IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. VICTOR JAVIER PICHARDO, Defendant-Appellant, Respondent on Review.	Multnomah County Circuit Court Case No. 110833156 CA A150488 SC S063885

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, VICTOR JAVIER PICHARDO

Review of the Decision of the Court of Appeals on Appeal from a Judgment
Of the Circuit Court for Multnomah County
Honorable Christopher J. Marshall, Judge

Opinion Filed: December 2, 2015
Before: Flynn, Presiding Judge, and Haselton, Chief Judge, and Wollheim, Senior Judge.

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

STATEMENT OF THE CASE

This is a criminal case that presents related issues under Article I, section 9, of the Oregon Constitution: whether a police officer's request for consent to search for drugs was reasonably related to the justification for the stop of defendant, and, if so, whether the illegaility should lead to the suppression of incriminating evidence.

Defendant was stopped by police based on reasonable suspicion for unlawfully impeding traffic and assisting another man, who was evading police. After asking for defendant's license and insurance information, a police officer asked for consent to search for drugs. Defendant consented, and police found drugs.

As argued below, the officer's request for consent to search violated Article I, section 9, because it was not "reasonably related" to the purpose of the stop, and because there was no independent constitutional justification to continue to detain defendant and inquire about drugs. Further, the evidence found by the police should be suppressed because defendant's consent to search was tainted by the unlawful misconduct.

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QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

Defendant agrees with the state's framing of the issues before this court, but presents his own proposed rules of law, which differ from the state's proposed rules.

First Question Presented

Under Article I, section 9, can an officer who has seized an individual to investigate possible criminal activity request consent to search without unlawfully extending the duration of the stop?

First Proposed Rule of Law

Yes. During an investigative stop, an officer may ask questions "reasonably related" to an investigation, but they must be circumstance-specific, necessary to address the investigation, and objectively reasonable. An officer's request for consent, like other questions, must be reasonably related to the constitutional justification for the stop.

Second Question Presented

If a request for consent to search was unlawful, under what circumstances should a court exclude evidence found during a voluntary consent search?

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Second Proposed Rule of Law

Whether a violation of Article I, section 9, will lead to the exclusion of evidence found as a result of the defendant's unlawfully obtained consent depends on the totality of the circumstances, including the temporal proximity of the constitutional violation to the consent, the presence of any intervening or mitigating circumstances, and the purpose and flagrancy of the police misconduct. Evidence will likely be suppressed if the consent is in close proximity to an illegality, there are no intervening or mitigating circumstances, and the purpose of the unlawful misconduct was to engage in an exploratory search without justification.

Summary of Argument

This court has a well-established framework to analyze the legality of investigatory stops under Article I, section 9. An officer may stop a person based on reasonable suspicion of criminal activity and make inquiries "reasonably related" to the justification for the stop. However, the inquiries must be based on specific, articulable facts that support the continued detention of the person. An officer may inquire about criminal activity other than what prompted the stop if the officer has independent constitutional justification.

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The state seeks to have this court adopt a *per se* rule that during an investigatory stop, any "fishing" questions or requests for consent to search are lawful and permissible. The state's rule, however, is inconsistent with the Article I, section 9, requirement that the inquiries during a stop be reasonably related to the justification of a stop. This court should decline to adopt such a broad-sweeping rule that untethers police inquiries from the constitutional source of their authority. Instead, this court should adhere to its established framework that provides a clear, workable rule for police officers and is supported by Article I, section 9, of the Oregon Constitution.

In this case, police stopped defendant after another man, who was running from the police, entered defendant's car that was stopped in the street. An officer asked defendant for his driver's license and insurance information, and defendant replied that he had insurance but no license. The officer then asked defendant for consent to search him for drugs, and defendant's response led to the police discovering drugs in the car. The officer's request for consent to search was unlawful because it occurred during an investigatory stop and was not reasonably related to the purpose of the stop, which was to investigate defendant for having possibly committed crimes unrelated to possessing drugs. There was also no

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independent constitutional justification for the inquiry, as the officer lacked reasonable suspicion that defendant possessed drugs.

The evidence found as a result of defendant's unlawfully procured consent to search should be suppressed. There was close temporal proximity between the unlawful misconduct and the consent to search, there were no intervening or mitigating circumstances, and the officer's conduct was flagrant in the sense that its purpose was to engage in an otherwise-prohibited fishing expedition. Under the Article I, section 9, attenuation analysis, this court should hold that the unlawful misconduct significantly affected defendant's consent to search, and any evidence found as a result should be suppressed.

