IN THE SUPREME COURT OF THE STATE OF OREGON

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| STATE OF OREGON,<br><br>Plaintiff-Respondent,<br>Petitioner on Review,<br><br>v.<br><br>ROMAN LANCE SUPPAH,<br><br>Defendant-Appellant<br>Respondent on Review. | Sherman County Circuit Court<br>Case No. 100016CT<br><br>CA A149412<br><br>S062648 |

# BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

Review of the decision of the Court of Appeals
on an appeal from a Judgment of the Circuit Court for Sherman County
Honorable Thomas M. Hull, Judge

Opinion Filed: August 6, 2014
Author of Opinion: Duncan, Judge
Before: Haselton, Chief Judge, and Armstrong, Wollheim, Ortega, Sercombe, Duncan, Nakamoto, Hadlock, Egan, DeVore, Tookey, Garrett, Judges, and Schuman, Senior Judge
Dissenting: Hadlock, Judge

*Continued…*

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## STATEMENT OF THE CASE

In this criminal case, the state has asked this court to determine the applicability of Oregon's exclusionary rule under Article I, section 9, to so-called "new crime evidence."

Because the state frames the issue as whether evidence of a "new crime" committed during an illegal stop is subject to suppression, the first issue on review is whether defendant, in fact, committed the crime of giving false information (ORS 807.620) when he inaccurately identified himself during an unlawful and (on this record) arbitrary stop.

Throughout the brief, when addressing the meaning of the "giving false information" provision, appellant differentiates between an unlawful stop that is "arbitrary" and an unlawful stop that is "lawfully inadequate." Defendant uses the phrase "unlawful and arbitrary" to describe an encounter where an officer lawlessly stops an individual without any articulated objective basis for doing so. In contrast, defendant employs the phrase "lawfully inadequate" to describe a stop based on insufficient or mistaken objective reasons. Most illegal stops fall into the "lawfully inadequate" category; this case falls into the "arbitrary" category.

The second question on review, assuming defendant's statement was a "new crime," is whether this court should nonetheless exclude it under Article I, section 9, because it derived from the underlying illegal seizure.

Because an Oregon motorist is not obligated to provide his true name during an *unlawful and arbitrary* traffic stop, this court should affirm the Court of Appeals judgment or dismiss the state's petition as improvidently allowed. In the alternative, this court should affirm the Court of Appeals, because the defendant's statement about his identity was evidence derived from the unlawful stop.

## Questions Presented and Proposed Rules of Law

**First Question Presented**: ORS 807.620 makes it a crime for a motorist to provide false information to an officer who is "enforcing the motor vehicle laws."

Does the statute apply when an officer stops a motorist without an objective, vehicle-code based reason for the stop?

**First Proposed Rule of Law**: No. The giving false information statute obligates a driver to accurately self-identify only when an officer is "enforcing motor vehicle laws." An officer who lacks any objective basis for the traffic stop is not enforcing the motor vehicle laws, as a matter of law.

**Second Question Presented**: Does the Oregon exclusionary rule apply when police obtain evidence of a "new crime" during an unlawful seizure?

**Second Proposed Rule of Law**: Yes. The Oregon exclusionary rule applies to direct and derivative evidence obtained from a police illegality, irrespective of the character of the evidence, that is, irrespective of whether the evidence is

physical or testimonial, contraband *per se* or derivative contraband, or whether a statement is truthful or untruthful.

**Third Question Presented**: When does an individual's statement or act constituting a "new crime" serve as a significant intervening event for purposes of severing the causal connection between an illegality and the discovery of the "new crime" evidence?

**Third Proposed Rule of Law**: An individual's act or statement constituting a "new crime" is a significant intervening event when the person acts "unilaterally and independently" from the illegality.

"Unilateral" means without prompting, independent of, and nonresponsive to the officer's request or unlawful command. In contrast, when the defendant's acts or statements directly respond to or reasonably correspond with the police request or questioning, then they are not "unilateral."

For example, the person who stops walking when an officer commands him to stop is responsive to the police directive, while the person who throws an item away when the officer tells him to stop acts unilaterally and unresponsively to the officer's direction to stop.

## Summary of the Argument

Defendant was driving a purple Cadillac in Sherman County, Oregon, when a Deputy Sheriff arbitrarily stopped him. During the roadside encounter, the deputy met defendant at his vehicle and asked for his identification. Defendant responded by providing a false name. As a result, the state charged him with providing false information to a police officer. ORS 807.620. Before trial, defendant moved to suppress his statement. The trial court denied

defendant's motion, but the Court of Appeals reversed concluding that the defendant's statement derived from the illegal seizure.

On review, the state asks this court to adopt an exception to the exclusionary rule. It asks that this court adopt a rule holding that a person who commits a new crime while illegally stopped forfeits the right to obtain suppression of evidence related to the new crime. The state reasons that the person's commission of a new crime while illegally stopped constitutes a significant intervening event that severs the causal link to the illegality, as a matter of law. The state's proposal suffers two fatal flaws, each of which independently calls for affirmance of the Court of Appeals *en banc* opinion.

**First Summary of Argument**: This case does not present this court with the occasion to test the state's "new crime" exception to the exclusionary rule, because the evidence does not establish that defendant committed the crime of "giving false information to a police officer," ORS 807.620, when he gave a false name to Deputy Hulke. The statutory construction supports defendant's argument for several reasons.

First, an individual only commits the crime of giving false information if they provide a false name to a police officer "who is *enforcing the motor vehicle laws*." ORS 807.620. The ordinary and legally accepted meaning of that phrase refers to a *police officer acting with lawful authority to investigate a specific violation of the traffic code*; stated simply, if the officer is not enforcing

a specific law, then he is not "enforcing" the motor vehicle laws. Similarly, if the officer is acting without legislative authority, then he is not "enforcing" motor vehicle laws.

Second, the legislature has provided the executive branch with the lawful authority to enforce traffic laws when the officer can establish probable cause to believe the driver has committed a traffic offense. ORS 810.410. Establishing probable cause requires the officer to articulate an objective basis supporting his subjective belief that the individual was violating a specific traffic offense. If the officer does not do so, then the record does not support the proposition that the motorist gave a false name to an officer who was "enforcing motor vehicle laws."

Third, other related statutes demonstrate that the giving false information statute belongs to a class of offenses that obligate an individual to cooperate with a police investigation only when the officer is acting lawfully or, at a minimum, when the officer is acting reasonably albeit mistakenly. When the legislature obligates an individual to cooperate with the police *regardless of the lawfulness of the investigation*, it does so explicitly (on the face of the statute, like "resisting arrest") or it announces the obligation by omitting terms such as "lawful" or "enforcing" when describing the criminal circumstances (like the "eluding" statute).

Fourth, the legislative history indicates that the giving false information statute only applies when a motorist provides a false name to an officer who is investigating a motor vehicle violation; in other words, the history makes clear that the statute would not apply when an officer stops someone unlawfully and arbitrarily.

Finally, in this case, the deputy who stopped defendant was not "enforcing motor vehicle laws": (1) the deputy failed to identify a Vehicle Code reason for the traffic stop, (2) dispatch did not have a record for the basis for the stop, (3) the deputy's report did not identify the basis for the stop, and (4) defendant did not know why the deputy stopped him.

At most, the deputy subjectively believed he stopped defendant for a "violation" though he could not recall which one. Because the state failed to offer *any* objective basis to support the seizure, the law presumes that the officer acted arbitrarily. The deputy's generic assertions that he stopped defendant for "a traffic violation" doesnot establish an objective basis upon which a reviewing court could conclude that the deputy had the probable cause necessary for "enforcing motor vehicle laws." Because defendant did not commit a new crime, this case does not present the scenario for this court to consider, much less adopt, the state's proposed "new crime" exception to the exclusionary rule.

