IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. ANDREW A SWAN, Defendant-Appellant Petitioner on Review.	Multnomah County Circuit Court Case No. 130242160 CA A154526 S064016

BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Review the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Multnomah County
Honorable David F. Rees, Judge

Opinion Filed: January 27, 2016
Author of Opinion: Nakamoto, J. pro tempore
Concurring Judges: Armstrong, Presiding Judge, and Egan, Judge.

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STATEMENT OF THE CASE

This case concerns defendant's convictions for driving under the influence of intoxicants (DUII), ORS 813.010 (Count 1), and reckless driving, ORS 811.140 (Count 2). After an officer arrested defendant for DUII, defendant unequivocally invoked his right to an attorney. The officer provided defendant an opportunity to telephone "someone," but he did not cease questioning defendant, and counsel was not present during the questioning. The officer asked defendant 28 questions as part of a DUII Interview Report. Then, the officer read defendant the implied-consent warnings and asked if he would submit to a breath test. As part of the warnings, the officer told defendant that, if he did not consent to the test, evidence of his refusal would be admissible in court against him. Defendant reinvoked his right to counsel, but the officer replied that defendant had already had enough time to consult with someone. Defendant eventually submitted to the breath test, and the state charged him with the above-listed crimes.

Before trial, defendant filed a motion to suppress, relying on Article I, section 12, of the Oregon Constitution. Defendant argued that the officer had failed to cease interrogation after he had unequivocally invoked his right to counsel and that the breath-test evidence and his statements were obtained as a result of that violation. The trial court granted the motion with respect to

defendant's statements, but denied defendant's motion with respect to the breath-test evidence.

Defendant appealed and assigned error to the trial court's denial of his motion to suppress. The Court of Appeals affirmed by written opinion. *State v. Swan*, 276 Or App 192, 366 P3d 802 (2016). This court granted defendant's petition for review.

Questions Presented and Proposed Rules of Law

First Question Presented

May the police ask an in-custody defendant for consent to search, specifically consent to take a breath test, after the defendant has unequivocally invoked the right to counsel under Article I, section 12?

First Proposed Rule of Law

No. When an in-custody defendant has invoked the right to counsel, police must cease all interrogation. That means they must not ask any direct questions or use words or conduct that is reasonably likely to elicit an incriminating response. Under both tests, asking a defendant for consent to take a breath test constitutes interrogation.

First, asking a defendant for consent to take a breath test constitutes express questioning. It is a statement that seeks a verbal response from the

defendant, and it is plainly impermissible under *Miranda* after an in-custody defendant has invoked the right to counsel.

Second, asking a defendant to submit to the breath test is likely to elicit an incriminating response. The question is designed to uncover incriminating evidence: Either the defendant will submit to the breath test, which results in his measured blood-alcohol content, or the defendant will refuse, which is admissible to infer his guilty state of mind. Because an officer's request for a defendant to consent to a breath test under the implied-consent laws is designed to elicit an incriminating response, asking a defendant to consent to a breath test constitutes impermissible interrogation under Article I, section 12.

Second Question Presented

Does asking a defendant for consent to take a breath test fall within an exception to interrogation, *i.e.*, is the request a "routine-booking question" or "normally attendant upon arrest and custody"?

Second Proposed Rule of Law

No. The routine-booking questions exception and the exception for words or actions normally attendant upon arrest and custody allow police to question suspects for administrative and record-keeping purposes to obtain biographical information and to take legal and physical custody over a person. Relegating a breath-test request to a routine-booking question would subvert *Miranda*'s protections.

Third Question Presented

Does a defendant's consent to take a breath test and the resulting measure of his blood-alcohol content derive from an Article I, section 12, violation if the defendant invokes his right to counsel but the police still question him immediately preceding the request to submit to the breath test?

Third Proposed Rule of Law

Yes. Interrogating a defendant after he has unequivocally invoked the right to counsel is a flagrant violation of the defendant's constitutional rights. The consent and breath-test results derive from the earlier impermissible interrogation when the request occurs immediately after the unlawful interrogation, when the impermissible interrogation and request for consent are intrinsically intertwined, and when there is no break in the unlawful interrogation and the request for consent to ensure that the defendant's decision to consent to take the breath test was not affected by the earlier violation.

Summary of Argument

After defendant's arrest for suspected DUII and reckless driving, the arresting officer informed defendant of his *Miranda* rights and defendant unequivocally invoked his right to counsel. At the police station the officer allowed defendant private access to a telephone. After 20 minutes, the officer brought defendant into the Intoxilyzer room and began the 15-minute

observation period. During that time, the officer completed the DUII Interview Report and asked defendant 28 questions pertaining to the crime. The officer then read defendant the implied-consent warnings and asked if he would submit to a breath test. The officer told defendant that if he did not consent to the test, evidence of his refusal would be admissible in court against him. When defendant again invoked his right to counsel, the officer said that defendant had already had enough time to consult with someone. Defendant eventually submitted to the breath test, which measured defendant's blood-alcohol content (BAC) as 0.18 percent.

Defendant moved to suppress the interview and the BAC results under Article I, section 12, of the Oregon Constitution. The trial court suppressed defendant's statements but not the breath-test results.

The breath-test results were the product of the earlier violation in two ways. First, the officer was not permitted to ask defendant if he would consent to a search, because defendant had unequivocally invoked his right to counsel. That inquiry was impermissible interrogation, and the breath-test results are the direct product of that violation. Second, the unlawful interrogation that led to the statements that the court suppressed also affected defendant's decision to consent to the breath test, *i.e.*, the BAC results derived from the preceding violation.

After a defendant has unequivocally invoked his right to counsel, all interrogation must cease. Interrogation means (1) express questioning and (2) other words or actions on part of the police that are reasonably likely to elicit an incriminating response. But there are exceptions to each means of interrogation: (1) routine-booking questions and (2) words or actions on part of the police that are normally attendant upon arrest and custody. Both exceptions exist to allow police to serve administrative functions necessary for arresting and booking a defendant while protecting the defendant's constitutional rights. And the limitations on both exceptions are the same: The police inquires must occur at the time of booking, arrest, or taking the defendant into custody; and the inquires must pertain to biographical information and inquiries normally attendant upon arrest and custody as opposed to seeking incriminating evidence.

Asking a defendant to take a breath test is not part of the booking process, is not designed to obtain biographical information about the defendant, and is not an inquiry normally attendant upon arrest and custody. That is, the question is asked solely of DUII suspects and is designed to elicit incriminating evidence. The request does not fall within the routine-booking questions exception or the exception for inquiries normally attendant to arrest and custody. Because the officer impermissibly interrogated defendant in obtaining his consent to take the breath test, defendant's BAC results should have been suppressed.

