IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. DEBORAH ANN MUSSER, Defendant-Appellant Respondent on Review.	Lane County Circuit Court Case No. 201001347 CA A145540 S060868

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

Petition to review the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Lane County
Honorable Debra K. Vogt, Judge

Opinion Filed: October 24, 2012
Author of Opinion: Judge Duncan
Concurring Judges: Presiding Judge Armstrong and Chief Judge Haselton

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STATEMENT OF THE CASE

Defendant-Respondent Musser (defendant hereafter) was convicted of possession of methamphetamine, ORS 475.895. The trial court ruled that a Springfield police officer stopped defendant based on reasonable suspicion, that defendant voluntarily consented to a search request, and that the officer lawfully found evidence of the crime in defendant's purse. After denying the motion to suppress, the trial court presided over a stipulated facts trial and found defendant guilty.

The Court of Appeals reversed defendant's conviction, reasoning that the officer lacked reasonable suspicion to stop defendant, and defendant's consent was tainted by the illegal stop, pursuant to the attenuation analysis in *State v. Hall*, 339 Or 7, 115 P3d 908 (2005). *State v. Musser*, 253 Or App 178, 289 P3d 340 (2012), *rev allowed*, 353 Or 533 (2013).

The Attorney General petitioned for review. The state acknowledges that the officer stopped defendant without reasonable suspicion, but asks this court to reverse *Hall* and the Court of Appeals decision in this case under the theory that voluntary consent alone satisfies Article I, section 9, despite any prior illegality. In the alternative, the Attorney General asks this court to reverse based on reasoning

found in *State v. Hemenway*, 353 Or 129, 295 P3d 617 (2013), *vacated*, 353 Or 498, 302 P3d 413 (2013).

Defendant's Use of the Vacated Opinion in *State v. Hemenway*

The Appellate Division of the Office of Public Defense Services (OPDS) represented Mr. Hemenway in this court and filed an extended brief on the merits explaining the origin and development of the fruit of the poisonous tree doctrine in federal and state law. OPDS now represents Defendant Musser in this case and Defendant Lorenzo in S060969.

Defendant Musser recognizes that the opinion in *State v. Hemenway* was vacated and has no precedential value. However, after vacating the opinion in *Hemenway*, this court allowed review in three cases (*Musser*, *Lorenzo*, and *Unger*) that, like *Hemenway*, pose fundamental questions concerning the attenuation doctrine and the exploitation analysis.

For purposes of efficiency, defendant Musser will use the vacated *Hemenway* opinion as a demonstrative model or academic opinion to advance the analysis and discussion of the state's alternative proposal in this case.

As will be seen below, defendant agrees with most of the analysis in *Hemenway*. To expedite the analysis in this case, defendant will primarily focus on the three problematic aspects of *Hemenway*: (1) the weight and effect of the

unlawful seizure on the decision to consent in the *Hemenway* model versus the traditional fruit of the poisonous tree doctrine, (2) the definition of exploitation, and (3) the re-incorporation of the "purpose and flagrancy" factor into Oregon's attenuation analysis.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Questiion. Is it constitutionally reasonable for law enforcement to stop individuals without reasonable suspicion and ask for consent?

Proposed Rule. A stop is a constitutionally significant event in that it interferes with a person's liberty, subjects her to police authority, holds her in place for investigation, and deprives her of the constitutional right to break off the interaction and leave. A stop is constitutionally unreasonable unless it is supported by reasonable suspicion.

Second Question. Does a stop without reasonable suspicion presumptively affect the stopped person's decision to consent?

Proposed Rule. The Fruit of the Poisonous Tree Doctrine presumes that a stop without reasonable suspicion affects the person's decision to consent.

Third Question. What must the state demonstrate to overcome the presumption that the unlawful stop affected the decision to consent?

Proposed Rule. The state must show that a significant intervening event or events cured the effects of the illegal seizure, or that the circumstances indicate that the stopped person would have consented even if the officer had engaged her in mere conversation (*Kennedy*).

Fourth Question. What does the term "purpose and flagrancy" mean in the attenuation analysis?

Proposed Rule: That term arose in federal law and refers to the "culpability" of the officer who committed the constitutional violation. The officer's "culpability" is a factor in the federal deterrence model and the application of the exclusionary rule

SUMMARY OF ARGUMENT

A stop is an event of constitutional magnitude. The person must comply with the order to stop and any subsequent lawful orders. The stop unmistakably conveys to the seized individual that she is the subject of an investigation and may not resume her preferred activities unless and until the officer permits her to do so. In no small way, the seizure reduces the individual to the officer's control under

color and penalty of law, encourages the individual to cooperate, and places the officer in a superior position over the individual to pursue the criminal investigation.

The Fruit of the Poisonous Tree Doctrine recognizes the impact of a suspicion-less stop on the individual by presuming that the illegal stop influenced the stopped person's decision to consent to a police request to search. It holds that evidence from the consent search is inadmissible unless the state can show that the consent was voluntary *and* the stop did not affect the decision to consent.

The three factors that typically govern the latter prong in Oregon law are the temporal proximity between the illegality and the consent, whether the person was informed of the right to refuse consent, and whether a significant intervening event removed or purged the effect of the illegal seizure on the person's decision to consent. Effectively, the state must show that the person would have consented if police had engaged her in mere conversation instead of stopping her, or that some significant intervening event (such as release from custody, contact with an attorney, or appearance in court) removed or purged the effect of the illegal stop and led to the consent.

The *Hemenway* model veers from that view. It reasons that consent during an unlawful stop is tainted only when police "exploit" the illegal seizure to obtain the consent. *Hemenway* explains that police exploit the illegal seizure to obtain

consent (1) by actively pursuing leads and information learned from the illegal seizure, or (2) when the nature of their tactics, conduct, or demeanor during the seizure overtly or subtly influence the person's decision to consent.

Hemenway suggests that low-key, professional, and courteous police conduct can mitigate the effect of a "minor," albeit, unlawful seizure, so as to enable the person to consent independently from the effects of the illegal seizure.

The *Hemenway* model leaves aside *Hall's* clear analytical lines in favor of an ill-defined balancing test that provides inadequate guidance to the bench and bar and will yield inconsistent results and years of litigation to better define the contours of the rule. More importantly, though, the *Hemenway* model steers the analysis away from a personal rights model (an inquiry into the effect of the constitutional violation on the individual) toward an assessment of the reasonableness of the police conduct in a given situation.

In the present case, both the *Hall* and the *Hemenway* models lead to suppression of the evidence from the consent search. Officer Grice saw defendant and a male friend in an area where he mistakenly believed they could not be. Grice contacted them "to make sure they were not doing anything wrong." When defendant began to walk away, he called out, "Hey, come back here. I need to talk to you." The state concedes that the officer lacked reasonable suspicion to stop.

Grice asked for identification, and defendant gave him a credit card with her photo. Grice noticed that she had a Costco card under a different name, questioned her about it (she said it was a friend's card), and ran the name through dispatch, which reported nothing suspicious about the name.

