IN THE SUPREME COURT
OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. CELSO AVILA-NAVA, Defendant-Appellant, Respondent on Review.	Washington County Circuit Court Case No. C092845CR CA A146527 S061802

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

Review of the decision of the Court of Appeals
on an appeal from the Judgment of the Circuit Court
for Washington County
Honorable Rick Knapp, Judge

Opinion Filed: July 3, 2013
Author: Haselton, Chief Judge
Before: Ortega, Presiding Judge; Haselton, Chief Judge; and Sercombe, Judge

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

STATEMENT OF THE CASE

This is a criminal case that presents the factual issue of whether defendant made a statement or asked a question during police interrogation.

After defendant was arrested and read his *Miranda* rights[1], he told an officer, "I won't answer any questions." The officer interpreted the statement as a question, and the trial court found that defendant "posed" the statement as a "quandary." The trial court denied defendant's motion to suppress his statements made during custodial interrogation, finding that defendant's statement was an equivocal invocation of the right to remain silent and therefore that the police did not violate defendant's *Miranda* rights by continuing the interrogation.

Before this court, the state frames the case as principally raising the legal issue of what standard to apply in determining whether a suspect has unequivocally invoked the right to remain silent under Article I, section 12, of the Oregon Constitution. The state also proposes several factors that a reviewing court should consider in looking at the totality of the circumstances of the invocation. However,

[1] *See Miranda v. Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966) (establishing the *Miranda* warnings).

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even under the state's proposed framework, the state's argument fails because the factual record only supports the finding that defendant unequivocally invoked his right to remain silent.

Because defendant does not dispute the analytical framework that the state proposes, the contested issues before this court are few and narrow. The primary contested issues are whether the trial court found that defendant asked a question and, if so, whether that finding is supported by legally sufficient evidence in the record.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

When a defendant during custodial interrogation says, "I won't answer any questions," and the interrogating officer interprets the statement as a question, is that sufficient evidence to support a trial court finding that defendant's invocation of his right to remain silent was equivocal?[2]

[2] The state's petition for review included a second question presented. However, the state does not include the second question before this court because it "was essentially a fact-specific refinement of the first question." Pet Br at 2. Because the state confines its analysis to the first question presented, defendant will do the same.

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Proposed Rule of Law

In determining whether a defendant unequivocally invoked the right to remain silent, a reviewing court should consider the defendant's words, as well as the surrounding circumstances. When a defendant's words are unequivocal on their face, and the only evidence that casts any doubt on the plain meaning of the words is an officer's subjective belief as to their meaning, the evidence only supports a finding that defendant's invocation was unequivocal.

Summary of Argument

Defendant agrees with the state's proposed rule of law. In many cases, the context of a police interrogation informs the meaning of a suspect's words. In this case, however, there is no contextual evidence that indicates defendant meant something other than what he clearly said. Defendant said, "I won't answer any questions." No reasonable officer would take that to be anything but an unequivocal invocation of the right to remain silent.

The state argues that other circumstances – such as that the conversation was in Spanish and that defendant did not appear to understand his rights – suggest the invocation was equivocal. However, the record does not support the state's argument that such circumstances, to the extent they exist, would change a

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reasonable officer's interpretation of defendant's clear, unequivocal statement that he would not answer any questions.

A reasonable officer test that looks at the totality of the circumstances must focus on objective factors; a defendant's or officer's subjective belief is irrelevant. Here, where the only evidence of ambiguity is an officer's subjective belief that defendant intended to ask a question – without any objective evidence to support that belief – the trial court erred in concluding that defendant's invocation was equivocal.

Factual and Procedural Background

The Court of Appeals accurately described the relevant historical facts. *See State v. Avila-Nava*, 257 Or App 364, 366-68, 306 P3d 752 (2013).[3] The issue in this case is whether defendant unequivocally invoked his right to remain silent during the following exchange with a police officer, Ganete, who had already advised the arrested defendant of his *Miranda* rights:

> "Ganete: 'Anything you say may be used against you in a court of law.'
>
> "Defendant: 'I don't understand what this means.'
>
> "Ganete: 'What is it that you don't understand?'

[3] The state contends that the Court of Appeals does not accurately capture the historical facts. However, as argued in further detail below, the Court of Appeals is correct.

