IN THE SUPREME COURT OF THE STATE OF OREGON

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

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

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

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

Continued…

LISA A. MAXFIELD #844337
Pacific Northwest Law LLP
121 S.W. Salmon Street, Suite 1420
Portland, Oregon 97204
Telephone: (503) 222-2510
Email:
lamaxfield@pacificnwlaw.com

Attorneys for Respondent on Review

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA M. JOYCE #013112
Solicitor General
MICHAEL A. CASPER #062000
Deputy Solicitor General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email:
michael.casper@doj.state.or.us

Attorneys for Petitioner on Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional & Statutory Provisions

Other Authorities

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

INTRODUCTION

This case centers on the actions that two individuals took to help a nine-year-old girl after they came to believe that the girl's father, defendant, was sexually abusing her. One of those individuals, defendant's housekeeper, called DHS to alert the agency to the abuse and suggested that she might be able to provide authorities with evidence—a stained pair of the victim's underpants—from defendant's home. The DHS worker who answered the housekeeper's call acknowledged that such evidence would be useful to police if she were to provide it, but he refrained from giving her approval to take it on the state's behalf, explaining that he "couldn't ask her to do that." The housekeeper, with another of defendant's employees, ultimately decided to take the underpants, and they brought them to police. At issue here is whether that seizure constituted warrantless "state action" for purposes of Article I, section 9, of the Oregon Constitution. Answering that question requires this court to determine the circumstances in which a private citizen acts as an "agent" of the state.

This court has never specifically set forth a test for determining when private conduct may be attributed to the state for purposes of Article I, section 9, but it should take this opportunity to make clear that a decision by state officials not to try to stop or discourage a whistleblower or other good

Samaritan from seizing evidence of a crime does not implicate Article I, section 9. State *inaction*, in other words, is not enough to make the state liable for the decisions and actions of private citizens. Consistently with the approach that federal courts take under the Fourth Amendment—and consistently with the basic principles of agency—this court should hold that a person's actions may be attributed to the state for purposes of Article I, section 9, only if state officials conveyed to the person that he or she was authorized to take those actions on the state's behalf.

QUESTION PRESENTED AND PROPOSED RULE OF LAW[1]

Question Presented

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

Proposed Rule of Law

A seizure of property by a private citizen is "state action" for purposes of Article I, section 9 only if the citizen was acting on the state's behalf *and at the*

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[1] The state's petition for review identified two Questions Presented, but the state limits its discussion in this brief to only one of those questions—*viz.*, whether an unconstitutional seizure occurred. The other question that the state identified in its petition—whether evidence subsequently obtained pursuant to a search warrant "derived" from the seizure—is not an issue that the court needs to reach, because, as discussed above, the seizure was not state action and, in any event, defendant did not seek to suppress the warrant-search evidence on the ground that it was "derived" from the seizure. Upon further consideration, therefore, the state has elected to focus its arguments solely on the first question.

state's behest. That state officials may have been forewarned of a possible seizure and declined to take steps to discourage or prevent it is not enough. Police officers or other state officials must have directed or controlled the seizure, or must have conveyed to the citizen that he or she was authorized to act on the state's behalf by asking or actively encouraging the person to do so.

SUMMARY OF MATERIAL FACTS

A. Defendant's employees took underpants belonging to defendant's daughter from defendant's house and delivered them to police.

Two of defendant's employees—a housekeeper and defendant's business assistant—suspected that defendant was sexually abusing his nine-year-old daughter, T. *State v. Sines*, 263 Or App 343, 345, 328 P3d 747 (2014). Charlene defendant's house cleaner, observed that T "was sleeping with [defendant]" in his bedroom and she suspected that T "was showering with [defendant]." (Tr 13-15). also found a "type of Vaseline stuff" "[u]p to half way up [defendant's] sheets," and found signs of its use in the bathroom. (Tr 26, 28). Based on her observation of Vaseline handprints on the bathroom walls, believed defendant "had been having sex with somebody in the bathroom area." (Tr 298). At the time, defendant was estranged from his wife, had no girlfriend, and had remarked that he did not need a girlfriend because "he had T." (Tr 292).

had observed a "lot of discharge" in multiple pairs of T's underpants, and noted that the "crotch was stiff." (Tr 18-19). "[A] couple pair * * * we threw away because it was so bad." (Tr 19). T's discharge "didn't really look normal" to and "didn't look like a young girl's underpants"; it "[l]ooked like maybe a 19-year-old was wearing it," "with the discharge and all that." (Tr 18-19). "[T]here were stains in the underpants that made [feel like they were underpants of a sexually active adult, and not the underpants of a nine-year-old[.]" (Tr 299). After defendant's wife returned in the fall of 2005, after having been away, did not find "that same type of discharge." (Tr 21-22). But after defendant's wife left again in March 2006, found "multiple pairs" with the "same * * * type of discharge." (Tr 22).

On March 20, 2006, called DHS and described her observations. (Tr 41). spoke with DHS's Mike Cleavenger. (Tr 164).[2] Cleavenger replied to concerns by noting that "we can't go any further without evidence," but he did not suggest that should gather evidence. (Tr 49). When asked, "what if I get something," Cleavenger replied, "It's up to you." (*Id.*). When said, "I'm going to get some underpants,"

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[2] testified that she spoke with Detective Mike Quick that day (Tr 48), but she apparently confused Mike Quick and Mike Cleavenger. As defendant acknowledges and the trial court found, Quick's and Cleavenger's testimony reflects that she spoke with Mike Cleavenger.