Finally, Grice saw two Crown Royal bags in defendant's purse and suspected illegal drug possession. He requested and obtained consent to search the bags and found evidence of drug possession in one of the bags.

The suspicion-less stop reduced defendant to the officer's control for the purpose of a criminal investigation. None of the attenuation factors suggests that the consent was attenuated from the stop. The request for consent came moments after the initial stop; there was no advice of rights to refuse consent; and no significant intervening event broke the chain of events from the illegal stop to the consent search.

The same result occurs under the *Hemenway* model. In addition to the above three factors, the *Hemenway* model looks to the police conduct during the seizure. Nothing about the officer's conduct lessened the adversarial and investigative nature of the contact. Officer Grice performed a criminal stop when he emphatically told defendant to "come back here" because he needed to talk with her. The focus of the stop expanded from suspicions of general wrongdoing and possible trespass, to identity theft, and, finally, to suspected drug possession. Grice

lacked objective reasonable suspicion for each suspected crime. Plus, Grice expanded the stop from the first inquiry to the second and finally to the third based on his observations of the contents of defendant's purse. Grice was on a fishing expedition based on the observations he made during the illegal stop.

Summary of Facts

On January 2, 2010, around 10:00 p.m., Springfield police officer David Grice was on patrol when he drove behind the Springfield Value Village Shopping Center. Tr 7-8. Grice frequently performs patrol checks behind the center because he reports that people in that area often engage in illegal activity, such as theft, burglary, criminal mischief, sex in public, and drug use. Tr 8.

That night, Grice drove into the area with the "alley lights" on top of his patrol car illuminated. Tr 38-39. He saw defendant and another person standing in a walkway or "breezeway" that connected the front of the shopping center with the back of it. Tr 17. Two businesses "near the walkway" were open, including a bar. Tr 17, 40. As soon as Grice drove into the area, defendant began to walk away. Tr 17. Grice, accelerated, stopped, got out of his patrol car, approached the two people, and said something to the effect of "Hey, I need to talk to you." Tr 18. Grice wanted to contact defendant and her companion because, in his experience,

people frequently engaged in unlawful activity behind the center, and he believed that the two were trespassing. Tr 19.

Defendant continued to walk away while her companion waited for Grice. Tr 18. Grice said directly to defendant, "Hey, come back here. I need to talk to you." Tr 18. At the second request, defendant turned around and walked back to where Grice was standing. Tr 19. Grice asked defendant for her identification. Tr 19. Defendant told him that she did not have traditional identification, but that she had a credit card with her name and picture on it. Tr 19.

Grice noticed that defendant seemed "really nervous and fidgety," and he could tell that defendant "probably did not want to be talking to [him]." Tr 19. Based on her inability to stand still and her nervousness, Grice suspected that defendant had recently used methamphetamine or some sort of stimulant. Tr 20.

Defendant gave Grice several credit cards with her name on them. Tr 21. As she was getting the cards out of her wallet, Grice noticed that defendant had a Costco card in her wallet with a different name on it. Tr 21, 27. He asked her about it, and defendant told Grice that the card belonged to a friend. Tr 20-21, 27. Grice "ran" defendant's name and the name on the Costco card through dispatch to check whether the person whose name was on the Costco card was a theft victim.

Tr 20. Dispatch reported that "nothing popped up," and Grice concluded that he had no reason to believe defendant was lying to him. Tr 20.

As defendant retrieved the credit cards from her wallet, Grice also noticed two Crown Royal pouches in defendant's purse. Tr 21. Because Grice thought that defendant had recently used methamphetamine, he believed that she probably had drugs in the pouches. Tr 21. He asked for defendant's consent to search them, and defendant agreed. Tr 21.

In one pouch Grice found make-up. Tr 21. In the other pouch he found three suspicious items: (1) a long, thin metal "scraper," which is a device used to scrape methamphetamine residue off of a pipe; (2) a metal spoon with striations on it, which made him believe that it was a "heating" or "cooking" spoon, commonly used to ingest methamphetamine; and (3) a two-by-two inch black pouch that contained a white, powdery residue, which Grice believed was probably methamphetamine. Tr 21-22.

Grice asked defendant about the pouch, and she said that she had found it on the ground and put it in her purse. Tr 22. At that point, based on his discovery of the scraper and the spoon and defendant's nervous and fidgety behavior, Grice believed that defendant possessed methamphetamine. Tr 26. Grice asked defendant for consent to search her entire purse, and defendant agreed. Tr 23. As Grice started to search the purse, defendant spontaneously told him that if he found

anything illegal in her purse, it would have to be something that her ex-husband had put there without her knowledge. Tr 23.

Inside a make-up bag in defendant's purse, Grice found a marijuana pipe, an Altoids container containing marijuana, three glass pipes, and a clear, plastic baggie containing a white crystalline substance that later field-tested positive for methamphetamine. Tr 23-24. At some point during the encounter, Grice learned that defendant and her companion both had prior arrests for possession of methamphetamine. Tr 28. The entire encounter from the time Grice initially contacted defendant until he cited and released her lasted approximately one hour. Tr 45.

ARGUMENT

The issue before this court is fundamental to search and seizure law. It involves the default answer to the following generic constitutional question: Does a stop without reasonable suspicion have a presumptive causative effect on the seized person's decision to consent to a search during the seizure?

The United States Supreme Court, other states, and treatise writers hold that as a matter of law the fruit of the poisonous tree doctrine assumes that the illegal seizure affects the decision to consent and the evidence from the consent search is the presumptive product of the illegal seizure, unless and until the state demonstrates that a *significant intervening event* or events broke the connection between the illegal seizure and the consent. Further, no opinion holds that police professionalism qualifies as a significant intervening event to undo the effect of the ongoing illegal seizure.

In Part I below, defendant will briefly review those parts of the *Hemenway* model that in defendant's view correctly clarify the fruit of the poisonous tree and attenuation doctrines in Oregon.

In Part II, defendant will review the legal presumptions embedded in the fruit of the poisonous tree analysis. Defendant will then explain how the *Hemenway* model overlooks the core presumption in the fruit of the poisonous tree model, wrongly assumes that police conduct can redress an ongoing illegal seizure, and uses a "purpose and flagrancy" exploitation factor that is inconsistent with both federal and state law.

In Part III, defendant applies a modified version and an unmodified version of the *Hemenway* model to the facts of this case.

I. Key Principles Validated in the *Hemenway* Model

The *Hemenway* model recognizes several principles critical to Oregon criminal law. First, the *Hemenway* model generally reaffirms *Hall's* approach to the fruit of the poisonous tree and the attenuation doctrines under Article I, section 9.[1] *Hemenway*, 353 Or at 137.

Second, the *Hemenway* model acknowledges that a person who is unlawfully stopped "is subject to police authority in excess of constitutional bounds and is thereby placed at a disadvantage relative to the constitutional position that he or she would have occupied absent the police interference." *Hemenway*, 353 Or at 140.