Factual and Procedural Background

Defendant entered a conditional plea of no contest to the charge of possession of heroin. *State v. Pichardo*, 263 Or App 1, 2, 326 P3d 624 (2014) (*Pichardo I*). After the trial court denied a motion to suppress evidence, defendant appealed. *Id.*

The relevant historical facts are stated accurately in *Pichardo I*:

> "On August 2, 2011, Gresham Police Officer Long and his partner were dispatched to assist other officers who were looking for a wanted person, who had fled police officers on foot after they attempted to execute an arrest warrant. Long was not informed about the basis of that warrant. While driving in the neighborhood in which had last been seen, Long and his partner saw

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> defendant's car stopped and idling in a traffic lane. There were no other vehicles traveling on that street. Long believed that defendant was impeding traffic in violation of ORS 811.130. As Long watched defendant's car, a man who matched description ran to the car, opened the front passenger door, jumped in, and leaned the seat back. At that point, Long was 'concerned' that defendant was helping evade the police.
>
> "Long and his partner drove toward the front of defendant's car, activated the overhead lights on their patrol car, and parked in front of defendant's car. Another police car with its overhead lights on pulled behind defendant's car. While other officers arrested the front-seat passenger (who, indeed, was Long approached the driver's side window and asked defendant to step out of the car. Defendant complied. Long asked defendant for his driver's license and proof of insurance, and defendant responded that he had insurance but no driver's license.
>
> "Long then asked defendant for consent to search him for drugs. Defendant consented and admitted that he had heroin in his pocket, which Long located and seized. Long arrested defendant, placed him in handcuffs, advised him of his *Miranda* rights, and placed him in the back seat of a patrol car. Long then asked defendant for consent to search his car. Defendant consented, and admitted that there were drugs in the car, which Long located and seized."

Pichardo I, 263 Or App at 2-3 (footnote omitted).

The Court of Appeals reversed and remanded, holding that "the arresting officer unlawfully extended the duration of the stop in violation of Article I, section 9, of the Oregon Constitution when he asked defendant about drugs without reasonable suspicion of criminal drug activity, and that the evidence that defendant

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seeks to suppress was the unattenuated product of that illegality." *Id.* at 2 (footnote omitted).

The state petitioned for review, and this court vacated *Pichardo I* and remanded the case to the Court of Appeals for reconsideration in light of *State v. Unger*, 356 Or 59, 333 P3d 1009 (2014), *State v. Lorenzo*, 356 Or 134, 335 P3d 821 (2014), and *State v. Musser*, 356 Or 148, 335 P3d 814 (2014). *State v. Pichardo*, 356 Or 574, 342 P3d 87 (2014) (*Pichardo II*).

On remand, the Court of Appeals again ruled in defendant's favor:

> "[U]nder these circumstances, our determination that the patent 'purpose' of the misconduct was 'directly to facilitate a search' for the evidence at issue, paired with immediate temporal proximity and the absence of any intervening or mitigating circumstance, lead us to conclude that the state failed to prove that defendant's consent was not 'the product of police exploitation of the illegal stop or search.'"

State v. Pichardo, 275 Or App 49, 58, 364 P3d 1 (2015) (*Pichardo III*) (citations omitted).

The state petitioned for review, and this court allowed review. *State v. Pichardo*, __ Or __, __ P3d __ (2016) (*Pichardo IV*).

ARGUMENT

This case presents two related legal questions regarding a seizure under Article I, section 9, of the Oregon Constitution: first, whether in the circumstances of this case an officer's request for consent to search for drugs was reasonably

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related to the justification for the stop; and second, if unlawful, whether the evidence the police subsequently discovered should have been suppressed.

I. The officer's request for consent to search for drugs was not reasonably related to the reason for the stop, and therefore the inquiry unlawfully extended the stop.

A. An officer's inquiries during an investigatory stop based on reasonable suspicion must be reasonably related to the justification for the stop.

