IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,	)	Deschutes County Circuit
	)	Court No. 06FE1054AB
Plaintiff-Respondent,	)	
Petitioner on Review,	)	Appellate Court No. A146025
	)	
v.	)	Supreme Court No. S062493
	)	
JOHN ALBERT SINES,	)	
	)	
Defendant-Appellant.	)	
Respondent on Review.	)	

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, JOHN ALBERT SINES

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Deschutes County
Honorable ALTA J. BRADY, Judge

Opinion Filed: June 4, 2014 Author of Opinion: Duncan, J.
Before: Armstrong, P.J., Duncan, J., and Brewer, J. *pro tempore*

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INTRODUCTION

The central legal question before this Court is: When is a seizure of property by a private citizen "state action" that implicates the constitutional protections against unlawful searches and seizures contained in Article I, section 9, of the Oregon Constitution and the Fourth Amendment to the United States Constitution? The specific issue here is whether the protections of Article I section 9 and the Fourth Amendment apply where a DHS worker, based on unsupported allegations lacking probable cause, made statements to a private person that caused her to steal property from defendant's home and to deliver it to DHS and the police, both of whom violated DHS administrative rules to aid and abet the theft.

This Court has observed that "[i]t is axiomatic that Article I, section 9, applies only to 'government-conducted or –directed searches and seizures,'" *State v. Luman*, 347 Or 487, 493, 223 P2d 1041, 1044-45 (2009)(emphasis added). The facts of this case reveal state involvement that was so direct and so significant that Article I, section 9 and the Fourth Amendment apply under any test.

The defendant proposes below that this Court adopt the two-factor test used by the Ninth Circuit and other federal courts in similar cases: (1) whether

the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts. *See, e.g., United States v. Walther,* 652 F2d 788, 792 (9th Cir 1981).

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

When is a seizure of property by a private citizen "state action" that implicates Article I, section 9, of the Oregon Constitution?[1]

Proposed Rule of Law

A search or seizure of property by a private citizen is "state action" implicating Article I, section 9 if: (1) the state knew of and acquiesced in the intrusive conduct and (2) the party performing the search intended to assist law enforcement efforts rather than to further his or her own ends.

SUMMARY OF MATERIAL FACTS

A. Without probable cause, consent or a search warrant, and following a conversation with DHS, defendant's employees took underpants from defendant's house and delivered them to the police.

On March 20, 2006, defendant's housekeeper, Charlene called a DHS worker, Mike Cleavenger, a former police officer, to discuss two or three

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[1] Defendant's "Question Presented" is identical to the state's. Defendant also agrees with the state that, in the event this Court decides this central question presented in favor of the state, defendant's contention that the police separately violated Article I, section 9 by possessing and then testing the underwear "is properly addressed in the first instance by the Court of Appeals on remand." State's Brief on Merits 31 n 6.

things she said worried her and another Sines employee, Michelle about the defendant and his nine-year-old daughter, (Tr 43-44). told Cleavenger she thought the defendant was sleeping with and that underwear had an unusual yellow "discharge" on it.[2] (Tr 42-43). After providing this information, asked Cleavenger, "What's going to happen now?" He replied, "Well, it's at a standstill. We can't do anything without evidence." (Tr 77, 64).

asked Cleavenger, "what if" she took some evidence? (Tr 49). Cleavenger said that he could not ask to take the underwear and that she had to make that decision herself. (Tr 168). Cleavenger told that he could "hook her up" with the Oregon State Police Crime Lab, (Tr 185-186) and that the lab "can probably tell a lot" from testing the underwear. (Tr 166). Cleavenger gave a direct line to call him back "when you have

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[2] never described the stain she saw as "semen." (Tr 104). She thought the "discharge" was created by the girl's own body; her concern was that she did not believe a nine-year old girl would create a large amount of "discharge" unless she had become sexually active. (Tr 103-104). Contrary to understanding, each of the state's medical experts testified there are many innocuous reasons a child might have a large amount of discharge, including normal Tanner stage 2 development. The state's experts indicated the presence of a large amount of vaginal discharge is not particularly significant in determining whether sexual abuse has occurred. (Tr 625, 2382-83). The description of the "discharge" is consistent with the "mucous-looking vaginal discharge" later seen by doctors during an examination of (Tr 2383). The Crime Lab later determined that the stain on the stolen underwear was *not* seminal fluid. (Tr 448, 1407).

something." (Tr 49, 168).[3] Cleavenger testified that, at the end of their conversation, "we left it that she was going to have to search her own heart for the answer to that question." (Tr 168). Cleavenger further testified that he expected her to bring police the underwear. (Tr 170).

In this type of case, where a child is living with a suspected abuser, DHS generally responds immediately and "almost always" interviews children within 24 hours. (Tr 181). *See* OAR 413-015-0210 (3) (mandating a 24 hour response for the safety of the child).

Cleavenger told a supervising detective what told him. (Tr 180). Detective Sergeant McMaster concluded, "there really wasn't much to go on [as] … we didn't have any disclosures, there was no hard evidence there was anything criminal at that point." (Tr 193, 265-266). The information provided by was "concerning, yes; criminal? probably not." (Tr 265). McMaster testified there was not sufficient evidence to obtain a search warrant. (Tr 265). According to McMaster, police were stalled in a "wait mode." (Tr 193). He then approved a delay in the mandatory 24-hour safety check on "agree[ing] with Cleavenger that we can wait two days for RP who will get panties of child." (Tr 192).

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[3] His report stated, "The RP has a direct line to call intake back when a pair of dirty underpants are obtained." *Id*.

After Cleavenger told "we can't go any further without evidence," (Tr 77, 64), and after Cleavenger told he would "hook her up" with the Oregon State Crime Lab to conduct tests on the underwear, (Tr 185-186), and after enlisted assistance by sharing Cleavenger's statement that authorities "could not do anything without physical evidence" (Tr 142, 149), and agreed to steal some underwear for to take to the police.

