IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. JEFFERY LORENZO, Defendant-Appellant, Respondent on Review.	Washington County Circuit Court Case No. C100238CR CA A145826 SC S060969

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

Review the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Washington County
Honorable Steven L. Price, Judge

Opinion Filed: September 12, 2012
Author of Opinion: Presiding Judge Ortega
Before: Presiding Judge Ortega, Chief Judge Brewer, and Judge Sercombe

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BRIEF ON THE MERITS

STATEMENT OF THE CASE

After the trial court denied defendant-respondent's (defendant hereafter) motion to suppress, defendant was convicted of manufacture of a controlled substance, ORS 475.856, delivery of a controlled substance, ORS 475.869(2), and felon in possession of a firearm, ORS 166.270.

The trial court ruled that an officer lawfully reached into defendant's apartment under the emergency aid exception to Article I, section 9, of the Oregon Constitution, lawfully knocked on defendant's bedroom door, obtained defendant's permission to enter the apartment, noticed evidence of marijuana consumption, and asked and obtained defendant's consent to search defendant's bedroom, which led to physical and testimonial evidence that formed the bases for the convictions.

The Court of Appeals reversed defendant's convictions. The court first held that the situation did not satisfy the requirements for the emergency aid exception. The court then relied on *State v. Hall*, 339 Or 7, 115 P3d 908 (2005), to reject the state's alternative argument that defendant's consent was independent of or only tenuously related to the Article I, section 9, illegality. *State v. Lorenzo*, 252 Or App 263, 269-71, 287 P3d 1133 (2012), *rev allowed*, 353 Or 562 (2013).

The Attorney General petitioned for review. The state does not challenge the Court of Appeals holding that the circumstances did not justify the officer's entry into the residence under the emergency aid exception. *See* Petition for Review at 2. Rather, the state asks this court to reverse *Hall* and the Court of Appeals decision in this case under the theory that voluntary consent alone satisfies Article I, section 9, despite any prior illegality. In the alternative, the state asks this court to reverse based on reasoning found in *State v. Hemenway*, 353 Or 129, 295 P3d 617 (2013), *vacated*, 353 Or 498, 302 P3d 413 (2013).

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

The Appellate Division of the Office of Public Defense Services (OPDS) represented Mr. Hemenway in this court and filed an extended brief on the merits explaining the origin and development of the fruit of the poisonous tree doctrine in federal and state law. OPDS now represents Defendant Lorenzo in this case and Defendant Musser in S060868.

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

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

As will be seen below, defendant agrees with most of the analysis in *Hemenway*. To expedite the analysis in this case, defendant will primarily focus on the three problematic aspects of *Hemenway*: (1) the difference between the traditional fruit of the poisonous tree doctrine and the *Hemenway* model with respect to the weight and effect of the unlawful seizure on the stopped person's decision to consent, (2) the definition and analysis of the exploitation prong of attenuation, and (3) the re-incorporation of the "purpose and flagrancy" factor into Oregon's attenuation analysis.

Questions Presented and Proposed Rules of Law

First Question. Does an officer summon and seize an individual if he pushes open the front door of a residence at 7 a.m., leans on the doorframe, reaches into the interior, knocks loudly on the person's bedroom door, announces he's a police officer, and calls the person by name?

Proposed Rule. By entering a residence, knocking on an interior bedroom door, announcing himself as a police officer, and calling the resident by name, an officer acts under color of law to summon the resident to the bedroom door. Similarly, a reasonable person would believe he was seized if he were

awakened at 7 a.m. by someone knocking loudly on his bedroom door, yelling "Police," and calling out the person's name.

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

Proposed Rule. An unjustified stop is constitutionally unreasonable.

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

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

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

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

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

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

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

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

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

Proposed Rule. The personal constitutional right against unreasonable seizure is violated when an officer unjustifiably seizes a person, regardless of whether the officer is polite or surly. Further, police are trained professionals who are expected to be civil and professional toward the public; consequently,

their professionalism does not qualify as a "significant intervening event" to undo the ongoing illegal seizure.

Summary of Argument

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

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

The three factors that typically govern the latter prong in Oregon law are (1) the temporal proximity between the illegality and the consent, (2) whether

the person was informed of the right to refuse consent, and (3) whether a significant intervening event removed or purged the effect of the illegal seizure from the person's decision to consent. Effectively, the state must show that the person would have consented if police had engaged him in mere conversation instead of stopping him, or that some significant intervening event (such as release from custody, contact with an attorney, or appearance in court) removed or purged the effect of the illegal stop and led him to give consent.

