IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. WILLIAM RICK DELONG, Defendant-Appellant, Respondent on Review.	Douglas County Circuit Court No. 09CR1050FE CA A146907 SC S062176

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

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Douglas County
Honorable JOAN GLAWE SEITZ, Judge

Opinion Filed: January 29, 2014
Before: Armstrong, P.J.; Nakamoto, J.; and Egan, J.

Continued…

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INTRODUCTION

This case requires the court to decide whether Article I, section 12 of the Oregon Constitution requires the suppression of physical evidence discovered by police officers during a voluntary consent search that was preceded by a *Miranda* violation. For decades following the United States Supreme Court's decision in *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966), this court adhered to the same framework for analyzing the right against self-incrimination under Article I, section 12 that the Court applied under the Fifth Amendment. But in *State v. Vondehn*, 348 Or 462, 236 P3d 691 (2010), this court rejected the Fifth Amendment approach to the suppression of physical evidence following a *Miranda* violation and concluded that Article I, section 12 requires a heightened standard. For purposes of the Oregon Constitution, any physical evidence that is "derived" from a *Miranda* violation must be suppressed. What this court did not address in *Vondehn*—but what it must answer here—is exactly what it means for physical evidence to be "derived" from an earlier *Miranda* violation, and how far this new exclusionary rule will sweep.

This court should clarify that *Vondehn*'s exclusionary rule, while it may sweep more broadly than the federal counterpart in some cases, does not sweep

so broadly as to exclude evidence that results from a consent search when the state has proven that the consent was voluntary. Article I, section 12 and the *Miranda* rule exist to protect against *compelled* self-incrimination. If a defendant gave consent voluntarily, it was not compelled; he or she necessarily retained—despite the prior *Miranda* violation—the power to authorize or forbid the requested search. The defendant's free exercise of that power—the decision to allow a search—is an event that, for purposes of Article I, section 12, precludes any finding that police officers "derived" the evidence from a preceding violation.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented:

How should courts determine whether a police officer's failure to give *Miranda* warnings requires suppression of physical evidence subsequently discovered during a consent search?

First Proposed Rule of Law:

If officers find physical evidence after a *Miranda* violation, suppression is required only if the statements police obtained in violation of *Miranda* allowed police directly to obtain the physical evidence or otherwise deprived the defendant of the ability to prevent police from obtaining the physical evidence. If a *Miranda* violation is followed by a consent search, suppression is

required only if the violation compelled the defendant to consent to the search that produced the evidence.

Second Question Presented

Here, officers violated the *Miranda* rule when they asked defendant, who was in their custody, if there was "anything in [his] vehicle that we should be concerned about." Defendant responded by saying "No," but added that "if [the officers] wanted to search the vehicle, [they] could." Officers then searched the car and discovered drug residue. Did the *Miranda* violation require suppression of the drug-residue evidence?

Second Proposed Rule of Law:

The violation did not require suppression of the subsequently discovered evidence. The unwarned question (asking whether officers "should be concerned about" the car's contents) called for a "yes" or "no" answer. It was only after defendant fully responded to that question by saying "no," thereby providing an answer that neither authorized a search nor provided any basis for increased suspicion, that he invited officers to search. The officer's unlawful question did not compromise—significantly or otherwise—defendant's ability to prevent the officers from lawfully searching the car.

STATEMENT OF MATERIAL FACTS

Douglas County Sheriff's Deputy Robeson stopped defendant after noticing him driving a car without wearing a seatbelt. *State v. Delong*, 260 Or

App 718, 320 P3d 653 (2014). When defendant was unable to provide any photo identification, Robeson handcuffed him and placed him in his patrol car. *Id.* The deputy did not give defendant *Miranda* warnings. *Id.* After a second deputy arrived, and while they waited for dispatch to process defendant's name, Deputy Robeson asked defendant if there was "anything in the vehicle that we should be concerned about." *Id.* at 720-21. Deputy Robeson testified that defendant, "told me 'no,' and that if we wanted to search the vehicle, we could." (Tr 8). Defendant "volunteered" the offer to search. (Tr 20).

The deputies then searched the car and found a fanny pack containing "a white powder residue." *Delong*, 260 Or App at 721. At that point, they gave *Miranda* warnings to defendant, they asked him about the items found in the car, and defendant admitted that the fanny pack was his and that it contained drug paraphernalia. *Id.* The deputies conducted a field test on the discovered residue, which indicated that the residue was methamphetamine. *Id.* The state charged defendant with unlawfully possessing methamphetamine. *Id.* at 720.

Defendant moved "to suppress all evidence resulting from the search [of his car], including his incriminating statements." *Delong*, 260 Or App at 721. In part, he argued that Article I, section 12, of the Oregon Constitution, required the deputies to give him *Miranda* warnings before asking if his car contained anything they should be concerned about. *Id.* at 721-22.

The trial court denied defendant's motion. (Tr 68). The court concluded that no *Miranda* violation occurred. (Tr 69). The court also found that Sergeant Robeson had testified credibly when he testified that "he did not ask for consent," that defendant "ultimately gave consent to search," and that the consent "was volunteered" by defendant. (Tr 69). A jury subsequently convicted defendant of unlawful possession of methamphetamine.

The Court of Appeals reversed. The court noted that the state "now concedes that *Miranda* warnings were required because defendant was in custody while handcuffed and being questioned in the police vehicle." *Delong*, 260 Or App at 722. Officers thus violated Article I, section 12 by asking defendant if his car contained "anything we should be concerned about." *Id.* at 724.

The Court of Appeals deemed the suppression issue "largely governed by the principles and reasoning that the Supreme Court set forth in *Vondehn* [.]" *Delong*, 260 Or App at 723. In particular, the Court of Appeals applied an exploitation analysis, concluding that suppression is required because "the causal connection" between the Article I, section 12 violation and the discovered evidence "is direct." *Id.* at 726-27. Thus, notwithstanding the trial court's determination that defendant gave consent voluntarily, the Court of Appeals concluded that the evidence obtained during the search should be suppressed because the officers had "exploited" the *Miranda* violation by

"obtain[ing] consent without securing from defendant both a 'knowing and voluntary waiver' of rights under Article I, section 12." *Id.* at 727.

SUMMARY OF ARGUMENT

In *Vondehn*, this court held that physical evidence that derives from a preceding *Miranda* violation must be suppressed, but it did not elaborate on how a court is to determine whether physical evidence derived from the violation. One possibility, exemplified by the Court of Appeals' opinion in this case, is to apply an exploitation test of the kind that the court applies in the context of other constitutional violations, such as Article I, section 9, in an attempt to vindicate the right that has been violated. But there are fundamental differences between a *Miranda* violation and violations of Article I, section 9, and those differences require a fundamentally different suppression analysis.

