IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. JESUS R. PRIETO-RUBIO, Defendant-Appellant, Respondent on Review.	Washington County Circuit Court No. C11693CR; C112523CR CA A152030 (Control), A152033 SC S062344

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 Washington County
Honorable THOMAS KOHL, Judge

Opinion Filed: April 2, 2014
Author of Opinion: Garrett, J.
Before: Duncan, P.J., Garrett, J., and Schuman, S.J.

Continued…

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STATEMENT OF THE CASE

This case presents an issue of first impression for this court: When an individual has been charged with a crime and thus has an Article I, section 11, right to counsel as to that crime, do the police violate that right by questioning the individual about an uncharged crime that occurred at a different time and that shares no causal link with the charge? As explained fully below, the answer to that question is "no."

In this case, a 12-year-old girl, A, reported that defendant had sexually abused her. Defendant was interviewed, arrested, and charged with two counts of first-degree sexual abuse of A. He retained counsel to represent him on those charges. Almost two months later, two more girls, K and L, disclosed that defendant had sexually abused them. Their abuse occurred at least eight months before defendant sexually abused A. Police interviewed defendant about K's and L's allegations without first notifying his counsel. At issue is whether the police violated defendant's Article I, section 11, right to counsel when they questioned defendant about the uncharged allegations.

The police did not violate defendant's right to counsel. Because defendant had not yet been charged with any crimes against K and L, he had no constitutional right to counsel with respect to those allegations. Further, police

did not attempt to elicit (and, in fact, did not elicit) any information about A or the events surrounding her abuse, instead focusing the questioning on the earlier events involving K and L. For that reason, the police did not violate defendant's constitutional right to counsel in the ongoing criminal prosecution for his crimes against A. The Court of Appeals erred by holding otherwise, and this court should therefore reverse the decision of the Court of Appeals and affirm the trial court judgment.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

When an individual has been charged with a crime and thus has an Article I, section 11, right to counsel as to that crime, does the right to counsel extend to other, uncharged allegations?

First Proposed Rule of Law

The text, history, and case law surrounding Article I, section 11, demonstrate that the right to counsel does not attach until an individual has been charged with a crime. Thus, an individual has no right to counsel for uncharged allegations.

Second Question Presented

When an individual has been charged with a crime and thus has an Article I, section 11, right to counsel as to that crime, under what circumstances may police question that individual about related, uncharged criminal acts?

Second Proposed Rule of Law

Once an individual has been charged with a crime, the police may not question the individual about the charged crime or the events surrounding it—*i.e.* the "criminal episode"—without first notifying the individual's counsel and giving counsel an opportunity to attend. In some cases, the events surrounding the charged crime will include uncharged criminal acts, if they occurred immediately before or after the charged crime or otherwise share a direct causal link, such that the acts arise from one another or are part of the same chain of events. However, the police are free to question the individual about alleged crimes that are similar in type to the charged crime but are otherwise unrelated.

SUMMARY OF ARGUMENT

Police questioned defendant about his sexual abuse of two victims, K and L, after he had been charged with sexual abuse of a different victim, A. At issue in this case is whether police violated defendant's Article I, section 11, right to counsel by doing so. That issue reduces to two questions: (1) Did defendant have a right to counsel as to the allegations involving K and L? and (2) If not, did police nonetheless violate his right to counsel in the ongoing criminal prosecution involving A? Because the answer to both questions is "no," this court should reverse the Court of Appeals' decision and affirm the trial court judgment.

The text, history, and case law surrounding Article I, section 11, demonstrate that the right to counsel does not attach until the state has begun a "criminal prosecution" against the defendant—that is, until after the defendant has been formally charged. Because defendant had not been charged with any crimes against K and L at the time of the questioning, he had no right to counsel as to their allegations. This court has announced one exception; a limited right to counsel attaches for a driver who has been arrested for driving under the influence of intoxicants (DUII): the driver "has the right upon request to a reasonable opportunity to obtain legal advice before deciding whether to submit to a breath test." *State v. Spencer*, 305 Or 59, 74-75, 750 P2d 147 (1988). Here, defendant had not been arrested for DUII and did not request to speak with his attorney. Thus, *Spencer* does not apply.

The only remaining question is whether police violated defendant's Article I, section 11, right to counsel in the ongoing criminal prosecution involving A when they questioned defendant about his abuse of K and L. Because defendant had been charged with the crimes against A and had retained a lawyer to defend him against those charges, defendant clearly had an Article I, section 11, right to counsel as to those charges. Thus, the police were not permitted to question defendant about his sexual abuse of A or the surrounding events without first notifying his attorney. However, the police limited their questioning to defendant's alleged sexual abuse of K and L. Defendant

sexually abused A at least eight months after he abused K and L, and K and L were not present when defendant abused A. The police therefore did not question defendant about the events surrounding his abuse of A by questioning him about K and L. As a result, Detective Rookhuysen did not violate defendant's right to counsel.

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

SUMMARY OF MATERIAL FACTS

A. After defendant had been charged with crimes against one victim and retained counsel, police questioned him about sexual abuse of two other victims that had occurred at least eight months before the charged crime.

