IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. JOSEPH LUCIO JIMENEZ, aka Joseph L Jimenez, Defendant-Appellant Respondent on Review.	Multnomah County Circuit Court Case No. 110241478 CA A148796 SC S062473

RESPONDENT'S BRIEF ON THE MERITS

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court for Multnomah County
Honorable Christopher J. Marshall, Judge

Opinion Filed: May 21, 2014
Author of Opinion: Schuman, S. J.
Concurring Judges: Duncan and Wollheim, JJ

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STATEMENT OF THE CASE

Defendant accepts the Attorney General's Statement of Facts with the addition and clarification of pertinent facts set out in the argument that follows.

Question Presented and Proposed Rule of Law

May an officer inquire about weapons during a routine traffic stop, consequently extending the duration of the stop, without reasonable suspicion that the person poses a threat to the safety of the officer or others?

Proposed Rule of Law.

Any questioning during a noncriminal traffic stop that is unrelated to the investigation and issuance of a traffic citation impermissibly extends the duration of the stop, unless it occurs during an unavoidable lull or is supported by reasonable suspicion. That includes questions related to officer safety when the officer does not have reasonable suspicion that the person poses a threat to his safety.

Summary of Argument

In *Rodgers/Kirkeby*, this court held that questions that are unrelated to the processing of a noncriminal traffic violation and extend the duration of the stop further restrict a person's liberty and constitute an unlawful seizure under

Article I, section 9, of the Oregon Constitution, unless the questions are independently justified.

The state suggests that inquiries about weapons are "related to" the processing of a noncriminal traffic stop and hence permissible, or alternatively, they are otherwise "reasonable" because they are "brief, minimally intrusive, and serve to protect officer safety." The state is mistaken for several reasons.

First, this court has always required reasonable suspicion of an immediate safety threat before an officer may investigate officer safety issues. In *Bates*, this court held that the officer's request during a traffic stop that the defendant pull a bag out from under a car seat was impermissible because the officer did not have adequate officer safety concerns. In *Amaya*, this court held that an officer's question to a passenger defendant about whether she had any weapons in her bag was permissible *because* he had legitimate officer safety concerns. In *Hoskinson*, this court held that a routine action to protect officer safety was impermissible; the officer must have a particularized suspicion of danger. Those cases show that officer safety inquiries are not "related to" the processing of all noncriminal traffic stops. Only if the totality of the circumstances objectively establishes that the officer has an independent, particularized concern may he or she inquire about weapons.

To the extent that the state claims that questions about weapons during a traffic stop are "reasonable" because they are brief and minimally intrusive, this

court has already rejected a similar argument in *Rodgers/Kirkeby* that brief questions during a traffic stop are only a "*de minimis*" infringement on a person's liberty.

Furthermore, questions about weapons during a noncriminal traffic stop are not "minimally intrusive," because they implicate several criminal offenses, thus changing the character of the stop from a noncriminal encounter to a possible criminal investigation. The question often serves as the first step in a "fishing expedition" that diverts the course of the stop from its noncriminal purpose. That heightens the degree of tension and danger for both parties.

Questions about weapons do not "serve to protect officer safety" because they do not necessarily (or even likely) yield the desired information. If the person denies possessing any weapons, the officer must take him at his word or conduct additional investigation, further delaying the processing of the stop. Unlike a patdown, which provides relatively reliable and accurate information about weapons possession, weapons inquiries are open-ended and uncertain.

Finally, weapons inquires implicate a citizen's Second Amendment and Article I, section 27, right to bear arms.

This court should not change current Article I, section 9, case law to allow weapons inquires during a noncriminal traffic stop that delay and hence further restrict a citizen's liberty without "reasonable suspicion, based upon

specific and articulable facts, that the citizen might pose an immediate threat of serious physical injury to the officer or to others then present."

ARGUMENT[1]

Defendant agrees with the state that "both Article I, section 9, and Oregon's statutes require that officers have a legal justification for temporarily detaining someone and that the officer's activities during that detention 'be reasonably related to that investigation and reasonably necessary to effectuate it.'" Pet BOM at 14 (citing *State v. Watson*, 353 Or 768, 781, 305 P3d 94 (2013)); *see also* Pet BOM at 15 ("Article I, section 9, permits officers to engage in actions that are 'reasonably related' to the traffic violation investigation."); Pet BOM at 16 ("The first principle is that questions that are 'related to' processing the stop are permissible under Article I, section 9."). Where defendant parts company with the state is in its assertion that questions about weapons are "reasonably related" to the processing of a routine traffic stop or are "otherwise reasonable." Pet BOM at 18. Defendant maintains that questions about weapons are reasonable only when the officer has a reasonable suspicion that the person poses a threat to the safety of the officer or others.

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[1] Appellate counsel thanks law student Joel Duran for his research assistance in this case.

Here, defendant was lawfully stopped for the noncriminal traffic violation of crossing against a "Don't Walk" sign. After discussing the reason for the stop with defendant, the officer asked defendant whether he had any weapons on him, "which [he does] with all contacts on the street with pedestrians, just for -- obviously for officer safety reasons." Tr 10. Defendant admitted that he had a gun in his right front pocket and immediately separated his feet, leaned forward, and put his hands on the hood of the patrol vehicle.

When the officer asked defendant about weapons, he diverted the course of the traffic stop from the legitimate process of issuing a citation for a noncriminal violation to a criminal investigation about weapons. Because the officer did not have a reasonable suspicion that the defendant presented an officer safety concern, a fact not challenged by the state in this proceeding, the officer unlawfully extended the duration of the stop, and the trial court should have granted defendant's motion to suppress. Pet BOM at 6 n 2.

