IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondents on Review v. ROBERT DARNELL BOYD, Defendant-Appellant, Petitioner on Review	Lane County Circuit Court Case No. 201026332 COA A151157 SC S063260

BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Multnomah County
Honorable Lauren S. Holland, Judge

Opinion Filed: March 25, 2015
Author of Opinion: Egan, J.
Before: Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge

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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Defendant was charged with the murder of his girlfriend, He moved to suppress statements that he made to the police after his arrest on the ground that the statements were obtained in violation of Article I, section 12, of the Oregon Constitution and the Fifth Amendment to the United States Constitution. The trial court denied the motion. Defendant tried his case to the court, and the trial court found defendant guilty as charged.

Defendant appealed and assigned error to the trial court's denial of his motion to suppress. The Court of Appeals affirmed by written opinion. *State v. Boyd*, 270 Or App 41, 346 P3d 626 (2015). This court allowed review. *State v. Boyd1*, 357 Or 550, ___ P3d ___ (2015).

Questions Presented and Proposed Rules of Law

First Question Presented

A murder suspect, who has invoked his right to counsel under *Miranda*, claims to have no memory of the homicide for which he was arrested and excitedly insisted that his girlfriend was alive when informed he was under arrest for her murder. After being jailed for seven hours, does the suspect "initiate" communication with the police when he asks an officer the following:

"Is anyone going to tell me why I am here? I need to call my baby girl because she is going to wonder where I am at."

Proposed Rule of Law

A suspect initiates communication with the police by making a statement that shows that he wants to have a generalized discussion about the investigation. A suspect does not initiate communication with the police when he asks about the nature of the charges or makes requests that relate to his custodial status.

Second Question Presented

In response to the suspect's inquiries, does an officer impermissibly "interrogate" the suspect when, rather than answering the suspect directly, he asks the suspect: (1) if he remembered being informed of the reason for his arrest during an earlier police interrogation; and (2) if he referred to the victim of the homicide as his "baby girl?"

Proposed Rule of Law

Interrogation is "direct questioning" or its functional equivalent—any words or actions on the part of the police that are likely to elicit an incriminating response. Any direct questioning that is not a part of the normal booking process is impermissible. Questioning a murder suspect about his recollection of a police interrogation, which happened close in time to a homicide the suspect has claimed not to remember, is interrogation. Similarly,

questioning a suspect, who purports not to remember why he is in custody, about whether he is asking to call the victim of the homicide is interrogation. The questions seek information about the suspect's memory and mental status and relate directly to the criminal investigation.

Third Question Presented

When the trial court erroneously admits statements that officers obtain in violation of the Fifth Amendment and Article I, section 12, does a defendant waive his objection to the admission of that evidence when the defendant's expert considers those statements in his psychological diagnosis, which defendant uses at trial to advance an affirmative defense of extreme emotional disturbance ("EED")?

Proposed Rule of Law

No. A defendant is entitled to treat a pretrial evidentiary ruling as the "law of the trial" and proceed with the trial in conformity to the ruling. Accordingly, a defendant does not waive his pretrial objection to evidence admitted under a trial court's ruling when he has an expert consider that evidence in making a psychological diagnosis that ultimately supports defendant's defense of EED.

Fourth Question Presented

When the prosecution violates a defendant's constitutional rights against compulsory self-incrimination by introducing statements obtained in violation of *Miranda* at trial, and the defendant testifies and presents the affirmative defense of EED to refute and explain those statements, may the defendant's testimony and the evidence he presents in advancement of his affirmative defense be considered in assessing the harm from the constitutional violation?

Proposed Rule of Law

No. Under federal law, a defendant's trial testimony is considered tainted and may not be considered in the harmless error analysis when the defendant testifies in order to overcome the impact of his illegally obtained statements. Similarly, under state law, this court assumes that a defendant's testimony was tainted unless the court can determine from the record that defendant's testimony did not refute, explain, or qualify the erroneously admitted pretrial statements.

The same harmless error analysis and exclusionary principles should prevent evidence other than a defendant's trial testimony from deeming the error harmless. The purpose of those rules—restoring the status quo and vindicating a defendant's rights—warrants disregarding a defendant's decision to acknowledge the challenged statements to advance an affirmative defense.

Fifth Question Presented

Does an officer adequately advise a suspect of his right to counsel under *Miranda* when he advises him that if he cannot afford an attorney that he has a right to a court-appointed attorney.

Proposed Rule of Law

Miranda requires that a suspect be informed of the right to have an attorney present before and during any interrogation. A warning that advises a suspect of his right to only court-appointed counsel is plainly inadequate because it informs the suspect that counsel will be appointed only at some future court proceeding.

Summary of Facts

I. Hearing on Defendant's Motion to Suppress

On November 28, 2010, at 2:30 a.m., defendant killed his girlfriend,

Shortly thereafter he was arrested at gun point several blocks away by Detective Wilson and Officer Conrad. Conrad advised defendant of his *Miranda* rights from memory as follows:

> "I said he had the right to remain silent. That anything he said could and would be used against him in a court of law. That if he could not afford an attorney, one would be appointed to him by the court."

Tr 54. Defendant indicated that he understood those rights. Tr 16.

The first interview/exchange

Iinitially, defendant told Conrad that he remembered walking with and that the next thing he remembered was being arrested by Conrad. Tr 61. Then, defendant told Conrad that he remembered walking on the bike path and seeing blood on his hands. Tr 61. Defendant shared his assumptions that he had been involved in a fight with someone over or that he had punched a car window. Tr 62.

After further questioning, defendant said he remembered that he and began arguing over cigarettes while walking home. Tr 64. was intoxicated and fell down. Tr 64. Because she believed defendant had pushed her, she hit him in the face four times, which "really hurt." Tr 67. Defendant denied engaging with her physically. Tr 67. Defendant said that the last thing that he remembered was hugging or holding before he found himself walking on the bike path. Tr 64.

Defendant said that it was cowardly to hit a woman. Tr 65. Defendant told Conrad several times that he loved and he asked about her well-being. Tr 65. Conrad did not tell defendant that was dead. Tr 60.

The second interview/exchange

Defendant's second interrogation was recorded at the police station an hour later. Tr 102. Detective Myers interviewed defendant. Myers did not re-

advise defendant of his *Miranda* rights. During the interview, the following exchange occurred:

> "Q: Okay. All right, well fine. What went on tonight? What brings you here tonight?
>
> "A: I really don't know, but I figure I either punched somebody's car or punched somebody because my hand is f****d up and I know I was pissed off because I was arguing with my girl—
>
> "Q: Uh-huh.
>
> "A: And evidently I started off because I f*****g realized where I was when she wasn't with me, so other than that, I have nothing else to say. I don't know why I am here, so—please don't talk to me anymore on that aspect until you bring me a lawyer."

Tr 148.

Myers asked defendant to change into jail clothes. Defendant asked Myers what he was being charged with. Tr 148. Myers informed defendant that was dead and that he was under arrest for her murder. Tr 148. Defendant reacted strongly to that information and volunteered the following statements:

> "A. Whoa, whoa, whoa, what the f**k you mean, my girlfriend is dead, man?
>
> "Q. She's dead.
>
> "A. No, no, no, no -- Ally's at home.
>
> "Q. Change your clothes, let's go.
>
> "A. Ally's at home.

"Q. Have a seat and change your clothes. That's all you've got to do. Relax and change your clothes.

"A. What do you mean, my girl is dead, man? That's not, no, no, no, we just had an argument. I left her -- my girl ain't dead. My girl is drunk at home with the baby. I don't -- f**k what y'all is saying, and why the f**k are all of you mother-f*****s gathering up on me?

"Q. We are not gathering up on you. We'd just like you to change your clothes, sit down and we'll get through this process.

"A. All right, but my girl ain't dead. My baby is at home, peaceful. No, I refuse to even entertain that thought. F**k you, you can kiss my ass. My baby's at home with the baby. She's at home where she ought to. No, hell no, f**k you, you can kiss my ass. No, my baby is fine. I don't give a f**k what y'all-- my baby is at home with I wouldn't give a f**k what y'all talking about. F**k that shit.

"Q. You want to slide your pants over here?

"A. Man, listen. F**k that, my baby ain't dead. My baby is at home with the baby. [inaudible] No, no, no -- (long dead air)

"Q. You just sit there until officers come to take possession of your things. Can someone transport him? (Pause)

'Q. Put your hands behind your back. I'll try not to [inaudible] them too hard. I know you got a bum finger.

"A. I'm not about to fight you because my baby ain't dead (inaudible) I don't know what the f*** happened tonight, but my baby ain't dead."

Tr 148.