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"Defendant: 'Anything I say can be used against me.'

"Ganete: 'That's correct. Anything you say can be used against you.'

"Defendant: '*I won't answer any questions.*'

"(Emphasis added.)"

"Ganete 'didn't accept [the italicized statement] as unequivocally [defendant] saying, "I don't want to talk to you."' Instead, Ganete interpreted defendant's statement 'as a question that he was pondering to me from lack of understanding.'"

Avila-Nava, 257 Or App at 366-67.

Based on that exchange, the Court of Appeals held that defendant had unequivocally invoked his right to remain silent:

"We first conclude that defendant's statement—'I won't answer any questions'—was an unequivocal invocation of his right to remain silent. The words that defendant used were unambiguous; that is, they were susceptible to only one reasonable understanding—an unqualified declaration that defendant would not answer any questions. Ganete's contrary understanding—that defendant's words, immediately after Ganete reiterated that '[a]nything you say can be used against you,' were a 'question' inviting further inquiry—was not reasonable. * * *

"Further, we agree with defendant that 'police cannot avoid the *Miranda* requirements by choosing whether to accept a defendant's statement.' Here, the trial court improperly relied on Ganete's unreasonable decision not to accept defendant's unambiguous statement as an unequivocal invocation of his right to remain silent.

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> "Nor can any of the interaction between Ganete and defendant serve to render defendant's unequivocal invocation retroactively equivocal. Again, the determination of whether a statement is 'an unequivocal or equivocal invocation' is based exclusively on 'the totality of the circumstances at and preceding the time that it was made.' * * * Here, nothing that preceded defendant's invocation 'casts any doubt' on the meaning and effect of defendant's declaration. Accordingly, the trial court erred in characterizing defendant's declaration as, at best, an equivocal invocation."

Avila-Nava, 257 Or App at 371-72 (citations omitted).

The legal question before this court is whether a reasonable officer would have understood defendant's statement to be unequivocal or equivocal. However, because this case primarily involves whether a trial court's fact finding is sufficiently supported by evidence in the record, defendant will set forth the relevant testimony at the pretrial hearing and the trial court's findings.

I. Testimony at the pretrial hearing

During the pretrial hearing, Ganete testified on direct examination as follows:

> "Q Right. Well, before you moved on he asked you if anything I say can be used again me. You said correct. What was his response to that?
>
> "A 'I won't answer any questions.'"

Tr 15. Ganete affirmed that testimony during cross-examination:

> "Q At this point, he tells you that he won't answer any questions, isn't that correct?

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"A Yes."

Tr 21.

The trial court directly asked Ganete about his response to defendant's statement:

> "Q I'm a little confused. He said at one point that I won't answer any questions, and then it seems pretty unequivocal. Why did you continue?
>
> "A Because I asked at one point, 'Are you saying you don't want to talk to me at all? You just want me to go away?' And his expression was, 'No, I can't talk to you if I don't understand what this right means because you're telling me I have the right to remain silent. I don't understand what this means.'
>
> "So, Your Honor, I guess to clarify this, I – my understanding is that he wasn't understanding that right, and I made every effort to explain to him what that meant, and this was our going back and forth until he finally said, 'Oh, I see what you're telling me. Okay.
>
> "Under that condition, then I want to talk to you. I understand what that right means.'
>
> "Q So when he said to you, 'I won't answer any questions,' that was phrased to you as a not a statement of – did you receive that as a statement where he was unequivocally exercising his rights not to talk to you, or was that a question he was pondering to you?
>
> "A I interpreted it as a question that he was pondering to me from lack of understanding. I didn't accept that as unequivocally he's saying, 'I don't want to talk to you.'"

Tr 23-24.

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On re-cross-examination, defense counsel once again asked about the exchange:

> "Q And he said, 'Anything I say can be used against me,' and you replied to him, 'That's correct.'
>
> "And then [defendant] said, 'I won't answer any questions,' and then you asked him a third time, correct?
>
> "A Yes."

Tr 25-26.