The next morning, waited for Defendant to leave and then snuck into the living quarters of the home to steal underwear from the laundry hamper. (Tr 150-152). "grabbed the first pair I came across" and hid them inside her lunch bag. (Tr 143).

and had no plans to take any underwear until spoke to Cleavenger. (Tr 149-50). and testified that their only purpose in getting the underwear was to assist law enforcement. (Tr 66, 78, 149-50).

After took the underwear, she put it in a plastic bag, and gave it to the next day. (Tr 143-44). called Cleavenger,[4] who told her, "Get it out of the plastic bag. Put it in a paper bag." (Tr 51). "It will ruin the evidence." (Tr 51). responded, "Okay. I'll do it right now." *Id.*

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[4] The defense agrees with the state that this conversation was likely with DHS worker Mike Cleavenger, not Detective Mike Quick. State's Brief on Merits 4, n 2.

Cleavenger arranged for to provide the stolen underwear to police the next morning. presented it to the detective.

Police immediately delivered the underwear to the Oregon State Crime Lab in Bend. (Tr 300). The lab director, Pam Bordner, conducted two tests to determine whether the underwear contained spermatozoa or seminal fluid. (Tr 445). No warrant was obtained for either of the tests. Later that day, Bordner informed the detective that she had identified at least three spermatozoa heads on underwear.[5] (Tr 311).

B. After the police gave the underpants to the crime lab and after the crime lab tested the underpants, the police obtained a search warrant and seized additional clothing.

Immediately after Bordner's call, police began preparing an application for a search warrant. (Tr 379, 311). According to the detective, it was Bordner's call saying she found sperm heads that prompted him to begin the search warrant application. (Tr 379). In the application, police relied on Bordner's lab finding of sperm heads and information that police obtained from and (Tr 303).

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[5] Bordner found no seminal fluid on the stolen underwear. (Tr 448, 1432). A defense expert, the former Alaska Medical Examiner, testified at trial that the state's expert had misidentified several structures as sperm heads and that the evidence was inconsistent with a sexual assault because too few sperm heads were found. (Tr 3341, 3348-49, 3351-54, 3377-78). Defendant asserts in his Third Assignment of Error in his Opening Brief in the Oregon Court of Appeals that that the trial court erred in excluding additional testimony from this expert that contamination from one garment to another in the laundry hamper could explain the sperm head findings.

That night, the warrant was executed. Defendant was arrested, and additional clothing of was seized, including a nightgown, pajama pants, a bathing suit, and jeans. (Tr 1290-1293). Testing of the seized items revealed additional sperm heads on those items.[6] On the nightgown, trace amounts of seminal fluid were also found.[7]

C. The defendant filed a motion to suppress, which was denied. The court of appeals reversed and this Court allowed review.

On April 20, 2007, the deadline for motions, defendant filed a motion to suppress and supporting memorandum, asking the court to exclude,

> "all evidence, including derivative evidence and statements, obtained through the unlawful and warrantless (a) search of the laundry hamper in his home, (b) seizure of the underwear from the hamper, (c) seizure of the underwear by police and (d) the destruction and testing of the underwear by the Oregon State Crime Lab."

When the suppression motion was filed in April 2007, the only clothing that had been forensically tested was the stolen underwear. The pajama bottoms, jeans and swimsuit seized pursuant to the warrant were not

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[6] In the average ejaculate, less than a teaspoon of seminal fluid transmits around 350 million spermatozoa. (Tr 3331). All seminal fluid has a plentiful amount of acid phosphatase or "AP." (Tr 1363, 3332-33). While some medical conditions, like cancer, will increase the amount of acid phosphatase, no medical condition will reduce it. (Tr 3332). The pajama bottoms had 1 sperm head and no AP. (Tr 1436). The swimsuit bottom had 1 sperm head and no AP. (Tr 1443). The jeans had 6 sperm heads and no AP. (Tr 1440).

[7] The nightgown had 30 sperm heads (Tr 1446-47) and evidence of seminal fluid. (Tr 1447).

forensically examined until August 27, 2007. (Tr 1453). The nightgown with seminal fluid was not forensically examined until June 2009. (Tr 1457).

Defendant's motion to suppress was denied on the grounds that theft was not "state action." The defendant was convicted of four counts of first-degree sexual abuse. The jury acquitted or deadlocked on eight other counts. The Court of Appeals reversed, holding that the state was "sufficiently involved that the seizure of the underpants was state action." 263 Or App at 349. The Court of Appeals decision is discussed in the argument section, below.

SUMMARY OF ARGUMENT

The Court of Appeals correctly determined that the search of the home and the seizure of the underwear were state action subject to Article I, section 9, of the Oregon Constitution. The determination of whether a search or seizure conducted by a private party amounts to state action under Article I, section 9 is primarily determined by a careful analysis of the facts, which, in this case, are provided, with transcript citations, in the Summary of Material Facts, *supra*.

In this case, there are seven key facts. The first three key facts were explicitly noted by the Oregon Court of Appeals, 263 Or App at 356:

(1) The DHS worker, Mr. Cleavenger, knew that defendant's housekeeper, Ms. planned to take defendant's daughter's underwear and give it to the police;

(2) Cleavenger communicated with about her plans to steal the underwear and offered law-enforcement support if she seized the underwear, which the police could not take without a warrant; and,

(3) Cleavenger and a Sheriff's Deputy, Detective Sgt. McMaster, delayed the normal 24 hour child abuse investigation to allow time to accomplish her planned seizure.

In addition to these three facts, there are four additional important facts:

(4) and another employee of defendant, did not plan to take any underwear until after Cleavenger told that the state "can't do anything without evidence;"

(5) Neither Cleavenger nor Sgt. McMaster made any efforts to dissuade from taking the underwear;

(6) and purpose in taking the underwear was to assist law enforcement; and,

(7) After took the underwear and gave it to Cleavenger told "[g]et it out of the plastic bag. Put it in a paper bag."