Even if the request to take a breath test was permissible, defendant's measured BAC must be suppressed because his consent and subsequent test derived from an earlier constitutional violation. Interrogating defendant after he had invoked his right to counsel was a flagrant violation. The request for defendant's consent occurred immediately after the interrogation, and defendant remained in custody during the entire encounter. There were no intervening circumstances. The implied-consent warnings did nothing to tell defendant that the previous interrogation was unlawful and that those statements would not be admissible against him. Moreover, the interrogation was intrinsically intertwined with the breath-test procedure. That is, the officer began the breath-test procedure before and during the interrogation. A reasonable person in the defendant's position would not know that the request for his breath sample was separate and apart from the earlier questioning. That improper interrogation likely affected the defendant's decision to take the test and thus his consent, submission to the breath test, and the BAC results derived from that impropriety.

Statement of Historical and Procedural Facts

On February 24, 2013, Portland Police Bureau Officer David Enz was working the graveyard shift. Tr 26. Enz responded to a call to investigate a car accident. Tr 26-27. When Enz arrived at the scene, he saw a patrol car behind

a blue Subaru and an unoccupied Dodge pickup truck in the middle of the intersection. Tr 27.

Enz approached the Subaru and met defendant seated in the driver's seat. Tr 27. Defendant's eyes were closed, and his head was bobbing forward. Tr 27. Enz knocked on the window. Tr 27. Defendant attempted to roll down the window, but ended up opening the door to talk to Enz. Tr 27. Enz explained why he was there. Tr 28. He pointed to the damage on defendant's car and asked what happened. Tr 28. Defendant said that he had "clipped" a car. Tr 28. In response to a question, defendant told Enz that he was not injured. Tr 28. Defendant's speech was slurred, his eyes were bloodshot and watery, and he smelled of alcohol. Tr 28. Enz explained to defendant that, based on his observations and "the fact that defendant admitted to driving," Enz believed it was more likely than not that defendant was impaired. Tr 28.

Enz described the standard field-sobriety tests (FSTs) and asked if defendant would perform them. Tr 28-29. Defendant asked to talk to an attorney. Tr 29. Enz told defendant that he could use his mobile phone to call an attorney from his car. Tr 29. At 3:07 a.m., defendant started dialing on his mobile phone, and Enz closed the car door. Tr 29.

Enz returned to defendant 11 minutes later and asked if he would perform FSTs. Tr 29. Defendant said, "What exactly are you asking me to do?" Tr 29.

Enz described the FSTs, and defendant "repeated everything into the phone." Tr 29. Defendant said, "Yes. Yes, I will." Tr 29.

Enz and defendant walked to the sidewalk, and defendant swayed and staggered on the way. Tr 30. Defendant continued to sway as he stood awaiting instructions on the FSTs. Tr 30. Enz asked defendant if he was diabetic and if he had any medical or physical issues that would affect his ability to stand, walk, or balance. Tr 30. Defendant said, "No." Tr 30. Defendant also said he did not have any vision problems. Tr 30.[1]

Enz administered three FSTs: the horizontal-gaze nystagmus (HGN), the walk-and-turn, and the one-leg stand. Tr 30. Defendant exhibited six of six intoxication clues on the HGN test, four of eight intoxication clues on the walk-and-turn test, and two of four intoxication clues on the one-leg-stand test. Tr 30. Enz concluded that defendant had failed each FST. Tr 30.

Enz arrested defendant for DUII and handcuffed him. Tr 31. Enz provided defendant the following warnings:

> "Basically, that he has the right to remain silent. Anything he say[s] can and will be used against him in the court of law. He has the right to have an attorney with him while he is being questioned. If he cannot afford to hire an attorney, one will be appointed to represent him at no expense."

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[1] The trial court suppressed those statements. Defendant includes them in the statement of facts to provide context for the entire encounter.

Tr 31, 33. "Defendant's first response was that he wanted an attorney." Tr 31. Specifically, defendant said, "NO! I want to talk to my lawyer." Tr 37. Enz explained that defendant would have another opportunity to consult with somebody privately at the precinct. Tr 31. Defendant then said, "Yes, I understand my rights." Tr 31.

Enz transported defendant to the North Precinct. Tr 31. Enz escorted defendant into a cell and provided him with defendant's mobile phone, a landline, and a copy of the Implied Consent Combined Report (ICCR). Tr 31. Enz told defendant "that he could make as many calls as he'd like to whomever he'd like and that [Enz] would be closing the cell door to provide him privacy while he was on the phone." Tr 31. Enz explained the breath-test procedure and closed the door at 3:47 a.m. Tr 31.

Enz returned to defendant at 4:07 a.m. and saw that defendant was still talking on the phone. Tr 31. Enz told defendant that he would have another "minute or so" to complete his call. Tr 31. Enz closed the door and returned at 4:10 a.m., as defendant was finishing his call. Tr 31.

Enz escorted defendant to the Intoxilyzer room and began the 15-minute observation period. Tr 32. During that observation period, Enz explained the DUII Interview Report to defendant. Tr 39. He said there were 28 questions and that defendant did not have to answer any of those questions if he did not wish to. Tr 39. Enz checked defendant's mouth to make sure there was nothing

inside and then went through the DUII Interview Report. Tr 41. Defendant did not answer Enz's question asking who was driving the car. Tr 43. Enz "read [defendant] the Implied Consent Combined Report in its entirety verbatim." Tr 32. Enz specified that he warned defendant that, if he refused or failed the test, his license or permit would be taken immediately and that, if he refused the breath test, he would be subject to a $650 fine and evidence of his refusal would be used against him in court. Tr 48-49.

Enz then asked defendant if he would consent to take the test. Tr 32, 48-49. Defendant "just stared" at Enz then started reading the ICCR. Tr 32. Enz said that he would give defendant a minute to think about it, but that he would ask for defendant's consent again after starting the instrument. Tr 32. Defendant asked for an attorney. Tr 32. Enz said that defendant had already had "ample time to consult with somebody for legal advice." Tr 32. Enz asked if defendant would take the breath test, and defendant said, "Yes." Tr 32. At 4:35 a.m., defendant submitted a breath sample that measured his BAC as 0.18 percent. Tr 32.

Enz did not know if defendant actually consulted with an attorney during his telephone calls. Tr 32. On the DUII Interview Report, Enz noted that defendant had requested an opportunity to consult with an attorney. Tr 42. Enz checked the box for "other" on the form to indicate whether defendant had spoken to an attorney or "other." Tr 42.

The state charged defendant with DUII and reckless driving. Defendant moved to suppress the statements obtained during the DUII Interview Report, his consent to take the breath test, and the BAC results. Defendant relied on Article I, sections 11 and 12, for his motion. At the suppression hearing, the state conceded that defendant had unequivocally invoked his right to counsel and that defendant never withdrew that invocation. Tr 6, 18-20. The state stipulated that the DUII Interview Report questions and defendant's answers should be suppressed. Tr 19-20. The parties focused on the admissibility of defendant's measured BAC.

The trial court ruled that Enz had violated defendant's Article I, section 12, rights by questioning him without an attorney present: "[D]efendant had properly invoked his right to counsel. And therefore, following that invocation, any custodial questioning initiated by the police should be suppressed." Tr 76. The court suppressed the DUII interview questions and defendant's responses to those questions. Tr 76.