Article I, section 9, of the Oregon Constitution provides in part that "[n]o law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure[.]" The basic principles of the Article I, section 9, limitations on police encounters with citizens are well established. "Analytically, police-citizen encounters typically fall into one of three categories that correlate the degree of intrusiveness on a citizen's liberty with the degree of justification required for the intrusion." *State v. Fair*, 353 Or 588, 593, 302 P3d 417 (2013). At one end of the continuum are "mere conversation" or "non-coercive" encounters, "which involve no restraint of liberty and thus require no justification." *State v. Watson*, 353 Or 768, 774, 305 P3d 94 (2013); *State v. Ashbaugh*, 349 Or 297, 308, 244 P3d 360 (2010); *State v. Holmes*, 311 Or 400, 407, 813 P2d 28 (1991). The other end of the continuum involves "arrests," which "involve protracted custodial restraint and require probable cause to believe that the person arrested has committed a crime." *Watson*, 353 Or at 774.

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In between are "stops," which involve "a temporary restraint on a person's liberty" and require "reasonable suspicion that the person has been involved in criminal activity." *Ashbaugh*, 349 Or at 308-09.

In this case, the parties agree with the Court of Appeals that the officers stopped defendant when they stopped his car. *Pichardo III*, 275 Or App at 53. In *Watson*, this court summarized Article I, section 9, case law pertaining to the constitutional restraints on an investigatory stop:

> "[L]aw enforcement officers [are required to] have a justification for temporarily seizing or stopping a person to conduct an investigation, and that the officer's activities be reasonably related to that investigation and reasonably necessary to effectuate it. If the officer's activities exceed those limits, then there must be an independent constitutional justification for those activities."

353 Or at 781. In *Watson*, this court also noted that the detention should not be "unreasonably lengthy" and the officers should "diligently pursue[] their investigation." *Id.* at 783, 783 n 16.

Under that framework, the analysis requires this court to ask (1) what justification the officer had for seizing defendant, and (2) whether the inquiry during the stop was reasonably related to effectuating the stop. If the officer's actions exceeded the limits of a reasonably related inquiry, then this court asks (3) whether there was an independent constitutional justification for the inquiry.

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B. This court should not adopt the state's expansive interpretation of what questions are "reasonably related" to an investigatory stop.

The state does not dispute this framework, and there is nothing necessarily controversial about the state's argument that "the officer must have leeway to investigate in a manner appropriate to the particular circumstances." Petitioner Brief on the Merits ("Pet BOM") at 14. However, the state's explication of how that "leeway" should work in practice is fundamentally at odds with the well-established principles of constitutional restraints on police authority under Article I, section 9.

The state's hypothetical explanation of how its rule of law would work in practice demonstrates that it is too broad:

> "[I]f an officer detained an individual based upon reasonable suspicion of theft, the officer reasonably could inquire about the suspect's history of drug use—not because the officer independently has reasonable suspicion of drug activity, but rather in an effort to gain some understanding of the suspect and a potential motive, as well as potentially developing a rapport that will facilitate the overall investigation."

Pet BOM at 14. In other words, when an officer suspects "criminal activity is afoot," the officer may ask any question that could help the officer "gain some understanding of the suspect" or "develop[] a rapport." *Id.* Under the state's rule, any question that would fall into those categories would be "reasonably related" to any stop based on reasonable suspicion. Because it is difficult to imagine any

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question that does *not* help to gain an understanding of a person or develop a rapport, the practical effect of the state's rule is to allow officers to ask any questions at all during a stop.

In effect, the state is asking this court to adopt a *per se* rule, but without explicitly doing so and without supporting argument as to how it is permissible within the existing Article I, section 9, framework. This court appears to have already rejected a similar argument, in *Musser*:

> "Police obviously need reasonable leeway to investigate and prevent crimes, and monitoring locations where criminal activity frequently occurs and where trespassers are often found is part of good police work. But police are not authorized to detain and question citizens merely to 'make sure they [are] not doing anything wrong.'"

356 Or at 158-59.

This court has also rejected an argument similar to the state's in this case and explained what "reasonably related" means during a stop. In *State v. Jimenez*, 357 Or 417, 353 P3d 1227 (2015), this court addressed whether an officer, during a traffic stop, may ask a stopped person whether he or she is carrying any weapons. The state asked this court to adopt a *per se* rule that "a law enforcement officer's inquiry about whether a detained individual possesses weapons" is "always" "reasonably related to the traffic investigation." *Id.* at 422. This court expressly declined the invitation, reasoning, "When an officer does not reasonably perceive a

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danger, we will not presume that such danger nevertheless exists or that the officer's inquiry about weapons would address such danger." *Id.* at 426.