Cleavenger said, "Well, then that's up to you if you want to get the underpants." (*Id.*). Cleavenger told "that I could not ask her to do that, and she had to make that decision herself." (Tr 168). did not understand Cleavenger to be implying that the agency needed her to obtain the underpants before it could do anything. (Tr 77). asked what authorities might be able to learn from the daughter's underpants, and Cleavenger replied that he could "hook her up" with law enforcement officials who could test the underpants. 263 Or App at 345-46.

After speaking with Cleavenger contacted a Deschutes County Sheriff's Deputy. 263 Or App at 346. Because had reported potential abuse, DHS policy required the agency to check on the safety of the child within 24 hours of a report of possible abuse absent "good cause for a delay." *Id.* The DHS worker and deputy concluded that "there was a * * * good likelihood that the case was going to get stronger when [the housekeeper] made [her] decision," and decided to "assign the case as a five-day response" instead of responding immediately. *Id.* Neither Cleavenger nor the sheriff's deputy told the about DHS's safety-check policy or told her that they would be delaying their safety check. *Id.* Cleavenger did not "discuss safety checks with [at all." *Id.* at n 4.

Meanwhile, called defendant's other employee, Michelle and said, "I'm thinking we need to get something of evidence," and "I'm

thinking underpants." (Tr 47). who was planning to work at defendant's home the next day, said "I'll *see* what I can do." (Tr 47). While inside defendant's laundry room the following day, removed a pair of underpants from an "open laundry basket." She gave them to that same day. (Tr 142-44, 152).

After receiving the underpants, called DHS's Cleavenger. (Tr 173). Cleavenger told her to put the underpants in a paper bag to preserve the evidence. said that she could deliver the underpants to authorities in the Wal-Mart parking lot that morning. (Tr 53). met Detective Quick and DHS employee Tonya Cloninger in that lot and handed them the bag containing the underpants. (Tr 54-55).

B. Police then obtained a search warrant for defendant's home and seized additional clothing while executing the warrant.

The police tested the underpants, which revealed spermatozoa heads. 263 Or App at 347. Police then applied for and obtained a search warrant for defendant's home. The search-warrant affidavit described the test results, but also recounted information gathered from defendant's housekeeper, the business assistant, and the DHS worker. *Id.* While executing the warrant, police seized additional clothing belonging to the victim. *Id.* Testing revealed spermatozoa heads on those items also. *Id.* The state charged defendant with

first-degree rape, first-degree sodomy (anal intercourse), and four counts of sexual abuse against T (ER 1-2, Indictment).[3]

C. The trial court concluded that the employees' conduct was not "state action" and denied defendant's motion to suppress.

Before trial, defendant moved to suppress evidence, "including derivative evidence," obtained via the seizure of the victim's underpants by his employees. 263 Or App at 347. Defendant argued that the employees' conduct was "state action," and that the seizure thus implicated Article I, section 9, of the Oregon Constitution. At the motion hearing, when asked whether the person she spoke with had said "anything like * * * 'We need you to get a pair of underpants' * * * ?" replied, "No. Never." (Tr 44). Instead, "it was my idea." (Tr 48). The trial court concluded that no "state action" occurred and denied the motion to suppress. *Id.* at 348.

At defendant's trial, the state's theory with respect to the rape and sodomy charges was that the spermatozoa on the victim's underpants came from the victim's vaginal discharge and thus proved sexual intercourse between defendant and T. (*See* Tr 1437-38, containing testimony of the director of the

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[3] As recited in the indictment, the charges for sexual abuse were for touching T's "vaginal area with his hand while on the bed," (ER-1, Indictment; Tr 4733, containing jury instruction on that count); for "touching her nipple with his hand" (ER-2, Indictment; Tr 4736); for "touching [T's] vaginal area with his hand when in the bathroom" (ER-2, Indictment; Tr 4737); and for "kissing [her] lips in the bedroom" (ER-2, Indictment; Tr 4737).

state police laboratory explaining that she found spermatozoa "in the crotch panel area only," and that the "crotch panel" is a "common area that you are going to find spermatozoa if somebody were wearing the garment * * * and there was sexual activity and * * * fluids are draining" onto the garment). Defendant countered the state's theory by arguing that the spermatozoa on the victim's clothing resulted from cross-contamination from other items of clothing in the laundry.

With respect to the sexual abuse charges (counts 1-4 in the indictment), T testified that defendant touched her vaginal area, touched her breast, and kissed her lips. (*See* Tr 1732-33, 1738-40, 1741, containing T's testimony that defendant touched her "privates" and kissed her lips). In addition, the state also presented evidence of similar statements T made others, including her foster mother, a DHS worker, and a therapist. (*See* Tr 1905-06, 1908, 3489, containing testimony that T told her foster mother that defendant touched her crotch, touched her nipple, and kissed her lips; Tr 1811, 1850-51, containing DHS worker Tonya Cloninger's testimony that T said defendant touched her "where the pee comes out"; Tr 2801, containing therapist Crowe's testimony that T said defendant touched her "privates").

A jury acquitted defendant of the rape and sodomy charges but found defendant guilty of each of the four counts of sexual abuse. Defendant appealed his convictions and assigned error, among other things, to the denial

of his motion to suppress the underpants and the results of the forensic testing performed on the underpants.[4]

D. The Court of Appeals held that defendant's employees engaged in unlawful "state action" by taking the daughter's underpants and that their conduct also invalidated evidence seized under the later warrant.

