IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review,	Marion County Circuit Court No. 09C42443
v.	CA A144192
MARK LAWRENCE UNGER, Defendant-Appellant, Respondent on Review.	SC S060888

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, MARK LAWRENCE UNGER

Petition to review the decision of the Court of Appeals
on an appeal from a judgment
of the Circuit Court for Marion County
Honorable THOMAS M. HART, Judge

Opinion Filed: September 26, 2012
Author of Opinion: Judge Duncan
Concurring Judges: Presiding Judge Armstrong and Chief Judge Haselton

Continued. . .

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STATEMENT OF THE CASE

In this criminal case, the state petitioned this court to revisit the attenuation analysis articulated in State v. Hall, 339 Or 7 (2005), and to reverse the Court of Appeals' decision in this case. State v. Unger, 252 Or App 478 (2012).

The question presented is whether defendant's consent - - provided during an illegal trespass by law enforcement - - rendered that illegality an irrelevancy for purposes of Article I, section 9, of the Oregon Constitution. In raising that issue, the state acknowledges that Hall answers that question against it, but asks this court to overrule Hall. If this court were to overrule Hall in the manner in which the state requests, it will directly and indirectly overrule several opinions from this court, and conflict with several circuits and the United States Supreme Court.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

(1) Under federal and state constitutional law, does a person's voluntary consent to an officer's request to search negate the officer's illegal conduct?

Proposed Rule of Law. No, the United States Supreme Court, several circuit courts, state courts, and this court have held for decades that when the state seeks to introduce evidence that police obtained through a consent search conducted during an illegal search or seizure, the state must show that the consent was both, causally unconnected to or unaffected by the illegal search or seizure, and also, voluntary.

(2) How can police illegality causally affect the searched individual's decision to consent in a way that is different from the voluntariness analysis?

Proposed Rule of Law. If police trespass onto an individual's property, and during that illegality receive defendant's consent to enter defendant's house and

search other areas, the illegality gave the police the opportunity to ask for consent. That opportunity - - an opportunity that should have never existed if the police had followed the law - - causally affected the searched individual's decision to consent. Logically, voluntariness plays no part in that analysis.

FACT SUMMARY

The Court of Appeals stated the facts as follows.

> "On the morning of April 17, 2009, four officers went to defendant's residence to conduct a 'knock-and-talk.' The officers had received two reports of drug activity at the house, and they wanted to talk to defendant about the reports and obtain his consent to a search of his house. The officers did not have a warrant to search the house.
>
> "To reach defendant's house, the officers turned off a paved road, drove down a gravel road, and then drove down a dirt road. Defendant's house is a split-level house. The officers first went to defendant's front door, which is on the same level as the driveway. One officer, Cypert, knocked on defendant's front door, but no one answered. After waiting two to three minutes, two other officers, Jaroch and Scharmota, went to a door on the lower level of the house, also on the front of the house. They knocked, but again no one answered. After that, the fourth officer, Roberts, walked around the back of the defendant's house and knocked on a sliding glass door, which led to defendant's bedroom. Defendant, who had been asleep, answered the door. Roberts told defendant that the officers were at his house to investigate the complaints they had received, and Roberts asked for permission to enter the house. Defendant asked to put on a robe and then allowed Roberts and the three other officers, who had joined him at the back door, to enter.
>
> "Defendant led the officers from his bedroom, where his girlfriend was still in bed, into his kitchen. Roberts again told defendant that they were investigating complaints about drug activity and asked defendant it he would show them around the house. Defendant did.
>
> "On the lower level of defendant's house, Roberts saw a torn piece of a baggie, inside of which he saw white powder and some small crystals. Roberts left the house to conduct a field test on the baggie to determine whether, as he believe, it contained methamphetamine

residue.

"Cypert read defendant a 'consent to search' card. Defendant refused to sign the card and said he wanted to call his lawyer. According to Cypert, defendant gave the officers 'verbal consent to continue to look through the house,' but said 'that he would not sign the card because he viewed the card as being a legal document and he would not sign a legal document without first consulting with his attorney.' The officers continued to search defendant's house, and defendant called his attorney. After speaking with his attorney, defendant told the officers that '[h]is attorney wanted everyone out of the house.' Cypert told defendant that he knew that defendant had spoken with his attorney, but that 'it was ultimately up to [defendant] to make [the] decision if he wanted [the officers] out of the house.' Defendant called his attorney a second time and, after the call, told the officers that he wanted them out of the house. At that point, Roberts informed everyone that the baggie had tested positive for methamphetamine, and the officers arrested defendant.

"The officers used information they had obtained during their search of the house to obtain a search warrant, which they executed later the same day. The execution of the warrant led to the discovery of other evidence of drug crimes.

"Defendant filed a motion to suppress the evidence obtained as a result of the officers' warrantless entry into his yard and search of his house, as well as the evidence obtained as a result of his arrest and the subsequent search of his home pursuant to the warrant. At the hearing on the motion, defendant argued that the officers violated his rights when they entered his backyard and that all evidence derived from the violation had to be suppressed, including the evidence that the officers obtained during their subsequent searches of the house.

"In response, the state argued that, even if the trial court found that the officers went to an illegal location by violating the curtilage and going to the back, they didn't witness anything illegal that drew their attention to the defendant.' Therefore, according to the state, 'there [was] no exploitation of the illegality.'

The trial court denied defendant's motion to suppress."

State v. Unger, 252 Or App 478, 479-481 (2012).

