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 Case No. 101033810 CA A148109 SC S061647

PETITIONER'S BRIEF ON THE MERITS

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

Affirmed: August 14, 2013
Author of Opinion: Armstrong, P.J.
Concurring Judges: Armstrong, Presiding Judge and De Muniz, Senior Judge
Dissenting Judge: Egan, Judge

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STATEMENT OF THE CASE

Nature of the Proceeding

Defendant was charged with delivery of cocaine, ORS 475.880, possession of cocaine, ORS 475.884, and tampering with physical evidence, ORS 162.295. He moved to suppress the evidence discovered after his arrest on a warrant on the ground that the evidence was tainted by the preceding illegal stop that was conducted to ascertain his identity. The trial court denied the motion. Defendant was tried by the court on stipulated evidence, and the court found him guilty as charged.

Defendant appealed, arguing that the evidence should have been suppressed under both Article I, section 9, of the Oregon Constitution and the Fourth Amendment to the United States Constitution. The state did not challenge the trial court's conclusion that defendant was illegally stopped, but argued that the arrest on the warrant purged the taint of the illegal stop. The Court of Appeals affirmed by written opinion. *State v. Bailey*, 258 Or App 18, 308 P3d 368 (2013). Defendant petitioned, and this court allowed review. *State v. Bailey*, 354 Or 490, __ P3d __ (2013).

Questions Presented and Proposed Rules of Law

First Question Presented.

When police obtain information from an unlawful stop of a person that allows them to arrest that person on a warrant, does Article I, section 9, of the Oregon Constitution require suppression of evidence obtained in a subsequent search incident to the arrest?

Proposed Rule of Law.

Article I, section 9, prohibits the use of evidence obtained as the result of an unlawful seizure. When an unlawful seizure allows police to obtain information, such as a person's identity or location, that leads to the person's arrest on a warrant, the resulting arrest is tainted by the unlawful seizure and cannot serve as an attenuating factor that purges the taint of the prior illegality. Consequently, any evidence discovered pursuant to that arrest must be suppressed.

Second Question Presented.

Does a person lose all his Article I, section 9, rights against unreasonable seizure when a warrant has been issued for his arrest?

Proposed Rule of Law.

A person has the right to be free from "unreasonable" seizures. An unlawful stop is unreasonable. An arrest on a warrant is reasonable. When both occur, Article I, section 9, demands that the person be put in the position that he or she

would have been in if the unlawful seizure had not occurred. If the unlawful seizure is used to obtain the lawful seizure, the resulting evidence must be suppressed.

Third Question Presented.

The Fourth Amendment requires that evidence discovered as the result of an unlawful seizure be suppressed unless the discovery is sufficiently attenuated from the illegality. When the police discover an outstanding arrest warrant during an illegal seizure, how should Oregon courts analyze whether the discovery of the warrant attenuates subsequently discovered evidence from the illegality?

Proposed Rule of Law.

In determining whether evidence discovered following arrest on a valid warrant discovered during an illegal stop should be suppressed under the Fourth Amendment, a reviewing court should consider the temporal proximity between the illegality and the discovery of the evidence, the intervening effect of the warrant, and the purpose and flagrancy of the police misconduct.

Fourth Question Presented.

When police officers unlawfully detain a person in order to identify that person and to determine whether he is the subject of an arrest warrant, is the discovery of a valid arrest warrant an intervening circumstance sufficient to attenuate the discovery of the evidence from the illegality?

Proposed Rule of Law.

When the police unlawfully detain a person in order to determine whether he is the subject of a warrant, the eventual discovery of a warrant is not a determinative intervening circumstance and should be given minimal weight in deciding whether subsequently discovered evidence has been sufficiently attenuated from the illegality. That is because federal law suppresses evidence to deter police misconduct; allowing the warrant to purge the illegality would "encourage" police to violate the Fourth Amendment.

Summary of Facts

The Court of Appeals stated the facts as follows:

> "In the fall of 2010, Portland was experiencing what one police officer termed a 'tremendous amount of gang violence' in the city. As part of efforts to forestall more violence, police officers set up surveillance at a funeral that was attended by several gang members. After the funeral, officers followed one of the attendees to a house in Northeast Portland, at which several gang members were seen by officers to be congregating. The officers were concerned that the gang members at the house were contemplating violence or that they would be the target of violence perpetrated by members of other gangs. The police continued to monitor the house, with both unmarked patrol cars on the ground and a Portland Police Bureau aircraft overhead. An officer in the aircraft saw four people leave the house and enter what he thought was a 'Dodge Charger, Magnum-type vehicle.' One of the officers testified that those cars are often rental cars and that rental cars are often used for drive-by shootings and other crimes.
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> "Concerned that the car's occupants were on their way to commit a crime, the officer in the aircraft followed the car as it left the house and asked a patrol unit to stop it. After the car's driver failed to

signal for the legally required 100 feet before making a turn, ORS 811.375(1)(b), the police stopped the car. There were two backseat passengers in the car, one of whom was defendant. When the driver could not produce valid proof of insurance, an officer attempted to contact the driver's insurance company by phone to determine whether the driver was, in fact, insured.

"Two backup officers arrived several minutes after the initiation of the stop. One of those officers, Stradley, recognized defendant to be a gang associate but could not remember his name. Various officers made repeated efforts to discern the identities of the two backseat passengers, but the passengers refused to identify themselves to the police. While the first officer on the scene was trying to contact the driver's insurance company, Stradley called Officer Burley to the scene to try to identify defendant and the other backseat passenger.

"Thirty minutes after the initiation of the stop, and some time after the officers had concluded their investigation into the status of the driver's insurance, Burley arrived. Burley looked inside the vehicle and was immediately able to identify defendant by name. After Burley recognized defendant, Stradley ran defendant's name for warrants and discovered that there was an outstanding felony warrant for defendant's arrest. While in the process of arresting defendant on the warrant, Burley noticed that defendant was having trouble speaking. He asked defendant to open his mouth, where Burley saw a plastic bag containing a white substance under defendant's tongue. Subsequent testing revealed that the bag contained cocaine. The police also searched the backseat area where defendant had been sitting; that search revealed approximately $700 in cash, which the officers attributed to defendant.

"Defendant moved to suppress the evidence discovered after his arrest. Among other things, the trial court concluded that the police had unlawfully seized defendant during the traffic stop but that the evidence discovered after his arrest was nonetheless admissible because the discovery of the warrant served to cure any prior illegality. The court therefore denied defendant's suppression motion. Defendant was subsequently convicted after a stipulated facts trial, and this appeal followed."

Bailey, 258 Or App at 19-21.

Summary of Argument

After passenger defendant refused to identify himself, he was unlawfully seized when police detained him for 30 minutes without justification while another officer was summoned to the scene to try to identify him. The other officer was able to identify defendant by name, police used that name to discover an outstanding warrant for defendant's arrest, and the resulting search incident to the arrest yielded drugs and cash. That is the evidence that defendant seeks to suppress.

When an unlawful seizure allows police to obtain information that is used to gain evidence, Article I, section 9, requires that the resulting evidence be suppressed. For example, when police conduct an unlawful stop and observe contraband that provides probable cause for an arrest or prompts the officers to request consent to search, the resulting arrest or consent search is tainted by the unlawful stop and the resulting evidence must be suppressed. The situation is no different when the information gained by the unlawful seizure is information about a person's identity. Police need two things to execute an arrest warrant – knowledge of the warrant and knowledge that the person they are arresting is the person named in the warrant. When one or both of those things is obtained as the result of an unlawful stop, the resulting arrest is tainted by the unlawful stop and all evidence obtained pursuant to the stop must be suppressed.

