IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. WILLIAM RICK DELONG, Defendant-Appellant, Respondent on Review,	Douglas County Circuit Court Case No. 09CR1050FE CA A146907 SC S062176

BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON JUSTICE RESOURCE CENTER, ALBINA MINISTERIAL ALLIANCE COALITION FOR JUSTICE AND POLICE REFORM, THE PORTLAND CHAPTER OF THE NATIONAL LAWYERS GUILD, INC., AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF OREGON, INC.

On Review of the Opinion of the Court of Appeals
On an appeal from a judgment of the Circuit Court for Douglas County
Honorable Joan G. Seitz, Judge

Court of Appeals Opinion filed: January 29, 2014
Author of Opinion: Nakamoto, Judge
Concurring: Armstrong, Presiding Judge, and Egan, Judge

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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 Albina Ministerial Alliance Coalition (AMA Coalition) is an umbrella group of individuals and community organizations at the forefront of community organizing for police accountability and oversight in Portland. The AMA Coalition was founded in 2003 after Kendra James, a young African-American woman, was shot during a traffic stop. In 2010, the AMA Coalition participants coalesced around the following goals: (1) A federal investigation

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[1] Undersigned counsel would like to thank and specifically credit law students Justin Withem and Michael Beilstein for their excellent research assistance.

by the Justice Department to include criminal and civil rights violations, as well as a federal audit of patterns and practices of the Portland Police Bureau (PPB); (2) Strengthening the Independent Police Review Division and the Citizen Review Committee with the goal of adding power to compel testimony; (3) A full review of PPB's excessive-force and deadly-force policies and training with diverse citizen participation for the purpose of making recommendations to change policies and training; (4) Lobbying the Oregon State Legislature to narrow the language of the State statute for deadly force used by police officers; (5) Establishing a special prosecutor for police excessive-force and deadly-force cases. The AMA Coalition pursues these goals with an emphasis on teamwork among its diverse members and on the
principles of non-violent direct action enunciated by Dr. Martin Luther King, Jr.

The National Lawyers Guild, Inc. (NLG) is a non-profit corporation formed in 1937 as the nation's first racially integrated voluntary bar association, with a mandate to advocate for fundamental principles of human and civil rights including the protection of rights guaranteed by the United States Constitution. Since then the NLG has been at the forefront of efforts to develop and ensure respect for the rule of law and basic legal principles. The Portland Chapter of NLG seeks to implement these goals in Portland and in Oregon as a whole, with a particular emphasis on police accountability and reform. It serves as a legal

support to local progressive organizations and a progressive voice within the local legal community.

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 generally.

Amici curiae wish to be heard by this court because the preservation of the robust individual rights and liberties afforded by the Oregon Constitution is a primary concern of all *amici*. Ensuring the strength of those rights and liberties is critically important in the context of police-citizen encounters like the one in this case. In such cases, police officer and citizen meet without the presence of a judicial officer to ensure that constitutional limits proscribe the police's investigation. And no advocate is present to ensure that the investigation's subject is fully aware of his or her rights—and fully confident in his or her entitlement to assert them.

As demonstrated by the empirical data discussed below, the power dynamics at play in the average police-citizen encounter exert significant pressure over the individual and frequently deprive the individual of his or her ability to determine dispassionately whether to protect his or her rights and to

decline to cooperate with law enforcement. In short, the empirical data shows that in the average police-citizen encounter, an individual's consent to the police's exercise of authority is a product of the social context in which that authority is exercised. *Amici* respectfully submit that, in crafting the rule that will govern this case and all others like it, the reality of the pressures that are brought to bear on individuals during police-citizen encounters should guide this court in determining when consent is the product of a prior illegality. In recognizing the ways in which individuals feel compelled to consent to police authority, this court can ensure the vindication of the individual rights guaranteed by this state's constitution.

SUMMARY OF ARGUMENT[2]

Amici urge this court to adopt the test proposed by defendant, Mr. Delong, as the correct test for determining when evidence is derived from a *Miranda* violation. A police officer violates an individual's rights under Article I, section 12, of the Oregon Constitution by questioning that individual in circumstances that are inherently compelling without first providing *Miranda* warnings and obtaining a knowing, intelligent, and voluntary waiver of the individual's Article I, section 12, right to remain silent. *State v. Vondehn*, 348 Or 462, 474, 236 P3d 691 (2010). When a police officer fails to provide

[2] *Amici* adopt defendant's questions presented and proposed rules of law.

