IN THE SUPREME COURT OF THE STATE OF OREGON

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| STATE OF OREGON,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>STEVEN P WAGNER NICHOLS,<br><br>Defendant-Respondent. | Hood River County Circuit Court<br>Case No. 140066CR<br><br>SC S063985<br><br>**EXPEDITED APPEAL UNDER ORS 138.060(2)** |

# RESPONDENT'S ANSWERING BRIEF

Appeal from Orders of the Circuit Court
for Hood River County
Honorable John A. Olson, Judge

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## STATEMENT OF THE CASE

Defendant accepts the Attorney General's statement of the case with the exception of its question presented and with the addition and clarification of pertinent facts set out in the summary of facts and the argument that follows.

### Questions Presented and Proposed Rules of Law

First Question Presented.

When a person has just been arrested for the murder of his girlfriend and asked about the circumstances behind her death, is his statement, "It's not something I want to talk about," an unequivocal invocation of his Article I, section 12, and Fifth Amendment rights to remain silent?

If it is a selective invocation of his right to remain silent on the subject of his girlfriend's death, may police continue to question him about that subject?

Alternatively, is it an equivocal invocation that must be clarified by police before further interrogation under Article I, section 12?

Proposed Rule of Law.

When a person in custody says that he does not want to talk about the subject that constitutes the basis for his arrest, that is an unequivocal invocation of his right to remain silent, and all interrogative police questioning must cease.

When a person in custody selectively invokes his right to remain silent by stating that he does not want to talk about a particular subject, police may not interrogate the person on that subject.

When a person in custody equivocally invokes his right to remain silent, police are required to clarify the person's intent before engaging in further interrogation under Article I, section 12.

Second Question Presented.

Should this court abandon the Article I, section 12, rule requiring clarification of an equivocal invocation of the right to remain silent?

Proposed Rule of Law.

Article I, section 12, requires that police seek clarification in the face of an equivocal assertion of the right to remain silent. That rule ensures that a person's Article I, section 12, rights are honored, provides a record for trial court and appellate review, and protects those most vulnerable to the coercive aspects of custodial interrogation.

## Summary of Argument

When a person in custody unequivocally invokes his right to remain silent under either Article I, section 12, or the Fifth Amendment, all interrogative police questioning must cease. When a person in custody objects to questions on a particular subject, he has selectively invoked his right to

remain silent and police may not interrogate him on that subject. That is because a person's right to remain silent must be scrupulously honored, and custodial interrogation puts pressure on a person to speak, making any resulting statements compelled. Finally, under Article I, section 12, when a person equivocally invokes his right to remain silent, police are required to clarify the person's intent before engaging in further interrogation.

When defendant arrived at the San Francisco International Airport on a flight from China, he was arrested on a warrant for the murder of his girlfriend. He was provided with *Miranda* warnings, but he was not given a clear statement of the basis for the warrant, as required by law. Instead, he had to ask the arresting detective a series of questions to get that information, which bled into the detective's inquiries about defendant's relationship with the victim. However, when the detective asked defendant to tell him about the circumstances behind his girlfriend's death, defendant said, "It's not something I want to talk about." Rather than ceasing the interrogation, the detective told defendant that he wanted to "make sure I don't have a serial murderer walking into my jail," and again asked defendant to tell him about the circumstances of how his girlfriend died. Defendant then made incriminating statements during the ensuing three-hour interrogation.

Defendant's statement that he did not want to talk about the subject that provided the basis for his arrest was an unequivocal invocation of his right to

remain silent. His statement encompassed the entire anticipated subject of the interrogation and clearly indicated that he did not want to talk about it. Consequently, all questioning should have ceased.

Even if defendant's statement could be construed as a selective invocation of his right to remain silent on the subject of his girlfriend's death, the detective failed to honor that invocation when he responded with his "need" for the information and resumed questioning on that subject. Those actions violated defendant's Article I, section 12, and Fifth Amendment rights.

Finally, even if defendant's statement was an equivocal invocation of his right to remain silent, the detective violated defendant's Article I, section 12, rights by failing to clarify defendant's intent before attempting to induce defendant to speak. For all those reasons, the trial court correctly suppressed defendant's subsequent statements.

The state suggests that this court should abandon the Article I, section 12, rule requiring police to clarify an equivocal invocation before engaging in further interrogation. However, that would be inconsistent with the purpose of Article I, section 12, which is to protect a defendant's constitutional right to be free from making a compelled statement in a custodial setting. Because the *Miranda* warnings tell a person that he has a right to silence (and do not tell a person that, as the state suggests, he must ask the police to cut off all questioning), a layperson will not know to unequivocally ask for that remedy.

Without the clarification requirement, many people's Article I, section 12, invocations will go unheeded. In addition, the rule requiring clarity is easier to administer than the state's proposed rule, because it creates more information from which to determine whether a person intends to invoke their Article I, section 12, rights. In that way, a person's constitutional rights are protected, but police do not risk losing information from a person who wishes to waive his rights. Finally, the state's proposed rule disproportionately impacts the most vulnerable—those with language barriers, communication disabilities, cultural differences, and limited education. This court should not adopt a rule that has the practical effect of depriving a portion of Oregon's citizens of their Article I, section 12, right to remain silent in the face of police interrogation under compelling circumstances.

## Summary of Facts[1]

Defendant was arrested at the San Francisco International Airport and the following interview ensued:

> "DET. MATSUURA: Is 'Mr. Nichols' okay with you or 'Stephen' okay with you?
>
> "[DEFENDANT]: Stephen's fine.

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[1] Because the court considers the totality of the circumstances leading up to an invocation of the right to remain silent when determining whether the invocation was unequivocal, defendant reproduces the transcript of the initial portion of the interview in its entirety.

"DET. MATSUURA: Okay. Okay. Stephen, this is me. I run investigations here at the airport.

"[DEFENDANT]: Okay.

"DET. MATSUURA: Okay. This is my partner, Andy Ward.

