for purposes of determining when the right to counsel "guaranteed by that provision 'attaches.'" *Davis*, 350 Or at 462. And, although it did not need to decide the question in *Davis*, this court also noted that the "holding in *Spencer* that the right to counsel under Article I, section 11, is triggered upon arrest is difficult to reconcile with the text of Article I, section 11, * * * as well as the historical context for the adoption of that provision." *Davis*, 350 Or at 477. Because *Spencer* did not follow the analytical path identified in *Priest*, and because—as this court has already recognized—its holding appears inconsistent with where that analytical path would lead, this court should now undertake that more rigorous analysis.

2. Applying the *Priest* analytical framework establishes that *Spencer* was wrongly decided because Article I, section 11's, right to counsel does not attach until criminal charges are formally filed.

When this court interprets and applies an original provision of the Oregon Constitution, it considers "[the provision's] specific wording, the case law

surrounding it, and the historical circumstances that led to its creation." *Priest*, 314 Or at 415-16. This court's "goal is to ascertain the meaning most likely understood by those who adopted the provision." *Davis*, 350 Or at 446; *see also State v. Sagdal*, 356 Or 639, 642, 343 P3d 226 (2015) ("We interpret referred constitutional amendments within the same basic framework as we interpret statutes: by looking to the text, context, and legislative history of the amendment to determine the intent of the voters."). That does not mean, however, "that the purpose of the *Priest* analysis is to fossilize the meaning of the state constitution so that it signifies no more than what it would have been understood to signify when adopted in the mid-nineteenth century." *State v. Mills*, 354 Or 350, 354, 312 P3d 515 (2013) (citing *Davis*, 350 Or at 446). Rather, this court's "goal is to determine the meaning of the constitutional wording, informed by general principles that the framers would have understood were being advanced by the adoption of the constitution." *Mills*, 354 Or at 354 (citing *State v. Savastano*, 354 Or 64, 72, 309 P3d 1083 (2013)).

a. The constitutional text suggests that the right to counsel applies only after formal charging.

The text of Article I, section 11, as originally adopted,[2] provides:

[2] The people have since amended Article I, section 11, by adding other guarantees concerning jury verdicts in first-degree murder trials. Or Const, Art I, § 11.

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

Or Const Art I, § 11 (1857). Thus, the rights provided in Article I, section 11—including the right to counsel—expressly apply only to "the accused" in "criminal prosecutions." Both terms "appear[] to connote the idea that the right attaches only upon the initiation of some sort of formal proceeding by the state against an individual," and that is likely how the framers would have understood them in 1857. *Davis*, 350 Or at 463. *See also MacPherson v. DAS*, 340 Or 117, 132, 130 P3d 308 (2006) ("[W]hen analyzing terms in original Oregon Constitution, court examines meanings of terms as framers would have understood them." (citing *Rico-Villalobos v. Giusto*, 339 Or 197, 206, 118 P3d 246 (2005)).

When the constitution was drafted, "prosecution" was defined in terms of formal criminal proceedings:

> PROSECUTION, *crim. law*, is the means adopted to bring a supposed offender to justice and punishment by due course of law. * * * The modes most usually employed to carry them on, are by indictment, * * * presentment of a grand jury, * * *coroner's inquest, * * * and by an information.

John Bouvier, 2 *A Law Dictionary Adapted to the Constitution and Laws of the United States of America* 306 (1848) (internal citations omitted; emphasis in original). *See also* Noah Webster, 2 *An American Dictionary of the English*

Language (1828) (reprint 1970) (defining "prosecution" as "[t]he institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment; as prosecutions of the crown or of the state by the attorney or solicitor general," and noting that "[p]rosecutions may be by presentment, information or indictment").

Similarly, an "accused"—particularly in the context of a "criminal prosecution"—was understood to be someone against whom a formal, written "accusation" had been brought. *See* Webster 1 *An American Dictionary* (defining "accused" as "[c]harged with a crime, by a legal process; charged with an offense; blamed"); Bouvier, 1 *A Law Dictionary* at 40 (defining "accusation" as "[a] charge made to a competent officer against one who has committed a crime or misdemeanor so that he may be brought to justice and punishment"). That understanding is supported by another right in Article I, section11—the right of the accused "to demand the nature and cause of the accusation against him, and *to have a copy* thereof." Or Const, Art I, § 11 (emphasis added). Because the provision gives the "accused" the right to "a copy" of "the accusation against him," the framers necessarily understood that the accusation would have been reduced to writing when the right attached. *See Davis*, 350 Or at 464 (so noting).

