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. C111693CR, C112523CR CA A152030 (Control), A152033 SC S062344

REPLY BRIEF 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

JOHN J. TYNER III #824157
Tyner & Associates
347 SW Oak
Hillsboro, OR 97123
Telephone: (503) 648-5591
Email: johntyneratty@gmail.com

Attorneys for Respondent on Review

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA M. JOYCE #013112
Solicitor General
REBECCA M. AUTEN #083710
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email:
rebecca.m.auten@doj.state.or.us

Attorneys for Petitioner on Review

Continued…

EMILY E. ELISON, #103800
Castleberry & Elison, P.C.
815 S.W. 2nd Ave. Ste. 500
Portland, OR 97204
Telephone: (503) 223-0011
E-mail:emily@castleberryelison.com

ALEXANDER A. WHEATLEY
#105395
Fisher & Phillips LLC
111 SW 5th Ave Ste 4040
Portland, OR 97204
Email: awheatley@laborlawyers.com

Attorneys for *Amicus Curiae* Oregon Justice Resource Center and on behalf of *Amici Curiae* American Civil Liberties Union of Oregon Incorporated, and Oregon Criminal Defense Lawyers Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional & Statutory Provisions

REPLY BRIEF OF PETITIONER ON REVIEW, STATE OF OREGON

ARGUMENT

At issue in this case is the proper interpretation of Article I, section 11, of the Oregon Constitution. In particular, this case presents the opportunity to apply the rule announced more than thirty years ago in *State v. Sparklin*, 296 Or 85, 95, 672 P2d 1182 (1983), that the Article I, section 11, right to counsel is specific to the "criminal episode in which the accused is charged" and does not extend to "factually unrelated criminal episodes." Under *Sparklin*, 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 without first notifying the individual's counsel and giving counsel an opportunity to attend. However, the police are free to question the individual about "factually unrelated" crimes without counsel present. Here, defendant had been charged with a particular crime—sexual abuse against A. The issue is whether police questioning about defendant's sexual abuse of two other victims (K and L) constituted questioning about the "events surrounding" defendant's sexual abuse of A or instead involved only "factually unrelated" crimes.

The state's opening brief fully analyzes the foregoing issue, applying the text, history, and case law surrounding Article I, section 11. The state files this reply brief to respond to arguments of defendant and *amici* that are not

responsive to the state's argument. First, defendant raises a different constitutional provision—Article I, section 12, of the Oregon Constitution—which is not at issue in this case. Second, *amici* ask this court to eliminate entirely the longstanding rule from *Sparklin*, rather than refining that rule and applying it to the circumstances of this case.

A. Article I, section 12, is not at issue in this case.

This case involves the proper interpretation of Article I, section 11, of the Oregon Constitution. That was the only issue presented to the Court of Appeals, and the only issue that the Court of Appeals decided. *See State v. Prieto-Rubio*, 262 Or App 149, 151-52, 324 P3d 543 (2014) (noting that case "turns on whether" defendant's crimes "were 'factually related' for purposes of Article I, section 11, of the Oregon Constitution"). Defendant nonetheless argues, in part, that the state's proposed test in this case would somehow alter this court's Article I, section 12, jurisprudence. (Def's BOM 9-13).

The state's analysis applies only to Article I, section 11, and has no bearing on the Article I, section 12, right against self-incrimination. The state argues that the Article I, section 11, right to counsel should apply only after an individual has been formally charged. (State's BOM 12-28). Defendant apparently does not challenge that argument. (Def's BOM 14 n 3 (noting that "[t]he starting point of the Article I, section 11 right to counsel is not at issue in this case")). Defendant, however, appears to read the state's brief as arguing

that the Article I, section 12, right against self-incrimination *also* does not apply until formal charging. (Def's BOM 11-12). To the contrary, the state agrees that Article I, section 12, applies whenever an individual is in "compelling circumstances." *State v. McAnulty*, 356 Or 432, 454, __ P3d __ (2014). The state's argument applies only to Article I, section 11.

B. The Article I, section 11, right to counsel is specific to the "criminal episode in which the accused is charged" and does not extend to "factually unrelated criminal episodes."

In *State v. Sparklin*, this court held that, when an individual has been charged with a crime and appointed counsel, Article I, section 11, prohibits police from questioning that individual "concerning the events surrounding the crime charged" without first notifying counsel. 296 Or at 93. However, the court also held that "[t]he prohibitions placed on the state's contact with a represented defendant do not extend to the investigation of factually unrelated criminal episodes." *Id.* at 95. *Amici* urge this court to abandon the *Sparklin* rule and instead adopt the "New York rule." Under that rule, police may not interrogate a represented individual about any matter—whether related or unrelated to the crime for which he is represented—unless counsel is present. (*Amici Curiae* BOM 2).