The facts of this case amount to state action under previous rulings of this Court such as *State v. Tucker*, 330 Or 85, 90, 997 P2d 182, 184 (2000).

This Court has not articulated a specific test for "state action" under Article I, section 9, and there is little historical data from the framers about Article I, section 9. If this Court decides to provide more specific guidance to

lower courts, it should adopt, under Article I, section 9, the following federal test under the Fourth Amendment: a search or seizure of property by a private citizen is unconstitutional "state action" if: (1) the state knew of and acquiesced in the intrusive conduct and, (2) the party performing the search intended to assist law enforcement efforts rather than to further his or her own ends. Both parts of this test are easily met here.

The trial court's denial of the motion to suppress the stolen underwear evidence was not harmless error. The state did not offer the stolen underpants evidence only to prove the charge of rape, on which the defendant was acquitted. The state argued at trial that sperm heads found in the underwear were proof of all the charges in the indictment, including sexual abuse. It is not "unlikely" that the jury considered the evidence as proof of sexual contact, ORS 163.305(6).

The stolen underwear was not redundant because other clothing offered as evidence was seized under a search warrant tainted by the unlawful seizure and search of the stolen underwear. It is tainted for two reasons. First, lab results from forensic testing of the stolen underwear prompted the search warrant. Second, probable cause for the warrant relied upon the discovery of sperm on the stolen underwear.

ARGUMENT

I. The Court of Appeals correctly held: "the initial search of defendant's home and seizure of the underwear was state action subject to Article I, section 9, of the Oregon Constitution." *State v. Sines*, 263 Or App 343, 345, 328 P3d 747 (2014).

A. The state was so closely involved with the seizure in this case that the seizure amounts to "state action" prohibited by Article I, section 9 and the Fourth Amendment.

In *State v. Tucker*, 330 Or 85, 90, 997 P2d 182, 184 (2000), this Court stated, "Article I, section 9, prohibits only state action that infringes on a citizen's constitutional rights. *See State v. Tanner*, 304 Or 312, 321, 745 P2d 757 (1987)."

In *Tucker*, a police officer investigated the scene of a single-automobile roll-over accident. According to this Court's opinion, "The trooper had reason to believe that defendant had identified himself falsely during the accident investigation. Without first requesting or obtaining a search warrant, the trooper chose to call the tow truck driver at home and to ask him to look through the papers and mail inside the automobile to help determine defendant's identity." *Tucker*, 330 Or at 87. The citizen found a gun and the defendant was charged with being a felon in possession of a firearm.

The state's brief provides, at 19:

> *Tucker* thus offers some helpful guidance in describing when a person is acting as an agent for purposes of Article I, section 9. Where a police officer specifically asks a person to search or seize property and the person complies with the officer's request, the person's decision is not "an independent volitional act," and in

> such a circumstance the person is functioning as an agent of the state.

In *Tucker*, the officer merely asked the tow truck driver to look through defendant's vehicle. There is no indication that the officer employed any coercion or even persuasion to convince the citizen to conduct the search. Although the state argued in *Tucker* that Article I, section 9 was not implicated because the search "was the act of a private individual," this Court found *Tucker* "not difficult," and held, "if a state officer requests a private person to search a particular place or thing, and if that private person acts because of and within the scope of the state officer's request, then Article I, section 9, will govern the search." *Tucker*, 330 Or at 90.

Defendant respectfully submits that the simple request by the officer in *Tucker* to look through some papers in the vehicle amounts to far less "state action" than if the officer in *Tucker* had received a call from the tow truck driver who said he was concerned that the driver of the automobile was drunk or had committed another crime and that he saw some papers in the automobile. If the officer responded to the tow truck driver by saying: "it's too bad about that serious roll-over accident. If we had some evidence from the vehicle showing the true identity of the driver, we could find him and see if he was drunk, and we could find out if he had just committed a crime or if he is wanted by the police. But I'm not allowed to tell you to look through the papers in his truck; it would have to be your decision; and, you are going to have to search

your own heart to make your decision. But, if you go through his truck and find anything, here's my direct line to call me back and I'll put your information into the computer right away so we can check him out."

In this case, the Court of Appeals listed three of the most significant facts it relied on:

> Because [DHS worker and former police officer] Cleavenger (1) knew what [defendant's housekeeper] planned to do and that she was likely to do it, (2) communicated with about her plans and offered law-enforcement support if she conducted the seizure that the state could not carry out without a warrant, and (3) delayed the safety check to allow to accomplish the planned seizure, the seizure was state action subject to Article I, section 9, of the Oregon Constitution.

263 Or App at 356.

The defense agrees these are the three key facts. In addition, it is important that: (4) and another employee of defendant, did not plan to take any underwear until after Cleavenger spoke to (Tr 149-50);[8] (5) neither Cleavenger nor Lt. McMaster made any effort to dissuade from committing the crime of theft; (6) and testified that their purpose in getting the underwear was to assist law enforcement, (Tr 78, 66, 149-50); and, (7) after took the underwear, put it in a plastic bag and

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[8] Because and had no plans to steal the underwear before spoke to Cleavenger, supra, the defense disagrees with the state's assertion that " and came up with the idea of seizing the underpants on their own," state's Brief on the Merits, 12.

gave it to but before turned it over to the state, Cleavenger told "[g]et it out of the plastic bag. Put it in a paper bag." (Tr 51-52).

Most importantly, it was Cleavenger's suggestion to "we can't do anything without evidence," that directly triggered the seizure of the evidence. Other than detailed comments to Cleavenger about the underwear, gave him very little data. *E.g.*, (Tr 42-43). Therefore, Cleavenger's response, "we can't do anything without evidence," is exactly the same as if he had responded, "we can't do anything without the underwear." Like *Tucker*, this case is not difficult. Cleavenger's conduct, abetted by Lt. McMaster, was "state action."