Sargent Lewis, an officer with 28 years of experience (19 as a detective) watched the interview via monitor and saw defendant's reaction. Tr 112-13, 115. Officers transported defendant to a holding cell at 4:00 a.m. Tr 112.

The third interview/exchange

Seven hours later, defendant was questioned a third time around 11:00 a.m., by Lewis, who visited defendant in his holding cell. Lewis had already visited the homicide scene and been briefed by other officers. Tr 124. Lewis had defendant show his hands. Tr 118. Lewis testified that, then, the following occurred:

> "Q. All right. So, he shows you his hands and then what?
>
> "A. That was it. He showed me the hands and palms and I started to leave and he said to me, 'is anybody going to tell me why I'm here, I need to call my baby girl because she's going to wonder where I'm at?'
>
> "Q. Okay and then what?
>
> "A. I asked him if he didn't remember Detective Myers telling him why he was here, and he replied, 'no, I don't remember nothing about that or talking to nobody.'
>
> "Q. Then what?
>
> "A. I asked him, when he was talking about his baby girl, if he was referring to * * * and he said that he was, and then I just told him that I was present when Detective Myers told him that she was dead and he was under arrest for killing her, and he got real agitated and started breathing heavy and clenching his fists and told me, 'no, no, she ain't dead, you're lying' and then he tells me 'I want to talk to the detective that you said I talked to.'"

Tr 119.

The fourth interview/exchange

Myers arrived at the jail within ten minutes. To expedite the interview, Myers and Lewis did not move defendant into an interview room. Tr 120.

Myers reminded defendant that he had previously asked to speak with a lawyer and asked him if he still wanted one. Tr 152. Defendant reaffirmed that he wanted to talk to Myers. Tr 152. Myers advised defendant of his *Miranda* rights, and defendant said that he understood them. Tr 153.

Defendant told Myers that he and were on their way home from a party when they had an argument about whether they were walking in the right direction. Tr 155. walked away from defendant, and he grabbed her from behind, causing her to fall. Tr 155. Defendant pulled her back to her feet by his jacket, which she was wearing. He pulled his jacket off because he was cold. Tr 155. was angry that defendant took his jacket, and she hit defendant's face with her fists. Although her blows did not hurt defendant, defendant was angry, and he felt like "bashing her f*****g head in." Tr 156. Defendant pinned up against a van, and accidently hit her in the face—meaning to hit her shoulder. Tr 156. fell backward and her head hit the ground. Tr 156.

Defendant told Myers that has a large soft spot on the back of her head, he was thankful that he hit her in the front rather than the back of the head, but he was concerned about the soft spot when she fell. Tr 156. Defendant blacked out after hitting Defendant knew that what he had done was "bad," but he was under significant stress and could not control

himself. Tr 157. Defendant thought alcohol consumption may have been responsible for his black out. Tr 158.

Myers told defendant that injuries were inconsistent with a single punch. Defendant requested an attorney. Tr 158. The interview lasted about 40 minutes. Tr 169.

II. Trial

The only issue at defendant's trial was the culpability of his mental state. He did not dispute that his actions caused death, that she was killed by blunt force trauma to the head and neck area, and that she suffered internal brain injury. Tr 565-658, 573.

During its case-in-chief, the state introduced evidence of defendant's statements to Myers (the fourth interview/exchange). Myers testified at trial consistently with his testimony at the motion hearing. Tr 522-527. The state did not offer defendant's statements during the first three interviews/exchanges in its case-in-chief.

Defendant testified in his defense: (1) he said that he didn't remember punching (2) he denied that he told Myers that he felt like bashing head in; (3) he knew that his actions caused death; but (4) he had been unaware of his actions and had not meant to hurt her.

More specifically, defendant testified that he remembered standing in front of and pressing her up against a van. Tr 975. Then he

remembered seeing her on the ground, unconscious. Tr 1055. Defendant heard her breathing. Tr 1063. He did not see blood. Tr 1067. Defendant panicked and left her there. Tr 976. Defendant's next memory was walking on the bike path and noticing blood on hands. Tr 977.

Defendant explained that Myers misunderstood him. Defendant had told Myers something about not wanting to fight: "I didn't want to bust a freaking head and that got misconstrued." Tr 985. Defendant explained that the misconstrued statement related to passer-byers who had stopped to check on welfare a few minutes before he struck her. Defendant was afraid that the passer-byers were going "to rob" or "fight" him and Tr 974-75.

Defendant also raised the affirmative defense of EED, for which he presented Dr. Harper's expert testimony. Tr 709-918. Harper considered defendant's statements to the police in his evaluation, but he did not testify as to their substance. Harper believed defendant's statements to Conrad in the field and to Myers at the police station (the first and second interviews/exchanges) were significant because they occurred shortly after the homicide. Tr 787. Harper devalued defendant's statements to Myers at the jail (the fourth interview/exchange), because the interview was not recorded and because Myers by then had already formed an opinion about defendant. Tr 786-89.

On rebuttal, the state presented the expert testimony of Dr. Johnson. Tr 1125-1325. Johnson agreed that defendant's statements to Conrad during the first interview/exchange were significant. Tr 1186. Johnson also relied heavily on defendant's statements to Myers in the fourth interview/exchange in reaching his diagnosis. Tr 1189-1191.

During his psychological interviews, defendant claimed "complete amnesia even for previous disclosures." Tr 1187. Specifically, Johnson testified:

> "[Defendant] did not endorse any of the elements that he reported to Myers in terms of wanting to hurt somebody, hitting her, watching her fall. He is claiming complete amnesia for the assault with the exception of a flurry of punches that he delivered."[1]

Tr 1245

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[1] Johnson's testimony regarding the "flurry of punches" is unclear but it appears he was referencing a portion of his interview with defendant in which defendant acted out a fight scene. Johnson testified: "He almost enacted the whole thing and he's gesturing and he's speaking as though it was his stream of consciousness at the time of the offense and [']who am I hitting? Is it, could it be, no, keep fightin, you're going to get hurt.['] * * * I interpreted that to mean that was his recollection of the assault of Ms. He didn't state that this is something that he imagined or something that he assumed." Tr 1192-93.

With regard to his interview with Johnson, defendant explained: "So when I talked to Johnson I was like okay, well if this makes sense, I guess that's what happened. Do I actually remember it from that night. No I assumed that that had to be—maybe I had to remember I was swinging. I had to know I was swinging, but truth be told I don't remember swinging nary one time. The only time I remember swinging was well before when I didn't hit her." Tr 1118.

The experts reached conflicting diagnoses. Harper testified that defendant was in a dissociative amnesic state at the time of the homicide. Tr 744-770. Johnson testified that defendant was malingering. Tr 1187-1190.

III. Procedural History

Defendant was indicted for murder on December 6, 2010. Oregon Judicial Information Network ("OJIN") 10. His attorney, Baker, filed notice of intent to rely on the affirmative defense of EED on April 6, 2011, and defendant was interviewed by the state's expert, Johnson, in June of 2011. OJIN 29. In July of 2011, Baker withdrew, and Friedman was appointed as defendant's lawyer. OJIN 56.

Friedman filed the *Miranda* motion that is at issue here on October 31, 2014. OJIN 76. At a hearing on the motion, defendant argued that the police ignored his exercise of *Miranda* rights and that he did not knowingly and voluntarily waive those rights. Tr 180-181. The trial court denied the motion and ruled that defendant voluntarily waived his rights under *Miranda* in the field and that police at the station house honored defendant's later exercise of his *Miranda* rights because " all questioning stopped of [defendant] at that point." Tr 183-84. The trial court further concluded that defendant reinitiated communication with the police at the jail and that he subsequently validly waived his *Miranda* rights. Tr 183-84. After the trial court denied the motion,

Friedman filed a trial memorandum on November 7, 2014, indicating that defendant would be presenting the affirmative defense of EED. OJIN 109.

Summary of Argument

Both the state and federal constitutions guarantee that the government will not compel a person to make statements that can be used to prosecute that person. The Fifth Amendment to the United States Constitution provides in part:

> "No person shall be * * * compelled in any criminal case to be a witness against himself * * *."

Article I, section 12, of the Oregon Constitution provides in part:

> "No person shall be put in jeopardy twice for the same offence (sic), nor be compelled in any criminal prosecution to testify against himself."

To establish that a suspect's custodial statements were not compelled, the state must show two things: first, that the suspect was adequately apprised of his or her *Miranda* rights before interrogation and, if exercised, that the exercise of those rights were honored; and second, if those rights were waived, that the suspect knowingly and intelligently waived them. *Miranda v. Arizona*, 384 US 437, 467, 86 S Ct 1602, 16 L Ed 2d 694 (1966); *State v. Vondehn*, 348 Or 462, 474, 236 P 3d 691 (2010).

