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 Case No. C11693CR; C112523CR CA A152030 (Control); A152033 SC S062344

AMENDED BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON JUSTICE RESOURCE CENTER; AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF OREGON, INC.; AND OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

On 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

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

(Counsel listed on inside cover) December 2014

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INTRODUCTION

The Oregon Justice Resource Center (OJRC) is a non-profit organization founded in 2011. OJRC works to "dismantle systemic discrimination in the administration of justice by promoting civil rights and enhancing the quality of legal representation to traditionally underserved communities." OJRC Mission Statement, www.ojrc.info/mission-statement. The OJRC Amicus Committee is comprised of Oregon attorneys from multiple disciplines and law students from Lewis & Clark Law School, where OJRC is located.[1]

The American Civil Liberties Union Foundation of Oregon, Inc. ("ACLU") is a nonprofit, nonpartisan corporation dedicated to maintaining the civil rights and liberties guaranteed or reserved to the people by the Oregon and United States constitutions; to that end, the ACLU has appeared in numerous cases in this and other Oregon courts as *amicus curiae* concerning civil liberties.

The Oregon Criminal Defense Lawyers Association ("OCDLA") is a statewide organization of criminal defense attorneys and others engaged in

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[1] Undersigned Counsel wish to acknowledge and thank Lewis & Clark law students Michael Beilstein and Justin Withem for their invaluable assistance preparing this brief.

criminal defense. OCDLA advocates for the vigorous defense of constitutional rights and the rights of those accused and convicted of crimes.

Amici wish to be heard by this court because an individual's right to counsel is of paramount importance in our adversarial system of justice. Time and again, Oregon courts have recognized the importance of counsel in custodial investigations and during judicial proceedings. Where an individual has invoked his or her right to counsel, the state should honor that invocation and refrain from communicating with that individual until the state knows that that individual is no longer represented by counsel.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

Under Article I, section 11, of the Oregon Constitution, when may police question an incarcerated individual who is represented by counsel?

Proposed Rule of Law

A defendant in custody in connection with a criminal matter for which he is represented by counsel may not be interrogated in the absence of his attorney with respect to that matter or an unrelated matter unless he waives the right to counsel in the presence of his attorney.

SUMMARY OF ARGUMENT

Amici encourage this court to adopt a rule, modeled after the rule adopted by the New York state courts, which prohibits state actors from communicating with individuals the state knows to be represented by counsel on criminal matters. The current "factually related" test is, obviously, fact dependent, requiring state actors to make case-by-case determinations regarding whether criminal charges are sufficiently factually related to entitle a person to representation. The rule advocated by *Amici* requires no such case-by-case determination by state actors, who may have a bias toward viewing the facts in favor of allowing uncounseled communications.

This rule would require that a state actor both refrain from initiating communication with a represented person and would preclude a represented person from waiving the right to counsel, once invoked, without counsel being present. State prosecutors are already bound by ethical rules that prohibit them from communicating with such represented persons. Allowing the police to do what prosecutors cannot invites prosecutors to remain willfully ignorant of police officer's actions, diminishes attorneys' ability to adequately represent their clients, and erodes individuals' rights to the representation of counsel when dealing with the state. Once a person has invoked their right to counsel on criminal matters, the state should respect that invocation and cease all communication with that represented person outside the presence of counsel.

ARGUMENT

> "We may not blithely override the importance of the attorney's entry by permitting interrogation of an accused with respect to matters which some may perceive to be unrelated."
>
> -*People v. Rogers*, 48 NY2d 167, 169, 397 NE2d 709 (1979).

I. Oregon's test for determining whether an individual's right to counsel protects the individual from interrogation must both protect the right to counsel and clearly guide police.

Article I, section 11, of the Oregon Constitution[2] protects a custodial suspect from police interrogation "concerning the events surrounding the crime charged," so long as he has retained an attorney or had one appointed. *State v. Sparklin*, 296 Or 85, 93, 672 P2d 1182 (1983). It "is specific to the criminal episode in which the accused is charged," and it "[does] not extend to the investigation of factually unrelated criminal episodes." *Id.* at 95.