"DET. WARD: (Inaudible.)

"[DEFENDANT]: Hi.

"DET. MATSUURA: Okay. One of my detectives. Okay? I need to read this to you because, obviously, you're not free to go anywhere.

"You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. And if you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish. Do you understand?

"[DEFENDANT]: Uh, yes.

"DET. MATSUURA: Okay. Here's why we're here. Okay? Everybody that comes into this airport, while it says 'San Francisco,' it actually sits in the city and county of San Mateo, two completely separate jurisdictions.

"[DEFENDANT]: Uh-huh.

"DET. MATSUURA: Are you from the Bay Area?

"[DEFENDANT]: No.

"DET. MATSUURA: No. Okay. So if I'm telling you anything you already know, you let me know. People do get arrested in -- in the airport. We come and interview them before they hit our jail. We want to know who they are, what they're

doing, why they're here, things like that. We want to make sure our facility is safe and the airport is safe. Okay?

"Have you been told why you're in custody?

"[DEFENDANT]: No.

"DET. MATSUURA: Okay. You have a warrant for your arrest.

"[DEFENDANT]: From where?

"DET. MATSUURA: The state of Oregon.

"[DEFENDANT]: For?

"DET. MATSUURA: Homicide.

"[DEFENDANT]: Homicide?

"DET. MATSUURA: Homicide. Do you have any idea what that's about?

"[DEFENDANT]: No.

"DET. MATSUURA: Okay.

"[DEFENDANT]: What's the name of the person?

"DET. MATSUURA:

"[DEFENDANT]:

"DET. MATSUURA: I -- Do you know a

"[DEFENDANT]: That's my mother's -- or that's my child's mom.

"DET. MATSUURA: Okay. Were you guys dating at all or was it just like a one-night stand thing where you guys -- you guys hooked up?

"[DEFENDANT]: No.

"DET. MATSUURA: Or were you guys having a relationship?

"[DEFENDANT]: No. We were together for a long time.

"DET. MATSUURA: Okay. Do you have any idea why there's a warrant for your arrest for a homicide for your daughter's -- the mother of your daughter?

"[DEFENDANT]: I don't.

"DET. MATSUURA: None at all?

"[DEFENDANT]: No.

"DET. MATSUURA: Well, obviously something happened. Do you know the circumstances behind her death?

"[DEFENDANT]: Yeah.

"DET. MATSUURA: Can you tell me about it?

"[DEFENDANT]: *It's not something I want to talk about*. It's --

"DET. MATSUURA: Well, I want to make sure I don't have a serial murderer walking into my jail.

"[DEFENDANT]: I'm not --

"DET. MATSUURA: You know what I mean.

"[DEFENDANT]: I'm not a killer.

"DET. MATSUURA: I --

"[DEFENDANT]: I'm --

"DET. MATSUURA: I don't know that. I don't know you. I can't make that -- that decision one way or another. But for the safety and security of my facility, I want to make sure I don't have the serial murderer walking into my facility without knowing it. Can you see my point?

"[DEFENDANT]: Yeah.

"DET. MATSUURA: Okay. I'm not here to draw judgment on you one way or the other. *I'm just looking for some information. So if you can tell me how about the circumstances of how she died, that'd be great.*

"[DEFENDANT]: She fell -- I don't even know how many years ago -- six years ago.

"DET. MATSUURA: Where?

"[DEFENDANT]: Eagle Crest.

"DET. MATSUURA: Where is that?

"[DEFENDANT]: It's in Oregon.

"DET. MATSUURA: I'm assuming it's in Oregon, because that's where the warrant came out of.

"[DEFENDANT]: It's in Oregon, yes.

"DET. MATSUURA: How did she fall down a cliff?

"[DEFENDANT]: Um, yeah."

TCF, 7/15/15 Declaration, Ex B, Transcript, Tr 1-5 (emphasis added)

(hereinafter "Tr").

## ANSWER TO ASSIGNMENT OF ERROR

The trial court did not err by granting defendant's motion to suppress his statements.

### Preservation of Error

The state preserved its arguments on appeal. At trial, defendant argued that his statement was an unequivocal invocation of the right to remain silent under both Article I, section 12, and the Fifth Amendment. Defendant's Motion for Omnibus Hearing, Appellant's Brief at ER 4-8. Alternatively, he argued that his statement was an equivocal invocation and the police failed to ask clarifying questions. *Id*. at ER 8-9.

### Standard of Review

> "What transpired during a custodial interrogation, including what a defendant said or did not say, is a question of fact. We are bound by the trial court's findings of fact if they are supported by evidence in the record, although 'we assess anew whether th[ose] facts suffice to meet constitutional standards.' *State v. James*, 339 Or 476, 481, 123 P3d 251 (2005). That is, whether a defendant's statements amounted to an unequivocal invocation of the right against self-incrimination, an equivocal invocation, or no invocation at all, is a question of law. *State v. Terry*, 333 Or 163, 172, 37 P3d 157 (2001), *cert den*, 536 US 910, 122 S Ct 2368, 153 L Ed 2d 189 (2002)."

*State v. Avila-Nava*, 356 Or 600, 609, 341 P3d 714 (2014).

Whether an officer's questions constituted interrogation is reviewed as a matter of law. *State v. Acremant*, 338 Or 302, 322, 108 P3d 1139 (2005) (citing *State v. Montez*, 309 Or 564, 572-73, 789 P2d 1352 (1990)).

## Argument

### I. The trial court correctly ruled that all of defendant's statements after he said, "It's not something I want to talk about" must be suppressed.

#### A. Police must scrupulously honor a person's in-custody invocation of the right to remain silent.

Article I, section 12, of the Oregon Constitution and the Fifth Amendment to the federal constitution both protect against compelled self-incrimination.[2] One manifestation of that protection is the right to remain silent in the face of custodial interrogation.