Defendant was subjected to custodial interrogations by the police on four occasions: (1) in the field by Conrad; (2) at the police station by Myers; (3) in

his holding cell by Lewis; and (4) in his holding cell by Myers. The trial court's denial of defendant's motion to suppress was legal error for at least two analytically different reasons.

First, the trial court should have suppressed defendant's statements from the fourth interrogation because defendant was interrogated after having invoked his right to counsel under *Miranda*. Under the rule in *Edwards v. Arizona*, 451 US 477, 101 S Ct 1880, 68 L Ed 2d 378 (1981), police are prohibited from interrogating a suspect who has invoked his right to counsel unless the suspect initiates further communications with the police that demonstrate his desire to have a generalized discussion about the investigation with the police. Defendant did not "initiate" further communications with the police when he asked why he was being held and when he asked to make a phone call. Those inquiries are routine questions associated with custody. They do not demonstrate that defendant wished to talk about the investigation.

In response to defendant's inquiries, Lewis questioned defendant. Lewis had seen defendant's reaction during Myers's interrogation. Lewis knew that defendant had disclaimed any memory of death and had vociferously insisted that she was safe at a home. Lewis asked defendant: (1) if he remembered that, at the close of Myers's interrogation, Myers had told defendant that was dead that he had been arrested for her murder; and

(2) if he referred to as his "baby girl." Those questions constituted interrogation.

Police had an obvious investigatory interest in whether or not defendant had feigned his lack of memory with respect to the homicide. Whether or not defendant remembered the details of a close-in-time interrogation bore on defendant's memory and mental status. Accordingly, as Lewis likely knew, Lewis's questions were reasonably likely to elicit a response that the prosecution would use at trial. Because Lewis interrogated defendant in violation of the rule of *Edwards*, as a matter of law, the state cannot show that defendant subsequently validly waived his right to counsel prior to Myers's interrogation—even though Myers re-advised defendant of his rights.

Defendant did not waive his pretrial objection to the admission of his statements to Myers merely because his expert considered them in making a psychological diagnosis that supported defendant's defense of EED. Defendant did not offer those statements into evidence. Moreover, defendant was entitled to treat the court's pretrial evidentiary ruling as the "law of the trial" and proceed with the trial in conformity to the ruling.

The trial court's denial of defendant's pretrial motion to suppress the statements he made to Myers during the fourth interrogation was not harmless. The state presented those statements in its case-in-chief. The statements were probative of the only factual issue at trial—defendant's intent. They were not

cumulative to other evidence. They were qualitatively different than the state's other evidence. And the prosecutor, during both opening and closing arguments, emphasized their significance to the fact-finder.

Further, defendant's trial testimony should not be considered in the harmless error analysis because the state cannot show that defendant's trial testimony was not tainted by the constitutional violation. For similar reasons, although it is a matter of first impression, the harmless error and exclusionary rules of the Fifth Amendment and Article I, section 12, should exclude consideration of defendant's use of the challenged statements by an expert to advance an affirmative defense of EED in the harmless error analysis. The purpose of the harmless error and exclusionary rules of the Fifth Amendment and Article I, section 12, are to restore defendant to the status quo and vindicate his rights. Therefore, unless the state can show that defendant's defense strategy was unaffected by the erroneous pretrial ruling, the defendant's evidence should not be considered in the harmless error analysis. Under the circumstances of this case, the state cannot meet that showing.

Second, the trial court also should have suppressed defendant's statements from the first and second interrogations because neither Conrad nor Myers advised defendant fully of his right to counsel under *Miranda*. Although defendant did not challenge the adequacy of the warning in the trial court, the

error is plain and warrants review. Further, the error was not harmless because it affected defendant's defense strategy.

Argument

I. The statements that defendant made to Myers during the fourth interrogation should have been suppressed.

A. Defendant unequivocally invoked his right to counsel under the Fifth Amendment and Article I, section 12, during Myers's station-house interrogation.

i. The Fifth Amendment

The right to counsel, which arises during custodial interrogations, has not only been afforded the procedural protections of *Miranda*, but those protections have been fortified. In *Edwards*, 451 US 477,[2] the court "established a second layer of prophylaxis for the *Miranda* right to counsel." *McNeil v. Wisconsin*, 501 US 171, 178, 111 S Ct 2204, 115 L Ed 2d 158 (1991). The rule from *Edwards* requires that once an accused invokes his right to counsel, police must cease all interrogation until an attorney is provided *unless* "the accused himself initiates further communication, exchanges, or conversations[.]" *Edwards*, 451 US at 484–85. Further, once "an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be

[2] In *Edwards*, the defendant was arrested, informed of his *Miranda* rights, and questioned in jail until the defendant requested an attorney. *Id.* at 478–79. Questioning ceased, but the next day police officers returned to the jail, again informed the defendant of his *Miranda* rights, and then obtained the defendant's confession when he said he was willing to talk. *Id.* at 479.

established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights." *Id.* at 484.

The rule in *Edwards* is needed to enforce the warnings required by *Miranda* because it is "inconsistent with *Miranda* and its progeny for the authorities, at their instance, to re-interrogate an accused in custody if he has clearly asserted his right to counsel." *Id.*; *see also Patterson v. Illinois*, 487 US 285, 291, 108 S Ct 2389, 101 L Ed 2d 261 (1988) ("Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny[.]"). *Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey*, 494 US 344, 350, 110 S Ct 1176, 108 L Ed 2d 293 (1990).

A second purpose served by the bright-line approach of *Edwards* is providing "'clear and un-equivocal' guidelines to the law enforcement profession."

Arizona v. Roberson, 486 US 675, 682, 108 S Ct 2093, 2098, 100 L Ed 2d 704 (1988).[3] "The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." *Minnick v. Mississippi*, 498 US at 151.

ii. Article I, section 12

In *State v. Kell*, 303 Or 89, 734 P2d 334 (1987), the court adopted and applied the reasoning of *Edwards*, in analyzing whether the defendant had waived his rights under Article I, section 12. Thus, as a matter of state constitutional law, "[u]pon request for counsel, questioning not only 'should' but must cease." *State v. Isom*, 306 Or 587, 593, 761 P2d 524 (1988). "When a suspect in police custody makes an unequivocal request to talk to a lawyer, all

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[3] The Court has not retreated from the bright-line rule in the cases decided since *Edwards*. In *Roberson*, 486 US at 682, the United States Supreme Court held that the *per se* prophylactic rule in *Edwards* bars police-initiated interrogation regarding an unrelated investigation following a suspect's initial request for counsel.

In *Minnick v. Mississippi*, 498 US 146, 147, 111 S Ct 486, 112 L Ed 2d 489 (1990), the Court was asked "whether *Edwards*' protection ceases once the suspect has consulted with an attorney." The Court answered in the negative, ruling that "the Fifth Amendment protection of *Edwards* is not terminated or suspended by consultation with counsel." *Id.* at 150.

In *Maryland v. Shatzer*, 559 US 98, 130 S Ct 1213, 175 L Ed 2d 1045 (2010), the court held that if an in-custody suspect, in response to *Miranda* warnings, invokes his right to counsel, law enforcement may re-initiate contact with the suspect if the suspect experiences a break in police custody of at least 14 days. *Shatzer* otherwise adhered to the rule in *Edwards*—a defendant who remains in custody may not be re-questioned having invoked his right to counsel.

police questioning must cease." *State v. Meade*, 327 Or 335, 339, 963 P2d 656 (1998); *see also State v. Montez*, 309 Or 564, 572, 789 P 2d 1352 (1990) (accord).

iii. Application

Here, there is no dispute that defendant's request for counsel during his station house interrogation by Myers was sufficiently clear to invoke the *Edwards* prohibition on further questioning.[4] And in response to defendant's request for counsel, Myers properly terminated the interrogation. At issue is whether defendant later "initiated" communication with Lewis and then made a knowing, intelligent, and voluntary waiver of his *Miranda* rights or whether Lewis "interrogated" defendant in violation of the rule in *Edwards*.

B. Defendant did not "initiate" communication with Lewis when he asked Lewis why he had been arrested and for permission to make a phone call.

i. The Fifth Amendment

The Court has described the "initiation" rule under *Edwards* as "a prophylactic rule designed to protect an accused in police custody from being badgered by police officers." *Oregon v. Bradshaw*, 462 US 1039, 1044, 103 S Ct 2830, 77 L Ed 2d 405 (1983). The divided opinion in the seminal case, *Bradshaw*, produced two competing tests, which do not differ materially in their

[4] Under Article I, section 12, police must cease interrogation when a person in police custody unequivocally invokes the right against self-incrimination. *State v. McAnulty*, 356 Or 432, 455, 338 P3d 653 (2014).

description, but when applied to the facts of the case, produced different outcomes.