The importance of counsel at a custodial interrogation cannot be understated. The presence of counsel is "one way to secure the right to be free from compelled self incrimination." *Id.* at 89. Having counsel advise a suspect before he speaks with police helps dispel "the coercive atmosphere of police interrogation[.]" *Id.* Because the presence of counsel is so important, the right to have counsel present must be protected and law enforcement must have clear guidelines regarding when

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[2] "In all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel[.]" Oregon Const. Art. 1, section 11.

it must refrain from questioning an individual without the presence of his or her counsel.[3]

A. Oregon's current rule neither adequately protects the rights of the individual nor adequately guides police.

This court has recognized that the investigatory stage of a case necessitates counsel:

> "There can be no question that the right to an attorney during the investigative stage is at least as important as the right to counsel during the trial itself. Where once the primary confrontation between state and individual occurred at the trial, now the point at which the individual first confronts the amassed power of the state has moved back in the process from trial to the police stage."

State v. Spencer, 305 Or 59, 73-74, 750 P2d 147, 155 (1988) (considering Art. 1, section 11) (quoting *Sparklin*, 296 Or at 92 n. 9). A suspect in custody, even without formal charges, "is confronted with the full legal power of the state *** [N]either the lack of a selected charge nor the possibility that the police will think

[3] The state may propose a bright-line rule as well: That law enforcement may interrogate a suspect about any matter so long as the suspect *is not represented in that exact matter*. This rule leads only to abuse; a suspect will be arrested for a minor crime simply to get him into custody, given counsel, and then questioned about a more serious crime for which he has not been charged and is not represented. Under that type of bright-line rule, the state will have the benefit of the coercive nature of custodial interrogations in any case in which a suspect can be held on an unrelated charge. *State v. Shannon*, 241 Or 450, 453, 405 P2d 837, 838 (1965) ("unchecked police interrogation leads to coercive practices").

better of the entire matter changes the fact that the arrested person is, at that moment, ensnared in a "criminal prosecution." *Id.* at 74.

The *Sparklin* rule, however, deems it acceptable for a suspect to confront "the amassed power of the state" and "the full legal power of the state" without the benefit of counsel so long as police determine that the acts are not factually related. *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.). This rule harms the adversarial process by excluding defense attorneys from critical meetings with the prosecution, and leaves suspects open to the coercive nature of custodial police interrogation even once represented.

Oregon's rule allowing law enforcement to question represented suspects about "factually unrelated criminal episodes" also does not offer law enforcement sufficiently clear guidelines. Officers must engage in case-by-case considerations each time a new case presents itself. This court has previously indicated a desire to avoid imposing such dilemmas upon officers in the interest of police and court efficiency: "[P]olice need clear guidelines by which they can gauge and regulate their conduct rather than trying to follow a complex set of rules dependent upon particular facts[.]" *State v. Brown*, 301 Or 268, 277, 721 P2d 1357 (1986) (automobile searches); *see also State v. Roberti*, 293 Or 59, 91, 644 P2d 1104, 1123 (1982) (Linde, J., dissenting) ("Police officers deserve and efficient law

enforcement require rules that are clear at the time of the investigatory act; a formula designed only for retrospective judgment on a motion to suppress evidence confuses the rule with its consequence."), *on reh'g* 293 Or 236 (1982), *vacated sub nom, Oregon v. Roberti*, 468 US 1205 (1984); *Berkemer v. McCarty*, 468 US 420, 421, 104 SCt 3138, 3140 (1984) (praising the *Miranda* rule's "simplicity and clarity").

B. Mr. Prieto-Rubio's case exemplifies why a different rule is needed.

The police behavior at issue in Mr. Prieto-Rubio's case illustrates how the lack of a clear standard for the right to counsel led to case-by-case exercises of police discretion: The uncertainty about whether Mr. Prieto-Rubio's right to counsel extended to a particular interrogation has led to more than three years of judicial review.

The police interrogated Mr. Prieto-Rubio while he was in custody, knowing that he was represented by counsel on charges pertaining to a factually related matter.[4] Regardless of the detectives' intent, it is clear that they utilized the fact of Mr. Prieto-Rubio's lawful custody to extract information, even though he was

[4] The extent of the factual relatedness of Mr. Prieto-Rubio's cases will presumably be an issue discussed at length in his briefing. *See State v. Prieto-Rubio*, 262 Or App 149, 156-160, 324 P3d 543 (2014) (describing factors that may evince factual relationship such as temporal proximity, shared location, similar acts, concurrent investigation by authorities, overlapping evidence or witnesses, and a "common scheme or plan").

represented by an attorney. Under the unclear standards of the "factually related" test, they might not have known better.