I. During a noncriminal traffic stop, police are limited to actions reasonably related to processing the stop and issuing a traffic citation.

Article I, section 9, of the Oregon Constitution protects individuals against unreasonable searches and seizures.[2] In *State v. Rodgers/Kirkeby*, 347

[2] Article I, section 9, provides:

Or 610, 227 P2d 695 (2010), this court addressed the operation of Article I, section 9, during a noncriminal traffic stop.

After explaining that "police inquiries during the course of a traffic stop (including requests to search a person or vehicle) are not searches and seizures and thus by themselves ordinarily do not implicate Article I, section 9," and that "police conduct that involves physical restraint or a show of authority that restricts an individual's freedom of movement typically does implicate Article I, section 9," this court discussed the unique circumstances of a traffic stop. *Rodgers/Kirkeby*, 347 Or at 622.

> "Nevertheless, in contrast to a person on the street, who may unilaterally end an officer-citizen encounter at any time, *the reality is that a motorist stopped for a traffic infraction is legally obligated to stop at an officer's direction*, *see* ORS 811.535 (failing to obey a police officer) and ORS 811.540 (fleeing or attempting to elude a police officer), and to interact with the officer, *see* ORS 807.570 (failure to carry or present license) and ORS 807.620 (giving false information to a police officer), *and therefore is not free unilaterally to end the encounter and leave whenever he or she chooses*."

> "Unreasonable searches and seizures. 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."

Id. at 622-23 (emphasis added). It is that legally-backed restriction of liberty that is key to the analysis.[3] Thus, the court concluded,

> "Police authority to detain a motorist dissipates when the investigation reasonably related to that traffic infraction, the identification of persons, and the issuance of a citation (if any) is completed or reasonably should be completed. *Other or further* conduct by the police, beyond that reasonably related to the traffic violation, must be justified on some basis other than the traffic violation."

Id. at 623 (emphasis added).

It is important to note that the *Rodgers/Kirkeby* analysis is not limited to police conduct that occurs after a traffic stop has ended or should have ended. It also applies to conduct that occurs during the stop. The use of the term "other" in addition to the term "further" in the quote above shows that not only additional police conduct after the stop has ended, but also other conduct not "reasonably related to the traffic violation" requires independent justification. Furthermore, the next paragraph explicitly references police conduct "during" a traffic stop:

> "One such exception [to the warrant and probable cause requirements] permits the police to stop and briefly detain motorists *for investigation of noncriminal traffic violations*. Police conduct **during** a noncriminal traffic stop does not further

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[3] The court's use of the term "nevertheless" indicates that the previously stated legal principles do not adequately address the circumstances of a traffic stop and that the subsequent statement is of great import. Webster's Third New Int'l Dictionary 1522 (unabridged ed 2002) (defining "nevertheless" as "in spite of that **:** NOTWITHSTANDING **:** YET").

> implicate Article I, section 9, **so long as the detention is limited and the police conduct is reasonably related to the investigation of the noncriminal traffic violation**. However, a police search of an individual or a vehicle **during** the investigation of a noncriminal traffic violation, without probable cause and either a warrant or an exception to the warrant requirement, violates Article I, section 9. Because police inquiries **during** a traffic stop are neither searches nor seizures, police inquiries in and of themselves require no justification and do not necessarily implicate Article I, section 9. However, police inquiries unrelated to a traffic violation, when combined with physical restraint or a police show of authority, may result in a restriction of personal freedom that violates Article I, section 9."

Id. at 624 (italics in original; bold added).

In a footnote, this court noted that the Article I, section 9, restriction of movement in both of the cases at issue occurred after the officers had completed the traffic infraction investigations and stated, "We express no opinion about the effect of unrelated police inquiries that occur during the course of the traffic violation investigation *and that do not result in any further restriction of movement of the individual*." *Id*. at 627 n 5 (emphasis added). Logically speaking, any unrelated police inquiry that occurs during the time when a person is not allowed to leave results in further restriction of movement of the individual, unless it occurs during an "unavoidable lull." Presumably, that footnote reserves decision on the "unavoidable lull" situation.

To understand where police questioning falls in the analysis, it is necessary to look at the application of the rule to the facts of each case. The court explained that "police inquiries unrelated to a traffic violation, when

combined with physical restraint or a police show of authority, may result in a restriction of personal freedom that violates Article I, section 9." *Id*. at 624.

In *Rodgers*, the defendant was stopped for driving with a burned out license plate, but the officer questioned him about a container of blue liquid and a metallic container in the car that the officer suspected was associated with the manufacture of methamphetamine. This court emphasized that the unrelated inquiries occurred after the officer had "completed the investigation reasonably related to the traffic infraction and issuance of the citation," when he no longer had authority to hold the defendant. *Id*. at 626. Yet the defendant was not told that he was free to leave, and given the positioning of the two officers on either side of the car, the defendant "had no way of knowing that [the officer's] questions and request to search the car were not part of the traffic investigation and that his cooperation in [the officer's] investigation was not required to continue." *Id*. This court concluded that

> "Under the totality of the circumstances, we conclude that [the first officer's] position at the driver-side window and [the second officer's] presence on the passenger side of the car was a sufficient 'show of authority' that, in combination with the unrelated questions concerning the items in the car and the request to search the car, resulted in a significant restriction of defendant's freedom of movement."

Id. at 627. Notably, because the justification for the traffic stop had ended (in the sense that the officer no longer had lawful authority to hold the defendant), this court relied on the physical positioning of the officers and the fact that they

did not tell the defendant that he was free to leave for the show of authority that, in combination with the unrelated inquires, violated the defendant's Article I, section 9, rights. Presumably, if the unrelated inquiries had occurred *during* the traffic stop, the traffic stop itself (with its legally imposed restriction on the defendant's liberty) would provide the requisite "show of authority."