The court denied defendant's motion with respect to the BAC evidence. Tr 77. The court concluded that defendant had been provided a reasonable opportunity to consult with counsel and, therefore, that there was no constitutional violation in asking him to submit to the test. Tr 77. The court explained:

> "I have also reviewed the case law about what right to counsel attaches with respect to submitting to a breathalyzer test. * * *
>
> "So to the extent that I don't have the case law in front of me, but I think that the applicability of the standards articulated by the Oregon Supreme Court in *State v. Spencer*, 305 Or 59, [750 P2d 147 (1988)], which was then applied in *State v. Smalls*, 201 Or App 652, [120 P3d 506 (2005)], applies. An arrested driver does not have an absolute right to consult with a lawyer before deciding whether to take a breath test. * * * Rather, what the driver has, is a right to a reasonable opportunity to obtain legal advice.
>
> "I'm specifically finding that that opportunity * * * was provided. There was no violation—no constitutional violation in asking the defendant to submit to * * * the breathalyzer."

Tr 77.

On appeal, defendant abandoned his challenge under Article I, section 11, but maintained that the court erred in failing to suppress the BAC results under Article I, section 12. The Court of Appeals disagreed and held that "the officer did not violate defendant's right against self-incrimination under Article I, section 12, by asking defendant to submit to a breath test" because that request did not amount to interrogation. The court first explained that it has "unequivocally rejected the proposition that asking a person to take a breath test is 'interrogation.'" *Id.* at 201 (citing *State v. Highly*, 236 Or App 570, 573, 237 P3d 875 (2010); *State v. Gardner*, 236 Or App 150, 154-55, 236 P3d 742, *rev den*, 349 Or 173 (2010); *State v. Cunningham*, 179 Or App 498, 502, 40 P3d 535, *rev den*, 334 Or 327 (2002); *South Dakota v. Neville*, 459 US 553, 103 S Ct 916, 74 L Ed 2d 748 (1983) (parentheticals omitted)). The court further

reasoned that asking a defendant to consent to a breath test is not interrogation because it is "part of the 'normal arrest and booking procedures.'" *Id.* (citing *Gardner*, 236 Or App at 156). The court then distinguished this case from *State v. Jarnagin*, 351 Or 703, 277 P3d 532 (2012), and *State v. Koch*, 267 Or App 322, 341 P3d 112 (2014), and held that "the BAC results were not derived from a prior constitutional violation." *Swan*, 276 Or App at 194, 201.

Argument

I. When a defendant unequivocally invokes his right to counsel, all police-initiated questioning must cease.

Article I, section 12, of the Oregon Constitution prohibits compelled self-incrimination: "No person shall be * * * compelled in any criminal prosecution to testify against himself." This court has construed the plain meaning of the term "compelled" to mean "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." *State v. Davis*, 350 Or 440, 447, 256 P3d 1075 (2011). "[T]he 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 453.

The following examples of the state compelling an individual to provide testimonial evidence under Article I, section 12, include custodial interrogation:

> "Some obvious examples are where an individual is on the stand, subject to contempt sanctions if he or she refuses to testify, *see In re Jennings et al.*, 154 Or 482, 59 P2d 702 (1936) (right against compelled self-incrimination under Article I, section 12, applied in contempt hearing where individual refused to answer questions under oath), or where an individual is required to act by court order, *see Shepard v. Bowe*, 250 Or 288, 293, 442 P2d 238 (1968) (right against self-incrimination applied in context of court-ordered psychiatric examination). *Another example of compulsion is custodial interrogation. See State v. Smith*, 310 Or 1, 7, 791 P2d 836 (1990) (*right against self-incrimination applied in context custodial interrogation*). In addition, a statute may compel an individual to testify. *See State of Oregon v. Hennessey*, 195 Or 355, 245 P2d 875 (1952) (immunity statute compelled individual to testify in exchange for grant of immunity)."

State v. Fish, 321 Or 48, 7, 893 P2d 1023 (1995) (emphasis added); *see also id.* (holding that evidence of the defendant's refusal to participate in FSTs was compelled where statute required the defendant to choose which way to testify against himself: perform FSTs or refuse performance and have evidence of the refusal used against him in court).

This case involves custodial interrogation, which the United States Supreme Court has also recognized as inherently coercive under the Fifth Amendment to the United States Constitution.[2] *Dickerson v. United States*, 530 US 428, 435, 120 S Ct 2326, 147 L Ed 2d 405 (2000) (citing *Miranda v. Arizona*, 384 US 436, 437, 86 S Ct 1602, 16 L Ed 2d 694 (1966)). The Court

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[2] The Fifth Amendment to the United States Constitution provides, "No person shall * * * be compelled in any criminal case to be a witness against himself[.]"

explained why the deceptively innocuous "police-station interview" is in fact a coercive exercise:

> "It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual of the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."

Id. at 457-58.

Because custodial interrogations are inherently coercive, the Court established a prophylactic rule that requires law enforcement to inform in-custody suspects of their rights prior to any questioning. *Id.* The warnings must convey that the defendant has a right to remain silent, that anything said will be used against the defendant in a criminal prosecution, that the defendant has a right to have an attorney present during the interrogation, and that if the suspect cannot afford an attorney, one will be provided by the court. *Miranda*, 384 US at 479. This court has "adopted *Miranda* warnings as an independent requirement under Article I, section 12." *State v. Vondehn*, 348 Or 462, 487 n 1, 236 P3d 691 (2010) (Linder, J., concurring).

Defendants have the right to have counsel present during interrogation because the presence of counsel helps dispel the coercive atmosphere.

Miranda, 384 US at 465; *see also State v. Joslin*, 332 Or 373, 380, 29 P3d 1112 (2001) (explaining that the assistance of counsel during custodial interrogations is one way to ensure the right to be free from compelled self-incrimination).

Thus, "when a suspect is in police custody and makes an unequivocal request to speak to a lawyer, all police interrogation of that suspect must cease." *State v. Charboneau*, 232 Or 38, 54, 913 P2d 308 (1996) (citations omitted). When a suspect unequivocally invokes his right to counsel under Article I, section 12, "a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *State v. Kell*, 303 Or 89, 96, 734 P2d 334 (1987) (quoting *Edwards v. Arizona*, 451 US 477, 484, 110 S Ct 1880, 68 L Ed 2d 378 (1991)). Unequivocally invoking the right to counsel is the defendant expressing "his desire to deal with the police only through counsel," thus, he must "not [be] subject[ed] to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* (quoting *Edwards*, 451 US at 484; footnote omitted in *Kell*). The denial of a defendant's request for counsel undermines his ability to exercise his right to remain silent "or to speak without any intimidation, blatant or subtle." *Miranda*, 384 US at 466.