In his *Sparklin* concurrence, Justice Linde referred favorably to the New York rule explained in *People v. Rogers*, 48 NY2d 167, 397 NE2d 709 (1979). *Sparklin*, 296 Or at 98 (Linde, J., concurring). The New York rule was inapplicable to the case at bar, but Linde nonetheless noted that the New York Court of Appeals had dealt with exactly the shortcomings he saw in the *Sparklin* majority's rule: That, absent the exact factual scenario presented in Mr. Sparklin's case – a defendant jailed in one city on a charge for which he is represented confesses to police from another city that he committed a crime in their jurisdiction – the rule would not clearly dictate what constituted a sufficient factual relationship. For instance, if the officers had been from the same city, but had questioned such a defendant about "activities related in time or place, by the identity of the victim, or by the repetition of similar unlawful acts[,]" the majority's test for admissibility would offer little guidance. *Id.*

Amici agree and advocate the adoption of just such a bright-line rule, modeled after the New York rule.[5] Justice Linde presciently anticipated that a case

[5] This court has previously addressed the New York rule, but it has not yet had the opportunity to adopt it. *See State v. Haynes*, 288 Or 59, 70, 602 P2d 272 (1979) (addressing Article I, section 12, issue); *State v. Kristich*, 226 Or 240, 248, 359 P2d 1106 (1961) (deferring issue to legislature).

addressing this rule would come before this court. Mr. Prieto-Rubio's is just such a case. *Amici* further advocate that the ethical rule prohibiting attorney contact with represented requires adoption of the New York rule.

II. The New York rule properly balances protecting individuals from the power of the state with clear guidance to police.

The New York[6] rule states that "a defendant in custody in connection with a criminal matter for which he is represented by counsel may not be interrogated in the absence of his attorney with respect to that matter or an unrelated matter unless he waives the right to counsel in the presence of his attorney." *People v. Lopez*, 16 NY3d 375, 377, 947 N.E.2d 1155 (2011). This rule stems from *Rogers*, 48 NY2d at 169, which held that "once an attorney has entered the proceeding, thereby signifying that the police should cease questioning, a defendant in custody may not be further interrogated in the absence of counsel," even on unrelated matters.

The defendant in *Rogers* was arrested for robbery and his lawyer instructed police not to question him. Although police ceased interrogation about the robbery (and after a purported waiver of *Miranda* rights), they interrogated Rogers for four

[6] The New York Constitution's grant of a right of counsel to defendants is similar to Article I, section 11. It reads, in relevant part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel[.]" NY Const, Art 1, section 6.

hours on matters unrelated to the robbery.[7] During that interrogation on the unrelated matter, he made statements which were eventually used to implicate him in the robbery charge, notwithstanding the fact that he was represented by an attorney at the time of questioning. *Rogers*, 48 NY2d at 170.

The court framed the issue as "whether once a defendant is represented on pending matters, the police may question the defendant on items unrelated to the subject of that representation after the defendant, in the absence of counsel, has waived his rights." *Id.* The court held that "[o]nce a defendant is represented by an attorney, the police may not elicit from him any statements, except those necessary for processing or his physical needs. Nor may they seek a waiver of this right, except in the presence of counsel." *Id.* at 173.

A. The New York rule emerged to protect an individual's right to counsel and right against self-incrimination.

"[T]he right to counsel [is] a cherished and valuable protection that must be guarded with the utmost vigilance." *Lopez*, 16 N.Y.3d at 380. This is not a remarkable notion: "The presence of counsel confers no undue advantage to the accused. Rather, the attorney's presence serves to equalize the positions of the

[7] Like Mr. Prieto-Rubio, Mr. Rogers was in custody at the time he was questioned about an incident separate from the one for which he was being held, and he was represented on the matter which led to his custody.

accused and sovereign, mitigating the coercive influence of the State and rendering it less overwhelming." *Rogers*, 48 N.Y.2d at 173.

Furthermore, the right is "indelible": Even if such a represented defendant *wished* to waive his right to have counsel present during an interrogation, he cannot do so unless his counsel is present during that waiver, and thus has a chance to advise him against proceeding with the interrogation. *Rogers*, 48 NY2d at 169; *see also People v. Arthur*, 22 NY2d 325, 329, 239 NE2d 537 (1968). This protection is offered so that an attorney has a chance to advise her client against proceeding with any interrogation which may compromise the integrity of his pending case. *Rogers*, 48 NY2d at 173.