**Second Summary of Argument**: Even if this court concludes that the deputy was "enforcing motor vehicle laws" when he stopped defendant and asked for his identification, defendant's statement in response was derived from the illegality.

As an initial matter, the Oregon exclusionary rule applies to "derivative evidence" regardless of whether the evidence is inculpatory or exculpatory, is relevant to an ongoing or new crime, or constitutes a true or false statement. Accordingly, this court should apply traditional exclusionary rule concepts in assessing whether defendant's decision to produce evidence during an unlawful seizure derived from the illegality.

Applying those traditional exclusionary rule concepts, this court should suppress defendant's misidentification statement for two reasons: (1) because defendant's decision to produce a false statement during the unlawful and arbitrary stop was not a significant intervening event for purposes of severing the casual connection between the illegality and the defendant's production of evidence; and (2) because the remaining *Hall* and *Unger* factors support the presumption that defendant produced the statement because of the unlawful stop.

First, an individual's decision to provide evidence during an ongoing illegal seizure is not a significant intervening event, unless the person acts unilaterally and independently from the illegality; in contrast, if the conduct is a

"direct response" or "corresponding reaction to" the illegality, then it derived from the illegality and must be suppressed. For example, in *State v. Crandall*, the defendant's act of abandoning property during the unlawful stop was not a direct response or corresponding reaction to the officer's request for the defendant to walk toward him. Similarly, in *Rodriguez* and *Kennedy*, the defendants' spontaneous decisions to waive their Article I, section 9, rights, were not direct responses or corresponding reactions to the officers' accusations of misconduct.

Accordingly, this court should apply a common sense approach in analyzing the relationship between the officer's unlawful conduct and the subsequent requests to determine whether the defendant's acts or statements directly respond to or reasonably correspond with the police commands. If the defendant's statements to police are within the scope of the officer's questioning, then this court should suppress those statements and acts as the direct product of the illegal seizure.

In this case, the defendant's decision to provide identifying information to the deputy was a direct and predictable response to the officer's question ("What is your name?") and to the ongoing situation (because routine traffic stops generally begin with a direction to produce identification). In other words defendant's statement was responsive. On the other hand, had defendant bribed

or assaulted the officer or fled the scene, those actions may not have been unresponsive and would not correspond with a request for identification.

The remaining *Hall* and *Unger* factors support the presumption that defendant produced the statement because of the unlawful stop. That is: defendant immediately produced the evidence during the unlawful stop; no significant intervening or mitigating event explained the production of the evidence; the deputy's purpose behind the stop was to obtain defendant's statements; and, finally, the deputy acted flagrantly by seizing defendant arbitrarily.

For those reasons, defendant's response was the direct product of the initial unlawful stop. This court should suppress defendant's statement, affirm the judgment of the Court of Appeals, and remand this case to the trial court for a new trial.

## Statement of the Historical and Procedural Facts

*July 14, 2010: Roadside Encounter*.

Defendant lives on the Warm Springs Indian Reservation. (Tr. 15). On July 14, 2010, around 2:50 p.m., defendant was driving a purple Cadillac on Interstate 84 in Sherman County, Oregon. (Tr. 7). Deputy Sheriff Brian Hulke initiated a traffic stop. (Tr. 7).

Deputy Hulke could not remember why he stopped defendant. (Tr. 8-9). When asked during the suppression hearing if he was able to "tell [the trial court] why [he] stopped this Defendant," Deputy Hulke replied, "I am not." (Tr. 8). He continued, "it [was for] for a traffic violation, and to my recollection I'm not sure what that violation was. I can tell you that it was something where I normally just give that individual a warning, and not a Uniform Citation for that violation." (Tr. 8-9).

Defendant did not know why Hulke stopped him either. (Tr. 15). Deputy Hulke did not tell defendant the basis for the stop, contact dispatch about the basis for the stop, or record whether he was issuing a citation or a warning. (Tr. 9-10, 15).

Instead, Deputy Hulke met defendant at his vehicle and asked for his name. (Tr. 7). Defendant gave the name "Harold provided a birth date, and indicated that he lived in Warm Springs. (Tr. 7). Deputy Hulke returned to his patrol car and checked the information defendant provided. (Tr. 7). Dispatch "came back saying that Mr. was driving while suspended[.]" (Tr. 7). Deputy Hulke cited defendant for failing to provide insurance and driving while suspended. (Tr. 8).

*Defendant's Statements to Sheriff's Office*.

Approximately one month after the traffic encounter, defendant informed the Sherman County District Attorney's Office that he had given a false name

to Deputy Hulke. (Tr. 11). In a follow-up conversation with Deputy Shull, defendant stated that he had given Deputy Hulke his friend's name, he thought his friend had a valid driver's license, and he did not want his friend to get in trouble. (Tr. 11). Defendant said "he knew it was wrong" but that, at the time of the stop, he did not want the deputy to tow his girlfriend's purple Cadillac. (Tr. 11-12).

Deputy Shull told defendant to contact the Warm Springs tribal police. (Tr. 12). Two days later, the tribal police sent the Sherman County Sheriff's Office a signed statement that read: "To whom it may concern, I Roman Suppah on the 14th of July, 2010 was pulled over for what I do not know. Was cited for driving while suspended and no insurance." (Tr. 13-14).

*Trial Court Proceedings.*

The state charged defendant by information with giving false information to a police officer. ORS 807.620.[1] Before trial, defendant moved to suppress "any statements or admissions made by Defendant," including those he made during the traffic stop and to the police a month later. (*See* Defendant's Motion to Suppress in the trial court file).

The state conceded that Deputy Hulke unlawfully stopped defendant. (Tr. 28). However, it urged the trial court to use the evidence against defendant.

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[1] The state also charged defendant with driving while suspended, ORS 811.182, but moved to dismiss it during trial. (Tr. 36).

According to the state, the evidence the deputy obtained during the stop was attenuated from the illegality, since defendant voluntarily made his statements because "[h]e didn't want to get his girlfriend's car towed." (Tr. 20). Similarly, the state argued that defendant's statements made a month later were voluntarily given by defendant "because he didn't want to get his friend in trouble." (Tr. 18, 20).

The trial court agreed with the state and denied defendant's motion to suppress:

> "[THE COURT]: I'm going to find the stop was illegal, but the conduct of the Defendant was independent in his own decision to notify the police that he gave a wrong name. And to keep his friend out of trouble[,] as well as having the car towed * * *[.] I'm also going to find there was a substantial attenuation of the time frame in which this took place."

(Tr. 29).[2]

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[2] After the court denied defendant's motion to suppress, the parties stipulated to use the factual record from the motion hearing as evidence in defendant's trial.

Based on that record, defendant moved for a judgment of acquittal arguing that the state had failed to prove that Deputy Hulke was "enforcing the motor vehicle laws" as required under ORS 807.620, because he had unlawfully stopped defendant without articulating any basis for the stop. (Tr. 39-42):

> "[Defense Counsel]: If [the deputy] just pulls [defendant] over because he's a Native American man driving down I-84, and he wants to figure out what this man is doing,[defendant] is free to tell him what ever name he wants to tell him."

(Tr. 42). *footnote continued……*

*Court of Appeals Ruling and State's Petition.*

Defendant appealed arguing that the trial court erred in denying his motion to suppress *his statements* that derived from the unlawful traffic stop. (App Br at 12).[3] The state responded that the statements were attenuated from the illegality and, for the first time on appeal, argued that the evidence should not be excluded because it constituted a "new crime." (Resp Br at 8-9).