Police must know and understand the above principles and honor a suspect's rights once the suspect has invoked. *State v. Isom*, 306 Or 587, 593, 761 P2d 524 (1988). Failure to do so warrants suppression of the unlawfully obtained statements and any statements and physical evidence "that derives from or is the product of that constitutional violation." *Jarnagin*, 351 Or at 714 (citation omitted).

Here, defendant unequivocally invoked his right to counsel, and he did not reinitiate contact with the police. The police were required to scrupulously honor his request and cease all interrogation. Instead, Officer Enz asked defendant 28 questions from a "DUII Interview Report" and asked defendant if he would submit to a breath test. The state conceded below that the 28 questions constituted interrogation. The issue is whether asking defendant for consent to take the breath test also constituted interrogation, which would result in suppression of his BAC results as unlawfully obtained derivative physical evidence. Alternatively, the issue is whether defendant's consent and breath-test results derived from the unlawful questioning that took place before the request for consent.

II. Officer Enz improperly interrogated defendant after defendant had unequivocally invoked his right to counsel.

The question of what constitutes "custodial interrogation" has been the subject of debate since the Supreme Court decided *Miranda*. The *Miranda*

Court held that interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in a significant way." 384 US at 444. In *Rhode Island v. Innis*, the Court expanded that definition to also include "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." 446 US 291, 301, 301 n 5, 100, S Ct 1682, 64 L Ed 297 (1980). The Court noted that, "[b]y 'incriminating response' we refer to any response—whether inculpatory or exculpatory—that the *prosecution* may seek to introduce at trial." *Id.* at 301 n 5 (emphasis in original). Shortly after the Court decided *Innis*, many jurisdictions applied the "incriminating response" test to direct questioning. *See* Meghan S. Skelton & James G. Connell III, *The Routine Booking Question Exception to Miranda*, 34 U Balt L Rev 55, 65, (2004). The Court later issued a plurality opinion that rejected the notion that the *Innis* test applied to express questioning:

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

> the *Innis* test focuses primarily upon 'the perspective of the suspect.'"[3]

Pennsylvania v. Muniz, 496 US 582, 601, 110 S Ct 2638, 110 L Ed 2d 528 (1990) (citation omitted). Instead, the plurality opinion announced an exception to the prohibition on express questioning for routine-booking questions asked "to secure the biographical data necessary to complete booking or pretrial services." *Id.* at 601 (internal citation omitted).

In *State v. Scott*, this court applied the *Innis* test to express questioning, but noted that it was doing so at the parties' request. 343 Or 195, 202-03, 166 P3d 528 (2007). This court should clarify that the *Innis* test does not apply to direct questioning. That is, interrogation means both (1) express questioning and, additionally, (2) words or actions by the police reasonably likely to elicit an incriminating response. Endorsing the plain meaning of express questioning is consistent with the protections provided by Article I, section 12, and *Miranda*. It would provide clear guidance to law enforcement and courts and protect suspects from being compelled to waive their right against self-incrimination. Thus, for the following reasons, once a suspect has invoked his or her right to counsel, and except for routine-booking questions, police are

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[3] In the dissenting opinion, Justice Marshall agreed with the plurality opinion that the booking questions are express questions that the *Innis* test does not apply to. Marshall disagreed with the plurality opinion creating an exception to express questioning, *vis.*, the booking-question exception. 496 US at 610-11 (Marshall, J., dissenting).

prohibited from asking the defendant any direct question, *i.e.*, a statement that would be punctuated with a question mark and that seeks to elicit a response. The police are also prohibited from words or actions that are reasonably likely to elicit an incriminating response, except those normally attendant upon arrest and custody.

A. Police fail to cease interrogation when they continue to question suspects after an unequivocal invocation of the right to counsel; unlawful questioning includes any express question likely to elicit a response from the suspect.

The *Miranda* rule was designed to provide clear instructions to law enforcement and clear warnings to people in custody. The warnings themselves are simple and convey a clear meaning to law enforcement, courts, and the public. *See Berkemer v. McCarty*, 468 US 420, 104 S Ct 3138, 82 L Ed 2d 317 (1984) ("One of the principal advantages of the doctrine that suspects must be given warnings before being interrogated while in custody is the clarity of that rule."). In the *Miranda* context, this court has repeatedly adopted bright-line rules for clarity and to avoid *post hoc* inquires. *See, e.g.*, *State v. Avila-Nava*, 356 Or 600, 612, 341 P3d 714 (2014) (holding that "in determining whether an unequivocal invocation of the right against self-incrimination was made, a court considers the defendant's words, in light of the totality of the circumstances at and preceding the time they were uttered, to ascertain whether a reasonable officer would have understood that the defendant was invoking that right");

Isom, 306 Or at 593 ("We now add to the admonition this flat rule: Upon request for counsel, questioning not only 'should' but must cease."); *State v. Montez*, 309 Or 564, 572-73, 789 P2d 1352 (1990) (when a suspect equivocally invokes his right to counsel, police questioning is limited to clarifying questions to determine to what extent the defendant is invoking that right).[4]

The value of bright-line rules in the *Miranda* context is that they provide clear standards for law enforcement and courts and leave little room for varying interpretation. It is particularly important and consistent with this court's jurisprudence to provide a bright-line rule that police-initiated questioning means precisely what it says: Express questioning occurs when the police, without prompting from the suspect, ask the suspect a question.

That rule is consistent with the principles underlying Article I, section 12, and the warnings provided to suspects. Specifically, *Miranda* requires police to tell a suspect that he or she has the right to have counsel present during

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[4] Even though the test for determining whether circumstances are compelling involves looking at the totality of circumstances to determine whether a reasonable officer should recognize the circumstances as compelling, the test is an objective one. The objective test avoids "burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind." *JDB v. North Carolina*, 564 US 261, 271, 131 S Ct 2394, 180 L Ed 2d 310 (2011); *see also State v. Roble-Baker*, 340 Or 631, 641, 136 P3d 22 (2006) (noting that Article I, section 12, has the same objective test for determining when circumstances become compelling and require *Miranda* warnings prior to questioning).

questioning. Because the warnings are designed to be simple and convey a clear message to the suspect about his or her rights, this court should construe "express questioning" consistent with its plain and ordinary meaning and with how a suspect would understand the warnings. A reasonable person would believe that when an officer says that the person has the right to remain silent that he or she has a right not to respond to questioning. A reasonable person would believe that when an officer says that the suspect has the right to have an attorney present throughout questioning, that he has a right to have an attorney present anytime the officer is asking the suspect for responses. A reasonable person would not understand that some questions are encompassed by the warnings, but others are not, or that some questions are not "questions" depending on how the person responds.

Thus, for purposes of interrogation, the plain and ordinary meaning of express questioning occurs when the police, without prompting, ask a suspect for a response.

i. The routine-booking questions exception is limited to non-investigatory questions during the booking process that elicit biographical information.

This court has not expressly adopted the routine-booking questions exception to the *Miranda* rule. Should this court formally adopt the routine-booking questions exception, the rule should be limited in three ways to adhere to the policies behind *Miranda*: (1) the questioning must occur during the

booking process, (2) the questioning must be limited to seeking only biographical information necessary to booking and pretrial services, and (3) the questioning must not be intended to elicit an incriminating response.