In *Kirkeby*, the defendant was stopped for driving with a suspended license. *Id*. at 615. The officer became concerned for his safety when the defendant got out of his vehicle to meet the officer, despite the fact that the officer knew the defendant and had never had any officer safety issues with him in the past and the defendant was cooperative and non-threatening during this encounter. After being told the reason for the stop, the defendant handed the officer his driver's license, at which point the officer had all the information he needed to issue a traffic citation. However, the officer testified that "he probably did not have all the information that he needed because he did not have the vehicle registration and proof of insurance." *Id*. at 615-16. Yet, instead of asking for that information, the officer asked the defendant whether he had any weapons on his person or in the vehicle.[4] *Id*. at 616. When the defendant stated that he did not have any weapons, the officer asked for a series

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[4] This court did not address whether the officer's question about weapons constituted an unlawful extension of the traffic stop, because the defendant did not make that argument on appeal. *Rodgers*/*Kirkeby*, 347 Or at 619 n 2, 627-28.

of consents to which the defendant agreed, including consent to conduct a patdown, to examine each of the items that he had felt in the defendant's pockets, and to open a small container which turned out to contain methamphetamine. The deputy testified that the defendant was not free to leave during that time. *Id*.

After summarizing those facts, this court concluded:

> "Based on the totality of the circumstances, *we conclude that the deputy's show of authority that accompanied his request that defendant consent* to a patdown and subsequent request that defendant consent to an examination of the contents of defendant's pockets occurred after the point that defendant should have been issued a citation or sent on his way. Because the deputy's further detention of defendant was a significant limitation on defendant's freedom of movement and was not justified by reasonable suspicion of criminal activity, defendant Kirkeby was unlawfully seized in violation of Article I, section 9."

Id. at 628 (emphasis added). Notably, the only "show of authority" by the officer was the traffic stop situation and the officer's inquires that were unrelated to processing the traffic citation. The officer testified that the defendant was not free to leave (presumably because the officer believed he needed the vehicle registration and proof of insurance), but that was only conveyed to the defendant by the fact that he was in the middle of a traffic stop.

In both *Rodgers* and *Kirkeby*, the "show of authority" that restricted the defendant's liberty and made the unrelated questioning that extended the duration of the detention an Article I, section 9, violation, was the fact that the

defendant reasonably believed he was not free to leave. *See State v. Backstrand*, 354 Or 392, 401, 313 P3d 1084 (2013) (defining a "show of authority" as "a reasonable perception that an officer is exercising his or her official authority to restrain," and explaining that "[e]xplicitly or implicitly, an officer must convey to the person with whom he is dealing, either by word, action, or both, that the person is not free to terminate the encounter or otherwise go about his or her ordinary affairs."). In the case of *Rodgers*, it was the facts that the defendant had not been told that he was free to leave and the officer's conduct confirming that. In the case of *Kirkeby*, it was the fact that the defendant was embroiled in a traffic stop. In both cases, the traffic stop could and should have been over, but because that information was not conveyed to either of the defendants, their liberty was restricted by the unrelated questioning.

Subsequent opinions of this court reiterate the analysis from *Rodgers/Kirkeby*. In *Watson*, this court stated that

> "both Oregon statutes and this court's Article I, section 9, case law require that law enforcement officers have a justification for temporarily seizing or stopping a person to conduct an investigation, and that *the officer's activities be reasonably related to that investigation and reasonably necessary to effectuate it*. If the officer's activities exceed those limits, then there must be an independent constitutional justification for those activities."

Watson, 353 Or at 781 (emphasis added).

In *State v. Backstrand*, 354 Or 392, 406, 313 P3d 1084 (2013), this court again recognized the significance of the fact that "a person detained for a traffic offense has a legal obligation to stop at the officer's direction and remain," in explaining the importance of context in determining whether verbal inquires constitute a seizure. *Id*. at 406. The court explained that the questions and request for consent in *Rodgers/Kirkeby* resulted in an unlawful seizure because,

> "From the standpoint of a reasonable person in the defendants' position, when the officers in both cases, after completing the investigation of the traffic offenses, asked unrelated questions and asked for consent to search, but did not tell the defendants that they were free to leave, those verbal inquiries communicated a continuation of the traffic stop, even though the officers no longer had authority to detain. *In that distinctive context, the verbal inquiries alone continued the seizures*, and continuation of the seizures was unlawful."

Backstrand, 354 Or at 407 (citations omitted) (emphasis added). And as explained above, whether the officer's unrelated inquires occur during or at the end of an otherwise valid traffic stop is immaterial. It is a logical necessity that if they do not occur during an unavoidable lull, they prolong the stop and "result in [a] further restriction of movement of the individual." *Rodgers/Kirkeby*, 347 Or at 627 n 5.

Thus, the state's assertion that "questions that are 'related to' processing the stop are permissible under Article I, section 9," and the converse that questions not related to processing the stop require independent justification,

are well-supported by this court's case law. Pet BOM at 16; *see Rodgers/Kirkeby*, 347 Or at 620 ("Before 1997, this court, in a series of cases, held that [ORS 810.410] not only described what an officer could do respecting a traffic stop; it also indicated what the officer could not do."). However, the state's next assertion, that inquiries about weapons are reasonably related to the processing of a routine traffic stop or otherwise reasonable is incorrect.