Third, the *Hemenway* model disavows the proposition that a criminal defendant has the burden to show a "minimal factual nexus" between an illegal warrantless seizure and subsequent consent or statements. Rather, when the state seeks to introduce evidence obtained during a warrantless search, it "has the burden to prove that the warrantless search was valid." *Hemenway*, 353 Or at 142; ORS 133.693(4).

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[1] Article I, section 9, provides:

> "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probably cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

Fourth, the *Hemenway* model acknowledges that when law enforcement obtains consent during a stop that lacks reasonable suspicion, the state must satisfy two separate prongs of the attenuation analysis, voluntariness and exploitation, before it may introduce evidence from the search. *Hemenway*, 353 Or at 138-39.

Fifth, the *Hemenway* model recognizes that the scope of the exploitation analysis is the totality of the circumstances, while the ultimate determination as to whether the illegal seizure was sufficiently removed from the consent decision so as to be attenuated from it is a "legal determination." *Hemenway*, 353 Or at 144.

The Significance of a Stop

Although the *Hemenway* model acknowledges the proposition that a person who is seized on less than reasonable suspicion is materially and unlawfully disadvantaged by the seizure, defendant will address this proposition because it is the premise and driving force of the fruit of the poisonous tree doctrine and informs the presumptive effect of the illegal seizure on the person's decision to consent. As will be seen later in the brief, the primary defect in the *Hemenway* model is its undervaluation of the illegal stop on the consent decision.

Oregon statutory law and state and federal constitutional law reinforce complementary themes: Law enforcement may seize individuals without a warrant under color of law to question them about suspected criminal activity, and individuals are required under penalty of criminal law to comply with law enforcement's lawful orders.

The "stop" of a person is a seizure of constitutional magnitude. *State v. Ashbaugh*, 349 Or 297, 244 P3d 360 (2010); *Terry v. Ohio*, 392 US 1, 88 S Ct 1868, 20 L Ed 2d 889 (1968). In the criminal context, a lawful stop must be supported by reasonable suspicion to believe that the person has committed, is committing, or is about to commit a crime. ORS 131.615(1); *see infra* n 1.

A stop occurs when law enforcement acts under color of law to restrict a person's liberty to engage in lawful activities without undo interference from government actors. *See* ORS 131.605(7) ("A stop is a temporary restraint of a person's liberty by a peace officer lawfully present in any place."). Oregon

statutory law authorizes stops and describes their lawful and reasonable dimensions.[2]

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[2] ORS 131.615 states:

> "(1) A peace officer who reasonably suspects that a person has committed or is about to commit a crime may stop the person and, after informing the person that the peace officer is a peace officer, make a reasonable inquiry.
>
> "(2) The detention and inquiry shall be conducted in the vicinity of the stop and for no longer than a reasonable time.
>
> "(3) The inquiry shall be considered reasonable if it is limited to:
>
> "(a) The immediate circumstances that aroused the officer's suspicion;
>
> "(b) Other circumstances arising during the course of the detention and inquiry that give rise to a reasonable suspicion of criminal activity; and
>
> "(c) Ensuring the safety of the officer, the person stopped or other persons present, including an inquiry regarding the presence of weapons.
>
> "(4) The inquiry may include a request for consent to search in relation to the circumstances specified in subsection (3) of this section or to search for items of evidence otherwise subject to search or seizure under ORS 133.535.
>
> "(5) A peace officer making a stop may use the degree of force reasonably necessary to make the stop and ensure the safety of the peace officer, the person stopped or other persons who are present."

Oregon law criminalizes the refusal "to obey a lawful order" by a peace officer. ORS 162.247 provides in relevant part:

> "(1) A person commits the crime of interfering with a peace officer or parole and probation officer if the person, knowing that another person is a peace officer or a parole and probation officer as defined in ORS 181.610:
>
> "* * * * *
>
> "(b) Refuses to obey a lawful order by the peace officer or parole and probation officer.
>
> "(2) Interfering with a peace officer or parole and probation officer is a Class A misdemeanor."

A stopped individual is in a restricted legal position, as a matter of law. The person must comply with the order to stop and any subsequent lawful orders. The stop conveys that the seized individual is the subject of an investigation who may not resume her preferred activities unless and until the officer permits her to do so. In no small way, the seizure reduces the individual to the officer's control under color and penalty of law, encourages the individual to cooperate, and places the officer in a superior position over the individual to pursue the criminal investigation.

Although a stop is not the type of seizure that amounts to custodial arrest for purposes of administrating *Miranda*-type rights under Article I, Section 12, or the Fifth Amendment to the United States Constitution, it nonetheless requires the

stopped individual to cease what she was doing, obey the officer's command, and attend to the officer's inquiries. *See State v. Prickett*, 324 Or 489, 494, 930 P2d 221 (1997) (Article I, section 12, of the Oregon Constitution does not require *Miranda* warnings during a typical traffic stop because the motorist is neither "in custody nor under compulsion in the constitutional sense."); *Berkemer v. McCarty*, 468 US 420, 438, 104 S Ct 3138, 82 L Ed 2d 317 (1984) ("* * * circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police. To be sure, *the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions.*" (Emphasis added)).

An *unlawful* seizure affects the detainee in at least two significant and discrete ways. First, the illegal seizure subjects the individual to investigatory questioning that she may not ignore and denies her an option of constitutional magnitude that should be available to her—the option to end the encounter and walk away.

Second, it is a fair assumption (if not a constitutionally conclusive presumption) that a seized person would prefer to have her liberty than to remain seized. Because the seizing officer has the authority to detain or release, a seized person reasonably believes that cooperation and compliance with the officer will

improve the prospect of release. The person in a mere encounter does not confront the same conundrum, because she determines her own movements, and her liberty in no way depends on whether she can influence the officer to release her.

Finally, the New Jersey Supreme Court and several commentators note that many if not most people who are stopped view the request for consent to search as "having the force of law" that compels compliance:

> "Unlike many other courts around the country, this Court has not previously grappled with the problems caused by standardless requests for consent to search a lawfully stopped motor vehicle. But one of our observations in *Johnson* [68 NJ 349, 346 A 2d 66 (1975)] is reflective of the problem. There, we observed that '[m]any persons, perhaps most, would view the request of a police officer to make a search as having the force of law.' *Johnson*, *supra*, 68 NJ at 354, 346 A 2d 66. In the context of motor vehicle stops, where the individual is at the side of the road and confronted by a uniformed officer seeking to search his or her vehicle, it is not a stretch of the imagination to assume that the individual feels compelled to consent. *Cf,* Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 *Tul. L.Rev*. 1409, 1465 (2000) (stating that '[p]sychological studies further confirm that ... there is an almost reflexive impulse to obey an authority figure.'); *see also* Adrian J. Barrio, Note, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1997 U Ill L Rev 215, 233–40 (discussing psychological studies regarding authority figures)."

State v. Carty, 170 NJ 632, 644, 790 A 2d 903 (2002).

Unlike law enforcement, the general public is not trained in search and seizure law. Although judges and criminal law practitioners come to recognize and appreciate the legal distinction between a command ("Stop") and a request for

permission ("May I look in the bag?"), that distinction is easily lost in the moment on the person who is the subject of an official criminal investigation.