The court of appeals disagreed. The court of appeals, following State v. Hall, State v. Rodgers/Kirkeby, 347 Or 610, 629 (2010), State v. Tyler, 218 Or App 105 (2008), and State v. Ayles, 348 Or 622 (2010), concluded that

> "Thus, in this case, as in Hall and Ayles, the state's argument that the officers' trespass did not taint the defendant's consent because the officers did not discover anything as a result of their illegal conduct that prompted them to request defendant's consent and would have sought his consent regardless, is unavailing. Indeed, if the state's argument were correct, officers could break into an individual's home, sit inside and wait for the defendant to return home, and then ask for consent to search the home. Applying the state's proposed rule, the officer's illegal conduct would not taint the defendant's consent.
>
> "In sum, the officers violated defendant's constitutional rights by trespassing on his property, and that violation tainted his subsequent consent to the officers' entry into and search of his home. As a result, all evidence obtained as a result of the entry and search should have been suppressed."

State v. Unger, 252 Or App at 487-88. Therefore, the court of appeals "[r]eversed and remanded." State v. Unger, 252 Or App at 488. On April 25, 2013, this court allowed the state's petition for review.

SUMMARY OF ARGUMENT

The state requests that this court overturn Hall. To do so would conflict with several opinions from this court, federal circuit courts, and the United States Supreme Court.

Voluntary consent alone cannot overcome police illegality that leads to consent - - even if volunteered consent may in specific circumstances. A "two-pronged" approach to admissibility is warranted: voluntariness and exploitation. All consent searches must be voluntary. But, even if voluntary, if police illegality leads to the consent without sufficient attenuation, then, even if voluntary, the consent is constitutionally unsound.

To adopt the state's proposed rule in this case - - namely that voluntary consent alone may attenuate the illegality from the consent - - would, without expressly stating so, shift the foundation of Article I, section 9, away from a "personal rights model" into the Fourth Amendment "deterrence model." This court should curb that platonic shift.

ARGUMENT

Introduction

I. The Argument for Overruling Hall: The State Contends that Hall Articulated New Principles that Conflict with Longstanding Article I, Section 9, Values

The doctrine of stare decisis is a bedrock legal principle that provides stability, predictability, fairness, and efficiency to the law. Farmer's Insurance Co. of Oregon v. Mowry, 350 Or 686, 693 (2011). The principle of stare decisis "applies with particular force in the arena of constitutional rights and responsibilities, because the Oregon Constitution is the fundamental document of this state and, as such, should be stable and reliable." Stranahan v. Fred Meyer,

Inc., 331 Or 38, 53 (2000).

Despite the fundamental institutional values underlying the stare decisis doctrine, this court will reconsider a prior interpretation of a constitutional provision if a party presents "a principled argument suggesting that, in an earlier decision, this court wrongly considered or wrongly decided the issue in question." Id. at 54.

The state advances two primary arguments for overturning Hall: (1) that Hall's suppression remedy undervalues the constitutional significance of voluntary consent, and (2) that re-assessing Hall will clarify the law, not complicate it. (Petitioner Brief on Merits 11-21).

The lead dissenter in Hall later characterized the Hall rule as a "new mode of analysis" that was unsupported by "any existing precedent, state or federal":

> "I dissented in Hall, arguing that the majority there had distorted the relevant legal analysis when the police, after committing an illegality, obtain incriminating evidence against a defendant. I contended that new mode of analysis adopted in Hall was not supported by any existing precedent, state or federal, and that the reasoning in Hall would lead to the needless suppression of evidence obtained by the police with the specific voluntary consent of the owner or possessor of the evidence."

State v. Ayles, 348 Or 622, 641 (2010) (Durham, J, concurring; emphasis added; internal citation omitted). Essentially adopting that dissent as its own, here, the state argues that voluntary consent alone can nullify any preceding Article I, section 9, police illegality.

However, this court should consider (1) Hall's "fruit of the poisonous tree" and two-part attenuation analyses reflect a well-developed body of law in federal and state courts; (2) Oregon has employed the fruit of the poisonous tree and the two-part attenuation analysis since at least the 1970's, (3) although the voluntariness and exploitation analyses overlap to some degree, they are different tests that address and preserve different constitutional values, and (4) the Hall majority carefully tailored the exploitation prong of the attenuation analysis to better reflect the values of Oregon's personal rights exclusionary rule.

II. Development of the Fruit of the Poisonous Tree Doctrine

A. Origins for the Fruit of the Poisonous Tree Doctrine

In 1920, Justice Holmes explained the core principles of the "fruit of the poisonous tree" doctrine. In Silverthorne Lumber Co. v. United States, 251 US 385 (1920), federal agents acting "without a shadow of authority" went to the Silverthorne's business office, "made a clean sweep of all the books, papers, and documents," and copied the materials. Id. at 390. Silverthorne applied for the return of the documents. The district court ordered their return to Silverthorne and impounded the copies. 251 US at 390. The government then served a subpoena on Silverthorne for the original documents. Silverthorne opposed the subpoena, was found in contempt, and petitioned the Supreme Court.

The government advanced an argument similar to the state's argument in the present case: "If at the time the arrest or seizure is valid, the fact that a prior

arrest or seizure, effective in bringing about the valid action, was entirely or partially illegal, is immaterial, and tenders a merely collateral issue." See, United States Brief, summarized at 64 L Ed at 20.

In rejecting the government's proposition, Justice Holmes explained that the Fourth Amendment applies both to illegally seized evidence (primary or direct evidence) and evidence that the government subsequently develops or generates (derivative evidence) from the illegal search or seizure:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

Silverthorne, 251 US at 392.

In 1939, Justice Frankfurter used the same analytical construct (naming it "Fruit of the poisonous tree") in analyzing a statute to explain that the government may not use direct or derivative evidence obtained in violation of § 605 of the Communications Act of 1934, 47 USCA §605. The Court again noted that the government could use the evidence if it were able "to convince the trial court that its proof had an independent origin." Nardine v. United States, 308 US 338, 341 (1939).

In 1963, the Court expressly held that the fruit of the poisonous tree doctrine applied to both physical and testimonial evidence directly obtained or derived from Fourth Amendment violations. Wong Sun v. United States, 371 US 471, 485 (1963). Despite the prior illegality, the state may demonstrate the

disconnection between the illegality and its possession of the evidence under any of three theories: inevitable discovery, independent source, or attenuation.