II. Inquiries about weapons are not "related to" the processing of a noncriminal traffic stop, nor are they "reasonable" without independent justification under Article I, section 9.

This court has always required reasonable suspicion that a person poses a threat to the safety of the officer or others before the officer may take action designed to address that concern.

A. Officer safety actions, including police inquires, always have required independent justification.

In *State v. Bates*, 304 Or 519, 747 P2d 991 (1987), this court held that

> "Article I, section 9, of the Oregon Constitution does not forbid an officer to take reasonable steps to protect himself or others if, during the course of a lawful encounter with a citizen, the officer develops reasonable suspicion, based upon specific and articulable facts, that the citizen might pose an immediate threat of serious physical injury to the officer or to others then present."

Id. at 524.

In that case, police stopped the defendant at 4:40 a.m. in a "high crime residential area" for the traffic infraction of "excessive vehicle emissions." *Id*. at 521. The defendant provided a valid Washington driver's license. When one

of the officers commented on an object on the floorboard between the defendant's feet, the other officer shined his flashlight in that area and saw the end of what appeared to be some kind of bag. He then "asked [the defendant] if he would reach down and very cautiously pull that item from between his feet, so I could see what it was." *Id*. The defendant reached under the seat and remained in that position while the officer "repeatedly asked him" to pull the object into view. After 10 seconds, the officer drew his revolver, ordered the defendant out of the vehicle, searched the bag, and then searched the vehicle. *Id*. at 521-22.

After explaining why most of the officer's stated reasons for concern were not reasonable, this court identified the determinative issue as:

> "May officers, in the course of a necessarily brief encounter with a driver for the purpose of issuing a traffic citation for a Class D traffic infraction and *without having any specific and articulable facts justifying their apprehension*, constitutionally require the driver to remove and open a bag from beneath the driver's seat of the car?"

Id. at 527 (emphasis added). It answered that question in the negative, stating, "Although the police are entitled to some leeway in taking protective measures, we must draw the line at some point," and holding that "The officers violated defendant's constitutional rights when they instructed him to slide the bag into view." *Id*.

Bates indicates that officer inquiries designed to ensure the safety of an officer during a traffic stop must be supported by "specific and articulable facts justifying [the officers'] apprehension." That position was reiterated in *State v. Amaya*, 336 Or 616, 89 P3d 1163 (2004).

In *Amaya*, the officer stopped a van for the traffic offenses of having a burned-out license plate light and making an unsignaled left turn at 1:00 a.m. in an area of Beaverton known for drug dealing. *Id*. at 618. His limited vision into the van and the nervousness of the driver and the passenger defendant caused the officer to be concerned for his safety. The officer checked the license of the driver and learned that it was suspended. *Id*. During the stop, the officer asked for and received consent from the driver to search the van. *Id*. at 619. He then asked the driver and the defendant to step out of the van. Although the officer encouraged the defendant to leave her bag in the van, she took it with her, placed it at her feet, and covered it with her trench coat. Those actions caused the officer to be concerned for his safety and suspect that the defendant might have a weapon or drugs in the bag. He asked the defendant what she had in the bag. She said that she had a gun in the bag and that she did not have a concealed weapon permit, so the officer searched the bag and found a gun. *Id*. at 619.

After explaining what was not at issue in the case, this court considered "whether [the officer's] questioning of defendant about the contents of her bag

constituted an unlawful seizure."[5] *Id*. at 630. However, it concluded that it need not decide that issue, because "[e]ven assuming that [the officer's] questions to defendant temporarily restrained her liberty and thus constituted a 'seizure' of defendant, those questions were permissible under Article I, section 9, because they were based on [the officer's] reasonable suspicion that defendant posed an immediate threat of serious injury to him." *Id*. at 631. It then explained why the circumstances of that case satisfied the officer safety requirements of *Bates*. *Id*. at 631-33.

The court concluded:

> "For the foregoing reasons, *we hold that [the officer's] questions about the bag's contents were based on a reasonable suspicion that defendant posed an immediate threat of serious injury to him and therefore did not violate defendant's rights under Article I, section 9*. Further, after defendant responded that she had a weapon in her bag and that she did not have a concealed weapon permit, the officers' subsequent search of the bag and seizure of the weapon were supported by probable cause to believe that defendant had committed a crime."

Id. at 633-34 (emphasis added). The fact that in *Amaya*, this court addressed whether officer safety concerns justified any potential seizure in that case shows that such justification is *always* necessary.

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[5] Because the defendant was a passenger in the vehicle and not the driver, she was only physically stopped, but she was not "seized" in a manner that implicated Article I, section 9. *Amaya*, 336 Or at 630; *see also State v. Thompkin*, 341 Or 368, 377, 143 P3d 530 (2006) (same).

Bates and *Amaya* show that questions about weapons are not part and parcel of a traffic stop.[6] Both cases involved traffic stops in which this court held that under Article I, section 9, officer safety investigations must be independently justified. The state has not shown why *Bates* and *Amaya* were wrongly decided or should be overturned.

The state's suggestion that questions about weapons should be allowed as a matter of routine is also contrary to this court's decision in *State v. Hoskinson*, 320 Or 83, 879 P2d 180 (1994). In *Hoskinson*, the officer arrested the defendant for driving while suspended. *Id*. at 85. He handcuffed the defendant, conducted a patdown search, and seized the defendant's wallet. He then searched the wallet and found methamphetamine. He testified that "I've – it's normal practice for myself to obtain the wallet and see if there are any weapons or any indications of things that would be used to escape that would alert myself to search the subject more thoroughly and extensively for additional means of escape." *Id*. This court held that such a "normal practice," without

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[6] In *Amaya*, this court noted that ORS 810.410(3)(d), which provides that during a traffic stop, a police officer "[m]ay make an inquiry to ensure the safety of the officer, the person stopped or other persons present, including an inquiry regarding the presence of weapons," authorizes police to make officer safety inquiries without requiring reasonable suspicion of an immediate threat to officer safety. *Amaya*, 336 Or at 623-24. However, it also recognized that "an officer's actions, even if authorized by ORS 810.410(3)(d), nevertheless must comply with Article I, section 9." *Id*. at 625.

any particularized suspicion of danger, cannot justify a search on officer safety grounds. *Id*. at 87-88.