That rule is consistent with this court's holding in *State v. Dempster*, 248 Or 404, 434 P2d 746 (1967), in which police already knew the defendant's identity, unlawfully detained him, discovered an outstanding arrest warrant, executed it, and found incriminating evidence during an ensuing search incident to arrest. This court held that the lawful arrest on the warrant purged the taint of the prior unlawful seizure. In that case, the police obtained all the information they needed to arrest the defendant independently of the unlawful stop. They already knew the defendant's identity, and they could have discovered the warrant at any time. The fact that the defendant was present and available for arrest when they did discover the warrant was a factual "but for" cause of the resulting discovery of the warrant. However, because the police did not learn anything from the unlawful seizure that allowed them to arrest the defendant, the arrest and subsequent search was not tainted by the unlawful stop.

That analysis is consistent with Oregon's exclusionary rule, which vindicates a defendant's Article I, section 9, rights by restoring a defendant to the position he would have been in had his rights not been violated. A defendant does not lose all of his rights against unreasonable seizure when a warrant is issued for his arrest. When a defendant is unlawfully seized and searched, the resulting evidence must be suppressed, even if the defendant has an undiscovered outstanding warrant. When a defendant is unlawfully seized and subsequently arrested on a warrant, he has been seized *twice* – once unlawfully and once

lawfully. If the unlawful seizure allowed police to arrest the defendant on the warrant, his Article I, section 9, rights against the unlawful seizure must be vindicated by suppressing the evidence that resulted from the unlawful seizure.

Here, because the police used the unlawful seizure to obtain defendant's name, which they then used to discover and execute the outstanding warrant, the arrest was tainted and the resulting evidence of drugs and cash must be suppressed under Article I, section 9, of the Oregon Constitution.

The result is the same under the Fourth Amendment to the United States Constitution. The Fourth Amendment bars the use of evidence obtained as a result of an unlawful stop unless the discovery of the evidence was sufficiently attenuated from the illegality. In considering whether the discovery of an outstanding warrant purges the taint of a prior unlawful detention, courts apply the analysis set out in *Brown v. Illinois*, 422 US 590, 95 S Ct 2254, 45 L Ed 2d 416 (1975). That analysis considers three factors: the temporal proximity of the illegality to the discovery of the evidence, the presence of intervening circumstances, and the purpose and flagrancy of the officers' conduct.

Because the warrant was discovered during the illegal detention in this case, the temporal proximity factor cuts in favor of defendant. In situations like this, in which defendant was detained for the purpose of determining his name and searching for outstanding warrants, the intervening circumstance of the discovery of the warrant has little attenuating effect. And the purpose and flagrancy factor

cuts strongly in favor of defendant under these circumstances. The basis of the federal exclusionary rule is to deter police misconduct. If police were allowed to illegally detain a person for the purpose of discovering outstanding warrants, not only would police not be deterred, they would be encouraged to violate people's Fourth Amendments rights to aid in law enforcement. Consequently, the Fourth Amendment requires suppression when the police illegally detain a defendant in order to ascertain his identity and check for warrants, as occurred in this case.

Argument

I. Introduction: Defendant seeks suppression of the evidence of unlawful drug activity discovered after the unlawful stop of defendant and his arrest on an outstanding warrant under both the state and federal constitutions.

At trial, defendant filed a motion to suppress "any and all evidence obtained as a result of unlawful police behavior, including the seizure of any all derivative evidence." Motion for Omnibus Hearing and to Suppress, Appellant's Brief at ER-2. He argued that police unlawfully extended the traffic stop when they held him in a car without reasonable suspicion that he had committed a crime until Officer Burley arrived and identified him by name. Officer Stradley used defendant's name to check for warrants and discovered an outstanding warrant for defendant's arrest. The officers arrested defendant on the warrant. During the course of the arrest, the officers found a plastic bag containing cocaine in defendant's mouth. They also found $700 in cash in the area of the car where defendant had been

sitting. Defendant seeks to prevent the state from using evidence of the cocaine and the cash in a prosecution against him for possession and delivery of cocaine and tampering with physical evidence.

The trial court found that "the traffic stop was extended substantially beyond the time that was sufficient to complete all the traffic stop business," that defendant "was detained," and that "once they discover the warrant it does cure those prior illegalities." Tr 258-59. On appeal, the state did not challenge defendant's assertion that he was unlawfully stopped prior to his arrest or the trial court's finding to that effect. Consequently, the Court of Appeals did not address the issue, explaining, "Because the state does not challenge the trial court's conclusion that the police unlawfully seized defendant, the only issue before us is whether the discovery of the valid arrest warrant purged the taint of the prior unlawful seizure of defendant." *Bailey*, 258 Or App at 21. On review, the state did not challenge the trial court's finding and the Court of Appeals' assumption that defendant was unlawfully stopped. Thus, as in the Court of Appeals, the only issue before this court is whether the arrest of defendant on a valid warrant cured the taint of the preceding unlawful stop on the subsequently discovered evidence of the drugs and money. Defendant maintains that the evidence must be suppressed under both the state and federal constitutions.

II. The challenged evidence must be suppressed under Article I, section 9, of the Oregon Constitution.

A. The Oregon exclusionary rule requires suppression of evidence obtained from a violation of a person's Article I, section 9, rights.

Article I, section 9, of the Oregon Constitution protects against "unreasonable" searches and seizures.[1] That provision is given effect by the Oregon exclusionary rule. *State v. Davis*, 295 Or 227, 237, 666 P2d 802 (1983) ("those rules of law designed to protect citizens against unauthorized or illegal searches or seizures of their persons, property, or private effects are to be given effect by denying the state the use of evidence secured in violation of those rules against the persons whose rights were violated"). That is accomplished by "restoring the parties to their position as if the state's officers had remained within the limits of their authority." *Id*.

In *State v. Hall*, 339 Or 7, 115 P3d 908 (2005), this court set out the now familiar template for determining when illegal police conduct requires suppression under Article I, section 9. First, the defendant must show "a minimal factual nexus" or a "but for" relationship between the illegal police conduct and the

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[1] Article I, section 9, of the Oregon Constitution provides:

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

evidence sought to be suppressed. *Id*. at 25, 34-35.[2] Once the defendant has passed that threshold, the state may establish that the evidence is admissible under Article I, section 9, in one of three ways: (1) the police would have inevitably discovered the evidence through proper and predictable police investigatory procedures; (2) the police in fact obtained the evidence independently of the illegal conduct; or (3) "the preceding violation of the defendant's rights under Article I, section 9, has such a tenuous factual link to the disputed evidence that that unlawful police conduct cannot be viewed properly as the source of that evidence." *Id*. at 25. In determining whether the challenged evidence is legally attenuated from the prior illegality, this court considers three factors:

> "(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

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[2] In *State v. Hemenway*, 353 Or 129, 295 P3d 617 (2013), *vacated by* 353 Or 498, 302 P3d 413 (2013), this court intended to "modify the exploitation analysis announced in *Hall*." *Id*. at 131. One modification was the elimination of the initial requirement that the defendant show a "minimal factual nexus" between the unlawful police conduct and the defendant's consent.

> "[W]e disavow the 'minimal factual nexus' part of the *Hall* test and instead hold that, when a defendant has established that an illegal stop occurred and challenges the validity of his or her subsequent consent to a search, the state bears the burden of demonstrating that (1) the consent was voluntary; and (2) the consent, even if voluntary, was not the product of police exploitation of the illegal stop."

Hemenway, 353 Or at 141.

refuse consent – that mitigated the effect of the unlawful police conduct." *Id*. at 35.[3]

That model is consistent with the goal of the exclusionary rule. As this court has explained:

> "In each of those above-described circumstances [inevitable discovery, independent source, and attenuation], the admission of the challenged evidence does not offend Article I, section 9, 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."

Id. That is not the case when officers obtain information as a result of illegal conduct and use that information to obtain the challenged evidence.

This court has repeatedly held that when evidence is obtained as a direct result of illegal police conduct, it must be suppressed, even when there is an otherwise lawful intervening event. In *State v. Juarez-Godinez*, 326 Or 1, 942 P2d

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[3] In *Hemenway*, this court added a fourth consideration, "the purpose and egregiousness of the illegal police conduct." *Hemenway*, 353 Or at 146-47. It explained,

> "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."