First, routine booking questions should be limited to those elicited during the booking process. *Muniz*, 496 US at 601-02. In *Muniz*, the plurality explained that the booking-questions exception was necessary to complete the booking procedure and pretrial services. *Id.* Making the exception applicable during the booking process serves that purpose and the purposes of *Miranda*. By limiting the exception to questioning that occurs during the booking process, it prevents police from abusing the exception and from badgering suspects who have invoked their rights against self-incrimination. As one scholar explained:

> "*Miranda* was aimed at protecting suspects from a wide variety of possible abuses of the interrogation process, and *Innis* served to broaden those protections by clarifying the extent of the definition of interrogation. Courts should therefore keep the routine booking question exception on as tight a leash as possible. Doing so will prevent the exception from being used as a post hoc justification for asking a superficially benign question in exactly the sort of circumstances that led the Court to conclude that custodial interrogations were inherently coercive."

Skelton, 34 U Balt L Rev at 96-97.

Second, the exception should be limited to questions that seek biographical information and not incriminating evidence. *See State v. Moeller*, 229 Or App 306, 311, 211 P3d 364 (2009) (holding that routine-booking questions are not subject to *Miranda* requirements because the questions are

asked to secure biographical data not to intended to elicit incriminating information). The exception is designed to allow police to carry out their administrative and record-keeping function. *Muniz*, 496 US at 601-02. Thus, the content of the questions should be limited to recording basic identification information and not gathering evidence of a crime.

The questioning should be limited in one final respect: it should not be designed to elicit an incriminating response. There may be questions that appear superficially to seek biographical information, but, under the circumstances, are actually designed to elicit an incriminating response. *See, e.g.*, *Thomas v. United States*, 731 A2d 415, 426 (1999) (holding that prolonged custodial interrogation regarding the defendant's true identity did not fall within the routine-booking questions exception). If a question is designed to elicit an incriminating response, then it likely serves an investigatory purpose and carries coercive undertones that the *Miranda* rights are intended to prevent. This limitation guards against abuse, ensuring that the questioning is directed at administrative, record-keeping concerns rather than investigatory interests. *See* Skelton, 34 U Balt L Rev at 99-101 (describing potential abuses of the booking-question exception without this limitation). Therefore, police should be prohibited from questions designed to elicit an incriminating response—even when the question otherwise appears to be a routine-booking question.

ii. Officer Enz unlawfully interrogated defendant by asking him if he would consent to a breath test after defendant had unequivocally invoked his right to counsel, and that question does not fall within the routine-booking questions exception.

Asking for consent to search constitutes express questioning, and when it is asked after an in-custody defendant has requested counsel, it is asked impermissibly. *See State v. Williams*, 248 Or 85, 432 P2d 679 (1967) (noting that asking a defendant for consent to search after he had invoked his right to counsel constituted impermissible questioning under the Fifth Amendment);[5] *United States v. Taft*, 769 F Supp 1295, 1305 (1991) (holding same and citing other jurisdictions in agreement), *but see* Wayne R. LaFave, *et. al*, 2 *Criminal Procedure* §3.10, 473 nn 72-73 (4th ed 2015) (collecting contrary authority). Here, Officer Enz asked defendant if he would consent to take a breath test after defendant had been told that he had the right not to answer questions and the right to have counsel present during any questioning, and after he had unequivocally invoked his right to counsel. Moreover, the question occurred immediately after defendant had just been unlawfully interrogated. A reasonable person in defendant's position would have viewed the questions as express questioning and would not have distinguished the earlier unlawful interrogation from the subsequent request for consent. Officer Enz's request for

[5] This court overruled *Williams* to the extent that it required police to warn a suspect prior to requesting consent that the suspect had a right to refuse that request. *State v. Flores*, 280 Or 273, 281, 570 P2d 965 (1977).

defendant's consent to take the breath test plainly constitutes "express questioning," which was prohibited after defendant had unequivocally invoked his right to counsel under Article I, section 12.

Moreover, asking a DUII suspect for consent to a search does not fall within the routine-booking questions exception. A request for consent to search is a police tactic designed to obtain the suspect's cooperation in discovering evidence related to a crime. Similarly, asking a suspect for consent to take a breath test is solely designed to generate inculpatory evidence against the defendant to prove his level of intoxication in a DUII prosecution.

In this case, the request for consent to take a breath test did not occur during the booking procedure, it was not asked to obtain defendant's biographical information, and it was designed to elicit an incriminating response. Here, Officer Enz questioned defendant in the Intoxilyzer room, and there is no indication that that is the place where the booking process normally occurs. The questioning that occurred in that room was investigatory in nature; indeed, the trial court suppressed 28 of the questions and the responses that were asked in that room. Asking defendant for consent to take a breath test was not likely to elicit biographical information; instead, the question is designed to generate evidence of defendant's level of intoxication or his guilty state of mind. Finally, as explained below in further detail, the request for consent to take a breath test will invariably produce an incriminating response. For those

reasons, asking defendant to consent to a breath test did not fall within the routine-booking questions exception.

B. An officer unlawfully interrogates a suspect after the suspect has invoked the right to counsel when the officer's words or actions are reasonably likely to elicit an incriminating response from the suspect.

This court adopted the *Innis* test that "interrogation extends to the type of police conduct that the police 'should know [is] reasonably likely to elicit an incriminating response'; 'incriminating response,' in turn, means any inculpatory or exculpatory response that the prosecution later may seek to introduce at trial." *Scott*, 343 Or at 203 (quoting *Innis*, 446 US at 301, 301 n 5; alterations in *Scott*). Although phrased in terms of what the officer "should know," the *Innis* test is objective and is reviewed from the suspect's perspective. *Arizona v. Mauro*, 481 US 520, 527, 107 S Ct 1931, 95 L Ed 2d 458 (1987).

This court applied the *Innis* test in *Scott*. In that case, the defendant was arrested in connection with a homicide. 343 Or at 197. The police took the defendant to a police station and advised him of his *Miranda* rights. *Id.* Two detectives questioned the defendant in an interview room. *Id.* At the start of the interview, the defendant unequivocally invoked his right to counsel by asking, "Uhm, may I have a lawyer present?" *Id.*

The officer responded by asking what he said, and the defendant twice reiterated that he wanted an attorney present. *Id.* at 197-98. The officer advised the defendant of his *Miranda* rights again, and the defendant said he understood. *Id.* at 198. The officer asked if the defendant had any questions about his rights and asked the defendant about his request for counsel. *Id.* The defendant again stated that "[i]t would be nice" to have counsel present. *Id.*

The defendant added, "See what I've seen on TV * * * I might need one." *Id.* The officer asked, "You saw something on TV?" *Id.* The defendant said, "Big picture of me, saying that * * * I killed somebody." *Id.* The officer repeated, "Saying that you killed somebody, huh? 'kay * * * all right * * * um * * * Was there a particular lawyer you had in mind?" *Id.* The defendant said, "I just want one here." *Id.* The officer said, "You just want one here. Do you have one that you've talked with in the past?" *Id.* At that point, the defendant said he did not care about having an attorney present and that the police could just ask him "what [they're] going to ask [him]." *Id.* at 199.

