IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. DEBORAH ANN MUSSER, Defendant-Appellant Respondent on Review.	Lane County Circuit Court Case No. 201001347 CA A145540 S060868

AMENDED BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

Petition to review the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Lane County
Honorable Debra K. Vogt, Judge

Opinion Filed: October 24, 2012
Author of Opinion: Judge Duncan
Concurring Judges: Presiding Judge Armstrong and Chief Judge Haselton

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BRIEF ON THE MERITS

STATEMENT OF THE CASE

Defendant-Respondent Musser (defendant hereafter) was convicted of possession of methamphetamine, ORS 475.895. The trial court ruled that a Springfield police officer stopped defendant based on reasonable suspicion, that defendant voluntarily consented to a search request, and that the officer lawfully found evidence of the crime in defendant's purse. After denying the motion to suppress, the trial court presided over a stipulated facts trial and found defendant guilty.

The Court of Appeals reversed defendant's conviction, reasoning that the officer lacked reasonable suspicion to stop defendant, and defendant's consent was tainted by the illegal stop, pursuant to the attenuation analysis in *State v. Hall*, 339 Or 7, 115 P3d 908 (2005). *State v. Musser*, 253 Or App 178, 289 P3d 340 (2012), *rev allowed*, 353 Or 533 (2013).

The Attorney General petitioned for review. The state acknowledges that the officer stopped defendant without reasonable suspicion, but asks this court to reverse *Hall* and the Court of Appeals decision in this case under the theory that voluntary consent alone satisfies Article I, section 9, despite any prior illegality. In the alternative, the Attorney General asks this court to reverse based on reasoning found in *State v. Hemenway*, 353 Or 129, 295 P3d 617 (2013), *vacated*, 353 Or 498, 302 P3d 413 (2013).

Defendant's Use of the Vacated Opinion in *State v. Hemenway*

The Appellate Division of the Office of Public Defense Services (OPDS) represented Mr. Hemenway in this court and filed an extended brief on the merits explaining the origin and development of the fruit of the poisonous tree doctrine in federal and state law. OPDS now represents Defendant Musser in this case and Defendant Lorenzo in S060969.

Defendant Musser recognizes that the opinion in *State v. Hemenway* was vacated and has no precedential value. However, after vacating the opinion in *Hemenway*, this court allowed review in three cases (*Musser*, *Lorenzo*, and *Unger*) that, like *Hemenway*, pose fundamental questions concerning the attenuation doctrine and the exploitation analysis.

For purposes of efficiency, defendant Musser will use the vacated *Hemenway* opinion as a demonstrative model or academic opinion to advance the analysis and discussion of the state's alternative proposal in this case.

As will be seen below, defendant agrees with most of the analysis in *Hemenway*. To expedite the analysis in this case, defendant will primarily focus on the three problematic aspects of *Hemenway*: (1) the difference between the traditional fruit of the poisonous tree doctrine and the *Hemenway* model with respect to the weight and effect of the unlawful seizure on the stopped person's decision to consent, (2) the definition and analysis of the exploitation

prong of attenuation, and (3) the re-incorporation of the "purpose and flagrancy" factor into Oregon's attenuation analysis.

Questions Presented and Proposed Rules of Law

First Question. Is it constitutionally reasonable for law enforcement to stop individuals without reasonable suspicion and ask for consent?

Proposed Rule. A stop is constitutionally unreasonable unless it is supported by reasonable suspicion.

Second Question. Does a stop without reasonable suspicion do more than place the officer in the stopped person's "mere physical presence"?

Proposed Rule. A stop without reasonable suspicion is a constitutionally significant event that interferes with a person's liberty, subjects her to police authority, holds her in place for investigation, and unlawfully deprives her of the constitutional right to break off the interaction and leave.

Third Question. Does a stop without reasonable suspicion presumptively affect the stopped person's decision to consent?

Proposed Rule. The fruit of the poisonous tree doctrine presumes that a stop without reasonable suspicion affects the person's decision to consent, because the unlawful stop imposes all the disabilities of a seizure on the person during her interaction with the officer.

Fourth Question. What must the state demonstrate to overcome the presumption that the unlawful stop affected the decision to consent?

Proposed Rule. The state must show that a significant intervening event cured the effects of the illegal seizure and caused the person to consent *or* that the circumstances demonstrate that the stopped person would have consented even if the officer had engaged in mere conversation (*Kennedy*).

Fifth Question. What does the phrase "purpose and flagrancy" mean in the attenuation analysis?

Proposed Rule: The phrase comes from Fourth Amendment attenuation analysis case law and refers to the officer's motive or purpose for committing the Fourth Amendment violation and the egregiousness of the officer's decision, two inquiries that are relevant to the administration of an exclusionary rule that is designed to deter illegal police conduct.

Sixth Question. Does an officer's civility and professionalism during an unconstitutional seizure cure or undo the legal injury caused by the ongoing unlawful seizure?

Proposed Rule. The personal constitutional right against unreasonable seizure is violated when an officer unjustifiably seizes a person, regardless of whether the officer is polite or surly. Further, police are trained professionals

who are expected to be civil and professional toward the public; consequently, their professionalism does not qualify as a "significant intervening event" to undo the ongoing illegal seizure.

Summary Of Argument

A stop is an event of constitutional magnitude. The person must comply with the order to stop and any subsequent lawful orders. The stop unmistakably conveys to the seized individual that she is the subject of an investigation and may not resume her preferred activities unless and until the officer permits her to do so. In no small way, the seizure reduces the individual to the officer's control under color and penalty of law, encourages the individual to cooperate, and places the officer in a superior position over the individual to pursue the criminal investigation.

The fruit of the poisonous tree doctrine recognizes the impact of a suspicion-less stop on the individual by presuming that the illegal stop influenced the stopped person's decision to consent to a police request to search. Because the illegal stop presumptively taints the consent, evidence from the consent search is inadmissible unless the state proves attenuation by showing that the consent was voluntary *and* the stop did not affect the decision to consent.

The three factors that typically govern the latter prong in Oregon law are (1) the temporal proximity between the illegality and the consent, (2) whether the person was informed of the right to refuse consent, and (3) whether a significant intervening event removed or purged the effect of the illegal seizure from the person's decision to consent. Effectively, the state must show that the person would have consented if police had engaged her in mere conversation instead of stopping her, or that some significant intervening event (such as release from custody, contact with an attorney, or appearance in court) removed or purged the effect of the illegal stop and led her to give consent.

The *Hemenway* model veers from that view. It incorporates several flawed principles from *State v. Rodriguez*. It repeats *Rodriguez's* legally erroneous assertion that unless the circumstances of the seizure are egregious, a seizure merely places the officer in the stopped person's "mere physical presence." Like *Rodriguez*, it reasons that consent during an unlawful stop is tainted only when police "exploit" the illegal seizure to obtain the consent. Tracking *Rodriguez*, the *Hemenway* model asserts that police impermissibly exploit the illegal seizure to obtain consent (1) by actively pursuing leads and information learned from the illegal seizure, or (2) when the nature of police tactics, conduct, or demeanor during the seizure overtly or subtly influence the person's decision to consent. *Hemenway* suggests that low-key, professional, and courteous police conduct can mitigate the effect of a "minor," albeit,

unlawful seizure, so as to enable the person to consent independently from the effects of the illegal seizure.

The *Hemenway* model brushes aside *Hall's* clear, traditional exploitation analysis in favor of an ill-defined, police-centric balancing test that provides inadequate guidance to the bench and bar and will yield both inconsistent results and years of litigation to define the contours of the rule. Most importantly, though, the *Hemenway* model steers the analysis away from Oregon's personal rights constitutional model (an inquiry into the effect of the constitutional violation on the individual) toward an assessment of the reasonableness of the police conduct in a given situation.