Miranda warnings, a court must suppress statements and physical evidence derived from that constitutional violation. *Id.*; *State v. Jarnagin*, 351 Or 703, 713, 351 P3d 535 (2012). Physical evidence derives from a *Miranda* violation when the evidence's discovery is a foreseeable result of unlawful custodial interrogation. Such evidence must be suppressed unless the state demonstrates that some intervening factor has severed the causal connection between the Article I, section 12, violation and the discovery of the physical evidence. Defendant's proposed test presents a sensible, workable solution that protects adequately the important individual rights afforded by the Oregon Constitution. To hold otherwise would allow the State to use evidence obtained as a result of an inherently coercive interaction to convict individuals of crimes. Oregon law forbids that outcome.

Abundant social science evidence supports the conclusion that an individual's unwarned statements during a custodial interrogation are the product of an inherently coercive interaction. Studies of the factors that affect obedience—including the authority of a person in uniform, the social context, physical proximity, and the time pressure on the individual to provide a response—establish the coercive power police officers wield. And, more specifically, research on individuals' compliance with officers' requests—and the reasons for that compliance—demonstrates further the coercive nature of police interactions with civilians. Those studies all point to the same

conclusion: The social dynamics at play during the police encounter in this case were inherently compelling, such that defendant's purported "consent," and the physical evidence obtained as a result of that consent, derived from the officer's violation of defendant's *Miranda* rights under Article 1, section 12.

ARGUMENT

I. The officers' discovery of physical evidence derived from their violation of Article I, section 12.

Amici agree with defendant's proposed rule: evidence obtained as a foreseeable result of unlawful custodial interrogation derives from that unlawful interrogation and must be suppressed. As this court has recognized, "when a suspect is subjected to custodial interrogation, [*Miranda*] warnings are necessary 'because of the inherent level of coercion that exists in such interrogations.'" *State v. Vondehn*, 348 Or 462, 471, 236 P3d 691 (2010). Social science research supports that conclusion. Research on the social psychology of obedience and the effect of social context on meaning demonstrates the coercive power brought to bear on individuals during police interactions. Studies on the rate of compliance with police officers and the reasons that people submit to authority further demonstrate that police wield coercive power even in settings far less restrictive than the one defendant faced here. Thus, the state's suggestion that defendant's statement that officers could

search his car was not derived from the *Miranda* violation ignores the reality of police-citizen encounters.[3]

A. Individuals' deference to authority figures imbues police officers with tremendous coercive power.

Decades of social-psychology research demonstrates that "momentary situational pressures and norms (*e.g.*, rules of deference to an authority) can exert a surprising degree of influence on people's behavior." Thomas Blass, *Understanding Behavior in the Milgram Obedience Experiment: The Role of Personality, Situations, and Their Interactions*, 60 J Personality & Soc Psychol 398, 409 (1991). Stanley Milgram pioneered this research with his now-famous study in which test subjects, upon prompting by the test administrator, delivered what they believed were a series of increasingly severe electric shocks to another person. Stanley Milgram, *Behavioral Study of Obedience*, 67 J Abnormal & Soc Psychol 371, 371-78 (1963). Eighty-seven percent of participants continued to deliver shocks even after the other person protested by pounding on the wall, and 65 percent continued on until the very end, beyond the "danger: severe shock" level to "XXX." *Id.* Subsequent studies in which the "victim" engaged in continuous screaming and pleading or complained

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[3] That reality is, apparently, often ignored. "A vast scientific literature has established that * * * observers do not reliably appreciate the strength and consequences of situational constraints on an actor's behavior." Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 Sup Ct Rev 153, 168-70 (2002).

about a heart condition yielded similarly high rates of obedience. Blass, 60 J Personality & Soc Psychol at 402. [4] A review of Milgram's obedience studies attributed the high rates of compliance, in part, to the incremental nature of the shock procedure and the fact that the subjects did not choose the situation in which they found themselves. *Id.* at 406. The "strong" situation presented by the experiment, combined with the psychological inhibition caused by its incremental nature, rendered it "virtually impossible" for the subjects "to respond in a detached, uninvolved manner." *Id.*

Milgram's research reveals the pressures at play here. Defendant did not choose to be questioned while in handcuffs in the back of a patrol car; the officer controlled his movements. Moreover, the scenario unfolded incrementally. Officer Robeson stopped defendant's car, asked for his license and registration, asked him to leave his vehicle, searched him, handcuffed him, and placed him in the back of his patrol car. Tr 5, 6, 9. He then had defendant fill out an "FI form," which asked for "name, race, date of birth, physical, driver's license number, employer," and other similar information. Tr 7. Thus, Officer Robeson's question "if there was anything we should be concerned about," Tr 8, must be considered in light of the authority he already had exerted