This court held that the police violated the defendant's rights by questioning him after he had invoked his right to counsel. This court focused specifically on the officer's reference to the television broadcast as impermissible because it concerned the shooting that the defendant was suspected of committing. The officer should not have referenced it because it

"would be reasonably likely to elicit some type of incriminating response from [the] defendant." *Id.* at 203-04.

The officer's questions regarding the defendant's preference for counsel did not alter the analysis. *Id.* at 204. That is, even though questioning a defendant about his preference for counsel may not always amount to impermissible police-initiated questioning, the fact that the officer's impermissible comment about the television broadcast was interspersed with that inquiry rendered the questioning unconstitutional. *Id.* This court explained that the officer's questions pertaining to the defendant's preference for an attorney "were interspersed with, and successive to, his questions regarding [the] defendant's exposure to the television broadcast identifying him as a murder suspect. The unconstitutionality of the latter questions is not somehow redeemed by the existence of the former ones." *Id.* at 204. Therefore, because the officer violated the defendant's right to counsel, his statements were properly suppressed.

i. Officer Enz's words or conduct after defendant invoked his right to counsel was unlawful interrogation because it was reasonably likely to elicit an incriminating response from defendant.

Officer Enz's request for defendant to consent to a breath test constituted interrogation because it was reasonably likely to elicit an incriminating response. An incriminating response is evidence that the prosecution may seek

to use against the defendant at trial, and it includes both inculpatory and exculpatory evidence. Asking a defendant to consent to take a breath test is likely to produce initially a yes or no response. If the defendant says no (or even if he silently refuses), then the state can offer that evidence against the defendant at a future prosecution. ORS 813.130(2)(a). The state is permitted to offer that evidence for "the jury to infer from the fact of [the defendant's] refusal that he or she is saying, 'I refuse to [take the breath test] because I believe I will fail [it].'" *Fish*, 321 Or at 56. Thus, at a minimum, the request for a defendant to take a breath test is likely to produce an incriminating response because the prosecution regularly seeks to use evidence of a defendant's refusal during the DUII prosecution to show the defendant's intoxication and guilty conscience.

If the defendant says "yes" to the officer's request to consent to a breath test, then that response leads to two forms of evidence that the prosecution may seek to offer at trial: (1) the actual consent and (2) the defendant's measured BAC following the test.

First, a defendant's consent can show that a defendant is being cooperative, that he understands the questions being asked of him, and that he is able to follow simple directions. That evidence can be either exculpatory or inculpatory, depending on the facts of the case. For instance, if the defendant was charged with DUII and resisting arrest arising out of the same police

encounter, the defendant's cooperation or lack of cooperation could be crucial to the state's case.

Second, consent is evidence that the defendant's breath sample is his own. In *State v. Cram*, 176 Or 577, 160 P2d 283 (1945), this court held that testimony from a doctor regarding the defendant's BAC did not violate the defendant's rights under Article I, section 12, because it was "obtained by means other than compulsion of the defendant," and its admission did "not depend on the defendant being called upon to make 'any act or utterance of his own.'" *Vondehn*, 348 Or at 468 (quoting *Cram*, 176 Or at 582).

In that case, the defendant was involved in a car accident, and, while he was unconscious, a blood sample was extracted from him. 176 Or at 578. The blood sample was tested and later used against him in a DUII prosecution. *Id.* at 578-79. The defendant objected to the doctor's testimony regarding the sample. *Id.* at 579.

In rejecting the defendant's claim, this court first reviewed the history of Article I, section 12, and explained that "the constitutional privilege against self-incrimination had generally been held to be declaratory of the common-law privilege and that that privilege was not limited to testimonial utterances, but extended to prevent the compelled production of documents or chattels." *Vondehn*, 348 Or at 468 (citing *Cram*, 175 Or at 581-82). Ultimately, the *Cram* court concluded that the "defendant had not been compelled to establish the

authenticity, identity, or origin of the blood; those facts were proved by other witnesses." *Id.* This court explained that the state already had possession of the blood sample and that it was "obtained without the use of any process against [the defendant] as a witness."[6] 176 Or at 593.

Moreover, the court "was not deciding that an accused can be forced to undergo a physical examination or to submit to a blood test." *Cram*, 176 Or at 594. Thus, although the defendant's blood-test results were ultimately not suppressed, it was because defendant was not compelled to provide the sample or any testimony regarding the sample.

This court left open the possibility that a defendant could be compelled if the evidence is obtained "through process." *Id.* And Justice Brand explained that when the evidence is obtained "through process," it is testimonial because it requires the defendant to produce the evidence, "vouch for it as being the sample which he was ordered to produce," and "[i]ts relevance would then depend upon his implied testimonial representation that the thing produced was

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[6] *Cram* was decided before the implied-consent statutory scheme was enacted in 1965. *Former* ORS 483.634 (1965). As adopted, evidence of a driver's refusal to submit to a chemical test was inadmissible in civil and criminal actions. *Id.* at §(3). In 1979, the legislature amended the implied-consent statute to allow the state to present evidence of a driver's refusal in criminal prosecutions to show that drivers who refuse blood-alcohol tests do so knowing that they will fail the test. Or Laws 1979, ch 822 §1; HB 2911 (1979); Audio Recording, House Judiciary Committee Subcommittee 3, HB 2911, Mar 29, 1979 (comments of Frank Papagni, Lane County Assistant District Attorney).

his blood." *Id.* at 595 (Brand, J., concurring). Thus, *Cram* illustrates another way in which asking for consent to take a breath test is likely to elicit an incriminating response: in agreeing to take the test, the defendant is representing that the sample is his breath.

Thus, asking a defendant for consent to take a breath test is likely to elicit an incriminating response, because the prosecution may use the defendant's verbal responses or the implied testimonial representation of his decision in a subsequent criminal prosecution.

Aside from the defendant's verbal response to the request to take a breath test, consent to taking a breath test likely leads to an incriminating measure of the defendant's BAC. Although the BAC result is not itself testimonial, Article I, section 12, protects against both compelling a defendant to testify and to furnish evidence.

In *Vondehn*, this court rejected the state's argument that the text of Article I, section 12, "does not prohibit the admission of physical evidence," that "it prohibits only compelling a person to 'testify.'" 348 Or at 467. Moreover, in *Soriano*, the court "also agreed that the word 'testify' is not a limit on the protections that Article I, section 12, affords: 'We see no reason to construe the Oregon Constitution to give protection from testifying but not from furnishing evidence.'" *Id.* at 469 (quoting *State v. Soriano*, 68 Or App 642, 646-47 n 4, 684 P2d 1220 (1984), *aff'd and opinion adopted*, 298 Or 392

(1982)). "Thus, this court has long interpreted Article I, section 12, to impose no distinction between compelled statements and physical evidence derived from such statements or between the use of compelled statements to obtain evidence and as testimony at trial." *Id.* at 469-70. Because when the question elicits a "yes" response, it invariably results in the defendant producing incriminating evidence to be used against him at trial; asking for that evidence constitutes interrogation.