In an *en banc* decision, the Court of Appeals reversed the trial court's ruling on defendant's motion to suppress. *State v. Suppah*, 264 Or App 510, 515, 334 P3d 463 (2014). An eight-member majority held that defendant's statements to Deputy Hulke during the traffic encounter derived from the ongoing unlawful stop and that the "new crime exception" to the Oregon

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The trial court denied the motion for judgment of acquittal and found defendant guilty, (Tr. 50), concluding that the legislature intended the crime of giving false information to police to apply during unlawful police encounters. (Tr. 56-57).

[3] On appeal, defendant specifically focused on suppressing his statements as the fruit of the illegal traffic stop. *Suppah*, 264 Or App at 515 n 4 ("defendant's appellate argument focuses on his statements.").

In addition, defendant only asserted an argument under Article I, section 9, of the Oregon Constitution and did not assign error to the trial court's ruling denying his motion for judgment of acquittal.

exclusionary rule did not apply, because defendant's statement did not create an officer safety concern. *Id*. at 531.[4]

Five dissenting judges would have held that the defendant's decision to "voluntarily commit a new crime" by giving a false name "was an intervening circumstance that attenuated the causal connection between the unlawfulness of the stop and the newly created evidence (the giving of the false name) that defendant sought to suppress." *Id*. at 540.

The state petitioned for review focusing this court on the scope and application of the "new crime" exception to Oregon's exclusionary rule. The state proposes a rule whereby new crime evidence would almost always be admissible unless "the police have flagrantly violated Article I, section 9 in effecting the detention or if they have illegally detained the person with the purpose of obtaining new-crime evidence." (State's BOM at 2).

## ARGUMENT

### I. An Oregon motorist does not commit the crime of giving false information to a police officer by providing a false name during an unlawful and arbitrary stop.

The giving false information statute reads, in relevant part:

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[4] In contrast, the majority held that defendant's statements to the Sheriff's Office a month later were attenuated form the illegal stop and not subject to suppression. *Id*. at 528. Defendant does not dispute that conclusion on review.

> "A person commits the offense of giving false information to a police officer if the person knowingly uses or gives a false or fictitious name, address or date of birth to any police officer *who is enforcing motor vehicle laws*."

ORS 807.620(1) (emphasis added).

For purposes of attaching criminal liability, the statute has three elements: an act element ("giving a false name"); a mental state element (committing the act "knowingly"); and an attendant circumstance element (committing the act "to any police officer who is enforcing motor vehicle laws").

As a general matter, providing a false name to another person, by itself, is not a crime. For example, a woman who misidentifies herself to an unwanted suitor has not committed a crime, even if the suitor is an off-duty police officer. In addition, as the plain terms make clear, providing a false name to a uniformed police officer, by itself, is not criminal. Rather, criminal liability only attaches if a person has a legal obligation to accurately identify himself; for example, a motorist who is stopped by a police officer "who is enforcing the motor vehicle laws." *Id*.

Determining the meaning of that phrase presents an issue of statutory construction, which this court resolves by applying the familiar principles set

out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610–12, 859 P2d 1143 (1993), and *State v. Gaines*, 346 Or 160, 171–72, 206 P3d 1042 (2009).[5]

### A. The plain language demonstrates that the legislature intended the statute to apply only when a motorist is stopped by an officer who is acting with lawful authority to investigate a specific motor vehicle code violation.

The ordinary and legally accepted meanings of the terms "enforcing" and "motor vehicle laws" demonstrate that the legislature intended the giving false information statute to apply only when a motorist is stopped by an officer who is acting within lawful authority to investigate a specific motor vehicle code violation.

Ordinarily, the verb "enforce" means "to put in force: cause to take effect: give effect to *esp.* with vigor." *Webster's Third New Int'l Dictionary* 751 (unabridged ed 1993). When used to describe the enforcement of a law or as a synonym for "implements," Webster's states, "Enforce refers to requiring operation, observance, or protection of laws, orders, contracts, and agreements *by authority*, often of a whole government or its executive or legal branches[.]" *Id*. (emphasis added).

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[5] In applying that methodology, this court attempts to discern the meaning of the statute most likely intended by the legislature that enacted it, examining the text in context, any relevant legislative history, and pertinent rules of interpretation. *Oregon Occupational Safety & Health Div. v. CBI Servs., Inc*., 356 Or 577, 584-85, 341 P3d 701 (2014).

Similarly, as a legal term of art, "enforce" means "to give force or effect to (a law *ect*.); to compel obedience to" and "enforcement" means "the act or process of compelling compliance with a law, mandate, command, decree, or agreement." *Black's Law Dictionary* 645 (10th ed 2014). Because the definitions of "enforcement" include "compliance," "observance," and "protection" of laws, it is natural to conclude that the enforcer—the executive branch in our system of government—must be acting with lawful authority to "enforce" laws enacted by the legislative branch. Otherwise, the executive officer is not "giving force" to any "law, mandate, command, decree, or agreement." *Id*.

In turn, the phrase "motor vehicle laws" is employed by the Oregon legislature to refer generally to the statutory regulations and offenses contained within the Oregon Vehicle Code. ORS 801.010. Read together then, the underlying import of the phrase "enforcing motor vehicle laws" means *a police officer acting with lawful authority to investigate a specific violation of the traffic code*; stated simply, if the officer is not enforcing a specific law, then he is not "enforcing the motor vehicle laws." Similarly, if the officer is acting without lawful legislative authority, then he is not "enforcing" motor vehicle laws.

Finally, if the giving false information statute applied with equal force to unlawful and arbitrary as well as lawful stops, then the underlined portion of the

phrase "any police officer who is enforcing the motor vehicle laws" would be superfluous. *See* ORS 174.010 (in construing statutes, "where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all"). Instead, the phrase modifies the attendant circumstance that makes the self-misidentification a crime and limits, rather than extends, the range of criminal culpability.

### B. Under ORS 810.410, the legislature granted the executive lawful authority to enforce the traffic laws when the executive officer had probable cause to believe an individual committed an offense.

"The authority of a police officer to stop a vehicle for a traffic violation is governed by ORS 810.410." *State v. Rodgers*, 347 Or 610, 619, 227 P3d 695 (2010). ORS 810.410, in relevant part, provides:

> "(2) A police officer may issue a citation to a person for a traffic violation at any place within or outside the jurisdictional authority of the governmental unit by which the police officer is authorized to act:
>
> "(a) When the traffic violation is committed in *the police officer's presence*; or
>
> "(b) When the police officer has *probable cause to believe an offense has occurred* based on a description of the vehicle or other information received from a police officer who observed the traffic violation.
>
> "(3) A police officer:
>
> "* * * * *

> "(b) May stop and detain a person *for a traffic violation* for the purposes of investigation reasonably related to the traffic violation, identification and issuance of citation.

ORS 810.410 (emphasis added).

As highlighted, that statute explicitly describes and limits when an officer has the lawful authority to stop an individual for a traffic infraction: (1) when the traffic violation is committed in the officer's presence; or (2) when the officer has the probable cause to believe an offense has occurred. *State v. Toevs*, 327 Or 525, 531, 964 P2d 1007, 1011 (1998) (explaining that ORS 810.410 "defines the authority of the police to respond to a traffic infraction[.]"); *see also State v. Matthews*, 320 Or 398, 403, 884 P2d 1224 (1994) (holding that an officer who stops and detains person for traffic infraction under ORS 810.410 must have probable cause to do so, *i.e.*, officer must believe that infraction occurred, and the belief must be objectively reasonable under the circumstances).