In *Bradshaw*, the defendant inquired of a police officer, "[e]ither just before, or during," a trip from the police station to jail, "Well, what is going to happen to me now?" *Id.* at 1045. The *Bradshaw* plurality observed that in posing this question, the defendant "'initiated' further communication in the ordinary dictionary sense of that word." *Id.* at 1046. The plurality opinion declined, however, to make that the dispositive inquiry observing that:

> "There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally 'initiate' a conversation in the sense in which that word was used in *Edwards*."

Id. at 1045.

The four-justice plurality concluded that a suspect's "inquiries or statements * * * relating to routine incidents of the custodial relationship" would not be sufficient to constitute "initiation" but that questions or statements that under the totality of circumstances "evinced a willingness and a desire for a generalized discussion about the investigation" would. *Id.*

Applying that test to the particular circumstances in *Bradshaw*, the plurality concluded that the defendant had "initiated" such a desire. The Court

observed that the defendant's ambiguous question could have been (and was) interpreted by the officer as relating generally to the investigation. The Court noted that the officer immediately reminded the defendant that he did not have to talk to the officer. The defendant said he understood and then they conversed. Under those circumstances the Court concluded that the defendant's "question * * * as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation" and "was not merely a necessary inquiry arising out of the incidents of the custodial relationship." *Id.*

The four-justice *Bradshaw* dissent supplied its own competing test. There is, however, little difference between the way the plurality and the dissent phrased the standard to apply in determining what constitutes an initiation. The plurality said that an initiation occurs when a suspect "evince[s] a willingness and a desire for a generalized discussion about the investigation," *Bradshaw*, 462 US at 1045–46, while the dissent said the suspect must "demonstrate a desire to discuss the subject matter of the investigation." *Id.* at 1055 (Marshall, J., dissenting). The dispute between the *Bradshaw* plurality and the dissent was over application of the standard to the facts. The four dissenters did not believe the defendant's open-ended question, "What is going to happen to me now?" qualified as the initiation of further communication. *Id.* at 1054 (Marshall, J., dissenting).

ii. Article I, section 12

This court has held for state constitutional purposes that a suspect "initiates" conversation with the police when he demonstrates "a desire for a generalized discussion about the investigation." *Meade*, 327 Or at 341. This court has applied that test on two occasions.

In *Meade*, the defendant was taken into custody and questioned about allegations that he had inappropriately touched his girlfriend's eight-year-old daughter. 327 Or at 337. The detectives advised the defendant of his *Miranda* rights. The defendant initially responded to questions fully and without objection. After making some admissions, the defendant said, "If I need a lawyer, I want a lawyer." *Id.* The detective paused; the defendant then held up his hands to prevent the detective from speaking further, and said, "You've talked a lot. I want to say a few things." Without pausing, the defendant then began to talk about his relationship with his girlfriend. The detective then resumed his questioning. The defendant subsequently made inculpatory statements.

The court held that the defendant's physical gestures and the substance of his statements that followed those gestures "evinced a willingness and a desire for a generalized discussion about the investigation." *Id.* at 341. The court explained:

> "[The d]efendant's physical gestures cut off further questions by the officers. Having asserted control over the conversation, he then chose to reopen the topic of the investigation."

Id.

In *McAnulty*, 356 Or at 457–58, the defendant was interrogated by the police in connection with the death of her 15–year–old daughter, who had suffered prolonged abuse, torture, and starvation. The police committed a *Miranda* violation during the first interrogation, and the defendant made a number of inculpatory statements in three subsequent interrogations. The court concluded that statements made during the second interrogation session were the product of the *Miranda* violation, but that statements elicited during the third and fourth interrogations "were not a product of the earlier illegality." 356 Or at 458. The court explained that, one hour after the second interrogation ended, the defendant had "initiated the third interrogation by stating that she had something to tell [the police]." *Id.*

iii. Application

Here, defendant did not "initiate" communication with Lewis. Defendant's exchange with Lewis began when Lewis entered defendant's cell and asked defendant to show him his hands. Lewis's request to look at

defendant's hands was not interrogation.[5] But, as Lewis began leaving, defendant asked:

> "Is anyone going to tell me why I am here? I need to call my baby girl because she is going to wonder where I am at."

The Court of Appeals correctly reasoned that defendant's "further questions about why he was in custody and reference to his 'baby girl' [could not] be characterized as re-initiation of interrogation because those questions did not evince defendant's desire of for a generalized discussion about the investigation." *Boyd*, 270 Or App at 47.

Defendant's first question: Is anyone going to tell me why I am here?, falls under *Bradshaw's* "custodial relationship" inquiry. The question "why am I here?" under circumstances where an accused has been arrested, placed in jail, and held without means of communication and without access to an attorney is a routine question that invites a limited response. "Yes, you will be brought before a judge who will explain the charges," or "Yes, you have been charged with this crime." A person, who is in custody, should be permitted to ask an officer, as a routine inquiry, why he is being held without initiating further interrogation.

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[5] *See United States v. Wade*, 388 US 218, 222, 87 S Ct 1926, 18 L Ed 2d 1149 (1967) ("[C]ompelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance.").

Further, the surrounding circumstances do not indicate that defendant had a desire for a generalized discussion about the investigation. Although Lewis's request that defendant show him his hands was not interrogation, it was Lewis and not defendant, who initiated the conversation in the ordinary sense of the word. That is, defendant did not summon the police to his jail cell. And unlike the defendant in *McAnulty*, who expressly told the police that she had something to tell them, defendant's question did not express a willingness to disclose information. His statement is also unlike the defendant's conduct and statement in *Meade*, in which the defendant took control of the conversation and then preceded to talk about the allegations.

Finally, even assuming that defendant's question was ambiguous, Lewis's response was unlike the officer's response in *Bradshaw*. Lewis did not interpret defendant's statement as relating generally to the investigation. And Lewis did not immediately remind defendant of his rights and that he did not have to talk to him. Rather, Lewis understood that defendant was asking a specific question about why he was in custody.

Defendant's second statement was that he needed to call his "baby girl" because she was going to wonder where he was at. That statement is a request to make a phone call. The *Bradshaw* Court specifically held that requests to make a phone call relate to a defendant's custodial status and may not be interpreted as requests for a generalized discussion about the investigation.

The *Bradshaw* Court was deeply divided in the application of the initiation test to the facts of that case. Under circumstances where the defendant initiated the conversation in the ordinary sense of the word and asked an ambiguous question, which was interpreted by the officer to be an "initiation," and which the officer responded to by reminding the defendant of his rights—four justices found that the defendant had initiated and four found that he had not. As discussed above, the circumstances of this case differ markedly from *Bradshaw*. Defendant did not begin the conversation with Lewis. Defendant's questions were not ambiguous. And Lewis did not respond to defendant's questions by reminding defendant of his rights.

The purpose of the initiation requirement is to make sure that officers do not construe just anything a suspect says after he has invoked his right to counsel under *Miranda* as a desire to submit to general questioning. Even if defendant's statements don't fall squarely into the "custodial relationship" inquiry exception, a defendant's statement still must demonstrate "a desire for a generalized discussion about the investigation." Because neither defendant's statements nor the surrounding circumstances show such a desire, Lewis could not respond to defendant's statements by interrogating him.

C. Lewis interrogated defendant.

i. Fifth Amendment

The *Miranda* Court defined interrogation as "questioning initiated by law enforcement officers." 384 US at 444. In *Rhode Island v. Innis*, 446 US 291, 301, 100 S Ct 1682, 64 L Ed 2d 297 (1980), the Court elaborated on the definition of interrogation and held that "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." The "functional equivalent" branch of interrogation refers to "any words or actions on the part of the police (other than those normally attendant to arrest and custody)[[6]] that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* In turn, "incriminating response" refers to "any response—whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial." *Id.* at 302 n 5.

Applying the test to the facts of the case, the majority found that police did not interrogate Innis when they discussed the danger that his missing shotgun posed to nearby handicapped schoolchildren, and therefore had not violated his *Miranda* rights. *Id.* at 294. The Court explained that the police did not expressly question Innis, and furthermore that the officers should not "have

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[6] *See Pennsylvania v. Muniz*, 496 US 582, 601, 110 S Ct 2638, 2650, 110 L Ed 2d 528 (1990) (delineating *Miranda's* "routine booking exception").

known that their conversation was reasonably likely to elicit an incriminating response." *Id.* The Court noted that no evidence was offered to suggest that the officers knew that Innis was particularly vulnerable to comments about the welfare of handicapped children. *Id.* at 302–03. And the Court characterized the officers' conversation with Innis as nothing "more than a few offhand remarks" and not a case where the "police carried on a lengthy harangue in the presence of the suspect."