Although *Rogers* was an expansion of the right to counsel at interrogations concerning unrelated matters, it "represents no great quantitative change in the protection we have extended to the individual as a shield against the awesome and sometimes coercive force of the State." *Id.* That is, "it would be to ignore reality to deny the role of counsel when the particular episode of questioning does not concern the pending charge." *Id.*[8]

[8] The New York Rule only applies where the suspect is *actually represented* on a pending charge (which the New York courts call "entry"). Thus, police *may* question a suspect on a matter unrelated to the pending charge if the suspect has no attorney on that pending charge. *People v. Ruff*, 81 NY2d 330, 333, 615 NE2d 611, 613 (1993).

It is immaterial that an attorney's presence could decrease the likelihood that a suspect will waive his right to silence. Rather, as the *Rogers* court emphasized, "[a]lthough the State has a significant interest in investigating and prosecuting criminal conduct, that interest cannot override the fundamental right to an attorney guaranteed by our State Constitution." *Id.* Other means of investigation beyond those that erode the right to counsel are available to police. *Id.*

B. The New York rule also evolved to help give police guidance.

Prior to *Rogers*, New York followed a rule not unlike the current formulation of Oregon's rule: New York's right to counsel "excepted from its scope questioning about a charge unrelated to the one on which defendant was represented." *Rogers*, 48 NY2d at 171. Notably, the court highlighted that during the existence of the rule allowing questioning on unrelated charges "it has been difficult to define the precise reach of the limitation concerning unrelated charges." *Id.* at 171.

Prior to *Rogers*, the protection from interrogation without counsel did not apply unless "an attorney has been secured to assist the accused in defending against the *specific charges for which he is held*." *People v. Taylor*, 27 NY2d 327, 332, 266 NE2d 630 (1971) (emphasis added); *see also People v. Hobson*, 39 NY2d 479, 483, 348 NE2d 894 (1976) (restating the exception established in *Taylor*).

Questioning about an unrelated incident was thus excepted from the scope of the right to counsel.

In the years that followed *Taylor* and *Hobson*, this "unrelated incident" exception proved unworkable and required "drawing the subtle distinctions necessitated" by a test concerning the factual relatedness of charges. *Rogers*, 48 NY2d at 171. Court decisions reflected a desire to move away from the "unrelated incident" exception by allowing more and more distantly related incidents to trigger a suspect's right to counsel. *See, e.g.*, *People v. Ermo*, 47 NY2d 863, 392 NE2d 1248 (1979) (noting that "the police exploited concededly impermissible questioning" as to an unrelated charge for which the defendant was represented).

Consequently, the *Rogers* rule is "defined through the adoption of pragmatic and simple tests *** in order to provide an objective measure to guide law enforcement officials and the courts." *Lopez*, 16 N.Y.3d at 381 (internal quotations omitted). New York courts have rejected suggestions that *Rogers* should be limited or modified, because it would introduce "new ambiguities where clarity and certainty are important for the individual as well as the public interest involved." *People v. Burdo*, 91 NY2d 146, 151, 690 NE2d 854, 856 (1997). "The *Rogers* rule is eminently straightforward: when an attorney undertakes representation in a matter for which the defendant is in custody, all questioning is barred unless the police obtain a counseled waiver. *Rogers* therefore requires inquiry on three

objectively verifiable elements – custody, representation and entry." *Lopez*, 16 NY3d at 382. This inquiry is decidedly more straightforward than whether two crimes are factually related.

C. The New York rule has proved workable.

New York still follows the rule announced in *Rogers*. In 1997, the Court of Appeals for New York wrote that "[f]or nearly two decades *Rogers* has stood as a workable, comprehensible, bright line rule, providing effective guidance to law enforcement while ensuring that it is defendant's attorney, not the police, who determines which matters are related and unrelated to the subject of the representation." *Burdo*, 91 NY2d at 151. In 2011, the court updated its timeline, noting that "[f]or over three decades, '*Rogers* has stood as a workable, comprehensible, bright line rule[.]'" *Lopez*, 16 NY3d at 382 (quoting *Burdo*).[9]

Because the New York rule has both adequately protected suspects' rights and provides clear guidance to law enforcement, *Amici* advocate for the adoption of the following rule: A defendant in custody in connection with a criminal matter

[9] In *Lopez*, the court added the requirement that police must ask whether a custodial suspect is represented. *Lopez* held that when police want to interrogate a suspect in custody about an unrelated matter, they "must make a reasonable inquiry concerning the defendant's representational status when the circumstances indicate that there is a probable likelihood that an attorney has entered the custodial matter, and the accused is actually represented on the custodial charge." 16 N.Y.3d 375, 947 N.E.2d 1155 (2011).

for which he is represented by counsel may not be interrogated in the absence of his attorney with respect to that matter or an unrelated matter unless he waives the right to counsel in the presence of his attorney.