Thus, "it is the justification for the stop—the probable cause to believe that a driver has committed a traffic infraction and the state's interest in investigating that potential infraction—that delineates the lawful bounds of the traffic stop." *State v. Watson*, 353 Or 768, 778-79, 305 P3d 94, 103 (2013). Therefore, if the officer stops an individual without probable cause to believe the motorist committed a traffic infraction, the officer is not acting with lawful authority as the legislature intended. And if the officer is not acting with lawful

authority, then he is not "enforcing a law." *See, e.g., State v. Porter*, 312 Or 112, 120, 817 P2d 1306 (1991) ("[B]y implication, the statute proscribes any further action by the police [beyond that specifically authorized] * * * unless [that further action] has some basis other than the traffic infraction."); s*ee also State v. Dominguez–Martinez*, 321 Or 206, 212, 895 P2d 306 (1995); *State v. Farley*, 308 Or 91, 94–95, 775 P2d 835 (1989); (both to same effect).

The officer is, of course, still free to *ask* for the person's identification. *State v. Backstrand*, 354 Or 392, 412, 313 P3d 1084 (2013) ("Police remain free to approach citizens and to ask for or impart information and to seek their cooperation. Asking a citizen to identify himself or herself and to show police a formal piece of identification is a form of cooperation and involves the kind of information that, as a general proposition, police are free to request."). But, when an officer acts without probable cause, the officer is not "enforcing" a specific violation of the motor vehicle code. And, if the officer is not acting with lawful authority, then the individual is free to ignore the request or answer, for example, by stating "I am Thomas Jefferson." That would not be a crime; just as lying about your identity, height or weight, or favorite food during a conversation with an ordinary citizen, is not a crime.

### C. The giving false information statute belongs to a class of offenses that obligate an individual to cooperate with a police investigation when the officer is acting lawfully or, at a minimum, when the officer is acting reasonably albeit mistakenly.

The legislature has drafted a number of criminal offenses that obligate an individual to cooperate with police or, at least, not impede a police investigation. However, in almost all instances, the legislature has triggered that obligation when the investigating officer is acting "lawfully" or, at a minimum, when the officer has a "good faith" basis to believe he is acting with lawful authority.[6]

In limited settings, the legislature has imposed the duty to cooperate with police even when the officer acts outside his lawful authority. Those settings are typically limited to situations involving significant safety concerns or regulatory/administrative functions. *See* ORS 161.260 ("A person may not use physical force to resist an arrest by a peace officer who is known or reasonably

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[6] *See* ORS 162.247 (**Interfering with a peace officer:** preventing the performance of "the lawful duties of the officer" or refusing "to obey a lawful order."); ORS 162.255 (**Refusing to assist in fire-fighting operations**: "disobeys a lawful order relating to the conduct of the person in the vicinity of a fire."); ORS 162.257 (**Interfering with a firefighter or emergency medical services provider**: prevents the performance of "the lawful duties of the firefighter or emergency medical services provider." *Former* ORS 166.025 (**Disorderly conduct in the second degree**: refusing "to comply with a lawful order of the police to disperse"). ORS 811.535 (**Failure to obey police officers**: failing " to comply with any lawful order" by a police officer who "[h]as lawful authority to direct, control or regulate traffic."); ORS 807.570 (**Failure to carry or present license**: does not present license to police officer after being "lawfully stopped or detained").

appears to be a peace officer, *whether the arrest is lawful or unlawful*."); ORS 162.385 (making it a crime for an individual to give a false name when the officer is acting pursuant to a warrant or is in the process of *serving* a citation).

However, even then, the legislature clearly makes an individual's obligations to cooperate *explicit*, (resisting arrest), or obvious by omitting terms such as "lawful" or "enforcing" when describing the criminal circumstances. *See* ORS 811.540 (fleeing or attempting to elude). As defendant will discuss below, the legislature did not enact the giving false information statute as an officer or public safety provision. So, the giving false information statute is not akin to the resisting arrest and eluding statute.

Similarly, the false information statute does not describe a ministerial act or process whereby the executive agent is simply effecting a warrant or serving a citation. So the false information statute is not like the *citation or arrest on a warrant* provision. ORS 162.385.

**D. The legislative history indicates that the giving false information statute applies when a motorist provides a false name to an officer who is investigating a motor vehicle violation; in other words, the history makes clear that the statute would not apply when an officer stops someone unlawfully and arbitrarily.**

For about as long as Oregonians have packed-up the Model-T for a trip to the Coast, taken in a drive-in movie, or driven off into the sunset, the legislature has criminalized using another person's *identification card or driver's license*.

Or Laws 1931, ch 264, §22 ("It shall be unlawful for any person to * * * display or represent as one's own any operator's or chauffeur's license not issued to the person so displaying the same.").

The 1931 prohibition remained intact, for the most part without major changes, and, in 1975, still prohibited "misusing" another person's "license or permit." Or Laws 1975, ch 451, § 215 ("No person shall commit any of the following acts with respect to an operator's or chauffeur's license * * * Display or represent as one's own, any such license or permit not issued to the person so displaying.").

However, in 1977, spurred by Judge Abraham, the legislature enacted a giving false information statute to prohibit individuals from not only misusing another person's license, but also from giving a false name or date of birth to an officer issuing a traffic citation. *Former* ORS 482.610.

The 1977 false information statue included similar language to today's version. It read:

> "No person shall * * *
>
> "* * * * *
>
> "Knowingly use a false name or fictitious name or knowingly give a false or fictitious address *to any police officer for any violation of the motor vehicle laws.*"

Or Laws 1977 ch 882 § 13; *Former* ORS 482.610(6).

The sponsor suggested that the law would give police additional options when someone gave a false name and would save resources when the state charged an unknowing individual with failure to appear on a citation. Judge Abraham explained during a work session on the bill that it was intended to "meet a growing problem in metropolitan areas" by making it a crime "for the person giving a false name in a *traffic violation*—the same as provided for the person giving a false name." Minutes, House Committee on Judiciary, HB 3238, April 21, 1977 (Tape recording side 1) (statement of Judge Abraham).

The history clarifies that the legislature intended the crime to apply when an officer was processing a violation. That is, the individual's obligation to provide a true name was triggered only when the officer was stopping the person *for a legitimate purpose*. Nothing about the history indicates an intent to make giving false information apply if the individual was stopped unlawfully or for an unexplained reason. The Court of Appeals reached the same conclusion. *See State v. Packer*, 72 Or App 677, 680, 696 P2d 1163 (1985) ("The [1977] legislative history indicates that the statute was intended to give authorities some recourse against a driver who, *after being stopped for a traffic citation*, give the police a false name." (emphasis added)).

The legislature made nonsubstantive changes to the provision in 1979 and 1981. And, in 1983, it renumbered the giving false information statute when it overhauled the motor vehicle code and changed the final phrase from

"*any police officer for any violation of the motor vehicle laws"* to "*any police officer who is enforcing the vehicle code."* Or Laws 1983, ch 338, § 343 (HB 2031). Once again, nothing about that change suggests that the legislature intended "enforcement" to include an officer's request during an arbitrary stop of persons in a motor vehicle.

Instead, the 1983 Legislature likely made that change to include motorists who are lawfully stopped, even if the officer ultimately decides to issue a warning or a court later acquits the defendant of the underlying traffic violation. *See State v. Jensen*, 79 Or App 112, 114, 717 P2d 1263 (1986) ("The fact that a citation was not ultimately given, like the later acquittal in *Packer*, 'does not diminish [the driver's] duty to provide the police with correct identification *for investigation of a violation of the motor vehicle laws*.'" (emphasis added)). That is, the legislature likely intended the word "enforce" to describe when law enforcement acts in good-faith to give effect to the traffic laws. However, that history still makes clear that the statute would not apply when an officer stopped someone unlawfully and without any traffic reason—*i.e.*, arbitrarily.