The *Innis* test "focuses primarily upon the perceptions of the suspect, rather than the intent of the police" in determining whether the suspect was coerced to provide incriminating information while in custody. *Illinois v. Perkins*, 496 US 292, 296, 110 S Ct 2394, 110 L Ed 2d 243 (1990). But "any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion" may be relevant in determining what the police knew or should have known in asking a question. *Innis*, 446 US at 302 n 8. That is, under the *Innis* test, a defendant need not prove that an officer intended to elicit a response, but an officer's knowledge of a defendant's particular vulnerability is a significant factor.

ii. The *Innis* test does not apply to direct questioning[7]

Courts disagree on whether the *Innis* test applies to direct questioning as well as its functional equivalent. *See Smiley v. Thurmer*, 542 F 3d 574, 582 (7th

[7] This argument was not presented to the Court of Appeals.

Cir 2008) (holding that the state appellate court unreasonably applied federal law by extending the *Innis* rule regarding "functional equivalent" interrogation to express interrogation); *United States v. Montgomery*, 714 F2d 201, 202 (1st Cir 1983) (*Innis* test does not apply to express questioning); *cf. United States v. Booth*, 669 F2d 1231, 1237 (9th Cir 1981) (*Innis* test applies to direct questioning). The Court's decisions in *Innis* and *Muniz* suggest that the protections of *Miranda* are not limited to a specific or qualifying type of express question.

The *Innis* majority, on at least three occasions, used language indicating that express questioning, in and of itself, satisfies the definition of interrogation under *Miranda*. *See Innis*, 446 US at 298, 299 n3 & 302. Nowhere in the opinion does the *Innis* majority suggest that the qualifying language of the "functional equivalent" test (words or actions that the police should know are reasonably likely to elicit an incriminating response) applies to express questioning. Rather, the court indicated on the facts before it that "[i]t is undisputed that the first prong of the definition of 'interrogation' [the express questioning prong] was not satisfied, for the conversation between [the police officers] included no express questioning of the respondent." *Innis*, 446 US at 302.

Further, in *Muniz*, the Court confirmed that direct questions asked during the booking process—even those questions not intended to elicit information

for investigatory purposes—constitute interrogation under *Miranda*. 496 US 582. In that case, the defendant was arrested for driving under the influence of alcohol. Without giving any *Miranda* warnings, a police officer first asked the defendant questions concerning the defendant's name, address, height, weight, eye color, date of birth, and current age. Five justices—the four constituting the plurality and Justice Marshall in dissent—agreed that those questions constituted custodial interrogation. *Id.* at 601; *see also id*. at 608-609 (Marshall, J., dissenting). The Court explained:

> "We disagree with the Commonwealth's contention that Officer Hosterman's first seven questions regarding Muniz's name, address, height, weight, eye color, date of birth, and current age *do not qualify as custodial interrogation as we defined the term in Innis*, supra, *merely because the questions were not intended to elicit information for investigatory purposes.*"

Muniz, 496 US at 601-02 (emphasis added) (citations and internal quotation marks omitted). The plurality went on to recognize a narrow exception to *Miranda* for "routine booking question[s]" that "secure the biographical data necessary to complete booking or pretrial services." *Id.* at 601.

The Court nonetheless made clear that "[r]ecognizing a 'booking exception' to *Miranda* does not mean * * * that any question asked during the booking process falls within that exception. Without obtaining a waiver of the suspect's *Miranda* rights, the police may not ask questions, even during

booking, that are designed to elicit incriminatory admissions." *Muniz*, 496 US at 602 n 14 (internal quotation marks omitted).

The import of the *Muniz* decision is that routine booking questions satisfy the definition of interrogation under *Innis* and *Miranda* (even when those questions are not intended to illicit and incriminating response), but in consideration of "the police's administrative concerns" are exempted from the evidentiary safeguards of *Miranda*. *Id.* at 601-02. As such, direct questioning that occurs outside of the booking setting is generally impermissible absent *Miranda* warnings or a valid waiver of an accused's *Miranda* rights regardless of whether the question was intended or likely to elicit an incriminating response.

iii. Article I, section 12

In *State v. Scott*, 343 Or 195, 166 P3d 528 (2007), this court adopted *Innis*'s definition of interrogation for purposes of Article I, section 12, and applied that definition to express questioning. In *Scott*, the defendant was arrested and advised of his rights under *Miranda*. At the start of the interview, defendant unequivocally invoked his right to counsel. After doing so, the officer asked defendant: "[y]ou saw something on TV? * * * saying that you killed somebody huh?" 343 Or at 199. The officer then paused for 8 to 10 seconds and asked defendant if there was a particular lawyer that he had in

mind. This court concluded the officer's questions constituted proscribed interrogation for purposes of Article I, section 12. This court explained:

> "Defendant's culpability for the shooting was the very subject of the television broadcast at which those questions were aimed; any further discussion of that broadcast would serve only to prolong a discussion that defendant had tried to terminate and, indeed, would be reasonably likely to elicit some type of incriminating response from defendant."

Id. at 203-04.

iv. Application

Outside of the booking process, police may not question a suspect in custody without obtaining a valid waiver of the suspect's *Miranda* rights. Here, Lewis asked defendant two questions: (1) if he remembered the substance of an earlier police interview; and (2) if he was asking to phone That questioning constituted interrogation because it did not occur in a routine booking setting; defendant had been in jail for seven hours.

In *Scott*, the parties posited that *Innis* controlled whether direct questioning constituted interrogation under Article I, section 12. 343 Or at 202. This court was not presented with arguments that *Innis* applies only to the functional equivalent branch of interrogation. Accordingly, *Scott* does not control the resolution of this case. [8]

[8] *See State v. Delong*, 357 Or 365, 372-73, 350 P3d 433 (2015) (concluding that *Vondehn*, 348 Or 462, did not control the resolution of the case, in part, because the court was presented with different arguments by the state).

The protections of *Miranda* are not limited only to questioning that an officer expects will elicit an incriminating response. Rather, a suspect, who has indicated an inability to deal directly with the police without counsel, is not to be questioned by the police. That rule is consistent with the Court's decisions in *Miranda*, *Innis*, and *Muniz* as well as they myriad of values that underlie the privilege against self-incrimination. *State v. Fish*, 321 Or 48, 55-56, 893 P2d 1023, 1027 (1995) (explaining that the right against compelled self-incrimination protects against "inquisitorial methods of investigation and prosecution" and maintains a "fair balance between individual autonomy and the governmental interest in prosecuting alleged offenders").

However, assuming direct questioning must satisfy the tests in *Innis* and *Scott* to constitute interrogation, Lewis's questions do. Under *Innis* and *Scott*, questioning by the police does not need to be prolonged or adversarial to constitute interrogation. *See Scott*, 343 Or at 195 (officer's two questions constituted interrogation). The dispositive inquiry turns on the nature of the question or questions, rather than the circumstances surrounding the questioning. Under *Innis*, any question likely to elicit a response that the prosecution may seek to use at trial is sufficient to constitute proscribed interrogation.

Here, rather than answering defendant's questions, Lewis questioned defendant: "Don't you remember detective Myers telling you why you were

here?" Tr 119. Lewis was an officer with 28 years of experience. Tr 112. He observed Myers tell defendant that had died and that he was under arrest for her murder. He saw defendant's response to that information: profound disbelief. Tr 148.

Certainly Lewis would have recognized that defendant's response to hearing about death coupled with his assertions to Conrad in the field that he did not remember what happened to put defendant's memory at the crux of the murder investigation. That is, the police had an obvious investigatory interest in whether or not defendant had feigned his lack of memory with respect to the events surrounding death. Correspondingly, the police had an obvious investigatory interest in whether defendant remembered the content of his interview with Myers, which happened close-in-time to the homicide (the incident to which defendant disclaimed any memory). Given Lewis's training and his knowledge of the circumstances of defendant's case, he should have known that his inquiry was reasonably likely to evoke a response that the prosecution might seek to introduce at trial.