The Court of Appeals reversed. It held that the state was "sufficiently involved that the seizure of the underpants was state action." 263 Or App at 349. The seizure was state action because the DHS worker "knew what the [housekeeper] planned to do and that she was likely to do it," "communicated with [her] about her plans and offered law-enforcement support if she conducted the seizure," and "delayed the safety check to allow [her] to accomplish the planned seizure." *Id.* at 353. The court described that last fact as "most notabl[e]," although it acknowledged that neither nor had been informed of the delay. *Id.* Because the seizure was warrantless and not justified by any exception to the warrant requirement, it violated Article I, section 9; accordingly, evidence of the underpants and of the positive test for spermatozoa should have been suppressed. *Id.* at 356.

The Court of Appeals then rejected the state's argument that any error in denying the motion to suppress the underpants seized by the employees was

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[4] For ease of reference, the state refers to the underpants and the results of the forensic testing done on them collectively as the "underpants evidence."

harmless, due to evidence—seized during the ensuing warrant search—that revealed spermatozoa on several *other* garments belonging to the victim. In part, the state argued that defendant had not articulated, either to the trial court or to the Court of Appeals, any basis for suppressing that additional evidence, even assuming that the conduct of defendant's employees violated his constitutional rights. (Resp Br 9-11). In rejecting that argument, the Court of Appeals concluded that evidence seized under the warrant "derive[d] from" the initial seizure by defendant's employees, and had to be suppressed under *State v. Hall*, 339 Or 7, 25, 115 P3d 908 (2005). *Sines*, 263 Or App at 359. The court noted that the officer who applied for the warrant testified, at the suppression hearing, that the positive test results with respect to the initial pair of underpants "prompted" him to apply for the warrant. *Id.* at 358. Because the initial unlawful seizure "caused" the state to seek the search warrant, the warrant search was invalid. *Id.* at 359.

SUMMARY OF ARGUMENT

The trial court correctly denied defendant's motion to suppress because the housekeeper's action in taking the victim's underpants from defendant's home was not state action. A search or seizure by a private citizen is not state action for purposes of Article I, section 9 unless the person acts as an agent for the state. But a private citizen who seizes property cannot be a state agent unless state officials explicitly or implicitly conveyed to that person that he or

she had the authority to act on the state's behalf—by directing, asking, or otherwise actively encouraging the private citizen's actions. That rule is grounded in familiar common-law principles of agency and vicarious liability, and it is consistent with this court's approach to "state action" in the context of other civil liberties protected by the Oregon Constitution. It is also the rule that federal courts have adopted under the Fourth Amendment. Those courts recognize that, for state officials to transform a private search or seizure into state action, the officials must affirmatively encourage or instigate the private action, by signaling to the private party that the state is a ready and willing participant in the action.

That did not happen here. had the idea to seize the underpants, and she initiated the call to DHS. At no point did state officials take steps that conveyed to the authority to seize evidence on the state's behalf. To the contrary, the DHS worker, Cleavenger, specifically refrained from asking or otherwise authorizing to seize evidence on the state's behalf. After suggested that she could seize the underpants from defendant's home, Cleavenger acknowledged that the evidence would be useful if she could provide it, but explained that he could not tell her to take the property and that it had to be her personal decision. Cleavenger thus did not imply that was authorized to act on the state's behalf, he conveyed just the opposite: that as a state official he could *not* sanction or participate in the seizure or provide

official approval. Although Cleavenger and law enforcement officials decided to wait before doing a welfare check to see if would come forward with the evidence, that decision was not communicated to Because Cleavenger never conveyed to that she was authorized to act on the state's behalf—implicitly or explicitly—she was not a state actor. Accordingly, the trial court correctly denied the motion to suppress.

But even if the underpants evidence was unlawfully obtained, the error in admitting that evidence was harmless. The underpants evidence had little or no relevance to the charges on which the jury actually convicted defendant, and, in any case, it was duplicative of other physical evidence admitted at trial. In particular, the court admitted into evidence several other items of the victim's clothing that contained defendant's spermatozoa, which police officers had obtained pursuant to a search warrant. Given that the jury had that physical evidence, admission of the underpants evidence would not have not changed its verdict. For that reason, any error in denying the motion to suppress the underpants evidence was harmless.

ARGUMENT

This court should affirm the trial court's decision to deny defendant's motion to suppress for either of two reasons. First, the trial court correctly concluded that the seizure of the underpants was not state action. and came up with the idea of seizing the underpants on their own, and they

ultimately decided to carry out that plan on their own. They were not state agents. Second, even if the seizure did constitute unlawful state action, the underpants evidence merely duplicated other, more powerful forensic evidence that police obtained lawfully when executing a search warrant. Thus, any error by the trial court in admitting the underpants evidence did not affect the outcome of the trial.

I. The trial court correctly denied the motion to suppress the victim's underpants because that evidence was not obtained by state action.

A. Article I, section 9, like the Fourth Amendment, applies to the search or seizure of property by a private citizen only if the person is acting as an agent for the state.

The prohibition against unreasonable searches and seizures enshrined in Article I, section 9, and the Fourth Amendment are very similar, but are not identical. Where the Fourth Amendment protects a person's reasonable expectation of privacy, the privacy interest protected under the state constitution is "one of right, not of expectation." *State v. Tanner*, 304 Or 312, 321 n 7, 745 P2d 757 (1987). Importantly, however, both constitutional provisions, as explained below, *are* identical in one respect: they both protect against intrusions by the government and not private parties.