[4] Rates of obedience have not changed systematically over time. Thomas Blass, *The Milgram Paradigm After 35 Years: Some Things We Now Know About Obedience to Authority*, 29 J of Applied Soc Psychol 955, 969 (1999).

successfully over the course of the encounter. Similarly, defendant's response to Robeson's question must be considered in light of the fact that defendant already had submitted to Robeson's authority by acceding to the series of commands Robeson gave defendant as the encounter unfolded.

1. Police officers' status as authority figures leads individuals to interpret officers' statements as commands.

Studies demonstrate that the social context of a statement plays an important role in it is meaning, particularly when a speaker employs indirect language. "Higher status people frequently direct the actions of others, and hence others expect the remarks of higher status speakers (in the appropriate contexts) to act as directives." Thomas Holtgraves, *Communication in Context: Effects of Speaker Status on the Comprehension of Indirect Requests*, 20 J of Experimental Psychol: Learning, Memory, & Cognition 1205, 1214-15 (1994). For example, in a study that compared listeners' comprehension of indirect requests by a high-status speaker with those of a speaker of equal status, listeners readily understood a remark by a person of higher status as a directive to act. *Id*. at 1214. In another study, subjects perceived a peer's statement "don't be late again" as more coercive than the statement "try not to be late again"; but when an authority figure (such as the subject's boss) made the same statements, there was no difference in perceived coercion. Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 Sup Ct Rev

153, 189 (2002) (citing Jennifer L. Vollbrecht, Michael E. Roloff & Gaylen D. Paulson, *Coercive Potential and Face Threatening Sensitivity: The Effects of Authority and Directives in Social Confrontations*, 8 Intl J Conflict Mgmt 235, 236 (1997)).[5] Thus, "power relationships dictate that when the police make a 'request' and they could apparently compel the suspect to carry out the request, the suspect will view the request as a command." Peter Tiersma, *The Judge as Linguist*, 27 Loy LA L Rev 269, 282 (1993).

This research is particularly relevant here, because the officer made an indirect statement when he asked defendant "if there was anything we should be concerned about." Tr 8. Although, at face value, the officer posed a question, in light of the social context, defendant readily could have interpreted that "question" as a directive. Thus, defendant's response—that the officers could search his car if they wanted to—was an acknowledgement of the officer's power. Viewed in the context of the social dynamics at work, defendant's response was far from a freely extended invitation to search his vehicle.

2. The presence of a uniform influences obedience.

Additional studies on situational factors that affect obedience demonstrate that compliance rates increase when the requestor is wearing a

[5] Another example further illustrates that dynamic. "If an ordinary citizen, taking a tour of the White House, asks a guard standing in front of the door to the Oval Office, 'May I enter this room?' it is simply a request. If the President asks, he is ordering the guard to step aside." Peter Tiersma, *The Judge as Linguist*, 27 Loy LA L Rev 269, 281 (1993).

uniform. In one study, the experimenter (dressed variously as a civilian wearing a sport coat and tie, a milkman, and an unarmed security guard) asked individuals to perform a simple task. Ric Simmons, *Not "Voluntary" But Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 Ind LJ 773, 808 (2005) (citing Leonard Bickman, *The Social Power of a Uniform*, 4 J Applied Soc Psychol 47 (1974)). Compliance rates were much higher when the experimenter dressed as a security guard. *Id.* Thirty-three percent of the subjects gave a dime to a stranger in response to the civilian, for example, whereas 89 percent complied with the guard. *Id.* Another study—in which the experimenter dressed as a blue-collar worker, a business executive, or a firefighter—demonstrated a similarly high level of compliance when the experimenter wore the firefighter's uniform relative to when he wore civilian clothes. David K. Kessler, *Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard*, 99 J Crim L & Criminol 51, 63 (2009) (citing Brad J. Bushman, *Perceived Symbols of Authority and Their Influence on Conformity*, 14 J Applied Soc Psychol 501, 502-06 (1984)).

In the context of this case, the officer's uniform further reinforced a social dynamic in which defendant was significantly more likely to view Officer Robeson's "question" as a command. The preceding studies accordingly suggest a source other than defendant's independent consent for defendant's submission to the officers' search of his vehicle. That is, the

studies discussed above, despite factual differences, "provide[] a viable explanation" as to why "people follow or obey a 'request' made by police officers in authority positions in situations where there is not only no ostensible benefit to do so, there is likely harm." Mary Strauss, *Reconstructing Consent*, 92 J Crim L & Criminol 211, 239-40 (2002).