Id. at 147.

772 (1997), police stopped the defendant's car for speeding. When the defendant could not produce a driver's license, the officer arrested him for failure to display a license and placed him in the back of the police car. The defendant refused consent to search his car, so the officer told him that another officer was bringing a dog to sniff search the car, and if the dog alerted, he would apply for a search warrant. The officer with the dog arrived 46 minutes after the initial stop, and the dog alerted on the car. Police used that information to apply for a search warrant. During the ensuing search, police found substantial quantities of drugs, which the defendant moved to suppress. *Id*. at 3-4.

This court held that the seizure of the defendant's car violated Article I, section 9, of the Oregon Constitution. It then held that the unlawful detention compelled the suppression of the evidence discovered in the subsequent search, because the evidence was "a product of the unlawful detention." *Id*. at 9. The court explained, "As a result of the unlawful detention, the police were able to subject the car to a dog sniff that, in turn, was used to obtain a search warrant." *Id*.

Similarly, in *Pooler v. MVD*, 306 Or 47, 755 P2d 701 (1988), this court held that an arrest was invalid because it was based on probable cause using evidence obtained during an illegal stop. In that case, a driver was stopped after making a U-turn in an apparent effort to avoid a police-conducted sobriety roadblock. *Id*. at 49. An officer stopped him and noticed an odor of alcohol. After the driver performed field sobriety tests, the officer arrested him. *Id*. This court concluded

that the statute providing for suspension of a person's driving privileges upon failure of a breath test after being arrested for driving under the influence of intoxicants required a "valid arrest." *Id*. at 51. In deciding whether the arrest in that case was invalid, this court explained:

> "An arrest is not invalid simply *because* a stop is somehow unlawful; an arrest is invalid if it follows as a consequence of and depends upon the unlawful stop. The intermediate step, or connecting link, between stop and arrest is the probable cause for the arrest. A stop may produce the evidence which forms the basis for probable cause for an arrest. Accordingly, an unlawful stop may 'invalidate' an ensuing arrest, but only through the exclusion of evidence garnered from the stop."

Id. at 52. In *Pooler*, the state conceded that the stop was unlawful. *Id*. at 52. Citing *State v. Valdez*, 277 Or 621, 561 P2d 1006 (1977), this court concluded that the evidence obtained as a result of the unlawful stop must be excluded. *Id*. at 52-53. Without the excluded evidence, the officer did not have probable cause to arrest the driver for DUII. Consequently, the arrest was invalid, so a requirement for the suspension of the driver's driving privileges was not met. *Id*. at 53.

In *Hall*, this court held that when consent to search is obtained as the result of an unlawful stop, the resulting evidence must be suppressed. It rejected the state's argument that a defendant's voluntary act of consenting severs the causal link between the evidence discovered during a consent search and any prior illegality. *Hall*, 339 Or at 26. It explained,

> "This court repeatedly has recognized that, even when a defendant's consent is voluntary – that is, when the defendant's free

> will has not been overcome by police coercion – that consent is insufficient to establish the admissibility of evidence from a warrantless search if the state cannot prove that the consent was independent of, or only tenuously related to, any preceding violation of the defendant's rights under Article I, section 9. Unless the state is able to make that showing, then the defendant's consent cannot operate to validate a warrantless search *because the defendant's consent itself derived from a violation of the defendant's rights under that state constitutional provision*. To not require suppression in such circumstances would be inconsistent with the previously described rationale underlying the Oregon exclusionary rule, that is, to place a defendant in the same position as if the governmental officers had acted within the bounds of the law."

Id. at 27-28 (citations omitted) (emphasis added). The *Hall* court identified two ways in which consent could be obtained as a result of an illegal stop:

> "A causal connection requiring suppression may exist *because the police sought the defendant's consent solely as the result of knowledge of inculpatory evidence obtained from unlawful police conduct*. 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."

Id. at 35. Either requires suppression of the resulting evidence.

The *Hemenway* court also recognized that evidence obtained as a direct result of an illegal stop must be suppressed:

> "Evidence may be tainted directly by the illegal police conduct, if, for example, the police illegally stop a vehicle, allowing them to view contraband that otherwise would not have been visible, and then request the driver's consent to search the vehicle as a result of what they saw. The consent in that example does not 'purge the taint' of the prior illegal stop, because the evidence has a direct causal connection to the illegal conduct."

State v. Hemenway, 353 Or 129, 146, 295 P3d 617 (2013), *vacated by* 353 Or 498, 302 P3d 413 (2013).

Those cases demonstrate that when police learn something during an illegal stop that they then use to obtain evidence, the resulting evidence must be suppressed. That is true even if the subsequent steps leading to the evidence are themselves independently lawful (such as a search warrant, a probable cause arrest, or voluntary consent).

B. In *Dempster*, this court held that a lawful arrest is an intervening circumstance that purges the taint of an illegal stop.[4]

In *State v. Dempster*, 248 Or 404, 434 P2d 746 (1967), the defendant sought to suppress the narcotics and a hypodermic syringe that were taken from his person during a search incident to arrest on a warrant following an illegal detention.

On January 6, 1966, the defendant was stopped on the street by police officer Kuntz. *Id*. at 405. Kuntz, who knew the defendant, questioned him about his activities, learned he was on probation, and sent him on his way. Two nights later Kuntz again "hailed" the defendant on the street and questioned him about his

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[4] Although *Dempster* was decided under the Fourth Amendment, the Court of Appeals has repeatedly cited it in its Article I, section 9, analysis. *See State v. Langston*, 223 Or App 590, 196 P3d 84 (2008); *State v. Allen*, 222 Or App 71, 191 P3d 762, *rev den*, 345 Or 503 (2008); *State v. La France*, 219 Or App 548, 184 P3d 1169 (2008), *rev den*, 349 Or 664, 249 P3d 1282 (2011); *State v. Bentz*, 211 Or App 129, 158 P3d 1081 (2007). Because the exploitation analysis under Article I, section 9, and the Fourth Amendment has similar roots, *see State v. Davis*, 295 Or 227, 231-37, 666 P2d 802 (1983) (tracing history of Article I, section 9, exploitation analysis), and *Dempster* is the only Supreme Court case on this subject, defendant discusses it in relation to Article I, section 9.

activities. *Id*. Kuntz asked in particular about a man named Ralph Lemon, who was suspected of stealing from parking meters, and learned that the defendant was living with Lemon. Kuntz then either asked or ordered the defendant to accompany him to the police station "so that [Kuntz] could contact defendant's probation officer, check defendant's status and learn how the probation officer felt about defendant's association with Ralph Lemon." *Id*. at 405, 406. On the way to the police station, Kuntz advised the defendant of his constitutional rights. *Id*. at 406. At the station, the defendant was left in the charge of another officer while Kuntz went to the Record Bureau to check the defendant's records. Kuntz returned with a bench warrant for the defendant's arrest. The warrant had been issued on December 21, 1965, for failing to appear on a complaint for disregarding a traffic signal. Kuntz arrested the defendant on the warrant and searched him pursuant to the arrest. *Id*. He found the narcotics evidence that the defendant sought to suppress.

The state conceded that Kuntz did not have probable cause to arrest the defendant when the defendant got into the car to go to the police station and that any arrest at that point was unlawful. *Id*. This court did not decide whether the defendant was arrested at that point, because it concluded that even if the defendant had been unlawfully arrested, the challenged evidence need not be suppressed.

The court reasoned that even if the defendant had been unlawfully arrested before being taken to the police station, he "was *lawfully arrested* at the police station *before he was searched*." *Id*. at 407 (emphasis added). The arrest was lawful because, "[t]he validity of the bench warrant is not challenged, and when [Kuntz] found the warrant he was bound to obey its command and arrest defendant." *Id*. The court then noted that the defendant was legally searched incident to the lawful arrest. *Id*. The court explained:

> "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*, *supra*, 371 US at 487, 83 S Ct at 417, 9 L Ed 2d 455."[5]

Id. at 408.

