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IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. WILLIAM RICK DELONG, Defendant-Appellant Respondent on Review.	Douglas County Circuit Court Case No. 09CR1050FE CA A146907 SC S062176

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

Review the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Douglas County
Honorable Joan G. Seitz, Judge

Opinion Filed: January 29, 2014
Before: Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge

Brief on Merits will be filed if review is allowed.

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RESPONDENT'S BRIEF ON THE MERITS

INTRODUCTION

Defendant was placed in custody and unlawfully questioned without *Miranda* warnings. An officer asked whether there was anything in his car that an officer should be "concerned" about. In response to that question, defendant denied that there was and consented to a search of the car. That was a bad idea, because there was methamphetamine in the car.

Neither party disputes that defendant was in custody, subject to interrogation, and should have received the *Miranda* warnings before being questioned. The issue before this court is whether the discovery of the methamphetamine was derived from the officer's acknowledged unlawful questioning. In order to answer that question, this court must decide how a court should determine whether physical evidence is derived from an earlier violation of Article I, section 12, of the Oregon Constitution.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

How should courts determine whether a violation of a defendant's rights under Article I, section 12, of the Oregon Constitution requires suppression of physical evidence?

Proposed Rule of Law

When the police violate Article I, section 12, by questioning a person after failing to provide *Miranda* warnings a court must suppress the person's statements and any physical evidence derived from that violation. Physical evidence is derived from a *Miranda* violation when police discover it as a foreseeable result of unlawful custodial interrogation.

Second Question Presented

After handcuffing defendant and placing him in the back of a police car, a police officer violated Article I, section 12, of the Oregon Constitution by interrogating him without providing the *Miranda* warnings. The officer asked defendant if there was if there anything in the car that he should be concerned about. Defendant responded "No" and that the police could search if they wanted. Does the record establish that evidence discovered in the ensuing search was not derived from the constitutional violation?

Proposed Rule of Law

The physical evidence in this case was derived directly from the unlawful questioning. Defendant provided one exculpatory answer to the officer's unlawful questioning: he denied that there was anything suspicious in his vehicle and invited the officer to search in order to prove the truth of his statement. Defendant's consent to search was not a spontaneous intervening event such that it severed the causal connection between the unlawful

questioning and the discovery of the evidence. There were no other attenuating factors such that the evidence should be admitted. The evidence must be suppressed.

SUMMARY OF ARGUMENT

When a police officer interrogates a criminal suspect without providing *Miranda* warnings, that officer violates Article I, section 12, of the Oregon Constitution. Evidence derived from such a violation, whether it is physical or testimonial, must be suppressed.

This court has not previously addressed how to determine whether physical evidence is derived from a *Miranda* violation. This court should now hold that physical evidence is derived from a *Miranda* violation when the evidence was obtained as a foreseeable result of unlawful interrogation. That evidence should then be suppressed unless there are intervening circumstances following the illegality that render it admissible.

The foreseeability test is derived from this court's cases explaining what constitutes interrogation. A police officer interrogates a person when he or she asks questions, or makes statements, that he or she should know could result in the discovery of incriminating evidence. Thus, physical evidence is derived from unlawful interrogation when a reasonable officer would know that the interrogation could result in the discovery of that physical evidence.

After determining that physical evidence is derived from unlawful questioning, this court should consider the factors outlined in this court's decision in *State v. Jarnagin*, 351 Or 703, 716, 277 P3d 535 (2012). There, this court described what factors a reviewing court must examine when it determines whether evidence discovered following a *Miranda* violation must be suppressed. That case involved subsequent testimonial, not physical, evidence, but the factors it outlined apply with equal force in this context. Under *Jarnagin*, a court should examine the totality of the circumstances, including the passage of time, a person's release from custody, the state's use of unlawfully obtained statements, and the subsequent provision of belated *Miranda* warnings.

Applying the proposed test in this case, the evidence must be suppressed. Although the officer asked defendant a question that *could* have been answered with just the words "yes" or "no," a reasonable officer would know that asking a person if he has anything concerning in his car invites a broader response that could, as intended, lead to the discovery of physical evidence.

Because defendant's offer of consent to search was responsive to the question and a foreseeable result of the interrogation, the physical evidence discovered in his car must be suppressed unless other sufficient intervening circumstances are present. They are not.. There was almost no passage of time, defendant was not released from custody, and he was not provided with his

Miranda warnings at any time before the discovery of the evidence. The discovery of the physical evidence was a direct result of the unlawful interrogation and it must be suppressed.

SUMMARY OF FACTS

The Court of Appeals decision set out the underlying historical facts as follows:

> "Defendant and his passenger, Keith, were driving in Douglas County when Sergeant Robeson observed that defendant was not wearing a seatbelt. Robeson stopped defendant and asked him for his driver's license, but defendant did not produce a license or any other form of picture identification. Robeson then asked defendant to step out of the car and detained him to verify his identity. Robeson handcuffed defendant, searched him, and placed him in the back of his patrol car. Deputy Poe arrived to assist around the time Robeson was taking defendant into custody.
>
> "Robeson and Poe both attempted to identify defendant. Robeson asked defendant questions about his identity and filled out a form based on defendant's responses. Defendant told Robeson that he was from Utah and gave him other identifying information, which Robeson then gave to dispatch to search for an Oregon or Utah driver's license. Meanwhile, Poe used his in-car computer to search for more information about defendant, including looking for mug shots from the local jail and 'wants and warrants.' Before dispatch responded, Robeson further asked defendant whether there was 'anything in the vehicle that we should be concerned about.' Defendant answered 'no' to that. Robeson did not ask for consent to search; however, defendant then volunteered that, if the deputies wanted to 'search the vehicle,' they could.
>
> "Poe found that there was a restraining order entered against defendant and informed Robeson, who then told Poe about defendant's consent to search the car. Poe conducted the search

