IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. CLARK ALLEN BAILEY, aka Clarke Allen Bailey, Defendant-Appellant, Petitioner on Review.	Multnomah County Circuit Court No. 101033810 CA A148109 SC S061647

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Multnomah County
Honorable EDWARD J. JONES, Judge

Opinion Filed: August 14, 2013

Author of Opinion: Armstrong, Presiding Judge
Before: Armstrong, Presiding Judge; De Muniz, Senior Judge; and Egan, Judge

---

Continued…

PETER GARTLAN #870467
Chief Defender
Office of Public Defense Services
ANNE FUJITA MUNSEY #994080
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email:
anne.k.munsey@opds.state.or.us

Attorneys for Defendant-Appellant/
Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA M. JOYCE #013112
Solicitor General
PEENESH H SHAH #112131
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email:
peenesh.h.shah@doj.state.or.us
anna.joyce@doj.state.or.us

Attorneys for Plaintiff-Respondent/
Respondent on Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

BRIEF ON THE MERITS

STATEMENT OF THE CASE

Officers arrested defendant after discovering that he had an outstanding felony arrest warrant. During a search incident to that arrest, officers discovered drugs and a large amount of cash. Defendant moved to suppress that evidence, arguing that the officers had unlawfully seized him before discovering the arrest warrant and had therefore exploited that illegality to discover the evidence. The trial court concluded that the officers unlawfully seized defendant but that the discovery of the arrest warrant purged that illegality. That ruling frames the issue before this court: whether the discovery of an outstanding arrest warrant attenuates any prior police impropriety.

In defendant's view, the lawful felony arrest warrant is of no moment because officers were only able to discover defendant's identity—and thus the warrant—as a result of the improper seizure. But the exclusionary rule operates only where its application will "vindicate" a defendant's right to be free from unreasonable seizures and searches. And as this court has repeatedly recognized, suppression of evidence does not serve to "vindicate" a defendant's Article I, section 9 rights where the improper police conduct cannot be viewed as the source of that evidence. When an officer discovers evidence by arresting a defendant on an outstanding arrest warrant and then searching him incident to

that arrest, that evidence does not result from the unlawful seizure, but from execution of the valid arrest warrant. Framed another way, the discovery of the outstanding arrest warrant attenuates any causal connection between an improper seizure and the subsequent search incident to arrest on that warrant. Suppression of that evidence is thus unavailable as a remedy for the improper police conduct. That same result obtains under a federal constitutional analysis—not only because the causal connection is attenuated, but also because suppression would not serve Fourth Amendment interests and because the cost of suppression is not outweighed by its benefits.

Questions Presented

An officer seized defendant and subsequently discovered that he had an outstanding arrest warrant. During a search incident to arrest on that warrant, the officer discovered evidence that defendant later sought to suppress on the ground that the initial seizure had been unlawful.

1. Under Article I, section 9, is evidence admissible when that evidence was discovered in a lawful search incident to an arrest on an otherwise lawful warrant, even if the warrant was discovered after an unlawful seizure?

2. Under Fourth Amendment exclusion principles, is evidence admissible when that evidence was discovered in a lawful search incident to an arrest on an otherwise lawful warrant, even if the warrant was discovered after an unlawful seizure?

Proposed Rules of Law

1. Yes. The discovery of an outstanding arrest warrant categorically attenuates any causal connection between an improper seizure and evidence discovered during a search incident to arrest on that arrest warrant.

2. Yes. The discovery of an outstanding arrest warrant attenuates any causal connection between an improper seizure and evidence discovered during a search incident to arrest on that warrant. Moreover, in that circumstance, suppression is inappropriate because it serves no interest protected by the Fourth Amendment, and the costs of suppression are greater than the benefits of any resulting deterrence.

Statement of Facts

The state charged defendant with unlawful delivery of cocaine, unlawful possession of cocaine, and tampering with physical evidence based on evidence discovered and seized in connection with his arrest on a warrant. (ER 1; Tr 49-52, 123-28). That arrest occurred during a lawful traffic stop of a car in which defendant was a passenger. (Tr 47-48, 94).

The relevant events occurred in the fall of 2010, when Portland was experiencing significant levels of gang violence. As part of its efforts to prevent further violence, police observed a funeral attended by known gang members. After the funeral, officers followed one of the funeral-goers—who is related to a "Crip" gang family in Portland—to a house where several gang

members were congregating for a funeral "after party." (Tr 40-41, 44-45). An officer then saw four people, including defendant, leave the house in a Dodge Charger car. (Tr 45-46). An officer testified that Dodge Chargers are often rental cars, and that rental cars are often used in drive-by shootings. (Tr 45). The officers were therefore concerned that the occupants might be on their way to commit a crime. (Tr 45). More specifically, officers were concerned that the individuals may have gotten "pumped up about their friend being killed and go out and do some violence themselves." (Tr 44).

The officers observed the car's driver fail to properly signal. (Tr 94). When the officer stopped the car for that violation, the driver and the passenger in the front seat of the car identified themselves to the detaining officer, but defendant and his fellow backseat passenger refused to do so. (Tr 59, 63, 177-78). An officer recognized defendant as a gang associate but could not remember defendant's name. (Tr 47). The officer knew that the driver had a concealed weapons permit, (Tr 46), and was therefore concerned that a firearm might be in the car, (Tr 48). Approximately 30 minutes into the stop—which eventually resulted in the driver being cited for the signaling violation that precipitated the initial stop, as well as for failure to provide proof of current insurance—another officer arrived at the scene and identified defendant by name. (Tr 99, 120-21, 142). A warrants check revealed an outstanding felony warrant for defendant, and he was removed from the car and arrested. (Tr 49-

51, 123). After the arrest, the officers discovered a large chunk of crack cocaine (which defendant was attempting to swallow) and a large quantity of cash on the back seat where he had been sitting. (Tr 125-28).

Defendant moved to suppress the cocaine and money, arguing that they were the product of his unlawful detention (specifically, an unlawfully extended traffic stop that covered him as a passenger). (ER 2-8). Defendant raised his claims under Article I, section 9, of the Oregon Constitution and under the Fourth Amendment to the United States Constitution. The trial court denied the motion. It concluded that, although the initial traffic stop was lawful, the stop "was extended substantially beyond the time that was sufficient to complete all the traffic stop business." (Tr 257-58). The court further concluded that, under the circumstances, defendant had been seized for constitutional purposes at the point when the officer identified him by name and a warrants check was run. (Tr 258). Notwithstanding those conclusions, however, the court held that the discovery of the outstanding warrant purged the taint of any preceding police illegality and that the challenged evidence was therefore not suppressible. (Tr 259).

After denying defendant's motion to suppress, the court found him guilty of the charged offenses at a stipulated facts trial. (Tr 292-99; ER 10-13). Defendant appealed, assigning error to the court's adverse ruling on his suppression motion.

The Court of Appeals affirmed. It held that this court's decision in *State v. Dempster*, 248 Or 404, 434 P2d 746 (1967), as applied by the Court of Appeals in *State v. Snyder*, 72 Or App 359, 695 P2d 958, *rev den*, 299 Or 251 (1985), controlled defendant's Article I, section 9, claim. Both cases hold that any taint from a preceding illegality is "purged" by the intervening discovery of an arrest warrant. The Court of Appeals went on to note that both cases remain good law following this court's decision in *State v. Hall*, 339 Or 7, 115 P3d 908 (2005). The court similarly rejected defendant's argument under the Fourth Amendment.

Summary of Argument

Oregon's exclusionary rule serves vindicate the rights protected by Article I, section 9. Accordingly, suppression is not required when the connection between the misconduct and the challenged evidence is so attenuated that the evidence cannot fairly be said to be the product of the illegality. In such cases, suppression of the evidence does not vindicate a defendant's rights because the evidence sought to be suppressed does not result from a violation of the defendant's rights. This court recognized long ago that discovery of an outstanding arrest warrant necessarily attenuates any causal connection between any preceding illegality and evidence obtained in the subsequent search incident to arrest on that warrant. *State v. Dempster*, 248 Or

404, 434 P2d 746 (1967). The question presented here is whether *Dempster* remains viable 45 years later.