In its opinion below, the Court of Appeals noted, "[n]either we nor the Supreme Court has explained with precision how much or what kind of state involvement is sufficient to trigger the protection of Article I, section 9." 263 Or App at 349, 328 P3d at 751. While defendant suggests a "Proposed Rule of Law" in this brief to provide guidance to lower courts, his proposed test is not necessary to decide this case because the facts show that state involvement was so direct and so significant that this seizure amounted to "state action" under any test.

B. This Court should hold, under Article I, section 9, that a search or seizure of property by a private citizen is unconstitutional "state action" if: (1) the state knew of and acquiesced in the intrusive conduct, and (2) the party performing the search intended to assist law enforcement efforts rather than to further his or her own ends.

1. The Oregon Supreme Court has a duty to interpret the Oregon State Constitution independently from the federal constitution.

In *State v. Caraher*, 293 Or 741, 750-51, 653 P2d 942, 946-47 (1982), this Court stated:

> [W]e remain free, even after *Florance*, to interpret our own constitutional provision regarding search and seizure and to impose higher standards on searches and seizures under our own constitution than are required by the federal constitution. This is part of a state court's duty of independent constitutional analysis. That a state is free as a matter of its own law to impose greater restrictions on police activity than those that the United States Supreme Court holds to be necessary upon federal constitutional standards is beyond question.

Following *Caraher*, this Court imposed greater restrictions on police activity than the United States Supreme Court in several cases, including, for example, *State v. Tanner*, 304 Or 312, 745 P2d 757 (1987) (re-expectation of privacy) and *State v. Dixon/Digby*, 307 Or 195, 766 P2d 1015 (1988) (re-open fields).

2. The methodology for interpreting provisions of the Oregon Constitution.

Two important factors in interpreting original provisions of the Oregon Constitution are the historical circumstances that led to the creation of the provision and the framers' understanding of the text and context of the provision. *Yancy v. Shatzer*, 337 Or 345, 353, 97 P3d 1161, 1165-66 (2004), *citing*, *Priest v. Pearce*, 314 Or 411, 416, 840 P2d 65 (1992). In the leading history of Article I, section 9, Hon. Jack L. Landau, *The Search for the Meaning of Oregon's Search and Seizure Clause*, 87 Or L Rev 819 (2008), Justice Landau notes that Article I, section 9 was adopted without recorded discussion. 87 Or L Rev 836-37. Justice Landau also notes that Matthew Deady has explained that Article I, section 9 was "copied from the fourth amendment," and was, like the fourth amendment, focused on the abuse of general warrants. 87 Or L Rev at 840. Justice Landau also explains that Article I, section 9 was originally intended as a limit to legislative authority and "it was not until the twentieth century that the courts construed article I, section 9 to apply directly to police conduct." Landau, 87 Or L Rev at 842. Thus, historical factors do not assist in an interpretation of Article I, section 9 in the context of this case.

3. Because of the lack of relevant historical analysis, this Court should rely on the third factor in *Yancy v. Shatzer*: "examining the case law interpreting those provisions," and on general principles of Constitutional law.

According to *Yancy, supra,* and *Priest v. Pierce, supra,* the third consideration used in determining the meaning of a constitutional provision is: "examining the case law interpreting those provisions." The United States Supreme Court has pointed out that a constitution is "a living document:"

> In passing upon the grave constitutional question presented in this case, we must never forget, as Chief Justice Marshall admonished, that the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs," and that "(i)ts means are adequate to its ends." [footnote omitted] Cases do arise presenting questions which could not have been foreseen by the Framers. In such cases, the Constitution has been treated as a living document adaptable to new situations.

Youngstown Sheet & Tube Co. v. Sawyer, 343 US 579, 682, 72 S Ct 863, 936, 96 L Ed 1153 (1952).

Similarly, Justice Landau has suggested, because of the lack of historical information on Article I, section 9, and because of its specific reference to "reasonableness," that this constitutional provision "requires constant reassessment in the light of changing circumstances":

> An argument—a good argument, in my view—could be made that the wording of the provision, with its reference to "reasonableness," invites analysis that is not historically bound, but instead requires constant reassessment in the light of changing circumstances. In fact, it strikes me that, whatever the merits of originalism generally or as applied to other constitutional

> provisions, it is impossible to apply that interpretive approach to the law of search and seizure in any meaningful way. There is too great a chasm between modern and nineteenth-century conceptions of law, reasonableness, criminal investigatory procedure, and technology.

Landau, 87 Or L Rev at 861.

4. This Court's duty to independently interpret the Oregon Constitution can be met by accepting a current federal standard.

In *State v. Campbell*, 299 Or 633, 648, 705 P2d 694, 703 (1985), this Court stated:

> In reaching this result on independent and separate state grounds under Article I, section 11, of the Oregon Constitution, we nevertheless adopt the reasoning of the Supreme Court of the United States in determining what constitutes unavailability of a hearsay declarant and what constitutes adequate indicia of reliability of hearsay declarations to satisfy our state constitutional confrontation clause.

Also, *Caraher,* 293 Or at 749, makes clear that, "[w]hen this court gives Oregon law an interpretation corresponding to a federal opinion, our decision remains the Oregon law even when federal doctrine later changes."

Therefore, the defendant respectfully suggests that this Court consider the following well-accepted federal approach in fashioning a test for whether a seizure committed by a private party amounts to state action governed by Article I, section 9.

5. This Court should hold, under Article I, section 9, that a search or seizure of property by a private citizen is unconstitutional "state action" if: (1) the state knew of and acquiesced in the intrusive conduct, and (2) the party performing the search intended to assist law enforcement efforts rather than to further his or her own ends.

As the State's Brief on the Merits points out, "federal courts generally apply a test that asks whether (1) the government knew of and acquiesced in the private search or seizure; and (2) the private individual intended to assist law enforcement or had some other independent motivation." State's Brief on the Merits, 24.