After defendant answered Lewis's question and told him that he did not remember talking to Myers. Lewis responded to defendant's second question, in which defendant asked call to his "baby girl." Again, Lewis did not answer defendant directly. He did not provide defendant with a phone or tell him when

he could place a call. Rather, Lewis asked defendant if the person he wished to call was By asking defendant if he was asking to phone the victim of the homicide for which defendant was being held, Lewis again inquired into defendant's memory and mental status. Further, by using name and asking the defendant if he was referring to her as his "baby girl," Lewis revealed knowledge of defendant's intimate affairs—a knowledge that would be unexpected and disconcerting to defendant, who had displayed memory problems. Thus, Lewis's question invited further conversation. More fundamentally, however, Lewis asked defendant a question about the victim of the homicide. He should have known that such a question was likely to elicit a response from the defendant that might be used against him in a criminal prosecution. Because Lewis interrogated defendant in violation of the rule in *Edwards*, the court should have been suppressed defendant's statements to Lewis.

D. Defendant did not validly waive his rights under the Fifth Amendment or Article I, section 12 prior to his interrogation by Myers.

Edwards stands for the bright-line rule that, as a matter of law, when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that the responded to further police-initiated custodial interrogation even if he has been advised of his rights. 451 US at 484.

Here, Lewis asked defendant two questions that were of investigatory import to the state. After defendant answered those questions, Lewis told defendant that was dead. In response to that information, defendant asked to speak with Myers. Myers arrived at defendant's cell in "less than ten minutes" and began the interview immediately, taking no time to move defendant into an interrogation room. Tr 120. Myers advised defendant of his rights under *Miranda*, reminded defendant that he had previously invoked his right to counsel, and then obtained defendant's waiver. However, because Lewis interrogated defendant in violation of the rule of *Edwards* and *Kell*, defendant's subsequent "waiver" of his right to counsel is invalid as a matter of law. As a result, his statement to Myers should have been suppressed.

E. Defendant did not waive his pretrial challenge to the admission of his statements through his EED defense.

Pretrial, defendant objected to the admission of his statements to Myers. But, at trial, defendant's expert, Harper, considered defendant's statements to Myers in his evaluation and diagnosis of defendant. Defendant did not waive his pretrial objection through Harper's testimony. Defendant was entitled to treat the pretrial ruling as the "law of the trial" and proceed with the trial in conformity to the ruling. *See* Kenneth S. Broun et al, *McCormick on Evidence*, § 55 (6th ed. 2006) ("[W]hen his objection is made and overruled, he is entitled * * * to negatively rebut or explain, if he can, the evidence admitted over his

protest. Consequently, there is no waiver * * *if he meets the testimony with other evidence which, under the theory of his objection, would be inadmissible." (citations omitted)).

In *McCathern v. Toyota Motor Corp.*, 332 Or 59, 23 P 3d 320 (2001)[9], the plaintiff's 1994 Toyota 4Runner rolled over on the highway after it swerved to avoid an oncoming car. The plaintiff brought a design defect claim against Toyota and prevailed in the trial court. In support of that claim, the plaintiff had an expert testify about prior rollover incidents based on facts obtained from police reports. Toyota objected to the admission of the information from police reports as inadmissible hearsay. The trial court overruled Toyota's objection.

On cross-examination, Toyota referred to portions of several police reports that included accident descriptions that were contrary to the expert's conclusion. Toyota also stipulated that the entire contents of the expert's file, which included the police reports, could be admitted into evidence. Toyota never asserted that it was admitting the file solely for impeachment purposes. On appeal, the Court of Appeals concluded that Toyota had "made a strategic decision to sacrifice preservation of its hearsay objection in order to get the substance of the documents underlying the expert's opinion before the jury."

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[9] *State v. McGinnis*, 335 Or 243, 64 P3d 1123 (2003) (holding that *McCathern*'s nonwaiver rule applies in criminal cases).

McCathern1 v. Toyota Motor Corp., 160 Or App 201, 235, 985 P2d 804, 824 (1999).

On review, this court disagreed with the Court of Appeals and stated that Toyota did not waive its hearsay objection by stipulation to the admission of the experts file. This court explained:

> "A party has the right to meet its opponent's evidence admitted under the trial court's rulings. After making the proper objections, a party may counter its opponent's evidence, whether correctly admitted or not, without waiving its evidentiary objection on appeal."

332 at 70.

Here, defendant's expert considered defendant's statements to Myers, as well as a variety of psychological tests and information about defendant's background, to diagnosis him as suffering from dissociative amnesia at the time of the homicide. While defendant's expert may have considered defendant's statements to Myers in making his diagnosis, he did not testify to the substance of those statements, nor did he credit defendant's statements to Myers with much weight. Rather, defendant's expert tried to rebut or explain how defendant's statements revealed something other than an intention to commit murder. For those reasons, defendant's "use" of statements to Myers to advance an affirmative defense of EED should not result in a waiver of his pretrial *Miranda* motion.

F. The admission of defendant's statements to Myers was not harmless.

i. The Fifth Amendment

Miranda violations are subject to harmless error analysis. The test applied upon review under the Fifth Amendment is stringent: the error may be deemed harmless only if there is "no reasonably possibility" that "the evidence complained of might have contributed to the verdict." *Chapman v. California*, 386 US 18, 87, S Ct 824, 17 L Ed 2d 705 (1967). Whether an error is harmless in a particular case depends upon a number of factors, including the importance of the evidence, whether the evidence was cumulative, and the overall strength of the prosecution's case. *Delaware v. Van Arsdall*, 475 US 673, 106 S Ct 1431, 89 L Ed 2d 674 (1986)

ii. Article I, section 12

Article VII (Amended), section 3, of the Oregon Constitution governs whether an appellate court must affirm a conviction even though a legal error occurred during the trial. *State v. Davis*, 336 Or 19, 28, 77 P3d 1111 (2003). In determining whether to affirm a judgment under that constitutional provision this court reviews the record to decide whether there was "little likelihood" that the error affected the jury's verdict. *Davis*, 336 Or at 32. The focus of the inquiry "is on the possible influence of the error on the verdict rendered, not whether this court, sitting as factfinder, would regard the evidence of guilt as substantial and compelling." *Id.* at 32.

In *McAnulty*, 356 Or at 437, a murder suspect was interrogated by the police four times. The court concluded that police violated defendant's Article I, section 12 rights, during the first two interrogations, and that the statements that defendant made during those interrogations should have been suppressed. *Id.* at 457-58. However, defendant's statements in the latter two interrogations were admissible and "provided more substantial admissions." *Id.* Under those circumstances, this court concluded that any error in admitting the statements from the first two interrogations was harmless. *Id.*

Similarly, in *State v. Walton*, 311 Or 223, 231, 809 P2d 81 (1991), this court reasoned that the admission of defendant's pre-*Miranda* statements was harmless because his post-*Miranda* statements were admitted without challenge.

iii. Application

Myers testified to defendant's statements at the jail during the state's case in chief. The substance of those statements were principally: (1) that defendant knew that he had hit the victim in the head; (2) that defendant was angry when he hit the victim; (3) that defendant felt like bashing the victim's head in; (4) that defendant knew what he did was wrong.

Defendant's statements to Myers were generally probative of the only factual issue at trial—defendant's intent. *See State v. Marrington*, 335 Or 555, 566, 73 P3d 911 (2003) (stating that erroneously admitted evidence that relates

to a "central factual issue" is more likely to have affected the verdict than evidence that relates to a tangential issue). The incriminating details contained in defendant's statements to Myers were not presented to the fact-finder through any other evidence. In that way, defendant's case is distinguishable from *McAnulty* and *Walton.*

Further, apart from defendant's statements, the prosecution had only circumstantial evidence of defendant's intent, relating to the timing and manner of death. The defense did not dispute evidence that was brutally beaten and that the beating transpired over a period of minutes. Passer-byers who stopped to check on welfare, minutes before her death, testified that defendant approached their car angrily and aggressively. Undoubtedly, the state's evidence (without defendant's statements to Myers) was sufficient to convict defendant of first-degree murder. However, that is not the standard for assessing harmless error under the state and federal constitutions. Rather, the controlling inquiry, again, is the effect of the evidence. And defendant statements were qualitatively different than the state's other evidence.

Further, the prosecutor emphasized defendant's statements to Myers during both opening and closing arguments. The prosecutor concluded his opening statement by quoting defendant's statement to Myers and by

connecting defendant's words, to his conduct, and to the consequence of death. He did what he said he was going to do.

> "The Defendant describes to Detective Myers, at one point in this incident, her hitting him and that it didn't hurt, in fact, good for her. She's standing up for herself, I guess, but that it made him mad and it made him feel like he wanted to bash her head in. That's his statement to Detective Myers. He wanted to bash her head in. It isn't without notice that that's what happened, that her head was bashed in, that she dies of blunt force trauma to her face, very large gashes above her eye, her ear is torn off and the ME will show the Court the damage to her brain, the shearing injuries to her brain and the hemorrhaging in the brain. So, what he felt like doing is what he did, which is murder. That's all, thank you."

