

Filed: July 28, 2022

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Adverse Party,

v.

RANDY GRAY,

Defendant-Relator.

(CC 21CR19107) (SC S068673)

En Banc

Original proceeding in mandamus.*

Argued and submitted February 23, 2022.

Rian Peck, Visible Law LLC, Portland, argued the cause and filed the brief for defendant-relator. Also on the brief was Christopher Marin Hamilton, CBMH Law, Portland.

Paul L. Smith, Deputy Solicitor General, Salem, argued the cause and filed the brief for plaintiff-adverse party. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Cassidy Rice, Portland, filed the brief for *amici curiae* American Civil Liberties Union of Oregon and Oregon Criminal Defense Lawyers Association.

GARRETT, J.

A peremptory writ will issue.

*On petition for alternative writ of mandamus from an order of the Multnomah County Circuit Court, Angel Lopez, Judge.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Relator.

☒ No costs allowed.

☐ Costs allowed, payable by:

☐ Costs allowed, to abide the outcome on remand, payable by:

1 GARRETT, J.

2 This matter is before us as an original mandamus proceeding. *See Or*
3 *Const*, Art VII (Amended), § 2. Relator invoked his statutory right to appear before the
4 grand jury that was considering whether to indict him on felony charges. Relator also
5 sought to have his counsel present in the grand jury room during his testimony. After the
6 trial court denied his motion to allow counsel to appear, relator sought mandamus relief
7 from this court. We allowed an alternative writ and now conclude that, on the facts
8 presented here, Article I, section 11, of the Oregon Constitution entitles relator to have
9 his counsel present in the grand jury room during his testimony.

10 I. FACTS

11 The relevant facts are procedural and undisputed.

12 Relator is the defendant in the underlying case in Multnomah
13 County Circuit Court. In April 2021, he was charged by district attorney's information
14 with (among other things) the felony of assaulting a public safety officer, ORS 163.208.

15 A district attorney's information may initiate a felony prosecution. *See*
16 ORS 131.005(9)(a), (b) (defining "district attorney's information"); *Or Const*, Art VII
17 (Amended), § 5(4), (5) (listing circumstances when information may serve as accusatory
18 instrument). With certain exceptions, however, felony charges can go to trial only on
19 indictment by the grand jury. *Or Const*, Art VII (Amended), § 5(3) (a person may be
20 charged with a felony "only on indictment by a grand jury").

21 Shortly after the information was filed, relator's defense counsel notified
22 the district attorney that relator intended to appear as a witness before the expected grand

1 jury proceeding. Such an appearance is authorized by ORS 132.320(12)(a), which
2 provides in part:

3 "A defendant who has been arraigned on an information alleging a
4 felony charge that is the subject of a grand jury proceeding and who is
5 represented by an attorney has a right to appear before the grand jury as a
6 witness if, prior to the filing of an indictment, the defense attorney serves
7 upon the district attorney written notice requesting the appearance."

8 In addition to giving notice that relator would exercise his statutory right to
9 appear, relator's counsel later emailed the district attorney, expressing relator's desire to
10 have his counsel present in the grand jury room and asserting that he had a right to the
11 presence of counsel under the Sixth Amendment to the United States Constitution. The
12 district attorney did not agree to counsel being in the grand jury room.

13 Relator then filed a motion in the trial court for an order allowing counsel
14 to attend. He noted that his right to counsel had already attached. He contended that the
15 Sixth Amendment to the United States Constitution meant that the exercise of his
16 statutory right to testify before the grand jury carried with it a right to have counsel
17 present. A defendant has a right to the presence of counsel at all "critical stages" of a
18 criminal prosecution. *See, e.g., Rothgery v. Gillespie County*, 554 US 191, 212 & n 16,
19 128 S Ct 2578, 171 L Ed 2d 366 (2008) (summarizing "critical stages"). Relator's written
20 argument asserted a right to counsel only under the federal constitution; he did not, at that
21 time, assert any claim under state law.

22 The state objected to the motion on the ground that, by statute, grand jury
23 proceedings are closed to all but certain designated persons, of whom a witness's attorney
24 is not one. *See* ORS 132.090(1) (subject to certain limited exceptions, "no person other

1 than the district attorney or a witness actually under examination shall be present during
2 the sittings of the grand jury"). In the state's view, while ORS 132.320(12) allowed
3 relator to testify, it did not provide for relator's counsel to be admitted into the room, and
4 the legislative history showed that the legislature did not expect counsel to be allowed
5 entry. The state contended that relator's constitutional argument was incorrect under
6 *State v. Miller*, 254 Or 244, 249, 458 P2d 1017 (1969) (grand jury is a "closed and
7 nonadversary proceeding").