In the present case, both the *Hall* and the *Hemenway* models lead to suppression of the evidence from the consent search. Officer Grice saw defendant and a male friend in an area where he mistakenly believed they could not be. Grice contacted them "to make sure they were not doing anything wrong." When defendant began to walk away, he called out, "Hey, come back here. I need to talk to you." The state concedes that the officer lacked reasonable suspicion to stop.

Grice asked for identification, and defendant gave him a credit card with her photo. Grice noticed that defendant had a Costco card under a different name, questioned her about it (she said it was a friend's card), and ran the name through dispatch, which reported nothing suspicious about the name.

Finally, Grice saw two Crown Royal bags in defendant's purse and suspected illegal drug possession. He requested and obtained consent to search the bags and found evidence of drug possession in one of the bags.

The suspicion-less stop reduced defendant to the officer's control for the purpose of a criminal investigation. None of *Hall's* traditional exploitation factors (temporal proximity, advice of rights, significant intervening event) suggests that the consent was attenuated from the stop: (1) the request for consent came moments after the initial stop; (2) there was no advice of the right to refuse consent; and (3) no significant intervening event broke the influence of the illegal stop on the decision to consent.

The same result occurs under the *Hemenway* model. In addition to the above three factors, the *Hemenway* model looks to the police conduct during the seizure and its possible effect on the stopped person. At no point did the criminal stop deescalate into a mere encounter, with defendant volunteering to waive her privacy rights. Rather, Officer Grice's criminal investigative purpose and commanding manner were unmistakable throughout. Grice initiated the criminal stop when he emphatically told defendant to "come back here" because he needed to talk with her. He asked for identification and noticed several items in her purse that caught his interest as she looked through her purse to satisfy his "request" for identification. Based on his observations of the contents of defendant's purse, Grice expanded the criminal stop from an

investigation into general wrongdoing and possible trespass, to an investigation for possible identity theft, and, finally, to an investigation of suspected drug possession—with each investigation lacking objective reasonable suspicion. In *Hemenway's* terms, Grice "exploited" the stop by pursuing investigative leads learned though his observations of defendant's purse during the unlawful stop.

Summary of Facts

On January 2, 2010, around 10:00 p.m., Springfield police officer David Grice was on patrol when he drove behind the Springfield Value Village Shopping Center. Tr 7-8. Grice frequently performs patrol checks behind the center because he reports that people in that area often engage in illegal activity, such as theft, burglary, criminal mischief, sex in public, and drug use. Tr 8.

That night, Grice drove into the area with the "alley lights" on top of his patrol car illuminated. Tr 38-39. He saw defendant and another person standing in a walkway or "breezeway" that connected the front of the shopping center with the back of it. Tr 17. Two businesses "near the walkway" were open, including a bar. Tr 17, 40. As soon as Grice drove into the area, defendant began to walk away. Tr 17. Grice, accelerated, stopped, got out of his patrol car, approached the two people, and said something to the effect of "Hey, I need to talk to you." Tr 18. Grice wanted to contact defendant and her

companion because, in his experience, people frequently engaged in unlawful activity behind the center, and he believed that the two were trespassing. Tr 19.

Defendant continued to walk away while her companion waited for Grice. Tr 18. Grice said directly to defendant, "Hey, come back here. I need to talk to you." Tr 18. At the second request, defendant turned around and walked back to where Grice was standing. Tr 19. Grice asked defendant for her identification. Tr 19. Defendant told him that she did not have traditional identification, but that she had a credit card with her name and picture on it. Tr 19.

Grice noticed that defendant seemed "really nervous and fidgety," and he could tell that defendant "probably did not want to be talking to [him]." Tr 19. Based on her inability to stand still and her nervousness, Grice suspected that defendant had recently used methamphetamine or some sort of stimulant. Tr 20.

Defendant gave Grice several credit cards with her name on them. Tr 21. As she was getting the cards out of her wallet, Grice noticed that defendant had a Costco card in her wallet with a different name on it. Tr 21, 27. He asked her about it, and defendant told Grice that the card belonged to a friend. Tr 20-21, 27. Grice "ran" defendant's name and the name on the Costco card through dispatch to check whether the person whose name was on the Costco card was a

theft victim. Tr 20. Dispatch reported that "nothing popped up," and Grice concluded that he had no reason to believe defendant was lying to him. Tr 20.

As defendant retrieved the credit cards from her wallet, Grice also noticed two Crown Royal pouches in defendant's purse. Tr 21. Because Grice thought that defendant had recently used methamphetamine, he believed that she probably had drugs in the pouches. Tr 21. He asked for defendant's consent to search them, and defendant agreed. Tr 21.

In one pouch Grice found make-up. Tr 21. In the other pouch he found three suspicious items: (1) a long, thin metal "scraper," which is a device used to scrape methamphetamine residue off of a pipe; (2) a metal spoon with striations on it, which made him believe that it was a "heating" or "cooking" spoon, commonly used to ingest methamphetamine; and (3) a two-by-two inch black pouch that contained a white, powdery residue, which Grice believed was probably methamphetamine. Tr 21-22.

Grice asked defendant about the pouch, and she said that she had found it on the ground and put it in her purse. Tr 22. At that point, based on his discovery of the scraper and the spoon and defendant's nervous and fidgety behavior, Grice believed that defendant possessed methamphetamine. Tr 26. Grice asked defendant for consent to search her entire purse, and defendant agreed. Tr 23. As Grice started to search the purse, defendant spontaneously

told him that if he found anything illegal in her purse, it would have to be something that her ex-husband had put there without her knowledge. Tr 23.

Inside a make-up bag in defendant's purse, Grice found a marijuana pipe, an Altoids container containing marijuana, three glass pipes, and a clear, plastic baggie containing a white crystalline substance that later field-tested positive for methamphetamine. Tr 23-24. At some point during the encounter, Grice learned that defendant and her companion both had prior arrests for possession of methamphetamine. Tr 28. The entire encounter from the time Grice initially contacted defendant until he cited and released her lasted approximately one hour. Tr 45.

Argument

The issue before this court is fundamental to search and seizure law. It involves the default answer to the following generic constitutional question: Does a stop without reasonable suspicion have a presumptive causative effect on the seized person's decision to consent to a search during the seizure?

The United States Supreme Court, other states, and treatise writers hold that as a matter of law the fruit of the poisonous tree doctrine assumes that the illegal seizure affects the decision to consent and the evidence from the consent search is the presumptive product of the illegal seizure, unless and until the state demonstrates that a *significant intervening event* broke the connection between the illegal seizure and the consent. Further, no opinion holds that

police professionalism qualifies as a significant intervening event to undo the effect of the ongoing illegal seizure.

In Part I below, defendant will briefly review those parts of the *Hemenway* model that in defendant's view correctly clarify the fruit of the poisonous tree and attenuation doctrines in Oregon.

In Part II, defendant will review the legal presumptions embedded in the fruit of the poisonous tree analysis and explain how the *Hemenway* model overlooks the core presumption.

Part III identifies the flawed principles from *State v. Rodriguez* that are imported into the *Hemenway* analysis.

Part IV explains that *Hemenway's* "purpose and flagrancy" exploitation factor is inconsistent with federal and state law.

Finally, in Part V, defendant applies the *Hall* model and the *Hemenway/Rodriguez* model to the facts of this case.

I. Key Principles Validated in the *Hemenway* Model

The *Hemenway* model recognizes several principles critical to Oregon criminal law. First, the *Hemenway* model generally reaffirms *Hall's* approach

to the fruit of the poisonous tree and the attenuation doctrines under Article I, section 9.[1] *Hemenway*, 353 Or at 137.

Second, the *Hemenway* model acknowledges that a person who is unlawfully stopped "is subject to police authority in excess of constitutional bounds and is thereby placed at a disadvantage relative to the constitutional position that he or she would have occupied absent the police interference." *Hemenway*, 353 Or at 140.

