

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,  
Respondent on Review,

v.

DENNY D. GHIM,

Defendant-Appellant,  
Petitioner on Review.

Washington County Circuit Court  
Case No. C111491CR

CA A152065

**SC S063021**

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**REPLY BRIEF ON THE MERITS – PETITIONER ON REVIEW**

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Review of the decision of the Court of Appeals on an appeal from a judgment of  
the Circuit Court for Washington County  
Honorable Gayle A. Nachtigal, Judge

Affirmed with Opinion: December 10, 2014  
Author of Opinion: Sercombe, Presiding Judge  
Concurring Judges: Hadlock, Judge, and Mooney, Judge pro tempore

Review Allowed: April 23, 2015

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*Continued . . .*

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## PETITIONER’S REPLY BRIEF

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### STATEMENT OF THE CASE

Defendant relies on the statement of the case set forth in his Petitioner’s Brief on the Merits filed on July 14, 2015.

### ARGUMENT

In its respondent’s brief on the merits, the state takes the novel approach of applying the interpretive methodology set forth in *Priest v. Pearce*, 314 Or 411, 415-18, 840 P2d 65 (1992), to Article I, section 9, of the Oregon Constitution. In *Priest*, this court identified “three levels” on which an original constitutional provision should be addressed: “its specific wording, the case law surrounding it, and the historical circumstances that led to its creation.” 314 Or at 415-16. The goal of the *Priest* methodology is “to identify the principles embodied in [the constitutional provision at issue] and to apply those principles faithfully to modern circumstances as they arise.” *State v. Savastano*, 354 Or 64, 72, 309 P3d 1083 (2013).

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Oregon courts have not applied the *Priest* methodology in the Article I, section 9, context,<sup>1</sup> but *Priest*'s basic interpretive goal is nevertheless well served by the extensive body of Article I, section 9, case law. Petitioner's brief draws upon that case law.

Literal application of *Priest* to Article I, section 9, appears unwarranted at this juncture. Blank-slate application could cast many years' of well-developed case law into doubt and might require a "major overhaul of the state's search and seizure jurisprudence." Jack L. Landau, *The Search for the Meaning of Oregon's Search and Seizure Clause*, 87 Or L Rev 819, 860 (2008). Oregon appellate courts have decided upwards of 2,000 cases interpreting or relying on Article I, section 9. In the last three years alone, Oregon appellate courts have published some 400 Article I, section 9, opinions. While those opinions painstakingly identify the principles embodied in Article I, section 9, thereby accomplishing the *Priest* interpretive goal, none of those cases save one (*see fn 1*) explicitly invoke the *Priest* methodology. Indeed, as noted by others, an originalist approach at this late stage may be of little utility given the "chasm between modern and nineteenth-century conceptions of law, reasonableness,

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<sup>1</sup> *State v. Carter*, 342 Or 39, 42-45, 147 P3d 1151 (2006), appears to be the one exception. In that case, this court performed a brief *Priest* analysis of Article I, section 9's requirement that a search warrant describe with particularity "the place to be searched, and \* \* \* the thing to be seized."

criminal investigator procedure, and technology.” Landau, *The Search for the Meaning*, *supra*, at 861.

Those observations aside, however, the state’s reliance on the *Priest* methodology (*see* Resp BOM at 12) overlooks one crucial facet of the analysis: a meaningful consideration of how constitutional principles identified through historical inquiry play out in today’s world. A complete *Priest* analysis would “identify the principles [that the constitutional provision] was intended to advance, while recognizing that the scope of that provision is not limited to the historical circumstances surrounding its adoption[,]” and “apply those principles faithfully to modern circumstances as they arise.” *Savastano*, 354 Or at 72. For instance, given the cultural, sociological, and technological changes that have marked the years since constitutional enactment, the state’s proposal that Article I, section 9, protects as “papers and effects” only tangible property such as paper documents locked away in a safe deposit box is both suspect and deeply problematic. Resp BOM at 13; *cf.*, *Riley v. California*, \_\_\_ US \_\_\_, 134 S Ct 2473, 2493, 189 L Ed 2d (2014) (expressing discomfiture at unrestricted law enforcement access via cell phone search to the extensive personal information that is now available digitally rather than in pre-digital analogue paper formats).

Ultimately, as the state’s analysis does not call into question this court’s interpretation of the *meaning* behind Article I, section 9, this court must

examine the intersection between the provision's historical context and the modern privacy right alleged here. Pet BOM at 22-36.

## **CONCLUSION**

Because the prosecutor's unwarranted scrutiny of years' worth of defendant's bank records implicates the protections afforded by Article I, section 9, this court should reverse the decision of the Court of Appeals, vacate the judgment, and remand this case to the trial court for further proceedings.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

### Brief length

I certify that (1) the petitioner's reply brief on the merits complies with the word-count limitation in ORAP 5.05(2)(a)-(b), and (2) the word-count of this brief (as described in ORAP 5.05(2)(b)) is 697 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)(g).

## NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original reply brief on the merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on October 14, 2015.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this reply brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Paul L. Smith, #001870, Deputy Solicitor General, Robert M. Wilsey, #085116, Assistant Attorney General, and Rolf C. Moan, #924077, Senior Assistant Attorney General, attorneys for Respondent on Review; and on Julia Elizabeth Markley, #000791, attorney for Amicus Curiae American Civil Liberties of Oregon, Inc.

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