The *Dempster* court did not provide any further analysis or explanation for its decision. Thus, the decision appears to be predicated on the nature of "the intervening legal arrest." The arrest on the warrant was not causally independent of the prior illegal detention, because "but for" that detention, the defendant

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[5] The *Dempster* defendant relied on *Wong Sun v. United States*, 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963), to argue that the evidence taken from him was the 'fruit' of an illegal arrest. *Dempster*, 248 Or at 407.

probably would not have been in police custody.[6] However, nothing about the arrest on the warrant was *legally* tainted by the prior unlawful detention. The police did not see anything or gain any information *because of* the illegal detention that allowed them to arrest the defendant on the warrant. The police already knew the defendant's identity, the warrant already existed, and Kuntz could have executed it at any time. The unlawful stop merely had the factual consequence that the defendant was present to be arrested when the warrant was discovered. Thus, because the arrest on the bench warrant was lawful and untainted by the prior illegality, it "attenuated" the causal connection (a factual one) between the prior illegality and the discovery of the challenged evidence.

That analysis is consistent with Oregon exclusionary rule law. In the case of a consent search, if the state is able to prove that "the consent was independent of, or only tenuously related to, any preceding violation of the defendant's rights under Article I, section 9," the resulting evidence will not be suppressed. *Hall*, 339 Or at 27. In the case of a search incident to arrest, if the state is able to prove that the arrest was independent of, or only tenuously related to, any preceding violation of the defendant's rights under Article I, section 9, then the evidence will not be

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[6] Under the *Hall* analysis, the defendant met his burden to prove a "but for" connection between the initial illegal arrest and the discovery of the challenged evidence, because the fact that the defendant was being detained allowed Kuntz to arrest him on the warrant. Under the *Hemenway* analysis, the state failed to prove that "but for" the initial illegal arrest, the defendant would still have been physically available for Kuntz to arrest him.

suppressed. The state can make that showing only if the police did not use any information gained from the illegal stop to make the arrest. If the arrest is based on probable cause, then the evidence supplying probable cause cannot have been obtained from the illegal stop. If the arrest is based on a warrant, then the identity of the defendant (which is necessary to make an arrest on a warrant) or the existence of the warrant cannot have been obtained as a result of the prior illegality.[7] Thus, if the arrest is untainted, the evidence discovered during a search incident to that arrest is untainted.

To the extent that *Dempster* appears to hold that *any* arrest on a lawful warrant purges the taint of any prior illegality, it is mistaken, and should be overturned. *See State v. Snyder*, 72 Or App 359, 364, 695 P2d 958, *rev den*, 299 Or 251 (1985) (stating, "the opinion in *Dempster* declares it irrelevant that prior illegality may have tainted the search; even if there was a taint, it was purged by the intervening discovery of the bench warrant"). Based on the foregoing analysis, *Snyder* is a misreading of *Dempster*.

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[7] An arrest warrant is rarely discovered *as a result* of an illegal detention, because even if the warrant is discovered during an illegal detention, it could have been discovered without the detention. The officer can check a person's name for warrants whether or not the person is present. Only when the detention itself yields the information, such as when a person tells an officer that he has a warrant in response to police questioning, is the discovery of a warrant tainted by the illegal detention.

If *Snyder* does not misread *Dempster*, defendant asks this court to reconsider *Dempster*. As this court has explained:

> "[W]e remain willing to reconsider a previous ruling under the Oregon Constitution whenever a party presents to us a principled argument suggesting that, in an earlier decision, this court wrongly considered or wrongly decided the issue in question. We will give particular attention to arguments that either present new information as to the meaning of the constitutional provision at issue or that demonstrate some failure on the part of this court at the time of the earlier decision to follow its usual paradigm for considering and construing the meaning of the provision in question."

Farmers Ins. Co. of Oregon v. Mowry, 350 Or 686, 694, 261 P3d 1 (2011) (quoting *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 54, 11 P3d 228 (2000)). *Dempster* is a 47-year-old opinion containing very little analysis. Given the extensive intervening case law on exploitation under both the state and federal constitutions, and the conflict with those cases that the *Snyder* reading of *Dempster* presents, this court should reconsider *Dempster* and clarify its holding in a manner that is consistent with established state and federal exploitation law.

C. When police learn a person's identity from an unlawful stop, and that information allows them to arrest a person on a warrant, then the arrest is tainted and cannot purge the taint of the unlawful stop on the subsequently discovered evidence.

As explained above, when police gain information from an illegal stop and then use that information to obtain evidence, the resulting evidence is tainted by the unlawful stop. *Hemenway*, 353 Or at 146 (noting that when police observe contraband as the result of an illegal stop and consequently ask for consent to search, the evidence discovered during the consent search is tainted and must be

suppressed); *Hall*, 339 Or at 35 (stating same principle in more generalized context); *Juarez-Godinez*, 326 Or 1 (holding that when evidence from dog sniff conducted during illegal stop was used to obtain a warrant, the evidence discovered pursuant to the search warrant was tainted and must be suppressed); *Pooler v. MVD*, 306 Or 47 (holding that when police made observations during illegal stop that provided probable cause to arrest for DUII, resulting arrest was invalid). Thus, when an illegal stop allows police to make observations that provide probable cause to arrest (such as drugs sticking out of a person's pocket, blood on a murder suspect's shirt, or distinctive shoes matching the description of a robbery suspect), the arrest is tainted, and any evidence discovered pursuant to a search incident to that arrest is tainted and must be suppressed.

The situation is no different when an illegal stop allows police to make observations that allow them to arrest the person on a warrant. A warrant alone is insufficient to make an arrest. The police must have probable cause to believe that the person they are arresting is the person named in the warrant. If an illegal stop provides police with information about a person's identity (such as a particular tattoo, a distinctive scar, physical appearance that allows an officer to recognize a person, a name, or a driver's license number), that information is tainted by the illegal stop, the resulting arrest on the warrant is tainted, and any evidence discovered pursuant to the arrest must be suppressed. A few hypotheticals illustrate the point.

1) An officer unlawfully stops a random vehicle in a low-income neighborhood to determine whether the driver has any warrants. He asks the driver for his driver's license, registration, and proof of insurance, checks the information on his computer, and discovers an outstanding warrant. Any evidence discovered during a search incident to arrest is tainted by the unlawful stop and must be suppressed.
2) An officer stops a vehicle for what he believes is a traffic violation, but because he is mistaken that the observed conduct is illegal, the stop is unlawful. He asks the driver for his driver's license, registration, and proof of insurance, checks the information on his computer, and discovers an outstanding warrant. Because the driver was legally required to provide the information to the officer pursuant to the traffic stop (which was unlawful), the information is tainted by the unlawful stop and any evidence discovered pursuant to the ensuing arrest is tainted and must be suppressed.
3) An officer stops a vehicle for what he believes is a traffic violation, but when he approaches the vehicle he realizes his mistake. Before he is able to tell the driver he is free to leave, the driver volunteers that he has an outstanding warrant. The officer confirms the warrant and arrests the driver. Although the unlawful stop is a "but for" cause of the arrest (the officer would not have learned that the defendant had a warrant if the stop had not occurred), it is not a "legal" cause of the arrest, because the stop was not the

source of the information – the driver was the source. The driver was not required to provide the information about the warrant to the officer because of the stop, and the officer did not independently observe the information because of the stop. The driver's unilateral decision to provide the information to the officer was an intervening event that mitigated the effect of the unlawful stop. Because the arrest on the warrant was not tainted by the initial unlawful stop, evidence discovered during a search incident to that arrest is admissible. *See State v. Rodriguez*, 317 Or 27, 41, 854 P2d 399 (1993) (holding that the defendant's offer to search his apartment for guns following a purportedly unlawful arrest showed that officer did not exploit the prior illegality to obtain consent); *State v. Kennedy*, 290 Or 493, 624 P2d 99 (1981) ("we believe that defendant's offer to let Officer Johnston search his luggage without a prior request for such consent is a strong indication that defendant's free choice was not tainted by the illegal stop when consent was given").