8 At the hearing, relator made the additional argument that the Oregon
9 Constitution gave him the right to have his counsel present in the grand jury room. He
10 also expanded on his contention about what that right entailed, arguing for the first time
11 that his counsel could not only be present but could take an active role, including
12 objecting to questions and directing relator not to answer questions.

13 The trial court denied relator's motion, ruling that relator's exercise of his
14 statutory right to appear before the grand jury did not entitle him to have his counsel
15 present in the room with him, but that counsel could wait outside and be available for
16 consultation.

17 Relator then filed this proceeding, seeking a writ of mandamus directing the
18 trial court to grant his motion. We allowed an alternative writ, and after briefing and
19 argument, the matter is now before us. Relator contends that the trial court erred, and
20 that relator's appearance before the grand jury, though voluntary, is nonetheless a "critical
21 stage" of the prosecution that entitles him to have his counsel present in the grand jury
22 room. The state argues that the legislature, in enacting the statute that gives relator the

1 right to testify, did not create a *statutory* right to have counsel present, and that relator's
2 exercise of his statutory right to appear does not trigger a *constitutional* right to have his
3 counsel present in the room with him.

4 II. DISCUSSION

5 A. *Overview of Grand Juries in Oregon*

6 "The origin of the grand jury is veiled in obscurity." *State v. Gortmaker*,
7 295 Or 505, 510, 668 P2d 354 (1983), *cert den*, 465 US 1066 (1984) (footnote omitted);
8 *see id.* at 510-12 (reviewing available history). The cases agree, however, that the grand
9 jury serves a "high function," not only of bringing to trial those persons justly accused of
10 crimes, but also of safeguarding the citizenry against arbitrary, malicious, or unfounded
11 prosecutions. *Id.* at 512; *see United States v. Mandujano*, 425 US 564, 571, 96 S Ct
12 1768, 48 L Ed 2d 212 (1976) (describing grand jury as "an integral part of our
13 constitutional heritage" whose "historic office has been to provide a shield against
14 arbitrary or oppressive action, by insuring that serious criminal accusations will be
15 brought only upon the considered judgment of a representative body of citizens acting
16 under oath and under judicial instruction and guidance"); *State v. Burleson*, 342 Or 697,
17 703, 160 P3d 624 (2007) (grand jury "serves a crucial role in protecting individual
18 liberties" by being "a brake on the state's potential abuse of the accusatory process").

19 The institution of the grand jury is provided for in the Oregon Constitution,
20 which also gives the legislature authority to enact implementing legislation. *See Or*
21 *Const*, Art VII (Amended), § 5(1)(b) (permitting legislature to enact statutes for
22 "[d]rawing and summoning grand jurors").

1 The grand jury is composed of seven persons sworn to inquire of crimes
2 committed or triable in the relevant county. Or Const, Art VII (Amended), § 5(2); ORS
3 132.010. The crimes may be submitted to the grand jury by the district attorney, ORS
4 132.330, or by a member of the grand jury, ORS 132.350.

5 In Oregon, a felony may be charged initially by the mechanism of either a
6 grand jury indictment or a district attorney information. *See* ORS 131.005(9)(b) (for
7 felonies, district attorney information "serves to commence an action, but not as a basis
8 for prosecution thereof"). With certain exceptions, however, felony charges in the state
9 can only go to trial on indictment by the grand jury. Or Const, Art VII (Amended),
10 § 5(3) (a person may be charged with a felony "only on indictment by a grand jury").
11 The exceptions are where the person waives indictment, *id.* § 5(4), or after a preliminary
12 hearing where a magistrate finds probable cause that the person committed a crime
13 punishable as a felony, *id.* § 5(5) (or the person waives a preliminary hearing).

14 The grand jury considers whether "all the evidence before it, taken together,
15 is such as in its judgment would, if unexplained or uncontradicted, warrant a conviction
16 by the trial jury." ORS 132.390. If the grand jury decides to indict, then it endorses the
17 indictment as a "true bill." ORS 132.400. If the grand jury decides not to indict, then it
18 endorses the indictment as "not a true bill," the effect of which is to dismiss any pending
19 charge against the defendant. ORS 132.430. Five grand jurors must concur to indict a
20 defendant. Or Const, Art VII (Amended), § 5(2); ORS 132.360.

21 The grand jury hears the testimony of witnesses under oath. *See* ORS
22 132.100 (requiring foreperson to administer oath to any witness). The testimony is

1 recorded and, in some circumstances, may be used as evidence against the defendant at
2 trial. ORS 132.250(1)(a) (district attorney's duty to have proceedings recorded); ORS
3 132.260(1)(b), (c) (record must include "[t]he name of each witness appearing before the
4 grand jury" and "[e]ach question asked of, and each response provided by, a witness");
5 ORS 132.270(7)(a) (permitting recording to be used as provided in several identified
6 sections of the Oregon Evidence Code).