Instead of ruling that an officer may ask about weapons "as a matter of routine and in the absence of circumstances" that justify the question, this court held that an officer may inquire about weapons when he or she "has reasonable, circumstance-specific concerns for the officer's safety":

> "[I]f the officer does not have at least a circumstance-specific safety concern, then the officer's weapons inquiry has no logical relationship to the traffic investigation. And, if the officer's circumstance-specific safety concerns are not reasonable, then an officer who acts on those concerns violates Article I, section 9[.]"

Id. at 419, 429. Under that standard, to demonstrate that an officer's inquiry about weapons was reasonably related to the investigation, the state must present evidence that "(1) the officer perceived a circumstance-specific danger and decided that an inquiry about weapons was necessary to address that danger; and (2) the officer's perception and decision were objectively reasonable." *Id.* at 430. The *Jiminez* standard was an application of reasonable suspicion to a specific context, specifically questions related to officer safety. *Id.* at 423.

Similar to *Jiminez*, this court should decline to adopt the state's seemingly *per se* construction of the "reasonably related" inquiry under *Watson*. Instead, this court should adhere to the existing Article I, section 9, framework. That is, during

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an investigative stop, an officer may ask questions "reasonably related" to an investigation, but they must be "circumstance-specific," "necessary to address" the investigation, and "objectively reasonable." *Jiminez*, 357 Or at 430.

The state does not appear to disagree with this court's rule of law in *Watson*, but rather to argue that essentially any questions are permitted during a stop, especially when an officer has no idea what particular crime a detained person may have committed. *See* Pet BOM at 13 (arguing that "because the officer may not be able to pinpoint a *particular* crime * * *, what may be reasonably related to the investigation will not be as limited as in the context of a traffic stop"); Pet BOM at 1 (arguing that "'fishing' questions, as well as requests for consent to search, are reasonable investigative techniques and will rarely run afoul of Article I, section 9"). The state's analysis would flip the constitutional constraint of an officer's authority on its head – the less reason an officer has to stop a person, the more extensive the inquiry can be to pursue the investigation. That argument ignores the necessary limitation on the officer's authority to stop: that the officer suspects the detained person of being involved in some criminal activity. In other words, with less reason to stop a person, the officer's inquiry must be more circumscribed. *See Fair*, 353 Or at 603 ("Article I, section 9, typically requires a degree of

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justification for a seizure of a person that correlates with the extent to which police conduct intrudes on that citizen's liberty.")

As an example, imagine an officer stops a person after developing reasonable suspicion she had committed harassment. Of course criminal activity is afoot. Under the state's rule, an officer could build "rapport" with her by investigating whether other unknown crimes are being committed – detaining her by asking for consent to search for drugs or weapons, asking whether she is on probation or supervision, and inquiring as to whether she has authorization by her employer to use her phone for personal business. The officer also could continue to detain the person to gain understanding of her, such as why she is in the area, where she is going to, and whether she has a lawful reason to be going about her business. Even though the officer had reasonable suspicion that she was committing a particular crime that required little, if any, further investigation, under the state's rule an extended detention for unnecessary investigation would be "reasonably related" to the stop.

Contrary to the state's argument, Article I, section 9, establishes clear rules for officers, and this court has explained those rules in its case law. Officers must have reasonable suspicion to stop a person. The officers may ask the stopped person questions that are reasonably related to the justification for the stop. A stop

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based on reasonable suspicion is "a temporary detention and questioning of a person," which is less intrusive than an arrest, and therefore requires less justification. *Fair*, 353 Or at 603. As a result, the scope of the investigation, including questioning, necessarily is cabined by the particular circumstances that provide reasonable suspicion. *Watson*, 353 Or at 780-81 (holding that an officer with reasonable suspicion of an immediate threat may search without a warrant, but "the scope of the search is limited to its constitutionally permitted purpose and must be reasonably necessary to effectuate that purpose"). However, if during the course of that stop the officer develops reasonable suspicion of a separate crime or probable cause to arrest, the investigation, including questioning, can be more thorough. *See Watson*, 353 Or at 785 (acknowledging that "an officer may develop reasonable suspicion or probable cause during the course of a traffic stop that may justify the activities that would not have been permissible based on the original purpose of the stop"). If, on the other hand, the temporary restraint has concluded without the officer developing reasonable suspicion about a separate crime or probable cause to arrest, the officer's authority to continue to detain the person dissipates, and a continued stop is no longer lawful. *See State v. Rodgers/Kirkeby*, 347 Or 610, 623, 227 P3d 695 (2010) ("Police authority to detain a motorist

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dissipates when the investigation * * * is completed or reasonably should be completed.").