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

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

In the present case, both the *Hall* and the *Hemenway* models lead to suppression of the evidence from the consent search. Here, the officer committed a search without justification when he pushed open the front door of defendant's residence, leaned in, and knocked on defendant's bedroom door. Further, the officer seized defendant when he knocked loudly on the bedroom door at 7 a.m., identified himself as a police officer, and called out to defendant by name, because a reasonable person in defendant's position would reasonably believe he was seized if he were awakened by a police officer who was inside his residence knocking on his bedroom door and calling out his name. For the following reasons, the illegal search and the illegal seizure tainted defendant's consent to the officer's entry.

Defendant was groggy when he awoke and responded to the knocking on his bedroom door. When he opened the bedroom door he saw that the front

door was open and the officer was standing in plain view. The officer immediately began to ask him questions and requested consent to enter. Because the officer had pushed open the exterior door to commit the unlawful search, defendant was denied the opportunity he should have had to go to the front door, see who was there, and, if he chose, ignore the officer by not answering the exterior door. One's residence is the quintessential physical area of privacy. Like answering a telephone, the resident can choose to answer or not answer the front door, and the person on the other side of the door is expected to respect the assertion of privacy by the resident who chooses not to answer the door. Defendant was denied that opportunity here.

The officer asked to enter, and defendant consented. From that position, the officer smelled marijuana and asked defendant to produce identification. When defendant reentered his bedroom to retrieve identification, the officer saw a baggie of marijuana on the bedroom floor. The officer obtained consent to search the room and found other contraband.

The state failed to meet the *Hall* factors to establish attenuation. Defendant was unlawfully seized and groggy when he responded to the knock and call at his bedroom door and was confronted by the officer who requested consent to enter the residence. The illegal search and seizure were virtually contemporaneous with the request for consent. The officer did not inform defendant of the right to refuse the request to enter. Finally, no significant

intervening event mitigated the affects of the illegal search and seizure on defendant's decision to consent.

The state also failed to meet the *Hemenway* factors to establish attenuation. In addition to the three factors noted above (close temporal proximity, absence of advice of rights, and absence of a significant intervening event), the officer "exploited" the illegalities within the meaning of *Hemenway*. The officer had failed to contact defendant using legal means (knocking on the exterior door and telephoning), and by pushing the door open, the officer denied defendant the opportunity to ignore the officer through a closed exterior door.

Additionally, defendant was groggy when he responded to the illegal search and was seized. Defendant was not in full possession of either his faculties or rights when he was seized. The officer used the factual and legal advantages created by the illegal search and seizure to obtain consent to enter the residence, from where he smelled marijuana. The marijuana smell prompted the officer to pursue a criminal investigation.

Defendant's Article I, section 9, rights to liberty and privacy were violated when the officer opened the front door without justification, knocked on defendant's bedroom door, seized defendant, and asked defendant to waive his constitutional right to privacy in his home and bedroom.

Summary of Facts

The Court of Appeals statement of facts is presented below. Defendant uses brackets and italicized font to supplement the court's statement of facts.

> "We state the facts consistently with the trial court's express and implied factual findings to the extent that there is sufficient evidence in the record to support them. *State v. Ehly*, 317 Or 66, 75, 854 P2d 421 (1993). Beaverton police were dispatched to an apartment complex at 6:51 a.m. [*on Monday, February 1, 2010*] in response to a report by a woman that her ex-fiancé, Kyle, was outside her apartment with a noose around his neck attempting to hang himself. [*Tr 126*]. [*The trial court took judicial notice that sunrise was at 7:32 a.m. that day. Tr 185*]. A number of law enforcement and medical personnel responded. The first two officers at the scene placed Kyle in handcuffs and removed the noose from his neck. Several more officers, including Wujcik, arrived shortly thereafter. Wujcik was told that Kyle lived in an apartment upstairs in the same complex, that he owned a firearm, and that he had a roommate named Jeff (defendant).
>
> "According to Wujcik, when police are called to 'suicidals, * * * sometimes they're suicidal because they have hurt somebody or killed somebody or something else is going on[.]' Knowing that 'somebody tried to kill themselves,' Wujcik became concerned about defendant's safety, so the officer went upstairs and knocked on the exterior door of defendant's apartment and several times called him by name: 'Beaverton Police Department, Jeff[;] are you okay[?]' There was no response from inside the apartment. Another officer then asked Kyle's ex-fiancé to call defendant. Although she did so twice, defendant did not answer the telephone. Having been informed where defendant's bedroom was located, Wujcik then opened the front door to defendant's apartment[, *leaned on the doorframe*] and reached in and knocked on defendant's bedroom door, which he could reach without stepping inside the front door into the apartment.[1] [*Tr 26*]. As he knocked, Wujcik called out, '[*Police*] Jeff, are you okay?' [*Tr 27*]. About 10 seconds later, defendant opened his bedroom door, appearing to have just awakened. [*Uniformed Officer*] Wujcik asked if he was alright, and defendant responded in the affirmative. [*Tr 28*].