On August 8, 2011, Detective Rookhuysen was notified that a 12-year old girl, A, had reported that defendant had sexually abused her. (Tr 45, 47). A disclosed that, on the night of August 7 or the morning of August 8, defendant had touched her breasts and vaginal area. (ER 3[1]; Tr 46). On August 9, Detective Rookhuysen interviewed defendant at his home; defendant admitted that he had been in the room with A, but said that he did not remember what

[1] "ER" refers to the excerpt of record attached to defendant's opening brief in the Court of Appeals. "ER 3" is the indictment involving the crimes against A and is two pages; "ER 4" is the indictment involving the crimes against the other victims and is also two pages.

had happened. (Tr 47-49). At the end of the interview, Detective Rookhuysen arrested defendant. (Tr 51-52).

Later that day, Detective Rookhuysen again interviewed defendant, after reading him his *Miranda* rights. (Tr 52-53). He asked defendant about A, as well as other children who had visited defendant's home. (Tr 71, 74). In particular, the first name of another victim, K, came up. (Tr 76-77). However, Detective Rookhuysen did not know how to find K, because he had only her first name. (Tr 77). The state ultimately charged defendant with two counts of first-degree sexual abuse of A, and he retained counsel to defend him against those charges. (ER 3; Tr 69).

Almost two months later, on September 27, 2011, K and L each disclosed that defendant had sexually abused them on discrete occasions in 2009 or 2010. (Tr 57-59, 84-85; ER 4). K stated that defendant had touched her vaginal area approximately 10 times on the same day. (Tr 58). L disclosed that she had stayed at defendant's home and that defendant had put his hand in her pants and touched her vaginal area. (Tr 58-59). She reported that the touching happened one time. (Tr 59). According to the victims' statements, the incidents of abuse occurred while each victim was alone with defendant; they were separate

events. (Tr 85-86). They also occurred at least eight months before defendant abused A. (ER 3, 4).[2]

On October 5, 2011, Detective Rookhuysen and Detective Cook visited defendant at the Washington County Jail, where he was being held on the charges pertaining to A. (Tr 56, 69-70). The detectives read defendant his *Miranda* rights and interviewed him about K and L's disclosures. (Tr 56, 67). Detective Rookhuysen knew that defendant was represented for his crimes against A, but did not contact defendant's lawyer because he planned to talk to defendant about only K and L. (Tr 69, 71, 87). Defendant did not ask to speak to his lawyer until the end of the interrogation, at which point the detectives stopped questioning him. (Tr 61).

When asked how he knew that he was not going to end up questioning defendant about the crimes against A, Detective Rookhuysen testified as follows:

> Well, I think it's impossible to have a conversation with him and not have some overlap. These are family members. So I mean, I think that it's fair to say, you know, a name might have come up.
>
> But at this point, he'd been charged on the first victim, and I was completely focused on victims two and three.

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[2] The state alleged that the crime against L occurred between January 1, 2010 and January, 1, 2011, and that the crimes against K occurred between August 31, 2009 and January 1, 2011. (ER 4). In other words, those crimes occurred—at the latest—on January 1, 2011, eight months before the crimes against A. (ER 3, 4).

(Tr 73-74). On cross-examination, defense counsel asked Detective Rookhuysen if he had talked with defendant, during all three interviews, about "the universe of kids who [had come] to his house" during the previous two years. (Tr 74). Detective Rookhuysen said that was "fair to say," but when asked who was mentioned in each interview, he responded,

> Well, I think there, in the first interview, I think at that point, I think I had a first name for one of the victims to come—that were going to come forward. Or that I thought could be potential victims; I'll say it that way.
>
> But, no, that third interview, the focus is on the new victims. They were the ones that I lacked any statement from the defendant about. That was — that was the focus, yeah, [L and K]. That was the focus of that third interview in the jail.

(Tr 74-75).[3]

During the interview, defendant made incriminating statements concerning K and L. The state then charged defendant with three counts of first-degree sexual abuse—two counts involving K and one involving L. (ER 4). On the state's motion, the trial court consolidated for trial the case involving A with the case involving K and L. (Tr 111).

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[3] Indeed, as became clear at trial, Detective Rookhuysen mentioned A only as a segue to informing defendant that the police wanted to talk with defendant about other potential victims (in other words, *not* A). (Tr 382). At no point during the interview did Detective Rookhuysen and defendant discuss defendant's crimes against A. (Tr 380-409). However, the recorded interview was not played at the suppression hearing, and Detective Rookhuysen did not testify as to the contents of the interview at the hearing.

Pretrial, defendant moved to suppress defendant's statements concerning K and L. He argued that the detectives had violated his constitutional rights by interviewing him about K and L without notifying his attorney. (Tr 90). The trial court denied defendant's motion, determining that defendant's actions against K and L "involved a different time frame and different victims and result in the allegations of different crimes" than his actions against A. (Tr 103-04). Defendant waived his right to a jury trial, and the court found him guilty of one count each of sexual abuse against K and L, and two counts of attempted sexual abuse against A. (ER 1, 2).

B. The Court of Appeals reversed defendant's convictions, holding that police had violated his Article I, section 11, right to counsel.