The "inevitable discovery" doctrine applies when the state establishes by a preponderance of the evidence that existing proper and predictable police procedures would have produced the contested evidence even if there had been no illegality. State v. Miller, 300 Or 203, 225-26 (1985) (explaining principle); Nix v. Williams, 467 US 431 (1984) (ongoing search would have discovered victim's body, irrespective of police officers' violation of defendant's Sixth Amendment right to counsel). An inventory policy illustrates and typifies the inevitable discovery doctrine. For example, the state may introduce evidence from an overbroad search incident to arrest if it can demonstrate the police would have inevitably discovered the same evidence during a subsequent inventory search at the jail.

The "independent source" doctrine applies when the state establishes that a causal agent other than the police illegality produced the evidence. For example, the doctrine would apply when one officer illegally enters the front door to a house and discovers evidence while a second officer enters through a rear door with a valid warrant and discovers the same evidence. See, e.g., Segura v. United States, 468 US 796 (1984) (evidence discovered pursuant to search warrant admissible where the warrant was issued based on information that police properly possessed separate from the information learned during an illegal entry).

The "attenuation" doctrine applies when the police illegality and the discovery of evidence are so separated by time and intervening events that the illegality is not considered a legal cause of the state's possession of the evidence. The attenuation analysis has two related but ultimately separate prongs: (1) voluntariness and (2) exploitation.

The classic example of attenuation is Wong Sung v. United States, 371 US 471 (1963), where police illegally entered defendant's residence, arrested him, and released him the following day after arraignment. Wong Sun voluntarily returned to the police station several days later, received Miranda-like warnings, and gave a voluntary statement. The Court held that that statement was admissible because it was sufficiently attenuated from the prior illegality: "On the evidence that Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement, we hold that the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint'" Wong Sun v. United States, 371 US at 491, quoting Nardine v. United States, 308 US 338 (1939).

B. The US Supreme Court Emphasizes that Voluntariness and Exploitation are Independent Inquiries in the Attenuation Analysis: Voluntariness is a Threshold Issue Governed by Longstanding Principles, while the Exploitation Analysis Assesses whether the Prior Illegality Facilitated the State's Possession of the Evidence.

The Supreme Court in Brown v. Illinois, 422 US 590 (1975), addressed the issue of voluntary consent. In Brown, police entered the defendant's apartment

without probable cause and without a warrant, arrested him, took him to a police station, administered Miranda warnings, and obtained a voluntary statement from him. The Illinois Supreme Court held that the Miranda warnings broke the causal connection" between the illegal arrest and the statements because the statements were "sufficiently an act of free will to purge the primary taint of the unlawful invasion." People v. Brown, 56 Ill 2d 312, 317 (1974).

The United States Supreme Court directly rejected that rationale. It articulated the two-pronged attenuation analysis (voluntariness and exploitation) and identified the factors relevant to the exploitation analysis:

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

Brown v. Illinois, 422 US at 603-04 (emphasis and bracketed numbering added). The Court identified dual rationales for excluding evidence under the "fruit of the poisonous tree" doctrine - - (1) deterring illegal police conduct, and, (2) maintaining judicial integrity by excluding evidence that the police obtain illegally. Id. at 599-600.

/ / /

In Dunaway v. New York, 442 US 200 (1999), police arrested the defendant without probable cause, brought him to the police station, administered Miranda warnings, and obtained his statement. New York's Appellate Division held the statement admissible, reasoning that although the police lacked probable cause to arrest, they had reasonable suspicion to briefly detain the defendant and the police conduct during questioning had been "highly protective of defendant's Fifth and Sixth Amendment rights[.]" Dunaway, 442 US 200, 219 (1979) (quoting, People v. Dunaway, 61 App Div 2d 299, 303 (1978)). Just as the Hall dissent relied on and the state argues here, the New York court reasoned that although the police may have violated the Fourth Amendment by arresting the defendant on less than probable cause, the defendant's statements were voluntary for Fifth Amendment purposes and therefore admissible.

In reversing, the Supreme Court noted that the lower court's reasoning "betrays a lingering confusion between 'voluntariness' for purposes of the Fifth Amendment and the 'causal connection' test established in Brown." Dunaway, 442 US at 219. The "voluntariness" and "causal connection" analyses are independent. When the derivative evidence is testimonial, the voluntariness inquiry advances classic Fifth Amendment and due process values that ask whether the statement was voluntary. But that "voluntariness" inquiry is a mere "threshold requirement" distinct from, and a mere predicate to, the analysis of the Fourth Amendment violation:

> " Consequently, although a confession after proper Miranda warnings may be found 'voluntary' for purposes of the Fifth Amendment, this type of 'voluntariness' is merely a 'threshold requirement' for Fourth Amendment analysis[.] Indeed, if the Fifth Amendment has been violated, the Fourth Amendment issue would not have to be reached."

Id. at 217 (quoting, Brown v. Illinois, 422 US at 604; footnote and internal citation omitted).

Despite Brown and Dunaway, several state courts and the Tenth Circuit similarly "blurred" the distinctions between the dual inquiries and temporarily adopted the rule that voluntary consent alone could remove the taint of a Fourth Amendment violation, only to later reverse themselves:

> "The dual requirement of voluntariness and sufficient independence from the prior illegal arrest to purge the taint of that arrest was blurred in our opinion of United States v. Carson, 793 F. 2d 1141, 1150 (10th Cir.) Cert. Denied, 179 US 914 (1986), which came after Recalde. There we said that a consent that is voluntary in fact is in itself an intervening act that purges any police illegality. Id. at 1147-48. However, Recalde was decided before Carson, and we are bound by the decision of that earlier panel. Thus, we reiterate that not only must the government show that consent is voluntary in fact, but it must also demonstrate a break in the causal connection between the illegality and the consent, so that the court will be satisfied that the consent was 'sufficiently an act of free will to purge the primary taint.' Wong Sun, 371 US at 486. Although the two requirements will often overlap to a considerable degree, they address separate constitutional values and they are not always conterminous."