It does. An arrest warrant reflects a neutral magistrate's determination that probable cause exists that an individual has committed a crime, and it contains a judicial mandate requiring an officer to seize that individual. In situations such as this, where the existence of the warrant pre-exists any police misconduct, that pre-existing warrant will always provide an independent—and lawful—basis for any search incident to arrest on that warrant, supplanting and attenuating any logical connection to the misconduct. Even under the more recent circumstance-specific test that this court has applied in the consent-search context, the discovery of an arrest warrant will almost always attenuate the taint of any preceding illegality.

A parallel federal exclusionary doctrine has also developed under the Fourth Amendment to the United States Constitution, and a similar *per se* rule obtains under that doctrine. Under the federal exclusionary rule, exclusion is appropriate only (1) if the challenged evidence bears an unattenuated logical connection to police misconduct, (2) if the police misconduct affects an interest served by exclusion, *and* (3) if the cost of exclusion is outweighed by the benefits of any resulting marginal deterrence. None of those conditions are present when a defendant relies on a preceding illegality to seek suppression of evidence discovered in a subsequent search incident to an arrest on a lawful

warrant. As under Oregon law, the discovery of an arrest warrant attenuates the effect of any prior misconduct. Moreover, no Fourth Amendment interest is served by excluding evidence obtained in a search incident to an arrest supported by an untainted probable cause determination. Finally, exclusion in this circumstance would impose greater costs than in other circumstances, but would provide little to marginal deterrence.

I. Under Article I, section 9, the discovery of an outstanding arrest warrant "purges" the taint of any previous illegality.

As noted, this case presents the question whether the exclusionary rule operates to suppress evidence found when, following an unlawful stop, officers discovered a valid felony arrest warrant and searched defendant incident to an arrest on that warrant. In support of his argument that the exclusionary rule should operate in such instances, defendant relies primarily on several recent cases from this court grappling with the question whether a consent search following an unlawful seizure is valid. *See State v. Hall*, 339 Or 7, 115 P3d 908 (2005); *State v. Hemenway*, 353 Or 129, 295 P3d 617, *vac'd*, 353 Or 498 (2013). While those cases may, in a broad sense, shed some light on how the exclusionary rule operates under Article I, section 9, they do not control cases such as this, where the unlawful seizure is followed not by a consent search but rather by the discovery of a valid arrest warrant. In such circumstances, the inquiry is more straightforward than in the consent-search context: the

discovery of a valid arrest warrant is, *ipso facto*, an event that attenuates any preceding illegality.

A. A defendant is entitled to suppression of evidence only where there is a causal connection between discovery of the evidence and any illegality that preceded it.

As this court is amply aware, the question whether a defendant is entitled to suppression of evidence can often be complicated to resolve. *Hemenway*, 353 Or at 146 (noting the complicated nature of such questions). But several general principles from this court's cases are undisputed here. The state therefore begins with those principles, as they provide a foundation for the more specific question of whether the discovery of an arrest warrant purges the taint of a prior unlawful seizure.

Suppression does not automatically follow from illegal police misconduct. Rather, in determining whether to resort to that remedy, this court looks to the "character of the rule violated in the course of securing the evidence" to decide "whether the rule implied a right not to be prosecuted upon evidence so secured." *State v. Davis*, 295 Or 227, 235, 666 P2d 802 (1983). The "character of the rule" includes Article I, section 9's recognition of "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure." Evidence will thus be suppressed if, and only if, suppression will "vindicate" a defendant's Article I, section 9 rights, by restoring the defendant to the same constitutional position he or she

would have occupied had no police illegality occurred. *See Davis*, 313 at 254 (the "exclusionary rule * * * operates to vindicate a constitutional right"); *Hall*, 339 Or at 24 (noting that "the aim of the Oregon exclusionary rule is to restore a defendant to the same position as if 'the government's officers had stayed within the law'"). Consequently, if suppression's sole purpose in a particular case is to deter future police misconduct, Article I, section 9 will not authorize suppression. *See Davis*, 313 Or at 254 ("the focus [of suppression under Article I, section 9] * * * is on protecting the individual's rights," and "not on deterring or punishing the excessive conduct of any particular government actor"); *Hall*, 339 Or at 24 (noting that prior decisions "explicitly * * * rejected the view that the Oregon exclusionary rule is predicated upon a deterrence rationale").[1] Accordingly, the "critical inquiry" is whether the state obtained the evidence as a result of a violation of the defendant's Article I, section 9 rights. *Hall*, 339 Or at 24, *Hemenway*, 353 Or at 146.

In making that determination, courts must examine the connection—if any—between the unlawful police conduct and the evidence that the defendant seeks to suppress. Although "but for" causation between the illegality and subsequent discovery of evidence is necessary to justify suppression, it not

---

[1] This court appears to have originally adhered the a deterrence rationale—similar to that which underlies the Fourth Amendment exclusionary rule—but changed courses in *Davis* and has adhered to a rights-vindication rationale since. *See Hall*, 339 Or at 24 n 14.

sufficient. *Hall*, 339 Or at 25("[T]his court has rejected the notion that evidence is rendered inadmissible under Article I, section 9, simply because * * * it would not have been obtained 'but for' unlawful police conduct."); *Hemenway*, 353 Or at 141.[2] Instead of turning on mere "but for" causation, the question is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *State v. Kennedy*, 290 Or 493, 500, 624 P2d 99 (1981) (citing *Wong Sun v. United States*, 371 US 471, 487-88, 83 S Ct 407, 9 L Ed 2d 441 (1963)). Thus, where the unlawful conduct "did not result in, produce, or lead to discovery of [the evidence,]" *State v. Sargent*, 323 Or 455, 462, 918 P2d 819 (1996), no suppression is required. In those circumstances, the police conduct cannot be viewed as the source of that evidence, and suppression therefore would not serve to vindicate the defendant's rights. *Hall*, 339 Or at 25; *see also State v. Smith*, 327 Or 366, 380, 963 P2d 642 (1998) (only evidence that is "actually obtained out of an illegal search or seizure" will be suppressed).

---

[2] In *Hemenway*, the court rejected *Hall's* minimal factual nexus construct. That decision was subsequently vacated based on the death of the defendant. *Hemenway*, 353 Or at 141. This court currently has under advisement a trio of cases that, like *Hemenway*, urge this court to abandon the minimal factual nexus test. *State v. Musser*, *State v. Unger*, and *State v. Lorenzo*.

This court has delineated several instances where, as a categorical matter, evidence does not "result in, produce, or lead to the discovery of evidence" sought to be suppressed. Those instances include (1) where the police would have inevitably discovered the evidence, (2) where the police obtained the evidence independently of the Article I, section 9 violation, and (3) where the preceding violation of the defendant's rights "has such a tenuous factual link to the disputed evidence that the unlawful police conduct cannot be viewed properly as the source of that evidence[.]" *Hall*, 339 Or at 25; *Hemenway*, 353 Or at 141. In each of those circumstances, the evidence cannot be suppressed because the evidence did not result from a violation of the defendant's Article I, section 9 rights. *See Hall*, 339 Or at 25; *Hemenway*, 353 Or at 141.

Oregon's suppression law contains some imprecision with respect to those three distinct doctrines—inevitable discovery, independent source, and attenuation. *See, e.g., State v. Hansen*, 91 Or App 189, 192, 754 P2d 604 (1988) ("No Oregon case (or any other case) that our research has revealed explains clearly the difference between the idea of derivation from an independent source and the attenuation exception."). Although courts frequently use some of those terms interchangeably, the three doctrines are conceptually distinct in ways that are significant to address the question presented here.

Inevitable discovery precludes suppression of evidence that officers discovered through improper means if the evidence very likely *would* have been discovered even without the use of improper methods. For example, when police discover evidence in an illegal search of a lawfully impounded vehicle, suppression is not required if the police can show that the same evidence would have been discovered through an inventory of that vehicle.

The independent source doctrine somewhat differently precludes suppression of illegally obtained evidence if the same evidence was *in fact* also discovered through separate and lawful means. That is, unlike the inevitable discovery doctrine, the independent source doctrine does not require a court to engage in counterfactuals. For example, if a defendant's accomplice lawfully gave incriminating financial records to the police, the defendant could not obtain suppression of those records if the police also obtained them through an unlawful search.