Article I, section 9, protects the right of citizens to be free from unreasonable intrusions into their possessory and privacy interests by the government. *See, e.g.*, *Tanner*, 304 Or at 321 (1987) (A privacy or possessory

interest under Article I, section 9, "is an interest against the state; it is not an interest against private parties").[5] For that reason, Article I, section 9's prohibition against unreasonable searches and seizures applies to state action, not to private action. *See, e.g.*, *State v. Luman*, 347 Or 487, 493, 223 Pd 1041, 1044-45, (2009) ("It is axiomatic that Article I, section 9, applies only to government-conducted or -directed searches and seizures, not those of private parties."); *State v. Tucker*, 330 Or 85, 89, 997 P2d 182 (2000) ("Article I, section 9, prohibits only state action that infringes on a citizen's constitutional rights."). In that regard, the scope of Article I, section 9, scope is consistent with the scope of the Fourth Amendment, which federal courts have long recognized applies only to searches and seizures performed by the government. *Walter v. United States*, 447 US 649, 656, 100 S Ct 2395, 65 L Ed 2d 410 (1980). For these reasons, the fruits of a private search or seizure—even an unlawful one—are not subject to exclusion under Article I, section 9, or the Fourth Amendment. *Tucker*, 330 Or at 89; *Walter*, 447 US at, 656 ("[P]rivate wrongdoing does not deprive the government of the right to use evidence that it

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

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

has acquired lawfully."). Although the vast majority of Article I, section 9, cases involve the conduct of police officers, this court has recognized that state action extends beyond the conduct of police officers and can include the conduct of others acting in their capacity as state officials or employees. *See, e.g., Tucker*, 330 Or at 89-90 (tow truck driver acting under the direction of the police); *State v. Okeke*, 304 Or 367, 745 P2d 418 (1987) (an employee of a state-funded detoxification center).

More generally, this court repeatedly has explained that a search or seizure constitutes "state action" if the person who performed the search or seizure was an official, employee, or a person acting as a state "agent." For example, in *State v. Rhodes*, 315 Or 191, 196, 843 P2d 927 (1992), this court defined a "search" for purposes of Article I, section 9 as "an intrusion *by a governmental officer, agent, or employee* into the protected privacy interest of an individual." (Emphasis added). Similarly, in *State v. Rodriguez*, 317 Or 27, 39, 854 P2d 399 (1993), this court defined "unlawful police conduct" for purposes of Article I, section 9 to mean "an act by *a government entity or its agent* that violates a defendant's rights under Article I, section 9, of the Oregon Constitution." (Emphasis added). *See also State v. Tiner*, 340 Or 551, 562, 135 P3d 305 (2006) ("Under Article I, section 9, a search occurs when a government agent intrudes into an individual's protected privacy interest."); *State v. Nagel*, 320 Or 24, 29, 880 P2d 451 (1994) ("Under Article I, section 9,

a search is 'an intrusion by a governmental officer, agent, or employee into the protected privacy interest of an individual.'" (internal quotation omitted).

In that respect, also, this court's Article I, section 9 jurisprudence is consistent with the approach that federal courts take under the Fourth Amendment. The United States Supreme Court has long held that the Fourth Amendment is a restraint "upon the activities of sovereign authority" and so applies to any state actor operating under color of that authority. *Burdeau v. McDowell*, 256 US 465, 475, 41 S Ct 574, 576, 65 L Ed 1048 (1921). The Fourth Amendment thus protects against unreasonable searches and seizures by government officials and those private individuals acting as "instrument[s] or agent[s]" of the government. *Coolidge v. New Hampshire*, 403 US 443, 487, 91 S Ct 2022, 29 L Ed 2d 564 (1971). In determining whether a person is an "instrument or agent" of the state for purposes of the Fourth Amendment, federal courts adhere to the principles underlying common law agency relationships and vicarious liability. *See, e.g., United States v. Jarrett*, 338 F3d 339, 344 (4th Cir 2003) (describing Fourth Amendment state action inquiry as "a fact-intensive inquiry that is guided by common law agency principles" (internal quotation omitted)).

Notably, the Court's description in *Coolidge* refers not just to "agents" but to two categories of individuals—those acting as "agents" of the government, and those who are "instruments" of the government. Both of those

categories, however, are deeply rooted in the common law of agency. At common law, courts recognized two kinds of agency relationships: so-called "servant" agents, over whom the principal retained a right to control, and "nonservant" agents, over whom the principal did not retain a right to control. *See Vaughn v. First Transit*, 346 Or 128, 137, 206 P3d 181 (2009) (describing two categories of common law agents). The Court's characterization encompasses both types of agency relationships, *i.e.*, persons, such as government employees, whose conduct the state directly controls ("instrument[s]" of the government), as well as persons over whom the government lacks direct control but whom the government has authorized to act on its behalf ("agents" of the government).

To summarize, Article I, section 9, like the Fourth Amendment, applies only to state action, and for purposes of both provisions, a search or seizure is not "state action" unless the person performing the action is a state official, employee, or agent. Given that legal framework, the issue here may be stated narrowly. It is undisputed that neither of the citizens involved in the seizure in this case are state employees or officials. Therefore, the question before the court is whether, when and seized property from defendant's home and delivered it to police, they were acting as "agents of the state." As explained below, they were not.

B. A private citizen who seizes property does not act as a "state agent" for purposes of Article I, section 9, unless state officials convey to the citizen the authority to seize the property on the state's behalf.

1. Although this court has explained that a person can be a state agent for purposes of Article I, section 9 if the person seizes property at the request of a police officer, it has not articulated a more general test.

As the Court of Appeals noted, this court has had little opportunity to provide guidance regarding "how much or what kind of state involvement is sufficient to trigger the protections of Article I, section 9." *Sines*, 263 Or App at 349. This court has decided only one case in which it concluded that a search by a private citizen constituted state action. That case—*Tucker* —stopped short of announcing a general test for determining whether a person is a state agent for purposes of Article I, section 9, but it nonetheless provides a useful starting point for developing such a rule.