Third, the *Hemenway* model disavows the proposition that a criminal defendant has the burden to show a "minimal factual nexus" between an illegal warrantless seizure and subsequent consent or statements. Rather, when the state seeks to introduce evidence obtained during a warrantless search, it "has the burden to prove that the warrantless search was valid." *Hemenway*, 353 Or at 142; ORS 133.693(4).

Fourth, the *Hemenway* model acknowledges that when law enforcement obtains consent during a stop that lacks reasonable suspicion, the state must satisfy two separate prongs of the attenuation analysis, voluntariness and

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[1] Article I, section 9, provides:

> "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probably cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

exploitation, before it may introduce evidence from the search. *Hemenway*, 353 Or at 138-39.

Fifth, the *Hemenway* model recognizes that the ultimate determination as to whether the illegal seizure was sufficiently attenuated from the consent decision is a "legal determination" based on the totality of the circumstances. *Hemenway*, 353 Or at 144.

The Significance of a Stop

Although the *Hemenway* model acknowledges the proposition that a person who is seized on less than reasonable suspicion is materially and unlawfully disadvantaged by the seizure, defendant will address that proposition because it is the premise and driving force of the fruit of the poisonous tree doctrine and informs the presumptive effect of the illegal seizure on the person's decision to consent. As will be seen later in the brief, a primary defect in the *Hemenway* model is its undervaluation of the illegal stop on the consent decision.

Oregon statutory law and state and federal constitutional law reinforce complementary themes: Law enforcement may seize individuals without a warrant under color of law to question them about suspected criminal activity, and individuals are required under penalty of criminal law to comply with law enforcement's lawful orders.

The "stop" of a person is a seizure of constitutional magnitude. *State v. Ashbaugh*, 349 Or 297, 244 P3d 360 (2010); *Terry v. Ohio*, 392 US 1, 88 S Ct 1868, 20 L Ed 2d 889 (1968). In the criminal context, a lawful stop must be supported by reasonable suspicion to believe that the person has committed, is committing, or is about to commit a crime. ORS 131.615(1); *see infra* n 1.

A stop occurs when law enforcement acts under color of law to restrict a person's liberty to engage in lawful activities without undo interference from government actors. *See* ORS 131.605(7) ("A stop is a temporary restraint of a person's liberty by a peace officer lawfully present in any place."). Oregon statutory law authorizes stops and describes their lawful and reasonable dimensions.[2]

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[2] ORS 131.615 provides in part:

> "(1) A peace officer who reasonably suspects that a person has committed or is about to commit a crime may stop the person and, after informing the person that the peace officer is a peace officer, make a reasonable inquiry.
>
> "(2) The detention and inquiry shall be conducted in the vicinity of the stop and for no longer than a reasonable time.
>
> "(3) The inquiry shall be considered reasonable if it is limited to:
>
> "(a) The immediate circumstances that aroused the officer's suspicion;

…….footnote continued

Oregon law criminalizes the refusal "to obey a lawful order" by a peace officer. *State v. Illig-Renn*, 341 Or 228, 142 P3d 62 (2006). ORS 162.247 provides in relevant part:

> "(1) A person commits the crime of interfering with a peace officer or parole and probation officer if the person, knowing that another person is a peace officer or a parole and probation officer as defined in ORS 181.610:
>
> "* * * * *
>
> "(b) Refuses to obey a lawful order by the peace officer or parole and probation officer.
>
> "(2) Interfering with a peace officer or parole and probation officer is a Class A misdemeanor."

A stopped individual is in a restricted legal position, as a matter of law. The person must comply with the order to stop and any subsequent lawful orders. The stop conveys that the seized individual is the subject of an investigation who may not resume her preferred activities unless and until the officer permits her to do so. In no small way, the seizure reduces the individual to the officer's control under color and penalty of law, encourages the individual to cooperate, and places the officer in a superior position over the individual to pursue the criminal investigation.

> "(b) Other circumstances arising during the course of the detention and inquiry that give rise to a reasonable suspicion of criminal activity[.]"

Although a stop is not the type of seizure that amounts to custodial arrest for purposes of administrating *Miranda*-type rights under Article I, Section 12, or the Fifth Amendment to the United States Constitution, it nonetheless requires the stopped individual to cease what she was doing, obey the officer's command, and attend to the officer's inquiries. *See State v. Prickett*, 324 Or 489, 494, 930 P2d 221 (1997) (Article I, section 12, of the Oregon Constitution does not require *Miranda* warnings during a typical traffic stop because the motorist is neither "in custody nor under compulsion in the constitutional sense."); *Berkemer v. McCarty*, 468 US 420, 438, 104 S Ct 3138, 82 L Ed 2d 317 (1984) ("* * * circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police. To be sure, *the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions.*" (Emphasis added)).

An *unlawful* seizure affects the detainee in at least two significant and discrete ways. First, the illegal seizure subjects the individual to investigatory questioning that she may not ignore and denies her an option of constitutional magnitude that should be available to her—the option to end the encounter and walk away.

Second, it is a fair assumption (if not a constitutionally conclusive presumption) that a seized person would prefer to have her liberty than to remain seized. Because the seizing officer has the authority to detain or release, a seized person reasonably believes that cooperation and compliance with the officer will improve the prospect of release. The person in a mere encounter does not confront the same conundrum, because she determines her own movements and her liberty in no way depends on whether she can influence the officer to release her.

Finally, the New Jersey Supreme Court and several commentators note that many if not most people who are stopped view the officer's request for consent to search as "having the force of law" that compels compliance:

> "Unlike many other courts around the country, this Court has not previously grappled with the problems caused by standardless requests for consent to search a lawfully stopped motor vehicle. But one of our observations in *Johnson* [68 NJ 349, 346 A 2d 66 (1975)] is reflective of the problem. There, we observed that '[m]any persons, perhaps most, would view the request of a police officer to make a search as having the force of law.' *Johnson, supra*, 68 NJ at 354, 346 A 2d 66. In the context of motor vehicle stops, where the individual is at the side of the road and confronted by a uniformed officer seeking to search his or her vehicle, it is not a stretch of the imagination to assume that the individual feels compelled to consent. *Cf*, Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 *Tul. L.Rev*. 1409, 1465 (2000) (stating that '[p]sychological studies further confirm that ... there is an almost reflexive impulse to obey an authority figure.'); *see also* Adrian J. Barrio, Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent,* 1997 U Ill L Rev 215,

> 233–40 (discussing psychological studies regarding authority figures)."

State v. Carty, 170 NJ 632, 644, 790 A 2d 903 (2002).

Unlike law enforcement, the general public is not trained in search and seizure law. Although judges and criminal law practitioners come to recognize and appreciate the legal distinction between a command ("Stop") and a request for permission ("May I look in the bag?"), that distinction is easily lost in the moment on the person who is the subject of an official criminal investigation.

Professor LaFave observes that an officer who conducts an illegal arrest communicates a "false claim of authority over the person[.]" Wayne R. LaFave, 4 *Search and Seizure* § 8.2(d), 106 (4th ed 2004). Similarly, a reasonable person who is illegally stopped confronts a false claim of authority that colors her subsequent interaction with the stopping authority, both overtly and subconsciously, as a matter of law.

It is analytically unsurprising, then, that a seized individual would cooperate with police. Rather, cooperation is expected because the criminal justice system specifically designs seizures to induce and often demand cooperation, often under penalty of law.

Accordingly, the fruit of the poisonous tree doctrine recognizes the seizure's debilitating effect on the stopped person and incorporates it into the attenuation analysis. In the attenuation analysis the state has a heavy burden to

rebut the presumption that the seizure influenced the decision to consent, which usually requires the state to demonstrate that a significant intervening event (such as release from custody, consultation with an attorney or third person, or court appearance) broke the influence of the illegal seizure on the consenter. *Wong Sun v. United States*, 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963).