> "[1] Although there was disagreement at the suppression hearing regarding whether the front door to the apartment was closed or slightly open, the trial court stated that it would "assume for the sake of argument" that the officer opened the exterior door of the apartment.
>
> "Wujcik then asked defendant for permission to come inside and speak to defendant, and defendant agreed and stepped out of the bedroom. Because he smelled a strong odor of marijuana coming from defendant's bedroom, Wujcik asked defendant for his identification. As defendant walked back into his bedroom to retrieve his identification, Wujcik observed a small baggie of what he believed to be marijuana on the floor of the bedroom. After asking him a couple of questions about Kyle, Wujcik informed defendant that he knew there was marijuana in the bedroom and asked defendant if he was selling the drug. Defendant replied that he was not selling marijuana, and Wujcik then asked for defendant's consent to search his bedroom. Defendant consented to the search, and, inside the bedroom, Wujcik found additional marijuana, a spiral notebook apparently containing drug records, digital scales, and a gun. After Wujcik read defendant his Miranda rights, defendant made incriminating statements."

State v. Lorenzo, 252 Or App at 264-65.

Argument[1]

The issue before this court is fundamental to search and seizure law. It involves the default answer to the following generic constitutional question:

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[1] Sections I-IV of the argument section that follows is identical to sections I-IV of the defendant-respondent's amended brief on the merits in *State v. Musser*, S060868. Section V, the application section, differs from the application section in Respondent's Musser's brief.

Does a stop without reasonable suspicion have a presumptive causative effect on the seized person's decision to consent to a search during the seizure?

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

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

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

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

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

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

I. Key Principles Validated in the *Hemenway* Model

The *Hemenway* model recognizes several principles critical to Oregon criminal law. First, the *Hemenway* model generally reaffirms *Hall's* approach to the fruit of the poisonous tree and the attenuation doctrines under Article I, section 9.[2] *Hemenway*, 353 Or at 137.

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

Third, the *Hemenway* model disavows the proposition that a criminal defendant has the burden to show a "minimal factual nexus" between an illegal warrantless seizure and subsequent consent or statements. Rather, when the

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[2] Article I, section 9, provides:

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

state seeks to introduce evidence obtained during a warrantless search, it "has the burden to prove that the warrantless search was valid." *Hemenway*, 353 Or at 142; ORS 133.693(4).

Fourth, the *Hemenway* model acknowledges that when law enforcement obtains consent during a stop that lacks reasonable suspicion, the state must satisfy two separate prongs of the attenuation analysis, voluntariness and exploitation, before it may introduce evidence from the search. *Hemenway*, 353 Or at 138-39.

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

The Significance of a Stop

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

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

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

A stop occurs when law enforcement acts under color of law to restrict a person's liberty to engage in lawful activities without undo interference from government actors. *See* ORS 131.605(7) ("A stop is a temporary restraint of a person's liberty by a peace officer lawfully present in any place."). Oregon statutory law authorizes stops and describes their lawful and reasonable dimensions.[3]

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[3] ORS 131.615 provides in part:

> "(1) A peace officer who reasonably suspects that a person has committed or is about to commit a crime may stop the person and, after informing the person that the peace officer is a peace officer, make a reasonable inquiry.
>
> …….footnote continued