If the question or inquiry is not reasonably related to the reason the officer stopped the person, then the officer cannot ask it during the course of an investigatory stop, absent independent constitutional justification. Almost by definition, if an officer does not have a reason to suspect the person has committed a particular crime, then the officer does not have reasonable suspicion to stop a person or make an inquiry during a stop on that basis.

C. The officer's request for consent to search for drugs was not reasonably related to the stop.

In this case, the officer asked defendant for his license or insurance, and defendant had insurance but no license. Tr 11. The officer testified, "At that point, I asked him if I could have consent to search him for any drugs." Tr 11. The issue in this case is whether the officer's request for consent to search for drugs was reasonably related to the reason for the stop, or, if not, whether there was an independent justification for the question.

The state points to the following testimony from Officer Long to support the request for consent to search for drugs:

> "Well, certainly at the point that we came to this call, we knew that the information we knew at the time was that a person with a warrant was – was running from officers. They were chasing him. He had dropped a backpack somewhere, so we don't know what the

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> contents of that were. We don't know why he's running, so obviously there's concern when someone's running from us, why he's running other than just the warrant.
>
> "Then this vehicle pulls up and the passenger jumps in that vehicle, leans back, we see that and then we approach.
>
> "So the concern, officer safety-wise is are there any weapons on that person, did he leave any weapons in the vehicle, did he give weapons or anything else to another pass – or to another occupant of the vehicle. Certainly in my experience, I've seen that, where stuff has been passed from one person to another, so there's officer safety concerns.
>
> "* * * * *
>
> "* * * [B]ased on the experience, I've had people run from me that have nothing more than some drugs on them. So, there's concerns there that that person had that as well and could have passed that to other occupants of the vehicle."

Tr 24-25 (referred to at Pet BOM at 15-16).

On redirect examination, the officer further testified as to his justification to request consent to search for drugs:

> "Q So the person with the – that gets into the defendant's vehicle, your information was that he had a backpack and he – you didn't see the backpack on him when he came out of the car?
>
> "A Correct.
>
> "Q Is that an area known for drug activity?
>
> "A Yes.
>
> "Q High drug activity?

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"A Yes.

"Q Both use and dealing?

"A Yes.

"Q That street in particular?

"A Yes.

"Q The reference to the possible wanted person and the warrant, do you know if that was a – what the warrant was for, or what the underlying crime was for?

"A I honestly don't. No."

Tr 58-59 (referred to at Pet BOM at 15-16).

In short, the officer stopped defendant for committing a traffic violation and for "attempting to help evade the police." *Pichardo I*, 263 Or App at 4-5. The request for consent to search for drugs was not reasonably related to either of those purposes of the stop.

First, defendant was stopped for unlawfully impeding traffic under ORS 811.130. Whether defendant had drugs would not be reasonably related to the officer's investigation into whether defendant had committed a traffic crime, and the state does not so contend before this court.

Second, the officer had reasonable suspicion to suspect defendant was aiding in evading the police. The state argues that "while Officer Long may not

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have had independent reasonable suspicion of drug activity, the request for consent was nonetheless reasonably related to the overall purpose of the investigative detention: exploring the relationship between defendant and and determining whether defendant had committed a crime." Pet BOM at 16. Whether defendant would give consent to search for drugs was not reasonably related to whether he was assisting

The officer did not know why was running, what had been in his backpack, what the warrant was for, or how defendant was related to him. If the officer were concerned about defendant's relationship with he could have lawfully inquired about that by asking, for example, "How do you know

Instead, the officer asked whether defendant would consent to a search for drugs, but without any circumstance-specific facts that would lead to an objectively reasonable belief that defendant possessed drugs.

Under Article I, section 9, an officer can make an inquiry reasonably related to a stop, but because possessing drugs was not the reason for the stop, and because the officer had no reason to think it was related to why was running from the police, the inquiry in this case was unlawful under Article I, section 9.