Defendant appealed, assigning error to the trial court's denial of his motion to suppress. The Court of Appeals reversed, reasoning that the police had violated defendant's Article I, section 11, right to counsel. *State v. Prieto-Rubio*, 262 Or App 149, 160, 324 P3d 543 (2014). The court relied on *State v. Sparklin*, 296 Or 85, 93, 672 P2d 1182 (1983), in which this court held that, after a defendant has been charged with a crime, police may not question him "concerning the events surrounding the crime charged" without first notifying the defendant's attorney. In *Sparklin*, this court explained that the Article I, section 11, right to an attorney "is specific to the criminal episode in which the

accused is charged" and does "not extend to the investigation of factually unrelated criminal episodes." *Id.* at 95.

Here, the Court of Appeals reasoned that the "criminal episodes" involving A, K, and L "were 'factually related' for purposes of defendant's right to counsel." *Prieto-Rubio*, 262 Or App at 157. The court acknowledged that the incidents "were separated by as much as two years" and that the crimes did not involve overlapping evidence. *Id.* at 157-58. However, the court noted that the crimes all occurred in defendant's home and involved similar conduct against similar victims. *Id.* at 158. The court also reasoned that Detective Rookhuyzen conducted a "single, unified investigation of defendant's crimes" against all three victims. *Id.* at 159.

The Court of Appeals explained that it could not "simply take at face value the [Supreme Court's] statement [in *Sparklin*] that the Article I, section 11, right 'is specific to the criminal episode in which the accused is charged.'" *Id.* (quoting *State v. Potter*, 245 Or App 1, 7, 260 P3d 815 (2011), *rev den*, 351 Or 586 (2012)) (first alteration in *Prieto-Rubio*; second alteration added). The court held that the right extends not just to the charged criminal episode, but to all "factually related" criminal episodes, regardless of "how they happen to be charged." *Prieto-Rubio*, 262 Or App at 159-60. The court reasoned that the criminal episodes in this case were "factually related," because there was "a distinct possibility" that defendant might have offered incriminating

information about A during the interview concerning K and L and because "the criminal episodes were handled by the same investigator who apparently treated them as linked from the very beginning[.]" *Id.*

The Court of Appeals therefore determined that the trial court had erred by denying defendant's motion to suppress the statements made during the interview concerning K and L. *Id.* at 160. Because defendant did not disclose any incriminating information about A during that interview, the court affirmed the convictions involving A. *See id.* at 151, n 2, 160. However, the court reversed the convictions involving K and L. *Id.* at 160.

ARGUMENT

At issue is whether police violated defendant's Article I, section 11, right to counsel when they questioned him about the allegations involving K and L, after defendant had been charged with crimes against A. Resolving that issue requires answering two analytically distinct questions: (1) Did defendant have an Article I, section 11, right to counsel as to the allegations concerning K and L? and (2) If not, were defendant's alleged acts against K and L part of the events surrounding his crimes against A, such that the questioning nonetheless violated defendant's right to counsel in the ongoing criminal prosecution involving A? Because the answer to both questions is "no," this court should reverse the Court of Appeals' decision and affirm the trial court judgment.

A. Defendant had no right to counsel as to the allegations involving K and L.

The text, history, and case law surrounding Article I, section 11, demonstrate that the constitutional right to counsel does not attach until an individual has been formally charged with a crime. This court has announced a limited exception to that rule, by holding that a driver who has been arrested for driving under the influence of intoxicants (DUII) "has the right upon request to a reasonable opportunity to obtain legal advice before deciding whether to submit to a breath test." *State v. Spencer*, 305 Or 59, 74-75, 750 P2d 147 (1988). But that case is inapposite here. Police did not arrest defendant for DUII or ask him to take a Breathalyzer test. Nor did he request an opportunity to speak with counsel before police questioned him. Because defendant had not been charged with any crimes against K and L when police questioned him, he had no right to counsel as to those allegations.

1. The text, history, and case law surrounding Article I, section 11, demonstrate that the right to counsel attaches only after a defendant has been formally charged.

To analyze an original provision of the Oregon Constitution, this court considers three factors: "[the provision's] specific wording, the case law surrounding it, and the historical circumstances that led to its creation." *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992). 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 [the court's] application of the constitutional text to modern circumstances." *State v. Davis*, 350 Or 440, 446, 256 P3d 1075 (2011). As this court recently explained in *Davis*, applying that analysis to Article I, section 11, demonstrates that the right to counsel applies only after an individual has been formally charged with a crime.[4]

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,[5] provides:

> In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offence 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).

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[4] In *Davis*, the court explained that this court's decision in *Spencer* indicated that the right attached earlier, on arrest. *Davis*, 350 Or at 477. Ultimately, the court did not need to determine whether the right attached after formal charging or on arrest, because the defendant in *Davis* had not been taken into formal custody when the alleged violation occurred. *Id.* The state addresses *Spencer* in the argument below.

[5] 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.

Thus, the rights provided in Article I, section 11—including the right to counsel—apply only to "the accused" in "criminal prosecutions." As this court explained in *Davis*, 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. Department of Administrative Services*, 340 Or 117, 132, 130 P3d 308 (2006) ("when 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 (1839) (internal citations omitted). *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 likely 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, section 11—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 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 State v. Mills*, 354 Or 350, 355, 312 P3d 515 (2013) (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 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—Rhode Island, South Carolina, North Carolina, Massachusetts, Virginia, Pennsylvania, and Delaware—had recognized the right in some way. *Davis*, 350 Or at 465-66 (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." *Davis*, 350 Or 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." *Davis*, 350 Or at 467. 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).