Professor LaFave observes that an officer who conducts an illegal arrest communicates a "false claim of authority over the person[.]" Wayne R. LaFave, 4 *Search and Seizure* § 8.2(d), 106 (4th ed 2004). Similarly, a reasonable person who is illegally stopped confronts a false claim of authority that colors her subsequent interaction with the stopping authority, both overtly and subconsciously, as a matter of law.

It is analytically unsurprising, then, that a seized individual would cooperate with police. Rather, cooperation is expected because the criminal justice system specifically designs seizures to induce and often demand cooperation, often under penalty of law.

Accordingly, the fruit of the poisonous tree doctrine recognizes the seizure's debilitating effect on the stopped person and incorporates it into the attenuation analysis. In the attenuation analysis the state has a heavy burden to rebut the presumption that the seizure influenced the decision to consent, which usually requires the state to demonstrate that a significant intervening event (such as release from custody, consultation with an attorney or third person, or court appearance) broke the influence of the illegal seizure on the consenter. *Wong Sun v. United States*, 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963).

II. The *Hemenway* Model (A) Discounts the Core Legal Presumption Embedded in the Fruit of the Poisonous Tree Doctrine, (B) Wrongly Assumes that Police Conduct can Redress an Ongoing Illegal Seizure, and (C) Defines the "Purpose and Flagrancy" Factor Improperly

The generic legal question before this court is whether it is reasonable for law enforcement to stop individuals without reasonable suspicion and obtain consent to search them or their property. The generic legal answer to that question is, "No, of course not." Yet, the *Hemenway* model appears to answer, "Well, that depends on the circumstances."

Defendant posits that *Hemenway* wrongly reaches that answer for the following three interrelated reasons.

A. The Fruit of the Poisonous Tree Doctrine Presumes that a Stop without Reasonable Suspicion or an Arrest without Probable Cause Taints Subsequent Consent

When law enforcement stops an individual without reasonable suspicion or arrests an individual without probable cause, the Fruit of the Poisonous Tree doctrine presumes that the illegal seizure taints the individual's subsequent statements or consent. That presumption exists and applies even when the statements or consent are "voluntary" in the traditional sense.

In *New York v. Harris*, 495 US 14, 18-19, 110 S Ct 1640, 109 L Ed 2d 13 (1990), the Court explained that when an arrest is made on less than probable cause, the defendant's *voluntary statements are the presumed product of the illegal arrest*:

> "This case is therefore different from *Brown v. Illinois*, 422 US 590 (1975), *Dunaway v. New York*, 442 US 200 (1979), and *Taylor v. Alabama*, 457 US 687 (1982). In each of those cases, *evidence obtained from a criminal defendant following arrest was suppressed because the police lacked probable cause*. The three cases stand for the familiar proposition that the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality. See also *Wong Sun v. United States*, 371 US 471 (1963). We have emphasized, however, that attenuation analysis is only appropriate where, as a threshold matter, courts determine that 'the challenged evidence is in some sense the product of illegal governmental activity.' *United States v. Crews, supra*, at 471. As Judge Titone, concurring in the judgment on the basis of New York state precedent, cogently argued below, '*[i]n cases such as Brown v. Illinois, (supra) and its progeny, an affirmative answer to that preliminary question may be assumed, since the 'illegality' is the absence of probable cause and the wrong consists of the police's having control of the defendant's person at the time he made the challenged statement. In these cases, the 'challenged evidence'—i. e., the post arrest confession—is unquestionably 'the product of [the] illegal governmental activity'—i.e., the wrongful detention*." 72 N. Y. 2d, at 625, 532 N. E. 2d, at 1235."

Harris, 495 US at 18-19 (emphasis added).

The latter italicized excerpt bears emphasis because it illustrates the deficit in the *Hemenway* model: When police have arrested a person but lack probable cause for the arrest, the challenged evidence is unquestionably the product of the illegal arrest.

The Court adheres to the same principle in the stop context. In other words, the Supreme Court follows the general rule that a stop on less than reasonable suspicion taints subsequent consent as fruit of the poisonous tree. The Court's stop cases are decided on whether a stop occurred or whether reasonable suspicion supported the stop; they are not decided on an attenuation analysis.

For example, in *Florida v. Bostwick*, 501 US 429, 111 S Ct 2382, 115 L Ed2d 389 (1991), uniformed officers entered a bus at a scheduled stop and approached and asked the defendant passenger for consent to inspect his ticket and identification. He consented and showed the police the requested items. After inspecting and returning the ticket and identification, the police explained they were looking to interdict illegal drugs, and, after informing him that he had the right to refuse, they asked him for consent to search his luggage. *Bostwick*, 501 US at 432. The defendant consented, and the officers found cocaine in one of the bags. The Florida Supreme Court concluded that the police policy and conduct in that case was a seizure *per se*. *Bostick v. State*, 554 So 2d 1153 (Fla 1989).

Because the state conceded there was no reasonable suspicion to stop the defendant, the controlling question on review was whether the police tactics had seized defendant. If no stop occurred, the evidence from the luggage was admissible pursuant to the defendant's consent; but, if the officers had stopped the

defendant, the evidence from the consent search was the "tainted fruit" of the suspicion-less seizure:

> "The sole issue presented for our review is whether a police encounter on a bus of the type described above necessarily constitutes a 'seizure' within the meaning of the Fourth Amendment. The State concedes, and we accept for purposes of this decision, that the officers lacked the reasonable suspicion required to justify a seizure and that, if a seizure took place, the drugs found in Bostick's suitcase must be suppressed as tainted fruit."

Bostwick, 501 US at 433-34. The Supreme Court held that the policy of mounting buses was not a *per se* seizure, and it remanded the case for further proceedings to determine whether the police had stopped the defendant given the individual circumstances of that case. *Id* at 439. *See also*, *Florida v. Royer*, 460 US 491, 507-08, 103 S Ct 1319, 75 L Ed 2d 229 (1983) (plurality)[3] (because officers arrested the defendant on less than probable cause, "Royer was being illegally detained when he consented to the search of his luggage, [and] we agree that the consent was tainted by the illegality and was ineffective to justify the search."); *Ohio v. Robinette*, 519 US 33, 51, 117 S Ct 417, 136 L Ed 2d 347 (1996) (Stevens, J, dissenting from the holding that no stop occurred and explaining "well settled law * * * that a consent obtained during an illegal detention is ordinarily ineffective * *

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[3] Justice Powell noted in his concurrence that Drug Enforcement Administrative agents receive specialized training in identifying drug courier profiles but agreed with the plurality position that the defendant's consent was tainted because the agents lacked probable cause to arrest.

* [.]" (Citations omitted)). *See generally*, LaFave, 4 *Search and Seizure*, § 8.2(d) at 107, n 144 (citing cases suppressing evidence from consent searches conducted *during* an illegal seizure).

