IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Petitioner, v. LINUS KORBIN NORGREN, Defendant-Respondent.	Washington County Circuit Court Case No. C142869CR CA A159441 S065316

BRIEF ON THE MERITS OF *AMICI CURIAE*
OREGON JUSTICE RESOURCE CENTER
AND DISABILITY RIGHTS OREGON

On appeal from a judgment of the Circuit Court for Washington County
Honorable Thomas W. Kohl, Judge

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BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON JUSTICE RESOURCE CENTER

INTRODUCTION

Amicus Curiae Oregon Justice Resource Center (OJRC) is a non-profit organization founded in 2011. OJRC works to "dismantle systemic discrimination in the administration of justice by promoting civil rights and enhancing the quality of legal representation to traditionally underserved communities." OJRC Mission Statement, www.ojrc.info/mission-statement. The OJRC Amicus Committee is comprised of Oregon attorneys from multiple disciplines and law students.

Amicus Curiae Disability Rights Oregon is the federally designated Protection and Advocacy agency for the State of Oregon, As Oregon's "P and A," DRO is charged with protecting the legal rights of individuals with disabilities in our state.

In this case, *Amici* ask this court to affirm the Court of Appeals determination that defendant's *Miranda* waiver was not knowing or intelligent when he was interrogated by the police while undergoing a mental health crisis. *Amici* also wish to be heard on a broader issue: police interrogation of mentally ill individuals generally. *Amici* urge this court to require law enforcement to account for mentally ill individuals' unique vulnerabilities when subjecting them to custodial interrogation. First, this court should hold that when, as in

this case, an officer knows or has reason to suspect that a person is experiencing a mental health crisis, the officer's decision to persist in interrogating the person without first taking additional protective measures constitutes coercive conduct that may render subsequent statements involuntary. Reasonable and effectively protective measures should include confirming that the person in custody could accurately restate the warnings or video-recording the warnings. This would allow a reviewing court to confirm that an effort was undertaken to ensure that the person in custody truly understood his or her rights. Another useful and reasonable protective measure would be to videotape the explanation and waiver of rights.

Second, this court should hold that, when a person is in the midst of a mental health crisis or exhibiting symptoms of a serious mental illness, it is legal error for a trial court to conclude that the person has voluntarily made statements or knowingly and intelligently waived their *Miranda* rights if the record lacks evidence showing that law enforcement took additional protective measures to confirm the person's capacity to waive *Miranda*.[1] Without such evidence, a trial court cannot permissibly find that a defendant has sufficient

[1] Another way of construing *Amici*'s proposed test is that evidence of a person's severe mental illness or mental health crisis creates a rebuttable presumption that the person's waiver was invalid. As discussed further below, such a construction is consistent with *Miranda* jurisprudence, where the state bears a "heavy burden" in establishing that any purported *Miranda* waiver is voluntary, knowing, and intelligent. *Miranda v. Arizona*, 384 US 436, 475, 86 S Ct 1602, 16 L Ed 2d 694 (1966).

capacity to undergo and reasonably resist coercive custodial interrogation or to waive their constitutional rights with "full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *State ex rel. Juv. Dept. of Washington County v. Deford*, 177 Or App 555, 572-73, 34 P3d 673 (2001) (quoting *Colorado v. Spring*, 479 US 564, 573, 107 S Ct 851, 93 L Ed 2d 954 (1987)) (describing a "knowing and intelligent" waiver in those terms).

ARGUMENT

I. The Court of Appeals correctly concluded that defendant's waiver of *Miranda* rights was not knowing or intelligent.

The Court of Appeals correctly determined that the state failed to prove that defendant's *Miranda* waiver was knowing or intelligent. Defendant was undergoing a mental health crisis[2] when he was interrogated by police, and it should have been apparent to the arresting officer.

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[2] For this brief, *amici* adopt the following definition of "mental health crisis":

> "'Mental Health Crisis' means an incident in which someone with an actual or perceived mental illness is experiencing intense feelings of personal distress (e.g., anxiety, depression, anger, fear, panic, hopelessness), obvious changes in functioning (e.g., neglect of personal hygiene, unusual behavior) and/or catastrophic life events (e.g., disruptions in personal relationships, support systems or living arrangements; loss of autonomy or parental rights; victimization or natural disasters), which may, but not necessarily, result in an upward trajectory of intensity culminating in thoughts or acts that are dangerous to self and/or others."

When the responding officer found defendant, he was "unconscious and lying naked in the fetal position." *State v. Norgren*, 287 Or App 165, 166, 401 P3d 1275 (2017). Police checked that defendant was breathing, rolled him over, and handcuffed him. *Id*. Defendant then awoke. *Id*. The officer noted that defendant was bleeding from his nose, hands, and feet. *Id*. "As soon as [the officer] stood defendant up, he read defendant his *Miranda* rights from a prepared card." *Id*. Defendant said he understood his rights, then "made incriminating statements and told [the officer] that 'he was a sasquatch and he was from a family of sasquatches.'" *Id*.

After spending five and a half hours with the officer, defendant was transferred to the hospital, where he was interviewed by the Mental Health

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Settlement Agreement, *United States v. City of Portland*, United States District Court for the District of Oregon Case No. 3:12-cv-02265-SI, Page 11, Attachment 1. Additionally, *amici* adopt the following definition of "mental illness":

> "Mental Illness" is a medical condition that disrupts an individual's thinking, perception, mood, and/or ability to relate to others such that daily functioning and coping with the ordinary demands of life are diminished. Mental illness includes, but is not limited to, serious mental illnesses such as major depression, schizophrenia, bipolar disorder, obsessive compulsive disorder ("OCD"), panic disorder, posttraumatic stress disorder ("PTSD"), and borderline personality disorder. Mental illness includes individuals with dual diagnosis of mental illness and another condition, such as drug and/or alcohol addiction."

Id. at 11-12.

Response Team and another officer. That officer's report "concluded that 'it was obvious from some topics and statements that [defendant] was having a break from reality.'" *Id*. at 167. Additional evidence adduced at the suppression hearing showed that defendant was undergoing a manic episode that began the day before the incident. *Id*.