In *Miranda v. Arizona*, 384 US 436, 473-74, 86 S Ct 1602, 16 L Ed 2d 694 (1966), the Supreme Court set out the requisite procedures to guarantee that right. A person must:

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[2] Article I, section 12, of the Oregon Constitution provides in relevant part: "No person shall * * * be compelled in any criminal prosecution to testify against himself."

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person * * * shall be compelled in any criminal case to be a witness against himself." The Fifth Amendment privilege against self-incrimination is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Malloy v. Hogan*, 378 US 1, 8, 84 S Ct 1489, 12 L Ed 2d 653 (1964).

> "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."

*Id*. at 479; *see also State v. Vondehn*, 348 Or 462, 474, 236 P3d 691 (2010) ("Article I, section 12, requires that the police inform a person subjected to custodial interrogation that he or she has a right to remain silent and to consult with counsel and that any statements that the person makes may be used against the person in a criminal prosecution.").

Furthermore, police must honor that right by ceasing interrogation when a person invokes the right to remain silent:

> "Once warnings have been given, the subsequent procedure is clear. *If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease*. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."

*Id*. at 473-74 (footnote omitted); *see also State v. Davis*, 350 Or 440, 459, 256 P3d 1075 (2011) ("if there is a right to remain silent that is guaranteed by Article I, section 12, it is a right to insist that the police refrain from interrogation after a person who is in custody or otherwise in compelling circumstances has invoked the right to remain silent"). Once a person in

custody expresses an intent to exercise the right to remain silent, police must "scrupulously" honor that right by refraining from engaging in conduct that would induce him to give up that right. *Miranda*, 384 US at 479.

Notably, the "right to cut off questioning" is derivative of the right to remain silent, in the same way as is the Fifth Amendment right to counsel. *See id*. ("Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."); *Id*. at 469 ("the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege" to "assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process"); *State v. Scott*, 343 Or 195, 200, 166 P3d 528 (2007) ("The [Article I, section 12,] right against self-incrimination includes a derivative right to counsel during custodial interrogation."). Thus, the primary right to be protected is the right to remain silent; the right to cut off questioning and the right to counsel are means of providing that protection.

On the other hand, a person may knowingly and intelligently waive the right to remain silent by voluntarily speaking with police after receiving *Miranda* warnings. *Miranda*, 384 US at 479; *see State v. Meade*, 327 Or 335, 339-41, 963 P2d 656 (1998) (holding that the defendant, without prompting from the police, initiated further conversation that evinced a willingness and a

desire for a generalized discussion about the investigation); *State v. Matt*, 251 Or 134, 137-38, 444 P2d 914, 915 (1968) (holding that "[a]ny clear and unambiguous conduct by a person who has been advised of his rights which indicates his willingness to answer questions without a lawyer is surely sufficient" to waive the right to counsel, and stating that the waiver of the right to remain silent is "so similar that there is no basis for requiring a specific verbal waiver in one and not the other").

With those principles in mind, this court and the Supreme Court have developed clear guidelines for police conduct during custodial interrogation.

**1. When a defendant unequivocally invokes his right to remain silent, both Article I, section 12, and the Fifth Amendment require police to cease all interrogation.**

When a person in custody unequivocally invokes his Fifth Amendment right to remain silent, police must cease all interrogation. *Miranda*, 384 US at 473-74; *see also Berghuis v. Thompkins*, 560 US 370, 381-82, 130 S Ct 2250, 2260, 176 L Ed 2d 1098 (2010) (requiring unequivocal invocation of the right to remain silent, following Court's analysis in *Davis v. United States*, 512 US 452, 459, 114 S Ct 2350, 129 L Ed 2d 362 (1994), which requires unequivocal invocation of Fifth Amendment right to counsel). Police may not reinitiate questioning until a reasonable period of time has elapsed and the defendant has been re-advised of his *Miranda* rights. *Michigan v. Mosley*, 423 US 96, 104-06, 96 S Ct 321, 46 L Ed 2d 313 (1975).

Those rules also apply to unequivocal invocations of the right to remain silent under Article I, section 12. *State v. Avila-Nava*, 356 Or 600, 609, 341 P3d 714 (2014) ("As noted, 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), *cert den*, 136 S Ct 34, 193 L Ed 2d 48 (2015) (same). Police may only reinitiate contact after a reasonable time and provision of new *Miranda* warnings. *Id*. at 458-59 (citing *State v. Stilling*, 285 Or 293, 302-03, 590 P2d 1223, *cert den*, 444 US 880 (1979)).

In *McAnulty*, this court found the following three statements to be unequivocal invocations of the right to remain silent: "(1) I'm done, I don't want to talk anymore."; (2) "I don't want to talk no more. I'm sorry. I just—"; and (3) "I don't want to no more, please, I don't want to." 356 Or at 451-52. The first two statements "unambiguously communicated that she no longer desired to talk with detectives," and the third statement in context, "effectively communicated her intent to stop the conversation" about the victim's injuries. *Id*. at 456 & n 11.

In *Avila-Nava*, the court found the defendant's statement, "I won't answer any questions" to be unequivocal. *Avila-Nava*, 356 Or at 618. In the process, the court held that a defendant's post-invocation statements may not be considered when determining whether an invocation was unequivocal:

> "Thus, we conclude that, in determining whether a defendant's words constituted an unequivocal invocation of the right against self-incrimination under Article I, section 12, a reviewing court must consider those words, *in the context of the totality of circumstances existing at the time of and preceding their utterance*, to determine whether a reasonable officer would have understood that the defendant was invoking that right."

*Id*. at 613 (emphasis added) (footnote omitted); *see also Smith v. Illinois*, 469 US 91, 100, 105 S Ct 490, 83 L Ed 2d 488 (1984) (applying same rule under Fifth Amendment).