> while Robeson interviewed Keith. Among other things, Poe found a fanny pack under the passenger seat. He showed it to Keith and asked whether it was hers. She said that it did not belong to her. Poe then opened the fanny pack and found several small zip-lock plastic bags, a pill bottle, and plastic straws, all containing a white powder residue.
>
> "Poe and Robeson then returned to defendant after a third deputy, Thornton, arrived to assist. Poe gave defendant *Miranda* warnings and asked questions about what Poe had found in the car. Defendant then made incriminating statements, including admitting that the fanny pack was his and that there was drug paraphernalia in it.[1] Thornton's field test on one of the plastic bags indicated that the white residue it contained was methamphetamine.
>
> "In seeking to suppress all evidence resulting from the search, including his incriminating statements, defendant argued, among other things, that the evidence should be suppressed because of a Miranda violation. Defendant contended that he was in custody and under compelling circumstances while he was handcuffed in the police vehicle and that Robeson was asking defendant questions without giving required Miranda warnings for the purpose of furthering a criminal investigation, beyond issuing a traffic citation. His consent to search the vehicle, he argued, was invalid because it was obtained during that period of questioning. Defendant also contended that, even if he had validly consented to a search of the vehicle, the state did not meet its burden to establish that his consent extended to a search of all of the vehicle's contents and closed containers. Thus, the search of the fanny pack was 'not within the scope of the consent search' and, without a warrant, was illegal.

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[1] The state has not advanced an argument that, if defendant's consent was invalid, the subsequent *Miranda* warnings nevertheless render those statements admissible. Thus, if this court agrees with defendant that the physical evidence must be suppressed, it must also suppress those statements. Regarding those statements, defendant incorporates the arguments he raised in his opening brief in the Court of Appeals. App. Br. at 19-24.

> "To counter those arguments, the state asserted that defendant was not being interrogated when Robeson asked him about 'anything of concern' in the vehicle. The state characterized that as part of routine questioning in connection with an attempt to positively identify defendant and asserted that no Miranda warnings were required. The state further argued that defendant had volunteered his consent to a search of the vehicle and, because no one else claimed to own the fanny pack, the officers had consent to search the fanny pack.
>
> "The trial court agreed with the state. It concluded that no Miranda warnings were required until Poe returned to defendant after having discovered the fanny pack and that defendant volunteered his consent to a search of the car, upon which Poe was entitled to rely when he opened the fanny pack."

State v. Delong, 260 Or App, 720-22, 320 P3d 653, *rev allowed*, 355 Or 567, 329 P3d 770 (2014).

The precise nature of the interaction between defendant and the Officer Robeson is key to this court's determination of this case. Therefore, defendant provides the following additional detail about that encounter not present in the Court of Appeals opinion.

Robeson became suspicious of defendant almost immediately upon seeing him. He thought that defendant, who was driving his car, was "paying close attention to me." Tr. 4. His suspicion was enhanced when defendant pulled off to the side of the road in what the officer believed was an effort "to avoid me." Tr. 4-5. After he pulled defendant over for a seatbelt violation, Robeson asked him for his driver's license, insurance, and registration, which he was not able to provide. Tr. 5-6.

Robeson said that what he does with a driver who cannot provide identification "kind of depends on the circumstances," but in this case he chose to take defendant into custody. Tr. 6. He asked defendant to step out of his car and "detained" him. Tr. 6. To do so, he handcuffed defendant, searched him, and placed him in his police car. Tr. 9. Around this time, another police officer, Poe, arrived on the scene. Tr. 21.

Robeson continued to investigate defendant's identity and defendant provided his first, middle, and last names. Tr. 6. He gave his full birth date, January 20, 1969. Tr. 6. He told Robeson that he was a "recent transplant to Oregon from Colorado." Tr. 7. He also acknowledged that he had "done prison time." Tr. 7. Robeson then had defendant fill out an "FI form," a document that asks for "name, race, date of birth, physical, driver's license number, employer. Those kind of items." Tr. 7.

Robeson gave the information that defendant provided to his dispatcher. Tr. 7. While he waited for a response, he checked his in-car computer to see if there were any reported contacts with defendant. Tr. 8. Finding none, he then asked defendant whether there was anything suspect in his car. Tr. 8. He described the exchanged as follows:

> "A. I asked Mr. Delong if there was anything we should be concerned about.
>
> "Q. And how did he respond to that?

> "A. He told me 'no,' and that if we wanted to search the vehicle, we could.

Tr. 8.

On appeal, defendant argued that police placed him in custody or compelling circumstances when he was handcuffed and placed in the back of a patrol car. App. Br. at 13. He argued that the subsequent questioning by the officer was unlawful because it was interrogation and the officer did not provide *Miranda* warnings. App. Br. at 18. Therefore, because defendant's consent to search came in response to the unwarned questioning, the evidence found in the fanny pack discovered in the car must be suppressed. App. Br. at 23.