II. Trial court's findings

The trial court concluded that defendant's invocation of the right to remain silent was equivocal, reasoning as follows:

> "THE COURT: All right. Well, I guess we have to start with the first *Miranda* rights that were given to the defendant, and that was done by Officer Kamenir. And he gave him his rights, and the defendant said he understood his rights. And then it was – he was taken to the police station where we then have Officer Ganete talking with him and re-advising him of this rights again. And there was a period of time, obviously, between the first advisal of rights and the second advisal of rights, which probably gives the defendant some opportunity to consider his rights and think about them.
>
> "And the Court's responsibility is to look at the totality of the facts surrounding the *Miranda* issue, and when you first – so there was this discussion that was going on between Officer Ganete and the defendant, and they started getting hung up on this one right that anything you say can be used against you in a court and wasn't sure what that was all about. And then the defendant says, 'I won't answer any questions,' and, you know, when you first hear that, you think that it's a unequivocal exercise of his *Miranda* rights, and it should shut down at that point.

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"But Office Ganete took great effort to try to explain to the Court that it was – it wasn't that he was exercising his rights. He wasn't saying, 'I won't answer any questions.' It was that he didn't know if he wasn't supposed to answer any questions or not, and so there's this – he was – it was apparent that the defendant was confused about what his rights were, and that's later cleared up before the defendant says, 'Okay. Now, I understand.'

"And so I at first thought it was actually an unequivocal exercise of his *Miranda* rights, but it was clear that that was – is not the case even though he did say, 'I won't answer any questions.' But it was posed more of a – as a quandary. The defendant didn't quite understand what was going on at the time.

"I'm supposed to look at the totality of the facts to try and understand this to make sure that the statements were voluntary, first of all, and it's real clear that there were no threats. There wasn't any coercion. There was no promises, no trickery, no fraud, no intoxication. He was confused initially, which is the biggest hurdle that they have – that the police have at the time to allow the statements for him to be voluntary. He's got to understand these obviously at least the *Miranda* rights and so forth, but they seem to be – they work through it, and the officer spent a lot of time with the defendant making sure he understood his *Miranda* rights. I don't believe under the totality of the facts that I heard that he was trying to manipulate the defendant in the situation.

"So then the next question is – so I do think the statements that he made subsequently were voluntary. I haven't heard the statements, but I'm assuming that they will be. The question is then did the defendant waive his *Miranda* rights or was this comment, 'Won't any questions,' a unequivocal exercise of his *Miranda* rights, and that's where I say I think the – in the totality of the facts that it's not unequivocal exercise of rights. He's trying to understand what his rights are, and that's what we want the police to do is when someone's not quite understanding it to explain it in detail so that they – so when it's all over with, and the person understands his rights, he can then

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> say, 'No, I don't want to talk to you. I won't answer any questions. Or yeah, I'll talk to you.' And apparently, after he understood his rights, he did decide to talk to the police.
>
> "So from a totality of the circumstances, I do find that he voluntarily and knowingly waived his *Miranda* rights. It's a bit different than we typically see, but obviously, there was a Spanish speaking issue here that they had to work through in terms of the *Miranda* rights. And obviously, the *Miranda* rights aren't really clearly interpreted from English into Spanish anyway, and so you can see where these rights are explained in detail to someone who doesn't speak English to be able to make sure that they clearly understand, and I do think he clearly understood what his *Miranda* rights were. So I will allow the statements to come in."

Tr 30-33.

ARGUMENT

This case presents essentially one contested issue, namely construing the trial court's fact finding that defendant said, "I won't answer any questions," in a way that "posed" a "quandary." The state argues that defendant did not unequivocally invoke the right to remain silent because he actually asked, "I won't answer any questions?" The state's interpretation of the record is not supported by the trial court's fact findings or the evidence at the pretrial hearing. Instead, the record supports the conclusion that defendant unequivocally invoked the right to remain silent by saying, "I won't answer any questions." No other contextual evidence suggests that defendant's statement was equivocal.

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I. Defendant agrees with the state's proposed rule of law about the standard to apply when reviewing whether a suspect unequivocally invoked the right to remain silent.

Article I, section 12, provides, in part, that "[n]o person shall * * * be compelled in any criminal prosecution to testify against himself." This court has held that Article I, section 12, is an independent source for warnings similar to the *Miranda* warnings required under the Fifth Amendment to the United States Constitution. *See State v. Magee*, 304 Or 261, 266, 744 P2d 250 (1987) (so stating); *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966) (establishing the *Miranda* warnings).