In defendant's view, this straightforward two-part federal test, which is the product of common law agency principles and decisions of the United States Supreme Court, provides guidance for Oregon's trial and appellate courts, and should be adopted under Article I, section 9.

The Ninth Circuit explained the reasons behind the two-part federal test, which it had previously devised, in *United States v. Reed*, 15 F3d 928, 931 (9th Cir 1994):

> This court has recognized that there exists a "gray area" between the extremes of overt governmental participation in a search and the complete absence of such participation. *Walther,* 652 F2d at 791. This case falls within the gray area.
>
> Cases which fall within the gray are best resolved on a case by case basis relying on the consistent application of certain general principles. *Id.* The general principles for determining whether a private individual is acting as a governmental instrument or agent for Fourth Amendment purposes have been synthesized into a two

part test. *United States v. Miller*, 688 F2d 652, 657 (9th Cir 1982). According to this test, we must inquire:

> (1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further his own ends.

Other Circuits that have used the Ninth Circuit's test are: Fifth Circuit, *United States v. Pierce*, 893 F2d 669, 673 (5th Cir 1990); Sixth Circuit, *United States v. Hardin*, 539 F3d 404, 418 (6th Cir 2008); Seventh Circuit, *United States v. Ginglen*, 467 F3d 1071, 1074 (7th Cir 2006); Eighth Circuit, *United States v. Malbrough*, 922 F2d 458, 462 (8th Cir 1990); Tenth Circuit, *United States v. Soderstrand*, 412 F3d 1146, 1153 (10th Cir 2005); and Eleventh Circuit, *United States v. Steiger*, 318 F3d 1039, 1045 (11th Cir 2003).

Thus, this Court should adopt this federal test as proper guidance for Oregon's courts.

6. The search in this case was "state action" under defendant's Proposed Rule of Law because it is clear that: (1) the state knew of and acquiesced in the intrusive conduct, and (2) the party performing the search intended to assist law enforcement efforts rather than to further his or her own ends.

In this case, the state "knew of" the intrusive conduct because told Cleavenger that she was going to take the underwear. (Tr 49).

Cleavenger also acquiesced in the intrusive conduct. Merriam-Webster defines "acquiesce" as "to accept, agree, or allow something to happen by staying silent or by not arguing." http://www.merriam-

webster.com/dictionary/acquiesce. In this case, Cleavenger's conduct met almost all parts of this definition. After telling that the investigation would go no further without evidence, he "allowed something to happen" by "staying silent" as thought out loud about getting the underwear. *See, e.g.*, (Tr 52), where says that she told Cleavenger twice that she was considering taking the underwear and that, each time, "he was quiet." Cleavenger also "accepted" decision to take the underwear and "did not argue" with her decision to take the underwear.

In fact, Cleavenger not only acquiesced in conduct, but encouraged her conduct in several additional ways. First, he offered "hook her up" with the State Crime Lab who could "tell a lot" by testing the evidence. (Tr 185-86). Second, Cleavenger verbally assented to the planned theft by saying, "Okay, if you want to but I can't tell you to do it." (Tr 69) (emphasis added). Third, he directed to "call me when you have something." (Tr 52). Fourth, he gave his direct line to use when she had the evidence. *Id.* And fifth, Cleavenger himself actually facilitated the theft by delaying the

required safety check on so there was time for the theft to occur[9] and then by directing on how to best preserve the evidentiary value of the underwear by packaging it in a paper bag instead of plastic. Summary of Material Facts, *supra*.

Moreover, the state's acquiescence was effectively communicated to and never considered the planned taking a theft (Tr 114) and Cleavenger never told her it was a crime. also was apparently aware of the state's acquiescence because she testified that she was never concerned that she would get into any trouble for stealing the underwear. (Tr 152-53). Finally, both and intended to assist law enforcement. (Tr 66, 78, 149-50).

Because the state knew of and acquiesced in and conduct, and because and intended to assist law enforcement, the

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[9] The state argues that because Cleavenger never told or about delaying the 24-hour safety check, "[t]he 'five-day response' reflects no efforts by the state to encourage or in their efforts." State's Brief on the Merits, p. 30. The state misses the point however. The state's failure to follow the 24 hour reporting rule is direct evidence of the state's knowledge and direct involvement, or at an absolute minimum its acquiescence, in and conduct. The crux of state action is whether the official "had a hand in" the unlawful intrusion. *US v. Lustig*, 338 US 74, 79 (1949). The delay in the 24-hour safety check is proof of the state's hand in the theft. Conspiracy law, which also is built upon principles of agency, imposes liability for the conduct of another even if one conspirator does not know all the activities of the other conspirators. *United States v. Berger*, 224 F3d 107, 114-15 (2d Cir 2000); *United States v. Colson*, 662 F2d 1389, 1391 (11th Cir 1981); *United States v. Brunetti*, 615 F2d 899, 903 (10th Cir 1980).

decision of the Court of Appeals should be affirmed.

If this Court rejects defendant's proposal that the above federal rule be adopted by this Court under Article I, section 9 of the Oregon Constitution, it should still apply this federal test to evaluate the search and seizure search under the Fourth Amendment and hold that the search and seizure were unlawful state action. *See,* ORAP 9.20(2)("The court may consider other issues that were before the Court of Appeals.")

C. Even under the State's Proposed Rule of Law, the seizure in this case was "state action" because the private citizens acted on the state's behalf and at the state's behest.

1. This Court should reject the State's Proposed Rule of Law.

While the defendant agrees with many of the facts and much of the law contained in the state's Brief on the Merits, he fundamentally disagrees with the state's Proposed Rule of Law as stated at pages 2-3 of the state's Brief on the Merits: "A seizure of property by a private citizen is 'state action' for purposes of Article I, section 9 only if the citizen was acting [1] on the state's behalf *and* [2] *at the state's behest*." (emphasis in original, numbers added). A test completely relying on words such as "behest" and "behalf" will not be useful to trial courts because those words are difficult to understand and apply.