The only time that this court has allowed an officer safety action as a matter of course is in the context of a search incident to arrest. In *State v. Owens*, 302 Or 196, 729 P2d 524 (1986), this court noted that under Article I, section 9, "a pat-down or limited search for weapons to protect the officer or to prevent escape would be justified whenever a person is taken into custody." *Id*. at 200. That is because it is always dangerous to allow a person who has been arrested for a crime and is in custody to possess a weapon, and a patdown search is the most limited and direct means to ensure that does not occur. And notably, any further officer safety actions in that situation must be independently justified by the standard reasonable suspicion of particularized danger. *Hoskinson*, 320 Or at 87-88. As explained below, questions about weapons do not reliably achieve the same justified goals.

In *State v. Rudder*, 347 Or 14, 217 P3d 1064 (2009), this court again emphasized the necessity that the officer safety action be tailored to the need, rather than based on generalized concerns. In that case, an officer stopped the defendant based on a reasonable suspicion that he had been involved in a nearby burglary. When the defendant would not hold still for a patdown search, the officer handcuffed the defendant and looked in his pocket, where he discovered methamphetamine. *Id*. at 16-17. This court held that the attempted

patdown and hand-cuffing of the defendant were appropriate officer safety measures, but the search of the defendant's pocket before completing the patdown was not. *Id*. at 24-25.

In doing so, this court made two important points that are relevant here. First, it held that "The question that courts must confront in these circumstances is whether the *particular* step taken by the police was one that was reasonable under the *particular* circumstances, not whether that step was within the range of reasonable responses to officer safety concerns *in general*." *Id*. at 22 (emphasis in original). Thus, once again this court rejected a "one-size-fits-all" analysis. Second, it explained that officer safety concerns do not trump an individual's constitutional rights:

> "We emphasize that the concept of reasonableness in this context is not biased in favor of the concerns of the police. Although this court is sensitive to the dangers inherent in police work and to the difficulties inherent in officer safety decisions, *that does not and cannot mean that we regard those concerns as having greater weight than the constitutional right of all persons*—even those who have been stopped on suspicion of criminal activity—to be free of unreasonable searches and seizures. If that constitutional right is to retain any vitality in the context of police stops, police officers must understand that the officer safety doctrine does not excuse protective measures that are disproportionate to any threat that the officers reasonably perceive."

Id. at 23. The state's invitation to create a general rule that questions about weapons are "related to" the processing of all traffic stops flies in the face of all of this court's officer safety case law.

B. Weapons inquiries are not "reasonable" in the absence of any officer safety concerns.

The state argues alternatively that weapons inquiries are reasonable under Article I, section 9, because they are "brief, minimally intrusive, and serve to protect officer safety." Pet BOM at 22.

That is similar to the "*de minimis*" argument that the state made and this court rejected in *Rodgers/Kirkeby*. When summarizing the parties' arguments, this court explained:

> "Focusing on the scope and length of the questioning at issue, the state proposes a rule that police questioning that is unrelated to a traffic stop, or a request for consent to search during a lawful traffic stop, will not constitute an unconstitutional seizure if that questioning creates only a *de minimis* delay during an otherwise lawful stop."

Rodgers/Kirkeby, 347 Or at 618. The state argued that in *Rodgers*, the two questions that the officer asked the defendant were of the same character as questions that he could have asked during a mere encounter on the street and they "took only a few moments and caused only a *de minimis* delay." *Id*. In *Kirkeby*, it argued that "the officer's single question about whether defendant had any weapons, followed by a request for consent to conduct a patdown and then a search," took four to five minutes and could have been asked of any person walking down the street. *Id*. at 619. However, as explained above, this court held in both cases that the officer's actions constituted an unreasonable seizure.

In a footnote, this court explicitly rejected the state's argument that this court's decision in *State v. Jackson*, 296 Or 430, 677 P2d 21 (1984), stands for the rule that a *de minimis* delay during a traffic stop does not implicate Article I, section 9. *Rodgers/Kirkeby*, 347 Or at 624 n 4. It explained,

> "The key of that holding was not the duration of the stop and detention, but the fact that the officer observed evidence of a crime from a lawful vantage point outside the car before conducting further investigation. Unlike the circumstances in these cases, the officer in *Jackson did not question the defendant about anything unrelated to the reason for the stop until he observed evidence of criminal activity, as required under Article I, section 9*."

Id. (emphasis added).

Thus, the fact that any delay and resulting restriction on the defendant's liberty is "brief" and "minimally intrusive" does not excuse the need for independent justification under Article I, section 9. *See State v. Rhodes*, 315 Or 191, 196-97, 843 P2d 927 (1992) (holding that officer's act of opening the door of the defendant's pickup from three or four inches to completely open, thus exposing the contents of the inside of the vehicle, was a "search" under Article I, section 9).

The state suggests that this court look to the Fourth Amendment test employed by various circuits of whether the inquiry about weapons "measurably extends" the traffic stop. However, that test is not appropriate for an Article I, section 9, analysis. First, the test is unclear and unworkable. Does "measurably extend" mean that the delay can be measured by a stopwatch? Or

does it mean a delay of over 30 minutes? Does it matter whether the person stopped was on his way to a meeting or out for a country drive?