The Court of Appeals concluded that the record lacked sufficient evidence that defendant's waiver was knowing or intelligent. *Id*. at 171. The court explained:

> "Given the legal requirements noted above related to waiver that require consideration of defendant's mental state to determine whether the waiver is made knowingly and intelligently, we conclude that, under the circumstances of this case—including defendant's mental health issues, that [the officer] encountered defendant in a remote wooded area, unconscious and lying naked in the fetal position, and defendant's statement that he was a sasquatch from a family of sasquatches—defendant's waiver was not knowingly and intelligently made. We do not mean to imply that any variant statement made by a person at the time of a waiver nullifies a waiver, only that in the context of the totality of circumstances at play in this case, our inquiry—which focuses on defendant's state of mind to determine whether he maintained the requisite level of comprehension to waive his rights—compels the conclusion that, here, defendant's waiver was not made knowingly and intelligently."

Id.

The Court of Appeals correctly assessed the waiver from defendant's point of view, and recognized that his mental health crisis would create a significant impediment to a knowing and intelligent waiver. Its decision should

be affirmed. But this court can and should address an issue that is squarely presented in this case, and acknowledge that interrogations of individuals with serious mental illnesses require additional protective measures to ensure validity.

II. Although mentally ill individuals interact frequently with law enforcement, existing police guidelines are ill-equipped to address the particular needs of this vulnerable population.

Owing to a lack of community resources, law enforcement officers are often the first state actors to respond to individuals experiencing a mental health crisis. *See* United States Department of Justice, Civil Rights Division, Letter to Mayor Sam Adams re: Investigation of the Portland Police Bureau, Sept 12, 2012 ("USDOJ Findings") at 8 ("The gaps in the mental health system increase the encounters between [the Portland Police Bureau (PPB)] and persons with mental illness. PPB is often the first and sometimes only responder to a crisis.").[3] That, in turn, means that there is an "overreliance on local law enforcement, jails, and emergency rooms" to respond to those individuals. *Id.* at 7. As explained by Dr. Alison D. Redlich,

> "A conservative estimate that 10 percent of inmates in U.S. state and federal prisons suffer from mental illness yields a total of about 140,000 mentally ill prisoners. This number represents only adults incarcerated in prisons, as opposed to jails; thus the number of persons with mental illness who have been interrogated by the

[3] Although the USDOJ findings concern only the practices of the Portland Police Bureau, the lack of available options for mentally ill individuals in crisis is a state-wide problem. USDOJ Findings at 7.

> police in recent years can be estimated to be much greater than 140,000."

Allison D. Redlich, Ph.D., *Mental Illness, Police Interrogations, and the Potential for False Confession*, Psychiatric Services, Vol 55, No 1 (January 2004) at 19 (hereinafter, "Redlich").

Others have "estimated [that the] prevalence [of mentally ill] in correctional settings range[s] from 6 to 20%. A national survey of jails by the Bureau of Justice Statistics * * * estimated that 16% of inmates are diagnosed with Axis I disorders." Richard Rogers, et al., *Knowing and Intelligent: A Study of Miranda Warnings in Mentally Disordered Defendants*, 31 Law & Hum Behav 401, 403 (2007) (hereinafter *Knowing and Intelligent*) (internal citations omitted). "With approximately 13.9 million arrests in 2004 * * *, even a conservative estimate of 5.0% would suggest that 695,000 defendants annually were suffering from severe mental disorders at the time of their arrests and subsequent Miranda warnings." *Id*.

The lack of services to treat the mentally ill, combined with inadequate training in law enforcement, can and does result in abuse, excessive force, injury to police officers and individuals with serious mental illnesses, and subsequent neglect and psychological decompensation in custody settings. *See generally* Joel Greenberg and Sarah Radcliffe, *Behind the Eleventh Door: Solitary Confinement of Individuals with Mental Illness in Oregon's State Penitentiary*, Disability Rights Oregon, *available at* http://droregon.org/wp-

content/uploads/Behind-the-Eleventh-Door-Electronic-Version.pdf (last accessed March 30, 2018). As indicated above, the United States Department of Justice recently examined the Portland Police Bureau and determined that PPB exhibited a pattern and practice of using excessive force against the mentally ill. USDOJ Findings at 1. USDOJ emphasized that

> "[t]he absence of a comprehensive community mental health infrastructure often shifts to law enforcement agencies throughout Oregon the burden of being first responders to individuals in mental health crisis. Despite the critical gaps in the mental health system, police agencies must be equipped to interact with people in mental health crisis without resulting to unnecessary or excessive force."

Id. at 2. The probability of arrest is 67 times greater for persons who demonstrate symptoms of mental illness compared with those who do not exhibit such symptoms. Redlich at 19. Similarly, the use of force during the course of arrest, and particularly the deployment of tasers, is disparately high for individuals with mental illness. US DOJ Findings at 2.

Because of their frequent interaction with individuals who experience serious mental illness, law enforcement needs clearer parameters for working with this vulnerable population—particularly with regard to interrogation. Although police already operate under established guidelines, researchers have questioned whether those guidelines are sufficient to protect suspects who are mentally ill. Redlich at 20; *see also* Saul M. Kassin, et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum Behav 3, 30

(2010) (hereinafter "*Police-Induced Confessions*") (noting that, despite the "strong consensus among psychologists, legal scholars, and practitioners that * * * individuals with cognitive impairments or psychological disorders are particularly susceptible to false confession under pressure, * * * little action has been taken to modulate the methods by which these vulnerable groups are questioned when placed into custody as crime suspects.").

Research indicates that individuals suffering from mental illness often have difficulty comprehending their *Miranda* warnings and making rational decisions concerning the waiver of those important rights. The evidence shows that a person in the throes of a mental health crisis is uniquely susceptible to even subtle pressures on the part of police, calling into question the voluntary nature of any purported waiver. And a mentally ill person's lack of comprehension and rational decision making raises significant questions about capacity to fully understand the nature of the rights being waived.

III. It is well-settled that a criminal suspect's mental capacity significantly impacts whether a purported *Miranda* waiver is a voluntary, knowing, and intelligent one.

