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IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR MARION COUNTY

STATE OF OREGON,

Plaintiff,

-VS-,

Defendant

CASE No. 13C41985

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S AMENDED MOTION TO SUPPRESS EVIDENCE, LIMITED TO ISSUE OF VOLUNTARINESS

MEMORANDUM OF LAW

In Oregon, a confession is initially presumed to be involuntary. *State v. Pollard,* 132 Or. App. 538 (1995). Before it can be received into evidence, the State must show that it was voluntarily given, that is, made without inducement through fear or promises, direct or implied. *State v. Aguilar*, 133 Or. App. 304, 307 (1995). To be voluntary, the confession must be "the product of an essentially free and unconstrained choice," which cannot occur if the defendant's will was overborne, or

his capacity for self-determination was critically impaired. Id. Usually, the court makes this determination based on the "totality of the circumstances" under which the statements were made. Id. Factors the courts have found relevant under a "totality of the circumstances" standard are discussed later in this memorandum. There is, however, one exception to employing the "totality of the circumstances" standard.

I. A Confession Or Admission Induced By An Express Or Implied Promise Of Leniency Is Involuntary As A Matter Of Law, And There Is No Resort To The "Totality Of The Circumstances" Analysis.

A confession induced by an express or implied promise of immunity is involuntary and inadmissible, *as a matter of law,* under both the Oregon Constitution, Article I, section 12, *Aguilar*, 133 Or. App. at 307; and under ORS 136.425(1), *State v. Powell*, 352 Or. 210 (2012); *State v. Ely,* 237 Or. 329, 332 (1964)(predecessor statute). When a confession to a crime is obtained as the result of an offer of immunity as to that crime, there is no further factual inquiry as to whether the confession was voluntarily made; the legal assumption is that the defendant's will was overborne. As a matter of law, the confession is held to be involuntary. *Aguilar*, at 307; *State v. Goree,* 151 Or App 621, 631-632 (1997). Only when the promise of leniency is made for a different crime than the confession elicited, does the court employ the "totality of the circumstances" test, with the promise then being part of the circumstances. *Goree,* 631-632.

If there is an implied promise of immunity or leniency, the only inquiry left is whether a person in the defendant's circumstances reasonably would have believed a promise was made and reasonably would have relied on that promise in making the

confession. *See Aguilar*, 133 Or. App. at 307-308; *Powell,* 352 Or. at 223 (ORS 136.425(1) requires an individualized inquiry into whether the alleged inducement was sufficiently compelling to influence the defendant's decision to confess).

Oregon courts have excluded admissions falling short of confessions, based on promises of leniency or other benefits falling short of immunity from prosecution. *Pollard*, 132 Or. App. at 543 (child murder-by-abuse case)("Admissions obtained by an express or implied promise of immunity or leniency are involuntary as a matter of law under the Oregon Constitution, Article I, section 12."); *Dorsciak v. Gladden,* 246 Or 233 (1967)(child rape case)(promise that judge would go easier on defendant if he confessed and pled guilty); *Powell, supra* (finding promise of keeping job and not informing wife of defendant's crime to be compelling).

In *Pollard*, the Court suppressed admissions obtained after the detective had made statements to the defendant quite similar to those made by to Defendant in offering to work things out as a family and get him help:

> "[DETECTIVE]: *Well, like I told you before, you're going to have to be up front with me or I can't help you.*
> "[DEFENDANT]: Ahm, I'm up front.
>
> * * * *
>
> "[DETECTIVE]: Ah, and like I said before, these things can happen and a man sometimes just isn't built to baby sit too well. You know what I mean?
> "[DEFENDANT]: Mh-hum.
> "[DETECTIVE]: And we get a little angry sometimes, so that's why I'm saying that if this happened, Ray, *let's get it over with. Let's get it done, get it up front and get on with your life and put your family back together.*
> "[DEFENDANT]: Yes, Sir.
>
> * * * *
>
> "[DETECTIVE]: [I]f something happened and you want to get this thing up front and get it taken care of, I can help you in that respect. *Because I can tell you, you know, that if you don't, they'll just take it to a grand jury. That's what we will do.*

> "[DEFENDANT]: Yeah.
> "[DETECTIVE]: *And if the Grand Jury thinks that you've done this, it makes it real rough.* But the thing at this particular point, you have an opportunity to step forward with this thing and face it.
> "[DEFENDANT]: Mh-hum.
>
> * * * *
>
> "[DEFENDANT]: And then it just runs down the family and it might, you know, I may have done it without thinking about it, you know. But as far as I know, ...
> "[DETECTIVE]: *This is what I'm trying to tell you, is you know, I can help you with that, but you've got to be totally honest with me.*
> "[DEFENDANT]: Yes, Sir.
> "[DETECTIVE]: And if, you know, if you lost it for a second and you shook the baby, that happens, and let's take it from there and work it out. Did it happen when you were angry, maybe?
> "[DEFENDANT]: It might have. I don't remember.
>
> * * * *
>
> "[DETECTIVE]: Well, we have excellent people here to help with that. They're available. *But we have to get through this portion of it before we can get to that part.*