Both the inevitable discovery and independent source doctrines are grounded in the fact that an alternative, untainted route to the challenged evidence breaks the but-for causal connection between any preceding illegality and the evidence. That is, the challenged evidence actually was (under the independent source doctrine) or likely would have been (under the inevitable discovery doctrine) discovered even in the absence of misconduct. *State v. Johnson*, 335 Or 511, 519, 72 P3d 282 (2003) ("The independent source

doctrine permits the introduction of evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality"); *id*. at 514 n 2 ("The 'inevitable discovery' doctrine 'permits the prosecution to purge the taint of illegally obtained evidence by proving, by a preponderance of the evidence, that such evidence inevitably would have been discovered, absent the illegality, by proper and predictable police investigatory procedures.'").

Attenuation, by contrast, is a doctrine which precludes suppression even when but-for causation cannot be denied, yet where the connection is so distant or attenuated that the evidence cannot fairly be said to be the product of the illegality. *See Hemenway*, 353 Or at 144 (when asking whether consent "attenuated the connection between the prior illegal conduct and the evidence obtained in the consent search," recognizing the existence of a "causal relationship between the two").

Here, the question is whether the discovery of an outstanding arrest warrant and evidence following police misconduct falls within any of those three categories just described. Although neither party maintains that such cases should be analyzed under the inevitable discovery or independent source doctrines, it is nonetheless tempting in some respects to analyze the effect of an outstanding arrest warrant under those doctrines. That is, there is—in a general and perhaps colloquial sense—both an independent reason and inevitability to

the officers' actions, *i.e.*, executing the warrant, arresting defendant, and searching him incident to that arrest. But the state recognizes that those doctrines require more. That is because the records in this and similar cases often do not reflect whether any police activity, unconnected to the lawful seizure, would have independently or inevitably led to the same evidence. Here, the most that can perhaps be established is that the police officers would have at some point arrested defendant, but the state cannot show that defendant would have had the same evidence—drugs and a large amount of cash—on him at that time.

Thus, analyzing this and similar cases under the attenuation doctrine is more appropriate, as that question asks whether the connection between an illegality and the subsequent discovery of evidence is too distant or attenuated to justify suppression.

B. An arrest carried out pursuant to a warrant and a subsequent search are so tenuously related to any preceding illegality that a defendant is not entitled to the suppression of evidence remedy.

This court has frequently explored how the attenuation doctrine operates in the context of consent searches. In *Hall*, for instance, this court addressed how courts determine whether a defendant's consent to search is sufficiently attenuated from a prior illegality so as to defeat suppression of evidence:

> Although determining the existence of [a causal connection requiring suppression] requires examination of the specific facts at

> issue in a particular case, we view several considerations relevant to that determination, including (1) the temporal proximity between the unlawful police conduct and the defendant's consent, (2) the existence of any intervening circumstances, and (3) the presence of any circumstances—such as, for example, a police officer informing the defendant of the right to refuse consent—that mitigated the effect of the unlawful police conduct.

Hall, 339 Or at 34-35. This court reaffirmed those factors in *Hemenway*, and added an additional factor that considers the purpose and egregiousness of the police conduct. 353 Or at 146.

But that test—which is aimed at resolving the fact-specific inquiry of whether the individual's decision to *consent* was infected by police misconduct—does not aid in evaluating the attenuating effect of an arrest warrant, which pre-existed any police misconduct and therefore could not, under any facts, be infected by it. *See Hall*, 339 Or at 35 (a "causal connection requiring suppression also may exist because the unlawful police conduct, even if not overcoming the defendant's free will, significantly affected the defendant's decision to consent."); *Hemenway*, 353 Or at 143 (factors helpful in "assessing whether the causal connection 'significantly affected' the defendant's decision to consent"). For instance, the temporal proximity factor aids in determining whether a defendant's consent was close in time to the police illegality and whether the consent itself was therefore somehow tainted

by the illegality.[3] *See also United States v. Green*, 111 F3d 515, 522 (7th Cir), *cert den*, 522 US 973 (1997) (noting that the time between the unlawful conduct and the consent is important in the consent context because the closer the time period, the more likely it becomes that consent was influenced by the illegality. In contrast, in the arrest warrant context, any influence the stop would have on the defendant's conduct is "irrelevant."). Similarly, whether an officer informs a defendant that he has a right to refuse to consent bears on whether that consent is truly the product of the defendant's free will. Consideration of those factors is compatible with the notion that suppression serves to vindicate the defendant's rights—a defendant who had the right not to be unlawfully seized has an equal right not to be bound by a consent that is the product of that seizure. Moreover, given the number of variables surrounding the asking and giving of consent—the manner of asking, the timing of asking, and other surrounding circumstances—utilizing a multi-factored test and applying it to the individual circumstances of the case is valuable in determining whether that consent was tainted. In short, and as this court noted in *Hemenway*, the test for

---

[3] In the state's brief on the merits in *Hemenway*, the state urged this court to replace its previous *Hall* formulation with an analysis that would assess whether the defendant's consent was voluntary. The state continues to assert that position, *see* State's BOMs in *Musser*, *Unger*, and *Lorenzo*. But, assuming that the court, as it did in *Hemenway*, largely re-adopts those factors, the state addresses them herein.

whether a consent search following an unlawful stop is reasonable under Article I, section 9 simply "cannot be reduced to a simple formula." 353 Or at 148.

But in many respects, the test in this context—where an officer discovers an outstanding arrest warrant—*can* be reduced to a simple formula. To be sure, the overarching inquiry remains the same, irrespective of whether the evidence is discovered pursuant to a consent search or pursuant to a search incident to an arrest on an outstanding warrant: should the evidence be suppressed because it was obtained in violation of the defendant's rights to be free from unreasonable searches and seizures under Article I, section 9? But unlike consent searches—where the facts of the particular encounter drive the question whether the police's unlawful conduct affected the individual's decision to consent—the discovery of a valid arrest warrant merits a far less complicated and fact-dependent analysis. That is because, as explained in greater detail below, an arrest on that warrant and a subsequent search are—categorically—so tenuously connected to any preceding impropriety that a defendant is not entitled to suppress evidence as a remedy. However, even if this court concludes that the *Hall/Hemenway* factors are relevant beyond the consent-search context, those factors lead to the same result.

1. An arrest categorically purges the taint of any preceding impropriety, without regard to the facts this court set forth in *Hall* and *Hemenway*.

This court recognized long ago that discovery of an outstanding arrest warrant necessarily attenuates any causal connection between any preceding illegality and evidence obtained in the subsequent search incident to arrest on that warrant. *State v. Dempster*, 248 Or 404, 434 P2d 746 (1967). Nothing in the intervening years has altered that conclusion. Although this court's analysis for suppression has shifted in other contexts, *see e.g., Hemenway*, none of those changes cast doubt on the principles articulated in *Dempster*.

In *Dempster*, this court held that where evidence is discovered in the course of a search incident to arrest on an arrest warrant, that warrant "purges" the taint of—or attenuates the link to—any preceding police illegality. There, officers detained the defendant at the police station while another officer conducted a warrants check. *Id.* at 406. The second officer discovered that the defendant had an outstanding failure-to-appear warrant and took him into custody pursuant to the warrant. *Id.* During a search incident to arrest, an officer located drugs and drug paraphernalia on the defendant's person. *Id.*

The defendant appealed, arguing that he had been unlawfully seized and the trial court was required to suppress the evidence as "fruit of the poisonous tree." *Id.* at 407. This court held that that discovery of the warrant provided a

distinct, lawful basis to detain defendant, thereby "purging" defendant's arrest (and search incident to arrest) of any taint resulting from the prior illegality:

> The lawful arrest on the bench warrant purged the search incident thereto of the taint of any illegality in the detention of defendant prior to that time. In the language used in *Nardone v. United States*, 308 US 338, 60 S Ct 266, 84 L Ed 307, 312 (1939), the connection between the alleged illegal arrest and the subsequent search had "become so attenuated" by the intervening legal arrest "as to dissipate the taint." *See also Wong Sun v. United States*, [371 US 471], 487, [83 S Ct 407, 9 L Ed 2d 441 (1963)].