US v. Melindez-Garcia, 28 F3d 1046, 1054 (10th Cir 1994) (string citations omitted; emphasis added); see also, Missouri v. Miller, 894 SW 2d 649, 655 (1995) ("To the extent, however, that the [State v.] Love[, 831 SW 2d 631

(1992)] decision stands for the proposition that a voluntary consent obviates the need to analyze the legality of the initial stop and necessarily dissipates the taint of a possible Fourth Amendment violation, it is overruled.").

Professor LaFave similarly notes that voluntariness and exploitation are separate tests: "While there is a sufficient overlap of the voluntariness and fruits test that often a proper result may be reached by using either one independently, it is extremely important to understand that (i) the two tests are not identical, and (ii) consequently the evidence obtained by the purported consent should be held admissible only if it is determined that the consent was both voluntary and not an exploitation of the prior illegality." Wayne R. LaFave, 4 Search and Seizure §8.2(d), 76 (4th ed 2004) (emphasis in original).

C. The Two-Pronged Attenuation Analysis Applies to Voluntary Consent that Follows an Illegal Search

The Court applies the same "fruit of the poisonous tree" principles to stop and consent cases. The analysis tracks Brown, Dunaway, and Wong Sun. When the government seeks to introduce evidence from a consent search that occurred during or after an illegal stop, the state must demonstrate that (1) the consent was voluntary, and (2) there was no causal connection between the illegality and the consent. As with Brown, Dunaway, and Wong Sun, voluntary consent to search does not cure the prior illegal search or seizure; rather, the voluntary consent is viewed as the presumptively inadmissible fruit of the prior illegality:

> "The proper disposition follows as an application of well-settled law. We held in Florida v. Royer, 460 US 491 (1983), that a consent obtained during an illegal detention is ordinarily ineffective to justify an otherwise invalid search. See also Florida v. Bostick, 501 US, at 433-434 (noting that if consent was given during the course of an unlawful seizure, the results of the search 'must be suppressed as tainted fruit'); Dunaway v. New York, 442 US 200, 218-219 (1979); Brown v. Illinois, 422 US 590, 601-602 (1975); Cf. Wong Sun v. United States, 371 US 471 (1963)."

Ohio v. Robinette, 519 US 33 (1996) (several internal citation omitted for readability) (Stevens, J, dissenting from the holding that no stop occurred). See generally, Wayne R. LaFave, 4 Search and Seizure, a Treatise on the Fourth Amendment, 8.2(d), 77 ("the fruit of the poisonous tree doctrine also extends to consents which are voluntary." (omitting footnote criticizing outlier cases "mistakenly assuming" that voluntary consent cures illegality)).

With respect, the Hall dissenters' complaint that the "new mode of analysis adopted in Hall was not supported by any existing precedent, state or federal" is flatly wrong for federal law purposes. This court should not adopt it.

D. Oregon Has Employed the Two-Pronged Attenuation Analysis for Decades.

For decades this court has used the fruit of the poisonous tree doctrine and the two-pronged "voluntariness"/"exploitation" attenuation analysis in its Article I, section 9, jurisprudence. If the state and the Hall dissenters were correct that voluntariness had been the sole and determinative question for Article I, section 9, purposes prior to Hall, there would be no need for this court to refer to Wong

Sun and Brown, the "fruit of the poisonous tree" analysis, or the two-pronged attenuation analysis in any Article I, section 9, case. But, this court has historically cited Wong Sun and Brown and routinely employed the two-pronged attenuation test in its Article I, section 9 analysis.

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

This court then addressed the state's alternative argument that even assuming an illegal entry, the statements were admissible because police administered the Miranda warnings and the defendant confessed voluntarily. This court rejected the argument, citing Brown v. Illinois, 422 US 590 (1975), and reasoning that Miranda warnings were "inadequate to relieve the obvious

taint" resulting from the illegal entry that violated Article I, section 9. Id. at 166.

In State v. Kennedy, 290 Or 493 (1981), police approached the defendant in an airport parking lot and asked to speak with him. After telling him they approached because they had suspicions he was involved in drug trafficking, the defendant denied he was carrying narcotics and unilaterally invited the officers - without the officers requesting consent - to search his person and his luggage: "Would you like to search my luggage?" This court emphasized that the officers "had not made any request for consent to search defendant or his luggage." Id. at 496.

The Kennedy court said the case presented three issues: (1) did the officers' conduct constitute a stop under Article I, section 9, (2) if so, did the officers' reliance on a drug courier profile constitute reasonable suspicion, and, most importantly for purposes of this case, "(3) [i]f the encounter between the police and defendant was a 'stop' unjustified by reasonable suspicion, was the search so 'tainted' by the unjustified 'stop' as to be illegal despite defendant's consent, or was defendant's consent sufficiently voluntary to validate the search?" Id. at 496.

The court reasoned that it did not need to decide the first two questions (whether a stop occurred and whether reasonable suspicion supported the stop) because, even assuming an illegal stop, the defendant's invitation to search without a police request for consent showed that the illegality had no cognizable

legal effect on (or causal connection to) the defendant's decision making. Kennedy - - unlike what the state would like this court to adopt - - does not stand for the broad proposition that voluntary consent alone may constitute an intervening event that attenuates any illegality from the discovery of admissible evidence. If the Kennedy court intended to announce that rule, it would not have cited Wong Sun or stated the two-pronged test for attenuation. Rather, Kennedy stands for the proposition that in exceptional circumstances the police illegality may be so minor and the defendant's voluntary response so unilaterally forthcoming that a court could conclude that the illegality had no disadvantageous effect on the defendant's decision to waive his Article I, section 9, right to privacy.