4) An officer sees a driver that he knows and decides to pull him over to chat. The stop is unlawful because the officer does not have reasonable suspicion of a crime or probable cause of a traffic violation. While talking to the driver, the officer calls in his name and discovers an outstanding warrant. Because nothing necessary to execute the warrant (the driver's identity and the existence of the warrant) was gained from the illegal stop, the arrest is

not tainted by the stop and any resulting evidence is admissible. The officer already knew the driver's name, and he could have discovered the existing warrant either before stopping the driver or after allowing the driver to leave. The fact that he discovered it during the stop is incidental to the stop. That is exactly what occurred in *Dempster*. 248 Or 404.

5) An officer has a hunch, but not reasonable suspicion, that the driver of a car is involved in illegal activity. He pulls the driver over, but the driver gives him a false name. He takes the driver to the police station, questions him, learns his true identity and that he has an outstanding warrant, and arrests him. Because the officer learned the driver's identity as a result of the unlawful detention, the arrest on the warrant is tainted by the unlawful detention, and any evidence discovered as a result of the arrest must be suppressed. Those are the facts of *Snyder*, but a different result. 72 Or App 359.

As with all exploitation analysis, the question is whether the prior unlawful police activity tainted the resulting evidence. When the unlawful stop is the source of information that leads to an arrest on a warrant, that arrest is tainted, as is any resulting evidence. The arrest cannot serve as an intervening event that severs the

connection between the illegality and the subsequently discovered evidence, because it is a direct result of the unlawful activity.[8]

D. A defendant retains an Article I, section 9, right to be free from unreasonable seizure despite the existence of a warrant for his arrest.

An arrest warrant is a judicial command to arrest a person. ORS 131.005(2) (defining "bench warrant"); ORS 131.005(14) (defining "warrant of arrest"); ORS 133.140 (listing requirements for arrest warrant, including "command" language in subsection (6). However, it does not sanction the seizure of the named person in any manner under any circumstances. ORS 133.235 (listing procedures for arrest, including arrest on a warrant). The judicial officer has not authorized police to commit illegalities to execute the warrant. Police may not enter a home to arrest a person on a warrant without probable cause to believe that the person is on the premises. *State v. Jordan*, 288 Or 391, 402, 605 P2d 646, *cert den*, 449 US 846 (1980). Police may not use unnecessary force in executing an arrest warrant. ORS 133.235(4). Similarly, police may not round up a group of young males in a low-income neighborhood on the assumption that some of them must have outstanding warrants and arrest those who do. That type of practice would significantly impair "the people's" freedom from unreasonable seizure, and to allow the police to

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[8] The fact that the arrest warrant and the person's identity exist independently of the unlawful police conduct is irrelevant. Evidence providing probable cause of a crime exists independently of police knowledge of it. Article I, section 9, requires that police obtain probable cause evidence in a lawful manner. It also requires that police secure an arrest on a warrant in a lawful manner.

deprive select groups of that Article I, section 9, right is even more concerning. *See State v. Campbell*, 306 Or 157, 759 P2d 1040 (1988) (explaining that in deciding whether a government practice is a search, "we must decide whether the practice, if engaged in wholly at the discretion of the government, will significantly impair 'the people's' freedom from scrutiny, for the protection of that freedom is the principle that underlies the prohibition on 'unreasonable searches' set forth in Article I, section 9").

Thus, this court overstated the point when it said, in *State v. Davis*, 313 Or 246, 834 P2d 1008 (1992):

> "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."

Id. at 255. When it made that statement, the *Davis* court was applying the *Jordan* holding to an arrest on a warrant in Mississippi by Mississippi law enforcement. *Id*. Because the officers had probable cause to believe that the defendant was in his mother's home, their warrantless entry did not violate his Article I, section 9, rights. *Id*. at 255-56. Thus, the quoted statement, to the extent that it implies that a person may be arrested on a warrant at any time under any conditions without any violation of his Article I, section 9 rights, is inaccurate *dictum*. Just as a search warrant does not strip a person of all of his Article I, section 9, rights against

search by the state, an arrest warrant does not strip a person of all of his Article I, section 9, rights against seizure by the state.

Article I, section 9, protects against "unreasonable" seizures. Although a seizure on a warrant is presumptively reasonable (provided that it is done in the correct fashion), a warrantless detention without reasonable suspicion is not. A person who has been seized without reasonable suspicion and then subsequently arrested on a valid warrant has been seized *twice* – once unreasonably and once reasonably. If the second seizure is obtained by exploiting the prior illegality, Article I, section 9, requires that the person be returned to the position he would have been in absent the illegality: that is, a person at large with an outstanding warrant. Thus, when evidence is discovered pursuant to that illegality, it must be suppressed.

That is not to say that an unlawfully seized defendant must be let go and remain forever free. An illegal detention does not negate the existence of the warrant. The cure for the illegal detention is to return the person to the position he would have been in absent the illegality. Once that has occurred, police are free to arrest the person on the warrant. However, the law does not require police to release a person and give him a five-minute head start before pursuing and arresting him on a warrant.

The relationship between the custody of a defendant and the evidence obtained pursuant to it is well-illustrated by the United States Supreme Court case,

United States v. Crews, 445 US 463, 100 S Ct 1244, 63 L Ed 2d 537 (1980). In *Crews*, the Court held that the in-court identification of the defendant following an illegal arrest need not be suppressed, because the victim was able to identify the defendant from her observations of him at the time of the robbery, uninfluenced by the later (suppressible) photographic and lineup identifications. It also held that the defendant "cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest," explaining, "[a]n illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction." However, that conviction cannot be obtained by using tainted evidence:

> "The exclusionary principle of *Wong Sun* and *Silverthorne Lumber Co.*[9] delimits what proof the Government may offer against the accused at trial, closing the courtroom door to evidence secured by official lawlessness. Respondent is not himself a suppressible 'fruit,' and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct."

Id. at 474.

The mere existence of a warrant does not retroactively justify all seizures of a person and legitimize any subsequently discovered evidence. The theory in *Dempster* was that the challenged evidence was lawfully discovered during a lawful search incident to a lawful arrest on an outstanding warrant. If the search

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[9] *Silverthorne Lumber Co. v. United States*, 251 US 385, 40 S Ct 182, 64 L Ed 319 (1920).

had occurred *before* discovery of the warrant, it would not have been a search incident to arrest. It would have been an unlawful search following an unlawful seizure, and the resulting evidence would have been suppressed. *See State v. Taylor*, 151 Or App 687, 950 P2d 930 (1997), *rev den*, 327 Or 432 (1998) (holding that trial court properly suppressed evidence obtained from consent search that occurred after unlawful stop and before officer discovered outstanding warrant; also suppressing evidence of the defendant's statements obtained after arrest on warrant, because they were based on evidence obtained during illegal search). Just as a search incident to arrest may not occur before the officer has probable cause to arrest, *State v. Elk*, 249 Or 614, 621-22, 439 P2d 1011 (1968), a search incident to arrest may not occur before the officer has all the information necessary to arrest the person on an outstanding warrant. Consequently, the mere existence of an arrest warrant does not deprive a person of his right against seizure; it simply makes the seizure "reasonable" when executed properly. *See State v. Bentz*, 211 Or App 129, 139-40, 158 P3d 1081 (2007) (holding that when officer searched the defendant without first verifying the existence of the warrant that the defendant told him about, as required by ORS 133.310(2), the resulting evidence must be suppressed).