II. The Fruit of the Poisonous Tree Doctrine Presumes that a Stop without Reasonable Suspicion or an Arrest without Probable Cause Taints Subsequent Consent

When law enforcement obtains evidence following a Fourth Amendment violation, the "fruit of the poisonous tree" doctrine presumes that the violation tainted the direct and indirect evidence arising from the violation:

> "In the typical 'fruit of the poisonous tree' case * * * the question before the court is whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality. *Thus most cases begin with the premise that the challenged evidence is in some sense the product of the governmental activity*."

United States v. Crews, 445 US 463, 471, 100 S Ct 1244, 63 L Ed 2d 537 (1980) (emphasis added). The exclusionary sanction "applies to any 'fruits' of a constitutional violation—whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused

obtained during an illegal arrest or detention." *Id*. at 470 (footnotes and citations omitted).

In *New York v. Harris*, 495 US 14, 18-19, 110 S Ct 1640, 109 L Ed 2d 13 (1990), the Court explained that when an arrest is made on less than probable cause, the defendant's *voluntary statements are the presumed product of the illegal arrest*:

> "This case is therefore different from *Brown v. Illinois*, 422 US 590 (1975), *Dunaway v. New York*, 442 US 200 (1979), and *Taylor v. Alabama*, 457 US 687 (1982). In each of those cases, *evidence obtained from a criminal defendant following arrest was suppressed because the police lacked probable cause*. The three cases stand for the familiar proposition that the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality. See also *Wong Sun v. United States*, 371 US 471 (1963). We have emphasized, however, that attenuation analysis is only appropriate where, as a threshold matter, courts determine that 'the challenged evidence is in some sense the product of illegal governmental activity.' *United States v. Crews*, *supra*, at 471. As Judge Titone, concurring in the judgment on the basis of New York state precedent, cogently argued below, '*[i]n cases such as Brown v. Illinois, (supra) and its progeny, an affirmative answer to that preliminary question may be assumed, since the 'illegality' is the absence of probable cause and the wrong consists of the police's having control of the defendant's person at the time he made the challenged statement. In these cases, the 'challenged evidence'—i. e., the post arrest confession—is unquestionably 'the product of [the] illegal governmental activity'—i.e., the wrongful detention*." 72 N. Y. 2d, at 625, 532 N. E. 2d, at 1235."

Harris, 495 US at 18-19 (emphasis added).

The latter italicized excerpt bears emphasis because it illustrates one deficit in the *Hemenway* model: When police have arrested a person but lack

probable cause for the arrest, the challenged evidence is unquestionably the product of the illegal arrest.

The Court adheres to the same principle in the stop context. In other words, the Supreme Court follows the general rule that a stop on less than reasonable suspicion taints subsequent consent as fruit of the poisonous tree. The Court's stop cases are decided on whether a stop occurred or whether reasonable suspicion supported the stop; they are not decided on an attenuation analysis.

For example, in *Florida v. Bostwick*, 501 US 429, 111 S Ct 2382, 115 L Ed2d 389 (1991), uniformed officers entered a bus at a scheduled stop and approached and asked the defendant passenger for consent to inspect his ticket and identification. Defendant consented and showed the police the requested items. After inspecting and returning the ticket and identification, the police explained they were looking to interdict illegal drugs, and, after informing him that he had the right to refuse, they asked him for consent to search his luggage. *Bostwick*, 501 US at 432. The defendant consented, and the officers found cocaine in one of the bags. The Florida Supreme Court concluded that the police policy and conduct in that case was a seizure *per se*. *Bostick v. State*, 554 So 2d 1153 (Fla 1989).

Because the state conceded there was no reasonable suspicion to stop the defendant, the controlling question on review was whether the police tactics had

seized defendant. If no stop occurred, the evidence from the luggage was admissible pursuant to the defendant's consent; but, if the officers had stopped the defendant, the evidence from the consent search was the "tainted fruit" of the suspicion-less seizure:

> "The sole issue presented for our review is whether a police encounter on a bus of the type described above necessarily constitutes a 'seizure' within the meaning of the Fourth Amendment. The State concedes, and we accept for purposes of this decision, that the officers lacked the reasonable suspicion required to justify a seizure and that, if a seizure took place, the drugs found in Bostick's suitcase must be suppressed as tainted fruit."

Bostwick, 501 US at 433-34.

The Supreme Court held that the policy of mounting buses was not a seizure *per se*, and it remanded the case for further proceedings to determine whether the police had stopped the defendant given the individual circumstances of that case. *Id* at 439. *See also*, *Florida v. Royer*, 460 US 491, 507-08, 103 S Ct 1319, 75 L Ed 2d 229 (1983) (plurality)[3] (because officers arrested the defendant on less than probable cause, "Royer was being illegally detained when he consented to the search of his luggage, [and] we agree that the

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[3] Justice Powell noted in his concurrence that Drug Enforcement Administrative agents receive specialized training in identifying drug courier profiles but agreed with the plurality position that the defendant's consent was tainted because the agents lacked probable cause to arrest.

consent was tainted by the illegality and was ineffective to justify the search."); *Ohio v. Robinette*, 519 US 33, 51, 117 S Ct 417, 136 L Ed 2d 347 (1996) (Stevens, J, dissenting from the holding that no stop occurred and explaining "well settled law * * * that a consent obtained during an illegal detention is ordinarily ineffective * * * [.]" (Citations omitted)). *See generally,* LaFave, 4 *Search and Seizure*, § 8.2(d) at 107, n 144 (citing cases suppressing evidence from consent searches conducted *during* an illegal seizure).

This court tracked that approach in the 1960s and 1970s. For example, this court suppressed a statement following an arrest without probable cause in *State v. Jones*, 248 Or 428, 433-34, 435 P 2d 317 (1967), stating:

> "It must next be determined whether the confession in the instant case is the product of the invalid arrest. In other cases the causal connection between an illegal arrest and the obtaining of the evidence in question has been held to be broken by: an intervening legal arrest, *State v. Dempster*, supra, *State v. Allen*, 248 Or 376, 434 P 2d 740 (Decided December 6, 1967); or by the intervention of several days' time during which the defendant was released on his own recognizance, *Wong Sun v. United States*, supra; or bringing the defendant before a magistrate between the time of illegal arrest and confession, see *Lacefield v. State*, 412 SW 2d 906 (Texas Crim 1967). In the instant case, where the confession was obtained within a matter of a few hours after the illegal arrest, while the defendant was in detention, without the presence of counsel, after a substantial physical encounter with the police which caused the defendant to become 'wild,' and before defendant had been before a magistrate, we do not feel the state has shown that the connection between the illegal arrest and the confession was 'so attenuated as to dissipate the taint.' See *State v. Dempster*, supra."

This court used similar analysis under Article I, section 9, in *State v. Olson*, 287 Or 157, 598 P2d 670 (1979). There, police with probable cause but without a warrant went to the defendant's residence after 10:00 p.m. to talk with him about his suspected role in a burglary. They knocked loudly, announced they were with the sheriff's office, shined a light in several windows, but received no response. They finally "opened the door and entered the house," without drawing their weapons. As they entered, they heard the defendant say, "Come in." *Id.* at 159. The police located the defendant in his bedroom with another person, arrested him, gave him *Miranda* rights, and obtained his confession. This court first invalidated the entry, reasoning that "both the Oregon and the United States Constitutions dictate that where exigent circumstances do not exist," probable cause alone does not justify a warrantless entry into the home. *Id.* at 165.

The court then turned to the state's alternative argument that even assuming an illegal entry, the statements were admissible because police administered the *Miranda* warnings and the defendant confessed voluntarily. This court rejected the argument, citing *Brown v. Illinois*, 422 US 590, 602, 95

S Ct 2254, 45 L Ed 2d 416 (1975),[4] and reasoning that *Miranda* warnings were "inadequate to relieve the obvious taint" resulting from the illegal entry that violated Article I, section 9. *Id*. at 166.