The context of Article I, section 11, further supports the understanding that the right to counsel does not attach until after formal proceedings have been

instituted. All of the rights provided in Article I, section 11, are trial rights. The provision begins by ensuring that "the accused shall have the right *to public trial* by an impartial jury in the county in which the offense shall have been committed." (Emphasis added). Next, the provision provides that the accused has the right—presumably in that "public trial"—"to be heard by himself and counsel." As noted above, the next right—"to demand the nature and cause of the accusation against him, and to have a copy thereof"—again suggests that some sort of formal, written "accusation" has been filed before the right applies. Finally, the remaining rights, concerning the confrontation of witnesses, "clearly refer to the conduct of trial." *Davis*, 350 Or at 464. *See also Mills*, 354 Or at 355 (noting that Article I, section 11, "lists 'a panoply of trial-related rights'" (quoting *State v. Harrell/Wilson*, 353 Or 247, 262, 297 P3d 461 (2013))). In sum, as this court has already recognized, the constitutional text suggests that the Article I, section 11, right to counsel is a trial right that attaches only after formal charges have been filed.

b. The historical circumstances surrounding Article I, section 11, further demonstrate that the framers intended the right to counsel to apply only after the defendant has been formally charged.

Article I, section 11, was "adopted without amendment or debate." *Davis*, 350 Or at 464 (citing Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857—Part I (Articles I & II)*, 37 Will L Rev 469, 517-18 (2001)). The historical circumstances surrounding Article I, section 11,

however, reveal "that the framers most likely understood its scope to be as limited as its text suggests, namely, that the right to the assistance of counsel is limited to the conduct of the trial or, at the earliest, proceedings following formal charges against an accused." *Davis*, 350 Or at 464.

"The right to counsel in the United States was not derived from English common law." *State ex rel. Russell v. Jones*, 293 Or 312, 326, 647 P2d 904 (1982) (Peterson, J., dissenting). Indeed, "[a]t English common law, a defendant accused of a felony actually was prohibited from being represented by counsel," although "individual judges had been known to permit felony defendants to obtain privately retained counsel on a case-by-case basis." *Davis*, 350 Or at 465 (citing William M. Beaney, *The Right to Counsel in American Courts* 8-11 (1955)). In 1696, Parliament granted defendants accused of treason a right to retain counsel, but it was not until 1836 that the right was extended to all felony defendants. *Davis*, 350 Or at 465.

The American colonies, in contrast, began granting criminal defendants the right to retain counsel in serious criminal cases as early as the mid-seventeenth century. *Id.* at 465-66. Before the Revolutionary War, at least seven colonies—Pennsylvania, Delaware, South Carolina, North Carolina, Virginia, Rhode Island, and Massachusetts—had recognized the right in some way. *See id.* (citing statutes and charters). "In each case, the scope of the prerevolutionary right to the

assistance of counsel was limited to assistance at trial or, at the earliest, after arraignment." *Id.* at 466.

"Following the Declaration of Independence, a majority of the states adopted constitutions that explicitly recognized a right to the assistance of counsel." *Id.* Many tied the right expressly to trial or to "criminal prosecutions." *Id.* at 466-67. Similarly, the Sixth Amendment to the United States Constitution grants the right to "the accused" in "criminal prosecutions." The text of those constitutional provisions—like the text of Article I, section 11—suggests that early Americans would have understood the right to counsel to be a trial right. Indeed, this court has recognized the "general agreement among historians that the Sixth Amendment and its state constitutional counterparts were understood to have a limited scope—they were originally understood to apply to the conduct of the criminal trial only and, even then, as a guarantee only of the right to *retained* counsel." *Id.* at 467 (emphasis in original). Case law in the early to mid-nineteenth century further supports the historians' understanding. *See id.* at 467-68 (collecting early cases indicating that right to counsel did not apply until, at the earliest, after formal charges were filed).