7 The district attorney¹ has an active role in grand jury proceedings. The
8 district attorney is required to "attend upon and advise the grand jury when required."
9 ORS 8.670. He or she may submit indictments to the grand jury. ORS 132.330.

10 In general, the district attorney conducts the examination of witnesses
11 before the grand jury. ORS 132.340 ("when required by the grand jury," the district
12 attorney "must * * * attend its sittings * * * to examine witnesses in its presence"). The
13 district attorney is thus excepted from the prohibition against persons being present when
14 the grand jury is taking testimony:

15 "Except as provided in subsections (2) and (3) of this section and
16 ORS 132.250 and 132.260, no person other than the district attorney or a
17 witness actually under examination shall be present during the sittings of
18 the grand jury."

19 ORS 132.090(1).² The grand jurors are not required to rely on the district attorney's

¹ A deputy district attorney may also perform that duty. *See* ORS 8.780 ("[S]ubject to the direction of the district attorney, [a deputy district attorney] has the same functions as the district attorney.").

² An interpreter may attend. ORS 132.090(3). If approved by the circuit court, a child up to the age of 12 or an intellectually disabled person may be accompanied

1 questioning, however; they may question the witnesses themselves. *See Miller*, 254 Or at
2 249 (noting that person testifying before grand jury would be "subject to questioning by
3 the district attorney and the grand jurors").

4 B. *Defendant's Statutory Right to Testify Before Grand Jury*

5 The case before us arises from a relatively recent statutory change to grand
6 jury proceedings. In 2015, the legislature granted defendants the right, codified at ORS
7 132.320(12), to appear and testify in grand jury proceedings when a defendant has been
8 arraigned on a felony allegation and is represented by counsel. It is undisputed that
9 relator gave proper written notice of his intention to exercise that right. The dispute
10 concerns whether relator's exercise of that right carries with it a right to have his counsel
11 present in the grand jury room during relator's testimony. In the discussion below, we
12 begin with the legislature's enactment of the statute in 2015. Although neither party
13 argues that that statute directly or fully answers the constitutional right-to-counsel
14 question, it is relevant context for our consideration of that question. *See State v. Davis*,
15 350 Or 440, 478, 256 P3d 1075 (2011) (when right to counsel has attached, court
16 "evaluate[s] the particular circumstances, the nature of the evidence, and the like to
17 determine the scope of the right to counsel" (citations omitted)).

18 The relevant statutory text regarding a defendant's right to testify is
19 contained in ORS 132.320(12). That subsection provides:

20 "(12)(a) A defendant who has been arraigned on an information

by a parent or guardian. ORS 132.090(2). To address a witness's needs, the circuit court
may also authorize a guard or medical or special attendant to attend. *Id.*

1 alleging a felony charge that is the subject of a grand jury proceeding and
2 who is represented by an attorney has a right to appear before the grand
3 jury as a witness if, prior to the filing of an indictment, the defense attorney
4 serves upon the district attorney written notice requesting the appearance.
5 The notice shall include an electronic mail address at which the defense
6 attorney may be contacted.

7 "(b) A district attorney is not obligated to inform a defendant that a
8 grand jury proceeding investigating charges against the defendant is
9 pending, in progress or about to occur.

10 "(c) Upon receipt of the written notice described in paragraph (a) of
11 this subsection, the district attorney shall provide in writing the date, time
12 and location of the defendant's appearance before the grand jury to the
13 defense attorney at the indicated electronic mail address. In the event of a
14 scheduling conflict, the district attorney shall reasonably accommodate the
15 schedules of the defendant and the defense attorney if the accommodation
16 does not delay the grand jury proceeding beyond the time limit for holding
17 a preliminary hearing described in ORS 135.070(2).

18 "(d) Notwithstanding ORS 135.070 and paragraph (c) of this
19 subsection, in order to accommodate a scheduling conflict, upon the request
20 of the defendant the time limit for holding a preliminary hearing described
21 in ORS 135.070(2) may be extended by a maximum of an additional five
22 judicial days and the district attorney and the defendant may stipulate to an
23 extension of greater duration. During a period of delay caused by a
24 scheduling conflict under this subsection, ORS 135.230 to 135.290 shall
25 continue to apply concerning the custody status of the defendant."