To summarize: Article I, section 9, protects against unreasonable seizures. The Oregon exclusionary rule vindicates that right by restoring a person to the position he or she would have been in absent an illegal seizure. A person does not

lose all rights against seizure when an arrest warrant is issued. When a person is seized twice, first unlawfully and then lawfully pursuant to an arrest warrant, his rights against the unlawful seizure must be vindicated. That occurs by returning him to the position he would have been in prior to the unlawful seizure. Thus, if any evidence was discovered as a result of that unlawful seizure, it must be suppressed. However, the person need not be released, because the ultimate condition of being in custody is justified by the warrant. If the state is able to show that any evidence obtained while the defendant was in custody was attenuated from the unlawful seizure, then that evidence need not be suppressed.[10]

E. The discovery of the evidence sought to be suppressed was tainted by the illegal stop in this case – the stop yielded information that was crucial to the arrest of defendant on the warrant – namely, defendant's identity.

Defendant was unlawfully seized when police detained him for 30 minutes without justification. Defendant was a passenger in vehicle that was lawfully stopped for a traffic infraction. When he refused to identify himself, Officer Stradley called Officer Burley to the scene to try to identify him. When Burley arrived, he looked inside the vehicle and immediately identified defendant by name. Stradley used that name to check defendant for warrants and discovered an

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[10] For example, a defendant's subsequent voluntary statements need not be suppressed if the state could show sufficient passage of time and adequate warnings, such as an explanation of the effect of the initial unlawful seizure on the defendant's rights. A similar result could occur regarding evidence discovered during a subsequent consent search.

outstanding arrest warrant. Defendant was arrested on the warrant. Drugs and cash were found pursuant to the ensuing search. That evidence must be suppressed.

The Oregon exploitation analysis in this case is straightforward. But for the unlawful seizure, defendant would not have been present for police to identify him, arrest him on the outstanding warrant, and search him pursuant to that arrest, which led to the discovery of the challenged evidence. *See State v. Ayles*, 348 Or 622, 631-32, 237 P3d 805 (2010) (holding that the unlawful seizure of passenger in lawfully stopped vehicle made him available to police for questioning, thus satisfying the defendant's burden to establish a minimal factual nexus between the illegal police conduct and the defendant's consent to search); *State v. Thompkin*, 341 Or 368, 379-80, 143 P3d 530 (2006) (same).

The challenged evidence was not discovered through an independent source. The arrest on the warrant was not an "independent source" of the challenged evidence, because the arrest was causally connected to the illegal seizure – the police would not have been able to arrest defendant on the warrant without the unlawful seizure.

Similarly, the challenged evidence would not have been "inevitably discovered" through proper and predictable police investigatory procedures, because the police were unable to identify defendant without the unlawful seizure.

Consequently, other predictable police investigatory procedures would not have led to defendant's arrest.

Finally, the discovery of the evidence was not "attenuated" from the unlawful seizure, because police used information obtained from the illegal seizure to find and execute the arrest warrant. Not only did the unlawful seizure place police in a position to observe defendant's physical features and ascertain his identity, police unlawfully detained defendant for that purpose. Although police observed defendant as a result of the lawful traffic stop, they could not identify him. It was the additional unlawful detention while they waited for Burley to arrive that yielded the desired information. That information – defendant's name – was used to discover the outstanding warrant, and the combination of defendant's identity and the warrant was used to arrest defendant. The connection between the illegal detention and the arrest on the warrant was direct and unattenuated. Consequently, all evidence discovered pursuant to the arrest on the warrant must be suppressed under Article I, section 9, of the Oregon Constitution.

III. The challenged evidence must be suppressed under the Fourth Amendment to the United States Constitution.

The Fourth Amendment to the United States Constitution bars the use of evidence obtained as a result of an unlawful stop unless the discovery of the evidence was sufficiently attenuated from the illegality. In the decades following this court's decision in *State v. Dempster*, 248 Or 404, 434 P2d 746, 747 (1967),

courts have formed a consensus that the attenuation analysis set out in *Brown v. Illinois*, 422 US 590, 95 S Ct 2254, 45 L Ed 2d 416 (1975), governs such situations. Modern courts that have confronted the question have uniformly declined to adopt a *per se* rule allowing the admission of evidence discovered after arrest on a warrant following an illegal seizure. This court should similarly apply the *Brown* analysis to such cases.

A. Evidence obtained as a result of an unlawful seizure is inadmissible unless the discovery is attenuated from the illegality.

The Fourth Amendment requires that a court exclude evidence discovered as the direct result of a police illegality or as the "fruits" of a prior illegality. *Wong Sun v. United States*, 371 US 471, 484, 83 S Ct 407, 9 L Ed 2d 441 (1963). However, when the discovery of the evidence is sufficiently "attenuated" from the illegality, the taint of the illegality may be sufficiently dissipated such that suppression is not required. *Id*. at 491.

In *Brown*, the United States Supreme Court considered the admissibility of a confession obtained following an illegal arrest. 422 US at 601-02. The Court explained that, even if the confession was voluntary and otherwise admissible under the Fifth Amendment, its admissibility must be separately analyzed under the Fourth Amendment and that *Miranda* warnings were not alone sufficient to render the statements attenuated from the illegal arrest. *Id*. Instead, the Court explained that three factors were relevant:

> "[1] The temporal proximity of the arrest and the confession, [2] the presence of intervening circumstances, and, [3] particularly, the purpose and flagrancy of the official misconduct * * *."

Id. at 603-04 (internal footnotes and citations omitted).

The framework for analyzing attenuation announced in *Brown* has been adapted by a number of state and federal courts to govern situations involving the discovery of a valid arrest warrant during an unlawful stop. As the *Brown* court explained in rejecting a *per se* rule, "The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test." *Id*. at 603. Because the *Brown* factors balance the recognition that evidence only distantly connected to a prior illegality may be admissible against the need to protect a defendant's rights under the Fourth Amendment, this court should adopt that test for cases involving the discovery of a warrant.

B. To determine whether the discovery of evidence is sufficiently attenuated from the illegality a court considers the temporal proximity between the illegality and the discovery of the evidence, the presence of any intervening circumstances, and the purpose and flagrancy of the police conduct.

In *Dempster*, this court held that the discovery of a valid arrest warrant and the defendant's subsequent arrest "purged the search incident thereto of the taint of any illegality in the detention of defendant prior to that time." 298 Or at 408. Although this court did not state that attenuation would always follow from the discovery of a warrant, it also did not articulate any criteria by which to determine

whether the evidence should be suppressed. The Oregon Court of Appeals has treated *Dempster* as a *per se* rule. For example, in the instant case the court described the state of the law in absolute terms: "Oregon has long recognized that the discovery of an outstanding warrant for a defendant's arrest purges the taint of prior unlawful police conduct that might otherwise require suppression of evidence obtained as a result of an arrest on the warrant." *State v. Bailey*, 258 Or App 18, 21, 308 P3d 368 (2013), *rev allowed*, 354 Or 490 (2013). This court should now clarify that ruling by explicitly adopting the *Brown* test as virtually every other jurisdiction has done.

In *United States v. Gross*, 662 F3d 393, 401 (6th Cir 2011), the court considered the attenuating effect of an arrest warrant on an illegal stop and explained that it would consider "all relevant factors 'such as the length of time between the illegal seizure and the [discovery of evidence or the confession], the presence of intervening circumstances, the purpose and flagrancy of the official misconduct, and whether the officers read the suspect his *Miranda* rights before he [confessed].'" (quoting *United States v. Lopez–Arias*, 344 F3d 623, 630 (6th Cir 2003) (brackets in *Gross*). The Seventh Circuit applied the same test in *United States v. Green*, 111 F3d 515, 521 (7th Cir 1997), and the Eight Circuit did so in *United States v. Simpson*, 439 F3d 490 (8th Cir 2006).