The *Hemenway* model acknowledges the two-pronged attenuation analysis (voluntariness and exploitation) but at several places seems to discuss the exploitation prong as though no presumption attached. For example, *Hemenway* explains that after the trial court determines the consent was voluntary, "the court must address whether the police exploited their prior illegal conduct to obtain the evidence." *Hemenway*, 353 Or at 146. A little later, *Hemenway* indicates that evidence the police observe as a direct result of the illegality is tainted and that "[e]vidence may also be tainted if police obtained the consent to search through less direct exploitation of their illegal contact." *Hemenway*, 353 at 146.

The *Hemenway* model works as follows. If police stop an individual without reasonable suspicion and the person consents to a search, the evidence will be admissible if the state shows *that the police did not exploit the illegality* to obtain the consent. *See Hemenway*, 353 Or at 150 ("[T]he better framed question is whether the police *exploited* the unlawful stop to obtain the consent." (Emphasis in original)); *Id.* at 146 ("Second, even if the consent was voluntary, the court must address whether the police exploited their prior illegal conduct to obtain the evidence.").

Contrary to the suggestion in *Hemenway*, the trial court does not ask whether the police exploited the illegal seizure. Rather, the fruit of the poisonous tree doctrine *presumes* that the illegal seizure affected the consent. Given that presumption, the trial court determines whether the state has rebutted that presumption and demonstrated that the illegal seizure did *not* affect the consent.

Like *State v. Rodriguez*, 317 Or 27, 854 P 2d 399 (1993), the *Hemenway* model fails to acknowledge the presumption that an illegal seizure taints consent. To determine whether the consent is tainted, both *Hemenway* and *Rodriguez* focus on police conduct as a distinct inquiry separate from the consequences that the illegal seizure imposes on the individual: "We think that evidence obtained during such a search should be suppressed *only* in those cases where police have exploited their prior unlawful conduct to obtain that consent." *State v. Rodriguez*, 317 Or at 40 (emphasis added).

Instead of crediting the presumption that the illegal seizure affected the consent, *Hemenway* and *Rodriguez* view the illegal seizure as doing little more than placing police and the individual in physical proximity of each other or "mere physical presence." *See State v. Rodriguez*, 317 Or at 40 ("Mere physical presence as a result of prior unlawful conduct does not constitute exploitation of that conduct.").

Contrary to the reasoning in those two cases, the illegal seizure does more than bring the officer and the individual together. Rather, the illegal seizure brings them together *and* (1) reduces the individual to the officer's control under color and penalty of law, (2) encourages the individual to cooperate with the officer, and (3) places the officer in a superior position over the individual to pursue an investigation.

In other words, the illegal seizure brings the officer into the individual's physical presence *and* creates an uneven and unlawful playing field: the individual is disadvantaged; she must comply with the order to stop and any subsequent lawful orders; she is the subject of an investigation; and she may not resume her preferred activities unless and until the officer permits her to do so.

The task for the state is to rebut the common sense and legal presumption that the disabling effects of a seizure color the seized person's mental calculations when determining how to respond to the officer's questions and request for consent. It's the state's task to prove that (1) a significant intervening event broke the presumptively harmful influence of the seizure on the consenter, or (2) the person would have consented even if the officer had engaged the person in mere conversation, instead of executing a stop.

In defendant's view, the second rationale (the person would have consented during mere conversation) drives *State v. Kennedy*, 290 Or 493, 624 P2d 99

(1981). In that case, this court did not decide whether the two officers had stopped the defendant when they approached him in the airport parking lot. Instead this court noted and followed other courts that had reasoned that "volunteering of consent without prior request from police is a strong indication of voluntariness." *Id.*, at 504 (citations omitted). In other words, when the circumstances of the stop are not egregious, the person who *volunteers* consent without being requested to consent would likely have consented even if the officer had engaged the person in mere conversation instead of a stop.

B. Contrary to the *Hemenway* Model, Polite and Professional Police Conduct does not Redress the Harm Caused by a Stop Lacking Reasonable Suspicion

Hemenway's definition of exploitation is derived from *Rodriguez*, and that definition is lacking. The primary flaw in the *Rodriguez/Hemenway* definition of exploitation is that it focuses on police conduct *apart from* the presumptive effect of the illegality on the individual. It appears to ask, "Did police do anything to *aggravate* the illegal seizure?"

The focus of the *Hemenway* model is on police conduct in two respects. First, the *Hemenway* model looks to police conduct and demeanor during the illegality to assess whether law enforcement tactics or demeanor affected the individual's decision to consent: "Likewise, particularly egregious police

misconduct—such as excessive use of force in unlawfully seizing a defendant—is more likely to affect the defendant's decision to consent than more restrained police behavior." *Hemenway*, at 147.

The *Hemenway* model also asks whether police undertook active efforts *after* the illegality to "exploit" the illegality. *See*, *Id*. at 147 ("'Exploitation occurs when the police take advantage of the circumstances of their unlawful conduct to obtain the consent to search.'" (*Quoting Rodriguez*, 317 Or at 40)).

The *Hemenway* model effectively articulates the controlling exploitation question as follows: "*Other than the illegality*, (1) did police *actively* use information gleaned from the stop or *actively* utilize the stop to obtain consent, or (2) did police otherwise conduct themselves in a way as to influence the decision to consent?"

The message of *Hemenway* is that police conduct and police demeanor during and after the illegality are the keys to determining exploitation. Under the *Hemenway* model, a peaceful, albeit unlawful, seizure has little exploitative effect on consent if police otherwise acted professionally and courteously during the unlawful seizure.

The United States Supreme Court has rejected the *Hemenway* reasoning that law enforcement's conduct can cure an ongoing unlawful seizure. For example, it has explained that the fruit of the poisonous tree doctrine presumes that a voluntary

statement that follows an arrest on less than probable cause *is* the tainted product of the seizure and professional police conduct does not undo the ongoing illegality. The Court's opinion in *Dunaway v. New York*, 442 US 200, 99 S Ct 2248, 60 L Ed 2d 824 (1979), illustrates the foundational deficit in the *Hemenway* model.

There, police arrested the defendant on less than probable cause, brought him to the police station, administered *Miranda* warnings, and obtained his statement and several sketches. New York's Appellate Division used *Hemenway*-like reasoning to hold the statements and sketches admissible. Like *Hemenway*, the New York court reasoned that even though the police lacked probable cause to arrest, the police conduct during questioning had been "'highly protective of defendant's Fifth and Sixth Amendment rights[.]'" *Dunaway*, 442 US 200, 219, 99 S Ct 2248, 60 L Ed 2d 824 (1979) (quoting, *People v. Dunaway*, 61 App Div 2d 299, 303, 402 NYS 2d 490, 493 (1978)). In other words, the New York court emphasized that—apart from making an arrest on less than probable cause—the police acted professionally and non-threateningly and, in fact, were highly protective of the defendant's Fifth and Sixth Amendment rights.