The requirement that police officers give *Miranda* warnings before interrogating a person in custody or in compelling circumstances is grounded in a judicial recognition of the inherently compelling nature of custodial interrogation and the difficulty of discerning whether statements made in that setting were freely made. To prevent the admission of evidence that may not have been voluntarily provided, which would violate Article I, section 12, the *Miranda* rule creates an irrebutable presumption that any unwarned statements *were* compelled. *Miranda* is thus a judge-made rule designed to serve a specific purpose—to protect against compelled self-incrimination by preventing

the state from using compelled evidence to obtain a conviction. Unlike the exploitation analysis that this court applies to constitutional violations like Article I, section 9, courts suppress evidence derived from a *Miranda* violation in order to *effectuate* a constitutional right, not not to *vindicate* a constitutional right. Where *Miranda* warnings are not given, the court must suppress whatever evidence—statements or physical evidence—that is necessary to ensure that compelled evidence is not admitted at trial.

In the particular context presented by this case—a consent search following a *Miranda* violation—suppression of physical evidence obtained during that search serves the purposes of the *Miranda* rule only if the effect of the violation was to render the consent involuntary and hence compelled. If a *Miranda* violation is followed by a consent that is in fact *voluntary*, suppressing the physical evidence resulting from that search does not protect against the risk of compelled self-incrimination. In that circumstance, suppression of any statements that followed the *Miranda* violation suffices, by itself, to safeguard the right against self-incrimination. If the consent is voluntary, then the physical fruits of the search are, by definition, not compelled, and need not be suppressed to effectuate Article I, section 12.

Even if this court were inclined to adopt a traditional "vindication of rights," exploitation approach, it should reach the same conclusion. To the extent that the failure to give *Miranda* warnings violated Article I, section 12,

that right is sufficiently "vindicated" by the exclusion of unwarned (and presumptively compelled) statements as well as any other evidence that was actually compelled. If a defendant's consent to a search is voluntary, he or she necessarily retained—despite any preceding police illegality—the power to authorize or forbid the requested search. Under those circumstances, the defendant, despite the police illegality, is still in the same constitutional position with respect to his or her ability to prevent the government from engaging in the search. Vindication of the defendant's Article I, section 12 rights does not also require excluding, in addition to the presumptively compelled unwarned statements, the physical fruits of the search to which the defendant voluntarily consented.

In this case, the trial court correctly denied defendant's motion to suppress because defendant voluntarily consented to—and in fact suggested—the search that led the police to discover the drug evidence. The *Miranda* violation here consisted of asking defendant a single unwarned question, whether officers "should be concerned about" the contents of defendant's car. That question called for a "yes" or "no" answer. It was only after defendant fully responded to that question by saying "no," thereby providing an answer that neither authorized a search nor provided any basis for increased suspicion, that he invited officers to search. The trial court found that the invitation was freely and voluntarily given, and, notwithstanding the *Miranda* violation, the

record supports that finding. It follows that the evidence was not "derived" from the *Miranda* violation. This court should therefore reverse the decision of the Court of Appeals, and affirm the judgment of the trial court.

ARGUMENT

The ultimate question that this case presents is whether evidence that police officers obtained during a voluntary consent search should be suppressed because of a preceding *Miranda* violation. For the reasons discussed in detail below, the answer to that question is 'no.' Because *Miranda* is a judicially created rule designed for the specific purpose of protecting the right against compelled self-incrimination, where *Miranda* is violated, evidence should be suppressed only to the extent that doing so serves that specific purpose. But where—as in this case—physical evidence is obtained from a search to which the defendant voluntarily consented, suppression of the evidence does not serve that purpose.

A. Legal Framework: Under *Vondehn*, physical evidence "derived" from a *Miranda* violation is inadmissible.

To determine what it means for physical evidence to be "derived" from a *Miranda* violation requires an understanding of the meaning and purpose of both Article I, section 12 and the *Miranda* rule, as well as the case law that led to this court's decision in *Vondehn*. The state therefore begins with a discussion of that legal framework in order to provide the necessary context for the arguments that follow.

1. Article I, section 12

Article I, section 12, provides, in pertinent part, "No person shall * * * be compelled in any criminal prosecution to testify against himself." Or Const Art I, § 12. To the framers of the Oregon Constitution, "compelled" meant "forced; constrained; obliged." Noah Webster, *An American Dictionary of the English Language* 235 (3d ed 1856). Thus, the framers intended Article I, section 12 to create an individual right not to be forced to provide any of the statements or incriminating evidence[1] admitted at one's own criminal trial.

The framers of the Oregon Constitution copied Article I, section 12, from the Indiana Constitution, which was in turn modeled after the Fifth Amendment's self-incrimination clause. *See State v. Soriano*, 68 Or App 642, 646 n 4, 684 P2d 1220 (1984) (Gillette, J.), *affirmed and adopted by* 298 Or 392, 693 P2d 26 (1984) (explaining history of Article I, section 12). Such constitutional provisions codified two related common law rules of criminal

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[1] Although the text of the provision is specifically directed at "testimony" this court has concluded that it also guards more generally against the use of *compelled* "evidence." *See Vondehn*, 348 Or at 469 (rejecting states argument that Article I, section 12 applies only to testimony); *State v. Soriano*, 68 Or App 642, 646 n 4, 684 P2d 1220 (1984) (Gillette, J.), *affirmed and adopted by* 298 Or 392, 693 P2d 26 (1984) (concluding that "We see no reason to construe the Oregon Constitution to give protection from testifying but not from furnishing evidence."). *But see State v. Fish*, 321 Or 48, 53, 893 P2d 1023 (1995) (holding that Article I, section 12, prohibits only the use of compelled "testimonial evidence.")

procedure: the prohibition on inquisitorial trials and the prohibition on the use at a criminal trial of a defendant's compelled out-of-court confession. *Id.* *See also State v. Cram*, 176 Or 577, 581, 160 P2d 283 (1945) (noting that "the provisions in the federal and state constitutions against self-crimination are generally held to be declaratory of the common-law rule, neither limiting or enlarging it." (internal quotations omitted)).

At common law, an out-of-court confession was admissible at a defendant's criminal trial if it was voluntary. Greenleaf, 1 *Law of Evidence*, § 219 (1842 and 1866); Cooley, *A Treatise on the Constitutional Limitations* at 314. A confession was "voluntary" if "no motives of hope or fear were employed to induce the accused to make it." Cooley, *Constitutional Limitations* at 314. The limits on admissibility of such confessions was rooted in ancient recognition that compelled confessions were inherently unreliable. *King v. Warickshall*, 1 Leach 262, ("[A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape* * *that no credit ought to be given to it; and therefore it is rejected.)"