On review, the Court of Appeals reversed the trial court's decision denying defendant's motion to suppress. The Court of Appeals held that this case was governed by this court's decision in *State v. Vondehn*, 348 Or 462, 236 P3d 691 (2010). *Delong*, 260 Or App at 722-23. The court noted this court's holding that "when the police violate Article I, section 12, such as by failing to give *Miranda* warnings, 'the state is precluded from using evidence derived from that violation to obtain a criminal conviction,' including 'physical evidence that is derived from that constitutional violation.'" *Id.* at 723 (quoting *Vondehn*, 348 Or at 472 (internal citations omitted).

The Court of Appeals also noted that the state agreed that there was a causal connection between the unwarned questioning and the discovery of the evidence in the car, and rejected the state's argument that defendant's voluntary consent "'severed any unlawful taint' of the Article I, section 12, violation." *Id.* at 725. The court then determined that the discovery was "prompted by Robeson's question during a custodial interrogation, which is 'inherently compelling.'" *Id.* Accordingly, the court reversed the trial court's denial of defendant's motion to suppress. *Id.* at 727.

The state petitioned for review of the Court of Appeals decision, which this court allowed. 355 Or 567, 329 P3d 770 (2014).

ARGUMENT

I. Article I, section 12, of the Oregon Constitution requires provision of "*Miranda*-like" warnings before police may engage in custodial interrogation.

Article I, section 12, of the Oregon Constitution provides in relevant part that "[n]o person shall * * * be compelled in any criminal prosecution to testify against himself." In order to effectuate that rule, this court has held that before officers interrogate suspects who have been arrested or otherwise placed in compelling circumstances, they must provide *Miranda*-like[2] warnings. *State v.*

[2] Defendant uses the term "*Miranda* warnings" interchangeably with "*Miranda*-like warnings" to refer to those warnings required under Article I, section 12.

Smith, 310 Or 1, 7, 791 P2d 836 (1990); *State v. Magee*, 304 Or 261, 264-65, 744 P2d 250 (1987). That is, officers must provide the warnings that are required under *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966). *Id.* "Because a custodial interrogation is inherently compelling, and to ensure the validity of a waiver of the right against self-incrimination, Article I, section 12, requires that the police" provide the *Miranda* warnings. *State v. Vondehn*, 348 Or 462, 474, 236 P3d 691 (2010). Although a person may choose to waive those rights, such a waiver must be knowing. *Id.*

In this context, interrogation refers "'not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *State v. Scott*, 343 Or 195, 202, 166 P3d 528 (2007) (quoting *Rhode Island v. Innis*, 446 US 291, 301, 301 n 5, 100 S Ct 1682, 64 L Ed 297 (1980) (footnote omitted). Questions normally attendant to arrest are routine booking questions and may include questions necessary to ensure officer safety. *State v. Cunningham*, 179 Or App 498, 505, 40 P3d 535, *rev den*, 334 Or 327 (2002). "Incriminating response" means "any response—whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial." *Id.* (emphasis omitted).

When the police obtain statements in violation of Article I, section 12, a court must suppress evidence discovered as a result of that violation so as to

restore a person to the position he or she would have been in had there been no constitutional violation. *State v. Simonsen*, 319 Or 510, 518, 878 P2d 409 (1994) (citing *State v. Davis*, 313 Or 246, 253-54, 834 P2d 1008 (1992)). In other words, "evidence is suppressed for violations of the Oregon Constitution 'to preserve * * * rights to the same extent as if the government's officers had stayed within the law." *Id.* (quoting *Davis*) (ellipsis in *Simonsen*).

Under Article I, section 12, when the police fail to give the required warnings and engage in custodial interrogation, a court must suppress physical, as well as testimonial evidence that derives from the violation. *Vondehn*, 348 Or at 475-76. In *Vondehn* this court rejected the state's argument that the suppression of physical evidence should turn upon whether the police obtained the evidence via "actual coercion" or a "mere failure to provide *Miranda* warnings." *Id.* at 475. It rejected that argument because

> "When the police violate Article I, section 12, whether that violation consists of 'actual coercion' or the failure to give the warnings necessary to a knowing and voluntary waiver, the state is precluded from using evidence derived from that violation to obtain a criminal conviction. It follows ineluctably that, when the police violate Article I, section 12, by failing to give required Miranda warnings, the state is precluded from using physical evidence that is derived from that constitutional violation to prosecute a defendant."

Vondehn, 348 Or 475.

In a concurring opinion, Justice Linder and two other justices agreed that violations of Article I, section 12, could properly lead to suppression of

physical evidence: "When those procedural requirements are violated, we properly ask whether any subsequently obtained evidence, physical or testimonial, is sufficiently a product of that violation to require suppression along with any statements made in direct response to unwarned custodial interrogation." *Vondehn*, 348 Or at 487. This court later reiterated that the failure to give the *Miranda* warnings is itself a constitutional violation and can result in the suppression of physical evidence. *State v. Jarnagin*, 351 Or 703, 716, 277 P3d 535 (2012).