This court's opinion in State v. Williamson, 307 Or 621 (1989), does not aid the state either, because this court held that the consent in that case was involuntary - in other words, the state failed to satisfy the threshold issue in the classic attenuation analysis. In that case, police stopped the defendant at an illegal roadblock, smelled marijuana coming from his truck, and asked for consent to search. When the defendant refused to consent the officers threatened to hold the truck while they sought a warrant. The defendant consented. This court held that the consent was involuntary because the officers threatened to hold the truck and seek a warrant based on evidence obtained from an illegal roadblock. Williamson stands for the proposition that consent is involuntary

when police obtain consent by confronting the person with evidence they obtained in violation of the person's Article I, section 9, rights. Because the defendant's consent was involuntary in Williamson, the court had no occasion to address the exploitation prong of attenuation.

State v. Rodriguez, 317 Or 27 (1993), employs the two-part attenuation test identified in Kennedy and reaches the same result as Kennedy because Rodriguez presented exceptional circumstances similar to Kennedy. There, officers arrested the defendant on a federal arrest warrant that did not satisfy Article I, section 9. They read him Miranda warnings and asked if he had any drugs or guns in the house, and he replied "No, go ahead and look." The police did so and found two guns. This court again identified the two-pronged voluntariness and exploitation test and explained that because the defendant volunteered consent, the remaining and sole issue before the court was whether the voluntary consent was nonetheless the product of the illegal arrest: "We begin our inquiry by making clear that this case does not present the issue whether defendant's consent to the search of his apartment was voluntary. Rather, this case presents the issue whether defendant's consent was obtained by exploitation of the purportedly unlawful arrest." Id. at 40.

The court expressly explained that even voluntary consent can be the impermissible product of a prior illegality:

> "In what circumstances, then, does unlawful police conduct render evidence obtained in a later consent search inadmissible, where the consent to the search is voluntary? We think that evidence obtained during such a search should be suppressed only in those cases where the police have exploited their prior unlawful conduct to obtain that consent. Only where such exploitation occurs can it be said that the evidence discovered subsequently was 'obtained in violation' of a defendant's rights under Article I, section 9."

Id. at 41 (emphasis added).

Echoing longstanding "fruit of the poisonous tree" and attenuation principles, this court said that whether "suppression is required" under the exploitation analysis "depend[s] on the nature of the connection between the unlawful police conduct and the evidence sought to be suppressed." Id. at 39. The court described exploitation as follows: "Exploitation occurs when the police take advantage of the circumstances of their unlawful conduct to obtain the consent to search." Id. at 40.

The Rodriguez court concluded that, like Kennedy, the defendant's unilateral and unprompted invitation to search demonstrated that the illegal arrest had no legally significant impact on the defendant. Again, like Kennedy, the officers did not ask for consent to search and the defendant unilaterally invited the officers to search his residence.

More recently, this court again identified the operative facts - the officer's request for consent in Hall versus the defendants' unprompted invitations to search in Kennedy and Rodriguez - that distinguish Hall from Kennedy and

Rodriguez. In State v. Crandall, 340 Or 645 (2006), police acting without reasonable suspicion directed the defendant-pedestrian to come to them (a seizure). On his way to police, the defendant stopped at a parked car, bent down, and placed a clear plastic baggie near one of the wheels. Noting the similarities to Kennedy and Rodriguez and the dissimilarities with Hall, this court reasoned that the defendant's "unilateral, voluntary decision to put the baggie underneath the car sufficiently attenuated the discovery of that evidence from the prior illegality, in the same way that the defendants' acts in Kennedy and Rodriguez did." Id. at 652.

III. This Case Demonstrates How Consent Can Be Voluntary and Yet Impermissibly Influenced by a Prior Illegality

A. An Illegal Search Affects the Individual's Consent Decision in Ways that are Different from the Traditional Voluntariness Analysis

Statements and consent are voluntary and admissible when they are the product of the individual's free will. However, they are involuntary and inadmissible when the person's will is overborne by express or implied threats, ORS 136.425 (statements), State v. Stevens, 311 Or 119 (1991) (consent), Schneckloth v. Bustamonte, 412 US 218, 233 (1973) (consent), when the person submits or acquiesces to a claim of lawful authority, Bumper v. North Carolina, 391 US 543 (1968), or when the person is induced to speak by an express or implied promise of leniency, State v. Ely, 237 Or 218 (1964).

The law tolerates a considerable amount of pressure on a person without rendering the person's consent involuntary: "[T]he fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search." United States v. Watson, 423 US 411, 424 (1976). For example, in State v. Stevens, 311 Or at 133-138, this court held that the defendant's stationhouse consent around noon was voluntary despite the facts that he was arrested and handcuffed a few hours earlier at 8:55 a.m., he was soaking wet when arrested, he was wearing only jeans and socks on a February morning, he was probably suffering from hypothermia, he had difficulty walking, had slurred speech, tested positive for methamphetamine at 2:25 p.m. after reportedly injecting himself three or four times the prior night , and despite the testimony of a psychiatrist who testified that based on his review of the transcripts, the defendant was "not capable of consenting voluntarily to a search." Id. at 134. This court reasoned that the consent was voluntary because "nothing in the record suggests that the police intimidated or coerced defendant in any way." Id. at 137.

The law tolerates pressure on motorists in a traffic stop context, as well. In holding that Miranda warnings are not required during a typical traffic stop, because the pressure does not amount to custodial or compelling circumstances for constitutional purposes, the Court acknowledged that a typical traffic stop exerts pressure on motorists:

> "Second, circumstances associated with the typical traffic stop are not such that the motorists feels completely at the mercy of the police. To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions."

Berkemer v. McCarty, 468 US 420, 438 (1984) (emphasis added).