In sum, the request for a defendant to take a breath test is not just reasonably likely to elicit an incriminating response, it is virtually guaranteed to elicit one. Thus, the request for a defendant to consent to a breath test under the implied-consent statutory scheme constitutes interrogation.

ii. Officer Enz's request for defendant to take a breath test does not fall within the exception for the officer's words or actions that are normally attendant upon arrest and custody.

Defendant acknowledges that some jurisdictions have held that asking a defendant to consent to a breath test does not amount to interrogation because it is normally attendant to arrest and custody. *Neville*, 459 US at 564 n 15. This court should not adopt that broad exception to Article I, section 12. First, if this court adopts the exception to interrogation for police words or conduct normally attendant to arrest and custody, it should narrowly construe that exception to maintain Article I, section 12's and *Miranda*'s protections. Second, although

the Supreme Court has indicated that DUII suspects are not afforded *Miranda* protections "outside the basic Fifth Amendment protection," the Court has also held that DUII investigations are not exempt from *Miranda*'s requirements. *C.f. Neville*, 459 US at 564 n 15 (noting that requesting consent to take a blood-alcohol test is normally attendant to arrest and custody and that the suspect's "choice of refusal thus enjoys no prophylactic *Miranda* protection *outside the basic Fifth Amendment protections*." (emphasis added)); *Berkemer*, 468 US at 441 (holding that when a DUII suspect is in custody, "he will be entitled to the full panoply of protections prescribed by *Miranda*").

First, if this court adopts the exception to the *Innis* test to include police conduct that is normally attendant to arrest and custody, it should adopt narrowing rules similar to those advanced above for the routine-booking question exception. That is, the inquiry must occur at the time of arrest and taking a suspect into custody, and the inquiry must be for an administrative purpose and not to obtain evidence.

Second, the legislature cannot create exceptions to the constitution: "It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, *at least unless it is so broad as to have the same extent in scope and effect*." *Soriano*, 68 Or App at 662 (quoting *Counselman v. Hitchcock*, 142 US 547, 585, 12 S Ct 195, 35 L Ed 1110 (1892); emphasis in *Soriano*)). Although constitutional rights may be "subjected to reasonable rules

and regulations for the enforcement and protection thereof," those "rules and regulations must not only be reasonable, but also must be for the enforcement and protection of the right, and not the denial thereof." *Tomasek v. State*, 196 Or 120, 143, 248 P2d 703 (1952) (citations omitted). More precisely, the legislature cannot devise new procedures to occur at the time and place of arrest and custody in order to circumvent constitutional requirements and generate evidence to be used at a subsequent prosecution. *See State v. Connally*, 339 Or 583, 587, 125 P3d 1254 (2005) (explaining that Article I, section 9, is not implicated by officers' inventory of contents of impounded cars *when the purpose of the inventory is not to discover crime evidence*, but for a legitimate administrative purpose).

Here, Officer Enz did not ask defendant for consent to take a breath test attendant to defendant's arrest and custody. No evidence shows that police regularly ask arrestees to consent to take a breath test. A request for consent is designed to elicit incriminating evidence from DUII suspects; it is not designed to serve arrest and custody objectives. Relatedly, the only purpose for asking a DUII arrestee to submit to a breath test under the implied-consent statutory scheme is to obtain evidence against the individual. The request for consent occurs after the officer has arrested the suspect for DUII. Thus, the officer has probable cause to believe that there is alcohol in the defendant's body. If the defendant agrees to take the test, the officer obtains evidence of the defendant's

consent and the BAC result. If the defendant declines or remains silent, his response is admissible at the DUII trial as evidence of his guilty conscience.

Thus, because Officer Enz asked defendant to take the breath test after defendant was arrested and subjected to custodial interrogation, and because the sole purpose of the question was to obtain evidence against defendant, it does not fall within the exception for inquiries normally attendant to arrest and custody.

II. Defendant's breath-test results derived from the Article I, section 12, violation.

When the police violate Article I, section 12, by subjecting a person to unlawful interrogation, the person's statements in response to the interrogation must be suppressed as well as any physical evidence that derived from that violation. *Jarnagin*, 351 Or at 717. This court looks to the totality of the circumstances to determine whether the physical evidence derived from the earlier constitutional violation. *Id.* That fact-intensive inquiry includes consideration of the following factors:

> "[1] the nature of the violation, [2] the amount of time between the violation and later statements, [3] whether the suspect remained in custody before making any later statements, [4] subsequent events that may have dissipated the taint of the earlier violation, and [5] the use that the state made of the unwarned statements."

Id. In reviewing those factors, this court considers whether the defendant's later decision to speak to the officers or to provide consent to search is

sufficiently a product of the earlier constitutional violation that suppression is necessary to vindicate the defendant's Article I, section 12, rights. *Id.*

This court applied the above-listed factors in *Jarnagin*. In that case, an infant who had been in the defendant's care was hospitalized with grave injuries. 351 Or at 705, 713. The police had several conversations with the defendant at his home and at the hospital concerning the events surrounding the infant's trauma. *Id.* at 706. During the stationhouse interview, the defendant provided an innocent explanation for the infant's injuries. *Id.* at 706-07. Although the police pressured him to change his story, the defendant maintained his initial explanation of the events. *Id.* at 707. The defendant left the stationhouse after a two-hour and 15-minute interview and drove to the hospital where the infant was being treated. *Id.* at 708.

In a private room at the hospital, the police confronted the defendant with doubts about his account of how the infant was injured. *Id.* The defendant elaborated on his explanation of the events. *Id.* at 709. The detectives asked if he would be willing to reenact his version of the events at his home while the officers videotaped him, and the defendant consented to that request. *Id.* The following day, the police videotaped the defendant at his home as he reenacted and narrated the events that he had described at the hospital. *Id.* at 710. The child died a few days later, and the state charged the defendant with murder by abuse and other crimes. *Id.* at 713.

Before trial, the defendant moved to suppress the statements he made during the video reenactment. *Id.* The trial court ruled that the police had violated the defendant's rights at the stationhouse and at the hospital by not providing him with *Miranda* warnings prior to questioning. *Id.* at 713-14. The trial court also suppressed the defendant's statements made during the video reenactment because they were "tainted" by the earlier *Miranda* violation. *Id.* at 714.

On direct review, this court upheld the suppression of the video evidence, because the video evidence derived from the earlier violation. *Id.* This court evaluated the above-listed factors used to determine whether the evidence derived from a constitutional violation.