### E. The deputy who stopped defendant was not "enforcing motor vehicle laws," because he stopped defendant without objective reason.

When the state seizes an individual without a warrant, the conduct is presumed to be unreasonable and arbitrary. *See Rodgers*, 347 Or at 623

("Seizures or searches for evidence to be used in a criminal prosecution, conducted without a warrant or without an exception to the warrant requirement, violate Article I, section 9, of the Oregon Constitution.").

Accordingly, it is the state's burden to demonstrate that it obtained evidence lawfully by producing a judicially authorized warrant or developing a record that demonstrates an exception to the warrant requirement. The state's obligation to meet that burden is triggered when an individual moves to suppress evidence. And its opportunity to meet that burden occurs at a hearing on the motion before the judiciary.

If, during that hearing, the state fails to offer *any* objective basis to support the seizure, then the law presumes that the officer acted arbitrarily. *State v. Cloman*, 254 Or 1, 8, 456 P2d 67 (1969) (discussing the probable cause requirement and explaining that "A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing."); *see also Brown v. Texas*, 443 US 47, 52, 99 S Ct 2637, 61 L Ed 2d 357 (1979) (invalidating a conviction for violating a Texas "stop and identify" statute because the initial stop was not based on specific, objective facts and, accordingly, the risk of "arbitrary and abusive police practices" was too great); *United States v. Brignoni-Ponce*, 422 US 873, 889, 95 S Ct 2574, 45 L Ed 2d 607 (1975) ("Police power exercised without probable cause is arbitrary.") (Douglas, J., concurring).

In this case, the state conceded that the officer unlawfully stopped defendant. Further, the officer did not articulate any specific basis for the stop at the time of the traffic encounter or during the suppression hearing. The officer vaguely suggested that he subjectively believed that defendant had committed a traffic violation, but he could not remember which one. (Tr. 8).

But more importantly, and detrimentally to the state's case, the state offered no evidence at the motion hearing that would make the officer's "subjective belief" objectively reasonable. Deputy Hulke attempted to explain his subjective mindset by suggesting, "[I]t was for a traffic violation, and to my recollection, I'm not sure what that violation was. I can tell you it was for something where I normally just give that individual a warning." (Tr. 8-9).

However, that explanation does not provide an objective basis for the stop, *e.g.*, whether the officer saw defendant traveling at a speed that in his training and experience exceeded the safe speeds for that road, observed the vehicle drift in its lane, or whether he had prior information about the purple Cadillac that suggested the driver was driving while suspended. And the crucial problem with the Deputy's explanation is that it provided no articulable facts for the trial court or this court to judge whether the officer acted reasonably as opposed to arbitrarily. ORS 810.410; *State v. Miller*, 345 Or 176, 185, 191 P3d 651 (2008) (explaining that the state must establish that the facts objectively are sufficient to establish probable cause); *Matthews*, 320 Or at 402–03 (holding

that an officer must have probable cause to believe that a traffic infraction has occurred).

For that reason, the deputy's explanation is no different than had an officer stopped someone on the street and, when asked to justify the stop, explained, "I suspected defendant had or was about to commit a crime." Based on that description, this court would not conclude that the state identified a reasonable basis for the officer's stop. *Terry v. Ohio*, 392 US 1, 22, 88 S Ct 1868, 1880, 20 L Ed 2d 889 (1968) ("This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence.").

Accordingly, the deputy was not "enforcing motor vehicle laws" and the giving false information statute did not apply. The officer was still free to ask defendant his name, but defendant was free to remain silent or identify himself as the Lindbergh baby. Neither would be a crime. In short, the fact that defendant *stated* he was "Harold had no criminal implications. And, to drive the point home, the fact that defendant's statement about his identity was false was no more criminal than if defendant had lied about where

he was going that day or whether he thought the Portland Trailblazers genuinely had a chance to win the NBA title. This court should affirm or dismiss.[7]

## II. In the alternative, defendant's statement to the deputy during the unlawful stop derived from the ongoing illegality.

The second question on review (should this court reach it) is whether the officer's discovery of defendant's identifying statement (that turned out to be false) derived from the unlawful stop where the officer seized defendant for an unknown reason and immediately asked for his name.

As an initial matter, the Oregon exclusionary rule applies to "derivative evidence" regardless of whether the evidence is inculpatory, exculpatory, or is relevant to an ongoing or new crime. Accordingly, this court should apply

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[7] A harder question would arise if an officer unlawfully stopped a motorist with a quantum of suspicion just short of probable cause or based on a reasonable mistake of law or fact. *See e.g., Matthews*, 320 Or at 404 ("Notwithstanding [the officer's] uncertainty about the manner in which defendant's headlights violated the law, or his inability to identify the specific law that defendant's headlights violated, it is clear from Frye's testimony that the events that he observed caused him to believe that defendant had committed an infraction."); *Heien v. North Carolina*, ––US ––––, 135 S Ct 530, 190 L Ed 2d 475 (2014) (holding under the Fourth Amendment, reasonable suspicions, as required for a traffic stop, can rest on a reasonable mistake of law); *United States v. Leon*, 468 US 897, 906, 104 S Ct 3405, 82 L Ed 2d 677 (1984) ("suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."). *footnote continued…..*

In those instances, the officer may very well be "enforcing" the motor vehicle laws. However, this case does not present that difficulty, because the deputy did not articulate *any* objective basis for the stop in this case.

traditional exclusionary rule concepts in assessing whether defendant's decision to produce evidence derived from the illegality.

Applying those traditional exclusionary rule concepts, this court should suppress defendant's statement for two reasons: (1) because defendant's decision to produce a false statement during the unlawful and arbitrary stop was not a significant intervening event for purposes of severing the casual connection between the illegality and the defendant's production of evidence; and (2) because the remaining *Hall* and *Unger* factors support the presumption that defendant produced the statement because of the unlawful stop.

### A. The purpose behind Oregon's exclusionary rule requires this court to suppress evidence that derives from the underlying illegality, which could include "new crime" evidence.

Article I, section 9, of the Oregon Constitution[8] protects the personal right to be secure against unlawful searches and seizures. *State v. Unger*, 356 Or 59, 113-14, 333 P3d 1009, 1041 (2014); *see also Rodgers*, 347 Or at 618 (applying Article I, section 9, to traffic stops).

When the government produces evidence by conducting an unreasonable search or seizure, Article I, section 9, provides a remedy that protects the right

[8] Article I, section 9, reads: "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."

"through the sanction of [the] suppression of evidence." *State v. Davis*, 313 Or 246, 253–54, 834 P2d 1008 (1992); *State v. Kosta*, 304 Or 549, 553, 748 P2d 72 (1987); *State v. Tanner*, 304 Or 312, 315–16 n 2, 745 P2d 757 (1987). No Oregon Supreme Court case limits that sanction based on policy considerations unrelated to the causal connection between the evidence and the illegality (the "derivative evidence" test). For example, there are no Oregon Supreme Court cases deciding the application of Oregon's exclusionary rule based on balancing the illegality against the value or character of the evidence at issue. *Accord Tanner*, 304 Or at 316-17 ("the character of the effects given by defendant to [a third party], and in particular whether they were stolen, is irrelevant in this instance. Searches and seizures are separate acts calling for separate analysis.").