Merriam-Webster defines "behest" as "an authoritative order; command." http://www.merriam-webster.com/dictionary/behest. The state's proposed rule would allow police to suggest, to ask politely or merely request that a citizen volunteer

to do what police cannot lawfully do. The state's proposed rule is inconsistent with *Tucker*, where a police officer politely asked a citizen to conduct an unconstitutional search and this Court easily found the citizen's subsequent search to be state action. *Supra.*

In explaining its "behest/behalf" test, the state says: "that state officials may have been forewarned of a possible seizure and declined to take steps to discourage or prevent it is not enough." Brief on the Merits 3. The state also says, "federal courts have reasoned that a person's conduct is not transformed into state action merely because government officials were aware of the conduct and did not attempt to stop or discourage it." Brief on the Merits 23. *See also*, Brief on the Merits 26. A blanket excuse for state officials who decline to take steps to discourage a private seizure that they know is about to occur is flatly inconsistent with the federal test, which finds state action where the official "acquiesced in the intrusive conduct." While, of course, the meaning of "acquiesced" must be determined on a case by case basis, the state's rule makes little sense where, as here, it is clear officials were forewarned a private citizen was going to commit a crime solely to provide police with property it had no right to take for itself and the officials did nothing to discourage the criminal act. Instead, officials affirmatively communicated the state's approval.

Also, as indicated above, *State v. Caraher* provides that this Court is free "to impose higher standards on searches and seizures under our own

constitution than are required by the federal constitution." *Caraher* at 750 (emphasis added). But, there is no support for interpreting an Oregon constitutional provision to impose lesser standards on searches and seizures than are required by the federal constitution. That is what the state suggests here.[10] This Court should not accept the state's Proposed Rule of Law.

2. Even the concepts of agency law relied upon by the state show state action in this case. The citizens did act at the behalf and behest of the state and state officials.

Apart from strongly suggesting that this Court graft common law agency law principles onto Article I, section 9, the state gives little guidance for the interpretation of its behalf/behest test. The state's clearest description of its meaning for "behalf" is on page 27 or its Brief on the Merits:

> Consistently with this court's Article I, section 11, jurisprudence, and with the federal courts' approach under the Fourth Amendment, this court should hold that a private citizen who seizes property is not a state agent for purposes of Article I, section 9, unless state officials conveyed to that citizen that he or she was authorized to act on the state's *behalf* by directing, instructing, asking, or otherwise actively encouraging and sanctioning the conduct. (emphasis added).

As indicated above, defendant believes that the state's view that "encouraging and sanctioning" is required for "state action" goes far beyond

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[10] In a special concurring opinion in *State v. Lowry*, 295 Or 337, 352, 667 P2d 996, 1005 (1983), Justice R.E. Jones stated: "In my view, such departures from the United States Supreme Court's guidance should occur only when it is necessary to provide Oregonians greater protections under Oregon's constitution on a principled basis and not merely upon the whim and caprice of this court for the sole purpose of achieving a provincial result".

Oregon cases such as *Tucker*, where this Court found state action where an officer merely asked a citizen to look for some papers in an automobile that had been involved in a rollover accident. Defendant has also indicated above that the state's requirement of "encouraging and sanctioning," is inconsistent with the federal test, which only requires knowing and acquiescing. *Supra.*

Yet, even under the state's proposed test, the state encouraged and sanctioned the private citizens' actions here. The state told a woman who expressed concern her boss was sleeping with his nine-year-old daughter and reported seeing odd stains on the child's underwear, that the state's investigation of her report was "at a standstill. We can't do anything without evidence." (Tr 77, 64, 45-46). As indicated in the Summary of Material Facts above, the state also: told her that if she took the underwear, it would "hook her up" with the state Crime lab; told her that the Crime lab "can probably tell a lot" from testing the underwear; gave her a direct line to call if she took the underwear; and stopped its investigation for up to five days to allow her time to take the underwear. This conduct by state officials amounts to "encouraging and sanctioning" so there is no test under which the seizure would not be state action.

The state's clearest definition of "behest" is at page 22 of its brief, which quotes *State v. Smith,* 310 Or 1, 791 P2d 836 (1990), a decision involving *Miranda* warnings, not a seizure:

> In summarizing its reasoning, this court concluded that the informant was not a state agent because the jail officers were not "directly or indirectly involved to a sufficient extent in *initiating, planning, controlling or supporting* the informant's activities" and thus the informant and was not acting "at the behest" of state officials *Id.* at 15 (emphasis added).

As to determining the proper test, the state's "state action" analysis in *Smith*, 310 Or 1, 791 P2d 836 (1990*)*, should have little relevance here because a rule for when a jailhouse informant is required to give *Miranda* warnings is fundamentally different from state involvement in a criminal act in violation of a citizen's property rights.

It is important that this Court has repeatedly relied upon personal and property rights to interpret Article I, section 9 to provide greater protections to Oregonians than even provided by the Fourth Amendment. *See, e.g., State v. Davis*, 295 Or 227, 237, 666 P2d 802, 809 (1983) (exclusion of unconstitutionally obtained evidence is not based on a judicial policy of deterrence but on personal rights because "[t]he very purpose of our constitutional provision was to protect a person's home from governmental intrusion."); *State v. Dixon/Digby*, 307 Or 195, 208, 766 P2d 1015, 1022 (1988) (rejecting federal "open fields doctrine" and extending Article I, section 9 protection to the curtilage of an individual's property), and *State v. Tanner*, 304 Or 312, 321, 745 P2d 757, 762 (1987) (declining to follow federal "reasonable expectation of privacy" analysis and giving Article I, section 9

protection to personal property entrusted to another, even thought the personal property had been stolen).

For the same reasons noted above regarding "behalf," defendant submits that the citizens here acted at the "behest" of the state and their conduct amounted to "state action" in violation of Article I, section 9.