But more importantly, that test is born out of the Fourth Amendment balancing of the government's interest in law enforcement against an individual's constitutional rights. *See Delaware v. Prouse*, 440 US 648, 653-54, 99 S Ct 1391, 59 L Ed 2d 660 (1979) ("the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests"). Article I, section 9, is a rights-based analysis, which focuses on individual rights. *See State v. Hall*, 339 Or 7, 24, 115 P3d 908 (2005) (explaining that the Oregon exclusionary rule serves to vindicate a defendant's personal rights), *cited in State v. Unger*, 356 Or 59, 81-82, 333 P3d 1009 (2014); *State v. Campbell*, 306 Or 157, 164, 759 P2d 1040 (1988) ("the privacy protected by Article I, section 9, is not the privacy that one reasonably *expects* but the privacy to which one has a *right*"), *quoted in State v. Howard/Dawson*, 342 Or 635, 643, 157 P3d 1189 (2007). Under Article I, section 9, a citizen has the right not to have his liberty restricted further than necessary to process the traffic stop, unless the further detention is independently justified. *Rodgers/Kirkeby*, 347 Or at 623.

Furthermore, defendant challenges the state's claims that weapons inquiries are minimally intrusive and serve to protect officer safety. Given the realities of such inquires and their consequences, the analysis is not that simple.

C. Weapons inquiries launch a criminal investigation, changing the character of a noncriminal traffic stop.

Traffic stops in Oregon are designed to be noncriminal encounters between police officers and citizens. In *State v. Porter*, 312 Or 112, 119-20, 817 P2d 1306 (1991), this court explained:

> "From [the legislative] history [of ORS 810.410], we glean that the legislature sought to keep traffic infractions decriminalized and to reduce the attendant law enforcement methods as much as necessary to accomplish that goal. The legislature intended to satisfy the concerns expressed in *Brown v. Multnomah County Dist. Ct.*, [280 Or 95, 570 P2d 52 (1977)], and thus to permit only minimal intrusions on Oregon drivers stopped for traffic infractions."

Id. at 119-20.

An inquiry about weapons changes the character of a traffic stop from a relatively benign noncriminal encounter into an adversarial criminal investigation. That is so for multiple reasons. First, the possession of a weapon implicates several criminal statutes. For example, ORS 166.250(a)-(c)[7] provides for a multitude of circumstances in which it is unlawful for a person to possess a firearm, including knowingly: carrying any firearm concealed upon

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[7] See Appendix at APP 1-3 for full text of ORS 166.250 and other weapons statutes.

the person; possessing a handgun that is concealed and readily accessible to the person within any vehicle; or possessing a firearm after being convicted of a felony. Under ORS 166.240(1) it is unlawful to "carr[y] concealed upon the person any knife having a blade that projects or swings into position by force of a spring or by centrifugal force, any dirk, dagger, ice pick, slungshot, metal knuckles, or any similar instrument[.]"

When an officer asks a person whether he or she possesses any weapons, it is most likely because the officer does not already see a weapon in plain view. Thus, any weapon the person might have would be concealed, which is a crime unless the person has a concealed weapon permit or meets some other exception to the application of ORS 166.250. ORS 166.260. Even if the officer's motive for inquiring about weapons is to ensure his safety, to an ordinary citizen, the question is equivalent to being asked, for example, whether he possesses illegal drugs or has committed a bank robbery.

At that point, the encounter has taken on the character of a criminal investigation, with the attendant possibility of arrest and incarceration. It is no longer a brief intrusion into the citizen's day to enforce a noncriminal violation; it has transformed into an inquiry into criminal conduct, making it a dangerous situation for both the citizen and the officer. If the citizen has committed a crime, the officer's questions make it more likely that the citizen will take action to avoid detection or apprehension. *See Arizona v. Johnson*, 555 US 323,

331, 129 S Ct 781, 172 L Ed 2d 694 (2009) ("the risk of a violent encounter in a traffic-stop setting 'stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop'") (quoting *Maryland v. Wilson*, 519 US 408, 414, 117 S Ct 882, 137 L Ed 2d 41 (1997)). If the citizen has not committed any crime, he may still feel alarm at the officer's inquires.

And even if the citizen does not view the question as an inquiry into criminal activity, he or she is still put on alert that the officer considers the encounter to be potentially dangerous, which in turn, elevates the citizen's apprehension about the gravity of the encounter. The encounter has been transformed from a simple traffic citation situation to one in which the citizen is concerned about further alarming the officer and possibly provoking a physical response on the officer's part.

Given the myriad implications of a weapons inquiry, it is not a police action that is categorically "related to" a noncriminal traffic stop. Nor is it a minimally intrusive action that is "reasonable" without independent justification.

D. Weapons inquires do not ensure officer safety.

The state claims that weapons inquiries are reasonably related to processing a traffic stop because traffic stops are "inherently dangerous." Pet BOM at 19-20. However, the inherent dangerousness of traffic stops has been

called into question by recent studies and analysis. *See Amicus* BOM, Section I.