Consistently with the common law rules that Article I, section 12 and the Fifth Amendment were intended to codify, courts long used a "voluntariness" test to determine whether a defendant's in-custody statements would be admissible. That test (which courts often traced to the Due Process Clause rather than the Fifth Amendment) asked whether in the totality of

circumstances, a person's will was overborne by the circumstances. Where confessions were coerced or compelled, they were inadmissible. *See Oregon v. Elstad*, 470 US 298, 304, 105 S Ct 1285, 84 L Ed 2d 222 (1985) (describing history).

2. The *Miranda* Rule

In *Miranda v. Arizona*, the Court substantially changed the test it had long used to determine the admissibility of in-custody statements. In that case, the Court recognized for the first time the extent to which custodial police interrogation practices are inherently coercive, creating "inherent pressure" that calls into question the voluntariness of responses. That inherent coercion "blurred the line between voluntary and involuntary statements," and increased the risk that the individual's Fifth Amendment rights would be violated by the admission of statements made during a custodial interrogation. 384 US at 438-40. To address that risk, the Court held that, before subjecting a person to custodial interrogation, officers must inform the person of his right not to answer any questions, that his answered would be used against him in a court of law, and of his right to counsel. *Id*. at 479.

If the police give that warning and advice of rights, any incriminating statements made by the defendant in response to police interrogation are generally assumed to be voluntary and admissible. If no warnings are given, however, then any statements made in response to interrogation are presumed to

be compelled. The latter presumption (at least for the state's case-in-chief) is irrebuttable—for purposes of the *Miranda* rule it does not matter if the facts show that the person in a particular circumstance made a free choice and did not feel compelled to answer. *See Elstad*, 470 US at 306-307 (describing development, application, and purpose of *Miranda* rule); *Seibert*, 542 US at 608 (same). The purpose of the *Miranda* rule is thus to dispel the compulsion otherwise inherent in a custodial setting and to prevent the state from using any potentially compelled evidence to obtain the defendant's conviction. *Id*.

Following *Miranda*, the Court has decided several cases involving the admission of evidence following a *Miranda* violation. In each it has declined to regard a *Miranda* violation as a constitutional violation and thus has declined to use a "fruit of the poisonous tree" analysis. See *Elstad,* 470 US at 308-309 (*Miranda* rule required *only* a defendant's un-*Mirandized* statements; the Fifth Amendment does not require the suppression of the defendant's subsequent, *Mirandized* statements.) Instead the court explained that "the admissibility of any subsequent statement should turn * * * solely on whether it is knowingly and voluntarily made." *Id.* at 309. *See also Missouri v. Seibert*, 542 US 600, 124 S Ct 2601, 159 L Ed 2d 643 (2004)(all of the defendant's post-*Miranda* statements in deliberate two stage interrogation must be suppressed, not as the "fruit" of a prior unlawful act, but because the state had not established that the

belated *Miranda* warnings were "effective" and the belated waiver truly voluntary.) *Id.* at 604 (plurality opinion).

The Court specifically held that the Fifth Amendment does not require the suppression of the *physical* evidence derived from a statement obtained in violation of the *Miranda* rule in *United States v. Patane*, 542 US 630, 124 S Ct 2520, 159 L Ed 2d 667 (2004). In that case, the issue was whether the Fifth Amendment required suppression of the defendant's gun, which officers found after defendant revealed its location to them during un-*Mirandized*,[2] post-arrest questioning. *Id.* at 634-35. A majority of justices concluded that the Fifth Amendment did not bar the use at trial of the physical fruits of a voluntary, but un-*Mirandized* statement. *Id.* at 633-45.[3]

3. *State v. Vondehn*

For decades, both before and after *Miranda*, this court consistently held that the individual right created by self-incrimination provision of Article I, section 12, was identical to the individual right created by the Self-Incrimination Clause of the Fifth Amendment. *See, e.g.*, *In re Jennings*, 154 Or

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[3] Although that majority was split into a three-judge plurality and a two-judge concurrence, all five of those justices agreed that, under *Elstad*, the failure to provide *Miranda* warning, standing alone, did not require suppression of the physical fruits of an otherwise voluntary statement. *Id.* at 637-42; 644-45.

482, 495-496, 59 P2d 702 (1936) (noting that Article I, Section 12, and the Fifth Amendment, are "counterparts"). After the Court adopted the *Miranda* rule, this court applied the same reasoning and analysis under Article I, section 12, adopting wholesale the *Miranda* warnings required by Fifth Amendment jurisprudence. *State v. Kell*, 303 Or 89, 95, 734 P2d 334 (1987) (adopting Fifth Amendment analysis as applicable to Article I, section 12, in a *Miranda* case because "there is no value in being different merely for the sake of difference"); *Sparklin*, 296 Or 85, 88-89, 672 P2d 1182 (1983) (holding that *Miranda* warnings were sufficient to satisfy any warning requirement created by Article I, section 12, and declining to adopt different warnings for the Oregon Constitution).

This court's cases following *Miranda* initially also mirrored federal cases in recognizing *Miranda* as a prophylactic rule, required to effectuate Article I, section 12, while recognizing that the *Miranda* warnings were not themselves dictated by the constitution. *See State v. Mains*, 295 Or 640, 645, 669 P2d 1112 (1983) ("[T]his court is called upon from time to time to specify the procedure by which [Article I, section 12] is to be effectuated. Such specifications are not the same as interpretations of the guarantee itself * * *."). *See also*, *State v. Sparklin*, 296 Or 85, 88, 672 P2d 1182 (1983) (*quoting Mains*); *State v. Magee*, 304 Or 261, 264-66, 744 P2d 250 (1987) (*per curiam*). This court's Article I, section 12, jurisprudence thus long followed in lock-step with the Supreme

Court's Fifth Amendment jurisprudence. But this court stepped in a different direction when it decided *Vondehn*.

In *Vondehn*, a police officer lawfully arrested the defendant, handcuffed him, and placed him in the back seat of a patrol car. The officer then asked the defendant if a backpack at the scene belonged to him and if it contained marijuana. The defendant admitted that the backpack was his and that it contained marijuana. The officer then asked for consent to search the bag, and the defendant consented. Because the officer had failed to administer *Miranda* warnings, the trial court suppressed the defendant's statements. But the trial court did not suppress the marijuana, ruling that defendant's consent had been voluntary. *Vondehn*, 348 Or at 464.

In this court, the state argued for a broad, *per se* rule: that Article I, section 12, by its terms, applies only to compelled *testimony*, not to physical evidence. This court rejected that argument, citing cases in which had held that Article I, section 12 required the suppression of physical evidence. *Id.* The state also argued that that this court should adopt the reasoning of *Patane*, and should hold that the mere failure to give *Miranda* warnings (absent "actual" coercion) did not require the exclusion of derivative physical evidence. This court rejected that argument as well. In doing so, it concluded that conducting custodial interrogation without giving *Miranda* warning is *itself* a constitutional

violation, and hence that any physical evidence "derived" from that violation must be suppressed.