Instead, the primary purpose for the state exclusionary rule is to vindicate the individual's personal rights by placing the person subjected to the violation in the same position as if no violation had occurred. *Davis*, 313 Or at 254.[9] The exclusionary rule accomplishes that task through suppressing the "direct

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[9] Suppressing unlawfully obtained evidence also protects the individual's rights enshrined under Article I, section 9, in two supplemental ways: (1) by potentially deterring future illegal police practices, and (2) by ensuring that unlawful evidence is not sanctioned during the court process—thus, bolstering public confidence in the judicial system. *See Unger*, 356 Or at 102-03 (Landau, J., concurring); *Id*. at 116-17 n 6 (Brewer, J., dissenting). *See also State v. McMurphy*, 291 Or 782, 785, 635 P2d 372 (1981) (describing those "supplemental" benefits as "desired consequences" but not as the constitutional basis for suppression).

results" of unlawful police action *and any derivative evidence* causally connected to the illegality. *Unger*, 356 Or at 67.

In this case, the deputy illegally stopped defendant to obtain evidence: specifically, defendant's self-identification. Defendant produced the evidence that the deputy sought. Accordingly, defendant sought to suppress his statement: "I am Harold He is seeking to suppress the testimonial evidence, not merely the character of the evidence. As this court made clear in *Tanner*,

> "If the police violated any right of defendant's, it was a right against the search that uncovered the effects, not some right in the effects themselves. An unlawful search that uncovers effects such as stolen goods or contraband, which also may not legally be possessed, will nevertheless result in suppression[.]"

*See Tanner*, 304 Or at 316-17. In other words, here, regardless of whether defendant's statement was "true" or "false", if it derived from the illegality, Oregon's exclusionary rule requires suppression.

The state now asks this court to create an exception to the exclusionary rule by classifying defendant's statement as "new crime" evidence, because that is how it wants to *use* the evidence. But, that categorization is not relevant to the exclusionary rule. *Id*. Rather, for purposes of Article I, section 9, the question is simply whether the evidence derived from the underlying illegality.

In some instances, evidence that the state could use in a new prosecution against an individual will derive from the illegality. In other instances evidence the state would use to prove a new crime will not derive from the illegality. In that latter instance, the evidence is admissible; not because the evidence is a "new crime," but because it did not derive from the illegality. In other words, derivative evidence might include several different categories of evidence: it might include exculpatory or inculpatory evidence; or evidence relevant to an ongoing or new crime. However, regardless of which category the evidence belongs, the question under the Oregon exclusionary rule is the same: did the evidence derive from the illegality? If so, it is not admissible.

The following example should be helpful: An officer unlawfully stops a defendant on the street and searches his backpack. As a result of the search, the officer finds a banana, a map, and a bag of meth. The officer asks the defendant about the items, and defendant responds, "The banana is my lunch, I bought the drugs for my personal use, and the map is a blueprint to a house I intend to burgle." The officer arrests the defendant for possession of methamphetamine and attempted burglary and seizes all three items.

During a motion to suppress, the court determines that the officer unlawfully seized the defendant and discovered the evidence and statements as a result. At that point, the defendant has the right under Article I, section 9, to suppress all the items and statements discovered regardless of whether they are

exculpatory (the banana), inculpatory (the bag of meth), demonstrated an ongoing crime (defendant's admission that the drugs were his) or demonstrated a future crime (the blueprint and defendant's statement about committing a burglary). In sum, the defendant is entitled to suppress the fact that the officer stopped him and discovered anything, because that vindicates his personal rights against unreasonable and arbitrary police conduct. *Id*.; *Compare and Contrast* Wayne R. LaFave, 6 *Search and Seizure* 11.4(j) (5th ed 2012) (explaining that, for purposes of the Fourth Amendment, the exclusionary rule's deterrence rationale serves as the reason to justify admitting "new crime" evidence, because it requires the court to balance the need to deter police conduct (which is low when a defendant responds *unexpectedly* by committing a new crime) against the cost of suppressing relevant evidence of a criminal conduct (which might be high depending on the value of the evidence at hand)).

The state has not identified any reasons for this court to graft a "new crime" exception into the Article I, section 9, suppression remedy. Nor has it offered this court a principled basis for distinguishing between excluding the act of an ongoing crime from a new crime. The Court of Appeals has created its own principled, yet unsupported policy rationale, namely, admitting evidence of crimes directed at an officer during an illegal detention. *State v. Gaffney*, 36 Or App 105, 108, 583 P2d 582 (1978) (creating an exception to the exclusionary

rule that applies to evidence of "*independent crimes* directed at officers who illegally stop, frisk, arrest or search" (emphasis added)).[10]

However, traditional exclusionary rule concepts are better suited at testing whether Oregon's exclusionary rule is appropriate under those circumstances. And, in most circumstances, the exclusionary rule will not apply to a crime directed at an officer during an unlawful stop—not because of an unstated policy choice, but because the new crime was a significant intervening event. *See e.g., United States v. Green*, 111 F3d 515, 522 (7th Cir 1997) (explaining that at least three other circuits allow in the "newly discovered evidence," so long as it was discovered after an illegal detention but subsequent to a lawful search incident to arrest); *see also* LaFave, 6 *Search and seizure* 11.4(j) at 487 (explaining that many jurisdictions that apply the new crime exception to the exclusionary rule do so based on attenuation principles).

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[10] A large number of other circuits and courts draw a practical line at admitting evidence of violent new crime. *See, e.g.*, *United States v. Waupekenay*, 973 F2d 1533, 1537-38 (10th Cir 1992) (cataloguing those cases and stating, "Our decision is consistent with the holdings of many other courts, state and federal, that have considered situations in which a defendant seeks to suppress evidence relating to his or her violence or threatened violence toward police officers subsequent to an unlawful search or seizure or a warrantless entry.").

### B. An individual's act or statement constituting a "new crime" is a significant intervening event when the person acts "unilaterally and independently" from the illegality; in contrast, when the defendant's acts or statements directly respond to or reasonably correspond with the police commands, then they are not "unilateral."

Evidence derives from an illegality in one of two ways: (1) defendant produces the evidence—either through an act, consent, or statements—because the illegality significantly affected his decision making process [**the "significant affects" model**]; or (2) because the police "traded on" the illegality by seeking or obtaining evidence as a result of the prior illegal conduct [**the "traded on" model**]. *Unger*, 356 Or at 80-81; *Hall*, 339 Or at 35.

It is the state's burden to prove that the evidence did not derive from the underlying illegality in *either way*. It can do so by proving (1) the police would have inevitably discovered the evidence through lawful and predictable procedures ["inevitable discovery], (2) the state had obtained the evidence independently of the violation ["independent grounds"], or (3) the factual link or causal connection between the illegality and the evidence is so tenuous that the illegality did not lead to discovery of the evidence ["attenuation"]. *Unger*, 356 Or at 64-65.

In this case, the state argues that defendant's decision to provide a false name to the deputy was attenuated from the unlawful and arbitrary stop, because defendant's statement was false. Specifically, the state likens

defendant's decision to lie during an unlawful stop to a defendant's unilateral decision to relinquish his privacy right during an unlawful stop. (State's BOM at 13-14). However, as defendant will demonstrate, the state's argument is misplaced.

**1) In *State v. Crandall*, the defendant's act of abandoning property during the unlawful stop did not directly respond to or reasonably correspond with the police request to walk toward him.**

An "intervening event" must be significant enough to overcome the presumption that the constitutional irregularity or illegality produced the evidence. *Hall*, 339 Or at 25 (stating proposition). Stated another way, a genuine attenuating event restores the normative police-citizen model and "erases" or "dissipates" the affects of the illegality to the point where this court can comfortably declare that the evidence derived from a source *other than* the illegality. *State v. Crandall*, 340 Or 645, 653, 136 P3d 30 (2006) (explaining that the point of "attenuation" is so "we can say that the unlawful police conduct cannot be viewed properly as the source of that evidence." (internal quotations omitted)).