Furthermore, that type of generalized statement does not take into account the widely differing character of traffic stops. Notably, most of the cases that the state cites in support of that proposition involve traffic stops of vehicles. *See*, *e.g.*, *Arizona v. Johnson*, 555 US 323, 330, 129 S Ct 781, 172 L Ed 2d 694 (2009) (noting that "the Court has recognized that traffic stops are 'especially fraught with danger to police officers,'" and quoting *Michigan v. Long*, 463 US 1032, 1047, 103 S Ct 3469, 77 L Ed 2d 1201 (1983), which "recognized that investigative detentions involving suspects in vehicles are especially fraught with danger to police officers.")). In *Pennsylvania v. Mimms*, 434 US 106, 98 S Ct 330, 54 L Ed 2d 331 (1977), the Supreme Court held that police may order persons out of an automobile during a stop for a traffic violation, and may frisk those persons for weapons if there is a reasonable belief that they are armed and dangerous, resting its decision in part on the "inordinate risk confronting an officer as he approaches a person seated in an automobile." *Id*. at 110. Thus, the Supreme Court recognizes a safety difference between encountering a person in a vehicle and encountering a person on the street. Notably, the Court still requires a reasonable belief that the person is armed and dangerous before allowing an officer safety frisk. *Id*.

The State cites *Maryland v. Buie*, 494 US 325, 110 S Ct 1093, 108 L Ed 2d 276 (1990), for the proposition that the Court recognized "the danger that inheres in on-the-street encounters and the need for police to act quickly for their own safety." Pet BOM at 19-20 n 6. However, in context, the Court followed that with the admonition that

> "despite the danger that inheres in on-the-street encounters and the need for police to act quickly for their own safety, the Court in *Terry* [*v. Ohio*, 392 US 1, 88 S Ct 1868, 20 L Ed 2d 889 (1968)], did not adopt a bright-line rule authorizing frisks for weapons in all confrontational encounters. Even in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted."

Buie, 494 US at 334. Given the different officer safety considerations in different situations, an across-the-board, one-size-fits-all officer safety rule for traffic stops is not appropriate. The current law, which allows officer safety inquiries when reasonably necessary, better serves the interests of this state.

In addition, a weapons inquiry without any officer safety concerns is not "reasonable," because it does not "serve to protect officer safety." First, if the officer does not have any particularized officer safety concerns, there is no need for the inquiry.

Second, a weapons inquiry provides only limited information, whose value is dependent on the officer's belief in the veracity of the citizen. A patdown tells the officer whether the person is carrying an object that could be a

weapon – the requisite information is obtained by the police action. But when an officer makes a verbal inquiry about the presence of weapons, he could receive a multitude of potential answers, each of which could be interpreted differently.

It is true that if the person truthfully admits to having a weapon, the officer has more information than he started with. But just knowing that a person has a weapon somewhere on his person is not that helpful. Knowing where the weapon is, whether the person has a permit to carry it, or whether the person is committing a crime all require further investigation.

If the person denies having a weapon, the officer must take the person at his word or ask to verify the statement (which is a common occurrence). *See*, *e.g.*, *Rodgers/Kirkeby*, 347 Or at 616 (officer in *Kirkeby* followed defendant's denial of weapons possession with request for consent to conduct a patdown). If the officer believes the person, he may be able to relax, but the verbal response does not provide the certainty of a patdown. If the officer seeks to verify the statement, he has embarked down a separate line of investigation and significantly deviated from processing the traffic stop.

If the officer receives an ambiguous answer, he has no further information at all and most certainly will want to obtain more, again requiring further investigation. Those examples show that an inquiry about weapons is not a "minimal intrusion" into a person's privacy. It initiates an investigation, if

not a fishing expedition, into an area completely unrelated to the traffic violation that provided the justification for the stop.

If this court were to accept the state's invitation to make a weapons inquiry part of a normal noncriminal traffic stop, it would beg the question: How far is the officer allowed to go? Must he accept the citizen's answer, or is he allowed to "check" for himself, entailing a search, which is a significant intrusion into a person's privacy rights, simply because the person committed a noncriminal traffic infraction.[8]

In short, by changing the law to allow officer safety inquires that further restrict a person's liberty, this court would be changing the character of a

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[8] The legislative history of the 1997 amendments to ORS 810.410 allowing weapons inquiries during traffic stops shows that the legislature recognized the problem. The original purpose of the amendment was merely to allow an officer to ask ("inquire") about weapons during the course of a traffic stop and only when the officer had a "degree of concern" about the motorist. Tape Recording, House Committee on Judiciary, Subcommittee on Criminal Law, HB 2433, Feb 13, 1997, Tape 25 A, at 52, 130, 210 (statement of Marion County Deputy District Attorney Stephen Dingle). According to Mr. Dingle, there was no intention to turn the traffic stop into a "broad inquiry." *Id*. at 237. The purpose was to allow the stopping officer to ask about weapons. *Id*. at 210, 371. In response to a question from Representative Prozanski, Mr. Dingle acknowledged that if the motorist said he did not have a weapon, the officer would have to accept the answer. *Id*. at 107. *See also*, Tape Recording, House Committee on Judiciary, Subcommittee on Criminal Law, HB 2233, February 13, 1997, Tape 24 B at 152 (statement of Portland Police Lieutenant Michael Bell: if the motorist says he does not have a weapon, "that's the end of it."); Tape Recording, House Committee on Judiciary, Subcommittee on Criminal Law, Feb 13, 1997, Tape 24 B at 247 (statement of Russ Spencer, representing Oregon Sheriff's Association: the bill does not contemplate or condone a "fishing expedition").

noncriminal traffic stop to that of a heightened criminal investigation, which is contrary to long-established case law and would not serve the interests of police officers and the government.[9]

E. Weapons inquiries tread on a person's Second Amendment and Article I, section 27, rights.

Article I, section 27, of the Oregon Constitution provides that: "The people shall have the right to bear arms for the defence (sic) of themselves, and the State, but the Military shall be kept in strict subordination to the civil power[.]" The Second Amendment to the federal constitution provides that "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