The Fifth Amendment of the United States Constitution provides that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." Similarly, Article I, section 12, of the Oregon Constitution provides that "[n]o person shall * * * be compelled in any criminal prosecution to testify against himself." In order to effectuate those rights, law enforcement

officials are required to inform criminal suspects of their right to remain silent[4] before subjecting them to custodial interrogation. *See State v. Vondehn*, 348 Or 462, 470, 236 P3d 691 (2010) (recognizing warning requirement under both state and federal constitutions); *see also Miranda v. Arizona*, 384 US 436, 444, 86 S Ct 1602, 16 L Ed 2d 694 (1966) (setting out required warnings).

To be sure, it is possible to waive one's right to remain silent and to provide statements to law enforcement that may be used in a subsequent criminal prosecution. *See id.* (recognizing possibility of waiver); *Miranda*, 384 US at 444 (same). But the state bears a "heavy burden" in establishing that any such waiver was made voluntarily, knowingly, and intelligently. *Miranda*, 384 US at 475; *see also Vondehn*, 348 Or at 475-76 (recognizing waiver standard).

In assessing whether the state has carried that burden, both the state and federal courts look to the "totality of the circumstances." *See Deford*, 177 Or App at 573. And, significantly for the issue posed by this case, both the state and federal courts recognize the important role that mental illness may play in determining *both* whether an individual's waiver was voluntary, and whether

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[4] The *Miranda* warnings inform the accused of a constellation of related rights: chiefly, the right to silence and the right to appointed counsel. *Miranda*, 384 US at 444 ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."). *Miranda* warnings also should include information sufficient for the accused to understand that he can stop the interrogation at any time and ask for a lawyer at any time. *Id*.

the waiver was knowing and intelligent. In *Colorado v. Connelly*, 479 US 157, 160-61, 107 S Ct 515, 93 L Ed 2d 473 (1986), for example, a defendant claimed that his mental illness rendered involuntary his unwarned confession to a murder. Although the Court ultimately held (over two dissents) that the specific factual record did not permit a finding that the defendant's confession was involuntary, the Court nonetheless was careful to recognize that an individual's mental illness "is surely relevant to [the] individual's susceptibility to police coercion" and therefore is a "significant factor in the 'voluntariness' calculus." *Id.* at 164 (citing *Spano v. New York*, 360 US 315, 79 S Ct 1202, 3 L Ed 2d 1265 (1959)).

The Oregon Court of Appeals has acknowledged the importance of a suspect's mental state on the *Miranda* waiver analysis. In *Deford*, this court recognized that the nature and effect of coercive conduct on the part of law enforcement must be assessed alongside the personal characteristics and circumstances of the individual questioned. *See* 177 Or App at 565. The Court of Appeals noted further that those personal characteristics and circumstances also bear on the "'knowing and intelligent' prong of the waiver analysis"; that is, the question whether one chose to waive his or her rights "with full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.* at 572-73 (quoting *Spring*, 479 US at 573).

Courts have already articulated special constitutional rules based on the diminished capacity of a class of individuals in other contexts. For example, the United States Supreme Court has long recognized that juveniles are particularly vulnerable to police interrogation tactics. The admissions and confessions of juveniles "require special caution," and courts must take "the greatest care * * * to assure that the [juvenile's] admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair." *In re Gault*, 387 US 1, 45, 55, 87 S Ct 1428, 18 L Ed 2d 527 (1967). Most recently, in *J.D.B. v. North Carolina*, 564 US 261, 131 S Ct 2394, 180 L Ed 2d 310 (2011), the Court determined that the question whether a person is in custody for the purposes of *Miranda* includes consideration of the suspect's age. Citing recent sociological and scientific studies, the Court noted that the risk of false confession is particularly high for juvenile suspects. *Id*. at 269 (citing amicus brief collecting studies that illustrate the heightened risk of false confessions when the suspect is a youth).

Relatedly, in the Eighth Amendment context, the Court has held that, because children are more vulnerable to external pressure, more suggestible, and more impulsive than adults, various sentencing schemes are unconstitutional as applied to them. *Miller v. Alabama*, 132 SCt 2455, 2469 (2012) (regarding life-without-parole for homicide offenses); *Graham v.*

Florida, 130 SCt 2011, 2026, 2032 (2010) (regarding life-without-parole sentencing for non-homicide offenses); *Roper v. Simmons*, 543 US 551, 569 (2005) (regarding death penalty).

In a case that parallels the Court's Eighth Amendment case law regarding juveniles, the Supreme Court in *Atkins v. Virginia* held that it was unconstitutional to execute a person with intellectual disabilities. 536 US 304, 306-07, 122 S Ct 2242, 2244, 153 L Ed 2d 335 (2002). As the Court explained:

> "Because of their disabilities in areas of reasoning, judgment, and control of their impulses * * * they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants."

Id. at 318. Individuals with intellectual disabilities[5] have a lesser capacity to understand and process information and to communicate with others—factors that both diminish their culpability and increase the probability of wrongful conviction. *Id*.

Like juveniles, and like the defendants with intellectual disabilities in *Atkins*, persons who are experiencing a mental health crisis have a diminished capacity to understand and process information, engage in logical reasoning and judgment, and communicate. As explained in detail below, recent empirical research sheds light on the ways in which mental illness may impair an

[5] These individuals were previously referred to as mentally retarded persons.

individual's ability to voluntarily, knowingly, and intelligently waive *Miranda* rights. That research represents a clarion call to the judicial branch to articulate clear rules governing law enforcement's interrogation of persons, like the defendant in this case, who law enforcement officers know or have reason to suspect to be impaired by mental illness and/or in the throes of a mental health crisis.

IV. Empirical evidence establishes that mental illness renders criminal suspects uniquely vulnerable to subtle coercion and frequently prevents them from fully understanding their Miranda rights.

In recent years, researchers have analyzed the factors that may affect comprehension of *Miranda* warnings. The results show that even those individuals who do not suffer from mental illness frequently fail to understand their rights in an interrogation. Because it is helpful in framing the research specifically addressing how mental illness may affect a purported *Miranda* waiver, *Amici* begin by discussing what the research shows about non-mentally ill individuals' ability to comprehend their *Miranda* rights. We then turn to the research specifically addressing how mental illness may further impair an individual's ability to voluntarily undergo custodial interrogation and fully understand their *Miranda* rights.