26 Textually, ORS 132.320(12) does not address whether defense counsel may
27 be present in the grand jury room when the defendant testifies. But defense counsel has a
28 central role in the entire right. To begin with, the very existence of the right to testify is
29 made contingent on the defendant having defense counsel. ORS 132.320(12)(a)
30 (defendant's right to testify applies only if defendant "is represented by an attorney"). It
31 is defense counsel who is authorized to give the district attorney notice if the defendant
32 wants to testify. *Id.* It is defense counsel who receives the notice from the district
33 attorney of when the defendant will appear. ORS 132.320(12)(c). In the event of a

1 scheduling conflict, the district attorney must reasonably accommodate the schedules of
2 both the defendant and defense counsel. *Id.* The role accorded to defense counsel --
3 especially the last point, that the district attorney must make efforts to schedule the
4 defendant's testimony in a manner that also accommodates the schedule of defense
5 counsel -- at least raises the question whether the legislature expected that defense
6 counsel would be present in the grand jury room for the defendant's testimony.

7 That possible inference from the text, however, is countered by the
8 statutory context. The legislature has been quite clear in identifying who may, and who
9 may not, be present in the grand jury room. *See* ORS 132.090 (so providing). No
10 statutory provision authorizes a witness to have counsel present in the room.

11 The legislative history of ORS 132.320(12) confirms that conclusion. The
12 statutory right to testify set out in ORS 132.320(12) was introduced as Senate Bill (SB)
13 825 (2015), and enacted by Oregon Laws 2015, chapter 586, section 1 (it has not been
14 amended since). The testimony indicated that there was an existing but varying practice
15 in Oregon of allowing defendants to voluntarily testify before a grand jury. If a
16 defendant asked to testify, district attorneys would often grant the request.³ The concern

³ The practice had been noted in passing in *Miller*, 254 Or at 249 (mentioning possibility that a defendant might "voluntarily testify" before grand jury). The witnesses before the legislature agreed that it happened; they disagreed only on how frequently a prosecutor declined to let the witness testify. *Compare* Audio Recording, House Committee on Judiciary, SB 825, May 13, 2015, at 0:30:45 (statement of Jeff Howes, First Assistant to Multnomah County District Attorney), <https://olis.oregonlegislature.gov> (accessed July 21, 2022) ("[I]f the defense attorney would make that overture, 'my client would like to come testify,' I don't know of a prosecutor personally that would turn that down."), *with id.* at 0:49:20 (statement of Jason

1 was that it was not a consistent practice; the statute was intended to formalize the practice
2 and make it uniform.

3 The legislative history is clear on the issue before us: Although the
4 legislature intended to formalize a defendant's right to appear before the grand jury and
5 testify, that intent did not include the right to have counsel present in the room during that
6 testimony. More than one legislator commented on that aspect of the bill. For example,
7 at a public hearing before the House Committee on the Judiciary, Representative Barton
8 confirmed that the bill made no provision for defense counsel in the room:

9 "Just in case the Court of Appeals ever reviews this transcript, I want to be
10 very clear that the bill that we are reviewing right now does not provide
11 defense counsel entry into the grand jury room."

12 Audio Recording, House Committee on Judiciary, SB 825, May 13, 2015, at 0:24:25
13 (statement of Rep Brent Barton), <https://olis.oregonlegislature.gov> (accessed July 21,
14 2022). He then expressed his concern about the absence of counsel when the defendant
15 would be testifying under oath:

16 "It's in the interest of the accused that I am extremely reluctant. I've never
17 practiced criminal defense law. But you don't have to be Clarence Darrow
18 to figure out that having your client cross-examined on record under oath,
19 in ways that are coming in at trial, without you being there, only bad things
20 can happen. And it just seems like there's no better way for an innocent
21 person to go to jail than for them to go in and do this. It makes me
22 extremely nervous on behalf of your clients."

23 *Id.* at 0:25:30. Gail Meyer, appearing as a witness on behalf of the Oregon Criminal

Short) ("I've asked for my clients to testify before the grand jury, and that's been
denied. * * * I've also asked, and it's been accommodated.").

1 Defense Lawyers Association (OCDLA), responded:

2 "This is a reform that is very much embraced by the National Association
3 of Criminal Defense Lawyers, and the American Bar Association got there
4 first [*i.e.*, had already proposed it]. And the reason is, once the indictment
5 is returned, all hell breaks loose. I mean it just does. And if there is an
6 explanation that can be provided by the target of the grand jury -- 'consider
7 this from my vantage point, I understood that I was under fear of bodily
8 harm if I didn't do X' -- that is something for the grand jury to consider
9 before the indictment. And so this is a reform that is very much embraced.
10 And again, it's embraced by a wide spectrum of organizations. But it's fully
11 vetted by the defense bar and it's a national concern. And there are some
12 states that are doing this. And again, Representative Barton -- * * * this
13 does occur in Oregon. It's not like we're inventing an opportunity that
14 doesn't happen. What the bill attempts to do is structure it, so that there
15 isn't ad hoc, disparate application of this around the state."

16 *Id.* at 0:26:05.