3. Research on police interactions confirms that people rarely comply freely with officers' requests.

Research that has directly examined the reasons why individuals comply with officers' requests further demonstrates the coercive power that officers wield during encounters with civilians. A study of stop data from Maryland and Ohio revealed that, of the 9,028 motorists whom police asked for consent to search their cars, 89.3 percent granted it. Steven Chanenson, *Get the Facts, Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches*, 71 Tenn L Rev 399, 452 (2004) (citing Illya D. Lichtenberg, *Voluntary Consent or Obedience to Authority: An Inquiry into the "Consensual" Police-Citizen Encounter* 199 (1999) (unpublished Ph.D. dissertation, Rutgers University)). In a random survey of 54 of the individuals whom police had asked for consent to search, 47 out of the 49 people who "consented" indicated that they did so only out of fear of what consequences would follow if they refused. Nadler, 2002 Sup Ct Rev at 202 (citing Lichtenberg, *Voluntary Consent* at 251, 268). Moreover, when asked whether

they thought the police would have honored a refusal to allow a search, only one respondent answered yes. *Id.* at 203 (citing Lichtenberg, *Voluntary Consent* at 271-72).

Another survey, with a larger response rate, yielded similar results. Over 400 respondents indicated on a scale from one to five—with one being "not free" and five being "completely free"—whether they would feel free to leave or say no to a police officer during an encounter on a sidewalk or on a bus. Kessler, 99 J Crim L & Criminology at 69. Half of the respondents selected one or two, and almost 80 percent selected three (the midpoint) or less on the scale. *Id.* at 75.[6]

Yet another study, based on observations of encounters between experimenters dressed as university security officers and passersby, further confirmed the coercive power an officer can wield. Alisa M. Smith, Erik Dolgoff & Dana Stewart Speer, *Testing Judicial Assumptions of the Consensual Encounter: An Experimental Study*, 14 Fla Coastal L Rev 285, 300 (2013). The security officers asked the test subjects in a normal tone of voice, "Please come here, I'd like to speak with you," then (if the subject complied), "May I have your name?" then (if the subject complied), "May I see your identification?"

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[6] Women and people under 25 years old reported that they would feel less free to leave than did men and people over the age of 25. Kessler, 99 J Crim L & Criminol at 75.

and then (if the subject complied), "Why are you on campus?" *Id.* at 301. Every one of the 83 subjects complied completely with every request. *Id*. at 303. "Not a single individual questioned the officers on their authority to approach, stop, question or ask for identification." *Id.* Moreover, 60 percent of the subjects indicated that they submitted to the inherent authority of the officers, and another 11 percent did so to avoid trouble, conflict, or being chased. *Id.* at 320. Thus, the authors concluded, "Even without physical restraint, force or commands, reasonable people are constrained to comply with authority." *Id.*

B. Officers' coercive power is amplified in minority communities.

Although race is not a factor in this case, this court's decision necessarily will have a disproportionate impact on minority communities because minorities, and in particular African-American men, are routinely targeted by law enforcement. *See* Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 Val U L Rev 243 (1991) (compiling data). Indeed, a recent nationwide study by the federal Bureau of Justice Statistics found that black drivers are stopped more frequently than white drivers and are more than twice as likely to be searched. *See* Lynn Langton & Matthew Durose, *Special Report: Police Behavior During Traffic and Street Stops, 2011,* Bureau of Justice Statistics 9 (Sept 2013). Oregon reflects the national data; a study of the

Portland Police Bureau stop data reveals that, although African-Americans comprise 6.3 percent of the city's population, 11.8 percent of all traffic stops and 22.1 percent of all pedestrian stops involve African-Americans. *See* Sgt Greg Stewart & Emily Covelli, Portland Police Bureau, *Stops Data Collection: The Portland Police Bureau's Response to the Criminal Justice Policy and Research Institute's Recommendations*, at 11, 15-17, 29 (2014). Consistent with the national data, African-Americans in Oregon are also more likely to be searched by police, and are more likely than white drivers to give consent to search. *Id.* at 15.

Maclin addresses why African-Americans more frequently consent by noting, in response to the assertion that an individual is free to disregard a police officer's requests, that

> "[t]his is what the law is supposed to be; black men, however, know that a different 'law' exists on the street. Black men know that they are liable to be stopped at anytime, and that when they question the authority of the police, the response from the cops is often swift and violent."