III. The Hemenway Model Contains Flaws from *State v. Rodriguez*

The *Hemenway* model relies in large part on this court's opinion in *State v. Rodriguez*, 317 Or 27, 854 P 2d 399 (1993). Unfortunately, the *Rodriguez* opinion introduced three flawed concepts into the fruit of the poisonous tree analysis. Contrary to the state's assertion, *Rodriguez* (not *Hall*) was a primary source for confusion in this area. *Hall* used traditional fruit of the poisonous

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[4] *Brown v. Illinois* contains the now familiar exploitation factors:

> "[1] The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. [2] The temporal proximity of the arrest and confession, [3] the presence of intervening circumstances, *see Johnson v. Louisiana*, 406 US 356, 365, 32 L Ed2d 152, 92 S Ct 1620 (1972), and particularly, [4] the purpose and flagrancy of the official misconduct are all relevant. *See Wong Sun v. United States*, 371 US at 491, 83 S Ct 407, 9 L Ed2d 441. The voluntariness of the statement is a threshold requirement. Cf. 18 USCS § 3501. And the burden of showing admissibility rests, of course, on the prosecution."

Brown v. Illinois, 422 US at 603-04 (bracketed numbering added).

tree concepts to clarify the analysis, tailor the analysis to Oregon's personal rights constitutional model, and provide predictability for the bench and bar. Because the *Hemenway* model re-incorporates several flawed *Rodriguez* principles, defendant will describe the *Rodriguez* opinion at length.

The *Rodriguez* facts are as follows. Rodriguez was an alien who was subject to deportation because he had a conviction for possession of a controlled substance. An agent from the Immigration and Naturalization Service[5] (INS) obtained an administrative warrant from an agency official who was authorized under federal law to issue arrest warrants for aliens. *State v. Rodriguez*, 317 Or at 29 n 2. Six Portland police officers and one FBI agent accompanied the INS agent to the defendant's apartment to arrest the defendant. The INS agent knocked on the door and briefly spoke with the defendant through a window, before the defendant opened the front door and stood in the doorway. The agent displayed the arrest warrant and told the defendant he was under arrest. Defendant said "Okay," and stepped "back in," which the agent interpreted as an invitation to enter and arrest the defendant. *Id*. at 30.

The agent entered and read the *Miranda* rights in Spanish to the defendant before asking if the defendant had any drugs or guns in the house.

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[5] The agency is now known as the United States Immigration and Customs Enforcement (ICE).

The defendant said "No, go ahead and look." *Id*. at 30. The agent clarified whether the defendant authorized a search ("Can we search?"), and the defendant said, "Yes, go ahead." *Id*. at 30. The officials found two guns in the apartment, and the defendant was convicted of the offense that was then known as ex-convict in possession of a firearm, ORS 166.270 (1987).

This court held that the administrative warrant "did not violate the Fourth Amendment." *Id*. at 43. This court did not decide whether the warrant or its execution violated Article I, section 9, because it ultimately concluded that even assuming a state constitutional violation, the defendant's consent "was not obtained by exploitation of the unlawful conduct, if any." *Id*. at 37. It reasoned:

> "Given those facts, it is apparent that the INS agent did not *trade on or otherwise take advantage of the arrest* to obtain defendant's consent to the search. Indeed, there is absolutely nothing in the encounter between the agent and defendant that can be construed as exploitation of the purportedly unlawful arrest. The mere fact that, but for the arrest, the agent would not have been standing in the doorway of defendant's apartment, in a position to ask defendant about drugs and guns, does not render the evidence discovered in the subsequent consent search inadmissible."

Id. at 41 (emphasis added).

A. First Flaw: the *Rodriguez* Phrasing Undermines the Presumption that the Illegal Seizure Tainted the Consent

The *Rodriguez* court began its fruit of the poisonous tree analysis by stating that because the defendant's consent was voluntary, the case concerned "the issue whether defendant's consent was obtained by exploitation of the purportedly unlawful arrest." *Id*. 317 Or at 38. The court then articulated and phrased several exploitation principles, one of which is subtlety wrong while the other two are patently wrong. Unfortunately, the *Hemenway* model resurrects those principles.

The first is subtle and concerns the phrasing of the general rule. Whereas the general rule is that an unjustified seizure of a person presumptively taints the person's subsequent consent, the *Rodriguez* opinion virtually flipped the presumptive rule so that a court is to exclude evidence from a consent search *only* in those cases where the police exploited the illegality to obtain consent: "There *may* be cases in which suppression of evidence obtained during a consent search *may* be necessary to vindicate a defendant's rights that were violated by earlier, unlawful police conduct." *Id.* at 39 (emphasis added); *see also Id*. at 40 ("We think that evidence obtained during such a search should be suppressed *only* in those cases where police have exploited their prior unlawful conduct to obtain that consent." (Emphasis added)).

Like *Rodriguez,* the *Hemenway* model acknowledges the two-pronged attenuation analysis (voluntariness and exploitation), but it, too, fails to properly credit the presumption that an illegal seizure taints consent. For example, *Hemenway* explains that after the trial court determines that the consent was voluntary, "the court must address whether the police exploited their prior illegal conduct to obtain the evidence." *Hemenway*, 353 Or at 146. A little later, *Hemenway* states that any evidence the police observe as a direct result of the illegality is tainted and that "[e]vidence *may also* be tainted if police obtained the consent to search through less direct exploitation of their illegal contact." *Hemenway*, 353 at 146 (emphasis added); *see also Hemenway*, 353 Or at 150 ("[T]he better framed question is whether the police *exploited* the unlawful stop to obtain the consent." (Emphasis in original)).

With due respect, the trial court does *not* ask whether the police exploited the illegal seizure. Rather, the fruit of the poisonous tree doctrine *presumes* that the illegal seizure tainted the consent. Consequently, the trial court presumes the seizure affected the consent, and it admits the results of the consent search *only if* the state produces evidence that affirmatively rebuts the presumption and demonstrates that the illegal seizure did *not* affect the consent. *State v. Olson*, 287 Or 157; *Wong Sun v. United States*, 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963).

B. Second Flaw: In *Rodriguez* the Illegal Seizure Results in the Officer's "mere physical presence" at the scene; To the Contrary, the Illegal Seizure Subjects the Stopped Person to a Clear Legal Disadvantage

The second and patently egregious flaw in the *Rodriguez* reasoning is its characterization of the illegal seizure as an event that does little more than place law enforcement in the "mere physical presence" of the stopped person. *See Rodriguez*, 317 Or at 40 ("Mere physical presence as a result of prior unlawful conduct does not constitute exploitation of that conduct."). When the unlawful conduct is an unjustified seizure of the person, that proposition is demonstrably wrong, as a matter of law.

Contrary to the reasoning in *Rodriguez*, the illegal seizure does significantly more than bring the officer and the individual together. Rather, the illegal seizure brings them together *and* (1) creates an uneven playing field that reduces the individual to the officer's control under color and penalty of law, (2) encourages the individual to cooperate with the officer, and (3) places the officer in a superior position over the individual to pursue an investigation. *Hall*, 339 Or at 25; *see also*, *Hemenway*, 353 Or at 140 ("Because the person stopped is unable to terminate the interaction with police, he or she is subject to police authority to in excess of constitutional bounds and is thereby placed at a disadvantage relative to the constitutional position that he or she would have occupied absent the illegal police interference.").

In other words, the illegal seizure brings the officer into the individual's physical presence *and* unlawfully subjects the individual to all the legal disabilities imposed by an unconstitutional seizure. She must comply with the order to stop and any subsequent lawful orders and she may not resume her preferred activities unless and until the officer permits her to do so.

The state's affirmative task is to rebut the common sense and legal presumption that the disabling effects of a seizure color the seized person's mental calculations when determining how to respond to the officer's questions and request for consent. It's the state's task to prove that (1) a significant intervening event broke the presumptively harmful influence of the seizure on the consenter, or (2) the person would have consented *even if* the officer had engaged the person in mere conversation, instead of executing a stop.