Id. at 407-08; *see also State v. Jones*, 248 Or 428, 433-34, 435 P2d 317 (1967) (citing the discovery of an outstanding arrest warrant as an example of an event which would effectively attenuate the taint of any illegality committed *prior* to the discovery of the warrant.). Thus, a lawful arrest on a warrant is an event that attenuates or dissipates the effect of a previous unlawful police illegality.

Defendant urges this court to limit *Dempster*'s reach. He argues that, unlike the circumstances in *Dempster*, officers here discovered defendant's identity as a result of the unlawful seizure, whereas the officers in *Dempster* already knew the defendant's identity. In defendant's view, that difference holds constitutional significance: here, the officers used the evidence obtained as a result of their unlawful detention of defendant to discover his outstanding arrest warrant, whereas in *Dempster* they did not. But defendant's argument ignores *Dempster's* reasoning. When ruling that the trial court correctly denied the defendant's motion to suppress the drugs found on his person, this court

made no reference to whether or not the police had lawfully obtained the defendant's identification. Rather, this court reasoned that even if defendant's initial arrest was unlawful, police lawfully arrested the defendant pursuant to the warrant, and before he had been searched. Moreover, when the police officer discovered the warrant, "he was bound to obey its command and arrest defendant." *Dempster*, 248 Or at 407. This court determined, in other words, that once the officer had discovered a lawful basis to arrest the defendant, the defendant was thereafter lawfully detained even where the preceding detention was unlawful.

Moreover, although the analysis in *Dempster* is brief, and tethered to cases decided under the Fourth Amendment, its conclusion is consistent with Oregon courts' standard analysis of the connection between improper police conduct and the subsequent discovery of evidence. As this court has framed the relevant analysis, the question is whether there is a "direct causal connection" between the two events. *See Hemenway*, 353 Or at 146 (consent will not "'purge the taint' of the prior illegal stop, [when] the evidence has a direct causal connection to the illegal conduct"); *Hall*, 339 Or at 25 (where there is "such a tenuous factual link to the disputed evidence that that unlawful police conduct cannot be viewed properly as the source of that evidence," evidence will not be suppressed). Thus, if the connection between the unlawful conduct and the discovery of evidence is "minimal" or "faint," *State v. Ayles*, 348 Or

622, __, 237 P3d 805 (2010) (Kistler, J., dissenting), admission of the evidence is permitted because "the defendant has not been disadvantaged as a result of the unlawful police conduct or, stated differently, because the defendant is not placed in a worse position than if the governmental officers had acted within the bounds of the law." *Hall*, 330 Or at 25. Suppression of such tenuously linked evidence "would not serve to vindicate the defendant's rights under Article I, section 9 because the evidence sought to be suppressed did not result from a violation of the defendant's rights under" that provision. *Hall*, 339 Or 26.

Where officers unlawfully seize an individual, and then uncover evidence of a crime only after (1) discovering an outstanding arrest warrant, (2) arresting him, and (3) searching him incident to arrest, the causal connection between the preceding illegality and the discovery of the evidence dissipates. The *direct* cause of the search that revealed the contested evidence is not the unlawful seizure; rather, the source of the evidence is the warrant, the arrest, and the search incident to arrest.

Stated differently, the connection between the unlawful seizure and the discovery of the evidence is supplanted with an independent—and lawful—basis for seizing (in fact, arresting) the defendant and conducting a search. *See e.g., Ayles*, 348 Or at__(Kistler, J., dissenting) (recognizing that an independent and untainted lawful cause made the connection between the illegality and the

discovery of evidence too weak to justify suppression).[4] An outstanding arrest warrant means that a neutral and detached magistrate has determined that probable cause exists to arrest the defendant and has mandated that officers arrest that individual. ORS 133.110 (Where there is probable cause to believe that a defendant has committed a crime specified in an information or complaint, a magistrate "shall" issue an arrest warrant); ORS 133.140(6) (warrant "shall" contain a command that a peace officer arrest the defendant and bring him before the court); *see also Davis*, 313 Or at 255 ("Once a valid arrest warrant issues for a defendant, that defendant has no constitutionally protected interest in keeping his or her person out of government custody. * * * A valid arrest warrant means constitutionally that it is not "unreasonable" to seize the person of the defendant on the authority of the warrant."). That finding of probable cause and that mandate to arrest defendant pre-exists—and thus is necessarily untainted by—any police conduct that preceded arrest on the warrant. Any search incident to arrest on that warrant is similarly untainted by the unlawful police conduct (assuming that search stays within the bounds of the search incident to arrest exception to the warrant requirement), because it is

---

[4] Although the dissent used the term "independent and lawful" cause, it does not appear that the dissent was framing the analysis in terms of the independent source doctrine. As noted above, there is some imprecision among independent source, inevitable discovery, and attenuation, but the dissent's framing of issue most closely parallels the attenuation doctrine.

triggered *not* by the unlawful seizure but by the arrest on the warrant. Simply put, the connection between the discovery of the warrant and the resulting arrest and search is immediate and direct. In contrast, the connection between the improper police conduct and the search, while still real, is comparatively distant and faint. The connection between the police misconduct and the discovery of evidence is too attenuated to justify suppression.

And the cases that defendant relies upon demonstrate those points. *See State v. Juarez-Godinez*, 326 Or 1, 942, 772 (1997), and *Pooler v. DMV*, 306 Or 47, 755 P2d 701 (1988). In both *Juarez-Godinez* and *Pooler*, the suppressible evidence was directly connected to—and therefore infected by—the unlawful police conduct. In *Juarez-Godinez*, for instance, the officers obtained evidence pursuant to a search warrant, but that warrant was based upon evidence that was gathered during an unlawful stop. This court concluded that the evidence was the product of the unlawful detention of the defendant's car because the unlawful detention allowed the officers "to subject the car to a dog sniff that, in turn, was used to obtain a search warrant." *Id*. at 9. Because the search warrant could not have been obtained absent the unlawful stop, that warrant was tainted by the unlawful seizure. Similarly, in *Pooler*, officers unlawfully seized the defendant and, during and as a result of that seizure, the officer developed probable cause that the defendant was driving under the influence of intoxicants. 306 Or at 49. Like the warrant in *Juarez-Godinez*, the arrest could

not have been effected absent the unlawful stop, and it was therefore also tainted. Significantly, in both cases, the officers developed the probable cause that led them to the disputed evidence only after—and as a result of—the unlawful police conduct. That is, those cases stand for the simple proposition that the taint of the illegal conduct cannot be purged by later events that are themselves tainted.

But here, as discussed above, the warrant pre-existed any police misconduct. That warrant, therefore, is the direct and untainted cause of the search incident to arrest on that warrant and the resulting evidence; the police misconduct is at best a tangential cause. Discovery of the arrest warrant thus serves as an event that attenuates the direct causal connection between the unlawful seizure and the evidence discovered pursuant to arrest on the warrant. And because the police misconduct did not directly result in the discovery of the evidence, application of the exclusionary rule does not vindicate a defendant's right to be free from unlawful search and seizure. Indeed, because of that preexisting warrant, defendant here—unlike the defendants in *Pooler* and *Juarez-Godinez*—did not occupy, before the unlawful police conduct, a position in which he enjoyed an unqualified right to be free from seizure.[5]

---

[5] A different result might obtain if, similar to the defendants in *Pooler* and *Juarez-Godinez*, the officers here had discovered the drugs and cash after the unlawful seizure but before discovery of the warrant.