D. There was no independent constitutional justification for the stop.

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Before this court, the state appears to acknowledge the officer did not have independent constitutional justification for the stop. *See* Pet BOM at 16 (noting that "Officer Long may not have had independent reasonable suspicion of drug activity"). The state is correct.

The only reasons the officer had to suspect drugs were (1) that people in the past who had drugs ran from him, and (2) that the stop occurred in an area of high drug activity. Neither of those concerns led to particularized suspicion that defendant was engaging in such behavior. "A police officer's suspicion must be particularized to the individual based on the individual's own conduct." *State v. Miglavs*, 337 Or 1, 12, 90 P3d 607 (2004). The officer did not have sufficient reason to think was involved in drugs, and therefore there was no reason to ask defendant whether he had drugs on that basis. *See Illinois v. Wardlow*, 528 US 119, 124, 120 S Ct 673, 145 L Ed 2d 570 (2000) ("An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime."). Accordingly, there was no independent constitutional justification for an inquiry about drugs in this case.

II. The unlawful extension of the seizure tainted defendant's consent to search, and therefore the evidence should be suppressed.

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In *Unger*, this court "clarif[ied]" the analysis for "whether the evidence that the state seeks to introduce must be suppressed because that evidence was obtained in violation of the defendant's constitutional rights." *Unger*, 356 Or at 85. *See Lorenzo*, 356 Or at 136 (noting that *Unger* "modified part of the [*State v.*] *Hall*[, 339 Or 7, 115 P3d 908 (2005)] exploitation analysis"); *Musser*, 356 Or at 150 (same). Under the modified *Hall* framework, a reviewing court must examine "the totality of the circumstances to determine whether the state had carried its burden of proving that the consent was independent of, or only tenuously related to, the unlawful police conduct." *Unger*, 356 Or at 86. The court considers several factors, including "the temporal proximity between the illegal police conduct and the consent," "the presence of any intervening or mitigating circumstances," and "the nature, extent, and severity of the constitutional violation," as well as "the purpose and flagrancy of the misconduct." *Id.* at 86. In this case, those factors indicate defendant's consent was significantly affected by the illegality, and therefore the evidence found as a result should be suppressed.

A. There was close proximity between the misconduct and the consent.

In this case, there was close proximity between the misconduct and the consent. The illegal seizure was ongoing when the police asked for consent to search. *Pichardo I*, 263 Or App at 2-3. In other words, because the request for

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consent occurred during the unlawful seizure, that supports the conclusion that "the consent was 'tainted' because it was 'derived from' or was a 'product of' the unlawful conduct.'" *Unger*, 356 Or at 80. The Court of Appeals correctly held that the temproal proximity in this case was "immediate" and that it weighs in favor of defendant: the officer "obtained defendant's consent in direct response to the inquiry that effectuated the unlawful seizure," and "no intervening or mitigating circumstance cut off the immediate temporal and direct causal link between those events." *Pichardo III*, 275 Or App at 55.

B. There were no intervening or mitigating circumstances that would suggest defendant's consent was attenuated from the illegality.

This factor also supports defendant, because there were no intervening or mitigating circumstances between the unlawful conduct and the consent to search. Such mitigating or intervening circumstances can include "*Miranda* warnings or admonitions to defendant that he could refuse to consent to a search." *Unger*, 356 Or at 90. Here, the officer only read defendant his *Miranda* rights after the search and after he arrested defendant. *Pichardo I*, 263 Or App at 3. After reading the *Miranda* rights, the officer again asked for consent to search. However, by that point, defendant had been arrested, handcuffed, and placed in the back of a police car based on unlawfully procured evidence. The giving of *Miranda* warnings by themselves was not sufficient to migitage the taint of the prior unlawful activity on

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defendant's consent. The lack of intervening or mitigating circumstances indicates that defendant's consent was the direct, immediate product of the unlawful conduct. *Cf. Musser*, 356 Or at 158 (noting that "there was not simply 'but for' causation—unlawful police conduct and then a request for consent," where the "unlawful conduct" "led directly" to the events that resulted in the consent to search).

C. The officer's unlawful misconduct was flagrant because it violated existing law and its purpose was to engage in a fishing expedition.