17 The legislative history further shows that the legislature declined to have
18 the defendant's testimony conducted in the form of direct and cross examinations. As
19 introduced, the bill had permitted a defendant to first "give evidence" to the grand jury,
20 then be examined by prosecutor and grand jury. The introduced bill would have
21 amended ORS 132.320 to include a subsection (12)(e) providing:

22 "When the defendant appears as a witness before the grand jury
23 pursuant to this subsection, the defendant shall be permitted to give any
24 relevant and competent evidence concerning the charges under
25 consideration and, after giving evidence, is subject to examination by the
26 district attorney and the grand jury."

27 SB 825 (2015), Introduced. That provision was deleted, however. *See* SB 825 (2015),
28 House Amendments to A-Engrossed (June 1, 2015). As the legislative history shows,
29 both the prosecutors' bar and the defense bar thought it was unnecessary, even without
30 counsel in the room. The prosecution believed it would allow a defendant to engage in

1 unconstrained speechmaking. Audio Recording, House Committee on Judiciary, SB 825,
2 May 13, 2015, at 0:10:25 (statement of Gail Meyer, OCDLA) ("The district attorneys
3 were concerned that this language allowed the defendant to simply give a monologue --
4 their phrase, 'to speechify' -- and *then* be subject to cross-examination." (Emphasis in
5 original.)). The defense bar expected defense counsel to be working with the prosecutor
6 before any testimony is given. Counsel would thus be aware if the prosecutor was likely
7 to treat the defendant as a hostile witness and seek only to obtain incriminating
8 confessions, and presumably counsel would then discourage the defendant from
9 testifying.⁴

10 In summary, then, the legislative history confirms what the text and context
11 suggest: The statutory right to appear before the grand jury does not also entail a
12 statutory right to have counsel present in the grand jury room during the testimony. It
13 also shows that the legislature expected the defendant to testify in the same manner as
14 other witnesses.

15 C. *State Constitutional Right to Counsel*

16 Having concluded that the statute giving relator the right to appear before

⁴ As Meyer would later testify:

"[U]sually you would never get your client in without having discussed this pretty much in-depth with the district attorney before you do it. And our thought is, if you really have a very hostile district attorney, you probably aren't going to agree to do this."

Audio Recording, House Committee on Judiciary, SB 825, May 13, 2015, at 0:42:15 (statement of Gail Meyer).

1 the grand jury makes no provision for his counsel to be present, we turn to relator's
2 constitutional arguments. As we will explain, we agree with relator that he has a state
3 constitutional right to have his counsel present in the grand jury room during his
4 testimony, although, contrary to relator's argument, that right is limited to having counsel
5 advise and direct relator regarding his testimony. Because we conclude that such a right
6 exists under the state constitution, and because relator does not argue that he would be
7 entitled to any additional or greater relief under the federal constitution, we have no need
8 to address relator's argument under the Sixth Amendment. *See State v. Cookman*, 324 Or
9 19, 32 n 15, 920 P2d 1086 (1996) (when court held that application of statute violated
10 state constitutional prohibition against *ex post facto* laws, court did not need to consider
11 whether it also violated federal prohibition against *ex post facto* laws); *State v. Medinger*,
12 235 Or App 88, 92 n 1, 230 P3d 76 (2010) (accepting argument that, "because the federal
13 [legal] standard is less stringent" than Oregon law, determination that arrest was not
14 supported by probable cause under Oregon law obviated need to reach federal question).

15 1. *Overview*

16 The right to counsel is set out in Article I, section 11, of the Oregon
17 Constitution.⁵ It provides in part:

18 "In all criminal prosecutions, the accused shall have the right * * * to

⁵ We note that an implicit right to counsel is found in the right against self-incrimination in Article I, section 12, of the Oregon Constitution. *See, e.g., State v. Scott*, 343 Or 195, 200, 166 P3d 528 (2007) (explaining that "[t]he right against self-incrimination [in Article I, section 12] includes a derivative right to counsel during custodial interrogation," and discussing cases). Relator makes no argument under Article I, section 12, and accordingly, we do not address it.

1 be heard by himself and counsel[.]"

2 This court has repeatedly addressed the meaning of that provision,
3 including in *Davis*, 350 Or 440, and *State v. Prieto-Rubio*, 359 Or 16, 376 P3d 255
4 (2016). In *Davis*, this court examined the provision's text, its history, and this court's
5 prior case law interpreting it, then used the identified underlying principles to inform how
6 the court should apply them to modern circumstances. *See Davis*, 350 Or at 446
7 (summarizing steps and citing cases);⁶ *id.* at 462-77 (analyzing those steps in connection
8 with right to counsel under Article I, section 11). In *Prieto-Rubio*, this court followed
9 *Davis* and applied it in a different context. Although the precise holdings of both cases
10 are not on point, they analyzed the history and purposes of the right in a way that is
11 helpful to considering the issue before us.