Under Article I, section 12, the police must give a defendant who is in custody or compelling circumstances *Miranda*-like warnings prior to questioning. *State v. Smith*, 310 Or 1, 7, 791 P2d 836 (1990); *Magee*, 304 Or at 261-65. If the person makes an unequivocal request to speak to an attorney or unequivocally invokes the right to remain silent, the police must accede to the request and cease all questioning. *See State v. Montez*, 309 Or 564, 572, 789 P2d 1352 (1990) (so noting for right to counsel). However, if the person's request or invocation is equivocal, the police may ask follow-up questions to clarify whether the person intended to invoke his rights. *See State v. Meade*, 327 Or 335, 339, 963 P2d 656 (1998) (so noting for right to counsel).

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This court has previously described the standard of review for whether a suspect unequivocally invoked a right during custodial interrogation:

> "This court reviews a challenge to the admissibility of a defendant's statements during custodial interrogation as an issue of law. 'We review legal conclusions regarding the invocation of the right to counsel for legal error.' The question of what transpired during a custodial interrogation, however, is an issue of fact for the trial court and the facts found may be – indeed, usually are – dispositive of the legal inquiry. We are bound by the trial court's findings of historical fact if evidence in the record supports them, although we assess anew whether the facts suffice to meet constitutional standards."

State v. James, 339 Or 476, 481, 123 P3d 251 (2005) (citations omitted). Within that framework, this case presents the issue of what standard to apply when analyzing whether an invocation was unequivocal or equivocal. However, the parties appear to agree on the correct legal framework.

The state proposes the rule of law that whether a suspect unequivocally invoked an Article I, section 12, right turns on whether a reasonable officer, under the totality of factual circumstances, would have understood that the suspect was invoking his right. Pet Br at 12. Defendant agrees; that is not an issue that needs clarification. *See State v. Acremant*, 338 Or 302, 322, 108 P3d 1139 (2005) (finding that defendant's invocation was unambiguous "when viewed in its entirety"); *State v. Charboneau*, 323 Or 38, 55, 913 P2d 308 (1996) (looking at

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"the totality of the circumstances" when deciding whether the defendant's request for counsel was unequivocal).

The state also suggests several considerations that are relevant to the totality of the circumstances analysis. First, the state proposes that the consideration of a reasonable officer's understanding must include context, including demeanor, intonation, gestures, surrounding conversation, and any other circumstances that would color a reasonable listener's understanding of the speaker's meaning. Pet Br at 16-18. Second, the state proposes that the relevant context includes (1) whether the words were uttered as a question, and (2) the language being spoken and any language barrier. Pet Br at 19-23. Defendant agrees that these can be relevant factors, depending on the facts of the case. Totality of the circumstances means that: all of the circumstances of a particular case.

This court's case law also suggests another relevant factor in the analysis. In *State v. Kell*, 303 Or 89, 99, 734 P2d 334 (1987), this court cited with approval *Connecticut v. Barrett*, 479 US 523, 107 S Ct 828, 93 L Ed 2d 920 (1987). In *Barrett*, the defendant told the police several times that he would talk with them about the incident at issue, but he would not make any written statements without a lawyer. 479 US at 525-26. The state supreme court held that the defendant had invoked his right to counsel, reasoning that his "expressed desire for counsel

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before making a written statement served as an invocation of the right for all purposes." *Id.* at 526. The United States Supreme Court disagreed, noting, "To conclude that respondent invoked his right to counsel for all purposes requires not a broad interpretation of an ambiguous statement, but a disregard of the ordinary meaning of respondent's statement." *Id.* at 529-30 (quoted in *Kell*, 303 Or at 99).

In other words, the defendant's statement needed no "interpretation" because the meaning was clear. The analysis in *Barrett* supports the proposition that the ordinary meaning of the defendant's words should be given significant weight in deciding whether the defendant has unequivocally invoked a right. *See also Davis v. United States*, 512 US 452, 459, 114 S Ct 2350, 129 L Ed 2d 362 (1994) (holding that, for purposes of the Fifth Amendment, a suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney").