In sum, the historical context in which Article I, section 11, was adopted further supports the view that the framers would have understood the right to counsel to attach, at the earliest, after formal charges are filed. The state is aware of no historical sources suggesting that the right to counsel would have been

understood by the framers to apply before formal charging; instead, the "limited evidence that exists reveals that the constitutional guarantee was understood uniformly to apply to the conduct of the trial and, perhaps, post-arraignment trial preparation." *Davis*, 350 Or at 468.

c. Except for *Spencer* and its limited progeny, Oregon case law further supports the understanding that the right to counsel does not apply until after the defendant is charged.

Early Oregon case law is consistent with the constitutional text and the historical understanding discussed above. *Davis*, 350 Or at 472. For example, in *State v. Butchek*, 121 Or 141, 144, 253 P 367, *reh'g den*, 121 Or 141 (1927), the defendant walked into the Portland Police Station and told police that he had killed his wife. Later that day, the defendant gave a detailed statement in response to questioning by a deputy district attorney. *Id.* at 146. After being convicted of murder, the defendant appealed, arguing that the police had violated his Article I, section 11, right to counsel "and that he could not lawfully waive his right to be represented by counsel in the trial of the case or at any point of the investigation by the state." *Id.* at 152-53. This court rejected that argument, noting that a statute required that defendants be informed of their right to counsel after they have been "arrested, charged with a crime, and * * * brought before the magistrate." *Id.* at 153. The court held that the "defendant had a right to the aid of counsel and the

further right to consult with his counsel, and that right was accorded him in due time." *Id.* at 153.[3]

As explained above, in 1981, a plurality of this court expressly held that the Article I, section 11, right to counsel does not attach until "after the defendant is formally charged." *Newton*, 291 Or at 803. In short, the court reasoned that the "criminal prosecution" does not begin until that point:

> For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.

Id. (quoting *Kirby v. Illinois*, 406 US 682, 689-90, 92 S Ct 1877, 32 L Ed 2d 411 (1972) (plurality opinion)).

Two years later, the court again emphasized that the Article I, section 11, right to counsel "remains focused on the trial; that is, it is the protection of rights to which a defendant is entitled in the trial itself which the guarantee is intended to preserve." *State v. Sparklin*, 296 Or 85, 94, 672 P2d 1182 (1983). The defendant in *Sparklin* had been formally charged at the time of the relevant questioning, so

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[3] *See also State v. Leland*, 190 Or 598, 626-27, 227 P2d 785 (1951) (citing *Butchek* for the proposition that police were not required to advise a suspect of the right to counsel when he had confessed before being brought before a magistrate); *State v. Henderson*, 182 Or 147, 173, 184 P2d 392, *reh'g den*, 182 Or 147 (1947) (citing *Butchek* for proposition that an "extra-judicial confession" is admissible even if police did not inform accused of right to counsel).

this court explained that it was "not presented in this case with the question whether the Article I, section 11 right to an attorney may attach at any time earlier than the federal right." *Id.* at 92, n 9. Although this court recognized that having counsel "during the investigative stage" may be important, it did not hold that the Article I, section 11, *right* to counsel attaches before formal criminal proceedings have begun. *Id.* Further, this court's emphasis on the right to counsel as a trial right is consistent with the view that the right does not attach until the formal initiation of a criminal proceeding.

Five years later, however, this court decided *Spencer*. As explained above, *Spencer* held that a driver arrested for DUII has an Article I, section 11, right to consult with counsel before deciding whether to submit to a breath test. 305 Or at 74-75.

Notably, although this court announced a limited right to counsel that may attach upon arrest in some circumstances, the holding of *Spencer* is very narrow. Indeed, in the 26 years since *Spencer* was decided, this court has relied on *Spencer* only twice when applying Article I, section 11.[4] *See State v. Durbin*, 335 Or 183,

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[4] This court has mentioned the *Spencer* right on two other occasions, without fully analyzing the issue. *Gildroy v. MVD*, 315 Or 617, 621-22, 848 P2d 96 (1993) (distinguishing *Spencer* because an administrative license suspension hearing "is not a criminal proceeding"); *State v. Trenary*, 316 Or 172, 174 n 2, 850 P2d 356 (1993) (declining to address Article I, section 11, issue because state had not sought review of it, but noting that *Spencer* addressed issue). This court has also cited *Spencer* for its holding concerning the purpose of the implied-consent