In *Tucker*, a state trooper who had stopped defendant and believed that defendant had provided him a false identity asked a tow-truck driver "to look through the papers and mail inside the [defendant's] automobile to help determine defendant's identity." 330 Or at 87. During the course of that search, the tow truck driver found a gun. The trooper eventually discovered that defendant was a convicted felon and the state charged him with being a felon in possession of a firearm. Defendant moved to suppress, arguing that

warrantless search of his vehicle by the tow-truck driver violated Article I, section 9. *Id*. at 88.

This court agreed with defendant that the search of his truck constituted "state action." In reaching that conclusion, this court explained that because the trooper had asked the tow-truck driver to perform the search, that search was not the "independent volitional act of a private citizen." *Id.* at 90. This court thus held that, "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." *Id.*

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. *See also State v. Luman*, 347 Or 487, 493, 223 P3d 1041 (2009) (citing *Tucker* and noting that "[i]t is axiomatic that Article I, section 9, applies only to government-conducted or -directed searches and seizures").

2. In articulating a more general test, this court should start from traditional common-law principles of agency.

Although *Tucker* describes one circumstance in which a person may be said to acting as an agent of the state for purposes of Article I, section 9, the

opinion stops short of formulating a more general test of agency as it applies to state action. What constitutes an "agent" for purposes of Article I, section 9, may not literally be an 'agent' in the sense that is used in commercial and contract law. But, just as it is in the commercial and contract-law context, the issue for purposes of Article I, section 9, is whether the state should be held responsible for the decisions and actions of a private party. Therefore, the principles underlying common-law agency relationships and vicarious liability should drive the analysis under Article I, section 9, just as they help to steer the inquiry under the Fourth Amendment.

As this court has recently explained, common-law agency is "a relationship that results from the manifestation of consent by one person to another that the other shall act on behalf and subject to his control, and consent by the other so to act." *Vaughn*, 346 Or at 135-36 (citing *Restatement (Second) of Agency* § 1 (1958)). In addition, a principal is vicariously liable for an act of its agent only if the principal "intended" or "authorized the result [ ]or the manner of performance" of that act. *Vaughn*, 346 Or at 137. In other words, to create a relationship in which the one party is responsible for an actions or decision of another, the former – the principal—must somehow convey to the latter—the agent—that he or she is authorized to act on the principal's behalf. *Id.* That notion is consistent with both the result and the reasoning in *Tucker*. In that case, as noted above, the tow-truck driver was acting as a state agent

because the search he conducted was not an "independent volitional act." By asking the tow-truck driver to engage in the search, the officer authorized the driver to perform that search on the officer's behalf; in performing the search, the driver consented to do so. More generally speaking, the state should be liable—for purposes of Article I, section 9—for the actions of a private party only to the extent that the state authorized the private party to act on its behalf.

3. In analogous circumstances, this court has articulated a "state agent" test under Article I, section 11, that is rooted in agency principles and recognizes that private citizens act as "state agents" only when state actively encouraged, directed, or participated in the conduct.

Although this court has not articulated a test for what constitutes a "state agent" for purposes of Article I, section 9, it has described such a test in a very closely related context. Under Article I, section 11, state officials or those who act as agents of the state must give a suspect *Miranda* warnings before any custodial interrogation. This court's test for determining who is an agent of the state for purposes of Article I, section 11, reflects the basic principles of an agency relationship just discussed.

This court's decision in *State v. Smith*, 310 Or 1, 791 P2d 836 (1990), is particularly instructive. At issue in *Smith* was the admissibility of statements that the defendant made to a cellmate who was a jailhouse informant and who reported the statements to police. The defendant argued that, because the cellmate was an agent of the police, the cellmate was obligated to provide

Miranda warnings before eliciting incriminating information from the defendant. This court rejected that argument and held that no warnings were required, because the cellmate was not a state agent for purposes of Article I, section 11. 310 Or at 14.

In reaching that conclusion, the court emphasized that the informant, not police, initiated contact with the police and told them about defendant's statements. *Id*. This court noted that the officers had "told [the informant] that if he heard something and wanted to pass it along, he could," but also had told the informant that "he was not required to do so" and instructed the informant not to directly question defendant. This court also emphasized that the officers had made "no deals with [the informant], paid him no money, and offered him no encouragement; nor did [the informant] request any." *Id*.

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). *See also State v. McNeely*, 330 Or 457, 461, 8 P3d 212 (2000) ("if the police are involved to a sufficient extent in initiating, planning, controlling, or supporting an informant's activities," then the exclusionary rule applies). Although the officers knew that the informant in *Smith* might gather information to report to

them and made no effort to discourage that, the ultimate decision about whether to gather information and report to police rested with the informant. As a result, he was not acting as an agent of the state.

This court's analysis in *Smith* reflects the basic nature of a common-law agency relationship discussed above. The extent to which a person is a state agent for purposes of Article I, section 11 depends on whether the person was acting "at the behest" of state officials. The same principle should hold true under Article I, section 9.

4. The test that federal courts apply under the Fourth Amendment, which is similarly rooted in agency principles, recognizes that the state's passive acquiescence in a private citizen's conduct is not sufficient to convert that conduct into state action.

As noted earlier, the test that federal courts apply to determine whether a person is a state actor for purposes of the Fourth Amendment is expressly rooted in underlying common-law principles of agency. Consistently with those principles, 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. Rather, for the requisite agency relationship to exist, state officials must convey to an individual that he or she has authority to operate on the government's behalf, and the government must be a willing participant in the conduct.