II. As a matter of fact, defendant said, "I won't answer any questions."

Under the analytical framework set forth by the state and defendant, this court must (1) determine what happened as a matter of fact and then (2) apply the framework to the facts. *James*, 339 Or at 481. The primary factual dispute in this case is narrow. Both parties agree as to what defendant said – "I won't answer any questions." The disagreement is over how defendant said it. The trial court found that defendant's words were "posed" as a "quandary." Therefore, this court must

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decide whether that refers to how the words were uttered, and, if so, whether the record supports that finding.

In stating its findings, the trial court used ordinary words of common usage. *See State v. Gaines*, 346 Or 160, 175 & nn 13-15, 206 P3d 1042 (2009) (in construing a statute, citing the presumption that the legislature intends "terms of common usage" to have their "plain, natural, and ordinary meaning" and citing the dictionary definition of such words). To "pose" can be defined as "to put or set forth : PRESENT, OFFER," to "PROPOUND," or "to puzzle by or as if by questioning : put in a quandary : BAFFLE, NONPLUS <determined not to be *posed*—Lucy M. Montgomery>." *Webster's Third New Int'l Dictionary* 1769 (unabridged ed 2002). As used here, "pose" is a transitive verb. A "quandary" is "a state of perplexity or doubt : DILEMMA <in a ~ as to where my road should lie –Clyde Higgs>." *Id.* at 1859.

The dictionary example for "pose" is from this passage in the book *Emily of New Moon*:

> "'And what is your father's God like, if I may ask?' demanded Ellen sarcastically.
>
> "Emily hadn't any idea what Father's God was like, but she was determined not to be posed by Ellen."

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L.M. Montgomery, *Emily of New Moon* 23 (Bantam Books 1993) (1923). Thus, to pose is not what Ellen did, by asking the question, but rather what Ellen aimed to do to Emily, by putting her in a "quandary" or presenting her with a dilemma.

When the plain meaning of the words used by the trial court is applied to the trial court's finding, then the court found that by saying the words, "I won't answer any questions," defendant aimed to present his dilemma to the officer. By so finding, however, the trial court has not made any finding about how defendant said the words, in the sense of whether he said the sentence in a rising intonation or some other way that could indicate a question. Instead, the trial court has merely made a finding as to defendant's subjective intent in making the statement.

That interpretation of the trial court's finding is supported by the officer's testimony. In this case, the only evidence to support the court's finding that defendant's statement was "posed" as a "quandary" is the officer's testimony that he "interpreted [defendant's statement] as a question that he was pondering to me from lack of understanding," and that he "didn't accept that as unequivocally he's saying, 'I don't want to talk to you.'" Tr 23-24. Notably, the officer does not state that his "interpretation" is based on how defendant said the words. For instance, the officer does not say that defendant used a rising intonation, or accompanied the

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statement by a quizzical tilt of the eyebrows, or any other action that could be construed as lending ambiguity to an otherwise unambiguous statement.

The officer's testimony instead indicates that his "interpretation" is based on the content of defendant's statements. In response to the trial court's question about why Ganete continued the conversation in spite of defendant's statement, Ganete explained:

> "Because I asked at one point, 'Are you saying you don't want to talk to me at all? You just want me to go away?' And his expression was, 'No, I can't talk to you if I don't understand what this right means because you're telling me I have the right to remain silent. I don't understand what this means.'
>
> "So, Your Honor, I guess to clarify this, I – my understanding is that he wasn't understanding that right, and I made every effort to explain to him what that meant, and this was our going back and forth until he finally said, 'Oh, I see what you're telling me. Okay.
>
> "Under that condition, then I want to talk to you. I understand what that right means.'"

Tr 24.

Ganete's explanation supports only one inference as to why he "interpreted" defendant's statement as a question. Ganete subjectively interpreted defendant's previous statements as indicating that defendant did not understand his rights; the tone or manner of defendant's invocation did not indicate to Ganete that defendant

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had asked a question. That is, if defendant said the words as a question, the officer would not have to interpret it as a question. It would instead simply be a question.

When the trial court's fact finding is read in light of the testimony that supports it, it indicates that the court made essentially two findings. First, defendant said the words, "I won't answer any questions." Second, the previous content of the conversation indicated that defendant's statement was "posed" as a "quandary," meaning it was intended to present or describe defendant's dilemma to the officer. The context of a conversation can be a factor in determining a statement's meaning, *i.e.*, whether a statement is unequivocal, and the trial court's finding about defendant's subjective intent might be relevant to that analysis.[4] However, at this step in the analysis, it suffices to note that the court did not find defendant's statement equivocal based on how it was asked, but rather because of the previous conversation. Therefore, the relevant fact finding in this case is that defendant said, as a statement, "I won't answer any questions."