> It is the Oregon Constitution that requires *Miranda* warnings and it is the Oregon Constitution that is violated when those warnings are not given. When the police violate Article I, section 12, whether that violation consists of "actual coercion" or the failure to give the warnings necessary to a knowing and voluntary waiver, the state is precluded from using evidence derived from that violation to obtain a criminal conviction.

Id. at 475-76.

Justice Linder, joined by Justices Balmer and Kistler, concurred in the result. Justice Linder emphasized, however, that she concurred in the result because the state had proposed an "ambitious" *per se* rule that physical evidence is never subject to exclusion under Article I, section 12. She rejected that *per se* rule. She then concluded that the officer's request for consent was sufficiently "part and parcel" of the *Miranda* violation that the state had the burden to show circumstance "that either legally or factually break that connection." Because the state had argued only for a *per se* rule, had not made that showing. *Id.* at 490 (Linder, J., concurring).

Justice Linder thus agreed with the majority's contention that physical evidence derived from a *Miranda* violation may be subject to suppression. But she noted that the majority had done nothing to explain what it means for evidence to be "derived" from a *Miranda* violation. Notably, she also seemed to reject the majority's assertion that Article I, section 12 is violated whenever

Miranda is violated. Instead, she recognized that *Miranda* is a judicially created rule, and that when it is violated it "falls to the court to determine whether to exclude evidence in order to serve the objectives of the rule":

> [O]ur state-law based *Miranda* rule is "a judicial means" to secure the guarantee against compelled self-incrimination, one that this court has devised because it is appropriate for this court "to specify the procedure by which [Article I, section 12's guarantee against compelled testimony] is to be effectuated." Thus, the rule is constitutionally grounded, even if *Miranda* warnings and waiver of them are procedures that the constitution does not itself mandate.

Id. at 487 (*quoting Mains*, 295 Or at 645).

B. In determining whether physical evidence has been "derived" from a preceding *Miranda* violation, this court should ask whether the statements obtained in violation of *Miranda* allowed police directly to obtain the physical evidence or otherwise deprived the defendant of the ability to prevent police from obtaining the evidence.

Because *Miranda* is a judicially created rule, where *Miranda* is violated this court should suppress evidence to serve the rule's purpose: not in order to *vindicate* Article I, section 12, but rather to *effectuate* it by ensuring that the state is not able to admit any compelled evidence to obtain defendant's conviction. As explained below, where police obtain physical evidence following a *Miranda* violation, effectuating Article I, section 12 requires suppressing that evidence only if the *Miranda* violation allowed the police directly to obtain the evidence or otherwise deprived the defendant of the ability to prevent police from obtaining it.

1. Because *Miranda* is a judge-made rule, the proper focus for determining whether physical evidence should be excluded for a violation of the rule is not on exploitation and vindication but on the extent to which suppression of the evidence will further the rule's purposes.

Although *Vondehn* held that physical evidence that is derived from a preceding *Miranda* violation must be suppressed, it did not explain how a court is to determine whether physical evidence has been derived. One possibility is to apply an *exploitation* test, like that which the court applies in the context of other constitutional violations, such as Article I, section 9, in an attempt to vindicate a defendant's rights. And admittedly, in some respects *Vondehn* seems to assume an exploitation approach—if a constitutional violation occurs at the time of the *Miranda* violation, it is difficult to see why a "derivation" analysis should differ in any fundamental way from the exploitation analysis of any other actual constitutional violation, including Article I, section 9. Yet there are profound differences between *Miranda* violations and violations of Article I, section 9.

Three crucial factors make a *Miranda* violation completely different from an Article I, section 9 violation and call for different suppression analysis. First, unlike a violation of Article I, section 9, a *Miranda* violation always requires the suppression of evidence. Under Article I, section 9, if the court finds that evidence obtained is sufficiently attenuated from the violation, then the evidence is admissible and the violation comes without any evidentiary cost

to the state. But if defendant has been interrogated without receiving *Miranda* warnings all unwarned statements are presumptively compelled and must be suppressed. Thus, where a *Miranda* violation occurs and the defendant later *voluntarily* consents to a search that leads to physical evidence, the suppression of the presumptively compelled statements alone is sufficient to ensure that compelled incriminating evidence is not admitted and that *Miranda*'s purpose is served.

Second, unlike a violation of Article I, section 9, which necessarily involves an actual unlawful search or seizure, a *Miranda* violation may not involve any coercive or compelling conduct at all. The *Miranda* rule creates a legal *presumption* that statements made in the absence of *Miranda* warnings were not voluntary. Importantly, however, that is a presumption: It applies even if an officer did not actually engage in any coercive conduct, it applies even if the defendant already knew his rights, and it applies even if the defendant's statements were actually voluntary. The *Miranda* rule by its nature thus requires exclusion of statements that—although they are presumed to have been coerced—were in fact voluntary. *Elstad*, 470 US at 306 (explaining that *Miranda* "sweeps more broadly" than Fifth Amendment). The rule, in other words, is already over-inclusive, even under the Fifth Amendment. In *Vondehn*, this court concluded that Article I, section 12 requires exclusion also of physical evidence derived from a *Miranda* violation, and it thus expanded the

scope of the exclusion beyond that required by the Fifth Amendment.[4] If this court were to conclude that the physical fruits of a *voluntary* consent search could be suppressed as the product of a preceding *Miranda* violation, it would extend the exclusionary reach of *Miranda* still further.[5]

Third, unlike an illegal search or seizure, which cuts to the very core of the rights that the framers enshrined in Article I, section 9, a *Miranda* violation comes nowhere near the core conduct that the framers intended to protect against when they enacted Article I, section 12. Protecting and vindicating the core rights protected by Article I, section 9, warrants a robust exclusionary rule.

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[4] A few other states have done the same thing under their state constitutions, relying on an exploitation approach and specifically on a deterrence rationale. *See, e.g.*, *State v. Farris*, 109 Ohio St 3d 519, 849 NE2d 985 (2006) ("to hold otherwise would encourage law-enforcement officers to withhold Miranda warnings"); *State v. Peterson*, 181 Vt 436, 923 A2d 585 (2007) (physical evidence obtained in violation of Miranda rights must be excluded at trial as "fruit of poisonous tree"; nothing that the "main rationale" was deterrence); *Commonwealth v. Martin*, 444 Mass 213, 827 NE 2d 198 (2005) (physical evidence derived from unwarned statements presumptively excludable from evidence as "fruit" of improper failure to provide such warnings); *State v. Knapp*, 285 Wis.2d 86, 700 NW 2d 899 (2005) (physical evidence obtained as direct result of deliberate Miranda violation excluded as "fruit of poisonous tree"). The standard for suppression in those states is not uniform. In *Knapp*, for example, the Wisconsin Supreme Court limited suppression to physical evidence derived from "deliberate" *Miranda* violations.