This court has found slightly more ambiguous statements to be unequivocal invocations of the Article I, section 12, right to counsel. *See Scott*, 343 Or at 201 (holding that "I would appreciate a lawyer present before I say anything more to you guys. * * *. I'd like to get one here," was unequivocal invocation); *State v. Acremant*, 338 Or 302, 322, 108 P3d 1139, *cert den*, 546 US 864 (2005) (holding that "I think that I do need a lawyer. I do," was unequivocal invocation). *See also Smith v. Illinois*, 469 US 91, 105 S Ct 490, 83 L Ed 2d 488 (1984) (holding that the defendant unequivocally invoked his right to counsel under the Fifth Amendment when he responded, "Uh, yeah. I'd like to do that," after being informed that he had the right to have a lawyer present when he was being questioned).

**2. When a defendant selectively invokes his right to remain silent, police must refrain from questioning the defendant on that subject.**

Sometimes, a person will clearly indicate a desire not to talk about a particular subject, but evince a willingness to discuss other subjects. That type of selective invocation of the right to remain silent must be "scrupulously honored" as much as a blanket invocation of the right to remain silent by ceasing all interrogation on that subject.

As the United States Supreme Court explained:

> "A reasonable and faithful interpretation of the *Miranda* opinion must rest on the intention of the Court in that case to adopt 'fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . . .' The critical safeguard identified in the passage at issue is a person's 'right to cut off questioning.' *Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation*. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'"

*Michigan v. Mosley*, 423 US at 103-04 (citations and footnote omitted). The statement that a person "can control * * * the subjects discussed" shows that the right to cut of questioning can be subject-specific.

The same is true under Article I, section 12. In *State v. Kell*, 303 Or 89, 734 P2d 334 (1987), this court considered the question, "[C]an there be a partial

waiver of the right against self-incrimination?" or more concretely, whether "police interrogating a person in custody may properly discuss certain aspects of a crime which the suspect is willing to talk about, even though the suspect wishes to consult a lawyer as to some other specific aspect of the crime." *Id*. at 94.

In that case, after receiving *Miranda* warnings and consenting to talk to the police, the defendant became upset when told that other people had said that he was the primary instigator. *Id*. at 91-92. At that point, he said, "Well I'm not going to go any further with this until I speak with a lawyer," but he continued to talk, saying "No, I mean I'll talk to you about it, but as far as this, my idea, I want to talk to a lawyer because this is a bunch of bullshit!" *Id*. at 92. The interview continued, and the defendant made incriminating statements about events surrounding the crime. *Id*.

This court chose to follow the federal rule articulated in *Connecticut v. Barrett*, 479 US 523, 107 S Ct 828, 93 L Ed 2d 920 (1987), in which the Court took the defendant at his word when he said he was willing to orally admit his involvement in the crime but would not sign a written statement without the presence of a lawyer. The Court explained that

> "the fundamental purpose of the *Miranda* decision 'was to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process,' but, once warned, 'the suspect is free to exercise *his own volition* in deciding whether or not to make a statement to the authorities.'"

*Kell*, 303 Or at 99 (quoting *Barrett*, 479 US at 528, emphasis in *Barrett*).

This court then concluded that Kell "chose to speak to the police officers about every aspect of the case except as to whose idea it was to dynamite the car," and it emphasized that "there was no interrogation by the police following defendant's first statement of interest in an attorney." *Kell*, 303 Or at 99-100. It held that the "[d]efendant was entitled to pick and choose what he wished to talk about" and that he "voluntarily waived his rights of self-incrimination under both the state and federal constitutions." *Id*. at 100. This court's emphasis on the lack of interrogation after the defendant's invocation shows that even during a partial waiver of the right against self-incrimination, police may not interrogate the defendant regarding the subjects for which he has invoked his rights.

A few years later, this court applied *Kell* to a defendant's selective exercise of his right to remain silent to conclude that his statements during a police interview were not obtained in violation of his Article I, section 12, and Fifth Amendment rights. *State v. Smith*, 310 Or 1, 9-11, 791 P2d 836 (1990). In *Smith*, the defendant was read his *Miranda* rights and agreed to an interview at the police station. *Id*. at 9-10. During the interview, the detective suggested that "if defendant had killed his wife because he found out she was having an

affair with another man, it might be manslaughter and not murder to which *defendant replied that he had nothing to say*." *Id*. at 10 (emphasis added).

This court agreed with the trial court that the defendant "had not invoked his right to remain silent" but "merely exercised his right to answer some questions and not to answer others," citing *Kell*. *Smith*, 310 Or at 10. It explained, "We find nothing which suggests that detectives persisted 'in repeated efforts to wear down [defendant's] resistance and make him change his mind.'" *Id*. at 10-11 (citation omitted). Again, the emphasis on the fact that the detectives did not attempt to change the defendant's mind regarding his decision not to answer certain questions shows that the detectives "scrupulously honored" the defendant's right to remain silent on certain subjects.

Finally, in *State v. Longo*, 341 Or 580, 148 P3d 892 (2006), this court again held that a defendant's refusal to answer particular questions or discuss certain subjects after receiving *Miranda* warnings did not require suppression of his remaining statements, again citing *Kell*. *Id*. at 592-93. Yet it noted the trial court's finding that "[t]he police officers were '*very* credible witnesses who gave [defendant] *every opportunity* **without pressure** to say, **or not say**, what he wanted or that which was on his mind." *Id*. at 592-93 (bold added, italics in trial court original). Again, that indicates the importance of police restraint in the face of a selective waiver of the right to remain silent—the defendant gets to control what he wishes to discuss. From that, it follows that when a defendant

unequivocally indicates that he does not want to talk about certain subjects, police may not continue to interrogate him on those subjects.