For example, in *State v. Crandall*, this court held that an individual's independent and unilateral act could sever the connection between an illegal seizure and the discovery of evidence. 340 Or at 652-53. There, the police had responded to an apartment complex at night to investigate a noise complaint. While at the complex, an officer observed the defendant emerge from an

apartment where the officer suspected drug activity was occurring. When the defendant saw the officer, he froze, but then quickly began walking away. The officer called to the defendant to "stop" and "come here." The defendant "stopped, turned around and walked back" toward the officer and, as he did, the defendant tossed a baggie underneath a parked car. The police seized the bag and discovered three bindles of methamphetamine. *Id*. at 647-48.

The state conceded that the officer had unlawfully stopped the defendant without reasonable suspicion. But it argued that defendant's decision to place the drugs under a parked car attenuated the discovery of the evidence from the illegality. This court agreed and explained "In deciding to put the baggie containing a controlled substance underneath the car in the parking lot, defendant acted both unilaterally and voluntarily" and consequently the "unlawful police conduct cannot be viewed properly as the source of that evidence." *Id*. at 653.

This court did not base its reasoning in *Crandall* on the notion that the defendant's action constituted "a new crime" or that the evidence consisted of contraband; the state had not charge the defendant with offensive littering after he placed the baggies underneath the car. Rather, this court found the evidence admissible, because the discovery did not derive from the illegality. In other words, the defendant's act of abandoning property during an unlawful stop did not correspond with the officer's request for him to move toward the officer. On

one hand, the fact that the defendant walked toward the officer was responsive; on the other hand, the fact that defendant abandoned property was non-responsive.

Had the officer in *Crandall* demanded that the defendant "stop" and "come here" *and* "dispose of anything illegal," there would be little doubt that this court would suppress the evidence defendant discarded in response. In that same vein, suppose the defendant in *Crandall* was across the street instead of across the parking lot when the officer seized him. And assume defendant immediately complied with the officer's request to "come here" by crossing the street. Under those circumstances, had the state charged defendant with jaywalking, the defendant would have had a legitimate basis to suppress the fact that he walked toward the officer in response to his request. On the other hand, under that scenario, if he ran from or shot a gun at the officer, those acts would be unilateral and not subject to suppression.

**2) In *Rodriguez* and *Kennedy*, the defendants' spontaneous decisions to waive their Article I, section 9, rights, did not a directly respond to or reasonably correspond with the police accusations of misconduct.**

This court based its holding in *Crandall* on two cases involving spontaneous waivers of privacy rights: *State v. Kennedy*, 290 Or 493, 624 P2d 99 (1981) and *State v. Rodriguez*, 317 Or 27, 854 P2d 399 (1993). In *Kennedy*, the police approached the defendant in the airport parking lot believing he fit a "drug smuggler's profile" and asked to talk to him. *Kennedy*, 290 Or at 496.

The defendant asked why, and an officer explained that he "had information that led [him] to believe that [the defendant] may be carrying narcotics on his person or in his luggage." *Id*. The defendant first responded by "den[ying] that he was carrying narcotics" and then, without prompting, continued, 'Would you like to search my luggage?'" *Id*. During the ensuing search, the officers found traces of a controlled substance. *Id*.

This court concluded that the discovery of the evidence was sufficiently attenuated from any illegality, relying primarily on the fact that defendant spontaneously invited the officer's search without prompting: "We believe that defendant's offer to let Officer Johnson search his luggage without a prior request is a strong indication that defendant's free choice was not tainted by the illegal stop when consent was given[.]" *Id*. at 504.

The facts in *Rodriguez* are similar. In that case, state and federal officers arrested the defendant at his home pursuant to an arrest warrant. *Rodriguez*, 317 Or at 29. The officers advised the defendant of his *Miranda* rights. *Id*. at 30. In response to the question, "Do you have any drugs or guns in the house," the defendant replied, "No, go ahead and look." *Id*. The officer confirmed the defendant's statement by asking "Can we search?" and defendant said again, "Yes, go ahead." *Id*. The officers searched his house and found a gun.

As in *Kennedy*, the court assumed that the arrest violated Article I, section 9. *Id*. at 37. The court also concluded, however, that the defendant's

*spontaneous offer* to search his house sufficiently attenuated the discovery of the gun and upheld the denial of his motion to suppress. *Id*. at 41.

Both *Rodriguez* and *Kennedy* demonstrate that a defendant's spontaneous and unilateral waiver of Article I, section 9, rights can act as a significant intervening event, because the statements were nonresponsive to the officer's actions. In other words, when the defendants in those two cases denied the accusations, those statements were responsive and could be suppressed. On the other hand, when the defendants followed up those responsive statements with spontaneous unprompted invitations, the actions were unilateral, *i.e*., they were no longer a direct consequence of the illegality. However, had the officers made an accusation and asked for consent, those cases might have turned out differently.

The following pattern emerges from *Crandall*, *Kennedy*, and *Rodriguez*: if the defendant unilaterally and spontaneously produces evidence or consent during an unlawful stop, then that may qualify as a significant intervening event to sever the causal connection between the illegality and the discovery of evidence. "Unilateral" means without prompting, independent of, and nonresponsive to the officer's request or unlawful command. In contrast, then, when the defendant's act or statements are responsive to the police request or questioning during the illegality, then they are not "unilateral." In other words, this court should apply a common sense approach in analyzing the relationship

between the officer's unlawful conduct and the defendant's acts or statements to determine whether they correspond with each other. If the defendant's statements to police are within the scope of the officer's questioning, then this court should suppress those statements and acts as the derivative product of the illegal seizure.

**3) In this case, the defendant's decision to provide identifying information to the deputy was a direct and predictable response to the officer's question ("What is your name?") and to the ongoing situation (because routine traffic stops generally begin with a direction to produce identification).**

Here, the officer unlawfully seized defendant and asked for his identifying information, as is typical after a motor vehicle stop. Defendant answered by providing a name, date of birth, and address. In other words, defendant's statement was a direct response to the question. The relationship between the officer's unlawful conduct and defendant's statements predictably correspond.

In contrast, defendant did not invite the deputy to search him for his identification; he did not throw evidence out the window, and he did not otherwise act unilaterally by, for example, offering a bribe to the officer, assaulting the officer, or fleeing in attempt to avoid the interaction. Those acts would have been nonresponsive to the officer's request.

Critically, the fact that defendant's statement was inaccurate or untrue, has no bearing on the question of responsiveness or connection to the police

illegality. For example, if an officer asks "what is in your bag" during an unlawful stop, the admissibility of the statement does not depend on the accuracy of the response. The response is suppressed regardless of whether the person truthfully responded "cocaine" or untruthfully responded "baking powder."

### C. The remaining *Hall* and *Unger* factors support the presumption that defendant produced the statement because of the unlawful stop.

As an initial matter, defendant does not allege that he made his statement involuntarily. Accordingly, the only remaining question is whether his statement was a product of the underlying illegality. In *Hall*, this court identified three relevant considerations to assess whether defendant's decision to consent was a product of the illegality: (1) the "temporal proximity" between the unlawful conduct and the discovery of the evidence; (2) the existence of any significant intervening circumstances that might explain why the police sought the evidence or defendant produced it apart from the illegality; (3) the presence of any circumstances that would have mitigated the effect of the illegal police conduct, such as an advice of rights or warnings. *Hall*, 339 Or at 35.

More recently, this court explained that the *Hall* factors were indeed relevant but that the inquiry is more nuanced. *State v. Unger*, 356 Or 59; *State v. Lorenzo*, 356 Or 134, __ P3d __ (2014); and *State v. Musser*, 356 Or 148, __ P3d __ (2014). According it added two additional considerations to the

calculus: the "nature, extent, and severity" of the constitutional violation and the "purpose and flagrancy" of the underlying illegal action.