[5] One incongruous result of that extension would be that in some cases—and perhaps many cases— a person in police custody will make statements that are in fact fully voluntary, and then give a consent to search that is also fully voluntary, and yet the physical evidence obtained in that search would be inadmissible. This court should decline to stretch *Miranda* that far.

A failure to provide a *Miranda* warning creates a risk of compelled self-incrimination, which the *Miranda* rule is designed to address, but it is a far cry from the actual admission of inquisition-style, compelled confessions that framers sought to prevent when they adopted Article I, section 12. *See Seibert*, 542 US at 623 (O'Connor, J. dissenting)(noting that Court had repeatedly made clear "that there simply is no place for a robust deterrence doctrine with regard to violations of [*Miranda*]"). *See Elstad*, 470 US at 305-307 (describing ways in which a Miranda violation "differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the [fruit of the poisonous tree] doctrine"); *Brown v. Illinois*, 422 US at 600-602 (same).

In sum, *Miranda* is a judge-made rule, designed for a specific purpose: protecting against the admission of compelled incriminatory evidence. Because *Miranda* is a judge-made rule that is designed for a specific prophylactic purpose, and not a procedural requirement actually enshrined in the constitution, the correct exclusionary-rule inquiry is to ask what steps are necessary to serve the rule's prophylactic purpose. Thus, where a *Miranda* violation occurs this court should ask what evidence must be suppressed to ensure that no compelled evidence is used to obtain the defendant's conviction.

2. Where officers obtain physical evidence following a *Miranda* violation, suppression serves *Miranda*'s purpose only if the statements obtained in violation of *Miranda* allowed police directly to obtain the evidence or otherwise deprived the defendant of the ability to prevent police from obtaining it.

In light of the purposes of the *Miranda* rule discussed above, to determine whether physical evidence was "derived" from a *Miranda* violation this court should ask whether the statements obtained in violation of *Miranda* allowed police directly to obtain the physical evidence or otherwise deprived the defendant of the ability to prevent police from obtaining the physical evidence. If so, the physical evidence, like the statements that led to it, is properly *presumed* to be compelled in order to effectuate Article I, section 12. To ensure that the state is not able to use any compelled evidence to convict the defendant, that physical evidence (in addition to the presumptively compelled statements) generally should be suppressed, at least absent some showing that under the particular circumstances suppression would not serve *Miranda's* purposes.[6]

Suppose, for example, that a defendant reveals the existence and location of incriminating physical evidence during un-*Mirandized* questioning. If the

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[6] Examples of such circumstances could include where the evidence was gained through an independent, lawful source or where the evidence inevitably would have been discovered, *see State v. Hall*, 339 Or 7, 44, 115 P3d 908 (2005), or where the un-*Mirandized* questions were necessary for public safety, *see New York v. Quarles*, 467 US 649, 104 S Ct 2626, 81 L Ed 2d 550 (1984).

officers are then able to obtain that evidence directly then that evidence is "derived" from the Miranda violation and may be subject to suppression. Under those circumstances the information that was presumptively compelled by the *Miranda* violation led police directly to the evidence and the presumptively compelled statements thus deprived the defendant of the ability to prevent police from obtaining the physical evidence.

The rule that the state proposes here is thus different than the Fifth Amendment rule that the Court adopted in *Patane*. Under the Fifth Amendment, physical evidence is not suppressed unless the unwarned statements leading to the evidence were obtained through *actual* (as opposed to merely presumed) coercion. In other words, the Fifth Amendment approach essentially drops *Miranda's* presumption that statements obtained in violation of *Miranda* were compelled when deciding whether to suppress derivative physical evidence. *Patane*, 542 US at 634-35. But the state's rule here—consistent with *Vondehn*—does not require the court to drop the presumption that statements made in violation of *Miranda* were compelled. If a defendant's presumptively compelled statements deprive the defendant of the ability to prevent the state from obtaining the evidence—regardless of whether those statements were "actually" compelled—then in order to protect the defendant's rights under Article I, section 12, both the statements and the physical evidence must be presumed to be the product of compulsion.

3. Suppressing physical evidence obtained from a voluntary consent search does not serve the purposes of *Miranda*.

As just explained, if a defendant's presumptively compelled statements deprive the defendant of the ability to prevent the state from obtaining the physical evidence, then effectuating Article I, section 12 may require suppression of the physical evidence. Conversely, however, if a defendant retains, notwithstanding the *Miranda* violation, the ability to prevent the state from lawfully obtaining physical evidence and the defendant freely chooses to allow the state to obtain the evidence, there is no risk that the physical evidence is the product of compulsion. In that circumstance, effectuating Article I, section 12 does *not* require presuming that the evidence is suppression of physical evidence. Thus, in the particular context of a consent search following a *Miranda* violation, suppression of physical evidence serves the purposes of *Miranda* only where the violation renders the consent involuntary. But where the consent was in fact voluntary, no such risk exists. In other words, if the defendant voluntarily consented to the search, the statements obtained in violation of *Miranda* did *not* deprive the defendant of the ability to prevent police from obtaining it. Under those circumstances, the physical evidence is not "derived" from the preceding violation.

Of course, the state carries the burden to prove that the consent *was* voluntary notwithstanding the *Miranda* violation. In deciding whether the state

has carried that burden, courts must carefully consider the totality of circumstances, including the nature of the violation, the nature of the consent, and the inherent pressures of a custodial setting, to determine whether the consent was actually the product of the defendant's free will and not the result of express or implied coercion. *See State v. Wolfe*, 295 Or 567, 572, 669 P2d 320 (1983) (consent is voluntary if the defendant exercised "free will" in deciding to consent, and if the decision did not result from express or implied police coercion). Ultimately, the focus must be on the effect that the *Miranda* violation had on the defendant's decision to consent.

Any determination whether a preceding *Miranda* violation implicitly or explicitly compelled a person to consent must begin from the premise that the lack of *Miranda* warnings does not *itself* render consent involuntary, because a request for consent is not interrogation and need not be preceded by a *Miranda* warning. *See Vondehn*, 348 Or at 489 ("With apparent unanimity, courts throughout the country that have considered the question have held that asking for consent to search is not interrogation within the meaning of the Miranda doctrine.") (Linder, J. concurring). *See also, e.g., United States v. Lemon*, 550 F.2d 467 (9th Cir.1977) (A defendant's consent to search is not an incriminating statement subject to suppression for *Miranda* violations.); *See also* 2 La Fave, *Search and Seizure: A Treatise on the Fourth Amendment* 671-74, § 8.1(j) (1978). Thus, the failure to give a *Miranda* warning to a person in

custody does not cast doubt on validity of request for consent. A police officer with a person who is lawfully in custody may always ask for and obtain a voluntary and valid consent to search. Standing alone the failure to give a *Miranda* warning before asking for consent to search does not implicate Article I, section 12.