Although the warnings required under Article I, section 12, are the familiar *Miranda* warnings that are mandated by the Fifth Amendment to the United States Constitution, the rights and the means of enforcing them are not identical. In contrast to the exploitation analysis in *Vondehn*, under federal law the Supreme Court has focused more narrowly on prohibiting the introduction of compelled testimony at trial. *United States v. Patane*, 542 US 630, 637, 124 S Ct 2620, 159 L Ed 2d 667 (2004). In *Patane*, the Court explained that the Fifth Amendment's Self-Incrimination "Clause cannot be violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements." *Id.* However, the Court recognized that the clause may also "extend to bar the compelled production of any incriminating evidence." *Id.* Despite recognizing the need to suppress compelled physical evidence, the *Patane* majority held that *Miranda* rule is a "prophylactic" rule that

"necessarily sweep[s] beyond the actual protections of the Self–Incrimination Clause." *Id.* at 640.

In further contrast to this court's holdings in *Vondehn* and *Jarnagin*, the Supreme Court in *Patane* held that "a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule." 542 US at 641. Instead, "violations occur, if at all, only upon the admission of unwarned statements into evidence at trial." *Id.* Accordingly, the Court held that "[i]ntroduction of the nontestimonial fruit of a voluntary statement * * * does not implicate the Self–Incrimination Clause. The admission of such fruit presents no risk that a defendant's coerced statements (however defined) will be used against him at a criminal trial." *Id.* at 643. That is so because "statements taken without sufficient *Miranda* warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination." *Id.* at 644. Thus, there is a distinction between the cases interpreting and applying Article I, section 12, and the Fifth Amendment – suppression of physical evidence following voluntary consent is available under the former and rarely under the latter.

Several state courts have declined to adopt the *Patane* analysis as to their state constitutions. Along with this court in *Vondehn*, Vermont rejected the *Patane* rule in *State v. Peterson*, 181 Vt 436, 446, 923 A2d 585 (2007). The

Vermont court explained that following *Patane* would require "a fundamental departure from our exclusionary rule jurisprudence in order not to apply an exclusionary rule here" and "would create an incentive to violate *Miranda*." *Id.* at 445-46. Other states that have rejected the rule include Ohio in *State v. Farris*, 109 Ohio St 3d 519, 849 NE 2d 985 (2006); Massachusetts in *Commonwealth v. Martin*, 444 Mass 213, 827 NE 2d 198 (2005); and Wisconsin in *State v. Knapp*, 285 Wis 2d 86, 700 NW 2d 899 (2005).

II. This court should determine whether physical evidence is derived from a *Miranda* violation by asking whether obtaining the evidence was a foreseeable result of the improper questioning .

This court suppresses evidence that is obtained as the result of a constitutional violation. In order to determine whether physical evidence should be suppressed following a *Miranda* violation, this court should ask simply whether the evidence was discovered as a result of that violation. In order to make that determination, this court should employ a test that asks whether the discovery of the evidence was a foreseeable result of the improper questioning. If not, the physical evidence is not "derived from" the *Miranda* violation.

Even when the discovery of physical evidence was a foreseeable result of the improper questioning, this court should ask whether the state has established that other intervening factors nevertheless break the causal chain between the violation and the discovery of the evidence. In those cases in which the discovery of the physical evidence was the foreseeable result of improper police

questioning and there are no intervening circumstances, suppression must result.

A. Evidence is derived from a *Miranda* violation when a reasonable police officer would foresee that the interrogation could lead to the discovery of that evidence.

In *Vondehn*, this court described the underlying rule as follows:"[W]hen the police violate Article I, section 12, by failing to give required *Miranda* warnings, the state is precluded from using physical evidence that is derived from that constitutional violation to prosecute a defendant."348 Or at 475-76.. However, *Vondehn* did not articulate a precise test by which a reviewing court can determine whether physical evidence discovered following a *Miranda* violation was derived from that violation. The state proposes that this court should examine whether the *Miranda* violation adduces statements from a defendant and whether those statements in turn lead to the discovery of physical evidence, only suppressing evidence when unlawful interrogation leads the person to make a statement that prevents him or her from freely declining to give consent. Defendant sets out below why such a test is unworkable and would not serve the ends of the rule. Instead, defendant suggests that the first question should be whether an officer's unlawful interrogation leads to the discovery of physical evidence by asking whether such discovery is a foreseeable outcome of that questioning.

Although this court has not applied this foreseeability analysis to the issue of the Article I, section 12, exploitation analysis, the concept finds its root in the court's definition of interrogation. As discussed above, interrogation includes not only express questioning but also any words or action "that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Scott*, 343 Or at 202. Thus, when police ask a person a question and get a response that they should know that the question was reasonably likely to elicit, the question led to that response.

The foreseeability concept provides a metric by which a reviewing court may determine whether a statement is responsive to police interrogation. For example, a question such as, "Do you have a gun in your car?" may foreseeably lead to a variety of answers. A person might answer, "yes," or "no," or might elaborate and respond, as in this case, with an offer to allow a search in order to prove the veracity of their answer. Any such answer is a readily foreseeable response to that question.

A question that appears on its face to call for only a response of the words "yes" or "no" is often likely to elicit more or different responses. For example, one study found that, upon calling fifty different restaurants and asking the question "Do you accept credit cards," a researcher received three categories of response, "Yes, we do," "Yes, we accept Mastercard and Visa," and "We accept Mastercard and Visa." Herbert H. Clark, *Using Language* 217

(1996). In other words, people either provided a direct response to the question, a direct response and additional information, or information that the people believed the questioner was seeking without a direct response.