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. The majority of 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 the 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, "This 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.[6]

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." *State v. Newton*, 291 Or 788, 803, 636 P2d 393 (1981). 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

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[6] *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 (1947) (citing *Butchek* for proposition that an "extra-judicial confession" is admissible even if police did not inform accused of right to counsel).

questioning, so the 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 the court recognized that the right to counsel "during the investigative stage," is important, the court did not hold that the right attaches before formal criminal proceedings have begun. *Id.* Further, the 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 initiation of trial proceedings.

Five years later, however, this court changed course in *State v. Spencer.* In that case, police had arrested the defendant for DUII and asked him to take a Breathalyzer test. 305 Or at 61. When the defendant asked if he could call his attorney before deciding whether to take the test, the police told him that he could not. *Id.* The issue presented was whether, under Article I, section 11, "an arrested driver has the right to call an attorney before deciding whether to submit to a breath test." *Id.* at 63.

The court held that the defendant's Article I, section 11, right to counsel attached when he was arrested and that the police had violated that right by denying him the opportunity to speak with his lawyer. *Id.* at 74-75. The court reasoned that a person who has been "taken into formal custody by the police on a potentially criminal charge is confronted with the full legal power of the state" and thus is "ensared in a 'criminal prosecution.'" *Id.* at 74. As a result,

the court held that "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.

Notably, although this court announced a limited right to counsel that may attach upon arrest in some limited 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.[7] 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.

In *State v. Durbin*, 335 Or 183, 185, 63 P3d 576 (2003), police arrested the defendant for DUII and took him to the county jail to take a breath test. At the jail, the defendant stated that he wanted to talk to a lawyer. *Id.* The officer gave the defendant a list of lawyers, whom the defendant attempted to contact by phone. *Id.* The defendant eventually reached a lawyer who was willing to

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[7] This court has mentioned the *Spencer* right on two other occasions, without fully analyzing the issue. *Gildroy v. Motor Vehicles Division*, 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, 174, 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 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).

consult with him; "[t]he arresting officer remained in the room and within earshot while [the] defendant conferred with that lawyer." *Id.* This court held that the right to "a reasonable opportunity to obtain legal advice" included a right to consult *privately* with counsel. *Id.* at 190. The court further held that, after the defendant requested the opportunity to speak with counsel, he was not required to separately request the opportunity to speak privately with counsel. *Id.* at 191. Thus, the officer violated the defendant's right to counsel by remaining within earshot while the defendant conferred with the lawyer.

In *State v. Dinsmore*, 342 Or 1, 147 P3d 1146 (2006), the court applied *Durbin.* The defendant had been arrested for DUII and reckless driving after crashing into two other vehicles, killing one of the other drivers. *Id.* at 3. Police took her to the police station to take a Breathalyzer test. Although the police permitted the defendant to call her attorney, an officer stayed with her while she did so. *Id*. In her subsequent homicide trial, the trial court admitted the results of the Breathalyzer. On appeal, the state conceded that the officer's presence during the defendant's consultation with her attorney violated her right to counsel under *Spencer* and *Durbin*. *Id.* at 10. The state nonetheless argued that, even though the results of the test were inadmissible in the DUII trial, they were admissible in the homicide trial. This court rejected that argument: "The state violated defendant's state constitutional right to counsel, and we therefore

conclude that the result of defendant's breath test is inadmissible for all purposes, including the remaining homicide charge." *Id.*

As *Durbin*, *Dinsmore*, and *Spencer* make clear, the court's holding in *Spencer* was very 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 Breathalyzer test.

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 "reasonably 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.*

The limited and anomalous nature of *Spencer* is further reinforced by this court's continuing reference, in post-*Spencer* cases, to the right to counsel attaching after formal charges have been initiated. *See State v. Randant*, 341 Or

64, 70, 136 P3d 1113 (2006) (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 (2005) (stating that Article I, section 11, was not "applicable at the time when defendant made his disputed statements," which were made post-arrest). 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 limited exception that a limited right applies during a post-arrest request to take a breath test.

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 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.

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.

2. Defendant had not been charged with any crimes against K and L when police questioned him about those allegations, and the questioning did not fall under the limited exception in *Spencer*.

Here, defendant had not yet been charged with any crimes against K and L when police questioned him about those allegations. (Tr 69; ER 4). As a result, his right to counsel as to those allegations had not attached. As noted above, however, in *Spencer* this court announced a narrow exception to that general rule: an individual has a limited right to "a reasonable opportunity to obtain legal advice" that attaches after arrest in limited circumstances. The validity of the *Spencer* exception is questionable, given the text and history of Article I, section 11. However, this court need not decide the validity of *Spencer* here, because the police questioning in this case did not fall within the limited *Spencer* exception.

As an initial matter, defendant had not yet been arrested for any crimes against K and L when Detective Rookhuysen questioned him. (Tr 360[8]). As a result, defendant had no right to counsel as to the allegations concerning K and L. *See Davis*, 350 Or at 477 ("[T]he prior decisions of this court are consistent that, *at the earliest*, the right to counsel under Article I, section 11, attaches at the time a defendant has been taken into formal custody." (Emphasis in original)).