If an officer were to engage in coercive, threatening, or menacing behavior before seeking consent, *that* kind of conduct, of course, could raise questions about whether a subsequent consent was voluntary or whether the officer had exploited his earlier bad behavior to obtain the consent. But the failure to give a subject *Miranda* warnings is not itself coercive or threatening conduct. The failure to give a *Miranda* warning creates a *presumption* that the subject's answers to interrogating questions were compelled. But because a request for consent is not interrogation (and, in fact, the *Miranda* warnings do not even address consent) nothing in the failure to *give* the warning in *itself* gives the police a constitutional advantage in obtaining consent.

Although the failure to give *Miranda* warnings does not itself cast doubt on the voluntariness of subsequent consent, a custodial subject's *answers* to unwarned questions could affect the voluntariness of a subsequent consent. If the defendant made incriminating unwarned statements in response to interrogation, the effect of those admissions, particularly in a custodial setting

that is already inherently compelling, may be sufficient to render the subsequent consent involuntary.

Suppose, for example, an officer arrests someone who is carrying a backpack and, neglecting to first give *Miranda* warnings immediately asks whether the person has anything unlawful in backpack. If the person says 'yes' and lets the proverbial cat out of the bag, then the person's subsequent decision to consent to a search of the backpack likely will be affected by the earlier unwarned statement. If the officer then asks for and obtains consent to search the bag without first giving belated *Miranda* warnings or other similar measures, then the consent— like the presumptively compelled confession that immediately preceded it—may also have been compelled by the *Miranda* violation. If so, then the consent was derived from the *Miranda* violation, and the physical evidence obtained should be suppressed.

Conversely, if the *Miranda* violation did not result in any incriminating admissions, it is unlikely to render the subsequent consent involuntary. For example, if in the same scenario just discussed the person in response to the officer's unwarned questions about the contents of the backpack *denies* having

anything illegal, it is difficult to imagine that a preceding denial would render a subsequent consent *involuntary*.[7]

Beyond the content of a defendant's unwarned admissions, a variety of other circumstances could potentially be relevant in determining whether the effect of the *Miranda* violation rendered a subsequent consent involuntary. The temporal proximity between a preceding *Miranda* violation and the consent may be one such factor. *See, e.g., Seibert*, 542 US at 616 (length of time following a *Miranda* violation bears on whether subsequent warning is effective). Intervening events, like the giving of belated *Miranda* warnings or exigent circumstances, could be significant in demonstrating a lack of exploitation. One example of such an intervening event (particularly relevant here) is if a suspect voluntarily offers, without prompting, to allow officers to search. That kind of spontaneous decision conclusively demonstrates that the

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[7] Another scenario, albeit one not at issue here, would be if police officers discover new information from statements obtained in violation of *Miranda* and that new information prompts the officers to ask for consent. In the state's view, even under that circumstance the ultimate question as to whether suppression is required to effectuate Article I, section 12 should turn solely on whether the consent was voluntarily given. Admittedly, however, this court has concluded otherwise in the context of Article I, section 9. *See Hall*, 339 Or at 35 (suppression may be required where "police sought the consent solely as the result of knowledge of inculpatory evidence obtained from unlawful police conduct"); *State v. Hemenway*, 353 Or 129, 146, 295 P3d 167 (2013), *vacated*, 353 Or 498, 302 P3d 413 (2013) (describing such evidence as "tainted directly by the illegal police conduct). In any event, this court does not need to reach that question to resolve this case.

Miranda violation did not compel consent. *See State v. Hemenway*, 353 Or 129, 145, 295 P3d 167 (2013), *vacated*, 353 Or 498, 302 P3d 413 (2013) ("The fact that a consent to search was unprompted or unilateral is relevant evidence of the voluntariness of the consent* * *unprompted or unilateral consent is less likely to be a product of illegal police conduct."); *State v. Rodriguez*, 317 Or 27, 854 P2d 399 (1993) (no suppression under Article I, section 9 violation where defendant spontaneously volunteered consent); *State v. Kennedy*, 290 Or 493, 624 P2d 99 (1981)(same). Similarly, if police were able to give effective but belated *Miranda* warnings which made clear that previous, unwarned statements were not admissible, then any subsequent consent is more likely to be voluntary. *See Elstad*, 470 US at 310-314; *Seibert* 542 US at 615-17; *Vondehn*, 348 Or at 480.

Another factor to consider, alluded to above, is whether the *Miranda* violation was flagrant or extreme, and whether it was designed to circumvent *Miranda* and obtain consent. If the record showed that the unlawful interrogation had been conducted in a manner that was prolonged, overbearing, accusatory or coercive, that would be relevant to determining whether a subsequent consent was freely given. *See Brown v. Illinois*, 422 US 590, 603-604, 95 S Ct 2254, 45 L Ed 2d 416 (1975) ("purpose and flagrancy" of misconduct relevant to determining voluntariness of consent). *See, e.g., State v. Jarnagin*, 351 Or 703, 717, 277 P3d 535 (2012) (considering flagrancy of

police conduct in context of *Miranda* violation). The concern that consent was derived from overbearing police misconduct is substantially diminished where the record shows that the *Miranda* violation was neither blatant nor prolonged. *Compare Elstad*, 470 US at 313 (subsequent *Miranda* waiver voluntary where initial *Miranda* violation was inadvertent and brief) *with Seibert*, 542 US at 617 (subsequent *Miranda* waiver was not voluntary where initial violation was protracted and deliberate attempt to circumvent *Miranda*); *see also Jarnagin*, 351 Or at 717 (statements on video tape were not a product of earlier *Miranda* violation and noting that violation was inadvertent and not flagrant). If there is evidence to suggest that officers intentionally withheld *Miranda* warnings, as in *Seibert*, or deliberately referred to unwarned statements or otherwise attempted to leverage information learned during the unwarned interrogation to obtain consent, that too could bear on the analysis of whether the ensuing consent was truly voluntary. Thus, if officers repeatedly ignored repeated requests for counsel and proceeded to question the defendant, that would factor into the analysis, in so far as it conveys a contempt for the law and communicates to the defendant that denying consent might be an exercise in futility.

For all of those reasons, this court should hold that if police officers obtain physical evidence from a consent search that was preceded by a *Miranda* violation, the evidence is admissible so long as the consent was voluntarily given. Put differently, evidence obtained during a consent search is derived

from *Miranda* violation, and should be suppressed, only if the effect of the *Miranda* violation (and the unwarned statements obtained as a result of it) was to compel the defendant to provide consent. As always, the state has the burden to prove that the defendant's consent was truly voluntary and was not compelled or coerced. If it carries that burden, then there is no basis under Article I, section 12—the very purpose of which is to protect against compelled self-incrimination—to suppress evidence discovered during the search.[8]

4. This court should reconsider its statement in *Vondehn* that a *Miranda* violation is itself a constitutional violation.