People frequently provide more information than a question may strictly request. This tendency frequently manifests during witness testimony in court proceedings, as any heavy reader of trial transcripts is aware. Indeed, in an online guide for victim witnesses, the United States Attorney's Office for the Middle District of Pennsylvania advises, "Do Not Volunteer Information: Answer ONLY the question asked of you. Do not volunteer information that is not actually asked for." Victim Witness Tips For Testifying In Court, http://www.justice.gov/usao/pam/Victim_Witness/testifying_tips.html (last visited September 4, 2014) (emphasis in original). As this court has noted in the context of a witness testifying at trial in response to unlawfully obtained evidence, it is difficult to "'unravel[]' all the factors that may have contributed to" that decision. *State v. Moore / Coen*, 349 Or 371, 385, 245 P3d 101, (2010), *cert den*, 131 S Ct 2461 (2011). In this context as well, it is difficult for a court to unravel all of the factors that go into a person's decision to give a particular response to a particular question.

If police ask "Do you have a gun in your car?" and a suspect responds, "There is a dead body in my house," or "There is a methamphetamine lab in my house and you may search it," those statements (and any resulting physical

evidence) are likely not derived from the question because they are not foreseeable responses to that question. Thus, defendant's test departs from a mere "but for" analysis. It might be that the suspect would not reveal the incriminating facts about his house but for the question about guns in the car, but the response is nevertheless not the type of answer that police would or should expect when asking that question. The distinction turns upon whether such a result is foreseeable from the questions asked.

B. After a court has initially determined that physical evidence is derived from a *Miranda* violation, it should determine whether, in the totality of the circumstances, the improper questioning caused the discovery of the evidence.

If the discovery of physical evidence is a foreseeable result of police interrogation it should generally be suppressed. However, a court may also determine if there are any other circumstances that break the chain of causality. If there are, the evidence may be admissible.

This court has set out a number of factors that a court may consider in making that determination in *Jarnagin*:

> "This court has looked to the totality of the circumstances in determining whether physical or testimonial evidence derives from or is the product of an earlier *Miranda* violation. *State v. Foster*, 288 Or 649, 655, 607 P2d 173 (1980); *State v. Mendacino*, 288 Or 231, 238, 603 P2d 1376 (1979); *see Vondehn*, 348 Or at 482, 236 P3d 691 (directing courts to consider 'all relevant circumstances' in deciding whether belated *Miranda* warnings were effective in ensuring a knowing and voluntary waiver of rights). Among other things, the court has considered the nature of the violation, the amount of time between the violation and any

> later statements, whether the suspect remained in custody before making any later statements, subsequent events that may have dissipated the taint of the earlier violation, and the use that the state has made of the unwarned statements."

351 Or at 716. In addition, a court should consider whether the police provided a belated administration of the *Miranda* warnings as an intervening factor. *Id.* at 721.

Under defendant's proposed rule, physical evidence that is discovered as a foreseeable result of unlawful interrogation should, presumptively, be suppressed. However, the state may establish that intervening circumstances have severed the connection of the illegality to the discovery of the evidence. Those circumstances may include the amount of time elapsed between the violation and the discovery of the evidence, whether the suspect has been released from custody, provision of *Miranda* warnings, or other subsequent events that may sever the causal connection.

For example, imagine police arrest a person and engage in an interrogation about the location of a gun without providing the *Miranda* warnings. If that person promptly answers the questions and provides the location of the gun, the subsequent discovery of that gun would be a foreseeable result of the questioning and no intervening factors would prevent its suppression. However, suppose instead the suspect declined to answer the questions but, several days later, voluntarily went to the police station, was

given the *Miranda* warnings, and then told the police where the gun was located. There, the questioning may have been a cause in fact of the gun's discovery, but the intervening events including the passage of time, release from custody, voluntary act going to the police station, and the provision of the warnings might serve to break that causal connection.

III. Applying defendant's propose rule to the facts in this case requires the suppression of the physical evidence.

The *Miranda* violation in this case led directly to the discovery of the physical evidence in defendant's car. Defendant granted consent to search his car in response to unlawful, unwarned, custodial interrogation. There were no intervening events and essentially no time passed between the constitutional violation and the discovery of the evidence. Therefore, suppression of the physical evidence is the proper remedy in this case.

The starting point for the analysis is the nature of the unlawful interrogation. The state characterizes the exchange as the moment when the officer asked defendant about whether there was anything in the car. However, the police-dominated atmosphere began earlier than that. Although Robeson asked only one question about the contents of the car, that was not the extent of the un-warned interrogation. As set out in the facts section, above, Robeson immediately became suspicious of defendant and asked questions eliciting a wide range of information, including defendant's status as a recent transplant to

Oregon and defendant's past incarceration. Tr. 6-7. In addition, Robeson had defendant complete the "FI" form which called for a great deal of personal information. Tr. 7. All of those questions constituted interrogation because Robeson was investigating defendant for driving without a license and he would have known that those questions could lead to statements that would be useful in a prosecution for that offense. Thus, the question about the contents of the car was the last in a series of interrogatory questions, not the extent of them.