III. The record does not support a finding that defendant asked a question.

Before this court, the state argues that the Court of Appeals erred by relying on facts that are contradicted by the trial court's finding. Specifically, the state

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[4] As argued in further detail *infra*, defendant disputes that the record supports the trial court's second finding, that defendant's subjective intent was to pose a quandary.

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argues that three pieces of contextual evidence support the trial court's "finding" that defendant asked, "I won't answer any questions?" As argued above, the premise of the state's argument – *i.e.*, that the trial court found that defendant asked a question – is incorrect. Further, none of the three cited pieces of contextual evidence supports the state's claim that defendant asked a question.

First, the state argues that the punctuation in the transcript is incorrect and "unreliable," and therefore not "determinative." Pet Br at 27. The record on appeal includes "the record of oral proceedings," which "shall be a transcript." ORAP 3.05(1), (2). *See* ORAP 9.20(5) ("The record on review shall consist of the record before the Court of Appeals."). The circuit court determines the accuracy of the transcript, not the parties on appeal or this court. *See Acremant*, 338 Or at 337 ("'It is elementary that it is the circuit court, not this court, which determines the correctness of the transcript which comes to this court on an appeal.'" (quoting *Fry v. Ashley*, 228 Or 61, 71, 363 P2d 555 (1961)). Parties to an appeal may challenge the accuracy of a transcript and either correct or supplement the record. *See* ORS 19.365(4); ORS 19.370(6); ORAP 3.40. The state has not done so in this case. The record before this court of the oral proceedings in the trial court is embodied in the transcript, which reflects that defendant said the words at issue without a

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question mark. Therefore, the possibility of errors in the punctuation of the transcript does not, and cannot, change the analysis in this case.

Second, the state relies on a selective quote from Ganete's testimony that provides an incomplete picture of the circumstances. The state cites "Detective Ganete's testimony that defendant's words were uttered 'as a question that [defendant] was pondering * * * from lack of understanding.'" Pet Br at 27 (citation omitted; alteration in original).[5] However, Ganete actually testified as follows: "I *interpreted it* as a question that he was pondering to me from lack of understanding." Tr 24 (emphasis added). Contrary to the state's assertion, interpreting and uttering are not synonymous. To "interpret" is "to understand and appreciate in the light of individual belief, judgment, interest, or circumstance: CONSTRUE." *Webster's Third New Int'l Dictionary* at 1182. To "utter" is "to give utterance to: PRONOUNCE, SAY, SPEAK." *Id.* at 2526. In other words, uttering is what defendant did, and interpreting is what Ganete did. *Cf. State v. Rodriguez-Castillo*, 345 Or 39, 47, 188 P3d 268 (2008) (with respect to whether a translator's statement was hearsay, rejecting the state's argument that "in converting the

[5] The state cites a more complete quotation of the officer's testimony on the previous page. Pet Br at 26. However, in arguing in favor of its view of the fact finding, the state also cites only part of the officer's statement. Pet Br at 27.

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victim's statements from Spanish to English and repeating them to the detective, [the translator] was not making an independent assertion").

Officer Ganete's testimony regarding "I won't answer any questions" was that it was a "response," Tr 15, it was what defendant "tells" him, Tr 21, and it is what defendant "said," Tr 25-26. Ganete then "interpreted it as a question" and "didn't accept that as unequivocally he's saying, 'I don't want to talk to you.'" Tr 24. Consistently with Ganete's testimony, the trial court found that "defendant says, 'I won't answer any questions,'" Tr 31, defendant "did say, 'I won't answer any questions,'" Tr 31, and defendant made "this comment, 'Won't answer any questions,'" Tr 32, though "it was posed more of a – as a quandary," Tr 31.