Footnote continued…

190, 63 P3d 576 (2003) (holding that the Article I, section 11, right to counsel included the right to consult privately with counsel); *State v. Dinsmore*, 342 Or 1, 10, 147 P3d 1146 (2006) (holding that violation of the Article I, section 11, right to consult with counsel before submitting to a breath test requires test results to be suppressed in all cases—not just for DUII charges). Both cases arose in the same factual context as *Spencer*: police asked an individual who had been arrested for DUII to perform a breath test; however, in neither case did the parties argue—or did this court appear to consider—whether *Spencer* represented a correct application of Article I, section 11.

d. Applying those underlying principles to modern circumstances produces the same result: the right does not apply until formal charges are filed.

The text, history, and case law—with the exception of *Spencer* and its limited progeny—surrounding Article I, section 11, demonstrate that the framers likely would have understood that criminal defendants were entitled to the assistance of counsel only at the trial itself. However, this court does not "freeze the meaning of the state constitution in the mid-nineteenth century" and instead applies the "relevant underlying principles" to "modern circumstances." *Davis*, 350 Or at 446.

(…continued)
laws. *State v. Cabanilla*, 351 Or 622, 634, 273 P3d 125 (2012); *State v. Machuca*, 347 Or 644, 658, 227 P3d 729 (2010); *State v. Fish*, 321 Or 48, 77 n 1, 893 P2d 1023 (1995) (Van Hoomissen, J., concurring in part and dissenting in part).

As this court explained in *Davis*, "the nature of law enforcement and public criminal prosecution" has changed since the Oregon Constitution was drafted. *Id.* at 469. "[B]efore the Civil War, organized police forces as we know them did not exist, professional prosecutors were rare, criminal investigations of the sort that are familiar today did not occur, and the evidence against a criminal defendant ordinarily was marshalled during the trial itself." *Id.* As a result, this court has—applying Article I, section 11, to modern circumstances—expanded the *scope* of the right, so that it applies to every step of the criminal prosecution, rather than solely at trial. *See id.* at 478 (describing expansion); *see also id.* at 469-72 (describing similar expansion of Sixth Amendment).

In *Sparklin*, for example, this court reasoned that, "once a person is charged with a crime he or she is entitled to the benefit of an attorney's presence, advice and expertise in any situation where the state may glean involuntary and incriminating evidence or statements for use in the prosecution of its case against defendant," such as interrogations. 296 Or at 93. Thus, once the right to counsel attaches, police may not interrogate the defendant "concerning the events surrounding the crime charged unless the attorney representing the defendant on that charge is notified and afforded a reasonable opportunity to attend." *Id.* *See also United States v. Gouveia*, 467 US 180, 189, 104 S Ct 2292, 81 L Ed 2d 146 (1984) (Sixth Amendment right to counsel applies where "the results of the confrontation 'might well settle the accused's fate and reduce the trial itself to a

mere formality'" (quoting *United States v. Wade*, 388 US 218, 224, 87 S Ct 1926, 18 L Ed 2d 1149 (1967)).

In sum, this court has appropriately applied the underlying principles of Article I, section 11, to modern circumstances by affording criminal defendants counsel at all key stages of the criminal prosecution, rather than solely at trial. But the same reasoning does not permit the court to expand the right *beyond* the criminal prosecution, so that it applies before the state has even initiated formal criminal proceedings. *See Davis*, 350 Or at 471, 478 (describing distinction between determining scope of right and determining when "criminal prosecution" has been initiated). The filing of formal charges "is the starting point of our whole system of adversary criminal justice." *Kirby*, 406 US at 689. "It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Id.* Before that point—even if the individual has been taken into custody and is enmeshed in the criminal justice *system*—there simply is no "criminal prosecution."

Put simply, expanding the right to counsel beyond the criminal prosecution itself would be inconsistent with the "underlying principles" of Article I, section 11. *See Sparklin*, 296 Or at 94 (the right to counsel "remains focused on the trial"). *See also Gouveia*, 467 US at 188-89 ("[T]he 'core purpose' of the counsel guarantee is to assure aid at trial, 'when the accused [is] confronted with both the

intricacies of the law and the advocacy of the public prosecutor.'" (quoting *United States v. Ash*, 413 US 300, 309, 93 S Ct 2568, 37 L Ed 2d 619 (1973))). For that reason, even when state and federal courts have expanded the right to counsel beyond the trial itself, "they uniformly adhered to the conclusion that the text of the guarantee and its underlying purpose could not justify extending the right to encounters before the initiation of formal criminal proceedings." *Davis*, 350 Or at 472. The same analysis applies under Article I, section 11.