In defendant's view, the second rationale (the person would have consented during mere conversation) drives this court's opinion in *State v. Kennedy*, 290 Or 493, 624 P2d 99 (1981). In that case, this court did not decide whether two officers who approached the defendant in an airport parking lot had stopped him. Instead this court noted and followed other courts that had reasoned that "volunteering of consent without prior request from police is a strong indication of voluntariness." *Id.* at 504 (citations omitted). In other words, *Kennedy* stands for the proposition that when the circumstances of the interaction are not egregious or overbearing, the person who *volunteers* consent

without being requested to consent would likely have consented even if the officer had engaged the person in mere conversation.

C. Third Flaw: *Rodriguez* Exploitation Refers to (1) Police Conduct (2) *After* the Initiation of the Illegality; the Proper Focus Belongs on the Individual

The third major flaw in *Rodriguez* is its view that "exploitation" refers to police activity following the initiation of the illegality: "Exploitation occurs when the police take advantage of the circumstances of their unlawful conduct to obtain the consent to search." *Rodriguez*, 317 Or at 40.

Hemenway's definition of exploitation is derived from *Rodriguez* and focuses on police conduct *apart from* the presumptive effect of the illegality on the individual. Like *Rodriguez*, the exploitation analysis in the *Hemenway* model asks whether police actively followed up to "exploit" the illegality. *See Id*. at 147 ("'Exploitation occurs when the police take advantage of the circumstances of their unlawful conduct to obtain the consent to search.'" (*Quoting Rodriguez*, 317 Or at 40)). *Hemenway's* exploitation analysis appears to ask, "Did *police* do anything to *aggravate or compound* the illegal seizure?"

Defendant acknowledges that the *Hemenway* model also looks to police conduct and demeanor at the initiation of the illegality to assess whether law enforcement tactics or demeanor could have affected the individual's decision to consent: "Likewise, particularly egregious police misconduct—such as excessive use of force in unlawfully seizing a defendant—is more likely to

affect the defendant's decision to consent than more restrained police behavior." *Hemenway*, at 147.

However, the *Hemenway* model articulates the controlling exploitation question as follows: *Other than the illegality*, (1) did police *actively* use information gleaned from the stop or *actively* utilize the stop to obtain consent, or (2) did police otherwise conduct themselves in a way as to influence the decision to consent?

The message of *Hemenway* is that the key to determining exploitation lies in police conduct and police demeanor during and particularly after the initiation of the illegality. Under the *Hemenway* model, a peaceful, albeit unlawful, seizure has little exploitative effect on consent if police otherwise act professionally and courteously during the unlawful seizure.

Again, the *Hemenway* emphasis on police conduct apart from the illegal, ongoing seizure overlooks the fundamental premise of the fruit of the poisonous tree doctrine, particularly in a personal rights constitutional model: A stop without reasonable suspicion or an arrest without probable cause *disadvantages the individual and presumptively taints the individual's decision to consent*. The illegality is the unjustified ongoing police control over the stopped person; the exploitation occurs when the stopped person gives consent from an unlawfully disadvantaged position.

The United States Supreme Court has rejected the *Hemenway* reasoning that law enforcement's courteous conduct can cure an ongoing unlawful seizure. For example, it has explained that the fruit of the poisonous tree doctrine presumes that a voluntary statement that follows an arrest on less than probable cause *is* the tainted product of the seizure and professional police conduct does not undo the ongoing illegality. The Court's opinion in *Dunaway v. New York*, 442 US 200, 99 S Ct 2248, 60 L Ed 2d 824 (1979), illustrates the foundational deficit in the *Hemenway* model.

There, police arrested the defendant on less than probable cause, brought him to the police station, administered *Miranda* warnings, and obtained his statement and several sketches. New York's Appellate Division used *Hemenway*-like reasoning to hold the statements and sketches admissible. Like *Hemenway*, the New York court reasoned that even though the police lacked probable cause to arrest, the police conduct during questioning had been "'highly protective of defendant's Fifth and Sixth Amendment rights[.]'" *Dunaway*, 442 US 200, 219, 99 S Ct 2248, 60 L Ed 2d 824 (1979) (quoting, *People v. Dunaway*, 61 App Div 2d 299, 303, 402 NYS 2d 490, 493 (1978)).

The Supreme Court reversed because the New York court did not appreciate the presumptive effect of the Fourth Amendment violation on the defendant's decision to give a statement. The Court explained that the police officers' respectful and protective treatment of Dunaway's Fifth and Sixth

Amendment rights did not undo the effect of the ongoing Fourth Amendment violation. The Court emphasized that it was looking for "significant intervening events" to break the influence of the unjustified seizure, and police professionalism during and after the seizure did not qualify as a significant intervening event to undo the ongoing illegal seizure. Part of the reasoning follows at length:

> "The situation in this case is virtually a replica of the situation in *Brown*. Petitioner was also admittedly seized without probable cause in the hope that something might turn up, and confessed *without any intervening event of significance*. [Footnote to *Brown* omitted] Nevertheless, three members of the Appellate Division purported to distinguish *Brown* on the ground that the police did not threaten or abuse petitioner (presumably putting aside his illegal seizure and detention) and that the police conduct was 'highly protective of defendant's Fifth and Sixth Amendment rights.' 61 AD2d, at 303, 402 NYS 2d, at 493. This betrays a lingering confusion between 'voluntariness' for purposes of the Fifth Amendment and the "causal connection" test established in *Brown*. Satisfying the Fifth Amendment is only the 'threshold' condition of the Fourth Amendment analysis required by *Brown*. *No intervening events broke the connection between petition's illegal detention and his confession. To admit petitioner's confession in such a case would allow 'law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the 'procedural safeguards' of the Fifth.'*"

Dunaway, 442 US at 218-19 (emphasis added) (*citing*, Comment, 25 Emory LJ 227, 238 (1976)). *Dunaway* is instructive because the Court determined that *Miranda* warnings and professional police conduct during the ongoing illegal seizure were legally inadequate to redress the ongoing Fourth Amendment

violation—arrest on less than probable cause. *See also, Taylor v. Alabama*, 457 US 687, 102 S Ct 2664, 73 L Ed 2d 314 (1982) (arrest without probable cause tainted custodial confession, despite six-hour gap between arrest and confession, administration of *Miranda* warnings, and the fact that the defendant was permitted a short a visit with his girlfriend).

The Court again explained the reach of the fruit of the poisonous tree rationale in *New York v. Harris*, 495 US 14. There, police *with* probable cause to arrest but without a search warrant or arrest warrant entered defendant's residence, arrested him, and questioned him at the residence and later at the police station. The Court held that because police violated *Payton v. New York*, 445 US 573, 100 S Ct 1371, 63 L Ed 2d 639 (1980) (which requires an arrest or search warrant to enter a suspect's residence to arrest), the evidence that police saw *in* the residence and the statements obtained *at* the residence were to be suppressed. However, the statements police obtained at the police station (removed from the unlawful residential entry) were admissible, because the Fourth Amendment violation in *Harris* was the *manner* in which police executed the arrest, not the fact that defendant was under arrest: "Because the officers had probable cause to arrest Harris for a crime, Harris was not unlawfully in custody when he was removed to the station house, given *Miranda* warnings, and allowed to talk." *Harris*, 495 US at 18.

When law enforcement lacks the requisite justification for the seizure, the question in the classic attenuation analysis is *not* (as *Hemenway* suggests) whether the police did anything *additional* to aggravate the illegal seizure; the question is whether a *significant* intervening event occurred to undo the presumptive affect of the illegal seizure on the decision to consent. There would be little or no need for the fruit of the poisonous tree doctrine if police professionalism could undo or erase the effect of an ongoing illegal stop or unlawful arrest, particularly when police are trained to act professionally and are presumed to act professionally. *See Hudson v. Michigan*, 547 US 586, 599 (2006) ("Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline.").