The only testimony as to how defendant said the words is that he "said" them and "t[old]" the officer the words, not that he asked a question. Similarly, the only finding as to how defendant said the words is that he "sa[id]" the words and that they were a "comment." That defendant "posed" the statement as a "quandary," as argued above, does not convey that defendant uttered the words in an interrogative way or otherwise indicated, by how he said the words, that he was asking a question. Therefore, the state's selective quotation from the officer's testimony also does not support the "finding" that defendant asked a question.

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Third, the state also cites, as support for its version of the trial court's fact finding, that "Detective Ganete genuinely perceived defendant's words as a question, *presumably* due to defendant's intonation and demeanor, which Detective Ganete *may well have* mimicked for the trial court when repeating them in his testimony." Pet Br at 28 (emphasis added). Of course, nothing in the trial court's findings indicates it based its findings on what Ganete "presumably" did or "may well have" done at the hearing. Whatever gesticulations and mannerisms Ganete conveyed to the court may have led the trial court to its fact finding that defendant "sa[id]" the "comment," "I won't answer any questions." However, that is as much of a "presumption" as the record permits. The remainder of the state's argument asks this court to speculate on what occurred in the courtroom without any evidence in the record to support the state's speculation.

In short, the state's argument in favor of its version of the facts is based on (1) a possibly faulty transcript, (2) a selective quotation from the testimony, and (3) gestures that may have been made but are not suggested by the record. All of the support for the state's position is, by definition, not on the record. Therefore, this court should not consider it. Instead, the legal question before this court, properly framed, is whether defendant unequivocally invoked his right to remain silent when "sa[id]" the "comment," "I won't answer any questions."

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IV. When defendant said, "I won't answer any questions," he unequivocally invoked his right to remain silent.

With that framework in mind, the application to this case is straight-forward. When a suspect in custody says, "I won't answer any questions," a reasonable officer would interpret that statement as an unequivocal invocation of the right to remain silent. *See Acremant*, 338 Or at 322 (holding that the defendant's statement – "I think that I do need a lawyer. I do." – "expressed unambiguously that he wished to speak with a lawyer before talking to the detectives"). Though a reviewing court should consider the totality of the circumstances in deciding whether a statement was unequivocal or not, here, there are no circumstances that would suggest defendant's statement is ambiguous.

The officer in this case did not "accept" defendant's statement as an invocation and instead "interpreted" it as a question. In essence, the only "contextual" evidence is that this officer ignored what defendant said and continued the conversation. To be sure, this officer appears to have subjectively believed defendant's invocation was equivocal. However, a reasonable officer would not have so construed defendant's words. *Cf. State v. Ashbaugh*, 349 Or 297, 316, 244 P3d 360 (2010) (for purposes of determining whether someone is "seized" under the Oregon Constitution, this court applies "an objective standard"

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that is not "concerned with a person's subjective belief that he or she has been seized").

That conclusion is bolstered by the principle that ordinary words do not require interpretation. Indeed, defendant could not have chosen more direct words to convey an invocation of his rights. For instance, defendant did not make a conditional statement or refer to the possibility of answering questions. *See Charboneau*, 323 Or at 55 (holding that the defendant's invocation was equivocal because the defendant "did not say that he wished to speak with a lawyer at the time; rather, he asked about the future," and "he asked only if he would have an *opportunity* to speak with a lawyer later" (emphasis in original)). Because Officer Ganete unreasonably failed to stop questioning defendant after he unequivocally invoked his right to remain silent, the Court of Appeals properly held that Ganete violated defendant's Article I, section 12, rights. *Avila-Nava*, 257 Or App at 371-73.

The state's argument to the contrary rests on three premises.

First, the state argues that defendant stated the words as a question. Pet Br at 26-29. However, as argued above, that assertion is based on misunderstanding the trial court's findings and is not supported by the record. Defendant said, "I won't answer any questions."

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Second, the state argues that "another contextual circumstance" that supports the finding that defendant's statement was equivocal "was the language barrier." Pet Br at 29. The state relies on a finding by the trial court that "the *Miranda* rights aren't really clearly interpreted from English into Spanish anyway." Pet Br at 29. However, there is absolutely no support for that finding in the record. As noted earlier, defendant does not dispute that a possible language barrier might be a relevant factor in the totality of the circumstances when determining whether a statement was unequivocal. However, that is no different than any of the other myriad factors a court might consider. There still must be evidence that the factor was present. Here, other than the mere fact that the conversation was in Spanish, there is nothing in the record to suggest that defendant's issue with understanding the *Miranda* rights was due to the language barrier, as opposed to defendant simply not understanding them. Therefore, it is not relevant here.