This court has stated that "as a general proposition, individuals in Oregon have a right to possess firearms for defense of self and property, under Article I, section 27, of the Oregon Constitution." *Willis v. Winters*, 350 Or 299, 316 n 1, 253 P3d 1058 (2011). However, the right to bear arms is not an absolute right, and the legislature has wide latitude to enact specific regulations restricting the possession and use of weapons to promote public safety. *State v. Christian*, 354 Or 22, 33, 307 P3d 429 (2013). Yet those regulations should not unduly burden a citizen's right Article I, section 27 rights: "We have consistently

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[9] In addition, such a change in the law would negatively impact minorities. Studies show that racial minorities are disproportionately targeted by police in conducting traffic stops. *See Amicus* BOM, section II.

acknowledged the legislature's authority to enact reasonable regulations to promote public safety *as long as the enactment does not unduly frustrate the individual right to bear arms for the purpose of self-defense* as guaranteed by Article I, section 27." *Christian*, 354 Or at 33 (emphasis added).

An inquiry about weapons during a routine noncriminal traffic stop without the requisite officer safety concerns unduly frustrates a citizen's right to bear arms. As explained above, it is essentially an inquiry about criminal activity that further restricts a person's liberty (assuming it does not occur during an unavoidable lull) without reasonable suspicion that the person has committed a crime. *See United States v. Black*, 707 F3d 531, 540 (4th Cir 2013) (explaining that where possession of a firearm is permitted, "the exercise of this right, without more, cannot justify an investigatory detention"); *United States v. King*, 990 F2d 1552, 1559 (10th Cir1993) ("we cannot accept the government's attempt to justify the seizure of [d]efendants based on * * * safety concerns due to the presence of the pistol."). At best, it is a question that puts the citizen on notice that the officer views him as a threat and may take action that is detrimental to the citizen in response to that belief. Under those circumstances, a citizen is likely to be chilled from exercising his right to bear arms in a lawful manner, yet still feel the need to protect himself from government officers. Protection from the government is the purpose of the

Second Amendment and Article I, section 27. Allowing inquires about weapons during every noncriminal traffic stop would frustrate that purpose.

III. Because no officer safety concerns justified the officer's delay of the noncriminal traffic stop in this case, the trial court erred in denying defendant's motion to suppress.

In this case, around noon at a busy intersection in southeast Portland, Officer Borchers saw defendant cross against a "Don't Walk" sign. Tr 7-8, 35-36. He turned his car around and approached defendant, who had already crossed the street and was sitting at a bus stop. Tr 8-9, 26. When defendant saw the officer approaching, he got up and began to walk away. Tr 9. The officer honked his horn and motioned for defendant to come back to where the officer was. Tr 9, 40.

The officer got out of his car, introduced himself to defendant, and explained why he had stopped him. He and defendant discussed why defendant had committed the violation, and then the officer "just asked [defendant] if he had any weapons on him, which I do with all contacts on the street with pedestrians, just for -- obviously for officer safety reasons." Tr 10. Defendant sighed, closed his eyes, and said "Yes." The officer asked what it was and defendant said, "I have a gun and it's in his [sic] right front pocket." Without the officer saying anything, defendant immediately separated his feet, leaned forward, and put his hands on the hood of the patrol vehicle. Tr 10.

Defendant was wearing a puffy black jacket over a hoodie sweatshirt, very large oversized baggy gray pants, and white tennis shoes, all of which the officer thought might indicate gang affiliation. Tr 11, 42-43. The stop occurred in a high crime area where gang activity was common. Tr 11.

Immediately after defendant put his hands on the patrol car, the officer put defendant in handcuffs, for officer safety purposes. By that time, a handful of people gathered around, which increased the officer's concern. Tr 10-14. He learned that defendant did not have a license for the weapon. Tr 12, 41-42, 44. The officer patted defendant down and confirmed the presence of the firearm, but left the gun in defendant's pocket because defendant was in restraints, he did not want to announce to onlookers that defendant had a weapon, and he did not want to leave it sitting on the hood of the car unattended or stuck in the belt of his pants. Tr 15. Backup never arrived, so eventually, the officer seized the weapon, put defendant in the back of the patrol car, and secured the weapon in the trunk of the patrol car. Tr 19. Defendant was charged with unlawful possession of a firearm, ORS 166.250(1)(a).

The Court of Appeals held that the circumstances known to the officer at the time that he asked defendant about weapons did not rise to the level of an officer safety concern. The state does not challenge that decision on review. Pet BOM at 6 n 2.

Because the officer's inquiry about weapons delayed the officer from processing the noncriminal traffic violation and it was not justified by reasonable suspicion of officer safety concerns, the unrelated question violated defendant's Article I, section 9, rights. Consequently, the trial court should have suppressed the subsequently obtained evidence, including the gun and defendant's statements.[10]

CONCLUSION

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

Respectfully submitted,

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ESigned

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[10] The state has not argued that the officer did not exploit the prior illegality to obtain the challenged evidence. Its position is that no prior illegality occurred. Consequently, the exploitation issue is not before this court. Even if it were, the state has not met it burden under that analysis. *See State v. Unger*, 356 Or 59, 86-87, 333 P3d 1009 (2014) (summarizing analysis). All of the challenged evidence flowed directly from the officer's illegal question. *Id*. at 86.

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

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,885 words.

Type size

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

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Respondent's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on February 13, 2015.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Respondent's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, attorney for Petitioner-Respondent and Jordan R. Silk, OSB #105031, attorneys for *Amici Curiae* Oregon Justice Resource Center.

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