Numerous states that have considered the question have also applied the *Brown* factors. Those include Alaska in *McBath v. State*, 108 P3d 241 (Alaska Ct

App 2005), Arizona in *State v. Hummons*, 227 Ariz 78, 253 P3d 275 (2011), Idaho in *State v. Page*, 140 Idaho 841, 103 P3d 454 (2004), Illinois in *People v. Mitchell*, 355 Ill App 3d 1030, 291 Ill Dec 786, 824 NE 2d 642 (2005), Florida in *State v. Frierson*, 926 So 2d 1139 (Fla.), *cert den*, 549 US 1082, 127 S Ct 734, 166 L Ed 2d 570 (2006), Louisiana in *State v. Hill*, 725 So 2d 1282 (La 1998), Oklahoma in *Jacobs v. State*, 128 P3d 1085 (Okla Crim App 2006), Texas in *State v. Mazuca*, 375 SW 3d 294 (Tex Crim App 2012), *cert den*, ___ US___, 133 S Ct 1724, 185 L Ed 2d 789 (2013), and Utah in *State v. Strieff*, 286 P3d 317 (Utah Ct App 2012), *rev allowed*, 298 P3d 69 (Utah 2013).

A series of Maryland cases demonstrate the trend. In an earlier case, Maryland rejected applying the *Brown* criteria to evidence discovered following a valid arrest on a warrant in *Brown v. State*, 124 Md App 183, 199, 720 A2d 1270, 1278 (1998), *cert den*, 353 Md 269, 725 A2d 1067 (1999). In a more recent case, the Court of Special Appeals of Maryland recognized that a number of courts had applied the *Brown* analysis, but it declined to expressly consider whether to modify its methodology, holding,

> "Whether we employ the balancing approach of *Brown v. Illinois* or conclude that it is not applicable * * * we come to the same conclusion. The exclusionary rule does not require suppression of the evidence obtained as a result of the search incident to a valid arrest on an outstanding warrant."

Myers v. State, 165 Md App 502, 527-28, 885 A2d 920, (2005) *aff'd*, 395 Md 261, 909 A2d 1048 (2006).

On review, the Maryland Court of Appeals explained that, in considering the admissibility of the evidence, it was "primarily concerned with whether [the officer's] discovery of the outstanding arrest warrant and subsequent lawful arrest, following the unconstitutional seizure, was sufficiently attenuated to be purged of the primary taint." *Myers*, 395 Md at 285. The court noted that the three-factor analysis from *Brown* served to determine "whether the primary illegal activity has been sufficiently attenuated" and that the attenuation doctrine has been "consistently followed" in subsequent cases. *Id*. at 286 (citing *New York v. Harris*, 495 US 14, 110 S Ct 1640, 109 L Ed 2d 13 (1990)). Although the *Myers* court affirmed the lower court's finding that the evidence was attenuated, it did so by considering the *Brown* factors. 395 Md at 291-92.

Defendant is unaware of any jurisdictions that have not applied the *Brown* attenuation analysis to suppression issues involving a discovered warrant in recent decades. As the Texas Court of Criminal Appeals noted, "Practically every other jurisdiction to address the question of attenuation of taint to the illegal seizure of physical evidence has deemed it appropriate to apply three of the *Brown* factors" – temporal proximity, intervening circumstances, and purpose and flagrancy of the officers' conduct. *Mazuca*, 375 SW3d at 303-04. This court should explicitly adopt the *Brown* Fourth Amendment attenuation analysis for cases involving a warrant discovered following an unlawful stop.

C. When police unlawfully seize a person for the purpose of checking for outstanding warrants, the attenuating effect of that warrant is minimal.

Although courts of many jurisdictions have reached a consensus that the *Brown* test is the appropriate tool under which to consider whether discovery of a warrant attenuates evidence from a prior illegality, courts have chosen to weigh the three factors differently. In applying the *Brown* test, it is important for this court to give effect to the deterrence rationale that underlies the Fourth Amendment exclusionary rule. In order to protect a person's rights under the Fourth Amendment, this court should hold that a warrant discovered following an illegal detention *carried out to discover that warrant* does not truly attenuate the discovery of evidence from the illegality because the warrant is not a true intervening circumstance. This court can safeguard those rights within the *Brown* framework.

Several courts have held that the first factor, the temporal proximity of the illegality to the discovery of the evidence, is the least important. *See Green*, 111 F3d at 522; *Simpson*, 439 F3d at 495. The temporal factor is less important in warrant discovery because "the intervening circumstance is not a voluntary act by the defendant." *Id*. *See also Hummons*, 227 Ariz at 81 (although short time between illegality and discovery of evidence favors suppression, "this is the least important *Brown* factor"). However, courts have premised their minimization of the importance of the first *Brown* factor on the importance of the discovery of the

warrant, as a true intervening factor where "there is 'no chance that the police have exploited an illegal arrest by creating a situation in which [the] criminal response is predictable.'" *Simpson*, 439 F3d at 495 (quoting *Green*, 111 F3d at 522, brackets in *Simpson*). Thus, a close temporal proximity between an illegality and the discovery of the evidence may be significant when the unlawful stop is designed to discover a warrant.

The importance of the second *Brown* factor, the presence of intervening circumstances, depends upon whether the discovery of the warrant is, in fact, a true intervening event. Although courts have recognized that the unexpected discovery of a warrant is highly attenuating, the same should not be true of a warrant that was discovered as the result of police misconduct designed to discover a warrant. As an example of the former scenario, the Seventh Circuit held in *Green* that the discovery of a valid arrest warrant serves as a strong intervening factor because when "the arrest is lawful, a search incident to the arrest is also lawful" and allows officers to search incident to the arrest. 111 F3d at 521.

However, the attenuating effect is far weaker when the *purpose* of the illegality was to discover a warrant. The Arizona Supreme Court held, "If the purpose of an illegal stop or seizure is to discover a warrant – in essence, to discover an intervening circumstance – the fact that a warrant is actually discovered cannot validate admission of the evidence that is the fruit of the illegality." *Hummons*, 227 Ariz at 81. If a warrant discovered under such

circumstances automatically attenuated evidence from a prior illegality, then police would be allowed to take advantage of

> "a new form of police investigation, whereby an officer patrolling a high crime area may, without consequence, illegally stop a group of residents where he has a 'police hunch' that the residents may: 1) have outstanding warrants; or 2) be engaged in some activity that does not rise to a level of reasonable suspicion."

Gross, 662 F3d at 404. Thus, the attenuative effect of a warrant discovered as the result of an illegality employed for the purpose of discovering that warrant is less than one discovered by chance during or after an otherwise illegal stop.

In a critique of courts that have admitted evidence following discovery of a warrant during an unlawful stop, one author notes that "the predictable discovery of an outstanding arrest warrant cannot logically be viewed as attenuating unconstitutional conduct in the manner contemplated by the Supreme Court's jurisprudence on the exclusionary rule." Michael Kimberly, *Discovering Arrest Warrants: Intervening Police Conduct and Foreseeability*, 118 Yale LJ 177, 182 (2008). Kimberly argues that warrants should not attenuate a prior illegality when the discovery of the warrant is a foreseeable consequence of the unlawful detention. *Id*. at 182-83. If officers may take advantage of a warrant discovered via an unlawful stop designed or likely to reveal the warrant, the following scenario may frequently recur:

> "(1) if [officers] run a warrants check or inquire about warrants and the individual has an open warrant, they will probably discover it; (2) if they discover a warrant, any evidence they seize in the search

> incident to arrest will be admissible, regardless of the illegality of the detention; and (3) if they do not discover a warrant, they are no worse off."

Id. at 183. In order to avoid creating a powerful incentive for police officers to unlawfully detain individuals to search for warrants, this court should give minimal weight to the presence of an arrest warrant as an intervening circumstance when officers acted in a way that was likely to lead to discovery of a warrant.

The state may argue that even if a warrant is discovered as a result of conduct intended to find one, the warrant should serve as a strong intervening event because police are required to act upon it and have no choice but to arrest the subject of the warrant. That view finds support in *Green*, where the court said, "It would be startling to suggest 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.'" *Green*, 111 F3d at 521. However, this court need not hold that officers may not arrest based upon a valid arrest warrant; it should merely hold that any evidence discovered following that arrest is not attenuated from the illegality. The Supreme Court of Kansas succinctly held that under those circumstances "the preceding unlawful detention does not taint the lawful arrest on the outstanding warrant, nor does it prevent the officer from conducting a safety search pursuant to that arrest; but it does taint any evidence discovered during the unlawful detention or during a search incident to the lawful arrest." *State v. Moralez*, 297 Kan 397, 415, 300 P3d 1090 (2013).