A. Robeson's interrogation foreseeably led to defendant's consent to search.

Defendant's offer of consent was not spontaneous. Although the officer did not specifically request consent, defendant's offer of consent came in response to Robeson's question. *See State v. Unger*, 356 Or 59, 79, ___ P3d ___ (2014) ("[E]ven if the defendant's consent in *Rodriguez* was 'volunteered,' that consent was, in fact, prompted by the officer's question about drugs and guns."). The state acknowledges that defendant would not have consented if not for the questioning. *See* Pet. Br. at 42 ("The officer's question admittedly may have caused the defendant to offer his consent to search, in the sense that if the officer had not asked the question defendant would not have offered his consent.").

Although the officer did not expressly ask defendant to consent, defendant's response (including the offer of consent) was *responsive* to the

question. As discussed above, a question that, on its surface, calls for only a yes or no response may elicit a wide range of responses. An officer who unlawfully questions a defendant about the contents of his car should know that an offer to search the car is one response that the questions might elicit. Therefore, defendant's offer of consent was a foreseeable response to the interrogation.

The state argues that defendant's consent was not responsive to the officer's question because the "question called for a 'yes' or 'no' answer" and defendant had already fully answered the question when he said "no." Pet. Br. at 8. However, a question from an officer may "call for" more than the simplest response. For example, in *Brewer v. Williams*, the United States Supreme Court considered the effect of the so-called "Christian Burial Speech." 430 US 387, 392-93, 97 S Ct 1232, 51 L Ed 2d 424 (1977). There, the defendant was a suspect in a murder who had invoked his right to counsel and was being transported from one location to another. *Id.* During the drive, a detective said:

> "I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a

> Christian burial for the little girl who was snatched away from them on Christmas (E)ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."

Id.

The suspect asked why the detective believed that they would be driving past the victim's body, and the detective responded, "that he knew the body was in the area of Mitchellville a town they would be passing on the way to Des Moines" and then said, "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the road." *Id.* at 393. The victim then described several locations where he had hidden evidence and then directed police to the body of the victim. *Id.*

Despite the fact that the detective explicitly told the defendant *not* to answer him or to discuss it further, the Court held that there could be no serious doubt that the detective "deliberately and designedly set out to elicit information from Williams just as surely as and perhaps more effectively than if he had formally interrogated him." *Id.* at 399.

Speech often conveys more than it appears to. The "Christian Burial Speech" was designed to elicit evidence despite the detective's express statement that he was not questioning the defendant. By the same token, a question like the one in the instant case is likely to result in more than a yes or no answer. That would be the case even if the officer had asked a truly narrow

question such as "Do you have any cocaine in the car." It is even more apparent when, as here, an officer asks a suspect if he has "anything" concerning in the car. Such a question is "reasonably likely to elicit an incriminating response from the suspect." There is no indication on this record that defendant would have offered consent to search the car had the officer not engaged in the unlawful questioning. Therefore, defendant's consent was a direct and foreseeable product of the unlawful questioning.

It would not have surprised the officer that his question elicited evidence – the record establishes that that was the intent behind his interrogation. As he explained on cross examination,

> "Q. Okay. So you asked him because you have a hunch that something is going on, right?
>
> "A. I know something is going on.
>
> "Q. Okay. That's why you asked him if you can search his car?
>
> "A. I didn't ask him if I could search his car.
>
> "Q. It's your testimony that he volunteered --
>
> "A. Yeah.
>
> "Q. -- after you say is there anything in the car?
>
> "A. Yes."

Tr. 20. Thus, although the officer did not ask defendant to search the car, he was engaged in a criminal investigation because he believed that "something is

going on." The officer's broad questioning constituted little more than a "fishing expedition." *See Unger*, 356 Or at 91 (in Article I, section 9 context consent to search may be tainted when it is derived from a stop or seizure "that is nothing more than a fishing expedition for incriminating evidence").

The state asserts that a request for consent to search is not interrogation. Pet. Br. at 26-27. This is correct. *Vondehn*, 348 Or at 489 (Linder, J. concurring). It is also irrelevant. The officer in this case did not ask for consent to search. Instead, he unlawfully interrogated defendant and received defendant's consent to search as a result of that unlawful conduct. It is beside the point that the officer *could* have possibly lawfully obtained defendant's consent by requesting it; he could have also lawfully obtained defendant's consent by providing the *Miranda* warnings before interrogating him or obtaining a search warrant. The situation is the same as if the officer had interrogated defendant, defendant had made inculpatory statements, and the officer had used those statements to obtain a warrant: in both cases, the statements that defendant made would form the basis of the officer's ability to search, and in both cases the search would be a result of the unlawful questioning.

B. No intervening circumstances render the physical evidence admissible despite the unlawful interrogation.

Here, the discovery of the physical evidence was a direct and foreseeable result of the unlawful interrogation. Therefore, it is presumptively derived from that unlawful interrogation. However, defendant proposes that this court should consider the totality of the circumstances in order to determine if the evidence should nevertheless be admitted. Those circumstances include:

- The nature of the violation;
- The amount of time between the violation and the discovery of the evidence;
- Whether defendant remained in custody;
- Subsequent events that may have dissipated the taint of the violation;
- The use that the police made of the unwarned statements; and
- Whether the police provided belated *Miranda* warnings before the discovery of the evidence.

Here, the only factor that weighs in favor of the state is that the police did not make use of any statements defendant had made in obtaining his consent. That factor alone is not dispositive.

The other factors all support suppression. Defendant first examines the nature of the violation. Robeson immediately suspected defendant of some sort of wrongdoing based on a "hunch." He quickly chose to arrest defendant and questioned him in detail about his identity before turning to the contents of the

car. Although the officer asked only one question about the car, that question came on the heels of more extensive, un-warned interrogation, and it was designed to elicit incriminating evidence. Indeed, it had precisely that result.