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

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

A stopped individual is in a restricted legal position, as a matter of law. The person must comply with the order to stop and any subsequent lawful orders. The stop conveys that the seized individual is the subject of an

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> "(2) The detention and inquiry shall be conducted in the vicinity of the stop and for no longer than a reasonable time.
>
> "(3) The inquiry shall be considered reasonable if it is limited to:
>
> "(a) The immediate circumstances that aroused the officer's suspicion;
>
> "(b) Other circumstances arising during the course of the detention and inquiry that give rise to a reasonable suspicion of criminal activity[.]"

investigation who may not resume her preferred activities unless and until the officer permits her to do so. In no small way, the seizure reduces the individual to the officer's control under color and penalty of law, encourages the individual to cooperate, and places the officer in a superior position over the individual to pursue the criminal investigation.

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

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

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

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

> "Unlike many other courts around the country, this Court has not previously grappled with the problems caused by standardless requests for consent to search a lawfully stopped motor vehicle. But one of our observations in *Johnson* [68 NJ 349, 346 A 2d 66 (1975)] is reflective of the problem. There, we observed that '[m]any persons, perhaps most, would view the request of a police officer to make a search as having the force of law.' *Johnson, supra*, 68 NJ at 354, 346 A 2d 66. In the context of motor vehicle stops, where the individual is at the side of the road

> and confronted by a uniformed officer seeking to search his or her vehicle, it is not a stretch of the imagination to assume that the individual feels compelled to consent. *Cf*, Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 *Tul. L.Rev*. 1409, 1465 (2000) (stating that '[p]sychological studies further confirm that ... there is an almost reflexive impulse to obey an authority figure.'); *see also* Adrian J. Barrio, Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent,* 1997 U Ill L Rev 215, 233–40 (discussing psychological studies regarding authority figures)."

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

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

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

It is analytically unsurprising, then, that a seized individual would cooperate with police. Rather, cooperation is expected because the criminal

justice system specifically designs seizures to induce and often demand cooperation, often under penalty of law.

Accordingly, the fruit of the poisonous tree doctrine recognizes the seizure's debilitating effect on the stopped person and incorporates it into the attenuation analysis. In the attenuation analysis the state has a heavy burden to rebut the presumption that the seizure influenced the decision to consent, which usually requires the state to demonstrate that a significant intervening event (such as release from custody, consultation with an attorney or third person, or court appearance) broke the influence of the illegal seizure on the consenter. *Wong Sun v. United States*, 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963).

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

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

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

United States v. Crews, 445 US 463, 471, 100 S Ct 1244, 63 L Ed 2d 537 (1980) (emphasis added). The exclusionary sanction "applies to any 'fruits' of a constitutional violation—whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest or detention." *Id*. at 470 (footnotes and citations omitted).

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

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

> *challenged statement. In these cases, the 'challenged evidence'—i. e., the post arrest confession—is unquestionably 'the product of [the] illegal governmental activity'—i.e., the wrongful detention*." 72 N. Y. 2d, at 625, 532 N. E. 2d, at 1235."

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

The latter italicized excerpt bears emphasis because it illustrates one deficit in the *Hemenway* model: When police have arrested a person but lack probable cause for the arrest, the challenged evidence is unquestionably the product of the illegal arrest.

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

For example, in *Florida v. Bostwick*, 501 US 429, 111 S Ct 2382, 115 L Ed2d 389 (1991), uniformed officers entered a bus at a scheduled stop and approached and asked the defendant passenger for consent to inspect his ticket and identification. Defendant consented and showed the police the requested items. After inspecting and returning the ticket and identification, the police explained they were looking to interdict illegal drugs, and, after informing him that he had the right to refuse, they asked him for consent to search his luggage.

Bostwick, 501 US at 432. The defendant consented, and the officers found cocaine in one of the bags. The Florida Supreme Court concluded that the police policy and conduct in that case was a seizure *per se*. *Bostick v. State*, 554 So 2d 1153 (Fla 1989).

Because the state conceded there was no reasonable suspicion to stop the defendant, the controlling question on review was whether the police tactics had seized defendant. If no stop occurred, the evidence from the luggage was admissible pursuant to the defendant's consent; but, if the officers had stopped the defendant, the evidence from the consent search was the "tainted fruit" of the suspicion-less seizure:

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

Bostwick, 501 US at 433-34.