The point is best illustrated by a simple example. Police arrest a suspect for three burglaries in a particular neighborhood. During the third burglary, the homeowner was shot and killed. The suspect is advised of his *Miranda* rights and says that he is willing to talk to the detectives. He admits his involvement in the first and second burglaries, but says that he wants to exercise his right to remain silent regarding the third burglary. The fact that the suspect freely discusses details of the first two burglaries does not mean that he has waived his right to remain silent regarding the third burglary. Any custodial police questioning regarding the third burglary would subject the suspect to impermissible coercion and be a violation of his Article I, section 12, and Fifth Amendment rights. *See State v. Charboneau*, 323 Or 38, 58, 913 P2d 308 (1996) (explaining that *State v. Sparklin*, 296 Or 85, 672 P2d 1182 (1983), "stands for the proposition that, when a lawyer invokes a defendant's right to remain silent for a specific crime, that lawyer does not thereby invoke the defendant's right to remain silent for unrelated crimes with respect to which the lawyer does not represent the defendant").

Thus, a partial waiver of the right to remain silent does not permit police free reign to question a person on any topic. The right must be "scrupulously honored," and selective invocation of the right when a person is in custody

allows him to control the subjects discussed, as required by Article I, section 12, and the Fifth Amendment.[3]

### 3. When a defendant equivocally invokes his right to remain silent, Article I, section 12, allows police to ask only clarifying questions.

Under Article I, section 12, when a defendant's invocation of the right to remain silent is only equivocal, police may ask only clarifying questions to determine whether the defendant is invoking his right to remain silent. *Avila-Nava*, 356 Or at 609 ("When the defendant makes an ambiguous or equivocal invocation of rights under Article I, section 12, however, the police are required to ask follow-up questions to clarify what the person meant before proceeding with interrogation," citing *Charboneau*, 323 Or at 54).

That follows the well-established Article I, section 12, rule requiring police to ask clarifying questions when a defendant equivocally invokes his Article I, section 12, right to counsel before interrogation may continue. *State*

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[3] The state argues, "A suspect has the right not to be compelled to answer any particular question, and a suspect has the right to cut off questioning as a whole. *But he does not have the right not to be asked a particular question or questions*." Appellant's Brief at 26-27 (emphasis added). The state's position is mistaken, because it ignores the compelling aspect of custodial interrogation. *See State v. Montez*, 309 Or 564, 572, 789 P2d 1352 (1990) (explaining that when a suspect in police custody unequivocally requests to speak with a lawyer, police must cease all questioning "to protect a suspect in custody from being 'badgered' by the police" (quoting *Oregon v. Bradshaw*, 462 US 1039, 1044, 103 S Ct 2830, 77 L Ed 2d 405 (1983)). When a defendant invokes his right not to be compelled to answer a particular question, continued custodial interrogation on that topic is compelling. The state has no basis to argue that any resulting statements were not compelled.

*v. James*, 339 Or 476, 480 n 2, 123 P3d 251 (2005) ("When the suspect's request for a lawyer is equivocal, however, the police may ask questions intended to clarify whether the suspect meant to invoke his or her right to counsel."); *Meade*, 327 Or at 339 ("When the request [to talk to a lawyer] is equivocal, however, the police may follow up with questions intended to clarify whether the suspect meant to invoke his right to counsel."); *Charboneau*, 323 Or at 55-56 (holding that the defendant's equivocal request for a lawyer was properly followed by clarifying questions); *State v. Montez*, 309 Or 564, 568, 572-73, 789 P2d 1352 (1990) (concluding that the officer's question asking the defendant if "he was telling us that he wanted an attorney and did not want to talk with us anymore," was a proper response to the defendant's equivocal invocation to his right to counsel).

### B. Defendant's statement was an unequivocal invocation of his right to remain silent, and police were required to cease questioning.

When viewed in the totality of the circumstances, defendant's statement, "It's not something I want to talk about," was an unequivocal invocation of his right to remain silent. *See Avila-Nava*, 356 Or at 618 (considering defendant's words "in the context of the totality of circumstances existing at the time of and preceding their utterance"). That is because "it" referred to "the circumstances behind her death," which was the basis for the arrest warrant and the reason the police had taken defendant into custody. When a person says that he does not

want to talk about the suspected crime for which he has been taken into custody, his invocation of the right to remain silent could not be clearer.

The interview begins with a few preliminary questions and statements to establish the identity of those present. Detective Matsuura then advises defendant of his *Miranda* rights. Matsuura next explains the basis of his jurisdiction and asks defendant whether he has been told why he is in custody. Notably, when defendant says he has not, Matsuura does not immediately inform defendant of the basis for the arrest warrant or show him the warrant, as required by statute. *See* ORS 133.235(3) (providing that when an officer arrests a person for a crime, "[t]he officer shall inform the person to be arrested of the officer's authority and reason for the arrest, and, if the arrest is under a warrant, shall show the warrant"). Rather, he lets the information out in dribs and drabs, forcing defendant to ask questions to learn the full basis for the warrant. Having started that conversation (which would not have occurred if he had complied with the law), Matsuura then leads into a discussion of the crime, asking whether defendant knows the victim and what his relationship with her was like. When defendant denies knowing why the arrest warrant was issued, Matsuura says, "Well, obviously something happened. Do you know the circumstances behind her death?" and "Can you tell me about it?" Tr 4. It is at that point that defendant says, "It's not something I want to talk about." Tr 4.

This is not a situation in which the defendant waived his *Miranda* rights, chose to talk to police about his crime, and later changed his mind. Here, defendant merely sought the information to which he was legally entitled (the reason for his arrest), and—as soon as the detective asked about the circumstances of the crime—defendant invoked his right to remain silent. The fact that defendant worded his invocation passively—"It's not something I want to talk about"—as opposed to directly—"I do not want to talk about it"— is irrelevant. An impeccably polite suspect who mildly conveys his wishes ("Would it be presumptuous of me to not touch on that sensitive topic?") communicates his wishes as much as a suspect with less tact ("Let's not go there!"). *See Davis v. United States*, 512 US at 459 (explaining that "a suspect need not 'speak with the discrimination of an Oxford don'" when invoking his right to counsel). Based on defendant's statement under the circumstances, "a reasonable officer would have understood that the defendant was invoking that right [to remain silent]." *Avila-Nava*, 356 Or at 613 (stating standard for unequivocal invocation).