**1) The temporal proximity between the defendant's statement and the unlawful stop favors suppression; the officer asked for, and defendant provided the evidence immediately during the ongoing illegality.**

In this case, defendant produced the evidence—made his statement—during the unlawful and arbitrary stop; in fact, a fair reading of the record reflects that the officer asked for, and defendant provided, the identifying information *immediately*. (Tr. 7-8). That is, the officer unlawfully seized defendant, met him at his vehicle, and obtained the evidence *before* any time had passed or the stop had ended. Therefore, a significant passage of time does not explain the defendant's decision make a statement to Deputy Hulke.

Accordingly this court can presume that defendant's decision to make the statement was a direct consequence of the unlawful stop. *Hall*, 339 Or at 36 (noting close temporal proximity between consent and unlawful stop). *See Bailey*, 356 Or at 505 ("Here, for example, the relevant police conduct consisted of an unlawful detention that persisted until shortly before the discovery of challenged evidence. In such circumstances, there is less likely to be a sufficient break in the causal chain[.]").

**2) The state did not identify any significant intervening events to prove that another event, apart from the illegality, was responsible for producing the evidence.**

The state relies on a single potential intervening event: defendant's decision to produce a false statement to the police during an unlawful stop. However, as discussed above, defendant's decision to produce that evidence was not an intervening event, because it was not a spontaneous, unilateral, or independent act apart from the illegality.

The state offers no other significant intervening events that could have affected the defendant's decision to make a statement. The absence of significant intervening events (such as the release of the defendant or contact with an attorney or third person) supports the presumption that the stop affected defendant's decision to speak. *Hall*, 307 Or at 35.

**3) The state points to no mitigating circumstances that attenuated the illegality from the discovery of defendant's statements.**

The state also did not identify any mitigating circumstances that might explain defendant's decision to produce the evidence in this case. The officer did not inform the defendant that he was free to leave; did not tell him that he had been unlawfully stopped; and did not inform him that he did not have to provide a name if he so chose.

The absence of warnings reinforces the presumption that the stop affected the defendant's decision making process. *Hall*, 307 Or at 35.

**4) Finally, the nature and extent of the unlawful conduct, the deputy's purpose in engaging in that conduct, and the flagrancy of the underlying illegality indicate that suppression is warranted.**

In *State v. Unger*, this court determined that an unlawful trespass onto a defendant's property did not produce a defendant's intervening voluntary consent. 356 Or at 92. There, several police officers went to the defendant's house to do a "knock and talk" concerning reports of drug activity at the house. When they received no answer at the front of the house, one officer trespassed into the back and knocked on a sliding glass door. At that point, the defendant came to the door, and the officer told him the police were there to investigate complaints they had received and asked if they could enter. The defendant allowed the original officer and three other officers to enter.

This court first reasoned that the unconstitutional trespass "simply brought the detectives, during daylight hours, to a door of the house, which defendant opened." *Id*. at 89. Consequently, "[w]ithin the universe of possible unlawful police activity, the trespass here was limited in 'extent, nature, and severity.'" *Id*. at 89. The next three factors (the *Hall* factors of temporal proximity, administration of warnings, and presence of significant intervening events) all pointed toward exclusion. However, the court determined that the police "purpose" in going to the back (to contact defendant "to ask for permission to search the house, not to search for incriminating evidence near the back door") and the lack of "flagrant" police misconduct (police followed a

path to the back door and did not "cross any barriers or use force to reach the door") led the court to conclude that the constitutional violation did not affect the defendant's decision to consent. *Id*. at 91-92.

This court reached a similar conclusion in *Lorenzo*, 356 Or at 145-46. In *Lorenzo*, police responded early one morning to an apartment complex where a man was walking around with a noose around his neck. Police took the man into custody and then tried to contact the man's roommate (the defendant) who lived in the same complex. After knocking on the apartment's front door, one officer nudged it open, reached into the apartment, and knocked on the door to defendant's bedroom (located just inside the front door). The defendant came to his bedroom door, opened it, and saw the officer standing immediately outside the now-open front door. The officer asked for consent to enter. The defendant agreed, and the officer ultimately discovered drug evidence. *Id*. at 137-38.

This court relied on *Unger* and concluded that the "unlawful search was limited in time and severity, which suggests that its illegality was unlikely to have had a significant effect on defendant's consent." *Id*. at 144. The court also observed that: the purpose of the police conduct was out of concern for defendant's welfare; the police did not gain any information from the illegal search (reaching in to knock on the bedroom door); and the "restrained interaction between police and defendant and the absence of any threats or intimidation did not present the kind of flagrant circumstances that would likely

have affected" defendant's consent such as to constitute "exploitation of the unlawful conduct." *Id*. at 145-46.

Finally, this court applied those same factors in *Musser* but reached a different conclusion. *Musser*, 356 Or at 159. In *Musser*, an officer stopped the defendant and a friend because he mistakenly believed they were trespassing in an area of a shopping center. He asked for identification, and the defendant handed him a credit card containing her photo. The officer noticed another card with a different name in the defendant's purse and requested to see it, suspecting possible identity theft. The officer also noticed two Crown Royal bags in the defendant's purse, requested and obtained consent to see them, and found evidence of drug possession in one of the bags.

In distinguishing *Unger* and *Lorenzo,* this court reasoned that "the stop here was a more severe violation of defendant's rights than the violation in *Unger*" because the police order "clearly indicated to defendant that she had no choice but to respond to the order, bringing her significantly under the control of the police." *Id*. at 156-57. Using the additional *Unger* factors, the court reasoned that (1) the "purpose" for the intrusion was a "shot in the dark" check for criminal activity and (2) the officer "continued to detain defendant while inquiring about various other crimes," which was an example of the state "taking advantage of that misconduct in a way that likely had an effect on defendant's decision to consent." *Id*. at 159. Accordingly, the court held

that under those circumstances, "the police improperly exploited their unlawful stop of defendant to gain her consent to the search." *Id*. at 159.

When considering the *Unger* factors, this case falls in line with *Musser*- for numerous reasons and, in fact, presents even more purposeful and flagrant misconduct. First, here, the nature character of the seizure was significant. The officer initiated a traffic stop. By definition, the stop interfered with defendant's liberty to travel freely and move about unrestrained and placed him under the control of the deputy. In that sense, it was far more intrusive than the trespass in *Unger*, or the quick, minimally-intrusive, emergency-fueled search in *Lorenzo*.

*Musser* is illustrative. In *Musser*, this court described the officer's conduct as impermissible: "police are not authorized to detain and question citizens merely to 'make sure they [are] not doing anything wrong.' The purpose of the unlawful stop here—in contrast to the 'knock-and-talk in *Unger*, which was precipitated by information about the presence of drugs, guns, and children in a particular house—apparently was a 'shot in the dark' to check for criminal activity." *Id*. at 159

However, the officer, in *Musser*, was at least acting for some objective reason. In contrast, the deputy, here, provided no objective basis for the stop. Instead, the only purpose for the stop appears to be the officer's desire to

investigate the man driving a purple Cadillac. According it was the type of "fishing expedition" requiring vindication under Article I, section 9.

Finally, the nature of a traffic stop placed the deputy in the position to ask for defendant's identification, a predictable routine that occurs hundreds of times a day in Oregon. For that reason, like in *Musser*, "the unlawful police conduct here led directly to observations," and then to the officer's request for identification. Defendant's response was the direct product of the initial unlawful stop. *Id*. at 14. This court should suppress defendant's statement.

## CONCLUSION

This court should affirm the judgment of the Court of Appeals and remand this case to the trial court for a new trial.

Respectfully submitted,

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

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 11,862 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 April 3, 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 Plaintiff-Respondent, and Robert M. Atkinson, #740173, *Amicus Curiae*.

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