This court has similarly held that Article I, section 12, of the Oregon Constitution does not require Miranda warnings during a typical traffic stop because the motorist is "neither in custody nor under compulsion in the constitutional sense." State v. Prickett, 324 Or 489, 494 (1997). Similarly, this court has never held that Miranda warnings are required during a criminal stop.

Because the deputies in this case did not engage in an overt display of force, threaten defendant, or promise leniency for cooperation, no Oregon or federal precedent would hold that the circumstances in this case overbore defendant's will and produced involuntary consent. Repeatedly this court has held that a seizure by itself does not overwhelm a person's ability to give lawful consent. See State v. Stevens, 311 Or at 133-38 (so holding).

Consequently, the present case more properly involves exploitation: Was the officers' illegal activity (trespass) causally connected to or did it affect defendant's decision to consent? The voluntary consent analysis alone does not capture the impermissible effect of a prior illegality on the decision to consent.

Clearly, here, the illegal trespass placed the officers in a position to request defendant's consent. They had knocked for a significant period of time at doors of defendant's home where they could lawfully be. However, after receiving no response for "two to three minutes," they then trespassed onto defendant's property and roused him out of bed. Without providing any warnings of any kind, or instructing him that he did not have to allow them further entry into his actual house, defendant complied with Roberts' request that defendant "show them around the house." Only after locating incriminating evidence inside the house did another officer read defendant a prepared "consent to search" card. At that point, defendant exercised his right to counsel, refused to sign the card and ordered all law enforcement out of his home. Without that trespass - - and without any intervening event that broke the causal connection between the trespass and defendant's consent - - the state cannot show any attenuation that would break that causal connection.

The state argues that (1) defendant's consent was voluntary, notwithstanding the officers' trespass, which alone "precluded any need to suppress the evidence," and (2), even if not, "the record shows no reason to conclude that the preceding police illegality significantly affected defendant's decision to consent." (Petitioner Brief on Merits 30).[1] That first point would

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[1]The state characterizes the "trespass" as "preceding" defendant's consent. (Petitioner Brief on Merits 30). That is not entirely accurate however.

obliterate any exploitation analysis, and reduce the inquiry to a single question: did the defendant voluntarily consent? And, the second point would obliterate any need to analyze any causal connection. In other words, only direct evidence that the police observed during their illegal conduct would be suppressed, without inquiry as to less direct exploitation. "Less direct exploitation" would take into account factors such as (1) the "temporal proximity" between the unlawful police conduct and the defendant's consent, (2) the existence of any intervening circumstances, and (3) the presence of any other circumstances, such as Miranda warnings or other admonitions, that would have informed the defendant of his or her right to refuse consent, that would have mitigated the effect of the illegal police conduct. See State v. Hall, 339 Or at 35.

B. How the State's Proposed Rule Compares with the Hall Rule in Various Applications and the Consequences of Adopting the State's Rule

The state's approach renders any initial illegality a virtual irrelevancy if the final step to the evidence is achieved through voluntary consent. That

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In this case, the officers' illegality (i.e. the trespass) was "on-going" during defendant's consent. Characterizing the "trespass" as "preceding" the "consent" implies that defendant's "consent" was "attenuated" from the officers' "illegality." That was not so. The illegality, or trespass, certainly began before defendant's consent. However, never did the illegality cease. The trespass continued while defendant consented. That distinction illuminates the drastic difference between a case like this from a case where (1) the illegality had such a tenuous factual link to the evidence that the unlawful police activity can hardly be viewed as the source of the evidence, (2) the police obtained the evidence independently of the illegality, or (3) the police inevitably would have obtained the evidence through lawful means.

approach nullifies the poisonous tree doctrine and denies relief for violations of constitutional rights.

To illustrate the significant consequences flowing from that proposed rule, consider the following examples.

Fact Pattern No. 1. An officer illegally enters and searches a residence while the occupants are away, finds contraband , leaves the residence as he found it, and returns later because of what he found to request consent to search. The occupants, who are unaware of the prior search, consent to the search. The officer finds and seizes the contraband he had found earlier.

State's Analysis. The search that violated the occupants' Article I, section 9, rights is an irrelevancy. The evidence is admissible because the occupants voluntarily consented to the second search. The approach requires overruling State v. Weaver, 319 Or 212 (1994).

Defendants Analysis. The search that violated the occupants' Article I, section 9, rights against unreasonable searches. The subsequent consent does not cure the prior illegal search. To restore the occupants to the position they would have been in had law enforcement acted lawfully, the evidence is suppressed. Because Hall properly overruled State v. Quinn, 290 Or 383 (1981), this analysis does not require overruling any cases.

Fact Pattern No. 2. An officer acting without probable cause stops a car and notes that the driver has bloodshot and watery eyes and smells of alcohol.

The officer politely asks the driver if he is willing to perform field sobriety tests (FST's), and the driver voluntarily consents.

State's Analysis. Because the officer lacked probable cause, the stop was illegal and the primary evidence from the stop (the observation of the driver's bloodshot eyes and the odor of alcohol) must be suppressed. However, because the driver voluntarily consented to the FST's, the results of the FST's are admissible.

Defendant's Analysis. The illegal stop violated the driver's Article I, section 9, rights against unreasonable seizures. The driver's subsequent consent does not cure the illegal stop. To restore the driver to the position he would have been in had law enforcement acted lawfully, both the primary evidence (the observation of bloodshot eyes and the odor of alcohol) and the derivative evidence (the FST results) are suppressed.

Fact Pattern No. 3. An officer politely arrests individuals without probable cause, administers Miranda warnings, and obtains incriminating statements.

State's Analysis. The unlawful arrest is irrelevant. The individuals received Miranda warnings and gave voluntary statements. The statements are admissible. This approach directly conflicts with Dunaway v. New York, and requires overruling State v. Olson, 287 Or 157 (1979).