Generally speaking, whether the requisite agency relationship exists for there to be "state action" for purposes of the Fourth Amendment depends "on the degree of the Government's participation in the private party's activities, ... a question that can only be resolved 'in light of all the circumstances.'" *Skinner v. Railway Labor Executives Ass'n*, 489 US 602, 614–15, 109 S Ct 1402, 103 L Ed 2d 639 (1989) (*quoting Coolidge*, 403 US at 487). The defendant bears the burden of proving the existence of such a relationship, and 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. *See, e.g.*, *Jarrett*, 338 F3d at 344 (applying that test).

Importantly, to satisfy the first prong—*i.e.*, to show that the government "knew of and acquiesced in the private action"—the defendant must demonstrate more than that the government *passively* accepted or acquiesced in a private party's efforts. Rather, there must be some degree of active encouragement or participation by a government official. In *Skinner*, for example, the Court found that private railroads acted as government agents sufficient to implicate the Fourth Amendment because the government regulations expressly encouraged and authorized the railroads' conduct. *Skinner*, 489 US at 615-16. As the Court concluded, "specific features of the

regulations combine to convince us that the Government did more than adopt a passive position toward the underlying private conduct." *Id.* (emphasis added).

Similarly, federal circuit courts have required evidence of more than mere knowledge and passive acquiescence by the government before finding an agency relationship. *See, e.g.*, *Jarrett*, 338 P3d at 346; *United States v. Smythe*, 84 F3d 1240, 1242-43 (10th Cir 1996) ("[K]nowledge and acquiescence * * * encompass the requirement that the government must also affirmatively encourage, initiate or instigate the private action." (citation omitted; emphasis added)); *United States v. Koenig*, 856 F 2d 843, 850 (7th Cir 1988) ("It is only by the exercise of some form of control that the actions of one may be attributed to another. Mere knowledge of another's independent action does not produce vicarious responsibility absent some manifestation of consent and the ability to control." (citations omitted)); *US v. Walther*, 652 F2d at 792 (9th Cir 1981) ("Mere governmental authorization of a particular type of private search in the absence of more active participation or encouragement is similarly insufficient to require the application of Fourth Amendment standards." (citations omitted)). Government encouragement that spurs a private party to do something that the person would not otherwise have done can be sufficient to transform the conduct into state action. *See Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F3d 1283, 1301 (9th Cir 1999) (finding state action where a jury could find that

actions were "unlikely to have been undertaken" without state encouragement (internal quotation marks omitted)).

Federal courts have also recognized that private action is not transformed into state action merely because the government knew of conduct and did not attempt to discourage it, even is government actors expressed their personal appreciation or approbation of the private citizen's efforts. In *Jarrett*, 338 F3d at 346, for example, the court explained that a computer hacker who supplied incriminating information to government officials was not a government agent, despite the fact that the government knew about the hacking and did nothing to stop it. In that case, the hacker obtained access to the defendant's computer, discovered child pornography, and sent it to law enforcement authorities. The hacker had previously done the same with a different defendant, after which an FBI agent assured the hacker that he would not be prosecuted and that, "'If you want to bring other information forward, I am available.'" *Id*. at 341. After the defendant's arrest, the FBI agent sent the hacker an e-mail explaining that he could not ask the hacker to search out such cases, but that "if you should happen across such pictures as the ones you have sent to us and wish us to look into the matter, please feel free to send them to us." *Id*. at 343. The circuit court concluded that, when he hacked into the defendant's computer, the hacker was not a government agent for purposes of the Fourth Amendment. The court noted that the government's behavior was "discomforting," but that the

government was "under no special obligation to affirmatively discourage [the hacker] from hacking." *Id*. at 347. *See also Coolidge*, 403 US at 488 ("[I]t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals."); *United States v. Souza,* 223 F3d 1197, 1202 (10th Cir 2000) (holding that police are under no duty to discourage citizens from conducting searches of their own volition). To create an agency relationship for purposes of the Fourth Amendment, the government must "signal affirmatively that the Government would be a ready and willing participant in an illegal search." *Jarrett*, 338 F3d at 347.

This court should adopt the same approach under Article I, section 9. 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. Passively allowing a private citizen to engage in a search or seizure is not sufficient; the state must signal that it is an active and willing participant in the conduct. That approach is grounded in long-recognized and clearly established principles of agency law and vicarious liability.

C. The individuals who seized the victim's underpants in this case were not state agents; therefore, the seizure did not implicate Article I, section 9.

Applying the rule just discussed to the facts of this case, and were not acting as state agents when they seized the victim's underpants, and therefore the seizure did not constitute state action for purposes of Article I, section 9. No one from the state directed or to seize T's underpants, suggested that they seize the underpants, or participated in (or supervised) the underpants' removal from defendant's house. Because a state official told that any action she took was "up to [her]," neither her conduct nor implicated defendant's constitutional rights.

As detailed above, contacted DHS of her own volition. The idea of taking the underpants was hers. When she proposed that idea to the DHS worker, Cleavenger, he did not direct or ask her to carry out the seizure. He told her, accurately, that the evidence could be useful to police in an investigation if she were to provide it. But he specifically refrained from asking her to take the evidence, and testified that he told her that "I could not ask her to do that, and she had to make that decision herself," and that "we left it that she was going to have to search her own heart." (Tr 168).