The Supreme Court reversed because the New York court did not appreciate the presumptive effect of the Fourth Amendment violation on the defendant's decision to give a statement. The Court explained that the police officers' respectful and protective treatment of Dunaway's Fifth and Sixth Amendment

rights did not undo the Fourth Amendment violation. The Court emphasized that it was looking for "significant intervening events" to break the influence of the unjustified seizure, and police professionalism during and after the seizure did not qualify as a significant intervening event to undo the ongoing illegal seizure. Part of the reasoning follows at length:

> "The situation in this case is virtually a replica of the situation in *Brown*. Petitioner was also admittedly seized without probable cause in the hope that something might turn up, and confessed *without any intervening event of significance*. [Footnote to *Brown* omitted] Nevertheless, three members of the Appellate Division purported to distinguish *Brown* on the ground that the police did not threaten or abuse petitioner (presumably putting aside his illegal seizure and detention) and that the police conduct was 'highly protective of defendant's Fifth and Sixth Amendment rights.' 61 AD2d, at 303, 402 NYS 2d, at 493. This betrays a lingering confusion between 'voluntariness' for purposes of the Fifth Amendment and the "causal connection" test established in *Brown*. Satisfying the Fifth Amendment is only the 'threshold' condition of the Fourth Amendment analysis required by *Brown*. *No intervening events broke the connection between petition's illegal detention and his confession. To admit petitioner's confession in such a case would allow 'law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the 'procedural safeguards' of the Fifth.'*"

Dunaway, 442 US at 218-19 (emphasis added) (*citing,* Comment, 25 Emory LJ 227, 238 (1976)). *Dunaway* is instructive because the Court determined that *Miranda* warnings and professional police conduct during the ongoing illegal seizure were legally inadequate to redress the ongoing Fourth Amendment violation—arrest on less than probable cause.

The Court again explained the reach of the fruit of the poisonous tree rationale in *New York v. Harris*, 495 US 14. There, police *with* probable cause to arrest but without a search warrant or arrest warrant entered defendant's residence, arrested him, and questioned him at the residence and later at the police station. The Court held that because police violated *Payton v. New York*, 445 US 573, 100 S Ct 1371, 63 L Ed 2d 639 (1980) (which requires an arrest or search warrant to enter a suspect's residence to arrest), the evidence that police saw *in* the residence and the statements obtained *at* the residence were to be suppressed. However, the statements police obtained at the police station (removed from the unlawful residential entry) were admissible, because the Fourth Amendment violation in *Harris* was the *manner* in which police executed the arrest, not the fact that defendant was under arrest: "Because the officers had probable cause to arrest Harris for a crime, Harris was not unlawfully in custody when he was removed to the station house, given *Miranda* warnings, and allowed to talk." *Harris*, 495 US

at 18.[4]

When law enforcement lacks the requisite justification for the seizure, the question in the classic attenuation analysis is *not* (as *Hemenway* suggests) whether the police did anything *additional* to aggravate the illegal seizure; the question is whether some *significant* intervening event occurred to undo the presumptive negative affect of the illegal seizure on the decision to consent. There would be little or no need for the fruit of the poisonous tree doctrine if police professionalism could undo or erase an illegal stop or unlawful arrest, particularly when police are trained to act professionally and are presumed to act professionally. *See Hudson v. Michigan*, 547 US 586, 599, 126 S Ct 2159, 165 L Ed 2d 56 (2006) ("Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline.").

The "fruit of the poisonous tree" doctrine expresses a staple criminal law principle that the state is not to profit directly or indirectly from its illegality.

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[4] *State v. Rodriguez* is an Oregon version of *Harris*. The officers in *Rodriguez* had a federal administrative warrant that did *not* violate the Fourth Amendment ("we conclude that the administrative arrest warrant issued to procure defendant's arrest as a deportable alien in this case did not violate the Fourth Amendment") but *did* violate the "oath and affirmation" requirement of Article I, section 9. *Rodriguez*, 317 Or at 43. In other words, the officers had probable cause to arrest Mr. Rodriguez, but the administrative warrant did not satisfy the Article I, section 9, requirement that a magistrate (as opposed to an administrative authority) issue a warrant. *Id*. at 33. Consequently, like Mr. Harris at the station house, Mr. Rodriguez "was not unlawfully in custody."

Recognizing that the Fourth Amendment violation presumptively affects an otherwise voluntary consent, federal courts have little difficulty applying the doctrine to suppress evidence when consent is given *during* an illegal seizure. *See*, e.g., *United States v. Macias*, 658 F3d 509 (5th Cir 2011) (suppressing evidence from voluntary consent obtained during illegal extension of traffic stop); *U.S. v. Lopez-Arias*, 344 F 3d 623, 630 (6th Cir 2003) ("Defendants granted their consent to search within half an hour from the initial stop and *during* the illegal arrest. There was no intervening time or event between the illegal arrest and defendants' consent." (Emphasis added); *U.S. v. Washington*, 490 F 3d 765 (9th Cir 2007) ("Here, the factors fairly and practically dictate our conclusion that Washington's consent did not purge the taint of his illegal seizure. *There was no time lapse*. Shaw requested Washington's consent to search the car immediately after he conducted a search of Washington's person, and *while Washington was illegally seized*. And there were no appreciable intervening circumstances." (Emphasis added; footnote omitted)). *See generally*, LaFave, 4 *Search and Seizure*, § 8.2(d) at 107, n 144 (citing cases suppressing the evidence from consent searches conducted during an illegal seizure).

Notably, the Sixth Circuit opinion in *U.S. v. Lopez-Arias* specifically overruled an earlier opinion suggesting that voluntary consent could break the chain of an ongoing illegal seizure: "In [United States v.] *Guimond*, [116 F3d 166

(6th Cir 1997)], a panel of this court seemingly held that if the consent to search was voluntary, it does not matter that the consent occurred during an illegal seizure. The panel in *Guimond* did not address the implications of the exclusionary rule nor did it distinguish the Supreme Court's holdings in *Royer*, *Dunaway*, and *Brown* or this court's holdings in *Caicedo*, *Richardson*, and *Buchanan*." *U.S. v. Lopez-Arias*, 344 F 3d at 629 n 1.

C. The "Purpose and Flagrancy" Factor in Federal Law is Grounded in Deterrence

The *Hemenway* model criticizes *State v. Hall* for jettisoning the purpose and flagrancy factor from the exploitation analysis. *Hemenway*, 353 Or at 147. The *Hall* court had reasoned that the factor was relevant to the deterrence rationale of the federal exclusionary rule but inapplicable to Oregon's personal rights rationale for evidence suppression. *Hall*, 339 Or at 35 n 21.

In *Herring v. United States*, 555 US 135, 129 S Ct 695, 172 L Ed 2d 496 (2009), Chief Justice Roberts, writing for the majority, confirmed *Hall's* observation. He explained that the primary motivation for the Fourth Amendment exclusionary rule is to deter illegal police conduct. Within the deterrence model, law enforcement's "culpability" in engaging in the violation is an important factor for determining suppression.