3. This Court should reject the state's suggestion that state action cannot occur whenever a state official tells a citizen that the decision to take another person's property is up to the citizen to decide.

The state asks this Court to create a complete excuse for any state official, no matter how strong he or she encouraged a private citizen to conduct a search, if the state official simply adds, "it's up to you whether to conduct a search." As the facts of this case make clear, such an excuse simply makes no sense.

The state's brief repeatedly stresses Cleavenger's comments to that he "could not tell her what to do" Brief on the Merits, 1, 4, 5, 7, 11, 12, 28, 29, 30. The state asserts that such comments practically amount to a total defense to any claim of state action: "In other words, by telling that he could not tell her to seize property from defendant's home and that she had to make the decision herself, Cleavenger made clear that the state could not officially sanction or be involved in the decision." Brief 30.

Allowing a state official to avoid a finding of state action by simply saying magic words like, "I'm not telling you what to do," would elevate form over substance. Such rote comments, especially when made out of context in

the midst of a complicated conversation and when repeated again and again, will likely have the effect of actually convincing the citizen to conduct the search. That appears to be what happened here, as evidenced by Ms. assent to Cleavenger's repeated comments:

> Q And during those conversations, did he say anything to the effect, "You have to get a pair of underwear, we need you to get a pair of underwear"?
>
> A No, he was very emphatic about saying, "I can't tell you what to do, I can't tell you what to get," which I got kind of a little bit irritated with that. I wanted to say, <u>All right already. You know, I know. I'm – I'll come up with it</u>. I didn't know why he kept saying that to me.

(Tr 62). *See also*, (Tr 52), where says: "It kind of irritated me. He kept bringing it up like that. I don't know why he kept saying that. It's like, <u>'Okay. I mean, yeah, I'll do it</u>.'" (emphasis added).

comments, "Okay. I mean, yeah, I'll do it," and, "All right already * * * I'll come up with it," show that the state directed and encouraged her conduct. Such encouragement even meets the state's strict behalf/behest test.

In sum, the search and seizure in this case was state action in violation of Article I, section 9 and the Fourth Amendment.

II. The trial court's denial of the motion to suppress the stolen underwear evidence was not harmless error.

Admission of evidence obtained in violation of the Constitution alters the evidence before the jury and, therefore, necessarily impacts its ultimate

deliberation and decision. For this reason, the issue in harmless error review is not whether the state's case was strong or even compelling without the disputed evidence. The issue is whether the error is "so technical in nature or so unsubstantial that this court can affirmatively find there was 'little, if any, likelihood of having changed the result of the trial'. *State v. McLean*, 255 Or 464, 468 P2d 521 (1970); *State v. Hansen*, 304 Or 169, 743 P2d 157 (1987); *State v. Davis*, 336 Or 19, 77 P3d 1111, 1116-1117 (2003).

A. The state is wrong to claim the stolen underwear evidence had "little or no relevance" to the crimes of conviction.

The state gamely claims the stolen underwear evidence had "little or no relevance" to the convictions for sexual abuse, so any error in failing to suppress was harmless. State's Brief on the Merits, 12. It asserts the state's sole purpose in introducing the underwear was to prove defendant raped State's Brief on the Merits, 32.

As the Court of Appeals points out, the state did not take the same tack at trial. *State v. Sines*, 263 Or App 343, 359-360, 328 P3d 747 (2014). There the state argued in closing that the sperm heads were proof of all the charges in the indictment. Nor was it apparent during trial that the state advanced the sperm head evidence only to prove rape. For example, the state's expert gave numerous possible explanations for the absence of seminal fluid, including that "the AP test … is just a presumptive test," (Tr 1423), the age of the stain on the clothing might have caused the AP to degrade, (Tr 1425), there was a

possibility defendant had "low activity with the enzyme" and "a lot of different factors … or various things." (Tr 1425). The possibility the AP degraded due to "heat and moisture in the vaginal cavity" was only one theory put forward by the state. (Tr 1426). Never did the state limit its theory of admissibility to a claim that the spermatozoa heads on the underwear came from vaginal discharge, and therefore proved defendant had had sexual intercourse with

It is impossible to know what evidence influenced or failed to influence eleven people to convict defendant in counts 1, 2, 3 and 4 after acquitting him in counts 5, 6, 7 and 11 and finding themselves unable to reach verdicts in counts 8, 9 and 10. That said, there are several ways the jury might have used this evidence. None would be harmless or inconsequential. For example, medical examination at the Kid's Center was "normal," (Tr 2578, 4910) and records from a separate "normal" examination by a pediatrician showed hymenal opening was 6 x 7 mm, or about the size of a corn kernel. (Tr 95; Tr 2435; 4910). The jury could have decided the medical evidence was inconsistent with rape but that the sperm heads proved ejaculation in presence so some sort of sexual touching must have occurred.

Jurors could have considered the sperm heads evidence as proof of "sexual contact," ORS 163.305(6); proof of defendant's sexual predisposition or inclination toward *See e.g. State v. McKay,* 309 Or 305, 308, 787 P2d 479(1990); proof that he kissed his daughter on the lips or touched her on her

chest for sexual gratification rather than mere parental affection, or by mistake or accident, OEC 404; or speculated defendant masturbated in presence to promote sexual contact with her. *See, e.g., State v. Muzzy*, 190 Or App 306, 330, 79 P3d 324 (2003), *rev den*, 336 Or 422, 86 P3d 1138 (2004).

It could also go without saying that the jury may have used the stolen sperm evidence improperly for its "ick" value, concluding that where there is smoke there must be fire.[11] If in fact the stolen sperm head evidence had "little or no relevance" to the charges of Sexual Abuse, its prejudicial impact is obvious. Yet, the trial court never had to decide whether to exercise its discretion under OEC 403, because it found the evidence was lawfully obtained and relevant at least to the charge of Rape.