For the same reason, Cleavenger did not actively encourage in a manner that implied or indicated that was authorized to act on the state's behalf. Cleavenger did inform that, if decided to obtain

T's underpants, he "would hook her up with a worker and with law enforcement who could make [testing at a lab] happen." (Tr 185-86). Ultimately, however, Cleavenger "told her that I could not ask her to [obtain T's underpants], and she had to make that decision herself." (Tr 168). Cleavenger's express refusal to make the decision signaled that he could and would not, as a state official, ask her to seize the evidence. In the words of this court in *Tucker*, decision to take the underpants was "an independent volitional act." At the end of their conversation, Cleavenger did not even know what decision ultimately would make—at most, he knew that *might* seize T's underpants. The fact that state officials knew that a private individual *might* seize a defendant's property does not render the seizure state action.

and ultimately decided to take the underpants, in a manner that they chose. By expressly leaving control over the decision up to and by declining to assert any control over whether or how the underpants might be taken, Cleavenger did not, in the words of *Smith*, "initiate, plan, control or support" the seizure. For that reason, was not an "instrument" of the state, nor was she an "agent" acting at the behest of the state.

Although Cleavenger admittedly did nothing to discourage from seizing the evidence, as explained above, he was under no obligation to do so. Nor is it enough that Cleavenger personally may have hoped that would

decide to seize the evidence, even if he tacitly communicated that to To create the requisite agency relationship, Cleavenger would have had to communicate something more than personal appreciation or approbation—he would have had to convey to that she was authorized to act *for the state*, that the state sanctioned her seizing the evidence on the state's behalf, and that the "the state was a ready and willing participant." But Cleavenger did just the opposite. He signaled that as a state official he could *not* ask her to do it, and that the decision had to be hers alone. *See, e.g.*, *Jarrett*, 338 P3d at 346, *State v. Krajeski*, 104 Wn App 377, 383-84, 16 P3d 69, *rev den*, 144 Wash 2d 1002 (2001) (landlords who searched apartment did not act as state agents, in part because officer "told them he could not authorize them to search" and "that whatever they did was of their own free will"). 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.

Although Cleavenger and law enforcement officials decided to wait before doing a welfare check to see if would come forward with the evidence, that decision did not convert the event into state action either. Neither Clevenger nor the police officer communicated to or their decision to postpone the welfare check, so there was no way that the decision could have conveyed that they were authorized to seize the property on

the state's behalf. The "five-day response" reflects no efforts by the state to encourage or in their efforts, or to suggest they were part of a state investigative team.

In sum, and did not act as state agents. It follows that their removal from defendant's home of the victim's underpants did not violate defendant's Article I, section 9 rights.[6]

II. Even assuming that taking the underpants from defendant's home violated Article I, section 9, any error in denying the motion to suppress the evidence was harmless.

For the reasons discussed above, the trial court correctly concluded that the seizure of the victim's underpants did not violate Article I, section 9, because it was not state action. But even assuming that the removal of the

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[6] Defendant also argued in the Court of Appeals that even if the seizure of the underpants did not violate Article I, section 9, the police violated Article I, section 9 by possessing and testing the underwear. The Court of Appeals did not reach that question (or several other assignments of error) because it concluded that the seizure did violate Article, section 9. The issue is thus not before this court, and it is properly addressed in the first instance by the Court of Appeals on remand. In any case, the police did not violate Article I, section 9 by testing the underpants. Because and acted on their own in procuring the underpants and handing them over, police lawfully possessed them and also had probable cause to believe they contained crime evidence. Defendant had a protected privacy interest in his home and a protected possessory interest against the state in the property inside his home, including his daughter's underpants. But those interests were "destroyed by private conduct," not state action. *State v. Luman*, 347 Or 487, 223 P3d 1041 (2009).

underpants from defendant's home did violate Article I, section 9, the admission of that evidence is not a basis for reversal because it did not affect the verdict. *See State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003) (state constitution requires court to affirm despite evidentiary error if "there [is] little likelihood that the particular error affected the verdict").

To begin with, the underwear evidence had little relevance to the crimes for which defendant was actually convicted. The state's purpose in introducing the underpants evidence was to prove that defendant had raped the victim. The state's theory, as explained above, was that the spermatozoa heads on the underwear came from vaginal discharge, and therefore indicated that defendant had had sexual intercourse with T. Defendant countered with an innocent explanation about the presence of his spermatozoa on the victim's underwear—that it resulted from cross-contamination when the underwear was laundered with defendant's clothing. Defendant's cross-contamination explanation apparently swayed the jury, as it ultimately *acquitted* defendant of rape and sodomy, counts 5 and 6.

The jury convicted defendant on four counts of sexual abuse (counts 1-4 in the indictment), but there is no clear connection between underpants evidence and *those* counts, which charged that defendant had kissed the victim, and touched her on breast and vagina. To prove those charges, as noted above, the state relied instead on T's direct testimony, and on her pretrial statements to

others, that recounted defendant's conduct in touching her vaginal area, touching her breast, and kissing her lips. Given that the jury had direct evidence of those offenses, which the jury credited, there is little likelihood that additional admission of the underpants evidence (which was not related to those charges and which the jury seems not to have credited anyway) made a difference in the outcome of the trial.

In addition, any error in the admission of the underpants evidence was harmless is because it was redundant. As explained above, the state presented four other items of the victim's clothing, besides the underpants, that also contained defendant's spermatozoa. Police obtained that clothing—T's nightgown, jeans, pajamas, and a swimsuit—pursuant to a search warrant. But defendant's motion to suppress the underwear evidence did not ask the trial court to suppress those additional items of clothing. Thus, even if the trial court had granted defendant's motion to suppress the underwear evidence, it would not have changed the result of the trial because the other physical evidence with defendant's spermatozoa would have been admitted and considered by the jury.