Further, as described above, *Spencer* applies only when police ask a driver arrested for DUII to submit to a breath test. Because defendant had not been arrested for DUII or asked to take a breath test, the holding of *Spencer* does not apply here. Moreover, defendant did not request the opportunity to consult with counsel, which is required before *Spencer* applies.[9] *Spencer*, 305 Or at 74.

In sum, the state had not initiated a "criminal prosecution" against defendant for any crimes against K and L, and he had no right to counsel as to

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[8] Detective Rookhuysen was not asked at the suppression hearing whether he had arrested defendant for the crimes against K and L when he questioned defendant. Later, at trial, he testified that, when he interviewed defendant about K and L, he was interviewing defendant "on possible charges for which he had not been arrested yet." (Tr 360).

[9] Defendant did request to speak with his counsel at the end of the interview, but the police ceased questioning at that point. (Tr 61).

those allegations. Further, the exception in *Spencer*, which provides for a limited right to counsel in certain circumstances, does not apply here.[10]

B. Because defendant's actions against K and L were not part of the events surrounding defendant's crimes against A, the police did not violate defendant's right to counsel in the ongoing criminal prosecution involving A by questioning him about K and L.

Having determined that defendant did not have an Article I, section 11, right to counsel as to the allegations involving K and L, the only remaining question is whether the police violated his right to counsel in the ongoing criminal prosecution involving A. Because defendant had been charged with

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[10] To the extent that this court determines that, pursuant to *Spencer*, some right to counsel attaches on arrest for any crime in any circumstance, this court should overrule it. As described fully above, the text, history, and case law surrounding Article I, section 11, demonstrate that the right to counsel does not attach until a defendant has been formally charged with a crime. To the extent that this court held to the contrary in *Spencer*, that holding is irreconcilable with the constitutional text and should be abandoned. *See Davis*, 350 Or at 477 ("It could be argued that the court's holding in *Spencer* * * * is difficult to reconcile with the text of Article I, section 11, * * * as well as the historical context for the adoption of that provision * * *."). Further, because this court has relied on *Spencer* only twice in the last 26 years, abandoning it will not unduly complicate the law. In fact, abandoning *Spencer* will clarify the law. The *Spencer* court—perhaps recognizing the obvious practical difficulties with providing a right to counsel on arrest—attempted to delineate two distinct rights: the "right to have reasonable access to legal advice" upon arrest for DUII, and the right to "an attorney at the state's expense," which does not arise until after charges have been filed. *Spencer*, 305 Or at 74. *See also* Joseph D. Grano, Rhode Island v. Innis: *A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 Am Crim L Rev 1, 11-18 (1979-1980) (describing practical difficulties with applying right to counsel before formal charges are filed). Eliminating the anomaly of *Spencer* will create consistency, in that the scope of the right to counsel will remain the same regardless of the circumstances.

the crimes against A and had retained a lawyer to defend him against those charges, defendant clearly had an Article I, section 11, right to counsel as to those charges. Thus, the police were not permitted to question defendant about his sexual abuse of A or the surrounding events without first notifying his attorney. However, Detective Rookhuysen limited his questioning to defendant's sexual abuse of K and L, which were not part of the events surrounding his abuse of A. Defendant sexually abused A at least eight months after he abused K and L, and K and L were not present when defendant abused A. As a result, Detective Rookhuysen did not violate defendant's right to counsel as to A by questioning him about K and L.

1. Article I, section 11, prohibits police from questioning a defendant about the charged crime and the events surrounding it.

As discussed above, although Article I, section 11, is a trial right, this court has expanded its scope beyond the trial itself. This court has reasoned that expanding the right to pretrial confrontations is necessary to ensure counsel's effectiveness at defending against the charges at trial and thus to preserve the fairness of the trial itself. *See Sparklin*, 296 Or at 94 (describing rationale).

As a result, "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." *Sparklin*, 296 Or at 93. Article I, section 11, therefore applies to any "government efforts to elicit information from the accused, including interrogation" about the charged crime. *State v. Davis*, 313 Or 246, 259, 834 P2d 1008 (1992). In short, after a defendant has been charged, "there can be no interrogation of a defendant concerning the events surrounding the crime charged"—*i.e.* the "criminal episode"—"unless the attorney representing the defendant on that charge is notified and afforded a reasonable opportunity to attend." *Sparklin*, 296 Or at 93.

In some circumstances, of course, "the events surrounding the crime charged" will include uncharged acts, if they occurred immediately before, during, or immediately after the charged crime. Acts may also qualify as being part of the "events surrounding the crime charged" if they otherwise share a direct causal connection that demonstrates that the acts arise from one another or are part of the same chain of events. Importantly, however, the prohibition is intended to prevent police from gaining information about *the charged crime*. In *Sparklin*, this court essentially held that questioning an individual about the events immediately preceding and following the charged crime is equivalent to questioning the individual about the crime itself. Nothing about the court's holding or reasoning would prevent police from questioning an individual about alleged crimes that occurred at a completely different time, simply because

those crimes were similar in type to the charged crime or involved related victims.