The Supreme Court held that the policy of mounting buses was not a seizure *per se*, and it remanded the case for further proceedings to determine whether the police had stopped the defendant given the individual circumstances of that case. *Id* at 439. *See also*, *Florida v. Royer*, 460 US 491,

507-08, 103 S Ct 1319, 75 L Ed 2d 229 (1983) (plurality)[4] (because officers arrested the defendant on less than probable cause, "Royer was being illegally detained when he consented to the search of his luggage, [and] we agree that the consent was tainted by the illegality and was ineffective to justify the search."); *Ohio v. Robinette*, 519 US 33, 51, 117 S Ct 417, 136 L Ed 2d 347 (1996) (Stevens, J, dissenting from the holding that no stop occurred and explaining "well settled law * * * that a consent obtained during an illegal detention is ordinarily ineffective * * * [.]" (Citations omitted)). *See generally*, LaFave, 4 *Search and Seizure*, § 8.2(d) at 107, n 144 (citing cases suppressing evidence from consent searches conducted *during* an illegal seizure).

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

> "It must next be determined whether the confession in the instant case is the product of the invalid arrest. In other cases the causal connection between an illegal arrest and the obtaining of the evidence in question has been held to be broken by: an intervening legal arrest, *State v. Dempster*, supra, *State v. Allen*, 248 Or 376, 434 P 2d 740 (Decided December 6, 1967); or by the intervention of several days' time during which the defendant was released on

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

> his own recognizance, *Wong Sun v. United States*, supra; or bringing the defendant before a magistrate between the time of illegal arrest and confession, see *Lacefield v. State*, 412 SW 2d 906 (Texas Crim 1967). In the instant case, where the confession was obtained within a matter of a few hours after the illegal arrest, while the defendant was in detention, without the presence of counsel, after a substantial physical encounter with the police which caused the defendant to become 'wild,' and before defendant had been before a magistrate, we do not feel the state has shown that the connection between the illegal arrest and the confession was 'so attenuated as to dissipate the taint.' See *State v. Dempster*, supra."

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

The court then turned to the state's alternative argument that even assuming an illegal entry, the statements were admissible because police administered the *Miranda* warnings and the defendant confessed voluntarily. This court rejected the argument, citing *Brown v. Illinois*, 422 US 590, 602, 95 S Ct 2254, 45 L Ed 2d 416 (1975),[5] and reasoning that *Miranda* warnings were "inadequate to relieve the obvious taint" resulting from the illegal entry that violated Article I, section 9. *Id*. at 166.

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

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

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

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

The *Hemenway* model relies in large part on this court's opinion in *State v. Rodriguez*, 317 Or 27, 854 P 2d 399 (1993). Unfortunately, the *Rodriguez* opinion introduced three flawed concepts into the fruit of the poisonous tree analysis. Contrary to the state's assertion, *Rodriguez* (not *Hall*) was a primary source for confusion in this area. *Hall* used traditional fruit of the poisonous tree concepts to clarify the analysis, tailor the analysis to Oregon's personal rights constitutional model, and provide predictability for the bench and bar. Because the *Hemenway* model re-incorporates several flawed *Rodriguez* principles, defendant will describe the *Rodriguez* opinion at length.

The *Rodriguez* facts are as follows. Rodriguez was an alien who was subject to deportation because he had a conviction for possession of a controlled substance. An agent from the Immigration and Naturalization Service[6] (INS) obtained an administrative warrant from an agency official who was authorized under federal law to issue arrest warrants for aliens. *State v. Rodriguez*, 317 Or at 29 n 2. Six Portland police officers and one FBI agent accompanied the INS agent to the defendant's apartment to arrest the defendant. The INS agent knocked on the door and briefly spoke with the defendant

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

through a window, before the defendant opened the front door and stood in the doorway. The agent displayed the arrest warrant and told the defendant he was under arrest. Defendant said "Okay," and stepped "back in," which the agent interpreted as an invitation to enter and arrest the defendant. *Id*. at 30.

The agent entered and read the *Miranda* rights in Spanish to the defendant before asking if the defendant had any drugs or guns in the house. The defendant said "No, go ahead and look." *Id*. at 30. The agent clarified whether the defendant authorized a search ("Can we search?"), and the defendant said, "Yes, go ahead." *Id*. at 30. The officials found two guns in the apartment, and the defendant was convicted of the offense that was then known as ex-convict in possession of a firearm, ORS 166.270 (1987).