As noted above, in *Vondehn* the state had urged this court to follow *Patane* and adopt a *per se* rule that a *Miranda* violation, in the absence of any

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[8] Admittedly the rule that the state proposes here is in tension with the ultimate outcome in *Vondehn*. In that case, like this one, the trial court found that the defendant had voluntarily consented to a search, yet the court concluded that the evidence was derived from the *Miranda* violation. But this court could adopt the rule the state proposes here without overruling *Vondehn*. As noted above, in *Vondehn* the state had only argued for a per se rule against the suppression of any physical evidence and did not rely on the fact that trial court had found the consent to be voluntary, nor did the state discuss the factual record and the extent to which it supported the trial court's finding. The facts in *Vondehn* were different than those here. In *Vondehn*, the defendant had, in response to unwarned questioning, *admitted* that his back pack contained marijuana before he granted the officer consent to search it. Those facts, in light of the factors (discussed above) that court must consider in determining whether consent following a Miranda violation is truly voluntary, would cast doubt on the trial court's finding that the consent was voluntary. Further, in *Vondehn* the officer also had learned information (that defendant owned the backpack) from the unwarned interrogation, and that information at least arguably prompted the officer to ask for consent in the first place. In that sense, too, the facts of that case are distinguishable from this one.

evidence of actual coercion, should never lead to the suppression of physical evidence. In rejecting that argument, this court concluded that Article I, section 12 itself compels police to give *Miranda* warnings before a custodial interrogation and where police fail to do so they violate the Article I, section 12. *Vondehn*, 348 Or at 462. This court should reconsider that conclusion, for two reasons.

First, it was not necessary to the ultimate holding in the case—*i.e.*, rejecting the approach in *Patane* and concluding instead that physical evidence derived from a *Miranda* violation should be suppressed. This court could have reached the very same conclusion—that physical evidence that is the product of a *Miranda* violation must be suppressed—not because a *Miranda* violation is itself the violation of constitutional right in need of vindication, but rather because suppression is necessary to serve the purposes of the *Miranda* rule. Indeed, that is precisely the tack that Justice Linder suggested in her concurring opinion. And that is the approach that the state urges the court to adopt here.

Second, it is incorrect. The conclusion that a *Miranda* violation is itself a violation Article I, section 12 is not supported in the opinion by an analysis of the meaning of Article I, section 12 using the ordinary means of constitutional interpretation. *See Priest v. Pearce*, 314 Or 411, 840 P2d 65 (1992) (describing methodology for interpreting constitutional provisions). Nor is possible to

square the conclusion with the text or history of Article I, section 12, or with this this court's earlier cases.

Article I, section 12, as noted earlier, provides that "No person shall * * * be compelled in any criminal prosecution to testify against himself." By its terms, the provision guarantees the right not to be "*compelled"* to provide incriminating evidence in one's own "criminal prosecution." But a *Miranda* violation may not involve any compulsion and it may not involve a criminal prosecution. While it is necessary during a criminal proceeding for courts to *presume* that statements obtained in violation of *Miranda* are compelled, and to suppress those statements, in order to effectuate Article I, section 12, that does not mean that all such statements *were* compelled. In fact, as explained above, not all statements obtained in violation of *Miranda* are actually compelled. And it follows, as a matter of logic, that not all *Miranda* violations are constitutional violations.

If, as this court stated in *Vondehn*, Article I, section 12 is violated whenever a police officer fails to give *Miranda* warnings, then Article I, section 12 does more than simply provide a right against compelled self-incrimination. In addition, the provision also confers a free-standing right to anyone in police custody to be advised that they are not required to answer interrogating questions. That freestanding constitutional right would apparently exist regardless of whether the officers actually engaged in any coercive behavior,

regardless of whether the person was already aware of his *Miranda* rights, and regardless of whether the person was ever actually prosecuted. It may be necessary to require police officers to give *Miranda* warnings in order to effectuate Article I, section 12, but it is impossible to find that policy anywhere in the text of Article I, section 12. Nor is it a requirement that the framers would have understood to be included in the Article I, section 12. As noted above, the intent of the framers was to codify the common law rule against the admission of compelled confessions, but nothing in the common law required such warnings.

In addition, the statement that a *Miranda* violation is itself a violation of Article I, section 12, is inconsistent with several of this court's prior cases cited above, such as *Mains*, and *Sparklin*, that had recognized *Miranda* as a prophylactic rule required to effectuate Article I, section 12, but not a process itself commanded by the constitution. Those cases recognized that *Miranda* is indeed a "constitutional" rule, in the sense that it is necessary to effectuate a constitutional provision, but it is not actually a procedure commanded by the constitution.[9] [10]

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[9] *Mains*, 295 Or 645; *Sparklin*, 296 Or at 88. *See also State v. Smith*, 301 Or 681, 725 P2d 894 (1986) (plurality) (holding that Article I, section 12, does not *require* the delivery of *Miranda* warnings); *Id.* at 713-14 (Linde, J., dissenting) ("refrain[ing] from stating that Article I, section 12, itself requires warnings before questioning," but concluding that court should adopt

Footnote continued…

In sum, this court's statement that a *Miranda* violation is itself a constitutional violation is incorrect and this court should disavow it, or at least clarify what it means. But even assuming that the court continues to characterize a *Miranda* violation is a violation of Article I, section 12, for all of the reasons already given the suppression analysis that the court applies still must account for the differences between a *Miranda* violation and a violation of Article I, section 9. Whether one characterizes a *Miranda* violation as a constitutional violation or not, *Miranda* remains a judge-made rule, designed for the purpose of ensuring that the state may not use any compelled evidence to obtain a defendant's conviction. Where a defendant consents to a search

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(…continued)
procedures to provide maximum protection to the Article I, section 12, right "unless and until politically accountable lawmakers legislate to the contrary and force the constitutional issue."); *Magee*, 304 Or at 266 (Carson, J., concurring, joined by Peterson, C. J., and Campbell, J.) (reiterating view that Article I, section 12 does not require that officers give *Miranda*-type warnings to persons detained for questioning).

[10] In concluding that a Miranda violation is itself a constitutional violation, *Vondehn* also conflicts with the line of cases holding that the Fifth Amendment and Article I, section 12 protect the *same* right. Adopting a stricter standard to protect Article I, section 12 than the Supreme Court adopted to protect the Fifth Amendment in *Patane* did not require this court to conclude, as it did in *Vondehn*, that Article I, section 12's self incrimination clause actually *means* something that the Fifth Amendments clause does not. Rather, this court could reach that result based instead on its conclusion that a stricter standard is needed to adequately protect Article I, section 12.

following a *Miranda* violation, if that consent is truly voluntary then *Miranda's* purpose is not served by suppressing the evidence obtained from the search.