Thus, an officer is free to effectuate an arrest if commanded to do so by a warrant, but that arrest does not attenuate the prior illegality.

Even if the discovery of a warrant is a strong intervening circumstance, when the purpose of the illegality was to find that warrant, the third *Brown* factor, the "purpose and flagrancy" of the officer's conduct may often require suppression. That factor is crucial because "[t]he purpose and flagrancy of illegal conduct * * * goes to the very heart and purpose of the exclusionary rule." *Hummons*, 227 Ariz at 81. *See also United States v. George*, 883 F2d 1407, 1416 (9th Cir 1989) (quoting *United States v. Perez-Esparza*, 609 F2d 1284, 1289 (9th Cir 1979)); *State v. Bainbridge*, 117 Idaho 245, 252, 787 P2d 231, 252 (1990). Because the basis for the federal exclusionary rule is to deter police misconduct, a rule that allows the admission of evidence that was discovered as a result of intentional police misconduct would do nothing to deter such misconduct. When police are free to commit misconduct and take advantage of the evidence "because of the fortuity that an arrest warrant happens to come to light before the evidence is discovered perversely serves to encourage, rather than discourage, official misconduct and renders the Fourth Amendment toothless." *Mazuca*, 375 SW 3d at 306.

Evidence discovered as a result of a police illegality must be suppressed unless the discovery of that evidence was attenuated from the illegality. In determining whether evidence has been attenuated, this court should apply the

methodology outlined in *Brown*. In applying the *Brown* test to cases where the police have discovered a warrant because they illegally stopped a person either for the purpose of finding a warrant or in a situation where the discovery of a warrant is a foreseeable result of the misconduct, this court must ensure that the deterrence rationale of the exclusionary rule is given full effect. To do that, it should hold that a warrant obtained in such a case does not constitute a strong intervening factor and that the purpose and flagrancy of the police conduct should be given great weight.

D. Applying the *Brown v. Illinois* framework to the facts of this case requires suppression of the evidence.

1. The discovery of the evidence came close in time to the illegality.

Most courts to consider this issue have held that the temporal proximity *Brown* factor is the least important factor in cases in which a warrant is discovered prior to the discovery of the evidence. However, that factor remains relevant. Further, where the discovery of the evidence follows close in time to the illegality, that proximity supports finding that the evidence is not attenuated. *See, e.g.*, *Frierson*, 926 So 2d at 1144 ("The brief amount of time that elapsed between the illegal stop and the arrest of respondent weighs against finding the search attenuated, but this factor is not dispositive.").

Here, there was no temporal break between defendant's illegal detention and the discovery of the evidence. Defendant was held pending Burley's arrival

whereupon Burley provided defendant's name to Stradley. Tr 123. The officers continued to hold defendant while they determined that defendant was the subject of a warrant. Tr 123. Defendant was arrested pursuant to that warrant. Tr 123-24. During the arrest the officers discovered the bag of cocaine in defendant's mouth. Tr 125. The temporal proximity between the ongoing unlawful detention and the discovery of the evidence supports suppression under the first *Brown* factor.

2. The discovery of the warrant was the intended result of the police conduct rather than a true intervening event.

The discovery of a warrant may generally serve as an intervening circumstance when considering whether the discovery of evidence has been attenuated from a prior illegality and purged of any taint. *Green*, 111 F3d 515, 521 (7th Cir 1997). That said, when police discover a warrant "from means that are indistinguishable from the illegal stop," that discovery is not a true intervening event. *Gross*, 662 F3d at 405. That is so because discovering a warrant is the foreseeable outcome of a police illegality that is intended to discover such a warrant.

Here, the discovery of the warrant was a direct, foreseeable, intended result of the police officers' misconduct. Officer Stradley held defendant to contact Officer Burley because Stradley could not remember defendant's name. Tr 48-49, 57. Stradley explained that he did not want to tell defendant that he was free to leave because he wanted defendant to remain and be identified by Burley:

> "Q [by defense counsel] So, it would be against your interest at that point to tell him he's free to leave, isn't that right? If you want to have him -- have him identified?
>
> "A Well, sure, I want to have them identified. Yes."

Tr 76.

The prolonged detention was not necessary to complete the traffic stop for which the officers had purportedly stopped the car. The trial court found that the officers could have completed the traffic stop "immediately, within minutes, I would say, within less than five minutes of the stop." Tr 258. Thus, the majority of defendant's detention was for no reason other than to ascertain his identity and then to check for warrants. Because the officers illegally seized defendant in order to check for a warrant, the discovery of that warrant is not a true intervening circumstance.

3. The police unlawfully detained defendant for the specific purpose of discovering his identity and checking for outstanding warrants. Exclusion of the evidence is necessary to deter such conduct.

Even if the discovery of the warrant is a strong intervening circumstance, this court must weigh that factor against the purpose and flagrancy of the officers' conduct. Because the Fourth Amendment's exclusionary rule is premised upon deterring police misconduct, weighing the officers' purpose goes to the heart of the analysis. *Hummons*, 227 Ariz at 81. On one hand, that factor may support finding attenuation when a police officer merely makes a mistake but the unlawful stop was not "pretextual or in bad faith." *Frierson*, 926 So 2d at 1145. By contrast, the

factor will weigh heavily towards suppression when "the officers stopped defendant for no apparent reason other than to run a warrant check on him." *Mitchell*, 355 Ill App 3d at 1038. Such a stop is also flagrant police misconduct when "the complete disregard of citizens' rights to be 'secure in their person' is clear." *Id*.

This case involves a purposeful and flagrant disregard for defendant's rights. The trial court found that the officer who stopped the vehicle could have cited the driver "immediately, within minutes, I would say, within less than five minutes of the stop," and that "that the traffic stop was extended substantially beyond the time that was sufficient to complete all the traffic stop business." Tr 258. He also found that defendant, a passenger who should not have had to remain, "was detained. There's no question in my mind that if he had tried to leave, they wouldn't have let him." Tr 258. During that detention, "[v]arious officers made repeated efforts to discern the identities of the two backseat passengers, but the passengers refused to identify themselves to the police." *Bailey*, 258 Or App at 20. Officer Burley was called to the scene for the express purpose of identifying defendant, and when he arrived 30 minutes later, he was able to do so. Officer Stradley was then able to run defendant's name for warrants, which led to the discovery of the outstanding warrant, defendant's arrest, and the discovery of the challenged evidence. *Id*. As the dissenting opinion states, "The record before us leaves no room to conclude other than that the officers were unlawfully detaining

defendant for the purpose of identifying him and running a warrant check on his name." *Id*. at 30 (Egan, J., dissenting).

That is exactly the sort of purposeful violation of a person's rights that the Fourth Amendment exclusionary rule is designed to protect against. If the discovery of an outstanding warrant purged the taint of a prior illegal detention conducted for the purpose of identifying the person and checking for warrants, then police would be encouraged to conduct illegal stops to aid in executing outstanding warrants. An illegal stop is a violation of a person's Fourth Amendment rights, not a law enforcement tool. The Fourth Amendment exclusionary rule's deterrence rationale demands suppression of the resulting evidence in circumstances such as occurred here.

Because the officers in this case acted with the purpose of holding defendant merely to discover his identity and check for warrants, and because the disregard for his right to be free from unlawful seizure was flagrant, the third *Brown* factor compels the exclusion of the evidence discovered following defendant's arrest on the warrant under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, defendant respectfully prays that this court reverse the decision of the Court of Appeals, vacate the judgment, and remand to the trial court for further proceedings.

Respectfully submitted,

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

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 12,152 words.

Type size

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

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on January 31, 2014.

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

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