Regarding the first factor, this court held that the nature of the violation—failure to recognize a situation as compelling and thus, failure to provide *Miranda* warnings—was not flagrant. *Id.* at 718. This court contrasted that violation with more extreme violations "in which the officers advised [the] defendant of his *Miranda* rights and then proceeded to question him despite his repeated requests for counsel[.]" *Id.* at 717 (citations omitted).

The court considered the second, third, and fourth factors in combination and noted that "a change in time and circumstances can be sufficient to dissipate the effects of an earlier *Miranda* violation." *Id.* at 718. Although there had been a 15- to 16-hour break between the stationhouse questioning and

the video reenactment, and the defendant was not in custody during that break, neither factor was sufficient to dissipate the effects of the earlier violation. *Id.*

Finally, the use that was made of the statements weighed in favor of suppression. The police obtained the defendant's version of events in violation of his rights during the hospital interview and that version of events essentially became the script for the video reenactment. *Id.* "In that circumstance, it is difficult to see how the video reenactment was not the product of the undisputed *Miranda* violation the night before." *Id.*

Here, the factors demonstrate that defendant's consent to take the breath test and his breath-test results derived from the unlawful interrogation. First, the nature of the violation was flagrant. This court has held that it is a flagrant violation for police to "advise[ ] a defendant of his *Miranda* rights and then proceed[ ] to question him despite repeated requests for counsel[.]" *Jarnagin*, 351 Or at 717 (citations omitted); *see also State v. Unger*, 356 Or 59, 82, 333 P3d 1009 (2014) (noting that police engage in "[p]articularly flagrant conduct" by engaging in "unlawful and lengthy in-custody interrogation"). That is precisely what happened here.

Defendant unequivocally invoked his right to counsel, but instead of ceasing interrogation, the officer first contradicted the *Miranda* rights. That is, Enz had just told defendant that he had the right to have counsel present during any questioning. Once defendant invoked, Enz "clarified" that defendant would

have a reasonable opportunity to consult with someone at the police station. That explanation is not consistent with the rules prescribed by Article I, section 12: *Miranda* informs suspects that they have the right to have counsel present during questioning, not merely a reasonable opportunity to "consult with someone."

Officer Enz then proceeded to question defendant pursuant to the DUII Interview Report. Although Enz gave defendant an opportunity to telephone someone and had told defendant that he did not have to answer any questions, neither of those amounts to honoring defendant's invocation under Article I, section 12.

Although the state may assert that Enz was merely confused about which provision of the constitution applied, confusion does not excuse the officer's transgressions on a suspect's Article I, section 12, rights. Further, it appears that Enz was not merely confused about which rule to apply, but instead that he believed that *Miranda* warnings were only formalistic in the DUII context. The defendant's right to have custodial interrogation cease following invocation is clear. This is unlike the situation where an officer fails to recognize circumstances as compelling: Enz recognized the circumstances were coercive and advised defendant of his *Miranda* rights. Therefore, the nature of the violation—failing to cease interrogation after defendant had unequivocally invoked his right to counsel—was flagrant and weighs in favor of suppression.

Next, this court looks to the effect that the temporal proximity between the violation and the discovered evidence had on the defendant's decision to consent to the search. The temporal-proximity factor weighs in favor of suppression when the police obtain the defendant's consent close to or during the constitutional violation. *State v. Delong*, 357 Or 254, 350, 374 P3d 433 (2015). Here, defendant consented to and provided a breath sample immediately after the unlawful interrogation. Moreover, the impermissible questioning was intrinsically intertwined with the request for a breath test because the officer had given defendant the ICCR prior to the interrogation.

The officer brought defendant into the Intoxilyzer room, checked his mouth, and observed defendant for the required 15 minutes. Those actions are required by the implied-consent laws. *See* OAR 257-030-0130 (listing method for operating Intoxilyzer 8000). During that observation period, the officer interrogated defendant. At the end of the interrogation, the officer read from the ICCR and asked defendant if he would consent to take the breath test.

It is likely that the unlawful interrogation affected defendant's decision to consent because a reasonable person in defendant's position would have believed that the request for consent was part of the previous unlawful interrogation. Thus, the police obtained defendant's consent in close temporal proximity to the violation, and this factor weighs in favor of suppression.

The third factor to consider is whether the suspect remained in custody. Defendant was under arrest and in police custody during the entire encounter. Moreover, he was in the same location that he had been when Officer Enz had unlawfully interrogated him. Thus, the third factor weighs in favor of suppression.

In the fourth factor, the court considers whether intervening or mitigating circumstances occurred between the violation and the consent, *e.g.*, subsequent *Miranda* warnings or a change in time and circumstances. *Vondehn*, 348 Or 477; *Jarnagin*, 351 Or at 716. Here, Enz gave defendant *Miranda* warnings and implied-consent warnings; however, neither mitigated the circumstance of the constitutional violation. After Enz advised defendant of his *Miranda* rights, he immediately undermined those warnings by telling defendant that he would only have a reasonable opportunity to consult with counsel. Moreover, Enz ignored defendant's invocation of his rights and reinitiated contact later—but still provided defendant with only a partial warning that he did not have to answer any questions. Thus, the *Miranda* warnings were not an intervening factor, and the officer's subsequent partial and incomplete explanations of defendant's rights did not attenuate the problem because they were incomplete and occurred prior to the violation.

The implied-consent warnings were not an intervening circumstance because they only informed defendant of his right to refuse to submit to the

breath test. They neither informed defendant of his rights under Article I, section 12, nor notified defendant that his earlier statements would be inadmissible.

To be clear, defendant's earlier statements pertained to how much alcohol and what types of alcohol he had consumed. He was immediately asked if he would submit to a breath test. A reasonable person in that situation would believe that the results of breath test could impeach his prior unlawfully elicited statements. The implied-consent warnings did nothing to sever that fear and did nothing to lessen the affect that the earlier interrogation had on defendant's decision to take the test. Thus, there were no intervening circumstances that occurred between the violation and defendant's consent to take the test.

Because Enz's request for defendant to take the breath test occurred immediately after the unlawful interrogation, because the request and unlawful interrogation were intrinsically intertwined, and because there was no meaningful break in the unlawful interrogation and the request for consent to ensure that defendant's decision was not affected by the earlier violation, defendant's consent and BAC results derived from the earlier violation and should have been suppressed.

CONCLUSION

The state obtained defendant's BAC in violation of his rights under Article I, section 12. Defendant requests that this court reverse the decisions of the Court of Appeals and the trial court and remand for a new trial.

Respectfully submitted,

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

Petition length

I certify that (1) this petition complies with the word-count limitation in ORAP 9.05(3)(a) and (2) the word-count of this petition (as described in ORAP 5.05(2)(a)) is 10,919 words.

Type size

I certify that the size of the type in this petition is not smaller than 14 point for both the text of the petition and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Appellant's Petition for Review to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on July 28, 2016.

I further certify that I directed the Appellant's Petition for Review to be served upon Benjamin Gutman attorney for Respondent on Review, on July 28, 2016, by having the document personally delivered to:

Benjamin Gutman #160599
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Respectfully submitted,

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