12 In brief: The right to counsel had been understood historically to focus on
13 *trial*. *See Davis*, 350 Or at 464 (summarizing conclusions from text); *id.* at 468
14 (summarizing history); *id.* at 472-73 (summarizing early Oregon caselaw); *see also*

⁶ Earlier cases had addressed Article I, section 11, but *Davis* was the first to do so using the approach to constitutional interpretation summarized in *Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (1992) (the "three levels" of analysis for a state constitutional provision are "[i]ts specific wording, the case law surrounding it, and the historical circumstances that led to its creation"). *See Davis*, 350 Or at 462 (noting that court had never previously applied that methodology to Article I, section 11). In applying that methodology, we seek "to understand the wording in the light of the way that wording would have been understood and used by those who created the provision, and to apply faithfully the principles embodied in the Oregon Constitution to modern circumstances as those circumstances arise." *State v. Hirsch / Friend*, 338 Or 622, 631, 114 P3d 1104 (2005), *overruled in part on other grounds by State v. Christian*, 354 Or 22, 40, 307 P3d 429 (2013) (internal quotation marks and citations omitted).

1 *Prieto-Rubio*, 359 Or at 24 (same). Changes in the nature of criminal prosecutions and
2 law enforcement, however, led first the United States Supreme Court and then this court
3 to extend the right to certain pretrial proceedings. *Davis*, 350 Or at 469-71 (summarizing
4 United States Supreme Court caselaw); *id.* at 473-76 (summarizing this court's prior
5 caselaw); *see Prieto-Rubio*, 359 Or at 24-25 (same).

6 A defendant's right to counsel under both the state and federal constitutions
7 generally begins when criminal proceedings have been initiated, at which point the right
8 is said to attach. *See Davis*, 350 Or at 471 (discussing federal cases); *id.* at 473-77
9 (discussing state cases). Yet the attachment of the right to counsel is separate from the
10 scope of that right: Even after the right has attached, not all pretrial proceedings require
11 the presence of defense counsel. *Id.* at 471-72 (federal law); *id.* at 476-77 (state law).
12 The right to have counsel *present* exists only as to those pretrial proceedings that
13 implicate the need to protect a defendant's right to a fair trial.

14 In *State v. Newton*, 291 Or 788, 636 P2d 393 (1981), *overruled in part on*
15 *other grounds by State v. Spencer*, 305 Or 59, 750 P2d 147 (1988), a plurality of this
16 court used language drawn from the United States Supreme Court's Sixth Amendment
17 cases to express the relevant standard for when a defendant has a right to the presence of
18 counsel under Article I, section 11:

19 "Any pre-trial adversarial contact of the state and a defendant at which
20 some benefit of counsel would be lost if counsel is not present, that is, at
21 which the state's case may be enhanced or the defense impaired due to the
22 absence of counsel, may be considered a critical stage of the prosecution at
23 which defendant has a right to the presence of counsel."

24 *Newton*, 291 Or at 802-03 (giving as examples the surreptitious questioning of an

1 indicted defendant, and the participation of a defendant in a post-indictment lineup
2 identification). Later cases reiterate the same standard in different words, but always
3 focusing on whether the absence of counsel would risk prejudice to the defendant's legal
4 interests. *See State ex rel. Russell v. Jones*, 293 Or 312, 315, 647 P2d 904, 905 (1982)
5 ("[A] criminal defendant's guarantee of the assistance of counsel exists at least at all court
6 proceedings from arraignment through probation revocation as well as all post-indictment
7 out-of-court critical stages where, without the assistance of counsel, the legal interests of
8 the defendant might be prejudiced."); *State v. Sparklin*, 296 Or 85, 93, 672 P2d 1182
9 (1983) ("[O]nce a person is charged with a crime he or she is entitled to the benefit of an
10 attorney's presence, advice and expertise in any situation where the state may glean
11 involuntary and incriminating evidence or statements for use in the prosecution of its case
12 against defendant."); *Prieto-Rubio*, 359 Or at 25 ("[U]nder Article I, section 11, the scope
13 of the right to counsel encompasses stages in criminal proceedings in which counsel's
14 presence could prevent prejudice to a defendant.").

15 2. *Application*

16 In this context, one of the first questions to consider is whether there is a
17 "criminal prosecution[]," because the text of Article I, section 11, makes the right to
18 counsel applicable only in that instance. It is not disputed that relator, having already
19 been formally charged by a district attorney's information, is the accused in a criminal
20 prosecution. It is also undisputed that relator's right to counsel has attached.

21 We turn, then, to the question whether relator's voluntary testimony before
22 the grand jury is such that he has a right to have counsel present in the grand jury room

1 during that testimony. We conclude that he does.