C. Even under a traditional "vindication of rights" approach it would not be appropriate to suppress physical evidence obtained from a voluntary consent search following a *Miranda* violation.

Even if this court were inclined to adopt a "vindication of rights" approach in this case, it should reach the same result. A person's Article I, section 12 rights are sufficiently vindicated by the exclusion of unwarned statements and any other evidence that was actually compelled. Vindication of that violation does not also require excluding, in addition to the presumptively compelled unwarned statements, the physical fruits of a search to which the defendant freely and voluntarily consented.

That a defendant *voluntarily* consented to a search of his or her person or property shows that the previous *Miranda* violation did *not* alter the defendant's constitutional position with respect to the state's ability to conduct a search, or with respect to the evidence at issue. In other words, if a defendant's consent to a search is voluntary, he or she necessarily retained—despite any preceding police illegality—the power to authorize or forbid the requested search. To hold otherwise renders a defendant's voluntary decision to authorize a search

without legal significance, and would have the remarkable effect that, under certain circumstances, he may not authorize a search of his person or property.[11]

That evidence from a voluntary consent search is admissible despite a preceding *Miranda* violation does not mean that the Article I, section 12 is not vindicated. It *is* vindicated— by the exclusion of the unwarned statements. Vindicating the defendant's Article I, section 12 rights requires those statements to be excluded because those statements are presumptively compelled. If the effect of the *Miranda* violation was also to render the consent compelled, then vindication of the *Miranda* violation would also require suppression of the physical evidence obtained during that search. But if the consent is voluntary then physical evidence obtained from the search is not truly a product of the *Miranda* violation. Under those circumstances, to vindicate Article I, section 12, it is sufficient to exclude the unwarned statements; it is not necessary to

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[11] In urging this court to adopt that rule, the state acknowledges that it has proposed a similar rule in the context of cases involving a consent search following a violation of Article I, section 9, but this court has (at least so far) declined to adopt it. *See Hall*, 339 Or at 27-28 (rejecting state's argument that voluntary consent required no additional exploitation analysis); *Hemenway*, 353 Or at 140 ("[A]pplying both the tests for voluntariness of consent and for exploitation is necessary to vindicate a defendant's right to be free from unreasonable search and seizure."). The state continues to urge this court to hold that granting of voluntary consent is enough, standing alone, to cure the taint of a prior violation of Article I, section 9. But even if this court is unwilling to adopt that rule in the context of an Article I, section 9 violation, for all the reasons explained above it should reach a different conclusion here in the (very different) context of a *Miranda* violation.

exclude both the unwarned statements and the fruits of a voluntary consent search.

D. The physical evidence in this case was not derived from a *Miranda* violation.

In this case, defendant voluntarily and spontaneously gave permission to the officer to search his car. Although defendant's decision to do so followed soon after a *Miranda* violation, nothing about that preceding violation or the information that the officer learned as a result of it *compelled* defendant to give that consent. The evidence discovered during the consent was therefore not derived from the violation and its admission did not violate Article I, section 12. The trial court correctly declined to suppress it.

As noted above, Deputy Robeson lawfully stopped defendant and asked for identification. When defendant was unable to supply any, Robeson lawfully detained defendant, handcuffing him and placing him in the back of his patrol car while the officer attempted to verify his identity. *Delong*, 260 Or App at 720. While defendant was in the backseat Robeson asked defendant if there was anything in the car that the officers needed to worry about. *Id.* Defendant responded, "no," and he then offered to have the officers search his car. (Tr 8). The officers then searched the car and found methamphetamine. In denying defendant's suppression motion, the trial court specifically found that the

officer had not asked for consent but that defendant had offered it spontaneously, and that he had done so voluntarily. (Tr 69).

The trial court's determination that the consent was voluntary notwithstanding the prior *Miranda* violation is amply supported by the evidence. As an initial matter, the fact that the officer failed to give *Miranda* warnings does not, in itself, cast doubt on the voluntariness of the defendant's consent. *Miranda* warnings, as explained earlier, are not required before an officer may obtain from a custodial subject valid consent to search.

Thus, if in this case Deputy Robeson had simply begun by asking defendant for consent to search the car, instead of asking whether there was "anything in the car he should be worried about," there is no question that if defendant had voluntarily said 'yes' the search would be lawful. It makes no sense to reach a different result here when the defendant consented of his own accord immediately following the officers question, unless something about the question or the response (no) somehow calls into question the voluntariness of the consent. But nothing here calls that voluntariness into question.

The officer's failure to provide the *Miranda* warning before asking whether there was "anything in the car he should be worried about" did not elicit any damning confessions that would call the defendant's decision freely to consent into question. Defendant *denied* that there was anything in the car. In addition, the *Miranda* violation was not flagrant; it consisted of a single

unwarned question, nor is there any evidence that it was deliberate or that the officer attempt to use information he had gained through the unwarned response to obtain consent. The single question that the officer posed did not accuse defendant or say anything about a search. It certainly did not require defendant to say anything about a search.

The officer did not even ask for consent—defendant spontaneously offered it without having been asked. As this court has explained, where a defendant spontaneously offers consent to search, even following an illegal seizure, the fruits of that search are admissible. *Rodriguez*, although an Article I, section 9 case, provides a useful example. There, the officer asked the defendant if he had any drugs or guns in his apartment. *Rodriguez*, 317 Or at 41. In response to that question, the defendant said, "No, go ahead and look." Id. Considering the circumstances, including the manner in which the defendant had granted consent, this court concluded that the consent was voluntary and suppression was not required—notwithstanding the fact that the police officer had illegally arrested the defendant—because the officer "did not trade on or otherwise take advantage of the arrest to obtain defendant's consent" *Id.* Exclusion would be even less warranted here, where the spontaneous consent followed a brief and apparently inadvertent *Miranda* violation.

The officer's question admittedly may have caused the defendant to offer his consent to search, in the sense that if the officer had not asked the question defendant would not have offered his consent. But at most that shows a but-for relationship. As this court has repeatedly stated, a but for relationship between evidence and a prior illegality is insufficient to justify the suppression . *Hemenway*, 353 Or at 147. In any case, the officer's question did not *compel* defendant consent. Rather, as the trial court properly found, defendant's consent was voluntary. That voluntary consent was an independent, constitutionally significant event that makes suppression of the evidence inappropriate.

CONCLUSION

This court should reverse the decision of the Court of Appeals, and affirm the judgment of the trial court.

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on July 23, 2014, I directed the original Petitioner's Brief on the Merits to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Peter Gartlan and Daniel C. Bennett, attorneys for appellant/respondent 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 10,280 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).

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