B. The Stolen Sperm Evidence was not Redundant.

The state also contends harmless error because the illegally obtained evidence was redundant of other physical evidence admitted at trial; specifically clothing items taken pursuant to the search warrant. However, evidence seized under the warrant was the classic "Fruit of the Poisonous Tree." *Wong Sun v. United States*, 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963). There would have been no search of the Sines' home, no seizure of other garments to test for semen and sperm and, very likely, no criminal prosecution, if the original underwear had not been stolen for police.

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[11] The split verdicts and mistried counts carry a strong whiff of a jury compromise.

Whether evidence must be suppressed as "derivative" of an illegal intrusion is controlled by the Supreme Court's exploitation analysis in *State v. Hall,* 339 Or 7, 34, 115 P3d 908 (2005). The court's task is to "determine whether police 'exploited' or 'took advantage of' or 'traded on' their unlawful conduct." *State v. Unger,* 356 Or 59, 80 (2014).

When a prior illegal intrusion taints a search warrant, the State must prove *both*: (1) that the decision to seek the warrant was not prompted by the unlawfully obtained evidence, *and* (2) that probable cause existed in absence of the tainted evidence. *Murray v. United States,* 487 US 533, 542-544 (1988); *United States v. Duran-Orozco,* 192 F3d 1277, 1281 (9th Cir 1999); *see also State v. Johnson,* 335 Or 511 (2003) (state must show the warrant is "causally unrelated" to the prior unlawful intrusion).

Here the state cleared neither hurdle.

The discovery of sperm heads in the stolen underwear prompted the search warrant. We know this because the state's witnesses documented it in their contemporaneous records and said so under oath at the suppression hearing. Before the underwear was stolen, Cleavenger told the investigation was "at a standstill. We can't do anything without evidence." (Tr 77, 64, 45-46). Cleavenger then consulted Detective Sergeant McMaster who concluded, "there really wasn't much to go on [as] … we didn't have any disclosures, there was no hard evidence there was anything criminal at that

point." (Tr 193, 265-266). information was "concerning, yes; criminal? probably not." (Tr 265). McMaster testified police were stalled in a "wait mode" (Tr 193), without sufficient evidence for a warrant (Tr 265), so he "agreed with Cleavenger that we can wait two days for RP who will get panties of child." (Tr 192).

The DHS worker who accompanied Detective Quick to take possession of the stolen underwear and deliver them to the crime lab testified that it was only after the lab results came back that police made the decision to get a warrant and there had been no talk of seeking a warrant before then. (Tr 246). Detective Quick, the search warrant affiant, testified that it was the call from the crime lab that prompted him to immediately begin writing the search warrant application. (Tr 379).

Nor did the State clear the second hurdle under *Murray* to show probable cause existed in absence of the tainted evidence. The pivotal allegation in the affidavit was that the crime lab found sperm on the stolen underwear. Absent the allegation of sperm heads in underwear, the affidavit is merely a string of conclusory assertions, speculation, unsourced hearsay and factual inaccuracies that fail even to establish reasonable suspicion.

But even had police had somehow cobbled together a probable cause showing without the benefit of the stolen underwear, it would not matter because evidence from the underwear is what prompted the warrant so it did not

come about by an "independent source." As the United States Supreme Court explained in *Murray*,

> The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

487 US at 542-544.

The "inevitable discovery" exception does not apply in this case. *See State v. Miller*, 300 Or 203, 225, 709 P2d 225 (1985) (Inevitable discovery requires proof that: (1) that certain proper and predictable investigatory procedures would have been utilized, and (2) that those procedures inevitably would have resulted in the discovery of the evidence in question.) Testimony at the suppression hearing showed that the only "investigatory procedure" in play in this case was to stay in "wait mode" until brought police underwear stolen from defendant's home. Even if authorities had followed their own rule and interviewed within 24 hours, the evidence would not have led inevitably to the lawful seizure of clothing from defendant's home. The night the warrant was executed, told emergency room professionals she was not abused. (Tr 2156). Six days later, denied sexual abuse when questioned by a social worker and, again later, by a nurse practitioner at the KIDS Center. (Tr 2206,

2211-12, 2572, 2557). again denied being abused during an assessment by a counselor two months later. (Tr 2453, 2493-94).

The state argues that the defendant's motion to suppress "all evidence, including derivative evidence and statements" obtained as a result of the seizure and forensic search of stolen underwear was somehow insufficient notice. It is true that when the motion was filed, the stolen underwear was the only item of clothing to have been forensically examined. It was unclear what evidentiary value, if any, clothing seized under the warrant might have. However, neither party needed to know the full evidentiary value of clothing seized under the warrant because that is *irrelevant* to the suppression analysis. Everyone knew from the outset that the search warrant rested upon and was wholly derived from the sperm heads found in the stolen underwear. That is why the prosecutor sought and the trial court granted the state leave to make a broad record at the suppression hearing regarding probable cause for the warrant.

It is also why the defense asked the state's witnesses a series of questions to: (1) show the very strong causal connection between the felony theft and warrantless forensic testing and the application for the search warrant, (2) determine whether information attributed to and was based upon personal knowledge, speculation or hearsay, and (3) to show Det. Quick's account of what other witnesses told him was inaccurate.

Both sides have had a full opportunity to make a record before the trial court. The trial court had a complete record from which to rule. It did not find that the search warrant was derivative of the unlawful seizure and forensic testing of the stolen underpants only because it decided the initial theft was not "state action" and, as a consequence, did not reach this issue.

CONCLUSION

This court should rule that the seizure of the victim's underpants violated Article I, section 9, and that the trial court's error was not harmless, and affirm the Court of Appeals' decision.

Dated this 9th day of February, 2015.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 9, 2015, I directed the original Brief on the Merits of Respondent on Review to be electronically filed with the Appellate Court Administrator, Appellate Court Records Section, and electronically served upon Michael A. Casper, Attorney for the State of Oregon, by using the Court's electronic filing system.

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,531 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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