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

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

> position to ask defendant about drugs and guns, does not render the evidence discovered in the subsequent consent search inadmissible."

Id. at 41 (emphasis added).

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

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

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

suppressed *only* in those cases where police have exploited their prior unlawful conduct to obtain that consent." (Emphasis added)).

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

With due respect, the trial court does *not* ask whether the police exploited the illegal seizure. Rather, the fruit of the poisonous tree doctrine *presumes* that the illegal seizure tainted the consent. Consequently, the trial court presumes the seizure affected the consent, and it admits the results of the consent search *only if* the state produces evidence that affirmatively rebuts the presumption and demonstrates that the illegal seizure did *not* affect the consent. *State v. Olson*,

287 Or 157; *Wong Sun v. United States*, 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963).

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

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

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

disadvantage relative to the constitutional position that he or she would have occupied absent the illegal police interference.").

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

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

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

words, *Kennedy* stands for the proposition that when the circumstances of the interaction are not egregious or overbearing, the person who *volunteers* consent without being requested to consent would likely have consented even if the officer had engaged the person in mere conversation.

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

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

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

Defendant acknowledges that the *Hemenway* model also looks to police conduct and demeanor at the initiation of the illegality to assess whether law enforcement tactics or demeanor could have affected the individual's decision

to consent: “Likewise, particularly egregious police misconduct—such as excessive use of force in unlawfully seizing a defendant—is more likely to affect the defendant’s decision to consent than more restrained police behavior.” *Hemenway*, at 147.

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

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

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

the exploitation occurs when the stopped person gives consent from an unlawfully disadvantaged position.

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

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

The Supreme Court reversed because the New York court did not appreciate the presumptive effect of the Fourth Amendment violation on the

defendant's decision to give a statement. The Court explained that the police officers' respectful and protective treatment of Dunaway's Fifth and Sixth Amendment rights did not undo the effect of the ongoing Fourth Amendment violation. The Court emphasized that it was looking for "significant intervening events" to break the influence of the unjustified seizure, and police professionalism during and after the seizure did not qualify as a significant intervening event to undo the ongoing illegal seizure. Part of the reasoning follows at length:

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

Dunaway, 442 US at 218-19 (emphasis added) (*citing*, Comment, 25 Emory LJ 227, 238 (1976)). *Dunaway* is instructive because the Court determined that

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

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

unlawfully in custody when he was removed to the station house, given *Miranda* warnings, and allowed to talk." *Harris*, 495 US at 18.

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

The "fruit of the poisonous tree" doctrine expresses a staple criminal law principle that the state is not to profit directly or indirectly from its illegality. Recognizing that the Fourth Amendment violation presumptively affects an otherwise voluntary consent, federal courts have little difficulty applying the doctrine to suppress evidence when consent is given *during* an illegal seizure. *See*, e.g., *United States v. Macias*, 658 F3d 509 (5th Cir 2011) (suppressing evidence from voluntary consent obtained during illegal extension of traffic

stop); *U.S. v. Lopez-Arias*, 344 F 3d 623, 630 (6th Cir 2003) ("Defendants granted their consent to search within half an hour from the initial stop and *during* the illegal arrest. There was no intervening time or event between the illegal arrest and defendants' consent." (Emphasis added)); *U.S. v. Washington*, 490 F 3d 765 (9th Cir 2007) ("Here, the factors fairly and practically dictate our conclusion that Washington's consent did not purge the taint of his illegal seizure. *There was no time lapse*. Shaw requested Washington's consent to search the car immediately after he conducted a search of Washington's person, and *while Washington was illegally seized*. And there were no appreciable intervening circumstances." (Emphasis added; footnote omitted)). *See generally*, LaFave, 4 *Search and Seizure*, § 8.2(d) at 107, n 144 (citing cases suppressing the evidence from consent searches conducted during an illegal seizure).

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

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

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

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

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

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

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

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

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

Herring, 555 US at 145- 46.

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

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

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

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

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

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

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

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

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

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

Hemenway, 353 Or at 147.