To be sure—as defendant notes—but for the unlawful seizure, the officers would not have been in a position to obtain his identity and run the warrants check that ultimately revealed the outstanding warrant. But that fact bears no constitutional significance. As this court has often repeated, "but for" causation is not enough to require suppression. *State v. Rodriguez*, 317 Or 27, 39-40, 854 P2d 399 (1993) ("This court has rejected the so-called 'but for' test * * *." (citing *Kennedy*, 290 Or at 500-01)); *Hall*, 339 Or at 25; *Hemenway*, 353 Or at 141. Nor is the state required "to prove that there was no causal link whatsoever between the illegal conduct" and, in this case, discovery of the warrant. *Hemenway*, 353 Or at 147 (citing *Rodriguez*, 317 Or at 40). The focus instead is on how the police acquire the evidence at issue and what actions brought the "disputed evidence to light[.]" *Hall*, 339 Or at 39. As described above, in cases where an officer discovers an outstanding arrest warrant, it is the fact that defendant has an outstanding arrest warrant—as well as the subsequent search incident to arrest on that warrant—that reveals the evidence. Moreover, from a purely factual standpoint, defendant's argument fails. The information obtained from the unlawful seizure—defendant's identity—is not what provides the basis for the search of defendant and his belongings. And his identity alone is not evidence subject to suppression. Instead, the officers discovered the evidence only after defendant's arrest warrant came to light and officers were mandated to take defendant into custody.

In short, to hold as defendant urges would serve only to further blur the distinction between a but-for cause of discovering the evidence—the unlawful seizure—and the legally significant cause of discovery of the evidence—the discovery of the outstanding warrant and the subsequent search incident to arrest. At the very least, defendant has failed to show that this court's decision in *Dempster* was "wrongly considered or wrongly decided[.]" *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 54, 11 P3d 228 (2000). Accordingly, this court should re-affirm the categorical rule that it announced in *Dempster* and the analysis that it has adhered to since, that discovery of the warrant attenuates the effect of any previous improper police conduct.

2. Even if the factors set forth in *Hemenway* are relevant beyond the consent-search context, those factors support concluding that the arrest warrant attenuated the taint of any preceding impropriety.

As discussed above, this court has developed factors for determining whether a consent following an unlawful seizure is sufficiently attenuates from the preceding illegality. In the state's view, and for the reasons just discussed, those factors should be replaced with a *per se* rule that the discovery of an outstanding arrest warrant always attenuates the causal connection between any improper police conduct and the discovery of evidence found during a search incident to arrest on that warrant. The benefit of having such a *per se* rule, of course, is to relieve trial courts and litigants of having to apply an unnecessary

multi-factored test. Relatedly, a *per se* rule ensures greater consistency in the law and in an area that, as amply demonstrated above, can be somewhat complex. But if this court rejects that argument and determines that those same factors guide the analysis here, those factors nonetheless lead to the same conclusion in this case: officers did not exploit any preceding illegality when they discovered an outstanding arrest warrant, arrested defendant and then searched him incident to the arrest on that warrant.

As set forth above, in determining whether the evidence at issue is sufficiently attenuated from the preceding illegality, this court considers the temporal proximity between the illegality and—in this case—the discovery of the warrant. This court also considers the existence of any intervening or mitigating circumstances, and—assuming that this court re-adopts the factors in *Hemenway*—the purpose and egregiousness of the unlawful police actions. The temporal proximity here was relatively close. However, and as alluded to above, this factor is more relevant when a court is trying to determine the effect that an unlawful police action had on an individual's decision to consent. *Green*, 111 F3d at 522 (noting that the time between the unlawful conduct and the consent is important in the consent context because the closer the time period, the more likely it becomes that consent was influenced by the illegality. In contrast, in the arrest warrant context, any influence the stop would have on the defendant's conduct is "irrelevant."). This and similar cases involves no act

on the part of the defendant, and thus an inquiry focused on the illegality's effect on him or her is unnecessary and holds no legal significance. That is, although the passage of time might affect a defendant's decision to consent to a search, timing has no bearing on the discovery of a warrant.

More important, in this case, is the existence of a significant intervening or mitigating circumstance—the discovery of the warrant. As noted, that warrant represented a judicial mandate that probable cause existed that defendant had committed a crime, and officers were thereby obligated to take defendant into custody. Once defendant was taken into custody, the officers were entitled to search him incident to that arrest. Discovery of that warrant therefore constituted an intervening or mitigating event between the unlawful seizure and the discovery of evidence found during the search incident to arrest on that warrant. *See also infra* at 35-42 (discussing attenuation under the federal exclusionary rule).

The final factor—the purpose and egregiousness of the police misconduct—is irrelevant to an Article I, section 9, exclusion analysis in this context. In *Hall*, this court recognized that this factor "relates to only the deterrence rationale of the Fourth Amendment exclusionary rule and has no applicability to the exclusionary rule under Article I, section 9." 339 Or at 35 n 21. In *Hemenway*, this court recognized a limited exception to that background rule:

> Although *Hall* was correct that the Oregon exclusionary rule, unlike the federal one, does not balance the value of deterrence against the costs of exclusion in determining whether evidence should be suppressed, we clarify here that the "purpose and flagrancy" of police misconduct nonetheless *may* play a role in exploitation analysis. 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. The verbal and nonverbal interactions between a defendant and the police leading up to the consent itself are relevant to whether or not the police gained consent through exploitation.

353 Or at 147 (emphasis added, internal citations omitted). That is, *Hemenway* recognized the relevance of flagrancy *only* when the determination is "whether *consent* has so attenuated the connection between the prior illegal conduct and the evidence obtained in the consent search." *Id*. at 144 (emphasis added). But neither that holding nor its rationale support recognizing the relevance of flagrancy when the determination is whether the *discovery of an arrest warrant* has attenuated the connection between illegality and challenged evidence. Similar to the temporal proximity factor, the flagrancy of misconduct might affect a defendant's decision to consent to a search, but it bears no relationship to the discovery of a warrant. *Green*, 111 F3d at 522 (noting as much).

Regardless, to the extent that this court considers the purpose and egregiousness of the police misconduct, that factor also weighs in favor of the state. Before considering the constellation of events that led to defendant's

arrest and whether those events reflect egregious police conduct, one point bears mention. Contrary to the manner in which defendant frames the officers' conduct, the record is devoid of any evidence—and therefore of any factual finding by the trial court—that the officers seized defendant *for the purpose of* running a warrant check. To be sure, the officers seized defendant, and subsequently ran a warrants check. But defendant takes two events that follow in time and links them causually to infer an intent that the record simply does not support. *See also Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968) (where the trial court did not make explicit factual findings, this court presumes that it found the facts to be consistent with its ultimate conclusion).

What the record *does* reflect is this: on the basis of a legitimate traffic violation, the police stopped a car in which defendant was riding. *State v. Bailey*, 258 Or App 18, 20, 308 P3d 368, *rev allowed*, 354 Or 490 (2013). The car had just left a house at which gang members had congregated after attending a funeral for a victim of gang violence. *Id*. at 19-20. The car itself was of a type commonly used in criminal activities, and officers detained defendant and the others in the car because they were "[c]oncerned that the car's occupants were on their way to commit a crime." *Id*. One of the officers quickly recognized defendant as a gang associate, though he could not remember his name. *Id*. at 20. In short, the police acted on the basis of heightened and individualized suspicion, even if that suspicion did not rise to the requisite legal

standard of "reasonable suspicion." That conduct is not "flagrant." Instead, the record shows that, although the police were highly interested in defendant and his companions, they did not stop the car until they had probable cause to do so based on the traffic violation. At the same time that they were trying to identify defendant, they were also simultaneously processing the traffic stop and trying to determine whether the driver was properly insured. (Tr 49, 95-100, 108 (testimony from detaining officer that he was still trying to verify insurance when the officer who identified defendant arrived)). At most, those facts reflect an imperfect attempt to obey Article I, section 9, not a flagrant disregard for its protections.

II. The Fourth Amendment exclusionary rule does not apply to evidence obtained following an arrest on a valid warrant

For the foregoing reasons, the Oregon Constitution does not require suppression of evidence discovered in a search incident to an arrest on a valid warrant, notwithstanding any preceding illegality. Nor is exclusion required by the Fourth Amendment to the United States Constitution, under which the United States Supreme Court has developed an exclusionary rule that is substantively different from the one developed under the Oregon Constitution.