A. Empirical research demonstrates that even non-mentally ill individuals may have significant difficulty understanding the nature of their *Miranda* rights in the context of custodial interrogation.

Social science research into *Miranda* warnings shows that even non-mentally ill individuals face numerous impediments to a knowing and intelligent waiver. First, there is a wide disparity in the form and content of *Miranda* warnings throughout jurisdictions, "vary[ing] remarkably in their length, complexity and comprehensibility." Richard Rogers, et al., *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage,* 31 Law & Hum Behav 177, 189-90 (2007). Although "[s]uccinct and simple warnings of fewer than 60 words" may be more comprehensible, they also "may omit important clarifications." *Id*. Conversely, "extended warnings, greater than 300 words, are simply written but may overwhelm defendants with marginally relevant details" and "they run a considerable risk of obscuring rather than clarifying Miranda rights." *Id*.

In one study, researchers surveyed an "extensive sample" of *Miranda* warnings from United States jurisdictions. The researchers analyzed the comprehensibility of warnings as well as their content components, *e.g.*, whether the warning informed defendants that they could have an attorney prior to questioning. *Id*. at 181-82. The study concluded, among other things, that "most suspects, even under optimal conditions, cannot adequately process the average Miranda warning of 92 words." *Id.* at 185.

Additionally, comprehension of *Miranda* warnings does not increase for individuals previously arrested or who believe that they know their rights well.

Richard Rogers, et al., *"Everyone Knows Their Miranda Rights": Implicit Assumptions and Countervailing Evidence*, 16 Psychol Pub Pol'y & L 300 (Aug 2010). Noting that "the public's frequent informal exposure to warnings through popular television shows and rote recitation of partial Miranda warnings" perpetuates the assumption that "everyone knows their *Miranda* rights," the study concluded that self-appraisals of *Miranda* knowledge are "only marginally indicative" of actual *Miranda* comprehension. *Id*. at 313-14. The study's findings provided "strong countervailing evidence against the common assumption that *Miranda* is ubiquitously understood * * * within our mainstream culture," underscoring "the pronounced discrepancies between what the public believes it knows and what it actually knows." *Id*. This study suggests that "the idea of an accurate working knowledge for most defendants is highly suspect [and] the public is largely misguided in their perceptions of *Miranda* rights." *Id*.

Finally, research also has shown that even for non-mentally ill individuals, stress "can have a disadvantageous influence on suspects' ability to understand their *Miranda* rights." Kyle C. Scherr, *You Have The Right To Understand: The Deleterious Effect Of Stress On Suspects' Ability To Comprehend Miranda*, 36 Law & Hum Behav 275, 276 (2012). In that study, college student volunteers were accused of cheating and then administered measures of *Miranda* comprehension. The results of the study "indicated that

stress, induced through an accusation of wrong-doing, significantly undermined participants' comprehension of *Miranda*. Specifically, participants who were accused of wrong-doing demonstrated significantly lower *Miranda* comprehension scores than participants who were not accused of wrong-doing." *Id*. at 279. The study found that "participants who were accused of wrong-doing in our research demonstrated an average comprehension score that was relatively equivalent to the average comprehension scores of juveniles * * *, adults who were diagnosed as psychotic, and adults who were patients at a psychiatric ward * * *." *Id.* That finding was especially significant as the researchers worked with college students, who are "typically assumed to have a higher level of intelligence than the general population." *Id.*

Importantly, the study noted that participants likely experienced a lesser-degree of stress than suspects accused of crimes by the police, and therefore the results observed in the study likely reflected "conservative estimates of the effect that stress has on *Miranda* comprehension during police accusation." *Id.* at 279. Scherr noted further that "the stress that suspects will likely experience in response to police accusation could reduce their *Miranda* comprehension to such a degree that their understanding of *Miranda* would be considered unacceptable, even from a legal standpoint." *Id*. at 280. This research has significant implications for the analysis of *Miranda* waivers. For example, it

demonstrates the possibility that "suspects will be especially susceptible to police tactics used to attain *Miranda* waivers." *Id*. at 280.

> "That is, because stress is compromising suspects' ability to appreciate the significance of *Miranda*, suspects may decide whether or not to waive their *Miranda* rights based on cues given by the police. If police minimize the importance of *Miranda* warnings * * *, then suspects may assume that waiving their rights is in their long term interests even though it is not. This could be a main reason why four out of every five suspects waive their *Miranda* rights * * *."

Id. at 280 (internal citations omitted).

The foregoing research suggests that any individual, even one who is educated or experienced in the criminal justice system, might have difficulty comprehending *Miranda* warnings. Research further suggests that individuals who have mental illness face even more obstacles to comprehension.

B. Empirical research shows that mental illness may fundamentally undermine an individual's ability to voluntarily participate in custodial interrogation and fully comprehend their *Miranda* rights.

An individual interrogated while in the midst of a mental health crisis is subject to all of the foregoing factors impairing an average person's ability to understand and validly waive their *Miranda* rights, plus more: the individual's mental illness may deprive them of their basic ability to think rationally, a key predicate to a *Miranda* waiver that is truly "knowing and intelligent." *Knowing and Intelligent*, 31 Law & Hum Behav at 403 ("Beyond rudimentary comprehension, the Miranda decision requires suspects to possess rational abilities. * * * The rational ability to ascertain each choice and its

consequences involves the capacity for suspects to generate reasons to exercise or waive Miranda rights.")

The foregoing study administered a battery of *Miranda* comprehension tests to a sample of 84 male and 23 female defendants from the North Texas State Hospital's competency-to-stand-trial unit. Most patients suffered from psychotic disorder (71 percent), and many suffered from bipolar disorders and other mood disorders (8.4 percent); finally, some patients suffered from dementia or other cognitive disorders (5.7 percent). Many of the patients also had issues with substance abuse. *Id*. at 403-04. Generally, the defendants in the study fell into the midrange of psychological impairment. *Id*. at 413. The testing measured the defendant's ability to state in their own words the content of the *Miranda* warnings and describe their reasons for waiving or exercising their *Miranda* rights. *Id*. at 405-06.