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

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

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

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

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

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

V. Application[7]

A. Traditional *Hall* Attenuation Analysis: Consent is the Presumptive Product of Prior Search and Ongoing Illegal Seizure

The trial court held that the emergency aid exception to the warrant requirement justified the warrantless search of the residence when the officer pushed open the front door, reached in, knocked on defendant's bedroom door, and called out to defendant. On review the state does not challenge the Court of Appeals rejection of the emergency aid exception, which means that the warrantless search lacked justification. It argues, instead, that the illegal search

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[7] The application section of the argument in this brief differs from the application section in *State v. Musser*, S060868.

was attenuated from defendant's consent to the officer's entry into the apartment and ultimately into the bedroom.

In defendant's view this case presents two Article I, section 9, illegalities. The first is the warrantless search described above when the officer pushed open the front door, leaned onto the doorframe, reached in, and knocked on defendant's bedroom door. *See State v. Rhodes*, 315 Or 191, 843 P2d 927 (1992) (opening truck door was a search). The second Article I, section 9, violation is the seizure of defendant. Defendant addresses each in turn.

The unlawful search did more than allow the officer to reach in and knock on defendant's door. Rather, because the officer had pushed open the exterior door to commit the unlawful search, defendant was confronted with the officer when he opened his bedroom door. In other words, the search denied defendant the opportunity he should have had to go to the front door, see who was there, and, if he chose, ignore the officer by not answering the exterior door. One's residence is the "quintessential domain protected by the constitutional guarantee against warrantless searches." *State v. Louis*, 296 Or 57, 60, 672 P2d 708 (1983). Like answering a telephone, the resident has the right to answer or not answer the front door, and the person on the other side of the door is expected to respect the assertion of privacy by the resident who chooses not to answer the door. The illegal search denied defendant this important right of privacy in the house.

Neither the officer's minimal physical exertion nor the location of the defendant's bedroom diminishes the injury to defendant's right to privacy. Analytically, the officer's act of reaching in and knocking on defendant's bedroom door has the same legal significance as if the officer had tiptoed fifteen feet inside the residence, knocked on a bedroom door, tiptoed out, and spoke to the defendant when he opened his door.

Defendant was also seized. As defendant argued in the Court of Appeals and the trial court,[8] the totality of the circumstances supports the conclusion that the officer seized defendant when he knocked on defendant's bedroom door inside the apartment at approximately 7 a.m., announced himself ("Police"), and called to defendant by name ("Jeff, are you okay"). That police conduct was a show of authority intended to draw the occupant to the door; further, that conduct would cause a reasonable person in defendant's position to believe that

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[8] Defendant's written motion to suppress in the trial court argued that the officers "unlawfully stopped or detained Defendant, and the stop was without reasonable suspicion. The police exploited the unlawful entry and stop to gain consent from Defendant to search his room." *See* Defendant's Memorandum of Law in Support of Motion to Suppress, at 4; Trial court file. At the motion to suppress hearing, defendant argued that the officer woke defendant from his sleep and drew him to the door because the officer was "knocking like a cop, and we know what that sounds like. * * * * You know, it's alarming." Tr 195.

Similarly, defendant argued on appeal that the officer "conducted a warrantless search and seizure when he opened the front door to apartment # 18, reached in, knocked on defendant's bedroom door, roused defendant from sleep, and summoned him to the door." *See* Appellant's brief at 13; *see also id.* at 24-25.

he was being summoned to the bedroom door for official police business. *State v. Ashbaugh*, 349 Or 297, 316, 244 P3d 360 (2010) ("A 'seizure' of a person occurs under Article I, section 9, of the Oregon Constitution: (a) if a law enforcement officer intentionally and significantly restricts, interferes with, or otherwise deprives an individual of that individual's liberty or freedom of movement; or (b) if a reasonable person under the totality of the circumstances would believe that (a) above has occurred.").

First, the knocking occurred on the bedroom door, which means that a reasonable person in defendant's position would believe that the person knocking on the door was most likely *inside* the apartment.

Second, the officer announced "Police" or "Beaverton Police," which is a display of official authority.

Third, the officer called defendant by name ("Jeff"), which would communicate to a reasonable person that the officer knows who he is, knows he's inside the bedroom, and is specifically summoning him to the door for official if not urgent police business.