Tr 193-94.

And during closing arguments, the state began its argument by again referencing defendant's statement to Myers.

> "The State said in the opening that what he [Boyd] intended to do is what he said to the detective and that's what he did. He felt like bashing her head in. He, in fact bashed her head in, ripped her ear off."[10]

Tr 1357.

In sum, defendant's statements were significant evidence of his mental state at the time of the crime. While the state had other sufficient evidence to secure a first-degree murder conviction, it relied on defendant's statements. It drew the fact-finder's attention to them both during opening statements and

[10] The prosecutor also argued that defendant's actions, the manner in which he killed established his intent. *See* Tr 1358-59.

closing arguments. Under those circumstances, this court should conclude that the admission of defendant's statements to Myers was not harmless.

G. The defendant's trial testimony and his expert's use of his statements should not be considered in assessing harm.

i. The Fifth Amendment

A defendant's trial testimony is normally reviewed in a harmless error inquiry. However, if the prosecution presents statements obtained in violation of *Miranda* in its case-in-chief and the defendant testifies "to overcome the impact" of that illegally obtained evidence, defendant's trial testimony cannot be considered on harmless error review or in any subsequent proceeding to establish guilt. *Harrison v. United States*, 392 US 219, 222-23 & n 9, 88 S Ct 2008, 20 L Ed 2d 1047 (1968). The state bears the burden of proving that defendant's improperly obtained statement did not induce the defendant to testify. *Id.*

Harrison involved a defendant who testified at trial after the government had introduced three confessions, all of which had been obtained in violation of federal rules. 392 US at 220 n 2. The DC Circuit reversed the conviction on the ground that the confessions had been illegally obtained and were therefore inadmissible. At Harrison's retrial, the confession was not introduced, but the defendant's testimony form the first trial was read into evidence. The Supreme Court reversed. It held that "the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled

thereby—the fruit of the poisons tree, to invoke a time-worn metaphor." *Id.* at 222.

Although the confessions at issue in *Harrison* were obtained in violation of rules applicable only to federal prosecutions, the Court has since made clear that *Harrison* is a Fifth Amendment case. In *Oregon v. Elstad*, 470 US 298, 316-17 (1985),[11] the court distinguished *Harrison* as follows:

> "If the prosecution has actually violated the defendant's Fifth Amendment rights by introducing an inadmissible confession at trial, compelling the defendant to testify in rebuttal, the rule announced in *Harrison v. United States*, 392 US 219 (1968), precludes use of that testimony on retrial."

The rule in *Harrison* is not based on a deterrence rationale alone. Rather, the Court structured the rule in *Harrison* "to safeguard the Fifth Amendment privilege." *Lujan v. Garcia*, 734 F 3d 917 (9th Cir 2013). The court explained:

> "But it is not deterrence alone that warrants the exclusion of evidence illegally obtained—it is 'the imperative of judicial integrity.' The exclusion of an illegally procured confession and of any testimony obtained in its wake deprives the Government of nothing to which it has any lawful claim and creates no impediment to legitimate methods of investigating and prosecuting crime. On the contrary, the exclusion of evidence causally linked to the Government's illegal activity no more than restores the situation that would have prevailed if the Government had itself obeyed the law.

Harrison, 392 US 219, 224 n 10 (citations omitted).

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[11] In *Elstad*, the Supreme Court addressed the scope of the *Miranda* exclusionary rule in the context of multiple confessions obtained from a suspect during a criminal investigation.

The rule in *Harrison* has not been extended to evidence outside of the defendant's trial testimony. However, the rationale that underlies *Harrison*—restoring the situation—warrants extension to a defendant's "use" of the challenged statements by an expert to advance an affirmative defense of EED, when the advancement of the affirmative defense is similarly "impelled" by the impact of the illegal statements. As *Harrison* explained:

> "The question is not whether the petitioner made a knowing decision to testify, but why. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible."

Harrison, 392 US at 223.

Harrison should be applied with respect to defendant's "use" of the challenged statements to advance an affirmative defense of EED. That is, if a defendant used the challenged statements to advance a defense of EED to overcome the prejudicial impact of the statements, than that use should be considered impelled just as his trial testimony. And that use should not be considered in the harmless error inquiry.

ii. Article I, section 12

Under Oregon law, in determining whether a violation of Article I, section 12, is harmless, this court "assumes" that a defendant's testimony was "tainted" "unless the court can determine from the record before it that a defendant's trial testimony did not refute, explain, or qualify the erroneously

admitted pretrial statements." *State v. Moore/Coen*, 349 Or 371, 384, 245 P3d 101 (2010).

Moore/Coen was a consolidated appeal of two separate criminal cases. In both cases, the trial court admitted in the state's case-in-chief statements that the defendants had made without having received *Miranda* warnings, and the defendants testified, attempting to explain the statements. On appeal in both cases, the state conceded that the trial court had erred in admitting the statements. However, it argued in one case (*Moore*) that the defendant's testimony could be considered in determining whether admitting the unwarned statements was harmless. In the other case, (*Coen*) the state argued that the defendant's trial testimony should be admissible in a retrial on remand.

The court rejected the state's arguments and concluded that it is appropriate "to assume that a defendant's trial testimony is tainted by the erroneously admitted pretrial statements." *Moore/Coen*, 349 Or at 385. The court reasoned that such a presumption was warranted "because the state has gained an advantage over a defendant at trial when it unconstitutionally obtains the defendant's statements and then introduces them into evidence." *Id.*

Inculpatory statements are exceedingly persuasive evidence of guilt. When those statements are illegally obtained and admitted into evidence in contravention of constitutional safeguards, a defendant should not have to choose between advancing a defense and preserving his evidentiary objection.

The goal of *Moore/Coen's* exclusionary/harmless error rule is to restore a defendant "to the position that he or she would have been in if police had not violated that constitutional right." 349 Or at 383 (so stating). Therefore, it is appropriate to apply *Moore/Coen* here and bar defense-offered evidence from the harmless error analysis that advances a defense strategy that was adopted to rebut or explain the unconstitutionally obtained evidence.

iii. Application to defendant's trial testimony

At trial, defendant took the stand and gave a different account than he reported to Myers. He said that he didn't remember punching He denied telling Myers that he felt like "bashing" head in. Defendant explained that Myers misunderstood him. Defendant said that his statement related to the passer-byers who had stopped to check on welfare. He didn't want to have to fight them. He said, "I didn't want to bust a freaking head."

The *Harrison* exclusionary/harmless error rule applies to this case because defendant testified at trial, "in order to overcome the impact of the confessions illegally obtained and hence improperly introduced" at trial. *Harrison*, 392 US at 223. Similarly, the exclusionary/harmless error rule of *Moore/Coen* applies because defendant's trial testimony "refuted" and "explained" the statements that he made to Myers during his fourth police

interrogation. Accordingly, defendant's testimony should not be considered in the harmless error analysis.[12]

iv. Application to defendant's use of the statements to advance a defense of EED

Defendant raised the statutory affirmative defense of EED.[13] The defendant's choice of trial strategy involved consideration of his statements by defendant's expert and the state's expert. However, there is a substantial possibility that defendant's defense strategy was the result of the trial court's erroneous *Miranda* ruling.

There is no explicit indication in the record that defendant adopted his defense strategy because of the trial court's error, but the circumstances suggest that was the case. Defendant was represented by Baker when he initially filed notice of the affirmative defense of EED on April 6, 2011. But after she withdrew, Friedman was appointed. Friedman filed the *Miranda* motion, which is at issue here. Only after that motion was denied, did defendant file a trial memorandum indicating that he would be presenting the affirmative defense of EED. Presumably if defendant had prevailed on the *Miranda* motion, the

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[12] Defendant's trial testimony included testimony about his criminal history, which included previous violent assaults.

[13] ORS 163.135 provides, in part, that "[i]t is an affirmative defense to murder for purposes of ORS 163.115 (1)(a) that the homicide was committed under the influence of extreme emotional disturbance if the disturbance is not the result of the person's on intentional, knowing, reckless or criminally negligent act and if there is reasonable explanation for the disturbance."

defense strategy would have been not to present the defense of EED because to do so would have put at issue the very statements that defendant sought to suppress.

Defendant has the right to present a defense. The Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 US 479, 485, 104 S Ct 2528, 81 L Ed 2d 412 (1984). The erroneous pretrial ruling impacts the availability of defendant's defenses. As a result of that ruling, defendant's choices of defenses are narrowed. He could not sit back and argue that the circumstantial evidence was insufficient to infer the requisite culpable mental state because defendant's statements to Myers constituted direct evidence of his intent. The state should not benefit from the erroneous pretrial ruling by forcing defendant to choose between preserving his pretrial objection and mounting an available a defense that requires the "use" of the challenged evidence.