The researchers initially sought to categorize *Miranda* comprehension into "excellent," "good," and "poor" levels of understanding. However, virtually no defendant from the sample was able to demonstrate an "excellent" understanding of the warnings. Although some defendants managed a "good" understanding, most defendants demonstrated a "poor" understanding. *Id*. at 408. The researchers further found that a mentally-ill person's educational background or history of prior arrests "cannot be considered effective screens for which defendants should be evaluated for their Miranda comprehension."

Id. at 414. "A basic but crucial finding was that mentally disordered defendants in the current study had widespread difficulties in understanding all but the simplest warnings. Importantly, these difficulties occurred despite their past experiences with the criminal justice system * * * and averaging close to high school education * * *." *Id*. at 414. The researchers posited that one explanation for their findings could be that Axis I disorders lead to functional impairment that "negatively affect[s] cognitive performance." *Id*. at 414. Another hypothesis for the test subjects' poor performance is "that most mentally disordered defendants lacked the ability to focus on many ideas * * *." *Id*.

The researchers also asked the study's participants to provide reasons for asserting *Miranda* protections. A substantial number—a full quarter of the defendants—"could not generate a single reason for why they should exercise their *Miranda* right to silence." *Id*. at 410. "A smaller number (16.2%) had a similar problem with their right to counsel. Taken together, 6.3% expressed no rational idea why they should exercise either of their constitutional protections." *Id*. When asking the participants why they might waive protections, the researchers noted that "[b]latant misestimation of abilities appears to be the most prominent theme in generating reasons for waiving Miranda protections." *Id*. at 415.

> "Salient examples include defendants' beliefs that they could handle the case themselves (19.6%) and prove their innocence

> (17.8%). * * * Despite their recent exposure to Miranda warnings, many defendants apparently had difficulty in applying key information (i.e. free legal assistance) to their own case. A major reason for not requesting an attorney was the inaccurate belief that the defendant was responsible for covering the legal fees. If extensively cross-validated, the impact of this belief may be profound, potentially affecting one in six mentally disordered defendants.
>
> "Smaller numbers of defendants may be motivated to waive their Miranda right to silence as an appeasement to police investigators. Such appeasements may reflect either a desire to appear cooperative or an avoidance of negative perceptions."

Id. at 415.

The study concluded that "thousands of mentally disordered defendants are likely impaired in their Miranda understanding and subsequent decisions." *Id*. at 412. It is important to note that the study likely overestimated the abilities of mentally disordered defendants to comprehend *Miranda* warnings, because the research "was conducted in an unhurried manner in a non-adversarial setting." *Id*. at 416. In a custody setting following arrest and, potentially, physical altercations with police, the researchers would expect to see further diminishment of *Miranda* comprehension especially when the delivery of the warnings is "rapid and rote." *Id*.

In another study of *Miranda* comprehension conducted on mentally ill subjects, researchers compared the abilities of psychiatrically impaired individuals to understand and validly waive their *Miranda* rights with the same abilities of other adults and juveniles. *See* Virginia G. Cooper, Patricia A. Zapf,

Psychiatric Patients' Comprehension of Miranda Rights, 32 Law & Hum Behav 390, 392 (Oct 2008). The study sample comprised 75 male and female inpatients admitted to Bryce Hospital in Tuscaloosa, Alabama. The patients were between the ages of 18 to 65 and suffered from psychiatric problems serious enough to require hospitalization. The subjects of this study were required to tell the examiner in the subject's own words what the *Miranda* rights mean, to compare each right to another statement and opine whether the two statements articulated the same or different concepts, and to define six words typically contained in a Miranda warning: consult, attorney, interrogation, appoint, entitled, and right. Examinees also were required to complete an assessment of their "grasp of the significance of the Miranda rights in relevant police, legal, and court procedures." *Id*.

Psychotic patients performed poorly overall. Patients who suffered from hallucinations, conceptual disorganization, or unusual thought content showed significant impairment in understanding their legal rights. *Id*. at 402. But the study also found that symptoms such as disorientation, distractibility, and bizarre behavior impacted the results of all the patients. *Id*. at 398. Comparisons between psychiatric patients and an adult sample showed that "generally, psychiatric patients were more impaired on measures of understanding and appreciation[.]" *Id*. Additionally "[f]or most comparisons, [psychiatric patients] were more impaired than the juveniles, but in some cases,

especially in patients without psychotic diagnoses, patients' performance was better." *Id*.

In earlier studies of adults and juveniles, 23 percent of adults and 55 percent of juveniles failed to understand at least one *Miranda* right. In the psychiatric patient sample, 60 percent did not understand at least one *Miranda* right. The researchers also compared the psychiatric sample with an earlier study of cognitively disabled adults, and found that the psychiatric patients' scores were only slightly better. The researchers found that 9 percent of the psychiatric patient sample could not understand *any* of their *Miranda* rights, performing worse than both adults and juveniles on that measure. *Id*. at 400-01. Again, "[t]he study results are considered a conservative estimate of the proportion of severely mentally ill who are *Miranda*-impaired." *Id*. at 403.

The foregoing may provide some explanation for a known phenomenon: mentally ill individuals falsely confess to crimes. *Police-Induced Confessions*, 34 Law & Hum Behav at 3. In a 2004 survey of false confessions, 22% of false confessors were mentally retarded, and 10% had a diagnosed mental illness. *Id*. at 5. The two most commonly cited dispositional risk factors for a false confession are a suspect's juvenile status and a suspect's mental impairment, either mental illness or mental retardation.[6] One survey of wrongful

[6] The term "mentally retardation" and its various iterations have been replaced by the term "cognitive impairment" and its variants.

convictions found that 69% of exonerated persons with mental disabilities were convicted on the basis of a false confession. *Id.* at 19.