Fourth, the officer's knocking, announcing, and calling to defendant by name occurred before sunrise while defendant was asleep. A reasonable person who was awakened during normal sleep hours by an officer pounding on his interior bedroom door and calling out his name would reasonably believe that the police were inside the apartment and were specifically summoning him to

come to the bedroom door. *See State v. Dahl*, 323 Or 199, 915 P2d 979 (1996) (police seized resident when they telephoned him in his residence and instructed him to come outside).

Because the state does not challenge the Court of Appeals ruling that the emergency aid exception was inapplicable, there was no justification for the seizure, as a matter of law. Consequently, defendant was seized without justification during his interaction with the officer, and his consent to the officer's request to enter the apartment and the officer's detection of an odor of marijuana were tainted or affected by the unlawful seizure.

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

The record reflects that all the lawful means of contacting defendant (knocking on the exterior door and telephoning) were unsuccessful. The illegal search and the seizure occurred approximately ten seconds before defendant opened the bedroom door. Consequently, there was close and ongoing temporal proximity between the illegalities and defendant's consent to the officer's entry.

The officer did not advise defendant that he could refuse entry. Further, defendant was "groggy" when he came to the door, which was unsurprising after being roused from sleep. Those facts weigh in favor of connection to the illegalities, not attenuation from the illegalities.

Finally, there were no significant intervening events to break the influences of the illegal search and seizure. Defendant was barely awake, and he did not speak with anyone other than the officer. Consequently, the state failed to show that defendant's consent was anything other than the product of the illegal search and ongoing illegal seizure under the *Hall* attenuation analysis.

B. Hemenway Model: No Factor Favors Attenuation

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

Extrapolating from the *Hemenway* facts and result, if police are present in a community-caretaking role, if the conversation between the officer and the unlawfully stopped person is low key and non-confrontational, if the person shows a willingness to waive his rights to privacy to put the officer at ease, then the interaction begins to look more like "mere conversation" than an investigatory seizure, and the court may conclude that the unconstitutional

police conduct was not a "significant" motivation for the person's decision to consent. *See Hemenway*, 353 Or at 150-52.

As noted immediately above, the state failed to satisfy the three traditional Oregon attenuation factors (temporal proximity, advice of rights, significant intervening event). The fourth *Hemenway* factor is purpose and flagrancy.

The officer "exploited" the unlawful stop within the meaning of *Hemenway*. Both aspects of *Hemenway's* "exploitation" were present: (1) defendant was surprised and groggy by the extremely unusual occurrence of being awakened before sunrise by loud knocking on his bedroom door by a person identifying himself as a police officer and summoning defendant by name to the bedroom door, and (2) the officer used the illegal search to execute an illegal seizure of defendant and obtain consent during the seizure.

When defendant opened his bedroom door, he was confronted by the officer standing outside and asking him questions. As explained above, the unlawful search did more than place the officer and defendant in mere physical proximity. Rather, because the officer had pushed open the exterior door to commit the unlawful search, defendant was denied the opportunity to go to the front door, see who was there, and, if he chose, ignore the officer by not answering the exterior door. One's residence is the "quintessential domain protected by the constitutional guarantee against warrantless searches." *State v.*

Louis, 296 Or 57, 60 672 P2d 708 (1983). Like answering a telephone, the resident has the right to answer or not answer the front door, and the person on the other side of the door is expected to respect the assertion of privacy by the resident who chooses not to answer the door. The illegal search denied defendant that important right of privacy in the house.

The search enabled the officer to contact and seize defendant, which the officer had been unable to do using lawful means. The stopping power is significant. When unlawful, it subjects the person to an unreasonable intrusion into his liberty, as a matter of constitutional law. The stop was illegal, and defendant's consent to the officer's entry into the residence and ultimate consent to a search of his room did not retrospectively render the prior search or stop legal. *See State v. Weaver*, 319 Or 212, 874 P2d 1322 (1994) (illegal search of defendant's business was not cured by defendant's later consent to a search when defendant was not informed of earlier illegal search).

Even under *Hemenway*, it is patently unreasonable and unconstitutional for police to enter a residence before sunrise, and without a warrant and without justification, and knock on a bedroom door to summon a person from sleep. The officer surprised defendant and used the advantages gained from the unlawful search and seizure to expand the inquiry into a criminal investigation.

CONCLUSION

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

Respectfully submitted,

ESIGNED

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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 12,261 words.

Type size

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

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Respondent's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on August 15, 2013.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Respondent'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.

Respectfully submitted,

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