Under those circumstances, Detective Matsuura was required to cease all interrogation. *Miranda*, 384 US at 473-74; *Avila-Nava*, 356 Or at 613; *McAnulty*, 356 Or at 455. Instead, he continued his attempt to get defendant to talk about the crime, first stating, "Well, I want to make sure I don't have a serial murderer walking into my jail," Tr 4, and then more explicitly:

> "DET. MATSUURA: Okay. I'm not here to draw judgment on you one way or the other. I'm just looking for some information. *So if you can tell me how about the circumstances of how she died, that'd be great*."

Tr 5 (emphasis added). At that point, defendant relented and began to talk about the crime for the next three hours.

That was impermissible interrogation in violation of defendant's Article I, section 12, and Fifth Amendment rights to remain silent. Consequently, the trial court correctly suppressed defendant's statements during that interview.

### C. Defendant's statement was an unequivocal selective invocation of his right to remain silent, and police were required to cease questioning on the subject of his girlfriend's death.

The state argues in its brief that even if defendant was refusing to answer questions on a particular subject, he was not invoking his right to cut off questioning. Appellant's Brief at 28-33. From that it concludes that that the only issue is whether his subsequent statements were voluntary. It urges:

> "In sum, the right to cut off all questioning is distinct from the right not to be compelled to speak, and that latter right includes the right not to be compelled to answer a particular question. A suspect's refusal or reluctance to answer a particular question or to discuss a particular topic does not require the police to cease or narrow questioning (though a suspect's subsequent statements will, of course, only be admissible if he voluntarily makes them)."

Appellant's Brief at 28.

It is defendant's position that when he expressed his desire not to talk about the crime for which he had been arrested, he was not selectively invoking

his right to remain silent or merely refusing to answer questions on a particular subject. He was refusing to answer questions on the only subject of interest to anyone at the time—whether he committed the charged crime. That was the subject of the interrogation; consequently, when defendant refused to talk about that subject, the interrogation should have ended.

However, even if this court interprets defendant's statement as a selective invocation, his "right not to be compelled to answer a particular question" was violated by Detective Matsuura's subsequent behavior. Not only did Matsuura continue to question defendant, he continued to question defendant on the exact subject that defendant had already said he did not want to talk about. A few sentences after defendant said that he did not want to talk about "the circumstances behind [the victim's] death," Matsuura said, "So if you can tell me how about the circumstances of how she died, that'd be great." Tr 4-5. Because defendant was in custody—an automatically compelling situation—questioning on a topic that defendant had already expressed his desire not to discuss could only yield compelled statements that must be suppressed.

Notably, the trial court found Detective Matsuura's behavior compelling. It found that Matsuura failed to ask clarifying questions in response to defendant's invocation, and stated, "Instead, the officer's response was to *put psychological pressure on the defendant to speak* by positing he had no way of knowing the defendant wasn't a serial murderer if the defendant didn't talk to

him." Memorandum Opinion Granting Motion to Suppress Statements at 4 n 1 (emphasis added), Appellant's Brief at ER-33.

This case illustrates the flaw in the state's proposed rule of law that "[a] suspect's refusal or reluctance to answer a particular question or to discuss a particular topic does not require the police to cease or narrow questioning." It is unsurprising that when a defendant in custody says that he does not want to talk about a particular topic, and his exercise of the right to remain silent on that subject is not honored, he will feel compelled to make statements on that topic. Police may not ride roughshod over a person's right to remain silent by continuing to question him on a topic on which he has already exercised his Article I, section 12, and Fifth Amendment rights.

### D. Alternatively, defendant's statement was an equivocal invocation of his right to remain silent, and police were allowed to ask only clarifying questions.

The trial court excluded defendant's statements because it concluded that defendant equivocally invoked his right to remain silent and that Detective Matsuura failed to ask clarifying questions:

> "Given the foregoing analytical framework, I find that [defendant] made an equivocal invocation of his right to remain silent when, in response to the question of whether he could tell the officer about the circumstances of Ms Castro's death, he responded, 'It's not something I want to talk about. It's—' The statement is ambiguous. It could be a way of signaling that the topic is still emotionally charged for the speaker, but that the speaker is nonetheless willing to discuss it. It could be an

> invocation of the right to remain silent. It cannot be reasonably construed as no invocation at all."

Memorandum Opinion Granting Motion to Suppress Statements at 4, Appellant's Brief at ER-33.

Defendant maintains that under the totality of the circumstances, his statement "It's not something I want to talk about. It's—" cannot reasonably be construed as a statement that the topic of his girlfriend's death "is still emotionally charged for the speaker, but that the speaker is nonetheless willing to discuss it." This is not a situation in which the circumstances of his girlfriend's death are still fresh in his mind. His girlfriend died almost six years previously. He was returning from an extended stay in China. The totality of the circumstances does not point to a recently grief-stricken man.

Furthermore, this is not a situation in which defendant had shown a desire to talk to police by making statements and answering interrogative questions, but only balked at the emotionally charged topic of his girlfriend's death. As soon as the detective broached the subject of the charged crime, defendant said that he did not want to talk about it. Consequently, defendant maintains that he unequivocally invoked his right to remain silent.

However, even if defendant's invocation was not unequivocal, his statement was undoubtedly an equivocal invocation. As the trial court recognized, "It cannot be reasonably construed as no invocation at all."

And as the trial court found, Detective Matsuura failed to ask any clarifying questions, as required by Article I, section 12. Memorandum Opinion Granting Motion to Suppress Statements at 4, Appellant's Brief at ER-33; *Avila-Nava*, 356 Or at 609 (stating requirement).