Mental illness, including Axis I disorders (psychological disorders) and Axis II disorders (personality disorders and intellectual disabilities), are a significant risk factor for false confessions. "Psychological disorder is often accompanied by faulty reality monitoring, distorted perception, impaired judgment, anxiety, mood disturbance, poor self-control, and feelings of guilt." *Id.* at 21; *see also* Redlich at 19 ("Mentally ill defendants, particularly defendants with psychotic disorders, are significantly less likely to understand their interrogation rights than defendants who are not mentally ill.").

> "[R]esearch suggests that adults with mental disabilities, as well as adolescents, are particularly at risk when it comes to understanding the meaning of *Miranda* warnings [because] they often lack the capacity to weigh the consequences of rights waiver, and are more susceptible to waiving their rights as a matter of mere compliance with authority."

Police Induced Confessions at 9.

There are three different types of false confessions: voluntary false confession, compliant false confession, and internalized false confession. All three impact people with mental illness. A voluntary false confession occurs when an innocent person claims responsibility for a crime without prompting or pressure from police. *Id*. at 14. Such confessions can arise from "an inability to distinguish fact from fantasy due to a breakdown in reality monitoring, a common feature of major mental illness." *Id*. A compliant false confession

occurs when a person is induced through interrogation to confess to a crime that they did not commit. Researchers have identified specific incentives for this compliance, such as being allowed to sleep or eat. "The desire to bring the interview to an end and avoid additional confinement may be particularly pressing for people who are young, desperate, socially dependent, or phobic of being locked up in a police station." *Id*. An internalized false confession occurs when a person is persuaded "not only to capitulate in their behavior but also to believe that they may have committed the crime in question, sometimes confabulating false memories." *Id*. at 15.

Law enforcement's preferred method of interrogation, the Reid technique, creates a serious risk of false confession when applied to individuals with mental illness.[7] Under the Reid technique, "the single-minded purpose of

[7] The Reid technique is the United States' leading interrogation method. Alan Hirsch, *Going to the Source: The "New" Reid Method and False Confessions*, 11 Ohio State J of Crim L 803, 803 (2014). Although the technique is "presented as a nine-step process", it can be reduced to three: "isolation, confrontation, and minimization." *Id*. at 805. Utilizing the Reid technique, police begin an interrogation by isolating the suspect, which "increases the suspect's anxiety and eagerness to extricate himself from the situation." *Id*. Then, the interview "begins with an accusation of the suspect, buttressed by the suggestion that the interrogators have irrefutable evidence, sometimes fabricated. Denials of guilt are aggressively cut off. The idea is to communicate to the suspect the futility of maintaining innocence." *Id*. Finally, the interrogator minimizes "the nature or consequences of the crime * * * [to] lead the suspect to infer that he will be treated leniently if only he confesses. Confrontation brings on despair; minimization supplies a lifeline. Together, they break down many suspects." *Id*.

interrogation is to elicit incriminating statements, admissions, and perhaps a full confession in an effort to secure a conviction." *Id*. at 6.

> "Police interrogators who are trained in [the Reid technique] are taught to assume guilt, to manipulate the suspect's emotions and expectations, and to take into account nonverbal behavioral cues, such as hesitant speech, sweating, or dry mouth, as indicators of deception. However, these cues, in addition to being general indicators of stress, may appear more frequently among persons with mental illness because of their illness or the medications they are taking."

Redlich at 20. In response to the Reid technique, persons with mental illness "may be more likely to confess, because they believe that the police officer is truly a friend who understands * * * or because they believe that they will be able to go home after confessing." *Id*.

Additionally, both guilty and innocent mentally ill persons may be more likely to confess in response to tactics such as police "trickery and deception." For example, some mentally ill individuals have

> "deficits in social skills such as assertiveness. Three common aspects of assertiveness are asking for assistance, saying 'no' to others, and providing corrective feedback. All of these aspects are relevant to the interrogative situation, and their absence may increase the likelihood of confession. Examples of assertive behaviors that some persons with mental illness may not be able to perform during an interrogation include asking for an attorney, denying commission of the crime, and telling the police officer that one is innocent when the police officer is insisting on one's guilt."

Id.; *see also* Alan Hirsch, *Going to the Source: The "New" Reid Method and False Confessions*, 11 Ohio State J of Crim L 803, 805 (2014) ("The problem [with the Reid Technique] is that these tactics are *too* powerful[.]"). In a 2012

revision to the Reid technique manual, even the technique's creators recognized that "the more aggressive aspects" of the technique should not be applied to certain populations, such as juveniles and those with intellectual disabilities and mental illness, because those populations are "especially prone to false confessions." Hirsch, 11 Ohio State J of Crim Law at 809.

Indeed, other jurisdictions have recognized that confrontational interrogation of mentally vulnerable individuals can lead to unreliable confessions. For example, England, Australia, and New Zealand have adopted legal provisions to ensure that statements elicited by police interrogation are reliable and properly obtained. Redlich at 22. In England, if a police officer "has any suspicion, or is told in good faith, that a person of any age may be mentally disordered or otherwise mentally vulnerable, or mentally incapable of understanding the significance of questions or their replies" then that person is entitled to certain legal protections, including the presence of an "appropriate adult" guardian, ideally a mental health professional, during any interrogation. Police and Criminal Evidence Act 1984 (PACE) – Code C, Annex E (May 2014). Additionally, "[e]ven when police adhere to all the legal provisions, a judge may consider it unsafe and unfair to allow the statement to go before the jury." Redlich at 22.[8]

[8] In the case of someone with a serious mental illness, "the crucial issue may be whether or not the defendant was 'mentally fit' when interviewed" or in other words, whether the defendant was "fit for interview." Redlich at 22.

Similarly, in some jurisdictions, videotaping of interrogations is now required by statute, judicial opinion, or court rule.[9] If nothing else, such a

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"Fitness for interview is closely linked to the concept of 'legal competencies,' which refers to an individual's physical, mental, and social vulnerabilities that may adversely affect his or her capacity to cope with the investigative and judicial process." *Id*. Historically, legal competence inquiries concerning confessions were focused on juveniles and adults with mental retardation or mental illness. This framework is a significant step towards protecting vulnerable populations. *Id*.