Further, Article I, section 11, does not apply unless the government is actually attempting to elicit information about the charged crime or the surrounding events. *Davis*, 313 Or at 259-60. In *Davis*, the defendant had been charged with a robbery; he failed to appear for trial and fled to Mississippi. *Id.* at 250. The trial court issued a warrant, and police located the defendant in Mississippi. *Id.* The police first told the defendant that they intended to take him back to Oregon on the outstanding warrant, so that he could face the robbery charges. *Id.* at 251, 259-60. They stated that they first wanted to talk to him about a murder and then proceeded to question him concerning that unrelated murder. *Id.* The defendant moved to suppress the statements that he had made about the murder. He argued that the police had violated his Article I, section 11, right to counsel as to the *robbery*, because police began the interrogation by discussing the defendant's extradition for the robbery. *Id.* at 258.

This court rejected the defendant's argument, concluding that the police had not attempted to elicit information about the robbery. *Id.* at 260. The court reasoned that the statements concerning extradition were not phrased as questions, nor were they "intended by the police or understood by [the] defendant as an attempt to elicit any information from [the] defendant about the

robbery." *Id.* The statements had "none of the earmarks of a question or a surreptitious attempt to get information from [the] defendant about the robbery." *Id.* As a result, the defendant's "right to counsel on the robbery charge was not violated by the officers' statements about extradition." *Id.* at 261.

In sum, once an individual has been charged with a crime, police may not attempt to elicit information about the charged crime or the events surrounding that crime without first contacting his or her lawyer. However, police are free to question the individual about other uncharged acts, as long as the questioning does not constitute a "surreptitious attempt to get information" about the charged crime or the surrounding events.

2. The police did not question defendant about the events surrounding his abuse of A.

Here, the trial court implicitly found that police did not question defendant about his crimes against A or the events surrounding those crimes. (*See* Tr 104 (explaining that the conduct against K and L "involved a different time frame and different victims and result in the allegations of different crimes" than his conduct against A)). That implicit finding is supported by the record and is therefore binding. *See State v. Foster*, 303 Or 518, 529, 739 P2d 1032 (1987) (stating standard of review).

Detective Rookhuysen testified that his questioning was "completely focused" on the sexual abuse of K and L (Tr 73-74), and that abuse does not constitute part of the "events surrounding" defendant's abuse of A. Defendant abused K and L at least eight months before he abused A. (ER 3, 4). Further, although all the abuse occurred in defendant's house, he abused each victim alone, without the other girls present. (Tr 85). K and L were not even at his house when he abused A. (*Id.*). Although the crimes and victims were similar, the abuse did not occur at or near the same time, nor were the crimes linked to each other in any other way.

Nor is there any indication that the questioning was simply a ruse to elicit information about the crimes involving A. Indeed, the record shows the contrary. Although the victims were related to each other and thus A's "name might have come up" during the interview, Detective Rookhuysen was not attempting to elicit information about A and in fact took precautions to avoid doing so by focusing his questions on K and L. He explained,

> Well, I think it's impossible to have a conversation with him and not have some overlap. These are family members. So I mean, I think that it's fair to say, you know, a name might have come up.
>
> But at this point, he'd been charged on the first victim, and I was completely focused on victims two and three.

(Tr 73-74). And although Detective Rookhuysen agreed with defense counsel that he had spoken with defendant about "the universe of kids" that had come to

defendant's home in all three interviews, he immediately clarified that the third interview was focused on K and L:

> Well, I think there, in the first interview, I think at that point, I think I had a first name for one of the victims to come—that were going to come forward. Or that I thought could be potential victims; I'll say it that way.
>
> But, no, that third interview, the focus is on the new victims. They were the ones that I lacked any statement from the defendant about. That was — that was the focus, yeah, [L and K]. That was the focus of that third interview in the jail.

(Tr 74-75).

Like in *Davis*, "the record does not establish" that anything Detective Rookhuysen said or did was "an attempt to elicit any information from defendant about" the crimes against A or the events surrounding those crimes. *Davis*, 313 Or at 260. Nothing in the record suggests that Detective Rookhuysen questioned defendant about A or otherwise "surreptitious[ly] attempt[ed] to get information" about defendant's abuse of A. *Id.* To the contrary, Detective Rookhuysen intentionally avoided discussing A, by focusing his questions on K and L. Indeed, Detective Rookhuysen had already questioned defendant about his crimes against A; he explained that he focused on K and L because "[t]hey were the ones that [he] lacked any statement from the defendant about." (Tr 75). As a result, the police did not violate defendant's right to counsel in the ongoing criminal prosecution involving A.

C. The Court of Appeals erroneously expanded this court's decision in *Sparklin*.

Sparklin stands for two limited propositions. First, after an individual has been charged with a crime, the Article I, section 11, right to counsel prohibits police from interrogating the individual about the charged crime and surrounding events (the "criminal episode") without first notifying the individual's lawyer. *Sparklin*, 296 Or at 93-94. Second, the Article I, section 11, right "remains focused on the trial" and, as a result, does not extend to "factually unrelated criminal episodes." *Id.* at 94-95. The Court of Appeals erroneously conflated those two holdings by holding that the right to counsel extends from the charged crime to any "factually related" crime and compounded the problem by defining "factually related" too broadly. Further, the court improperly expanded *Sparklin* by holding that police may not question a defendant about anything that *might* elicit information about the charged crime, even when the police take precautions not to elicit such information.