In its most recent opinions discussing exclusion under the Fourth Amendment, the United States Supreme Court has consistently cautioned that "[s]uppression of evidence * * * has always been [the Court's] last resort, not

[its] first impulse." *Hudson v. Michigan*, 547 US 586, 591, 126 S Ct 2159, 165 L Ed 2d 56 (2006); *see also Herring v. United States*, 555 US 135, 140, 129 S Ct 695, 172 L Ed 2d 496 (2009) (same, quoting *Hudson*); *Davis v. United States*, 564 US __, 131 S Ct 2419, 2427, 180 L Ed 2d 285 (2011) (similar, quoting *Hudson*). Accordingly, the Fourth Amendment exclusionary rule is "applicable only where its *remedial objectives* are thought most efficaciously served." *Hudson*, 547 US at 591 (emphasis added, internal quotation marks omitted). Those remedial objectives, however, do not involve protecting individual rights; the federal exclusionary rule, unlike the remedy afforded for violations of Article I, section 9 of the Oregon Constitution, is not "designed to redress the injury occasioned by an unconstitutional search." *Davis v. United States*, 131 S Ct 2419, 2426, 564 US 322, 180 L Ed 2d 285 (2011) (internal quotation marks omitted). Instead, the "rule's sole purpose * * * is to deter future Fourth Amendment violations." *Id*.

Hudson represents the Court's most recent attempt to identify—in view of the exclusionary rule's narrow objective—a consistent framework for limiting the rule's application to only those circumstances in which deterrence can be achieved. In so doing, the Court reflected on the development of the exclusionary rule—from its origins in "expansive *dicta*" that suggested a "wide scope" and "reflexive application," to its more modern "reject[ion of] that approach" in favor of one constrained by various independent principles. *See*

547 US at 591 (rejecting reasoning in cases as recent as 1971); *see also Davis*, 131 S Ct at 2427 (observing that the Court's "precedents establish important principles that constrain application of the exclusionary rule").

Because *Hudson* contains the clearest, fullest, and most recent articulation of Fourth Amendment suppression doctrine, it is the starting point of any suppression analysis.[6] *See*, *e.g.*, *United States v. Hector*, 474 F3d 1150, 1154-55 (9th Cir 2007), *cert den* 552 US 1104, 128 S Ct 875, 169 L Ed 2d 737 (2008) (analyzing Fourth Amendment suppression by following *Hudson*'s framework). In view of the exclusionary rule's narrow objectives, *Hudson*

---

[6] Defendant's Fourth Amendment argument relies exclusively on *Brown v. Illinois*, 422 US 590, 95 S Ct 2254, 45 L Ed 2d 416 (1975). As discussed below, *Brown* is relevant only to one element of the necessary exclusion analysis under *Hudson*, and even there, only in modified form after *Herring* and *Davis*.

The dissent in the Court of Appeals decision below similarly followed that analytical path, as did all of the various authorities relied upon therein. *See Bailey*, 258 Or App at 33-34 (citing *State v. Mazuca*, 375 SW3d 294 (Tex Crim App 2012), *cert den*, __ US __, 133 S Ct 1724, 185 L Ed 2d 789 (2013); *United States v. Gross*, 662 F3d 393 (6th Cir 2011); *United States v. Simpson*, 439 F3d 490 (8th Cir 2006); *United States v. Green*, 111 F3d 515 (7th Cir 1997); *McBath v. State*, 108 P3d 241 (Alaska Ct App 2005); *State v. Hummons*, 253 P3d 275 (Ariz 2011); *State v. Frierson*, 926 So 2d 1139 (Fla), *cert den*, 549 US 1082, 127 S Ct 734, 166 L Ed 2d 570 (2006); *State v. Page*, 103 P3d 454 (Idaho 2004); *People v. Mitchell*, 824 NE2d 642 (Ill 2005); *State v. Moralez*, 300 P3d 1090 (Kan 2013); *State v. Hill*, 725 So 2d 1282 (La 1998); *Myers v. State*, 909 A2d 1048 (Md 2006); *Jacobs v. State*, 128 P3d 1085 (Okla Crim App 2006); *State v. Strieff*, 286 P3d 317 (Utah Ct App 2012), *rev allowed*, 298 P3d 69 (Utah 2013)). Of those cited authorities, many pre-date *Hudson*, and the rest fail to follow the analysis prescribed in that case.

identified at least three sets of principles independently precluding suppression of evidence connected to a Fourth Amendment violation. Those principles, discussed in more detail below, are (1) logical causation and attenuation, (2) interest-based attenuation, and (3) cost-benefit balancing. Under each of those sets of principles, the exclusionary rule does not apply to evidence obtained following an arrest on a lawful warrant.

A. When evidence is obtained as a result of executing a warrant, that warrant is an intervening circumstance that attenuates any causal link to any preceding illegality.

The federal exclusionary rule is first constrained by the familiar principles of logical causation and attenuation.[7]

As *Hudson* recognized, even when but-for causation is established, it "can be too attenuated to justify exclusion." 547 US at 593 (citing *Nardone v. United States*, 308 US 338, 341, 60 S Ct 266, 84 L Ed 307 (1939)). The Supreme Court later added to *Nardone* by enumerating factors—temporal proximity, intervening circumstances, and the purpose or flagrancy of the

---

[7] As discussed above on page 13, the independent source doctrine is another means for defeating but-for causation. Although Oregon's version of that doctrine may not apply to the discovery of an arrest warrant following improper police conduct, the *federal* version of that doctrine is substantively different, and may apply to that situation. *See Hudson*, 547 US at 618 (Breyer, J., dissenting) (criticizing the majority opinion for asking "what police might have done had they not behaved unlawfully" instead of "what they did do"). Accordingly, the state does not here concede whether the independent source doctrine defeats but-for causation under the federal exclusionary rule.

misconduct—relevant to attenuation. *Brown v. Illinois*, 422 US 590, 598-99, 603-04, 95 S Ct 2254, 45 L Ed 2d 416 (1975). That form of attenuation is "causal attenuation," as distinguished from the interest-based form of attenuation discussed in the next section.

Of the three federal circuits to have considered this precise question—whether the discovery of an arrest warrant can attenuate the effect of any preceding illegality—two have expressly stated that the first *Brown* factor, temporal proximity, is less relevant when the discovery of an arrest warrant is an intervening circumstance; the lapse of time is typically more useful in determining the effect of police misconduct on a defendant's later voluntary acts. *See United States v. Simpson*, 439 F3d 490, 495 (8th Cir 2006) ("In instances where the intervening circumstance is the discovery of an outstanding arrest warrant, courts have held the first factor—the time elapsed between the initial illegality and the acquisition of the evidence—is less relevant because the intervening circumstance is not a voluntary act by the defendant." (citing *Green*, 111 F3d at 522 (7th Cir), *cert den*, 522 US 973, 118 S Ct 427, 139 L Ed 2d 328 (1997))). The third and remaining federal circuit has similarly observed that, although the temporal factor is relevant when the challenged evidence is a confession or otherwise involves an act of free will, that factor bears no relevance when the challenged evidence is, as here, physical. *United States v. Gross*, 662 F3d 393, 402 n 2 (6th Cir 2011). In sum, the relevant

authorities agree that *Brown*'s temporal proximity factor adds little to the analysis of whether the discovery of an arrest warrant attenuates the taint of any preceding illegality.

The second *Brown* factor, by contrast, is likely dispositive. Here—and as detailed above in the discussion of Article I, section 9—discovery of the arrest warrant is an intervening circumstance involving a legal command to arrest the target individual. An officer's compliance with that judicial command carries enough legal significance to attenuate the causal link between (1) evidence obtained in executing the warrant and (2) any preceding illegality. Here, again, two federal circuits agree that discovery of an arrest warrant is an intervening circumstance sufficient, standing alone, to attenuate the taint of preceding illegality. *Green*, 111 F3d at 521 ("The lawful arrest * * * constituted an intervening circumstance sufficient to dissipate any taint caused by the illegal automobile stop."); *Simpson*, 439 F3d at 496 ("[W]e rule [defendant's] outstanding arrest warrant constitutes an extraordinary intervening circumstance that purges much of the taint associated with the officers' unconstitutional conduct."). That conclusion rests on the rationale that the discovery of a warrant is not generated by the preceding illegality. *Green*, 111 F3d at 522 ("[I]n the case of an arrest made pursuant to a warrant there is also no chance that the police have exploited an illegal arrest by creating a situation in which [the] criminal response is predictable, such as creating a situation where the

criminal will flee, which in turn will give the police an independent basis for an arrest, and thus a search incident to the arrest." (brackets in original, internal quotation marks omitted)). Only one other circuit has considered the issue, concluding that an arrest warrant is a non-dispositive intervening circumstance. *See United States v. Gross*, 662 F3d 393, 404 (6th Cir 2011) ("We agree * * * that, where there is a stop with no legal purpose, the discovery of a warrant during that stop may be a relevant factor in the intervening circumstance analysis, but it is not by itself dispositive.").[8]