[9] The following jurisdictions require recording custodial interrogations in most cases: Alaska, *Stephan v. Alaska*, 711 P2d 1156, 1162-65 (Alaska 1985); Connecticut, Conn Gen Stat §54-1*o*; Illinois, 705 ILCS 405/5-401.5 (juveniles) and 725 ILCS 5/103-2.1 (adults); Maryland, MD Code Ann, Crim Proc §§2-402-403; Michigan, Mich Comp Laws §§763.7-11; Minnesota, *Minnesota v. Scales*, 518 NW2d 587, 591-92 (Minn 1994); Montana, Mont Code Ann §§406.4-406.11; Nebraska, Neb Rev Stat §§29-4501-08; New Mexico, NM Stat Ann §29-1-16; North Carolina, NC Gen Stat §15A-211; Vermont, 13 VSA, chapter 182, subchapter 3, Law Enforcement Practices, §5581, Sections 4 and 5; Wisconsin, Wis Stat Ann §§968.073 and 972.115;

A substantial number of other jurisdictions recommend recording interrogations, or require recordings for certain interrogations, such as those of juveniles. For example, Arkansas has a Supreme Court Rule requiring recordings to be made whenever practical. Arkansas Supreme Court Rule of Criminal Procedure (2012) 4.17; *see also* Indiana, Rule of Evidence 617; New Jersey, Supreme Court Rule 3:17; Utah, Utah Supreme Court Rule of Evidence 616; California has a statute requiring recorded interviews of juveniles in homicide investigations. Cal Penal Code §859.5; *see also* District of Columbia, DC Code §§5-116.01-03 (recording required for persons suspected of violent crimes); Maine, ME Rev State Ann, title 25, §2803-B(1)(K) (for serious crimes); Missouri, Mo Rev State, ch 590.700 (for certain listed felonies).

Oregon requires video-recordings of interrogations for homicides and Measure 11 offenses, and juveniles accused of adult crimes. ORS 133.400. If police fail to comply with the statute, the statements are not suppressed, but the jury may be instructed that police were legally required to record the interview and recorded interviews are more accurate. UCrJI 1007.

Even if there is no rule, statute, or judicial opinion, many precincts record interviews, and many states have recommended recorded interviews. *See*

requirement allows a reviewing court to fully appreciate the totality of circumstances that color an interrogation and inform the inquiry into whether it was conducted after a voluntary, knowing, and intelligent waiver of rights. Furthermore, the increasingly frequent use of body cameras would allow that inquiry to reach the period before a more formal interrogation or recitation of *Miranda* warnings.

To summarize, the foregoing research provides support for a few key principles. First, *Miranda* warnings are often incompletely understood, even when a suspect does not suffer from mental illness. For example, the stress of an accusation seriously diminishes the ability to comprehend warnings. Scherr, 36 Law & Hum Behav at 280. Second, a person's mental illness may contribute to an inability to withstand police coercion, as demonstrated by the correlation between false confessions and mental illness. *Police Induced Confessions* at 9. That is, even routine interrogation strategies such as the Reid technique are impermissibly coercive when applied to a person suffering from mental illness. Finally, a person's mental illness may significantly impair their ability to understand their *Miranda* rights fully. That is especially true when

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generally, National Association of Criminal Defense Lawyers, Custodial Interrogation Recording Compendium By State, https://www.nacdl.org/usmap/crim/30262/48121/d (last accessed March 26, 2018) (compiling rules from all United State jurisdictions).

the person's mental illness impacts cognitive functioning, such as a psychotic disorder, but it's true for other psychiatric illnesses as well. Cooper and Zapf, 32 Law & Hum Behav at 398. Research confirms that the intertwined effects of serious mental illness and compelling circumstances are far too complex to support a binary separation of the totality of circumstances into a simplistic distinction between issues of fact and issues of law. In this case, the state cannot establish that defendant's purported waiver of Miranda rights was voluntary, knowing, and intelligent.

Informed by the available research, it is apparent that the defendant's purported waiver of *Miranda* in this case cannot pass constitutional muster. In this case, law enforcement chose to interrogate defendant even though they recognized from the outset of the encounter that he likely was suffering a mental health crisis. And, in pressing forward with their interrogation of defendant, police failed to take additional protective measures to ensure that defendant had the mental capacity to provide statements in custodial interrogation voluntarily, or that defendant sufficiently understood the nature of his *Miranda* rights such that he could validly waive them. In light of that, this court should affirm the Court of Appeals decision, articulating in the process a rule requiring police to take additional protective measures before interrogating a suspect whom police know may be suffering from serious mental illness. More specifically, this court should at a minimum require police to engage in a

video-recorded dialogue with such individuals in which police ask the individual to define in their own words the nature of their *Miranda* rights. That additional protective measure would go far in informing police whether the individual has the mental capacity to undergo voluntary custodial interrogation and whether the individual understands the nature of their *Miranda* rights sufficiently to make a valid waiver of them. It would also improve the ability of the courts to understand the critically important totality of circumstances under which a defendant was arrested and informed of Miranda rights. Such a holding would be consistent with existing federal and state precedent, and it would ensure adequate protection of the constitutional rights of persons suffering from mental illness.

A. Persisting to interrogate an individual in the midst of a mental health crisis without first taking additional protective measures is coercive conduct that may render a mentally ill individual's *Miranda* waiver involuntary.

Both Oregon state and federal law require consideration of a suspect's mental capacity in determining whether coercive conduct on the part of police renders a suspect's *Miranda* waiver involuntary. *See Connelly*, 479 US at 164 ("[A]s interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus." (Citing *Spano*, 360 US 315)); *Deford*, 177 Or App at 565 (explaining that "personal circumstances that may make a suspect less able to resist coercion are legally relevant" to the

voluntariness analysis in the presence of coercive conduct on the part of police). Put a different way, although coercive police conduct is always required to establish that a suspect's *Miranda* waiver was involuntary, conduct that may not be coercive to a suspect with unimpaired mental capacity may, in fact, be impermissibly coercive to a suspect with diminished mental capacity. *Deford*, 177 Or App at 565 ("The amount of pressure that police constitutionally may exert varies with the 'totality of the circumstances' surrounding a statement; the factors to be considered as a part of that totality include a suspect's age, education, and intelligence.").