3. Overruling *Spencer* will clarify the law.

As this court's Article I, section 11, case law currently stands, *Spencer* and its limited progeny are an anomaly. As *Durbin*, *Dinsmore*, and *Spencer* make clear, this court's holding in *Spencer* was narrow: "an arrested *driver* has the right upon request to a reasonable opportunity to obtain legal advice *before deciding whether to submit to a breath test*." *Spencer*, 305 Or at 74-75 (emphasis added). Indeed, this court has never expanded *Spencer* beyond the limited context of a post-arrest request to take a breath test. *See State v. Randant*, 341 Or 64, 70, 136 P3d 1113 (2006), *cert den*, 549 US 1227 (2007) (Article I, section 11, right to counsel "attaches when the state indicts a defendant and does so 'independently of any invocation of that right by [the] defendant * * *.'" (quoting *Sparklin*, 296 Or at 92) (omission in *Randant*); *State v. Acremant*, 338 Or 302, 308, 321 n 17, 108 P3d 1139, *cert den*, 546 US 864 (2005) (stating that Article I, section 11, was not "applicable at the time when defendant made his disputed statements," which were

made post-arrest); *State v. Moore*, 324 Or 396, 401–02, 927 P2d 1073 (1996) (arrested murder suspect did not have non-waivable right to consult with counsel before questioning). *See also Kirby*, 406 US at 689–90 (Sixth Amendment right to counsel does not attach until formal charging).

Moreover, even when an individual has been arrested for DUII and asked to take a breath test, "the right to counsel at that stage of the criminal prosecution is not as broad as the right to counsel that an accused enjoys at trial." *Durbin*, 335 Or at 189. The arrested individual has a right only to a "reasonable opportunity to obtain legal advice," not the right to have counsel appointed at state expense. *See Spencer*, 305 Or at 74 (noting that *Newton* had "blurred the distinction between a person's right to have reasonable access to legal advice with the state's obligation to provide an indigent suspect with an attorney at the state's expense"). Further, unlike the trial right, the *Spencer* right arises only "upon request." *Id.* In sum, this court's case law reinforces the understanding that the right to counsel applies only after formal charges have been filed, with the anomalous exception that a limited right applies during a post-arrest request to take a breath test.

Without a principled basis for *Spencer*'s exception to the clear rule that Article I, section 11, rights attach only upon formal charging, courts and parties will continue to be confused by how expansive the *Spencer* exception is and whether any other exceptions exist. That confusion, in turn, will continue to lead to seemingly inconsistent results. *Compare State v. Veatch*, 223 Or App 444, 450–

52, 196 P3d 45 (2008) (officer did not violate the defendant's rights by remaining in room when the defendant left voicemails for attorney and spoke with his mother in attempt to locate attorney, because a suspect has no right to confidentiality when *seeking* an attorney) *with Lile*, 267 Or App at 718–19 (officer violated defendant's rights by remaining in room while defendant spoke with receptionist, because receptionists can "serve as a conduit of confidential communications between a client and the attorney" and "[t]he officer's presence could have had a chilling effect on defendant's communications" by limiting the information that defendant chose to relay).

Aside from inconsistent application of the *Spencer* right to counsel, providing a right to counsel pre-charging may also present fundamental federal equal protection concerns under *Gideon v. Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 (1963). In *Gideon*, the United States Supreme Court held that, for the Sixth Amendment right to counsel to be meaningful, the government must provide counsel for any person "too poor to hire a lawyer." 372 US at 344. Neither *Gideon* nor its progeny distinguishes among various parts of a criminal proceeding as providing a greater or lesser need to ensure that all people with a constitutional right to counsel have an attorney appointed for them if they cannot

otherwise afford one.[5] Therefore, if the Oregon Constitution provides a right to counsel, to ensure that "every defendant stands equal before the law"—rich or poor—*Gideon* would require that the state provide that counsel at no cost to individuals who could otherwise not afford to hire an attorney.