The "fruit of the poisonous tree" doctrine expresses a staple criminal law principle that the state is not to profit directly or indirectly from its illegality. Recognizing that the Fourth Amendment violation presumptively affects an otherwise voluntary consent, federal courts have little difficulty applying the doctrine to suppress evidence when consent is given *during* an illegal seizure. *See*, e.g., *United States v. Macias*, 658 F3d 509 (5th Cir 2011) (suppressing evidence from voluntary consent obtained during illegal extension of traffic stop); *U.S. v. Lopez-Arias*, 344 F 3d 623, 630 (6th Cir 2003) ("Defendants granted their consent to search within half an hour from the initial stop and

during the illegal arrest. There was no intervening time or event between the illegal arrest and defendants' consent." (Emphasis added)); *U.S. v. Washington*, 490 F 3d 765 (9th Cir 2007) ("Here, the factors fairly and practically dictate our conclusion that Washington's consent did not purge the taint of his illegal seizure. *There was no time lapse*. Shaw requested Washington's consent to search the car immediately after he conducted a search of Washington's person, and *while Washington was illegally seized*. And there were no appreciable intervening circumstances." (Emphasis added; footnote omitted)). *See generally*, LaFave, 4 *Search and Seizure*, § 8.2(d) at 107, n 144 (citing cases suppressing the evidence from consent searches conducted during an illegal seizure).

Notably, the Sixth Circuit opinion in *U.S. v. Lopez-Arias* specifically overruled an earlier opinion suggesting that voluntary consent could break the chain of an ongoing illegal seizure:

> "In [United States v.] *Guimond*, [116 F3d 166 (6th Cir 1997)], a panel of this court seemingly held that if the consent to search was voluntary, it does not matter that the consent occurred during an illegal seizure. The panel in *Guimond* did not address the implications of the exclusionary rule nor did it distinguish the Supreme Court's holdings in *Royer*, *Dunaway*, and *Brown*or this court's holdings in *Caicedo*, *Richardson*, and *Buchanan*."

U.S. v. Lopez-Arias, 344 F 3d at 629 n 1.

IV. The "Purpose and Flagrancy" Factor in Federal Law is Grounded in Deterrence

The *Hemenway* model unfairly criticizes *State v. Hall* for jettisoning the purpose and flagrancy factor from the exploitation analysis. *Hemenway*, 353 Or at 147. The *Hall* court had reasoned that the factor was relevant to the deterrence rationale of the federal exclusionary rule but inapplicable to Oregon's personal rights rationale for evidence suppression. *Hall*, 339 Or at 35 n 21.

In *Herring v. United States*, 555 US 135, 129 S Ct 695, 172 L Ed 2d 496 (2009), Chief Justice Roberts, writing for the majority, confirmed *Hall's* observation. He explained that the primary motivation for the Fourth Amendment exclusionary rule is to deter illegal police conduct. Within the deterrence model, law enforcement's "culpability" in engaging in the violation is an important factor for determining suppression.

The Chief Justice explained that the "purpose and flagrancy" factor focuses on (1) the officer's purpose in engaging in the illegal conduct and (2) whether the officer's *decision* to conduct the illegality was particularly egregious, when compared against a reasonable officer standard:

> "The pertinent analysis of deterrence and culpability is objective, not an 'inquiry into the subjective awareness of arresting officers,' Reply Brief for Petitioner 4-5. See also *post*, at 710, n. 7 (GINSBURG, J., dissenting). We have already held that 'our good-faith inquiry is confined to the objectively ascertainable question

> whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.' *Leon*, 468 US at 922, n 23, 104 S Ct 3405. These circumstances frequently include a particular officer's knowledge and experience, but that does not make the test any more subjective than the one for probable cause, which looks to an officer's knowledge and experience, *Ornelas v. United States*, 517 US 690, 699-700, 116 S Ct 1657, 134 L Ed 2d 911 (1996), but not his subjective intent, *Whren v. United States*, 517 US 806, 812-13, 116 S Ct 1769, 135 L Ed 2d 89 (1996)."

Herring, 555 US at 145- 46.

Consequently, federal courts do *not* suppress evidence when police rely in good faith on a magistrate's determination that probable cause exists to issue a warrant, *United States v. Leon*, 468 US 897, 104 S Ct 3405, 82 L Ed 2d 677 (1984), or when police rely on a statute that is later declared unconstitutional, *Illinois v. Krull*, 480 US 340, 107 S Ct 1160, 94 L Ed 2d 364 (1987), or when police rely in good faith on inaccurate data in court records, *Arizona v. Evans*, 514 US 1, 115 S Ct 1185, 131 L Ed 2d 34 (1995), and even when police rely in good faith on inaccurate data in police records. *Herring*, 555 US 135.

However, when law enforcement decision-making is responsible for the unjustified seizure, the federal court will consider the "flagrancy" or unreasonableness of the police decision that results in the violation:

> "The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct. As we said in *Leon*, 'an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus' of applying the exclusionary rule."

Herring, 555 US at 129, *quoting US v. Leon*, 468 US 897, 911, 104 S Ct 3405, 82 L Ed 2d 677 (1984).

Consequently, the federal "purpose and flagrancy" attenuation factor compares the individual officer's decision-making that led to the constitutional violation against a reasonable officer standard to assess the officer's "culpability." The federal "purpose and flagrancy" factor does not purport to measure the effect of the officer's conduct on the person giving consent.

The deterrence reasons for the federal "purpose and flagrancy" factor do not resonate with Oregon's personal rights model. The personal rights model does not ask whether the officer was "culpable" or acted in good or bad faith when he engaged in the violation, or what was in his mind at the time of the violation. *State v. Ainsworth*, 310 Or 613, 621, 801 P2d 749 (1990) ("Article I, section 9, prohibits certain governmental action, not certain governmental states of mind. The Oregon Constitution does not require an inquiry into the observing officer's thoughts to determine whether the officer's conduct unconstitutionally violates a defendant's Article I, section 9, rights."). Rather, the issue in the Oregon personal rights model is whether an individual has suffered a constitutional violation because of state action.

The purpose of the exclusion remedy under Oregon law is to restore the individual to the position she would have been in, and should have been in, had law enforcement acted lawfully, regardless of whether law enforcement acted in

good or bad faith. *State v. Davis*, 295 Or 227, 237, 666 P2d 802 (1983) (explaining Oregon's personal rights rationale for evidence suppression). The *Hemenway* model mistakenly criticizes *Hall* and mistakenly reincorporates the "purpose and flagrancy" factor into Oregon's attenuation analysis.

To be sure, the *Hemenway* model employs the factor to capture a different concept. It asks whether law enforcement's *manner* while seizing the individual, holding the individual, or asking for consent could have affected the individual's mental state or perception of the events:

> "For example, police misconduct that is intended to gain a defendant's consent may well be more likely to substantially affect that defendant's decision to consent. Likewise, particularly egregious police misconduct—such as excessive use of force in unlawfully seizing a defendant—is more likely to affect the defendant's decision to consent than more restrained police behavior."

Hemenway, 353 Or at 147.

Defendant acknowledges that the manner in which law enforcement conducts itself can affect the attenuation analysis, but defendant posits that the manner of execution is likely more relevant to the voluntariness prong of the analysis, as opposed to the exploitation prong.

As well, defendant posits that police professionalism should be the norm. The law and society expect police to act courteously, civilly, and professionally when dealing with the public. Police are trained and entrusted to do so, and the fact that they act professionally should not be considered an exceptional

circumstance that warrants special note as an attenuating factor to cure the impact of an ongoing illegal seizure. *See Hudson v. Michigan*, 547 US at 599 ("Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline."). When an officer stops an individual without reasonable suspicion, the person has suffered a constitutional injury, regardless of whether the officer was civil or surly. In fact, law enforcement has successfully utilized the "good cop/bad cop" approach for decades for the purpose of unsettling suspects and rendering them more forthcoming to the "good cop" archetype. *See Miranda v. Arizona*, 384 US 436, 452, 86 S Ct 1602, 16 L Ed 2d 694 (1966) (explaining the "friendly-unfriendly" or the "Mutt and Jeff" interrogation technique for eliciting statements from suspects).