III. Both prosecutors and the police should be barred from communicating with an individual once the state knows that the person is represented on criminal matters.

Both the Oregon and federal right to counsel have expanded over time to track the growing importance of pre-trial investigation to the ultimate outcome of a case. *State v. Davis*, 350 Or 440, 470, 256 P3d 1075 (2011). Today, as criminal codes have expanded and plea bargaining has become a primary method for resolving criminal charges, information about one charge will often influence the disposition of other charges, even if factually unrelated. The extent of the right to counsel should reflect actual criminal procedure in order to ensure fairness and prevent potential abuses by police.

As this court has noted, "[i]n the smallest civil matter an attorney and his or her investigator are restricted in their contact with a represented party." *State v. Sparklin*, 296 Or 85, 93 672 P2d 1182 (1983). We as a society recognize the fundamental importance of the attorney-client relationship and, in order to protect that relationship, have developed multiple sources of law protect the attorney-client relationship, including Constitutional provisions, rules of evidence, and ethical rules. *See, e.g.*, Oregon Const. Art. 1, section 11 (right to counsel); OEC 503

(attorney-client privilege); ORPC 4.2 (prohibiting attorneys from communicating with represented persons). This court should conclude that it can "require no less of prosecutors or police in criminal matters" than it does of civil attorneys in the "smallest civil matter[s]." *Sparklin*, 296 Or at 93. By adopting the New York rule proposed above, this court would protect individual's rights to representation, protect attorneys' right and obligation to adequately represent their clients, and remove the inconsistency apparent in holding civil attorneys responsible for the conduct of investigators and not prosecutors for the conduct of the police.

A. Oregon ethical rules prohibit communication with represented individuals outside of the presence of counsel.

Oregon Rule of Professional Conduct (ORPC) 4.2 states that an attorney may not "communicate or cause another to communicate on the subject of the representation with a person the lawyer knows to be represented by a lawyer on that subject." This "is a prophylactic rule designed to insulate represented persons against possible overrreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation." *In re Conduct of Knappenberger*, 338 Or 341, 345-46, 108 P3d 1161 (2005) (quoting *The Ethical Oregon Lawyer* § 7.42 (Oregon CLE 1991)). The rule "shields a party's substantive interests against encroachment by opposing counsel and safeguards the relationship between the party and her attorney *** [O]ur

adversary system is premised upon functional lawyer-client relationships." *United States v. Lopez*, 4 F3d 1455, 1459 (9th Cir 1993).

The ORPCs apply to state prosecutors. *See In re Conduct of Burrows*, 291 Or 135, 629 P2d 820 (1981) (applying former Disciplinary Rule 7–104(A)). Therefore, under the plain terms of ORPC, a prosecutor violates her ethical obligations if she communicates with, *or* if she causes another to communicate with, a represented person so long as the prosecutor knows the suspect is represented on that "subject."[10] *See, e.g.*, AMERICAN BAR ASSOCIATION MODEL RULE OF PROFESSIONAL CONDUCT ("ABA MRPC"), Rule 4.2, Comment [4] (2014) ("A lawyer may not make a communication prohibited by this Rule through the acts of another."); *State v. Buchholz*, 97 Or App 221, 225 775 P2d 896 (1989) (if a state actor is "directly or indirectly involved in initiating, planning, controlling or supporting a discussion that would elicit incriminating statements from defendant," those actions will be imputed to the state).