State v. Pollard, 132 Or. App. at 545-547 (emphasis original)

The Court in *Pollard* rejected the State's claim that the detective had not made an implied promise of immunity: "That accords with the ostensibly sympathetic, 'these things happen' tenor of the parties' conversation in which the detective professed to empathize, man-to-man, with defendant's situation and repeatedly purported to be interested in 'helping' him." Id. at 548. The [] tried that tactic during most of their second phone conversation with Mr. Defendant.

In *State v. Capwell*, 64 Or. App. 710, 716 (1983), the Court suppressed admissions in a child sex abuse case, obtained by a police officer whose statements "contain[ed] the implication that, if defendant confessed, he would receive treatment, but, if he did not confess, he would face criminal prosecution," when the

officer told him that treatment was an option the court would consider in lieu of incarceration.

In *Dorsciak v. Gladden, supra*, the Supreme Court held a confession to child rape involuntary when the interrogating officer threatened publicity if the case went to trial, which the defendant repeatedly said he wanted to avoid, and also told him that if he both confessed and pled guilty, the judge would be easier on him. "The state's own evidence establishes that the statement was not made 'without the inducement of either fear or hope.' The hope of leniency from the judge if the defendant made a statement was held out. The fear of publicity about his daughters if he did not make a statement was emphasized by the interrogators." Id. at 240-241.

In addition to the state constitutional ground, Oregon has long followed the common law rule—now embodied in ORS 136.425(1)—requiring suppression of "[a] confession or admission . . . when it was made under the influence of fear produced by threats" or "induced by promises of leniency". *Powell*, 352 Or. at 218 (State acknowledged that under Oregon case law the statute, which speaks only of fear produced by threats, extended equally to promises of leniency). This common law turned statutory rule was intended to "to exclude potentially false—and thus unreliable—confessions from evidence." *Powell*, 352 Or. at 222-23 (citing Oregon cases recognizing this objective since 1929). "The rule has been stated thus: 'Was the inducement held out to the accused such as that there is any fair risk of a false confession? For the object of the rule is not to exclude a confession of the truth, but

to avoid a possibility of a confession of guilt from one who is in fact innocent.'" *State v. Linn*, 179 Or. 499, 507 (1946)(citation omitted).

A. Under Oregon Law, It Does Not Matter Whether The Promise Is Made By Law Enforcement Or By Private Individuals.

In Defendant's case, the State has stipulated that the [] were police agents during their conversations with Mr. Defendant that produced the confession or admissions at issue. The defense submits their status means that Article 1, section 12 applies, and their promise to resolve the matter "as a family" rather than turn it over to police and seek prosecution, if he confessed, was a clear promise of immunity by police agents that renders the confession involuntary as a matter of law.[1] *Pollard*, *supra*; *see, State v. Foster,* 303 Or. 518, 525 (1987)(*en banc*)(Article I, section 12 applies to individuals "acting under the orders or directions of, on in concert with, such a [state] officer or agent"). However, even if the [] are viewed as private persons rather than police agents, ORS 136.425(1)—which applies to both private individuals and law enforcement—requires suppression under *Powell* and *Ely.*

In *Powell,* the defendant was a FedEx employee who confessed to theft of packages when questioned at work by FedEx investigators, who did not have actual authority to decide whether the state would bring criminal charges. The investigators promised to handle the matter "in-house" and not turn him over to the police. The Supreme Court found that "although the FedEx investigators did not have any official

[1] "[H]ere's the deal, man. . . . [T]here's two roads diverging for me. One is . . . we make this a family matter and we talk it out right here, and you apologize, we forgive you, we figure out how to move forward from here. The other road is um, I got to take my daughter down to the, to the cops" (3rd call; p.5).

power to decide on behalf of the state whether to prosecute defendant for a crime, defendant here likely believed that if they refrained from pressing charges for the thefts, no one else would do so either." Id. at 224. The Court went on to observe:

> [T]he promise of avoidance of what otherwise appears to be imminent criminal prosecution may provide a compelling inducement for even an innocent person to confess. As an initial matter, avoiding criminal prosecution altogether would relieve an innocent person of the worry of being wrongly convicted—a real possibility which would weigh heavily upon even the cleanest conscience. In addition, a number of detrimental consequences accompany a criminal prosecution, even one that eventually results in a not guilty verdict. Regardless of guilt or innocence, there may be public records of the accusation and the arrest, time spent in jail before going to trial or obtaining bail, potential media coverage or social or reputational consequences, and the expense of obtaining counsel, in addition to the significant amount of personal time, stress, and energy that must be devoted to defending oneself against criminal charges. Id.