Essentially no time passed between the questioning and the discovery of the evidence. Upon receipt of the consent to search, the officer promptly searched the car while remaining on the scene. Tr. 10. Further, there were no other intervening events that could have reduced the taint. Indeed, around the time that Robeson handcuffed defendant and started to unlawfully interrogate him, a second officer, Poe, arrived, heightening the police-dominated atmosphere of the encounter. Defendant remained in custody throughout.

Finally, and most importantly, defendant was not provided the *Miranda* warnings until after the illegal drugs were discovered. This is not a situation in which the court must consider whether a belated delivery of the warnings cured an earlier, tainted interrogation – the taint persisted throughout.

As in *Vondehn*, the state has not pointed to "circumstances that either legally or factually break" the connection between the *Miranda* violation and the physical evidence. 348 Or at 490 (Linder, J., concurring). Had it done so, the evidence might be admissible despite being discovered as a result of unlawful interrogation because the discovery might be remote or faint from the violation. Here, however, the discovery of the evidence was an immediate, direct, foreseeable result of the police illegality.

IV. The rule proposed by the state incorrectly focuses on a defendant's *response* to improper questioning in determining whether physical evidence is derived from a *Miranda* violation.

The state proposes, as a rule of law, that this court determine if it must suppress physical evidence following a *Miranda* violation by examining whether "statements police obtained in violation of *Miranda* allowed police directly to obtain the physical evidence or otherwise deprived the defendant of the ability to prevent police from obtaining the physical evidence." Pet. Br. at 23. If the statements made in response to the improper questioning lead to the discovery of physical evidence then the discovery of the physical evidence is "properly *presumed* to be compelled" and should be suppressed. *Id.* The state gives, as an example, the following scenario: A defendant is questioned without being provided the *Miranda* warnings and reveals the location of physical evidence. If the police obtain that evidence "directly" it is derived from the *Miranda* violation and "may be subject to suppression." *Id.* at 23-24. Suppression may be appropriate there because statements that were "presumptively compelled" by the *Miranda* violation led to the discovery. *Id.* However, the state would term a defendant's spontaneous consent to be an intervening event that would allow officer's to search. *Id.* at 29.

A fundamental flaw in the state's test is that it interposes the defendant's statements into the analysis and transforms the question from "what is the effect of the police illegality?" into "what is the effect of the defendant's statement in

response to the police illegality?" In other words, instead of asking whether physical evidence is derived from a *Miranda* violation, the state's test asks whether physical evidence is derived from a statement that is derived from a *Miranda* violation. This court should properly focus on whether evidence is derived from the *Miranda* violation itself, suppressing "not only the statements that a suspect makes in direct response to unwarned questioning but also evidence that derives from or is a product *of that constitutional violation*." *Jarnagin*, 351 Or at 713 (emphasis added). *See also Vondehn*, 348 Or at 488 ("The starting point of [the "derives from"] test should be the underlying Miranda violation because the nature and extent of that violation necessarily bear on whether and to what extent other evidence that police obtain is connected to that violation.") (Linder, J., concurring).

The state would have the test focus on whether the defendant's statements made in response to the *Miranda* violation "deprive the defendant of the ability to prevent the state from obtaining the physical evidence." Pet. Br. at 25. A court should not suppress evidence "if a defendant retains, notwithstanding the *Miranda* violation, the ability to prevent the state from lawfully obtaining physical evidence and the defendant freely chooses to allow the state to obtain the evidence." *Id.*

The state acknowledges that its proposed rule is in "tension" with *Vondehn*. Pet. Br. at 32 n 8. Therefore, it also expressly requests that this court

disavow the statement in that case that a *Miranda* violation is itself a constitutional violation. *Id.* at 32. The state asserts that that portion of the holding was not necessary to the result in *Vondehn* and is not supported by the text of Article I, section 12, under the methodology set out in *Priest v. Pearce*, 314 Or 411, 840 P2d 65 (1992). Pet. Br. At 33-34.

However, the holding in *Vondehn* that the failure to provide the *Miranda* warnings is a constitutional violation was a key component of that case's suppression analysis. This court explicitly determined that failure to provide the warnings was a constitutional violation in order to reject the state's argument that failure to give the warnings should not be used as a basis to suppress physical evidence in the absence of "actual coercion." *Vondehn*, 348 Or at 475. This court rejected that argument, holding "When the police violate Article I, section 12, whether that violation consists of 'actual coercion' or the failure to give the warnings necessary to a knowing and voluntary waiver, the state is precluded from using evidence derived from that violation to obtain a criminal conviction." *Id.* This court examined its Article I, section 12, case law and described the basis of the requirement, under Oregon law, that *Miranda* warnings be provided:

> "Article I, section 12, affords a constitutional right to remain silent. That right is, however, subject to waiver. Because a custodial interrogation is inherently compelling, and to ensure the validity of a waiver of the right against self-incrimination, Article I, section 12, requires that the police inform a person subjected to

> custodial interrogation that he or she has a right to remain silent and to consult with counsel and that any statements that the person makes may be used against the person in a criminal prosecution. Article I, section 12, requires those *Miranda* warnings to ensure that a person's waiver is knowing as well as voluntary."