Defendant's Analysis. The statements were voluntary for Article I, section 12, purposes, but the illegal arrest violated the defendants' Article I, section 9, right against unlawful search and seizure and exposed them to questioning without the ability to leave. To restore the individuals to the position they would have been in had law enforcement acted lawfully, the statements are suppressed. No opinions need to be overruled.

Fact Pattern No. 4. An officer unobtrusively seizes a briefcase without probable cause, shows it to the owner, and politely requests consent from the owner to search the briefcase. The owner consents to a search , and the officer finds contraband.

State's Analysis. The seizure of the briefcase was illegal, but the officer's conduct did not coerce the owner's consent. The contraband is admissible.

Defendant's Analysis. The seizure was illegal, and the owner was impermissibly placed in a disadvantaged position he should not have been in when calculating whether to consent to the officer's search request. The contraband is inadmissible.

Fact Pattern No. 5. An officer acting without reasonable suspicion stops as many people as he can in hopes of obtaining consent to search. The officer is courteous at all times and observes nothing during the stops to arouse suspicions. Many individuals "voluntarily" consent to the search request, and the officer finds contraband during several searches.

State's Analysis. The illegal seizure is irrelevant. Each illegal stop is merely a "but for" fact that placed the officer in a position to request consent. As long as the consent was "voluntary," any evidence obtained during the search is admissible. This approach requires overruling Hall and Olson.

Defendant's Analysis. The illegal stop unlawfully disadvantaged each individual by placing him in a subordinate position that he should not have been in. Absent exceptional circumstances, the individual's decision to yield his constitutional right against unreasonable searches and consent to the search was made while the person was in an unlawful construct attributable to state action. No opinions need to be overruled.

Fact Pattern No. 6. Officers break into a individual's home, sit in the home and wait for the individual to return home. Upon return, the officers request consent to search the home in a polite manner. The individual consents to the officers' request.

State's Analysis. Similar to above, the trespass is irrelevant because all it did was merely place the officers in a position to request consent. So long as the officers were cordial when asking for consent, then any evidence obtained during the consent search is admissible. That approach requires overruling State v. Olson, 287 Or 157 (1979), State v. Rodgers/Kirkeby, 347 Or 610 (2010), State v. Ayles, 348 Or 622 (2010), and conflicts with Brown v. Illinois, 422 US 590 (1975).

Defendant's Analysis. Following those cases, this court should hold that:

> We cannot conclude that the illegal search of defendant's property, while it was ongoing, had no factual nexus to defendant's decision to consent. A defendant gains nothing from having a constitutional right to be free from unreasonable searches if the police can violate that right and – by definition – use the circumstances of that violation as a guarantee to request him to further surrender his liberty. There was a minimal factual nexus between the trespass and defendant's decision to consent.

That proposed rule requires this court merely to follow precedent, namely, Olson, Hall, Rodgers/Kirkeby, Ayles, and Brown, in the context of an illegal trespass or search. In fact, even the Ayles dissenters appear to agree with that approach.

There, the dissent pointed out:

> "Relying on State v. Olson, the majority reaches a different conclusion. However, this is not a case in which the officers broke into defendant's house without justification and roused the defendant and his companion from their bed, as they did in Olson. Nor is this a case in which the defendant, on entering his home, found an officer unlawfully inside his home pointing a gun at him and saying, 'Don't move, you are under arrest.' [Brown v. Illinois, 422 US 590, 603 (1975)]. In that case, neither the officers' entry into the defendant's house nor their arrest of him at gun point was constitutionally justified. In those cases, this court and the United States Supreme Court respectively held that the mere fact the officer gave Miranda warnings before the defendants made incriminating statements was not sufficient to purge the taint of the officers' unconstitutional entries into the defendant's homes. In light of the nature and severity of the Fourth Amendment and Article I, section 9, violations in those cases, something more than Miranda warnings was required."

State v. Ayles, 348 Or 622, 653 (2010) (Kistler, J, dissenting) (citations omitted).

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C. Hall Customized Attenuation to Reflect Oregon's Personal Rights Model

Like Olson, Kennedy and Rodriguez before it, Hall articulated the general two-pronged attenuation rule. The result in Hall differed from Kennedy and Rodriguez merely because the facts led to a different result, not because the controlling rule of law was different. Hall provided the general two-pronged attenuation rule and applied it to a typical fact pattern; Kennedy and Rodriguez laid out the same general rule and applied it to exceptional fact patterns.

Hall modified the attenuation analysis to better reflect the Oregon "personal rights" theory of exclusion. The federal test has a fourth factor that directly speaks to the "deterrence rationale" of the federal exclusionary rule: "the purpose and flagrancy of the official misconduct [is] relevant." Brown v. Illinois, 422 US at 603-04.

Hall removed that factor from Oregon attenuation analysis because it concerned "deterrence," which is not the rationale for excluding evidence in Oregon. Hall, 338 Or at 35; State v. Kosta, 304 Or 549, 553 (1987); State v. Tanner, 304 Or 312, 315 (1987). As this court recognized in State v. Smith, 327 Or 366, 379 (1998), "[t]his court * * * has rejected that deterrence rationale as foreign to the Oregon search and seizure provision, holding, instead, that the Oregon exclusionary rule exists to vindicate a personal right to be free from unlawful searches and seizures." Similarly, in State v. Ainsworth, 310 Or 613,

621 (1990), this court held:

> "Article I, section 9, prohibits certain governmental action, not certain governmental states of mind. The Oregon Constitution does not require an inquiry into the observing officer's thoughts to determine whether the officer's conduct unconstitutionally violates Article I, section 9."

Although the remaining three factors pertain directly to the goal of the "personal rights model," namely, to restore the person to the position he or she would have been in had police acted lawfully, State v. Davis, 295 Or 227, 235 (1983), in this case, the state requests this court completely alter that "personal rights model" for a federal "deterrence" approach.