Instead, Matsuura "put psychological pressure on the defendant to speak by positing he had no way of knowing the defendant wasn't a serial murderer if the defendant didn't talk to him." Memorandum Opinion Granting Motion to Suppress Statements at 4 n 1, Appellant's Brief at ER-33. The statement, "I want to make sure I don't have a serial murderer walking into my jail," cannot reasonably be construed as a routine booking question. *See Montez*, 309 Or at 572-73 (allowing only "neutral questions, intended only to clarify whether and to what extent [the] defendant was invoking his right to counsel"); *see also Scott*, 343 Or at 202-03 (defining "interrogation" under Article I, section 12, consistently with the Fifth Amendment as including "not only * * * express questioning, but also * * * any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect," and citing *Rhode Island v. Innis*, 446 US 291, 301, 301 n 5, 100 S Ct 1682, 64 L Ed 297 (1980)).

Because Detective Matsuura failed to clarify whether defendant was invoking his Article I, section 12, right to remain silent, and instead continued

to try to persuade defendant to talk about the charged crime, he violated defendant's Article I, section 12, rights, and all subsequent statements must be suppressed.

## II. This court should not abandon the Article I, section 12, rule requiring clarification of an equivocal invocation of the right to remain silent.

The state asks this court to abandon the rule, clearly stated in *Avila-Nava*, that "[w]hen the defendant makes an ambiguous or equivocal invocation of rights under Article I, section 12, * * * the police are required to ask follow-up questions to clarify what the person meant before proceeding with interrogation." *Avila-Nava*, 356 Or at 609.

However, before this court will reconsider a previous ruling under the Oregon Constitution, a party must "present[ ] * * * a principled argument suggesting that, in an earlier decision, this court wrongly considered or wrongly decided the issue in question," "giv[ing] particular attention to arguments that either present new information as to the meaning of the constitutional provision at issue or that demonstrate some failure on the part of this court at the time of the earlier decision to follow its usual paradigm for considering and construing the meaning of the provision in question." *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 54, 11 P3d 228 (2000). The state provides no basis to overturn this court's prior decisions.

### A. Article I, section 12, protects a defendant's constitutional right to be free from making a compelled statement in a custodial setting.

In *Davis*, this court conducted an extensive and thorough analysis of Article I, section 12, under the methodology provided in *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992). *Davis*, 350 Or at 447-59. It concluded that the text, historical analysis, and case law construing the provision all indicate a limitation on the manner in which the state obtains information for criminal prosecution—the information may not be compelled by a custodial setting. *Id*. at 447 (explaining that the text of Article I, section 12, "states a prohibition on the manner in which information may be obtained in a criminal prosecution, *viz*., it may not be obtained by force or coercion"); *id*. at 453-54 ("In short, the evidence of the historical circumstances of the adoption of Article I, section 12, in the mid-nineteenth century reveals that the constitutional right against self-incrimination generally was understood to limit the means by which the state may obtain evidence from criminal defendants by prohibiting compelled testimony."); *id*. at 458-59 (explaining that Oregon case law "has always held that the need for warnings is triggered by questioning either in custody or in circumstances short of custody that are nevertheless compelling").

As the Court has explained, the provision of *Miranda* warnings and the "right to cut off questioning" work to ensure that a person in the coercive atmosphere of custodial interrogation is not compelled to speak. *Mosley*, 423

US at 103-04; *Miranda*, 384 US at 479. Only by scrupulously honoring a person's right to remain silent can courts be assured that custodial statements are not compelled. That is why when a person in-artfully or equivocally invokes the right to remain silent, police must halt interrogation to determine the person's true intent. If an ambiguous statement was not intended as an invocation, the questioning may proceed. But if it was intended as an invocation, that invocation must be honored.

### B. *Miranda* warnings do not inform people that they have the right to cut of questioning.

In its brief, the state insists that the "right to remain silent" and the "right to cut off questioning" are distinct rights, and that a person must clearly invoke the right to cut off questioning to receive that protection from compelled self-incrimination under Article I, section 12. Appellant's Brief at 19-28.

Yet notably, the now well-known *Miranda* warnings do not include the information that a person has the right to cut off questioning. *Miranda*, 384 US at 479 (requiring only that a person be warned 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"); *Vondehn*, 348 Or at 474 (requiring that "police inform a person subjected to custodial interrogation that he or she has a right to remain silent

and to consult with counsel and that any statements that the person makes may be used against the person in a criminal prosecution"). As given, a suspect is informed only that she may impassively listen to a barrage of questions and maintain her silence. How can a person clearly invoke a right that she does not know that she has?

The state's insistence that a person who has been informed of specific rights must unequivocally invoke the unarticulated right to cut off questioning to receive that benefit is unreasonable on its face, fundamentally misleading, and does not conform to the intent of Article I, section 12. It imposes a latent formalistic requirement on uniformed laypersons that will result in many people making compelled statements simply because they do not know their rights and how to access them. That is exactly the evil that the *Miranda* opinion was designed to prevent.

On the other hand, requiring police to clarify an equivocal or ambiguous invocation of the right to remain silent protects a person's Article I, section 12, rights while still allowing police to obtain voluntary statements from people who wish to waive those rights. There is simply no rational reason not to insist on clarification.

### C. The rule requiring clarification provides more information and is easier to administer than the state's proposed rule.

Contrary to the state's claim, the clarification rule is easier to administrate than the state's rule. Appellant's Brief at 46-48. Whether a person has unequivocally invoked his right to remain silent is a slippery slope. *See Davis v. United States*, 512 US 452, 459, 114 S Ct 2350, 129 L Ed 2d 362 (1994) (requiring a person to invoke his right to counsel with "the requisite level of clarity"). Deciding where to draw that line in the face of myriad expressions of the right is a difficult task indeed. And if no clarification is required on the part of police, reviewing courts will be left with a scant record and limited information. Applying the type of close textual analysis used for statutory interpretation to a layperson's statement is an exercise in folly.