1. *Sparklin* does not support the Court of Appeals' multi-factored test.

The Court of Appeals has greatly expanded *Sparklin* by holding that an individual has a right to counsel under Article I, section 11, for crimes with which the individual has been charged, as well as any uncharged acts that are "factually related" to the charged crimes. *Prieto-Rubio*, 262 Or App at 156-57. The Court of Appeals considers several factors to determine whether crimes are

"factually related," including the temporal proximity between the crimes, the similarity between the crimes, whether the police investigated the crimes in "a single, unified investigation," and whether questioning about one crime might lead to information about the other. *Id.* at 157-59.

Notably, however, the Court of Appeals' test rests on a flawed underlying premise. Nowhere in *Sparklin* did this court hold that the right to counsel attaches to all uncharged acts that are "factually related" in some way to the charged crime. Indeed, such a holding would be contrary to the principle, discussed above, that the right to counsel does not attach until an individual has been charged with a crime. Instead, *Sparklin* merely announced limitations on police investigation of *the charged crime,* for which the right to counsel has already attached. *See Sparklin*, 296 Or at 93 ("*Once an attorney is appointed or retained*, there can be no interrogation of a defendant concerning the events surrounding the crime charged * * * ." (Emphasis added.)); *see also id.* at 92 ("The state had already initiated a 'criminal prosecution' against defendant * * *."); *id.* at 93 (noting that a person is entitled to the benefit of an attorney in certain situations, "once a person is charged with a crime"). *See also Davis*, 350 Or at 478 (noting distinction between scope of right and when the right has attached).

Under *Sparklin*, police may not question the defendant about the charged crime and surrounding events—also known as the "criminal episode"—without

first notifying counsel. In many cases, of course, those events will include other, uncharged acts that are "factually related" to the charged crime. But it is important to recognize that the right to be protected is the right that has already attached to the *charged crime*. Individuals do not enjoy a right to counsel for *uncharged* acts simply because the police happen to investigate them at the same time as crimes with which the individual has been charged. Police do not violate a defendant's right to counsel unless they question the defendant about the events surrounding the charged crime.

It follows that the Court of Appeals test, applying the right to counsel to uncharged acts that are "factually related" to the charged crime—based on their similar nature, a consolidated investigation, and other factors—goes too far. The court's test goes beyond the test announced in *Sparklin* and is inconsistent with the text, history, and case law surrounding Article I, section 11.[11]

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[11] *Sparklin* could be read for the proposition that the right to counsel actually attaches to uncharged crimes, as long as they are part of the same "criminal episode" as the charged crime. *See Sparklin*, 296 Or at 95 ("[T]he article I, section 11 right to an attorney is specific to the criminal episode in which the accused is charged."); *Davis*, 313 Or at 258-59 ("The Article I, section 11, and Sixth Amendment rights to counsel 'in all criminal prosecutions' are offense-specific, *i.e.*, counsel is *deemed to represent a person on a particular charge or criminal episode*." (Emphasis altered.)). However, for the reasons discussed in the text, when read in context, it is clear that the court was delineating the *scope* of the right to counsel as to the charged crime, explaining that police may not question the defendant about the charged crime or the events surrounding that crime. To the extent that the opinion could be read as holding that the right *attached* to other, uncharged crimes, this court

Footnote continued…

In expanding *Sparklin*, the Court of Appeals reasoned that limiting the right to counsel to charged crimes "would allow the state to easily avoid the limits that Article I, section 11, places on its power to interrogate criminal defendants without informing their attorneys." *Prieto-Rubio*, 262 Or App at 159. The court reasoned that "the state could strategically delay filing certain charges against a defendant, interrogate that defendant about those uncharged crimes without informing his attorney, use evidence gleaned from that interrogation to file an additional charging instrument, and then consolidate the charges for trial." *Id.*

As an initial matter, if the defendant committed the uncharged acts in the same criminal episode as the charged crimes, the state could *not*, in fact, "avoid the limits" of Article I, section 11. To question the individual about the uncharged acts would violate the defendant's rights as to the charged crimes.

Moreover, the court's reasoning is grounded in policy concerns, rather than the text, history, and case law surrounding Article I, section 11. And those policy concerns appear to be unfounded. As the court itself recognized, there was "no evidence in this case to suggest that the police strategically delayed

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(…continued)
should disavow that holding for the reasons discussed in section A. In any event, the court made clear that, even if the right extends beyond the charged crime, it extends only to other crimes in the same "criminal episode," not to all "factually related" crimes. The Court of Appeals erred by holding otherwise.

charging defendant with the crimes against" K and L. *Prieto-Rubio*, 262 Or App at 160.

In fact, the record demonstrates that Detective Rookhuysen did *not* engage in any strategic delay. K and L had not yet disclosed their abuse when defendant was charged with the crimes against A. (Tr 84). At that time, the police suspected that defendant had committed crimes against other victims, but they did not yet have probable cause to arrest defendant for those crimes. (*Id.*). Although K's first name had come up in an interview, Detective Rookhuysen did not know how to locate her. (Tr 77). Detective Rookhuysen questioned defendant about K and L when he did because it was only then that they had disclosed their abuse. (Tr 57-58, 84). Not only is there nothing in the record to suggest strategic delay, but the timeline of events demonstrates the contrary.