2 As a preliminary matter, we note that this situation appears to fall squarely
3 within the text of Article I, section 11. In *State ex rel. Russell*, this court addressed
4 whether the defendant had the right to the presence of counsel at a presentence interview
5 before a probation officer. We began with what we called the "short answer." As Article
6 I, section 11, provides that an accused has the right "to be heard by himself and counsel,"
7 "[a] short answer, therefore, is that counsel cannot be excluded from any
8 stage of the criminal prosecution at which a defendant is to be 'heard[.]'"
9 293 Or at 315.

10 Such a simplistic approach does not fully represent the more detailed legal
11 test set out in our caselaw, discussed above. But it does offer some support for relator's
12 position, which we now consider in light of that more detailed framework.

13 As noted above, a defendant generally has the right to the presence of
14 counsel during a proceeding when the presence of counsel could protect a defendant
15 against prejudice as to the criminal charges. See *Prieto-Rubio*, 359 Or at 25 (right to
16 counsel exists where "counsel's presence could prevent prejudice to a defendant");
17 *Newton*, 291 Or at 802-03 (defendant has right to presence of counsel when "the state's
18 case may be enhanced or the defense impaired due to the absence of counsel").

19 Here, relator will be questioned by the district attorney, and under oath.
20 That testimony will be recorded, and it could be used against relator at trial. As sworn
21 testimony in response to the district attorney's questions, the proceeding has similarities
22 to a defendant taking the stand at trial. The opportunities for prejudice are manifest: The

1 defendant might waive an evidentiary privilege by failing to claim it, or he might make
2 statements against interest, or he might present testimony in a way that contradicts (or
3 seemingly contradicts) any later testimony at trial. The state is correct that the
4 legislature, in enacting ORS 132.320(12), did not intend to convert the grand jury into an
5 "adversarial" proceeding. And the legislative history reflects an expectation that, in the
6 main, defendants will not choose to appear before grand juries in circumstances where
7 the interactions are expected to be particularly adversarial. At the same time, we cannot
8 ignore the fact that a defendant who exercises the statutory right to appear will already
9 have been charged with a crime. That fact alone lends an inherently adversarial quality to
10 a prosecutor's questioning of the defendant that is not present with respect to any other
11 witness.

12 We also agree with relator that counsel's presence in the grand jury room
13 during the defendant's testimony would lessen the risk of prejudice. In *State ex rel.*
14 *Russell*, we found a constitutional right to the presence of counsel when there was only a
15 low chance that counsel would be able to protect a defendant's interests. Regarding the
16 right to counsel at a presentencing interview before a probation officer, this court noted
17 that "little purpose" would often be served by the presence of counsel, and that later
18 procedural opportunities meant that there "rarely" would be a "risk of irremediable harm"
19 if counsel were absent. 293 Or at 317-18. "Yet, circumstances are conceivable where the
20 presence of counsel would be helpful." *Id.* at 318. That was sufficient for this court to
21 hold that the defendant had a right to have counsel present for the presentencing
22 interview.

1 The same is also true for relator's testimony before the grand jury. At a
2 minimum, counsel's presence means that relator may consult with a fully informed
3 counsel, who will have directly heard the question and can provide relator with informed
4 advice.

5 We note that there is a common practice of grand jury witnesses stationing
6 their counsel outside the grand jury room so that the counsel may be consulted during the
7 witness's testimony. *See Sara Sun Beale et al., Grand Jury Law and Practice* § 6:30
8 (Westlaw 2d ed Dec 2021 update) ("Generally a witness who has retained counsel is
9 permitted a reasonable opportunity to consult with counsel outside the grand jury room
10 before and during his testimony."). We do not think that the presence of counsel outside
11 the grand jury room is a sufficient substitute for the presence of counsel inside the room
12 for a defendant who has been charged and whose right to counsel has attached. An
13 attorney who is not present must rely on a hearsay version of the question, one stripped of
14 context, and relayed by a person who is unlikely to be educated in the law. An attorney
15 who hears the question directly, and in the context in which it was asked, will be better
16 equipped to provide advice.

17 We therefore agree with relator. Under Article I, section 11, a defendant's
18 appearance before the grand jury, albeit voluntary, is a critical stage of the prosecution
19 that triggers the constitutional right to have counsel present.

20 The state contends that that conclusion is inconsistent with this court's
21 decision in *Miller*, 254 Or 244. The issue in that case was whether the defendant had
22 validly waived his right to indictment by grand jury when he was unrepresented at the

1 time. *Id.* at 247-48. This court considered whether the decision to waive indictment was
2 a critical stage, and it held that it was not:

3 "[United States Supreme Court caselaw requires] legal representation for an
4 accused at a time when he must take steps or make a choice which is likely
5 to have a substantial effect on the prosecution against him. We do not
6 perceive that waiver of grand jury is such a choice, as we do not believe
7 that such a waiver is actually determinative of whether criminal
8 proceedings could or would be brought."