To be sure, this court in *Spencer* sought to dispose of such concerns by declaring that the right to counsel in this circumstance was more limited, and it "doubt[ed] that the [United States] Supreme Court would take the dictates of [*Gideon*] and its progeny that far." *Spencer*, 305 Or at 74. In reliance on that *dictum* in *Spencer*, the Court of Appeals has expressly held that the state is not required to provide a lawyer for a person arrested for DUII. *State v. Smalls*, 201 Or App 652, 657, 120 P3d 506 (2005), *rev den*, 340 Or 158 (2006). However, it is not clear how—if Article I, section 11, provides an individual with a right to counsel—the state would not be required to provide that counsel to an indigent person under the equal protection rationale from *Gideon*.

Finally, overruling *Spencer* in this case will not cause any undue hardships to citizens of this state. Under current law, when an arrestee requests to speak with an attorney before submitting to a breath test, law enforcement officers make every effort to honor that request by providing the arrestee with an opportunity to contact

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[5] Of course *Gideon* operated from the assumption that the Sixth Amendment right to counsel did not attach until formal charges were filed.

and consult with counsel. Therefore, anyone who has a case currently pending anywhere in the criminal justice system who requested to speak with an attorney before submitting to a breath test will have been given that opportunity. No one with a pending case will be disadvantaged by a change in the law in this case.

Further, the right to counsel in a criminal prosecution, unlike other constitutional rights like freedom of expression and freedom of worship, is not a right around which most citizens structure their daily lives. That is, it is unlikely that anyone is making a calculated decision to put themselves in a position to be arrested for DUII in reliance on the belief that he or she will get to speak with an attorney before submitting to a breath test. To change the contours of how and when that right applies would not fundamentally change the relationship between the state and its citizens or the relationship among the citizens of the state.

C. Officer Wood did not violate defendant's Article I, section 11, right to counsel by remaining within earshot when defendant spoke with his attorney's receptionist.

Because this court in *Spencer* accelerated the attachment of the right to counsel to a point in time before the initiation of a "criminal prosecution," this court should overrule that decision, and it should hold that the Article I, section 11, right to counsel does not attach until the state has filed formal charges. Based on that correct understanding of Article I, section 11, this court should conclude that Officer Wood did not violate defendant's Article I, section 11, right to counsel when he remained within earshot while defendant spoke with his attorney's

receptionist before deciding whether to submit to a breath test. Although defendant was under arrest at that time, no formal charges had been filed against him; therefore, Article I, section 11, did not provide him with a right to counsel.[6]

[6] There is no issue in this case about whether defendant had a right to counsel under Article I, section 12, of the Oregon Constitution or the Fifth Amendment to the United States Constitution. That constitutional right—commonly referred to as a *Miranda* right to counsel—can attach before formal charges have been filed, but only when a suspect is in custody or compelling circumstances and is being subjected to interrogation. *See, e.g.*, *State v. Roble-Baker*, 340 Or 631, 638, 136 P3d 22 (2006) (recognizing that *Miranda* warnings are required under Article I, section 12, "before questioning" by police of a person who is in "full custody" or in compelling circumstances); *McNeil v. Wisconsin*, 501 US 171, 182 n 3, 111 S Ct 2204, 115 L 3d 2d 158 (1991) ("We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation[.]'"). Asking a person to take a breath test or a field sobriety test is not "interrogation" for purposes of *Miranda* right to counsel attaching. *See State v. Higley*, 236 Or App 570, 573, 237 P3d 875 (2010) (so holding, citing *South Dakota v. Neville*, 459 US 553, 564 n 15, 103 S Ct 916, 74 L Ed 2d 748 (1983); *State v. Gardner*, 236 Or App 150, 155, 236 P3d 742 (2010); and *State v. Cunningham*, 179 Or App 498, 502, 40 P3d 535, *rev den*, 334 Or 327 (2002)).

CONCLUSION

For all of the foregoing reasons, this court should reverse the decision of the Court of Appeals, and it should affirm the decision and the judgment of the circuit court.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on July 14, 2015, I directed the original Brief on the Merits of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Andrew Robinson, attorneys for appellant, by using the 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 7,531 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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