The Chief Justice explained that the "purpose and flagrancy" factor focuses on (1) the officer's purpose in engaging in the illegal conduct and (2) whether the officer's *decision* to conduct the illegality was particularly egregious, when compared against a reasonable officer standard:

> "The pertinent analysis of deterrence and culpability is objective, not an 'inquiry into the subjective awareness of arresting officers,' Reply Brief for Petitioner 4-5. See also *post*, at 710, n. 7 (GINSBURG, J., dissenting). We have already held that 'our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.' *Leon*, 468 US at 922, n 23, 104 S Ct 3405. These circumstances frequently include a particular officer's knowledge and experience, but that does not make the test any more subjective than the one for probable cause, which looks to an officer's knowledge and experience, *Ornelas v. United States*, 517 US 690, 699-700, 116 S Ct 1657, 134 L Ed 2d 911 (1996), but not his subjective intent, *Whren v. United States*, 517 US 806, 812-13, 116 S Ct 1769, 135 L Ed 2d 89 (1996)."

Herring, 555 US at 145- 46.

Consequently, federal courts will *not* suppress evidence when police rely in good faith on a magistrate's determination that probable cause exists to issue a warrant, *United States v. Leon*, 468 US 897, 104 S Ct 3405, 82 L Ed 2d 677 (1984), or when police rely on a statute that is later declared unconstitutional, *Illinois v. Krull*, 480 US 340, 107 S Ct 1160, 94 L Ed 2d 364 (1987), or when police rely in good faith on inaccurate data in court records, *Arizona v. Evans*, 514

US 1, 115 S Ct 1185, 131 L Ed 2d 34 (1995), and even when police rely in good faith on inaccurate data in police records. *Herring*, 555 US 135.

However, when law enforcement decision-making is responsible for the unjustified seizure, the federal court will consider the "flagrancy" or unreasonableness of the police decision that results in the violation:

> "The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct. As we said in *Leon*, 'an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus' of applying the exclusionary rule."

Herring, 555 US at 129, *quoting US v. Leon*, 468 US at 911.

Consequently, the federal "purpose and flagrancy" attenuation factor compares the individual officer's decision-making that led to the constitutional violation against a reasonable officer standard to assess the officer's "culpability." The federal "purpose and flagrancy" factor does not purport to measure the effect of the officer's conduct on the person giving consent.

The deterrence reasons for the federal "purpose and flagrancy" factor do not resonate with Oregon's personal rights model. The personal rights model does not ask whether the officer was "culpable" or acted in good or bad faith when he engaged in the violation, or what was in his mind at the time of the violation. *State v. Ainsworth*, 310 Or 613, 621, 801 P2d 749 (1990) ("Article I, section 9, prohibits certain governmental action, not certain governmental states of mind. The Oregon

Constitution does not require an inquiry into the observing officer's thoughts to determine whether the officer's conduct unconstitutionally violates a defendant's Article I, section 9, rights."). Rather, the issue in the Oregon personal rights model is whether an individual has suffered a constitutional violation because of state action.

The purpose of the exclusion remedy under Oregon law is to restore the individual to the position she would have been in, and should have been in, had law enforcement acted lawfully, regardless of whether law enforcement acted in good or bad faith. *State v. Davis*, 295 Or 227, 237, 666 P2d 802 (1983) ("[T]hose rules of law designed to protect citizens against unauthorized or illegal searches or seizures of their persons, property, or private effects are to be given effect by denying the state the use of evidence secured in violation of those rules against the persons whose rights were violated, or, in effect, by restoring the parties to their position as if the state's officers had remained within the limits of their authority.") The *Hemenway* model mistakenly criticizes *Hall* and mistakenly reincorporates the "purpose and flagrancy" factor into Oregon's attenuation analysis.

To be sure, the *Hemenway* model employs the factor to capture a different concept. It asks whether law enforcement's *manner* while seizing the individual, holding the individual, or asking for consent could have affected the individual's mental state or perception of the events:

> "For example, police misconduct that is intended to gain a defendant's consent may well be more likely to substantially affect that defendant's decision to consent. Likewise, particularly egregious police misconduct—such as excessive use of force in unlawfully seizing a defendant—is more likely to affect the defendant's decision to consent than more restrained police behavior."

Hemenway, 353 Or at 147.

Defendant acknowledges that the manner in which law enforcement conducts itself can affect the attenuation analysis, but defendant posits that the manner of execution is likely more relevant to the voluntariness prong of the analysis, as opposed to the exploitation prong.

As well, defendant posits that police professionalism should be the norm. The law and society expect police to act courteously, civilly, and professionally when dealing with the public. Police are trained and entrusted to do so, and the fact that they act professionally should not be considered an exceptional circumstance that warrants special note as an attenuating factor to cure the impact of an ongoing illegal seizure. *See Hudson v. Michigan*, 547 US at 599 ("Another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline."). When an officer stops an individual without reasonable suspicion, the person has suffered a constitutional injury, regardless of whether the officer was civil or surly. In fact, law enforcement has successfully utilized the "good cop/bad cop" approach for decades for the purpose of unsettling suspects

and rendering them more forthcoming to the "good cop" archetype. *See Miranda v. Arizona*, 384 US 436, 452, 86 S Ct 1602, 16 L Ed 2d 694 (1966) (explaining the "friendly-unfriendly" or the "Mutt and Jeff" technique for eliciting statements from suspects).

To the extent the court wishes to retain the concept articulated in *Hemenway* and include it in the exploitation analysis, defendant respectfully suggests that the court adopt a different term to express it. The *Hemenway* model seems to suggest that police conduct that effectively de-escalates a stop from a confrontational investigation into something akin to "mere conversation" can qualify as a mitigating factor in the attenuation analysis. If that was the intent of *Hemenway*, the factor could be changed from "purpose and flagrancy" to something else, such as "remedial police conduct." However, as argued above, the ongoing and unlawful loss of liberty is truly restored only through release from the seizure, not police professionalism.

The *Hall* court was correct when it abandoned the "purpose and flagrancy" factor for purposes of Oregon law. The United States Supreme Court uses the term in the federal deterrence model to measure the egregiousness of the officer's decision to commit the Fourth Amendment violation. That definition and use of the "purpose and flagrancy" factor in the federal system is irrelevant to Oregon's

personal rights model, and its continued use will cause confusion in Oregon's attenuation analysis.

III. Application

A. Traditional Fruit of the Poisonous Tree and Attenuation Analyses: Consent is the Product of an Ongoing Illegal Seizure

The key to traditional Fruit of the Poisonous Tree analysis in the seizure context is whether law enforcement lacked the requisite justification (reasonable suspicion to stop or probable cause to arrest) when they seized the individual and requested consent.

If reasonable suspicion justified the stop or probable cause justified the arrest, a reviewing court merely applies the traditional voluntariness tests to determine whether the consent was voluntary. If the seizure was justified and the consent was voluntary, the evidence is admissible.

If the stop was unjustified by reasonable suspicion or the arrest was unjustified by probable cause, the Fruit of the Poisonous Tree doctrine works to impose the presumption that the illegal seizure affected or tainted the unlawfully seized person's decision to consent. In those situations, the state has the burden to show that the consent was both voluntary and attenuated from the illegal seizure.