9 *Id.* at 249. This court then added:

10 "Had defendant chosen to insist upon indictment, there is nothing
11 that a lawyer could have done to represent him before the grand jury,
12 because that is a closed and nonadversary proceeding. All that a lawyer
13 could have done for him was warn him not to voluntarily testify in front of
14 the grand jury where, while unrepresented, he would have been subject to
15 questioning by the district attorney and the grand jurors."

16 *Id.* The state focuses on the court's statement that, if a defendant did choose to
17 voluntarily appear before the grand jury, he or she would be "unrepresented."

18 We think that the state reads too much into the words "while
19 unrepresented." In general, the only time the defendant would be permitted to be in the
20 grand jury room would be as a witness. But *Miller* was issued before any statute
21 provided a defendant with a right to make such an appearance, and the court was not
22 addressing focused arguments by a defendant whose right to counsel had attached and
23 who sought to appear before the grand jury as a matter of right.

24 The state suggests that finding a right for counsel to be present in the grand
25 jury room would imply that courts must also allow defense counsel to attend the entirety
26 of the grand jury proceeding -- or, more sweepingly, that defense counsel must be
27 permitted to be present for any number of other events during an investigation and

1 prosecution, such as police interviews of every witness. We disagree. We are addressing
2 whether a defendant, who has *already* been charged, whose right to counsel has attached,
3 and who is testifying under oath when questioned by the district attorney, is entitled to
4 have counsel present in the room for that testimony. We have expressly held that
5 "[c]ollecting and recording existing evidence does not require the presence of defense
6 counsel." *State v. Tiner*, 340 Or 551, 564, 135 P3d 305 (2006), *cert den*, 549 US 1169
7 (2007) (no right to have counsel present for photographing of defendant's tattoos).
8 Moreover, as the United States Supreme Court stated in *United States v. Ash*, 413 US
9 300, 93 S Ct 2568, 37 L Ed 2d 619 (1973):

10 "None of the classical analyses of the assistance to be given by
11 counsel * * * suggests that counsel must be present when the prosecution is
12 interrogating witnesses in the defendant's absence even when, as here, the
13 defendant is under arrest; counsel is rather to be provided to prevent the
14 defendant himself from falling into traps devised by a lawyer on the other
15 side and to see to it that all available defenses are proffered."

16 413 US at 316-17 (quoting *United States v. Bennett*, 409 F2d 888, 899-900 (2d Cir), *cert*
17 *den*, 396 US 852 (1969) (Friendly, J.)); *see also Ash*, 413 US at 312 ("In all cases
18 considered by the Court, counsel has continued to act as a spokesman for, or advisor to,
19 the accused.").

20 We have agreed with relator that he has the right to have counsel *present* in
21 the grand jury room during his testimony. But relator also asserts that he is also entitled
22 to have counsel conduct the direct examination of him and then make formal evidentiary
23 objections to the district attorney's questions. Relator does not anchor those assertions in
24 any authority beyond the constitutional right to counsel generally, and we do not agree

1 that the right to the presence of counsel necessitates the expansive role that relator
2 envisions. The statutes contemplate that the questioning in the grand jury room will be
3 done by the prosecutor and the grand jurors, ORS 132.340; *see Miller*, 254 Or at 249, and
4 there is no judge present to rule on evidentiary objections, *see* ORS 132.090 (listing
5 limited set of persons who may be present during grand jury proceedings). The
6 legislative history furthermore shows that, when the legislature created a charged
7 defendant's right to voluntarily testify before the grand jury, it declined to create a
8 process of direct and cross examinations. Providing for questioning to be done by
9 anyone else would effect a significant and disruptive change to the grand jury process
10 that the legislature rejected and that is not necessary to vindicate the right that Article I,
11 section 11, protects. That right functions as a shield, *see Prieto-Rubio*, 359 Or at 25
12 (right to presence of counsel is to "prevent prejudice to a defendant"): It protects
13 defendants against questioning that could cause them to make admissions against their
14 interest, waive a privilege, or otherwise prejudice their defense at trial. As such, that
15 constitutional right is vindicated by having counsel present who can hear the questions
16 that are asked, advise and direct the client with respect to answering them, and, if
17 necessary, advise the client to terminate the testimony.

18 III. CONCLUSION

19 For the foregoing reasons, we conclude that, when a defendant seeks to
20 testify before a grand jury under ORS 132.320(12), the defendant has a state
21 constitutional right to have counsel present in the grand jury room for consultation during
22 the defendant's testimony. Counsel may advise or direct the defendant as to questions

- 1 that are asked, but performance of the consultative function does not extend to examining
- 2 the defendant or any other witness.
- 3 A peremptory writ will issue.