In *Burrows*, the court reviewed disciplinary action taken against a district attorney who had violated the no-contact rule by allowing police to speak to a

[10] It is important to note that the term "subject" as used in ORPC 4.2 is much broader than the ABA MRPC, Rule 4.2, which instead uses the term "matter." *In re Newell*, 348 Or 396, 407-08, 234 P3d 967 (2010). "Subject" means "something concerning which something is said." *Id*. at 407 (quoting *Webster's Third New Int'l Dictionary* 2275 (unabridged ed 2002)); *see also In re Burrows*, 291 Or 135, 629 P2d 820 (1981).

defendant about participating in an undercover investigation without his attorney present. *Burrows*, 291 Or at 138. The prosecutors argued that their communications did not relate to the subject for which the defendant was represented, but instead were confined to the undercover work. *Id.* at 142. The court rejected this assertion, quoting the Disciplinary Review Board:

> "[Defendant] was likely as concerned about the ultimate sentence that would be imposed or the charges that might be reduced or dropped as he was about the probabilities of a conviction. For all we know, if [defendant's lawyer had been present], an even better arrangement could have been struck in [defendant's] behalf. * * * In short, we think that where it was clear that [defendant's] undercover drug activities were likely to, or at least were expected to, impact the pending criminal charges, *the subject matter of the communications necessarily involved the pending criminal charges*."

Id. at 143 (emphasis added). Ultimately, the court held that, because the subject of the communication between the prosecutor and the defendant (*i.e.*, defendant's participation as an undercover informant) would affect defendant's sentencing in an entirely separate matter (*i.e.*, rape and robbery proceedings), those communications were on the same "subject."

Burrows acknowledges the reality that charges which are brought and tried together, whether factually-related or not, *necessarily* influence each other's outcome.[11] Especially as a large majority of cases are resolved through pleas, this

[11] Indeed, in Mr. Prieto-Rubio's case, the state fought to obtain the strategic advantage of consolidating the charges for trial.

kind of negotiating is a critical stage in the resolution of the charges. *See Patterson v. Illinois*, 487 US 285, 308, 108 S Ct 2389 (1988) (Stevens, J., dissenting) ("a lawyer is likely to be considerably more skillful at negotiating a plea bargain"). .

Pursuant to *Burrows*, it is clear that a prosecutor may not communicate with a person about the same subject concerning which the person is represented, and that the same "subject" at least includes topics which may influence sentencing. In the instant case, regardless of whether the criminal charges Mr. Prieto-Rubio faced were "factually related," as this court has or may in the future define that term, the communications the police had with Mr. Prieto-Rubio certainly involved the same "subject" as defined in *Burrows* – the communications all related to the subject of crimes Mr. Prieto-Rubio may have committed, and evidence relating to those crimes would be used in any trial, negotiation, or sentencing. Because the communications related to the same "subject" it is undeniable that the prosecutor in this case would have been forbidden by ORPC 4.2 from communicating with Mr. Prieto-Rubio as the police did here, and that the prosecutor would have been forbidden from instructing or allowing the police to do so when she herself would have been prohibited.

ORPC 4.2 must also encompass situations where a prosecutor knows or should know that the police will communicate with a represented person about the same subject regarding which the person is represented. Any other rule invites

prosecutors to remain willfully ignorant of the actions of the police, who, maybe with a wink and a nod, are permitted to do exactly that which the prosecutor is ethically forbidden from doing. Indeed, this court has previously recognized that "[i]t would be difficult to hypothecate a set of circumstances which better illustrate the folly and danger of a principle of ethics which would permit a lawyer to excuse his misfeasance or nonfeasance by delegating to, and then later blaming, a non-lawyer." *Burrows*, 291 Or at 143 (reprimanding prosecutor even though the police had disobeyed his instructions to notify defense counsel).

B. Statements obtained in violation of the no-contact rule should be suppressed as they are in other jurisdictions.

Other states recognize that enforcement of no-contact rules on both police and prosecutors is essential to the adversarial court system. In order to protect the attorney-client relationship, Minnesota suppresses, through its supreme court's inherent supervisory power, certain evidence obtained in violation of the no-contact rule. *State v. Lefthand*, 488 NW 2d 799, 801-02 (Minn 1992); *see also State v. Clark*, 738 NW 2d 316, 341 (Minn 2007) (describing case-by-case approach applied to determine whether suppression is appropriate). In South Dakota, the right to counsel under its constitution "must be held to be at least co-extensive with that provided by the Code of Professional Responsibility to a party in a civil action." *State v. Wiegers*, 373 N W 2d 1 (SD 1985). Kentucky has acknowledged that, in the civil context, even innocent violations of this rule

require disqualification of the attorneys from the case as well as suppression of statements obtained. *Shoney's, Inc. v. Lewis*, 875 SW 2d 514, 516-17 (Ky 1994) ("[when] the integrity of the adversarial process is at stake, we must make every effort to prevent harm to the civil justice system").