Maclin, 26 Val U L Rev at 253. Owing to a long and sordid history[7] of violent encounters between police officers and African-American men, that community in particular feels pressured to cooperate for fear of physical reprisals. *See id.* at 255 ("Black males learn at an early age that confrontations with the police should be avoided; black teenagers are advised never to challenge a police officer, *even when the officer is wrong*." (Emphasis added)).

Although those concerns are heightened for black men, as the foregoing suggests, *no* citizen is immune from the coercive pressures that are inherent in every police-citizen encounter and which are brought to bear as a result of all the factors discussed above. In deciding the rule of law that will apply to this case and others that follow it, it is critical for this court to recognize the actual coercive forces at work in police-citizen encounters, to understand the imbalance of power in those encounters, and to be vigilant in vindicating individual rights protected by the Oregon Constitution by suppressing evidence when it derives from a constitutional violation. And, although judicial

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[7] That history continues to repeat itself. On August 9, 2014, an unarmed black teenager named Michael Brown was shot in the streets of Ferguson, Missouri, by Police Officer Darren Wilson. Brown was one of five unarmed black men killed by police officers between July and August of 2014. *See* Josh Harkinson, *4 Unarmed Black Men Have Been Killed By Police in the Last Month*, Mother Jones, *available at* http://www.motherjones.com/politics/2014/08/3-unarmed-black-african-american-men-killed-police (last accessed Aug 13, 2014) (noting the deaths of Eric Garner, John Crawford, Ezell Ford, and Dante Parker).

intervention and suppression of unlawfully obtained evidence is required in *all* cases, this court also should be mindful that minority communities face even greater pressures in police-citizen encounters, and face those pressures more frequently than others.

II. Suppression is required to vindicate individual rights

As this court recently confirmed in *State v. Unger*, 356 Or 59, 74, ___ P3d ___ (2014), suppression of unlawfully obtained evidence is necessary to vindicate the violation of an individuals' rights under the Oregon Constitution. As defendant ably explains in his Brief on the Merits, evidence that is discovered as a foreseeable result of a *Miranda* violation derives from that violation. And, as explained in the preceding sections, consent does not attenuate a preceding *Miranda* violation; rather, it *results* from it. Oregon law therefore requires suppression of the physical evidence discovered as a foreseeable result of a prior *Miranda* violation. *Vondehn*, 348 Or at 475-76.

It is incumbent on the courts to vindicate individual rights, because, as the research discussed above demonstrates, individuals rarely feel free to vindicate their own rights when confronted by a display of authority. In an ideal world an individual who is, in fact, free to leave will simply walk away. In an ideal world, a suspect, such as Mr. Delong, would already know that he has a right to refuse to answer a police officer's questions and would not need to be informed of that right. But we do not live in an ideal world. The reality is

that individuals do not always understand their rights or do not always feel free to assert those rights even if they do understand them. *See* Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 San Diego L Rev 507, 535 (2001) (noting that "far from feeling free to terminate an encounter, the reasonable person, by all indications, submits to the legitimate and coercive authority of the police. He or she is, in brief, on the short end of an asymmetric power relationship.").[8]

A. In light of police officers' coercive power, defendant's statement that officers could search his car was a foreseeable result of the unlawful custodial interrogation.

Defendant in this case faced a far more coercive environment than those in the studies discussed in Section I above. Defendant was subjected to a custodial interrogation while handcuffed in the back of a police car. Officer Robeson's question regarding the contents of defendant's car came after an

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[8] Importantly, innocent individuals routinely are subject to police coercion with no judicial oversight, which results in "widespread interference with personal liberty without any objective justification." Steinbock, 38 San Diego L Rev at 535. Regardless of the flagrancy of an officer's conduct, individuals still tend to experience most interactions as coercive. In the study of individuals whom police asked for consent to search their car, discussed in Section I.A.3, above, the majority of the individuals reported feeling "violated" and "really bitter" about the experience and continued to think about the experience about once per day. Nadler, 2002 Sup Ct Rev at 211-12. Thus, clear judicial statements regarding the limits of police coercion are necessary guidance for law enforcement and are essential for statewide protection.

incremental series of commands and restraints on defendant's liberty that maximized the coercive power of Officer Robeson's authority, as explained in Section I.A above. Moreover, as explained in Section I.A.1 above, Officer Robeson's status as an authority figure rendered his question about the contents of defendant's car more akin to a command than a request. Additionally, as Section I.A.2 explains, Officer Robeson's uniform bolstered his coercive power. Finally, Officer Robeson never told defendant that he had a constitutional right to refuse to say anything at all to the police officers.