Third, the state also argues that defendant did not appear to understand his rights. Pet Br at 30. The trial court found that "defendant didn't quite understand what was going on at the time" and noted that defendant's statement was "posed * * * as a quandary." However, the record does not support a finding that defendant's subjective intent in making the statement was to inquire as to the meaning of that right. Neither the trial court nor the state articulate how defendant

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not understanding his rights would result in defendant saying "I won't answer any questions" in an equivocal way.

The state argues that "[d]efendant had already expressed confusion regarding that warning and his question was the latest in a series of inquiries or statements seeking further clarification," and "[i]n that context, a reasonable officer could not have been certain whether defendant was continuing to seek clarification or whether he was switching gears and now invoking a right." Pet Br at 30. To the contrary, a reasonable officer hearing the words, "I won't answer any questions," should understand that the suspect had understood his rights and was indicating that he wanted to remain silent.

Further, as the state notes, defendant appeared to not understand "the warning that anything he said could be used against him." Pet Br at 30. The right to remain silent and the warning that anything a person says may be used against the person are separately stated in the *Miranda* warnings, which in this case, were as follows:

> "'It is my [duty] to inform you before you make a declaration: You have the right to remain silent. Anything you say may be used against you in a court of law or a judicial tribunal. You have the right to speak to an attorney and to [have him or her] present during the interrogation. If you do not have the funds to contract an attorney, the Court will assign one to you without cost.'"

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Avila-Nava, 257 Or App at 366. As given to defendant, the "right to remain silent" is separate from the statement that "[a]nything you say may be used against you in a court of law[.]" *Id.*

The state fails to explain why a person not understanding one part of the *Miranda* warnings would state a completely separate part of the warnings as a question. Similarly, the record does not support the trial court's finding that defendant intended to "pose" a "quandary" because that finding is based on the same unexplained conclusion that a person having questions about one of the *Miranda* warnings is apparently incapable of unequivocally invoking the *Miranda* rights.

Even with that finding, however, the state's argument fails. Under the state's own test, "the rule should turn on objective factors perceivable by officers, rather than subjective intent about which officers can only speculate." Pet Br at 13. Here, the officer's interpretation of defendant's subjective intent is something about which "officers can only speculate," and therefore should not be considered. Insofar as the officer described his interpretation of defendant's words, that too is irrelevant because it is not an "objective factor perceivable by officers." To the extent the officer's interpretation could be based on objective factors, such as the words defendant used, the state fails to explain why defendant's previous questions

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about the *Miranda* warnings would lead to the conclusion that the statement, "I won't answer any questions," was a question. More to the point, the record does not support a legal conclusion that a reasonable officer, when faced with questions about some of the *Miranda* rights, would, as a matter of law, interpret a subsequent statement as a question.

Defendant unequivocally invoked the right to remain silent when he said, "I won't answer any questions." No evidence in the record supports a contrary factual or legal conclusion. After defendant's unequivocal invocation, "that request must be granted and further questioning must cease." *Montez*, 309 Or at 572. However, the police continued interrogating defendant, and the state does not challenge the Court of Appeals conclusion to the contrary. *See Avila-Nava*, 257 Or App at 372-73 (holding that Ganete's "constitutionally precluded questioning" led to defendant's statements, which "were the product of the constitutional violation"). Accordingly, defendant's statements should have been suppressed for a violation of his Article I, section 12, rights, and this court should affirm the Court of Appeals.

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CONCLUSION

For all the reasons explained above, this court should affirm the judgment of the Court of Appeals and reverse the order of the trial court denying defendant's motion to suppress.

DATED August 11, 2014.

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) that the word count of this brief (as described in ORAP 5.05(2)(a)) is 6,704 words.

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Brief on the Merits of Respondent on Review to be filed with the Appellate Court Administrator, Appellate Courts Records section, 1163 State Street, Salem, OR 97301.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Brief on the Merits of Respondent on Review will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Peenesh H. Shah, #112131, Assistant Attorney General, attorney for Defendant-Respondent.

DATED August 11, 2014.

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