On the other hand, the police officer on the scene is in the best position to determine whether a person in custody intends to invoke his right to remain silent. He knows the circumstances leading up to an equivocal invocation, he can read tone of voice and body language, and most importantly, he can ask the person what he wants to do. That opportunity to clarify an ambiguous or equivocal statement will never exist again, while the attempt to interpret the statement will continue through a trial court motion to suppress and possibly multiple levels of appellate review.

A rule requiring police to clarify equivocal invocations of the right to remain silent is clear and easy to administer. If police have any doubt, they can ask a simple, neutral, clarifying question. By doing so, they avoid the risk of coercing a statement from a suspect or losing the information for prosecutorial purposes through later litigation. Yet they maintain the ability to rely on a person's voluntary waiver of their Article I, section 12, rights.[4]

Placing the burden on educated police officers to know and follow the law is entirely appropriate. As explained above, a suspect in custody may not know that he has the right to cut off questioning, because the *Miranda* warnings do not inform him of that right. However, police officers are briefed on constitutional law and know the constitutional limits of their investigative power.

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[4] Notably, the Supreme Court's opinion in *Davis* focuses on the evil of requiring police to cease all interrogation in the face of an ambiguous or equivocal reference to an attorney. *Davis v. United States*, 512 US at 460 ("But when the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning 'would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity,' because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present." (citation omitted)). The current Article I, section 12, clarification rule does not yield that result, because it allows police to determine *whether* the suspect wishes to invoke his right to remain silent or his right to counsel. It allows both the suspect and police to avoid an unintended outcome.

The state suggests that uniformity between the Oregon and federal rule in this situation is important because Oregon suspects may be interrogated by out-of-state officers who do not know Oregon law. Appellant's Brief at 48. However, it is not difficult, and in fact seems to be standard practice, for local authorities to allow police from the charging jurisdiction to conduct the interrogation. *See, e.g.*, *Acremant*, 338 Or at 317-18 (defendant arrested in Stockton, California, and questioned there by Medford, Oregon, detectives); *State v. Davis*, 313 Or 246, 247, 834 P2d 1008 (1992) (defendant arrested and questioned in Mississippi by Portland police officers); *Montez*, 309 Or at 567 (defendant arrested in Pocatello, Idaho, and questioned there by Portland detective); *Kell*, 303 Or at 91 (defendant arrested in Santa Barbara, California, and held there for Springfield, Oregon, detectives who questioned him there). The investigating officers have more information about the crime and are in a better position to ask the appropriate questions. The only duty of a foreign jurisdiction is to hold the suspect until the charging jurisdiction can take custody of him.

For all of those reasons, the current Article I, section 12, rule requiring clarification in the face of an equivocal invocation is a more practical and efficient rule than that proposed by the state.

### D. The state's proposed rule disproportionately impacts the most vulnerable—those with language barriers, communication disabilities, cultural differences, and limited education.

Requiring an unequivocal invocation of the right to remain silent harms the most vulnerable—those who need the greatest *Miranda* protection. In *Davis*, the Court acknowledged that fact:

> "We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present."

*Davis*, 512 US at 460. The Court's response—that the *Miranda* warnings themselves provide adequate protection—does not address that disparate impact. *Id*.

Justice Durham, in his dissenting opinion in *Meade*, also noted the problem:

> "The majority's conclusion that the suspect must make an *unequivocal* request for a lawyer rests the effectuation of the suspect's constitutional right on his or her ability to speak to police interrogators in assertive, definite terms and without pauses, questions, or conditions. Some suspects, and particularly those familiar with police interrogations, are familiar with those requirements and follow them without difficulty. Others, and **especially women, members of some racial minority groups and the poorer, less-educated social classes, more often speak with authority figures in non-assertive, hedged speech patterns**. Those groups commonly incorporate questions and other qualifications and conditions into their speech in order to avoid rudeness and to maintain respectful or friendly relationships with police officers. For many suspects in those groups, as well as

> other suspects who, because of their ignorance or fear, are unfamiliar with the procedures and pressures that sometimes accompany police interrogation, ambivalent invocations of the right to counsel seem to be the rule, not the exception."

*Meade*, 327 Or at 344-45, Durham, J., dissenting (footnotes omitted, italics in original, bold added).

No one has ever suggested that Article I, section 12, does not protect all Oregon citizens equally. The disparate impact of the state's proposed rule is another reason that this court should not adopt it.

### E. Even under the state's proposed rule, Matsuura violated defendant's Article I, section 12, rights in this case.

Although it does not say so explicitly, the rule advocated by the state requiring an unequivocal invocation appears to apply only after a person has been advised of his *Miranda* rights and waived them, but later changes his mind and wishes to invoke. It quotes *Davis*, which provides "A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted." Appellant's Brief at 41-42 (quoting *Davis*, 512 US at 460-61). And it notes that "the vast majority of states have adopted the same rules *at least for the post-waiver context*." Appellant's Brief at 43 (emphasis added). It cites the Massachusetts rule applying the clear-invocation rule, "but only to ambiguous invocations that occur after the defendant has waived his *Miranda* rights."

Here, as explained above, defendant never waived his Article I, section 12, right to remain silent. After being advised of his *Miranda* rights, the only statements that defendant made were in an effort to determine why he was in custody, which the detective failed to tell him despite the legal requirement to do so. Thus, this is not a situation in which defendant evinced a desire to waive his Article I, section 12, rights and voluntarily speak with police, but then changed his mind. As soon as defendant learned the reason for his custody and the officer began the interrogation, defendant invoked his right to remain silent. Thus, even under the state's proposed rule, Detective Matsuura violated defendant's Article I, section 12, rights, and the trial court correctly suppressed defendant's statements.

## CONCLUSION

For the foregoing reasons, defendant respectfully prays that this court affirm the decision of the trial court to suppress defendant's statements.

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 9,617 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 Respondent's Answering Brief to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on August 2, 2016.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Respondent's Answering Brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman #160599, Solicitor General, attorney for Plaintiff-Appellant.

Respectfully submitted,

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