The Supreme Court then noted that the investigators made sure that Powell thought about the consequences of prosecution in considering their request for his confession:

> Here, the FedEx investigators made clear that defendant would suffer those sort of detrimental effects if they involved the police when they told him that if they turned the case over to the police, "[t]hey'll be going to get search warrants for your house, for your mother's house. They'll go through all of your stuff. It's just gonna be a big mess, okay?" The promise of avoidance of that invasion of privacy and humiliation of defendant and his family constitutes a compelling inducement to confess. The state's contention that the promise of avoiding criminal prosecution is insufficiently compelling to induce a confession is without merit. Id. at 224-225.

[] statements to Mr. Defendant are strikingly similar: [redacted]

Powell also examined "other compelling benefits unrelated to defendant's criminal prosecution, over which [the investigators] did have control," which were the likelihood defendant could keep his job, and also prevent his wife from finding out

which would benefit his marital relationship. 352 Or. at 225. The Court found "Those were compelling benefits when offered in exchange for defendant's confession, especially when coupled with the additional assurance that a confession would not result in criminal prosecution. Those promises were sufficiently compelling to induce a confession." Id.

In Mr. Defendant's case, the [] repeatedly offered him the compelling benefits of keeping their love and support—something he repeatedly stressed that he deeply wanted—if only he confessed, thereby sparing his family, [redacted], the trauma of a public prosecution: [redacted].

Powell relied on one additional fact in suppressing the confession that is identical to Mr. Defendant's case: That Powell staunchly denied any knowledge or involvement in the crime, until the investigators extended their promises to him. 352 Or at 225. [Redacted].

The fact that Mr. Defendant knew his calls with the [] were being recorded is insufficient to negate a reasonable reliance on their promise of avoiding criminal prosecution if he confessed. He and Mr. [] discussed how every call was recorded and therefore "saved," was different from calls being monitored by corrections staff. (3rd call, page 6). Mr. [] also disparaged the risk of police involvement based on their calls being recorded, stating, "I also know people that work in the prison system and they got better things to do than listen to every call from [] Correction Facility." (Id.) *Compare, Powell, supra,* where the Court found the defendant's reliance on avoiding prosecution was not defeated when the FedEx investigators assured the defendant

that the arrival of the police officer, who administered *Miranda* warnings, was just for "third-party documentation," and the officer told defendant he was "not necessarily" going to be arrested, and it was "ultimately up to your company how they want to handle this." 352 Or. at 228. Mr. Defendant could reasonably have believed that even if corrections officials happened to be listening, the [] would not cooperate with a prosecution. *See, Ely, supra,* wherein the Court suppressed the confession of a teacher to molesting a child, to his employer and the child's parent, who told him they planned no criminal prosecution if he confessed, although he would lose his job. "The defendant could have believed that if these three men would not prosecute him no one else was likely to do so." 237 Or at 334.

Mr. Defendant, knowing that his calls were being recorded but unlikely being monitored, faced a slight risk of police involvement should he confess. At the same time, he faced a promise of certain criminal prosecution if he did *not* confess. The promise of avoiding prosecution is sufficiently powerful to remain compelling even if a risk of prosecution remains. "The state's contention that the promise of avoiding criminal prosecution is insufficiently compelling to induce a confession is without merit." *Powell,* 352 Or. at 225. And here, as in *Powell,* there were other compelling benefits that the [] could deliver—the love and support of family that Mr. Defendant, isolated in prison, so deeply desired—even if police became involved.

B. Under Oregon Law, It Does Not Matter If The Promise Was Made During A Voluntary Conversation That The Defendant Was Free To Terminate.

The defendants in *Powell* and *Ely* were not in custody, free to terminate the confrontation at any time, and their confessions were suppressed. In *Pollard*, the statements were made during a 40-minute interview with a police detective and recorded; "Defendant, who was not in custody, submitted to the interview voluntarily." 132 Or. App. at 544. Powell and Ely were confronted by employers (plus the victim's parent in *Ely*), and presumably motivated by self-interest in not terminating the conversation and walking out on their jobs. Likewise, Mr. Defendant—once confronted by Mr. [] with the accusations during the first call—had to call back if he wished to continue trying to solve the problem by talking with the []; to not call back would be the equivalent of walking out on his family, and almost surely bring police involvement.

There is absolutely no evidence that Mr. Defendant would have continued to call back had he been advised the [] were police agents. Indeed, when Det. Bennett attempted to interview him about a week later, Mr. Defendant declined to make any statements.