To the extent the court wishes to retain the concept articulated in *Hemenway* and include it in the exploitation analysis, defendant respectfully suggests that the court adopt a different term to express it. The *Hemenway* model seems to suggest that police conduct that effectively de-escalates a stop from a confrontational investigation into something akin to "mere conversation" can qualify as a mitigating factor in the attenuation analysis. If that was the intent of *Hemenway*, the factor could be changed from "purpose and flagrancy" to something else, such as "remedial police conduct." However, the ongoing

and unlawful loss of liberty is truly restored only through release from the seizure, not police professionalism.

The *Hall* court was correct when it abandoned the "purpose and flagrancy" factor for purposes of Oregon law. The United States Supreme Court uses the term in the federal deterrence model to measure the egregiousness of the officer's decision to commit the Fourth Amendment violation. That definition and use of the "purpose and flagrancy" factor in the federal system is irrelevant to Oregon's personal rights model, and its continued use will cause confusion in Oregon's attenuation analysis.

V. Application

A. Traditional *Hall* Attenuation Analysis: Consent is the Product of an Ongoing Illegal Seizure

The key to traditional Fruit of the Poisonous Tree analysis in the seizure context is whether law enforcement lacked the requisite justification (reasonable suspicion to stop or probable cause to arrest) when they seized the individual and requested consent.

If reasonable suspicion justified the stop or probable cause justified the arrest, a reviewing court merely applies the traditional voluntariness tests to determine whether the consent was voluntary. If the seizure was justified and the consent was voluntary, the evidence is admissible.

If the stop was unjustified by reasonable suspicion or the arrest was unjustified by probable cause, the Fruit of the Poisonous Tree doctrine works to

impose the presumption that the illegal seizure affected or tainted the unlawfully seized person's decision to consent. In those situations, the state has the burden to show that the consent was both voluntary and attenuated from the illegal seizure.

Oregon currently uses three of the four traditional factors to determine attenuation: temporal proximity, administration of warnings, and the occurrence of a significant intervening event. *Hall*, 339 Or at 35 n 21.

In this case, the state acknowledges the officer lacked reasonable suspicion that defendant had committed, was committing, or was about to commit a crime when the officer stopped her. Several minutes into the unlawful stop, the officer requested consent and defendant consented to a search of two bags in her purse. The officer did not inform defendant that she had the right to refuse to consent. There were no significant intervening events to break the influence of the seizure. Consequently, defendant's consent was unquestionably the product of the ongoing illegal seizure in the *Hall* attenuation analysis.

B. *Hemenway* Model: No Factor Favors Attenuation

The *Hemenway* model uses four factors to assess attenuation: temporal proximity, administration of warnings, the occurrence of a significant intervening event, and the "purpose and flagrancy" of the illegality. Under *Hemenway*, "purpose and flagrancy" means (1) that police used the seizure to actively advance and expand its investigation or (2) police tactics and conduct during the illegal seizure reasonably and forseeably influenced the person's decision to consent.

Extrapolating from the *Hemenway* facts and result, if police are present in a community-caretaking role, if the conversation between the officer and the unlawfully stopped person is low key and non-confrontational, if the person shows a willingness to waive her rights to privacy to put the officer at ease, then the interaction begins to look more like "mere conversation" than a criminal stop, and the court may conclude that the illegal seizure was not a "significant" motivation for the person's decision to consent. *See Hemenway*, 353 at 150-52.

Again, none of the *Hemenway* factors favors attenuation in the present case. The stop was without reasonable suspicion, and the officer requested consent and defendant consented several minutes into the stop. The officer did not inform defendant that she had the right to refuse the consent request. There were no significant intervening events to interrupt the nature or flow of the investigatory seizure. No circumstances suggested that the tenor of the

conversation was anything other than a criminal investigation conducted under color of law.

Finally, the officer "exploited" the unlawful stop within the meaning of *Hemenway* by actively pursuing "leads" or lines of inquiry spurred by his observations of the contents of defendant's purse during the unlawful seizure. He testified that he contacted defendant and her male friend "basically to make sure they were not doing anything wrong: Breaking the law, damaging any property." Tr 18. When defendant initially walked away, the officer yelled to her, "Hey, come back here. I need to talk to you." Tr 18.

When she returned, the officer asked to see identification. Defendant explained that she did not have state-issued identification with her but showed him a credit card with her photo. Tr 19. The officer noticed a Costco card under a different name in defendant's purse and asked about it. Defendant explained that it was a friend's card. The officer "ran" the name through dispatch to check on reported thefts under that name. Dispatch had no reports for that name, and the officer accepted defendant's explanation. Tr 20.

Defendant provided additional cards identifying her, and the officer concluded that defendant had properly identified herself. Tr 20. While defendant was looking through her purse for identification, the officer saw two crown royal bags and suspected defendant of another possible crime—possession of controlled substances. Tr 21.

Grice expanded the criminal investigation from general wrongdoing or trespass, to possible identity theft, to possible possession of a controlled substance because he observed items in defendant's purse—observations he made because she was satisfying his request to produce identification during the unlawful stop. Consequently, the illegal stop to investigate one crime that lacked reasonable suspicion became a platform to investigate a second crime that lacked reasonable suspicion and finally a third crime that lacked reasonable suspicion. Both aspects of *Hemenway's* "exploitation" were present: (1) the officer expanded the investigation because of information he learned during the unlawful stop, and (2) defendant was well aware of the expanding criminal investigations.

This scenario is reminiscent of *State v. Warner*, 284 Or 147, 585 P2d 681 (1979), where several officers stopped the defendant and his friend and questioned them in relation to a recent robbery. After the chief of police was satisfied that the men were not involved with the robbery, he "asked" them to empty the contents of their pockets onto the hood of a police car. When they did so, the companion had several .38 caliber hollow point bullets. That caused the officers to yell "freeze" and arrest the two men. *Warner*, 284 Or at 154. The police chief admitted that he had asked the men to empty their pockets as a form of "fishing expedition" to see what he could find. *Id*. at 153. This court

held that the evidence obtained from the arrest should be suppressed because it was tainted by the illegal seizure:

> "It follows that the evidence obtained from that point forward is tainted by the illegal seizure of the defendant's person and by the illegal search and seizure of the contents of his pockets, and therefore must be suppressed. *State v. Valdez*, 277 Or 621, 561 P2d 1006 (1977); *Wong Sun v. United States*, 371 US 471, 83 S Ct 407, 9 L.Ed.2d 441 (1963)."

Id. at 166.

The stopping power is significant. When unlawful, it subjects the person to an unreasonable intrusion into her privacy, as a matter of constitutional law. The stop was illegal, and defendant's ultimate consent to a search of her purse did not retrospectively render the stop legal. *See State v. Weaver*, 319 Or 212, 874 P2d 1322 (1994) (illegal search of defendant's business was not cured by defendant's later consent to a search when defendant was not informed of earlier illegal search). The investigation expanded from one crime that lacked reasonable suspicion (at best, trespass) to a second crime that lacked reasonable suspicion (property or identity theft), to a third crime that lacked reasonable suspicion (possession of a controlled substance).

Even under *Hemenway*, it is patently unreasonable and unconstitutional to seize and hold individuals without reasonable suspicion to conduct *seriatim* criminal investigations in the hope that incriminating evidence will eventually turn up.

CONCLUSION

For the foregoing reasons, defendant respectfully prays that this court affirm the decision of the Court of Appeals.

Respectfully submitted,

Signed
By Peter Gartlan at 10:19 am, Aug 13, 2013

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

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 11,648 words.

Type size

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

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Respondent's Amended Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on August 13, 2013.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Appellant's Opening Brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

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