As an initial matter, *amici* fail to apply the proper analysis for overruling this court's well-established precedent. *See State v. Ciancanelli*, 339 Or 282, 290-91, 121 P3d 613 (2005) (laying out framework and explaining that "the

party seeking to change a precedent must assume responsibility for affirmatively persuading [the court] that [it] should abandon that precedent"). For that reason alone, this court, applying "[a] decent respect for the principle of *stare decisis*," *Ciancanelli*, 339 Or at 290, should decline to revisit *Sparklin*.[1]

Moreover, for the reasons discussed in the state's opening brief, the *Sparklin* court correctly held that the Article I, section 11, right to counsel is offense specific and thus does not prevent police from questioning an individual about matters unrelated to the charged crime. Nothing in the brief of the *amici curiae* undermines the reasoning in *Sparklin* or the state's opening brief. *Amici* argue that any information that police obtain—even information about factually unrelated charges—may influence the disposition of the charged crime. (*Amici Curiae* BOM 15). As a result, they argue that police should be prevented from

---

[1] *Amici* argue that this court has never "had the opportunity to adopt" the New York rule. (*Amici Curiae* BOM 8 n 5). To the contrary, this court had that opportunity in *Sparklin* and expressly rejected the New York rule. *Sparklin*, 296 Or at 90-91 (rejecting New York rule when analyzing defendant's Article I, section 12, argument); *id.* at 95 (holding, contrary to the New York rule, that "[t]he prohibitions placed on the state's contact with a represented defendant do not extend to the investigation of factually unrelated criminal episodes"); *id.* at 95-98 (noting that, "[w]ith the exception of New York," all state courts to address the issue under the Sixth Amendment held that police do not violate right to counsel by interrogating about factually unrelated crimes, and ultimately adopting that analysis). Although the concurring opinion questioned the majority's decision to do so, the *Sparklin* majority expressly rejected the New York rule.

any questioning, including questioning about crimes that are factually unrelated to the charged crime. (*Id.*). Here, however, the state did not attempt to use defendant's statements about his unrelated crimes—the crimes against K and L—to prosecute him for his crimes against A. Were the state attempting to do so, a different rule may well apply. *See, e.g.*, *Maine v. Moulton*, 474 US 159, 179-80, 106 S Ct 477, 88 L Ed 2d 481 (1985) (incriminating statements inadmissible in prosecution of crime to which Sixth Amendment right had attached, but not in prosecution of other crimes). The concern that *amici* raise simply does not arise in this case.

In sum, *Sparklin* was correctly decided, and *amici* provide no reason to revisit it. Indeed, although *amici* argue that "[t]he New York rule has proved workable" (*Amici Curiae* BOM 14), the concurring and dissenting opinions in the cases that *amici* cite show otherwise. *People v. Lopez*, 16 NY3d 375, 388, 947 NE2d 1155 (2011) (Smith, J., concurring) ("In reality, our right to counsel jurisprudence is so complicated that it is almost incomprehensible, and it regularly produces unjust results."); *People v. Burdo*, 91 NY2d 146, 158-59, 690 NE2d 854 (1997) (Wesley, J., dissenting) (noting absurd results of New York rule, which prevents questioning only if the defendant is in custody for the charged crime and allows questioning if the defendant is in custody for a different crime, even though the defendant has counsel for the charged crime). This court should reject *amici*'s invitation to overrule *Sparklin.*

CONCLUSION

For the reasons explained in the state's opening brief and reply brief, this court should reverse the decision of the Court of Appeals and affirm the trial court's judgment.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
ANNA M. JOYCE
Solicitor General

/s/ Rebecca M. Auten
REBECCA M. AUTEN #083710
Assistant Attorney General
rebecca.m.auten@doj.state.or.us

Attorneys for Petitioner on Review
State of Oregon

RMJ:bmg/6105643

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 18, 2014, I directed the original Reply Brief of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Alexander A Wheatley, attorney for *amicus curiae*, by using the electronic filing system. I further certify that on December 18, 2014, I directed the Reply Brief of Petitioner on Review, State of Oregon to be served upon John J. Tyner III, attorney for appellant, and Emily E. Elison, attorney for *amicus curiae*, by mailing two copies, with postage prepaid, in an envelope addressed to:

John J. Tyner III
Tyner & Associates
347 SW Oak
Hillsboro, OR 97123

Emily E. Elison #103800
Castleberry & Elison, P.C.
815 S.W. 2nd Ave. Ste. 500
Portland, OR 97204

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 1,305 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).

/s/ Rebecca M. Auten

REBECCA M. AUTEN #083710
Assistant Attorney General
rebecca.m.auten@doj.state.or.us
Attorney for Plaintiff-Respondent

RMJ:bmg/6105643