That is, of the federal circuits to have considered the issue, the majority agree that, because the discovery of a warrant bears no relationship to any preceding illegality, it is sufficient to purge the taint of that preceding illegality. Defendant objects to a *per se* rule of this sort, but the United States Supreme Court has at least twice adopted such *per se* rules. *See Hudson*, 547 US at 594 (suppression not required when police execute search warrant in contravention of knock-and-announce requirement); *New York v. Harris*, 495 US 14, 110 S Ct 1640, 109 L Ed 2d 13 (1990) (suppression not required when police obtain

[8] Discovery of a warrant is no less significant an intervening circumstance than a defendant's decision to commit a crime in response to an unlawful stop. *See, e.g., United States v. Sprinkle*, 106 F3d 613, 619 & n 4 (4th Cir 1997) (holding that a "new and distinct crime, even if triggered by an illegal stop, is a sufficient intervening event" to "purge the taint of any initial police misconduct," and citing similar holdings from the First, Fifth, Eighth, Tenth, and Eleventh Circuits). Indeed, it is more significant because a warrant is in no way precipitated by the stop itself.

evidence as a result of a lawful arrest unlawfully effected by entering the subject's home without an arrest warrant or consent). Moreover, the Court has typically expressed aversion only to *per se* rules of *suppression*, not to *per se* rules of *admission*. *See Harris*, 495 US at 17 (observing court's general refusal to adopt a *per se* rule "that would make inadmissible any evidence" linked to unlawful police conduct); *but see Brown*, 422 US at 603 (declining to adopt a particular *per se* rule of admissibility).

Finally, the third *Brown* factor is the flagrancy of the Fourth Amendment violation. Defendant rests much of his argument on this factor, (*see* App Br 46-49), but flagrancy, in this context, bears little relationship to causation. For that reason, and particularly in view of the United States Supreme Court's recent decisions in *Herring* and *Davis*, that factor is better analyzed under the final *Hudson* step—balancing the costs of exclusion against the benefits of deterrence, as applied below to the facts of this case.

Under *Herring* and *Davis*, the flagrancy of the police misconduct is central to the third *Hudson* principle—balancing the benefits of deterrence against the costs of suppression. *See Herring*, 555 US at 141-43 (reasoning—in the context of analyzing whether "the benefits of deterrence * * * outweigh the costs"—that the deterrent effect of exclusion varies with the flagrancy of police misconduct (citing *United States v. Leon*, 468 US 897, 911, 104 S Ct 3405, 82 L Ed 2d 677 (1984)); *Davis*, 131 S Ct 2427 ("In a line of cases beginning with

[*Leon*], we also recalibrated our cost-benefit analysis in exclusion cases to focus the inquiry on the 'flagrancy of the police misconduct' at issue"). In making flagrancy a determinative factor in the cost-benefit analysis, the Supreme Court relied on *Leon*, which in, in turn, drew on Justice Powell's reasoning—from his concurring opinion in *Brown*—that the attenuation (or "dissipation") concept "attempts to mark the point at which the detrimental consequences of illegal police action become *so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost*." *Leon*, 468 US at 911 (emphasis added).

That is, *Herring* and *Davis* mark a shift, pulling the *Brown*-derived cost-benefit analysis—along with its central inquiry, regarding flagrancy—out of the causal attenuation inquiry and into a separate inquiry, as required by *Hudson*. Because the flagrancy issue is so central to the cost-benefit inquiry and otherwise unrelated to questions of causation or attenuation, that issue should no longer be considered as significant to the *Brown* attenuation analysis. Instead, that issue is to be considered in the separate, cost-benefit inquiry.

Logic supports moving the question of flagrancy into a separate inquiry. That is so because flagrancy typically bears no significance to causation. Therefore, even highly flagrant misconduct should not result in exclusion except in the rare circumstance where the flagrancy bears some causal relationship to the discovery of evidence. *Cf. Murray v. United States*, 487 US 533, 535-36, 543-44, 108 S Ct 2529, 101 L Ed 2d 472 (1988) (where law

enforcement officers "forced entry" into a warehouse to view its contents without a warrant, suppression precluded because officers later obtained a warrant to search same warehouse, assuming warrant was based on information known before forced entry).

To be sure, the flagrancy of the misconduct might occasionally bear some significance to factual causation. For example, voluntary consent to search might be a sufficient intervening event to attenuate the link between a search and preceding misconduct. But that consent is less likely to be voluntary in the context of highly flagrant misconduct because the police can generate the intervening event by increasing the flagrancy of their misconduct. Although an illegal stop by itself cannot coerce an individual into consenting, a flagrantly illegal stop—for example one involving unreasonable force or threats—might well coerce consent.

By contrast, flagrancy bears little or no significance when the intervening event cannot be produced by misconduct. Here, for example, the police could not, through increasingly flagrant misconduct, increase the likelihood of finding a warrant. In this circumstance, therefore, flagrancy is significant only to deterrence, and that inquiry—in light of *Hudson, Herring, and Davis*—is separate from factual causation and attenuation.

In sum, under *Hudson*'s more modern approach, only two *Brown* factors retain significance: temporal proximity and intervening circumstances. But

when, as here, the intervening circumstance is not one involving the defendant's own acts, such as granting consent to search, temporal proximity is irrelevant. Thus, the causal attenuation analysis reduces to the one remaining *Brown* factor: the discovery of the arrest warrant. That fact is an intervening circumstance significant enough, standing alone, to dispositively attenuate the causal link between police misconduct preceding execution of the warrant and evidence obtained in that execution. When the causal relationship between the challenged evidence and the preceding illegality is so attenuated, the exclusionary rule does not apply.

B. When evidence is obtained upon execution of a warrant, Fourth Amendment interests have been protected and resolved by the magistrate's probable cause determination, and exclusion would serve only interests unrelated to the Fourth Amendment.

The exclusionary rule is next constrained by attenuation principles of a different, less familiar, variety:

> Attenuation can occur, of course, when the causal connection is remote. Attenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained. The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve.

Hudson, 547 US at 593 (internal quotation marks and citations omitted). That is, when police misconduct violates interests that "have nothing to do with the

seizure of the evidence, the exclusionary rule is inapplicable." *Id*. at 594. This form of attenuation is based not on principles of logical causation, but instead on an interest-based analysis.

In *Hudson*, for example, the police misconduct was a failure to knock and announce before executing a search warrant. 547 US at 590. The Supreme Court concluded that, because the interests protected by the knock-and-announce requirement—privacy, dignity, safety, and protection of property—have nothing to do with the seizure of the evidence, the exclusionary rule was inapplicable. *Id*. at 593-94.

Here, the police misconduct involves a seizure of defendant. (*See* Tr 258-59). But the Fourth Amendment protects individuals from seizure only "*[u]ntil a valid warrant has issued*." *See Hudson*, 547 US at 593 ("Until a valid warrant has issued, citizens are entitled to shield 'their persons, houses, papers, and effects,' from the government's scrutiny." (internal citation omitted; quoting US Const, Amend IV)). That is, the subject of an arrest warrant has no right to be free from seizure. Having lost that right, the subject of a warrant is left only with the right to be protected from execution of the warrant in an unlawful manner. But the interests protected by *those* rights are similar to the interests discussed in *Hudson*—dignity and safety. As explained in *Hudson*, because those interests bear no relation to the seizure of evidence, exclusion does nothing to vindicate them and is therefore inappropriate.