II. The statements that defendant made during the first and second interrogations should have been suppressed.

A. An individual subject to in-custody interrogation must be advised that he has a right to counsel before and during questioning.

i. The Fifth Amendment

The privilege against self-incrimination embodied in the Fifth Amendment to the Federal Constitution is not self-implementing. *Miranda*, 384 US at 490. The United States Supreme Court has developed mechanisms

for safeguarding that right. Foremost among those mechanisms are *Miranda* warnings. *Id.* at 479. *Miranda* warnings inform a suspect not only of the basic right against self-incrimination but of other ancillary rights that are essential to preserve that right. *See Dickerson v. United States*, 530 US 428, 438, 120 S Ct 2326, 147 L Ed 2d 405 (2000) (holding that "the protections announced in *Miranda*" are "constitutionally required" under the Fifth Amendment and that Congress could not overrule that requirement by statute).

Miranda warnings provide that an individual taken into police custody and subjected to questioning must be advised of the following:

> "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that, if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."

Miranda, 384 US at 479. Warnings are adequate so long as they reasonably convey to a suspect his rights as required by *Miranda*. *California v. Prsyock*, 453 US 355, 359, 101 S Ct 2806, 69 L Ed 2d 696 (1981).

In *Florida v. Powell*, 559 US 50, 54, 130 S Ct 1195, 175 L Ed 2d 1009 (2010), the Court concluded that two warnings, which advised the defendant that he had "the right to talk to a lawyer before answering any of [their] questions," and that he had the "right to use any of [his] rights at any time during the interview" were not the "clearest possible formulation of *Miranda's* right to counsel advisement" but were "sufficiently comprehensive and

comprehensible when given a commonsense reading." *Id.* at 63. The Court cited the warnings given by the FBI as an example of a "police best practice." *Id.* at 64. Those warnings, in relevant part, state: "You have the right to talk to a lawyer for advice before we ask you any questions. You have the right to have a lawyer with you during questioning." *Id.*

ii. Article I, section 12.

Like the United States Supreme Court, this court has adopted *Miranda*-like warnings to secure the protections of Article I, section 12. *See State v. Magee*, 304 Or 261, 744 P2d 250 (1987) (stating, definitively, that Article I, section 12, "furnishes an independent basis" for requiring that police administer *Miranda* warnings to suspects who are in custody).[14] More recently, in *State v. Vondehn*, 348 Or at 470, this court explained that "the Oregon Constitution requires *Miranda* warnings" and as a result, the failure to give those warning, when required, is itself a constitutional violation that requires a remedy.

[14] This court's implementation of *Miranda* warnings under the state constitution was not without controversy. In *State v. Smith*, 301 Or 681, 725 P2d 894 (1986), the court rejected defendant's argument that Article I, section 12, required *Miranda* warnings be given at a time earlier than formal arrest. The plurality of the court concluded (notwithstanding its decisions *State v. Sparklin*, 296 Or 85, 672 P 2d 1182 (1983) and *Mains*) that *Miranda* warnings were not necessary under the state constitution.

B. Officer Conrad did not adequately advise defendant of his right to counsel under the Fifth Amendment or Article I, section 12.

The *Miranda* warnings that defendant received from Conrad when he was arrested in the field were inadequate under the Fifth Amendment and Article I, section 12. Officer Conrad recited *Miranda* rights to defendant as follows:

> "I said he had the right to remain silent. That anything he said could and would be used against him in a court of law. That if he could not afford an attorney, one would be appointed to him by the court."

Tr 54.

Miranda requires that a suspect be informed of the right to have a lawyer present before and during any interrogation, and the warning here did not inform defendant of that right. The warning did not include any statement that indicated that defendant's right to an attorney began before and continued throughout the interrogation. Rather, the warning, read in context, suggested that defendant was entitled to counsel only at some future court proceeding—where one would be appointed to him by the court. Because Conrad's warnings did not communicate that defendant had a right to counsel, before and during Conrad's interrogation of defendant, they were inadequate, and defendant's statements in the field should have been suppressed. *Miranda*, 384 US at 47 (holding that unless an accused is informed of all of the mandated rights, "no evidence obtained as a result of interrogation can be used against him.").

C. Detective Myers did not advise defendant of his rights under the Fifth Amendment or Article I, section 12.

Myers did not re-advise defendant of his *Miranda* rights at the police station or correct Conrad's infirm warnings. As a consequence, defendant's recorded statements to Myers at the police station should have also been suppressed.

D. The error warrants review

Lewis purported to recite the *Miranda* warnings that he gave to defendant by memory. As is evident, that recitation includes no reference to the accused's right to counsel prior to and during questioning. At the suppression hearing, defendant did not cross-examine Lewis about the content of his warnings or otherwise argue that the warnings that he had recited to defendant were inadequate.

On appeal, defendant raised a plain error challenge to the adequacy of Lewis's warnings.[15] App Brief at 18. In response, the state asserted that the error was not plain because the prosecutor might have clarified that Lewis's warnings were, in fact, complete, if the defendant had raised a pointed challenge. Resp Brief at 13. The state's argument overlooks the fact that the

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[15] An appellate court may review unpreserved error as plain error if (1) it is an error of law, (2) the error is "obvious, not reasonably in dispute," and (3) it appears on the face of the record and (4) the court determines that circumstances warrant the exercise of discretion to consider the error. *State v. Reyes-Camarena*, 330 Or 431, 435, 7 P3d 522 (2000).

Supreme Court in *Miranda* held where a challenge is made to the introduction of a defendant's statement, the burden is on the government to show that the warnings have been given. 384 US at 479. Thus, in this case, when Lewis failed to mention that he advised defendant that he had a right to counsel prior to and during questioning, the burden was on the prosecutor to clarify the testimony. The state had a full opportunity to develop the facts concerning the content of the *Miranda* warning, and did so, and that content was insufficient. For those reasons, the error is plain.

This court should exercise its discretion to correct the error.[16] The right to have counsel present prior to and during police questioning uniquely protects an accused's rights under the Fifth Amendment and Article I, section 12. *Fare v. Michael C.*, 442 US 707, 719, 99 S Ct 2560 (1979). A lawyer's presence during questioning can help prevent over-reaching by police officers and ensure the accuracy of any statements made. *Miranda*, 384 US at 466, 470. Those benefits are lost where a suspect is not adequately advised of his right to have counsel present prior to and during police questioning and then waives those rights. Further, warnings that convey the full substance of *Miranda*'s specific

[16] *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 382, 823 P2d 956 (1991), sets forth a nonexclusive list of factors to guide the court's exercise of discretion.

holdings obviates the need for a case-by-case inquiry into the voluntariness of a confession. *Prysock*, 453 US at 359.

In the Court of Appeals, the state argued that the error did not warrant discretionary review, in part, because defendant asserted his right to counsel during Myers's questioning—and thus "to the extent the rights summarized by Conrad were incomplete, defendant clearly understood them[.]" Resp Brief at 14. However, *Miranda* explained that "[n]o amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in [the] stead" of an adequate warning. *Miranda*, 384 US at 472. A valid waiver of *Miranda* rights may occur only after full advisement of the *Miranda* rights. *Id.* at 470.

For those reasons, this court should review the error and hold that defendant's statements to Conrad in the field and Myers in the police station were obtained in violation of *Miranda*.

E. The admission of defendant's statements to Conrad and Myers during the first and second interrogations was not harmless.

The statements defendant made during the first and second interrogation, to Conrad in the field and Myers at the police station were not admitted during the state's case-in-chief. Defendant's trial testimony was also generally consistent with those statements. And defendant's expert gave considerable weight to defendant's statements to Conrad in making his diagnosis. As a

consequence, the state's expert's use of those same statements on rebuttal was not harmful as the case was tried.

However, should this court agree with defendant's preceding arguments and conclude that the erroneous pretrial ruling affected the entirety of defendant's defense strategy, from his decision to testify to his choice to advance the affirmative defense of EED through expert testimony, this court should find the *Miranda* violation harmful because of the impact it appeared to have on defendant's defense strategy.[17]

[17] Defendant's opening statements suggested that defendant expected the state to introduce defendant's statements to Conrad and Meyers in its case in chief.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that this court reverse the decision of the Court of Appeals, reverse defendant's conviction, and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

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 13,679 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).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on September 22, 2015.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Paul L. Smith, #001870, Deputy Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

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