In both Hall and this case, the three remaining attenuation factors are helpful in assessing the impact of the illegality on the person's decision to consent: (1) the temporal proximity between the illegality and the consent; (2) the presence of a significant intervening event; and (3) the administration of appropriate warnings. All three factors focus on the individual and are relevant to whether the individual made the decision to consent independent of the undue influence and restrictions of the police illegality. In this case, defendant consented during the police illegality, without the presence of any intervening event, and without any warnings from the officers. Under those circumstances, the state cannot prove that defendant's consent was "attenuated" from the police illegality, and the officers' conduct should play virtually no role in that assessment. The officer's mentality or cordiality - - to the extent that they play

any role in the analysis of whether consent is constitutionally sound - - pertains to the "voluntariness" of the consent, not to the "exploitation analysis." To remain true to the foundational precepts of Article I, section 9, this court should not adopt, as the state requests, a "deterrence" approach.

However, even under the Fourth Amendment "deterrence" approach, consent to search is generally invalid if an illegal search or seizure occurred before the consent. Florida v. Royer, 460 US 491, 501-508 (1983) (consent to search luggage invalid because it was subsequent to defendant's confinement during interrogation, which constituted arrest without probable cause); United States v. Santa, 236 F3d 662, 676-78 (11th Cir 2000) (consent invalid because given after illegal warrantless entry and arrest).

If, however, consent to search is given under conditions sufficiently attenuated from the illegal arrest or search, evidence discovered during the subsequent search will not be suppressed. Wong Sun v. United States, 371 US 471, 487-88 (1963). In some circumstances, even Miranda warnings, nonconfrontational police interviews, and periods of solitary reflection will be insufficient to purge any illegality. See United States v. Reed, 349 F3d 457, 464 (7th Cir 2003) (so holding). And, most circuits "construe Wong Sun and Brown to require a showing of attenuation as well as voluntariness for a consent following an illegal search or seizure to avoid the consequences of the exclusionary rule." United States v. Snype, 441 F3d 119, 132 (2nd Cir 2006). For

example, similar to the facts here, at least one circuit - - the Eighth Circuit - - has held that consent to search is not attenuated when no intervening circumstance exists between an officer's illegal trespass and a homeowner's consent. United States v. Lakoskey, 462 F3d 965, 975 (8th Cir 2006).

D. The Unlawful Search Led to the Consent

A warrantless search or seizure is presumptively unreasonable as a matter of law. State v. Davis, 295 Or 227, 237 (1983). When the state seeks to introduce evidence from a warrantless seizure or search, it has the burden to prove that it possesses the evidence through an exception to Article I, section 9; that is, it must prove that its possession of the evidence is constitutionally reasonable or permissible, despite the absence of a warrant. ORS 133.693(4); Davis, 295 Or at 237.

The presence of police illegality intensifies the state's burden to show that it lawfully possessed evidence from a warrantless search or seizure. The purpose of the "exploitation" prong of the attenuation analysis is to afford the state an opportunity to demonstrate that even though it obtained the evidence following a warrantless seizure or search, and even though it has "unclean hands" due to law enforcement illegality, its possession of the evidence is nonetheless unaffected by, or is causally disconnected from, the illegal search or seizure. The state is entitled to explain that its possession is otherwise in compliance with Article I, section 9. The state failed to carry that heavy burden in this case, and, should

never be able to do so merely by pointing to "voluntary consent."

Here, the officers attempted to contact defendant in his home multiple times without success. The officers' trespass onto defendant's property allowed the officers to make contact with defendant. But for that illegality - - as the record revealed here given the officers knocked on multiple doors at defendant's house without any contact - - the officers would not have been in a position to obtain defendant's consent. Thus, the state cannot prove that they would have ever gained the evidence without the trespass.

Also, there were no intervening events that caused defendant's consent to be only tenuously connected to the officers' on-going trespass. Under those circumstances, the state's possession of the evidence was certainly affected by the officers' trespass. Unlike Rodriguez and Kennedy where the state presented evidence that, before consent was even requested each defendant volunteered it, here, without the illegal trespass, the state cannot identify any event that interrupted the causal connection between that trespass and defendant's consent. To that extent, this case differs from any case where the defendant volunteered consent, or consented after being admonished with any warnings. Hence, even if voluntary, defendant's consent cannot, as a matter of law, overcome the blatant police illegality that led to the consent at issue in this case.

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CONCLUSION

For those reasons, this court should affirm the court of appeals. In doing so, this court will not be forced to reverse years of precedent and alter significantly the "personal rights" purpose of Article I, section 9. By adopting the state's proposed approach to "exploitation" - - namely, voluntariness alone dictates, and, if not, police flagrancy and egregiousness must be considered - - this court will be obligated, even if only indirectly, to overturn several cases from this court, and contradict Fourth Amendment jurisprudence from several circuits.[2]

If this court disagrees, and overturns the court of appeals, then this court must remand to that court to decide the other assignments of error that the court of appeals did not reach. See State v. Unger, 252 Or App at 479 n2.

Dated: July 3, 2013

FERDER CASEBEER FRENCH & THOMPSON, LP

/s/ Jason E. Thompson
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[2]If this court were to hold in that fashion, that holding would directly conflict with the Sixth, Seventh, Ninth and Eleventh Circuits. See United States v. Lakoskey, 462 F3d at 975. Those circuits "require a showing of attenuation as well as voluntariness for a consent following an illegal search or seizure to avoid the consequences of the exclusionary rule." Id.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I directed that the foregoing BRIEF ON THE MERITS OF RESPONDENT ON REVIEW be e-filed on July 3, 2013, by submitting the electronic form in Portable Document Format (PDF) that allows texts searching and allows copying and pasting text into another document to

http://appellate.courts.oregon.gov

I further certify that, on July 3, 2013, I directed the foregoing BRIEF ON THE MERITS OF RESPONDENT ON REVIEW to be electronically served by using the court's electronic filing system to:

Rolf Moan
Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem OR 97301

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 9,096 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)(g).

DATED: July 3, 2013

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