C. Once represented, the right to counsel cannot be waived except in the presence of counsel.

Both the New York rule and rule 4.2 recognize that the only way to protect an individual's fundamental right to counsel, once invoked, and attorneys' right and obligation to represent the interests of her client is to completely bar the State from communicating with a represented person outside the presence of counsel. To that end, both rules preclude a represented person from waiving the right to counsel outside the presence of counsel. *Rogers*, 48 NY2d at 169; ABA MRPC, Rule 4.2, Comment [3] ("This rule applies even though the represented person initiates or consents to the communication."). Prohibiting uncounseled waiver is necessary, particularly in custodial settings, in order to protect both the rights of the accused and to protect the rights of the accused's counsel to fulfill her obligation to her client.

Oregon courts recognize that attorneys have the right and obligation to be present during communications between the state and the attorney's client. Even if a defendant has initially waived his right to counsel, that waiver is invalidated if he is not given the chance to accept the assistance of an attorney who actually

attempts to contact him. *State v. Haynes*, 288 Or 59, 70, 602 P2d 272 (1979).[12] "To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney available to provide at least initial assistance and advice, whatever might be arranged in the long run." *Id.* at 72.

Likewise, the failure to inform the defendant that a lawyer was attempting to contact him "both fail[s] to honor the lawyer's invocation of defendant's right to remain silent and [keeps] defendant from making an informed choice whether to incriminate himself by preventing defendant from learning of the existence of the lawyer and of the lawyer's desires." *State v. Simonsen*, 319 Or 510, 518, 878 P2d 409 (1994).

These decisions acknowledge that lawyers have an obligation to adequately represent their clients' interests and should be afforded the opportunity to do so. Even though neither defendant asserted his right to counsel, the intervention of a lawyer who had never met or spoken with the client was sufficient to result in suppression of the evidence obtained after the lawyer attempted to reach the defendant. *Haynes*, 288 Or at 74; *Simonsen*, 319 Or at 518. In the case of a person who is represented by counsel on one charge but not another, such as Mr. Prieto-Rubio, it is unthinkable that the attorney would decline to be present during

[12] Although this case was decided under the derivative right to counsel under Article I, section 12, its holding should apply with equal force to circumstances where the right to counsel exists under section 11.

questioning regarding the second charge. The interest of an attorney already representing the defendant, and who in all likelihood will end up representing the client on both charges, is far greater than that of the lawyers in *Haynes* and *Simonsen*, and his interest in the case should have the same result of excluding evidence produced in his absence.

The basis for suppressing the statements in *Haynes* was that, after the attorney attempted to contact the defendant, the defendant cannot knowingly or intelligently waive his right to counsel. *Haynes*, 288 Or at 70. Because an attorney would presumably always want to be present for contact between their client and the police or prosecutor, and because of the need for counsel to be present in order to uphold his side of the adversarial process, a represented person should only be able to knowingly or intelligently waive their right to counsel if the attorney is present.

CONCLUSION

While *Amici* are confident that the criminal charges Mr. Prieto-Rubio are indeed "factually related," as this court has defined that term, the factually related test leads to uncertainty. *Amici* offer a bright-line rule, which is easy to follow and in-line with the public policy favoring the attorney-client relationship evidenced by ORPC 4.2. Amorphous tests and rules that allow police to do what prosecutors are ethically prohibited from doing are bound to lead to over-steps by the state –

whether innocent, because a particular police officer believes that charges are not related, or intentional, because the officer knows that the fuzzy grey line will leave room for argument in the future. The certainty of the proffered rule ensures that the state will know that it cannot communicate with a represented person without counsel present.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 6,299 words.

Type size

I 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(4)(f).

/s/ Alexander A. Wheatley
Alexander A. Wheatley, OSB No. 105395

CERTIFICATE OF FILING AND SERVICE

I certify that on December 8, 2014, I filed the original of this AMENDED BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON JUSTICE RESOURCE CENTER with the State Court Administrator by the eFiling system.

I further certify that on December 8, 2014, I served a copy of the AMDENDED BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON JUSTICE RESOURCE CENTER on the following parties by electronic service via the eFiling system or via conventional e-mail service:

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