Indeed, as applied to the facts of this case, the interest-based analysis reflects nothing more than a different formulation of an old rule: the presence of probable cause to arrest precludes exclusion of evidence or statements obtained after the defendant is placed in custody. *Hudson* drew its interest-based version of attenuation from the reasoning in *New York v. Harris*, 495 US 14, 110 S Ct 1640, 109 L Ed 2d 13 (1990), which declined to suppress a confession obtained after the police unlawfully executed a lawful warrant. *Hudson*, 547 US at 593. Under those facts, *Harris* concluded that *Brown*'s standard causal attenuation analysis was inapplicable because that analysis is limited to circumstances where "the police lacked probable cause." *Harris*, 495 US 18-19. *Harris* thus established a rule—adapted in *Hudson* to recognize a more general interest-based form of attenuation—that, whatever rights an individual may have once probable cause to arrest has lawfully been established, the interests protected by those rights cannot be vindicated by exclusion under the Fourth Amendment. *See also United States v. Crawford*, 372 F3d 1048, 1056 (9th Cir 2004) (en banc), *cert den*, 543 US 1057, 125 S Ct 863, 160 L Ed 2d 783 (2005) (discussing cases supporting the conclusion that, "[a]fter *Harris*, the presence of probable cause to arrest has proved dispositive when deciding whether the exclusionary rule applies to evidence or statements obtained after the defendant is placed in custody"). As a corollary to that rule,

the *Brown* analysis is beside the point once probable cause to arrest has been lawfully established.

Here, defendant did not lose all rights once he became the subject of a lawful arrest warrant—representing a neutral magistrate's determination that probable cause supported arrest. *See, e.g.*, *Steagald v. United States*, 451 US 204, 212-13, 101 S Ct 1642, 68 L Ed 2d 38 (1981) ("The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search."). However, that neutral determination abrogated defendant's Fourth Amendment rights to shield his person, or items in his immediate possession, from government intrusion. Regardless of what other rights he continued to possess, the interests protected by those rights have nothing to do the Fourth Amendment, and exclusion would therefore be inappropriate.

C. When evidence is discovered upon the execution of an arrest warrant, that evidence should not be suppressed on account of preceding misconduct because suppression's cost outweighs the benefits of any marginal deterrence.

Finally, "[q]uite *apart from the requirement of unattenuated causation*, the exclusionary rule has never been applied except where its deterrence benefits outweigh its substantial social costs." *Hudson*, 547 US at 594 (emphasis added, internal quotation marks and citations omitted). This cost-benefit analysis—separate from the attenuation requirement, as made clear by

the emphasized phrase above—has proved to be increasingly significant, serving as the primary reason for denying exclusion in recent Supreme Court decisions.

For example, in *Herring*, the Court relied almost exclusively on a cost-benefit analysis when denying exclusion as a remedy when officers unlawfully arrested the defendant based on a reasonable belief that the defendant was the target of an outstanding warrant. 555 US 137, 141-47. *Davis* reiterated that analysis, again relying primarily on cost-benefit analysis to deny exclusion as a remedy for law enforcement actions taken in conformance with legal precedent that was later overruled. 131 S Ct at 2423.

The upshot of *Herring* and *Davis* is a "recalibrat[ion of the Court's] cost-benefit analysis in exclusion cases to focus the inquiry on the flagrancy of the police misconduct at issue." *Davis*, 131 S Ct 2427 (internal quotation marks omitted). More specifically, the recalibrated analysis recognizes that "[t]he extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct." *Herring*, 555 US at 143. That is, exclusion requires not just culpable or flagrant misconduct, but misconduct "sufficiently culpable that * * * deterrence is worth the price paid by the justice system." *Id*. at 144. "Culpability," in this sense, is equivalent to "flagrancy." *See Herring*, 555 US at 143 (implicitly equating the two concepts). It is distinct from mere intentionality, which is a separate inquiry.

Id. at 144 (holding that, to trigger exclusion, police conduct must be both "deliberate" and "culpable"). Just as importantly, the deterrence to be weighed is not deterrence generally, but the *marginal* deterrence gained by exclusion. *See Herring*, 555 US at 141 ("We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence." (internal quotation marks omitted)).

Here, despite defendant's characterizations to the contrary, the police did not flagrantly ignore the law when they detained him. As discussed above, the police lawfully stopped a car in which defendant was riding, they suspected that the vehicle was en route to a crime, and they quickly recognized defendant as a gang associate, though they could not remember his name. *Bailey*, 258 Or App at 20. That is, the police acted on the basis of heightened and individualized suspicion, even if that suspicion did not rise to the requisite legal standard of "reasonable suspicion." That conduct—unlawful though it may have been—is not so flagrant that its marginal deterrence warrants incurring the substantial cost of exclusion. That conduct is not attributable to a pattern or practice of systematic violations, as envisioned by defendant and commentators. (Pet Br 27-28, 42-43). Instead, as discussed above, the record shows that, although the police were highly interested in defendant and his companions, they did not stop the car until they had justification to stop for a traffic violation. At most, those facts reflect a failed attempt to obey the Fourth Amendment, not a

flagrant disregard for its protections. *See Davis*, 131 S Ct at 2428-29 (suppression not warranted except in cases involving deliberate, reckless, or grossly negligent conduct, or in those involving "recurring or systemic negligence").

In fact, exclusion under the circumstances of this case will arguably provide no *marginal* deterrence. Absent the discovery of the warrant, any evidence discovered as a result of the unlawful stop would have been suppressed. Thus, police already have significant disincentive to stop individuals for haphazard warrant checks—engaging in such misconduct would lead to suppression of any evidence or statements obtained from individuals not wanted on warrants, as well as any evidence or statements obtained before any warrant is discovered. Such flagrantly illegal behaviors would also expose police to potential claims under 42 USC § 1983. Those risks are unlikely outweighed by the hope of randomly finding a warrant.

Leaving aside the minimal benefits of suppression in this case, its cost extends beyond the standard cost of "letting guilty and possibly dangerous defendants go free" and thereby offending "basic concepts of the criminal justice system." *Herring*, 555 US at 141 (internal quotation marks omitted). Exclusion in this case would amount to a suggestion that "because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant — in a sense requiring an official call of 'Olly, Olly,

Oxen Free.'" *See United States v. Green*, 111 F3d 515, 521 (7th Cir), *cert den*, 522 US 973, 118 S Ct 427, 139 L Ed 2d 328 (1997). Exclusion would thus encourage officers to shirk their duty of immediately arresting individuals wanted on warrants—to avoid risking exclusion of any evidence obtained following arrest, the officers might choose to delay the arrest until they can be sure it will not be deemed tainted by the courts. Though our criminal justice system tolerates the occasional acquittal of guilty criminals, it cannot tolerate any suggestion that those who are accused of wrongdoing may evade arrest.

In short, exclusion is appropriate only (1) if the challenged evidence bears an unattenuated logical connection to police misconduct, (2) if the police misconduct affects an interest served by exclusion, *and* (3) if the cost of exclusion is outweighed by the benefits of any resulting marginal deterrence. None of those conditions are present when a defendant relies on a preceding illegality to seek suppression of evidence discovered in a subsequent search incident to an arrest on a lawful warrant. For that reason, exclusion is never appropriate in those circumstances.

CONCLUSION

For the foregoing reasons, this court should affirm the rule it announced in *Dempster*, and hold that the discovery of an arrest warrant serves as an event that attenuates the discovery of evidence found incident to that arrest from the preceding unlawful police conduct. The same result should also obtain under

the Fourth Amendment. The judgment of the trial court and of the Court of Appeals should therefore be affirmed.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

/s/ Anna M. Joyce

ANNA M. JOYCE #013112
Solicitor General
anna.joyce@doj.state.or.us
PEENESH H SHAH #112131
Assistant Attorney General
peenesh.h.shah@doj.state.or.us

Attorneys for Plaintiff-Respondent/
Respondent on Review
State of Oregon

AMJ:blt/5138488

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on March 28, 2014, I directed the original Brief on the Merits to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Peter Gartlan and Anne Fujita Munsey, attorneys for appellant/petitioner on review, by using the court's electronic filing system.

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

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 12,250 words. I further 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(2)(b).

/s/ Anna M. Joyce

ANNA M. JOYCE #013112
Solicitor General
anna.joyce@doj.state.or.us
PEENESH H SHAH #112131
Assistant Attorney General
peenesh.h.shah@doj.state.or.us

Attorneys for Plaintiff-Respondent/
Respondent on Review
State of Oregon

AMJ:blt/5138488