In light of those circumstances, the state's argument that defendant freely chose to allow the officers to search his car is untenable. Empirical evidence confirms that individuals comply with police officers' requests as "the result of submission, rather than consent." Smith, Dolgoff & Speer, 14 Fla Coastal L Rev at 321. This court itself has recognized the inherent level of coercion that exists in custodial interrogations. *Vondehn*, 348 Or at 472. Thus, defendant's statement that the officers could search his car was a foreseeable result of the officers' *Miranda* violation.

B. No intervening circumstances diluted the officer's coercive power over defendant.

Social science research demonstrates that resisting the coercive power of an authority figure is most difficult when one is under pressure and in a face-to-face interaction. People forced to make decisions under pressure fail to

consider all the relevant information and alternatives and tend to rely "on implicit cultural theories and norms." Nadler, 2002 Sup Ct Rev at 195-96 (citing Chi-yue Chiu et al., *Motivated Cultural Cognition: The Impact of Implicit Cultural Theories on Dispositional Attribution Varies as a Function of Need for Closure*, 78 J Personality & Soc Psychol 247, 255-56 (2000)).[9] Moreover, even small stressors, such as the presence of another person in the room, can trigger physiological responses that make people to feel threatened and compromise their ability to reason. *Id.* at 195 (citing Jim Blascovich & Joe Tomaka, *The Biopsychosocial Model of Arousal Regulation*, 28 Advances in Experimental Soc Psychol 1, 23-24 (1996).

The physical proximity of an authority figure also has an impact on the degree of coercive power he or she wields. In the Milgram experiments, the test administrator's physical proximity to the subjects had "a pronounced effect." Blass, 60 J Personality & Soc Psychol at 399. Only 23 percent of participants were fully obedient when the experimenter left the laboratory and

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[9] As an example, Nadler points to a local police department's effort to curb underage drinking. 2002 Sup Ct Rev at 193-194. Police sent out forms to 2,700 households asking for homeowners' consent to allow police to search their home if the police received a report of underage drinking. *Id.* (citing Robert Hanley, *An Anti-Drinking Campaign and How It Flopped: Police Want to Break Up Teen-Agers' Beer Parties, but Parents Won't Let Them In,* NY Times, Sept 28, 1994, at B1). Only 20 forms were signed and returned. *Id.* at 194. This stands in stark contrast to the high rates of compliance with police in face-to-face encounters.

gave orders over the phone, whereas 65 percent of the subjects were fully obedient in the original study, in which the administrator remained physically present. *Id.* Other studies have found that "people feel more pressure to comply with a request when the requester speaks to them from a close physical distance." Nadler, 2002 Sup Ct Rev at 190-91 (citing Chris Segrin, *The Influence of Nonverbal Behaviors in Compliance-Gaining Processes*, in *The Nonverbal Communication Reader: Classic and Contemporary Readings* (Laura K. Guerrero, Joseph A. DeVito & Michael L. Hecht, eds.) (1990)).

Here, defendant made the statement that the officers could search his car if they wanted to while under time pressure and in close proximity to Officer Robeson. Defendant was still handcuffed in the back of the patrol car, with Officer Robeson speaking to him from the front. Tr 8, 28.[10] Officer Robeson posed a question to defendant—whether there was anything in the car to be concerned about—that demanded an immediate response.

Thus, when defendant made the statement, he still faced the compelling atmosphere created by the *Miranda* violation. He remained in custody, and no time elapsed between the violation and his statement. No subsequent events diluted the coercive nature of the encounter. As a result, defendants' statement,

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[10] Officer Robeson testified that, at the time, he was checking on the in-car computer. Tr 8. Officer Poe testified that Officer Robeson was sitting in his car while speaking to defendant. Tr 28.

and the resulting discovery of physical evidence, derived from the *Miranda* violation.

CONCLUSION

For the foregoing reasons, this court should adopt defendant's proposed rules and affirm the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
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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 5,033 words.

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CERTIFICATE OF FILING AND SERVICE

I certify that on September 16, 2014, I filed the original of this BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER with the State Court Administrator by the eFiling system.

I further certify that on September 16, 2014, I served a copy of the BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER on the following parties by electronic service via the eFiling system:

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