As explained above, the circumstances surrounding custodial interrogation render even non-mentally ill individuals more susceptible to coercive interrogation tactics. *See, e.g.*, Scherr, 36 Law & Hum Behav at 280. When the individual suffers from mental illness—or when the defendant is actually in the midst of a complete break from reality, as the defendant in this case was—that susceptibility to police coercion is magnified. *See Police Induced Confessions* at 9.

In light of that scientific reality, this court should hold that, where police know or should know that a person likely is suffering from a serious mental illness, pressing forward in an interrogation of that person without taking additional protective measures constitutes impermissible coercive conduct. *Cf. Deford*, 177 Or App at 565; *accord Connelly*, 479 US at 164. What additional

protective measures are necessary will differ under the circumstances. At a minimum, however, officers should be required to engage in a dialogue with the suspect regarding the suspect's *Miranda* rights that includes having the suspect explain in their own words what those rights mean to them. *Cf. Deford*, 177 Or App at 573-74 (placing emphasis on fact that officer "slowly and carefully read the *Miranda* warnings to [the suspect], stopping after each one, and asking [the suspect] to define them," and holding the suspect's *Miranda* waiver valid, in part, because the suspect "was able to repeat each warning and to give appropriate definitions").[10] Absent affirmative confirmation that a mentally ill suspect has the present cognitive ability to comprehend and articulate the rights they are being asked to waive, the courts have no assurance that the suspect has the mental capacity to resist the "subtle forms of psychological persuasion" employed by interrogating officers and to provide voluntary statements in spite

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[10] *Amici* do not mean to suggest that simply having an individual repeat each right in their own words is sufficient, without more, to *create* a valid waiver in every case. The proposed dialogue is not a call and response ritual; it should instead be a two-way conversation in which each party hears and seeks to understand the other person. If adopted, this sort of interactive dialogue would reveal to law enforcement and to reviewing courts whether, in the first instance, a person is capable of waiving *Miranda* rights (or whether that person's misconception of their rights can be corrected so that they ultimately do comprehend their rights). As the research suggests, many mentally ill individuals exhibited a poor understanding of their rights when asked to repeat in their own words the *Miranda* protections. *See Knowing and Intelligent*, at 408. Thus, it is the substance of the accused's answers in response to a police officer's efforts to clarify understanding that ultimately will determine whether the accused voluntarily, knowingly, and intelligently waived their *Miranda* rights before submitting to an interrogation.

of those tactics. *Cf. Connelly*, 479 US at 164; *cf. also Police Induced Confessions*, at 6, 20 (describing the "Reid technique" of police interrogation).

B. When officers interrogate a mentally ill suspect, they must take additional protective measures to ensure that a *Miranda* waiver is knowing and intelligent.

As this court explained in *Deford*, to find that a suspect knowingly and intelligently waived their *Miranda* rights, the record must show that the suspect's decision to waive was "'made with full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.'" 177 Or App at 572-73 (quoting *Colorado v. Spring*, 479 US 564, 573 (1987)). For all of the reasons discussed in this brief, when police interrogate a suspect suffering from a serious mental health episode, there is a greater risk that that suspect does not fully understand their rights despite purporting to waive them. This court should therefore hold that police who seek to interrogate such suspects must take additional protective measures to ensure that any *Miranda* waiver is a knowing and intelligent one.

As with the voluntariness analysis, additional protective measures sufficient to confirm a suspect's capacity to waive may vary with the circumstances. But again, at a minimum, police should be required to engage in an additional dialogue with the suspect in which they ask the suspect to repeat in their own words what the *Miranda* rights mean to them. *Cf. Deford*, 177 Or App at 573 (emphasizing that the officer engaged in a similar dialogue in

concluding that the suspect validly waived *Miranda*). Absent additional protective measures, the state cannot carry its burden of proving that the defendant was fully aware of the nature of their rights and the consequences of abandoning them. *See id.* at 572-73.

C. The record in this case lacks sufficient evidence to conclude that defendant voluntarily, knowingly, and intelligently waived his *Miranda* rights.

As the Court of Appeals correctly determined, the trial court erred in concluding that the state had carried its "heavy burden" of establishing that defendant made a voluntary, knowing, and intelligent waiver of his *Miranda* rights. There can be no dispute that the law enforcement officers who encountered defendant knew that he was in the midst of a serious mental health episode.

Despite that knowledge, officers persisted in interrogating defendant without first taking additional protective measures necessary to ensure that defendant possessed sufficient mental capacity to undergo custodial interrogation or fully understand his rights. Instead, the officers treated defendant as they would have treated any other suspect; they read him his Miranda rights and then asked him whether he understood the rights that had been read. Crucially, officers did not make efforts to ensure that defendant understood the rights he was waiving, such as asking defendant to explain in his own words what those rights meant to him, as the officer had in *Deford*. And,

the interrogation was not recorded so the reviewing court could not assess the waiver in context. Without taking at least those additional protective measures, the officer's subjective belief that defendant had the ability to voluntarily, knowingly, and intelligently waive *Miranda* lacks a sufficient basis to conclude that his waiver was voluntary, intelligent, and knowing. Thus, the record in this case does not satisfy the state's "heavy burden" of establishing that defendant's *Miranda* waiver was valid. *See Miranda*, 384 US at 475. The trial court should have granted defendant's motion to suppress.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Oregon Justice Resource Center and Disability Rights Oregon respectfully request that this court affirm the decision of the Court of Appeals.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 8.15(3) n 5 and ORAP 5.05(2)(b)(i)(B) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 8866 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).

s/ Crystal S. Maloney
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CERTIFICATE OF FILING AND SERVICE

I certify that on April 3, 2018, I filed the original of this BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON JUSTICE RESOURCE CENTER AND DISABILITY RIGHTS OREGON with the State Court Administrator by the eFiling system.

I further certify that on April 3, 2018, I served a copy of the BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON JUSTICE RESOURCE CENTER AND DISABILITY RIGHTS OREGON on the following parties by electronic service via the eFiling system:

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