After his ambiguous apology at the end of the third call, Mr. Defendant called back a fourth and final time to try to speak with his sister. However, Mr. [] again monopolized most of the conversation, and elicited additional admissions from Mr. Defendant. *Powell* makes clear that those admissions are "presumptively inadmissible" and must be suppressed, even though there was a "break in the interrogation," unless

the State can prove by "clear evidence" that "the delusive hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled." 352 Or. at 227 (citation omitted)(finding subsequent statements obtained by police officer after *Miranda* warnings not sufficient to dispel the improper influence that induced defendant's previous statements).

II. Voluntariness under the "Totality of the Circumstances" Test

The Oregon test for voluntariness is broader than the determination of voluntariness under the federal Due Process Clause. The federal rule is only triggered by coercive government conduct in obtaining the confession that violates constitutional standards of fairness, irrespective of the truth or falsity of the confession. Oregon law provides for suppression of statements induced by promises or threats from private citizens not acting as police agents, and specifically requires the Court to evaluate the risk of a false confession. *See Powell, supra; Ely, supra*; *Linn, supra.*

> As our cases consistently have recognized, confessions are unreliable when rendered under circumstances in which the confessor perceives that he or she may receive some benefit or avoid some detriment by confessing, regardless of the truth or falsity of the confession. Whether the person offering the benefit or threatening the detriment or the person to whom the confession is made are state actors or private persons is not, in itself, determinative of the reliability of the confession. *Powell,* 352 Or. at 223.

Powell makes clear that the promised benefits trial courts must consider extend to those of a personal nature, unrelated to immunity or leniency in a criminal prosecution. Id. at 225 (benefit of keeping job and avoiding marital conflict). Thus, assuming *arguendo* that the [] did *not* promise avoidance of prosecution upon which

Mr. Defendant reasonably could have relied, but only the benefits of family love and support, those promised benefits must be weighed in determining voluntariness.

Police deception weighs against a finding of voluntariness. *State v. Cochran*, 72 Or.App. 499, 512 (1985). The federal cases cited by *Cochran* to illustrate police deception are *Massiah v. United States,* 377 U.S. 201 (1964); *Spano v. New York,* 360 U.S. 315 (1959); *Leyra v. Denno,* 347 U.S. 556 (1954). All of those cases involved persons other than police purporting to want to help the defendant while secretly working as police agents. "A form of deception that totally undermines the fifth or sixth amendment protections available to an individual occurs when the police deceive a suspect about whether an interrogation is taking place." *Cochran*, at 513 (citation omitted). Clearly, that occurred in Mr. Defendant's case.

Coercive interrogation techniques are among the factors to consider in determining voluntariness, even if "[n]o one of these interrogation techniques, by itself, would necessarily have overborne defendant's will. Under the 'totality of circumstances' test, however, we do not consider interrogation techniques one by one." Id., at 516. The defense will offer testimony on coercive interrogation techniques used by the Spanglers, acting as police agents, at hearing on this motion.

Psychological coercion, even if not so great as to by itself overbore a suspect's will, is a factor. "[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." *Colorado v. Connelly*, 479 U.S. 157, 164 (1986). The danger of psychological coercion increases when police agents

purposefully use or exploit the known weaknesses of a suspect to obtain a confession. Id. at 164-165. In addition, the peculiar susceptibility of the person interrogated to the coercive methods must be considered if offered by the defense. *See, State v. Kinkade,* 59 Or. App. 192, 196 (1982)(factors include psychological coercion and "both the character of the accused and the details of the interrogation").

A defendant's emotional condition is a factor to consider, and may alone render a confession involuntary. *See, State v. Farmer*, 65 Or. App. 336, 339-40 (1983)(extreme emotional disturbance caused defendant to lack the capacity to make her incriminating statements to police voluntarily).

> " 'Extreme emotional disturbance' has been defined as:
> " '* * * the emotional state of an individual who: (a) has no mental disease or defect (that rises to the level established by statute defining lack of criminal responsibility); (b) is exposed to an extremely unusual and overwhelming stress; and (c) has an extreme emotional reaction to it, *as a result of which there is a loss of self-control and reason is overborn* by intense feelings, such as passion, anger, distress, grief, excessive agitation or other, similar emotions * * *.' Id at 339 (citations omitted).

Mr. Defendant, isolated from family and friends and undergoing his first incarceration, suddenly accused of [], and threatened with public prosecution, humiliation and loss of family love and support, certainly experienced "an extremely unusual and overwhelming stress," sufficient to result in extreme emotional disturbance.

RESPECTFULLY SUBMITTED this 5th day of January, 2014.

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