Because an illegal seizure unlawfully reduces the individual to the officer's authority and control and denies the individual the constitutional right to break off

the encounter and walk away, the state's burden to prove attenuation is difficult to meet. This court suppressed a statement following an arrest without probable cause in *State v. Jones*, 248 Or 428, 433-34, 435 P 2d 317 (1967), stating:

> "It must next be determined whether the confession in the instant case is the product of the invalid arrest. In other cases the causal connection between an illegal arrest and the obtaining of the evidence in question has been held to be broken by: an intervening legal arrest, *State v. Dempster*, supra, *State v. Allen*, 248 Or 376, 434 P 2d 740 (Decided December 6, 1967); or by the intervention of several days' time during which the defendant was released on his own recognizance, *Wong Sun v. United States*, supra; or bringing the defendant before a magistrate between the time of illegal arrest and confession, see *Lacefield v. State*, 412 SW 2d 906 (Texas Crim 1967). In the instant case, where the confession was obtained within a matter of a few hours after the illegal arrest, while the defendant was in detention, without the presence of counsel, after a substantial physical encounter with the police which caused the defendant to become 'wild,' and before defendant had been before a magistrate, we do not feel the state has shown that the connection between the illegal arrest and the confession was 'so attenuated as to dissipate the taint.' See *State v. Dempster*, supra."

Oregon currently uses three of the four traditional factors to determine attenuation: temporal proximity, administration of warnings, and the occurrence of a significant intervening event. *Hall*, 339 Or at 35 n 21.

In this case, the state acknowledges the officer lacked reasonable suspicion that defendant had committed, was committing, or was about to commit a crime when the officer stopped her. Several minutes into the unlawful stop, the officer requested consent and defendant consented to a search of two bags in her purse. The officer did not inform defendant that she had the right to refuse to consent.

There were no significant intervening events to break the influence of the seizure. Consequently, defendant's consent was unquestionably the product of the ongoing illegal seizure in the *Hall* attenuation analysis.

B. Hemenway Model: No Factor Favors Attenuation

The *Hemenway* model uses four factors to assess attenuation: temporal proximity, administration of warnings, the occurrence of a significant intervening event, and the "purpose and flagrancy" of the illegality. Under *Hemenway*, "purpose and flagrancy" means (1) that police used the seizure to actively advance and expand its investigation or (2) police tactics and conduct during the illegal seizure reasonably and forseeably influenced the person's decision to consent.

Extrapolating from the *Hemenway* facts and result, if police are present in a community-caretaking role, if the conversation between the officer and the unlawfully stopped person is low key and non-confrontational, if the person shows a willingness to waive her rights to privacy to put the officer at ease, then the interaction begins to look more like "mere conversation" than a criminal stop, and the court may conclude that the illegal seizure was not a "significant" motivation for the person's decision to consent. *See Hemenway*, 353 at 150-52.

Again, none of the *Hemenway* factors favors attenuation in the present case. The stop was without reasonable suspicion, and the officer requested consent and defendant consented several minutes into the stop. The officer did not inform

defendant that she had the right to refuse the consent request. There were no significant intervening events to interrupt the flow of the investigatory seizure. No circumstances suggested that the tenor of the conversation was anything other than a criminal investigation conducted under color of law.

Finally, the officer "exploited" the unlawful stop within the meaning of *Hemenway*. He testified that he contacted defendant and her male friend "basically to make sure they were not doing anything wrong: Breaking the law, damaging any property." Tr 18. When defendant initially walked away, the officer yelled to her, "Hey, come back here. I need to talk to you." Tr 18.

When she returned, the officer asked to see identification. Defendant explained that she did not have state-issued identification with her but showed him a credit card with her photo. Tr 19. The officer noticed a Costco card in defendant's purse under a different name and asked about it. Defendant explained that it was a friend's card. The officer "ran" the name through dispatch to check on reported thefts under that name. Dispatch had no reports for that name, and the officer accepted defendant's explanation. Tr 20.

Defendant provided additional cards identifying her, and the officer concluded that defendant had properly identified herself. Tr 20.

While defendant was looking through her purse for identification, the officer saw two crown royal bags and suspected defendant of another possible crime—possession of controlled substances. Tr 21.

This scenario exposes another disfavored police action: the fishing expedition. In *State v. Warner*, 284 Or 147, 585 P2d 681 (1979), several officers stopped defendant and his friend and questioned them in relation to a recent robbery. After the chief of police was satisfied that the men were not involved with the robbery, he "asked" them to empty the contents of their pockets onto the hood of a police car. When they did so, the companion had several .38 caliber hollow point bullets. That caused the officers to yell "freeze" and arrest the two men. *Warner*, 284 Or at 154. The police chief admitted that he had asked the men to empty their pockets as a form of "fishing expedition" to see what he could find. *Id*. at 153. This court held that the evidence obtained from the arrest should be suppressed because it was tainted by the illegal seizure:

> "It follows that the evidence obtained from that point forward is tainted by the illegal seizure of the defendant's person and by the illegal search and seizure of the contents of his pockets, and therefore must be suppressed. *State v. Valdez*, 277 Or 621, 561 P2d 1006 (1977); *Wong Sun v. United States*, 371 US 471, 83 S Ct 407, 9 L.Ed.2d 441 (1963)."

Id. at 166.

Defendant recognizes that *Warner* is not on all fours with the current case, but it is close and it illustrates the expansive intrusiveness of "fishing expeditions." Here, the officer believed that defendant and her friend were doing "something wrong" when he stopped them and asked for identification.

That stop expanded into an investigation of a possible theft or identity crime, which also lacked reasonable suspicion, when the officer saw and asked about a Costco card in defendant's possession.

Finally, the officer expanded that stop into an investigation of a possible drug crime, again without reasonable suspicion, based on defendant's possession of two crown royal bags. Consequently, the illegal stop to investigate one crime that lacked reasonable suspicion became a platform to investigate a second crime that lacked reasonable suspicion and finally a third crime that lacked reasonable suspicion.

The stopping power is significant. When unlawful, it subjects the person to an unreasonable intrusion into her privacy, as a matter of constitutional law. The initial stop was illegal in this case, and defendant's ultimate consent to a search of her purse did not retrospectively render the stop legal. *See State v. Weaver*, 319 Or 212, 874 P2d 1322 (1994) (illegal search of defendant's business was not cured by defendant's later consent to a search when defendant was not informed of earlier illegal search). The investigation expanded from one crime that lacked reasonable

suspicion (at best, trespass) to a second crime that lacked reasonable suspicion (property or identity theft), to a third crime that lacked reasonable suspicion (possession of a controlled substance).

Even under *Hemenway*, it is patently unreasonable and unconstitutional to seize individuals without reasonable suspicion to conduct *seriatim* criminal investigations in the hope that incriminating evidence will eventually turn up. *Hemenway* does not condone fishing expeditions.

CONCLUSION

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

Respectfully submitted,

ESigned

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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 10,370 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(2)(b).

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, Oregon 97301, on July 30, 2013.

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

Respectfully submitted,

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