2. The Court of Appeals improperly expanded the scope of Article I, section 11, effectively holding that it applies whenever there is a "possibility" that the defendant might reveal incriminating information.

Although the Court of Appeals considered the effect of the police questioning on defendant's right to counsel as to the criminal prosecution involving A, it imposed far too broad a standard for determining whether defendant's rights were violated. The court reasoned that "it was foreseeable that additional information about [A's] case *might have* emerged" when the police questioned defendant about the abuse of K and L and that even though

no such information did, in fact, emerge, it "was a distinct possibility." *Prieto-Rubio*, 262 Or App at 159 (emphasis altered). As described fully above, however, the relevant question is whether police actually questioned defendant about the events surrounding the crimes against A or otherwise attempted to elicit information about those events.

To reach its conclusion, the Court of Appeals relied on one statement from *Sparklin*, where this court explained that, once a person is charged with a crime, he or she is entitled to the advice of an attorney in "any situation where the state may glean involuntary and incriminating evidence or statements for use in the prosecution of its case against [a] defendant." *Prieto-Rubio*, 262 Or App at 159 (quoting *Sparklin*, 296 Or at 93) (bracketed material in *Prieto-Rubio*). Although the *Sparklin* court used admittedly broad wording, when read in context, it is clear that the court was simply explaining why the right to counsel extends to interrogations *about the charged crime*. In fact, shortly after the above-quoted statement, the court clarified that, because of the foregoing principle, "there can be no interrogation of a defendant concerning the events surrounding the crime charged" without notification of counsel. *Sparklin*, 296 Or at 93.

Further, prohibiting only government attempts to elicit information is consistent with the principles underlying Article I, section 11. As discussed above, the provision is intended to protect a defendant's rights at trial, when the

defendant is met with "the prosecutorial forces of organized society." *Kirby*, 406 US at 689. The court has extended the right to pretrial procedures only when the defendant is confronted with those same "prosecutorial forces." *See Sparklin*, 296 Or at 93 ("Once [the] accused has sought the safeguard of counsel, it is unfair to let skilled interrogators lure him from behind the shield into an unequal encounter." (Quoting Note, *Interrogation and the Sixth Amendment: The Case for Restriction of Capacity to Waive the Right to Counsel*, 53 Ind L J 313, 315 (1977-1978)); *Ash*, 413 US at 310 (noting extension of right to counsel to investigative procedures that are "appropriately * * * considered to be parts of the trial itself" because "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both"). Where, as here, the police intentionally avoid any questions concerning the charged crime, the defendant is simply not confronted with an adversary who is attempting to gain information to use in the "criminal prosecution." *See* James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 Iowa L Rev 975, 985-86 (1985-1986) ("According to the current view, the perils of inequality are only realized when the government deals with an accused in some significant way. The risks engendered by imbalanced strength become legitimate concerns only when governmental agents 'deliberately elicit' information prejudicial to" the defense.).

Moreover, to the extent that *Sparklin* left any doubt about the issue, *Davis* clarified that the right to counsel applies only to "government effort[s] to elicit information from the accused with respect to [the charged crime]." *Davis*, 313 Or at 260 (internal quotation marks omitted). Thus, contrary to the Court of Appeals' opinion, Article I, section 11, does not prevent the police from any questioning that *might* inadvertently lead to information about the charged crime.

In all events, for the reasons discussed in the previous section, the state disagrees with the Court of Appeals' conclusion that it was "foreseeable" that the questioning here could have led defendant to disclose information about the charged crime. The mere fact that A's name "might have come up" during questioning does not mean that defendant was likely to provide information about *the crimes* against her, particularly when Detective Rookhuysen took precautions to focus on the abuse of K and L. (Tr 73-74). And although Detective Rookhuysen agreed with defense counsel that he had spoken with defendant about "the universe" of potential victims in each interview, he immediately clarified that the focus of the relevant interview was on K and L. (Tr 74-75).

Because Detective Rookhuysen did not attempt to elicit information about defendant's abuse of A during his questioning about K and L, it was unlikely that defendant would disclose any incriminating information about his

crimes against A. Indeed, he did not do so. Thus, Detective Rookhuysen did not violate defendant's right to counsel as to his crimes against A by questioning defendant about his abuse of K and L.

CONCLUSION

Because defendant had not been charged with any crimes against K and L when police questioned him, his right to counsel as to those allegations had not yet attached. Further, police did not violate the only right to counsel that had attached—the right in the ongoing criminal prosecution involving A—by questioning defendant about K and L. The Court of Appeals erred by holding otherwise. This court should therefore reverse the decision of the Court of Appeals and affirm the trial court judgment.

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 2, 2014, I directed the original Brief on the Merits to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the electronic filing system. I further certify that on October 2, 2014, I directed the Brief on the Merits to be served upon John J. Tyner III, attorney for appellant, by mailing two copies, with postage prepaid, in an envelope addressed to:

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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 11,327 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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