348 Or at 474. The determination that a failure to give the *Miranda* warnings is a constitutional violation was not an aside in *Vondehn*, it was the holding of that case.

This court has recently adhered to that holding in *Jarnagin*. There, the court explained "When an officer violates *Miranda* by failing to give the requisite warnings, we suppress not only the statements that a suspect makes in direct response to unwarned questioning but also evidence that derives from or is a product of *that constitutional violation*." 351 Or at 713 (emphasis added). The state expressly asks this court to disavow that portion of the holding in *Vondehn* without addressing this court's methodology for balancing constitutional interpretation with the importance of stability in the law. *See Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 53, 11 P3d 228 (2000) (addressing role of *stare decisis* in constitutional interpretation). *Vondehn* was decided in 2010 and *Jarnagin* in 2012. This court should consider, among other concerns, the importance of providing stable guidance on the meaning and nature of Article I, section 12, and not alter the underlying framework of those decisions.

More fundamentally, this court was correct in *Vondehn* to describe unwarned questioning as an independent constitutional violation. When an

officer interrogates a criminal suspect without providing the *Miranda* warnings, that suspect cannot *knowingly* waive his or her Article I, section 12, rights. *Vondehn*, 348 Or at 474; s*ee also State v. Joslin*, 332 Or 373, 383, 29 P3d 1112 (2001) (in context of right to representation, criminal suspect must be provided warnings "before the suspect may be said knowingly to have waived his or her right against compelled self-incrimination under Article I, section 12"). A suspect cannot knowingly waive his right against self-incrimination without being aware of his right against self-incrimination.

The requirement of a knowing waiver of the Article I, section 12, right against self-incrimination marks a point of departure from the right against warrantless search and seizure in Article I, section 9. Unlike Article I, section 12, evidence obtained by a warrantless search may be admitted in trial if it was obtained via the defendant's voluntary consent and the state meets its burden to show "that [a] defendant's consent was not the product of the unlawful police conduct[.]" *Unger*, 356 Or at 88. There is no requirement that a defendant's waiver of his or her Article I, section 9, right against unreasonable search and seizure be "knowing," and therefore there is no analogous *Miranda*-like warning informing a criminal suspect that he or she has a right against warrantless searches. *State v. Flores*, 280 Or 273, 281, 570 P2d 965 (1977). A police officer may obtain valid consent from a criminal suspect by requesting it. By contrast, a police officer may not obtain lawful evidence by engaging in

unwarned custodial interrogation, even if a defendant's response is "voluntary" – such a procedure is inherently coercive and cannot lead to a knowing waiver without the warnings. Failure to provide the warnings is correctly seen as an independent constitutional violation.

The "knowing" requirement set out above is one reason why the state's reliance upon *State v. Hemenway*, 353 Or 129, 145, 295 P3d 167 (2013), *vacated*, 353 Or 498, 302 P3d 413 (2013), *State v. Rodriguez*, 317 Or 27, 854 P2d 399 (1993), and *State v. Kennedy*, 290 Or 493, 624 P2d 99 (1981) is inapposite. Another is because, unlike those cases, in the *Miranda* context a defendant has been either arrested or placed in compelling circumstances that approximate arrest. Such a situation is inherently more coercive than a mere stop.

Finally, it would be difficult or impossible for a court to apply the state's rule. A court would be required to analyze what psychological impact a suspect's own words had on him or herself. A suspect who remains silent in response to unwarned interrogation but acquiesces to a request for consent following that questioning might not see the results of that consent suppressed, whereas a suspect who disgorges numerous inculpatory statements in response to the same questioning could see suppression. A defendant should not be in a worse position because he or she does not provide inculpatory information in response to unlawful questioning.

The state's rule, by focusing on voluntary consent, does not take into account the requirement that a person must *knowingly* waive his or her Article I, section 12, rights. Thus, a person who *unknowingly* but "voluntarily" waives those rights by answering questions and granting consent could nevertheless see resulting evidence admitted against him or her in court. Such a defendant would not see his or her personal right against self-incrimination vindicated.

Finally, the state's rule fails to take into account any of the factors outlined by this court in *Jarnagin* with one exception: the use that the state has made of the unwarned statements. Certainly whether the state has traded upon any statements made by a person in obtaining physical evidence is a relevant factor in the analysis, but it is just one of a number of factors a court must consider. For example, if police engaged in a lengthy, intense interrogation of a suspect without providing warnings, perhaps delivering something resembling the coercive "Christian burial speech" and a defendant wordlessly led officers to a body, under the state's formulation the physical evidence would not have "derived" from the violation because the suspect did not speak.

The decision to suppress evidence should not turn upon the words that come out of a suspect's mouth in response to police interrogation. The decision should turn upon the effect of the police illegality. When that illegality leads to physical evidence it should be suppressed.

CONCLUSION

Defendant was the subject of unlawful police interrogation when he was asked, without warning, several questions designed to elicit incriminating evidence. When an officer asked if defendant had anything concerning in his car, the officer knew or should have known that consent to search the car was a potential response. Defendant's grant of consent in response to that unlawful interrogation was presumptively coerced, and nothing in the record establishes that it should nevertheless be admitted. This court should affirm the Court of Appeals decision suppressing the physical evidence found as a result of that unlawful interrogation.

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 8,724 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 September 9, 2014.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Respondent's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, attorney for Petitioner on Review.

Respectfully submitted,

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