The Court of Appeals rejected this "harmless error" argument, but its analysis is based on a false premise regarding the scope of defendant's motion to suppress. In particular, the Court of Appeals noted that defendant's motion to suppress the underwear evidence asked the trial court to suppress the underwear as well as "any derivative evidence or statements." The Court of

Appeals further noted that while being cross-examined at the suppression hearing, two of the states witnesses—Cleavenger and Quick—testified that obtaining the results of the forensic tests on the underwear had "prompted" them to submit the warrant application. The Court of Appeals reasoned that, under *State v. Hall*, 339 Or 7, 115 P3d 908 (2005), defendant thus proved that the seizure of the underwear caused the police to seek a warrant, and the state failed to carry its burden of showing that the warrant search evidence was not the product of police exploitation.

There are two problems with that analysis. First, it is based entirely on a contention—*viz.*, that the warrant search evidence derived from seizure of the underwear—that defendant never made. Admittedly, defendant's motion to suppress asked the trial court to exclude "all evidence, including derivative evidence and statements," obtained through the search and seizure of the underpants. Importantly, however, defendant never identified any particular evidence beyond the underpants or the subsequent testing results that he believed was "derived" from the underpants. Defendant's memorandum supporting the motion also included a generic reference to "derivative evidence and statements obtained as a result of the searches and seizures," but identified no evidence aside from the underpants or their testing results. (Rec 60-62, Memorandum 6-8; *see also* Defendant's Final Argument on Motion to Suppress at 1 and 19 (Record 191, 173), referring to "[t]he underpants and all evidence

derived from" it, but identifying no particular other evidence). Neither the motion nor the memorandum suggested or implied that the warrant search evidence was "derivative" of the underpants evidence, much less provided a legal argument as to how it might be derived.

Nor was the issue litigated at the hearing on defendant's motion. As the Court of Appeals correctly noted, defendant's attorney did ask both Cleavenger and Quick if obtaining the DNA results had "prompted" them to submit the warrant application, which both men confirmed. But defendant never suggested that their testimony demonstrated that the warrant-search evidence "derived" from the seizure of the underwear, nor did defendant ask the court to suppress the warrant-search evidence on that basis, or advance any legal argument in that regard.[7] According to the Court of Appeals, merely by asking those questions during cross examination, defendant's counsel implicitly communicated to the trial court that he also was asking the court to suppress the warrant-search evidence, and by eliciting testimony about what "prompted" authorities to submit the warrant application, defendant effectively shifted the burden to the

[7] Defendant later filed a motion to suppress the warrant-search evidence and to controvert the warrant. But those motions were based on a different argument altogether; in neither did defendant argue that the warrant-search evidence derived from the seizure of the underwear evidence. In any case, the trial court denied those motions and defendant did not assign error to those rulings on appeal.

state to prove that the warrant search evidence did not derive from the seizure of the underwear. *State v. Sines*, 263 Or App at 345. The state respectfully disagrees. If defendant had intended to make such an argument, he was required—at the very minimum—to (1) expressly identify that the evidence that should be suppressed and (2) give some indication as to why. Relying on the trial court and the prosecutor to infer an exploitation argument from a question posed to a witness is insufficient. *See State v. Walker*, 350 Or 540, 552, 258 P3d 1228 (2011) ("a party has given opponents and the trial court enough information to be able to understand the contention and to fairly respond to it.").

The second problem with the Court of Appeals analysis is that—even assuming that defendant had successfully preserved the argument that the warrant search evidence derived from the underwear seizure—the proper remedy would not be to *reverse*, as the Court of Appeals concluded, but rather to *remand* the matter to the trial court to address the argument and make necessary factual findings. Whether the underwear evidence really "prompted" the officers to seek a warrant or whether, instead, they would have sought the warrant even without that evidence is a question of fact, and it should be made by the trial court. *See State v. Murray v. United States*, 487 US 533, 542, 108 S Ct 2529 (1988) (remanding to the trial court under similar circumstances under Fourth Amendment); *see generally*, *State v. Paulson*, 313 Or 346, (where

factual question has not been addressed, case must be remanded to the trial court for further proceedings). Here, the trial court never had any occasion to reach that factual question because it concluded that the seizure of the underpants did not violate Article I, section 9. But there is substantial circumstantial evidence in the record from which the trial court could find that officers would have sought such a warrant even if and had decided not to take the victim's underwear. Under those circumstances, remand is the proper disposition.

In sum, defendant's motion sought only to suppress the underwear and the results of the lab tests on that underwear, it did not seek the suppression of the warrant-search evidence. Because the underpants evidence is duplicative of the warrant-search evidence, any error in denying that motion to suppress the underpants evidence is harmless. In all events, if this court were to conclude that the seizure of the underwear violated Article I, section 9, and also that defendant preserved the argument that the warrant search evidence "derived" from that seizure, then the proper remedy would be to remand the matter to the trial court to make the requisite factual findings and rule on the merits of that argument.

CONCLUSION

This court should rule that the seizure of the victim's underpants did not violate Article I, section 9, reverse the Court of Appeals' decision, and remand

the case for further proceedings. If this court concludes that the seizure violated Article I, section 9, it should nonetheless conclude that the admission of the underpants was harmless because the evidence is redundant of evidence lawfully obtained pursuant to a search warrant.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
ANNA M. JOYCE
Solicitor General

/s/ Michael A. Casper
MICHAEL A. CASPER #062000
Deputy Solicitor General
michael.casper@doj.state.or.us

Attorneys for Plaintiff-Respondent
State of Oregon

MC2:bmg/604556721

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 2, 2014, I directed the original Brief on the Merits of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Lisa A. Maxfield, attorney for appellant, by using the 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 9,380 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

/s/ Michael A. Casper

MICHAEL A. CASPER #062000
Deputy Solicitor General
michael.casper@doj.state.or.us

Attorney for Plaintiff-Respondent

MC2:bmg/6045567