"Whether expressed through conduct or comments, the 'purpose' of what is later determined to be unlawful police conduct could well be relevant both to understanding the nature of the misconduct and, ultimately, to deciding whether the police exploited that misconduct to obtain consent to search." *Unger*, 356 Or at 83. The "purpose" factor weighs against the state when the objective circumstances of the encounter indicate the purpose of the police was to "'take[] advantage of' or 'exploit[]' their unlawful conduct to the defendant's detriment," because in such circumstances, "that tainted 'purpose' suggests that the defendant's consent, even if voluntary, also may be tainted." *Id.* at 91.

In *Unger*, this court explained that if an officer's purpose is to engage in a "fishing expedition," the misconduct is more likely to affect the defendant's consent:

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> "[W]hen police observe contraband because they have unlawfully stopped someone or unlawfully entered a home—and *then* ask for consent to search, their 'purpose' is more likely to be to seize the contraband that they already have seen as a result of their misconduct. In those circumstances, the police have 'taken advantage of' or 'exploited' their unlawful conduct to the defendant's detriment, and that tainted 'purpose' suggests that the defendant's consent, even if voluntary, also may be tainted. So, too, may be a consent that follows a random stop or seizure that lacks probable cause or reasonable suspicion that a crime has been committed and that is nothing more than a fishing expedition for incriminating evidence."

356 Or at 91 (emphasis in original).

This court has also recognized that unlawful police conduct necessarily affects the circumstances of a police-citizen encounter. *See Unger*, 356 Or at 93 ("[U]nlawful police conduct undoubtedly has an effect on citizens and on how they interact with police officers in certain circumstances[.]"); *Musser*, 356 Or at 159 (explaining that police misconduct "likely had an effect on [a] defendant's decision to consent"). Similarly, in *State v. Wolfe*, which addressed whether the defendant's consent to search was voluntary after he had been interrogated without *Miranda* warnings, this court viewed the purpose and flargrancy of the officer's actions in light of how clearly the actions violated existing law:

> "We find the police misconduct in this instance to be flagrant. The officer properly had obtained an arrest warrant, and he would have been derelict in his duty had he failed to arrest defendant. *Miranda* was decided 17 years ago. The rules and requirements of these warnings must be known to every police officer. Surely this officer, who testified that he has had 14 years of experience in law

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> enforcement work, deliberately and purposefully tried to elicit incriminating answers from defendant by questioning him before advising him of his constitutional rights. The request for consent immediately followed this questioning. If, in the present situation, defendant felt he had incriminated himself by answering the preliminary questions, nothing occurred to change that attitude."

295 Or 567, 573, 669 P2d 320 (1983). *See Unger*, 356 Or at 81 (referring to *Wolfe* as justification for analyzing purpose and flagrancy in the exploitation analysis); *see also Pichardo III*, 275 Or App at 55-56 (holding that "the police misconduct in this case was at least moderately flagrant in that the prohibition against extending stops by way of gratuitous investigatory inquiries had been well established as of the time of this stop").

In this case, the officer's request for consent to search was flagrant, in that it violated clearly established existing law. The purpose of the officer's request, in light of the lack of reasonable suspicion that defendant was involved in drugs, was to engage in an impermissible "fishing expedition" and attempt to procure consent for an exploratory search that the officer could not otherwise engage in. Based on the officer's question to defendant, focused solely on drugs, defendant would have understood that the police purpose was to investigate him for illegal activity. *See Musser*, 356 Or at 159 ("The initial and developing purpose of the police misconduct in continuing to detain defendant while inquiring about various

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possible crimes shows the state taking advantage of that misconduct in a way that likely had an effect on defendant's decision to consent.").

Because the officer's purpose was to engage in an unlawful fishing expedition and unlawfully procure defendant's consent for an exploratory search, this factor weighs in favor of finding that the officer's unalwful misconduct significantly affected defendant's decision to consent to search.

CONCLUSION

For all the reasons explained above, this court should affirm the judgment of the Court of Appeals and reverse the order of the trial court denying defendant's motion to suppress.

DATED August 18, 2016.

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) that the word count of this brief (as described in ORAP 5.05(2)(a)) is 5,880 words.

Type Size

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

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Appellant's Opening Brief to be filed with the Appellate Court Administrator, Appellate Courts Records section, 1163 State Street, Salem, OR 97301.

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 Leigh A. Salmon, #054202, attorney for Plaintiff-Respondent.

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