IN THE SUPREME COURT OF THE STATE OF OREGON

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

BRIEF ON THE MERITS OF PETITIONER ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Marion County
Honorable THOMAS M. HART, Judge

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

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QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First question presented

Should this court reconsider the exclusionary rule that it articulated in *State v. Hall*, 339 Or 7, 115 P3d 908 (2005), with respect to Article I, section 9, of the Oregon Constitution?

First proposed rule of law

Because the *Hall* rule undervalues the constitutional significance of a defendant's voluntary consent to a warrantless search, because revisiting it will clarify and not complicate the law, and because it reflects an incomplete application of the methodology for construing constitutional provisions, this court should reconsider and reject it.

Second question presented

If police violate a defendant's rights under Article I, section 9, of the Oregon Constitution, and if the defendant subsequently gives voluntary consent to a warrantless search, is the evidence found during the search admissible?

Second proposed rule of law

If a defendant voluntarily consents to a search, and if the search uncovers incriminating evidence, the search should be deemed "reasonable" and the evidence deemed admissible.

If this court decides not to adopt that principle, it should nonetheless recognize that a defendant's voluntary consent is—at the very least—a highly significant factor when assessing whether suppression is required by an Article I, section 9, violation that preceded the consent.

Third question presented

While attempting to contact defendant, police officers violated Article I, section 9, by trespassing onto his back porch and knocking on his door. Defendant answered the door and then voluntarily consented to a warrantless search of his house. Did the trespass require suppression of the evidence found during the ensuing consent search?

Third proposed rule of law

The record shows not only that defendant's consent was voluntary, but that the preceding police illegality was short in duration and unaccompanied by aggressive or intimidating police behavior. Because nothing in the record suggests that the trespass significantly affected defendant's decision to consent, the trespass provides no basis for suppression.

SUMMARY OF ARGUMENT

Under *State v. Hall*, 339 Or 7, 115 P3d 908 (2005), if evidence is found during a voluntary-consent search, and if the consent followed police conduct that violated Article I, section 9, of the Oregon Constitution, the evidence often will need to be suppressed. Under *Hall*, suppression will be required if (1) the

defendant "shows a minimal factual nexus" between the unlawful police conduct and the consent; and (2) the state then fails to prove that consent "was independent of, or only tenuously related to, the unlawful police conduct." As applied by *Hall* and its progeny, that standard has required suppression whenever a police illegality was ongoing when consent was given or was otherwise in close "temporal proximity" to the consent.

In *State v. Hemenway*, 353 Or 129, 149, 295 P3d 617 (2013), *vacated*, 353 Or 498, ___ P3d ___ (2013), this court re-assessed and modified *Hall*'s suppression holding, explaining that *Hall* "did not give sufficient [constitutional] weight to a defendant's voluntary consent to a search." The court vacated *Hemenway*, however, after discovering that the defendant had died before the decision issued. Consequently, *Hall* once again represents existing law. The state asks this court to again re-assess *Hall*, and asks the court to either overrule or substantially modify *Hall*'s suppression holding.

Because *Hall* fails to recognize the constitutional significance of a defendant's voluntary consent to a warrantless search, because overruling it will clarify rather than complicate the law, and because it reflects an incomplete application of the methodology for construing constitutional provisions, re-assessing it is appropriate.

In the state's view, evidence found during a voluntary-consent search necessarily is admissible under Article I, section 9. If a defendant voluntarily

consented, he or she necessarily made an uncoerced choice. Consequently, any prior police illegality did not affect the defendant's "constitutional position" with respect to the evidence at issue—that is, the defendant still possessed the unfettered ability to either authorize the requested search or to forbid it. Suppression thus is not necessary to vindicate any constitutional rights with respect to the discovered evidence, and is inappropriate under Article I, section 9.

The *Hemenway* court rejected the state's suggestion that a voluntary consent necessarily renders evidence admissible despite a prior police illegality. If this court again rejects that suggestion, the state asks it to re-articulate two other conclusions that the *Hemenway* court reached: that *Hall* undervalued the constitutional significance of a voluntary consent to a search, and that *Hall* overvalued the significance of temporal proximity between a police illegality and a subsequent consent.

The state's alternative proposed rule of law is consistent with those conclusions. Under the state's alternative proposed rule, a police illegality that violates Article I, section 9 and precedes a voluntary consent to a search will not require suppression if the state can establish any of the following: (1) that nothing about the circumstances surrounding the consent suggests that the illegality significantly affected the decision to consent; (2) the discovery of the

evidence was inevitable; or (3) the discovery came from a source that was independent of the police illegality.

Here, no basis for suppression existed under either of the state's proposed rules. First, although police were unlawfully on defendant's back porch when he let them enter his house, defendant voluntarily consented to the entry, and he voluntarily consented to a search of the home that revealed methamphetamine residue. In turn, the discovery of the residue supported a search warrant that led to additional incriminating evidence. Because defendant's voluntary consent authorized the discovery of the residue, it also rendered the search warrant valid. By itself, defendant's voluntary consent made the challenged evidence admissible, and no further analysis is needed.

Second, even if this court rejects that proposition, no basis for suppression exists. The state showed not only that defendant voluntarily consented but that nothing about the police trespass significantly affected the decision to consent. The preceding police illegality—the back-porch trespass—was of short duration. Further, nothing about the trespass, or about the officers' conduct when defendant encountered them on his porch, was aggressive or intimidating. Because nothing suggests that the trespass significantly affected defendant's decision to let the officers enter and search his home, Article I, section 9, provides no basis for suppression.

SUMMARY OF MATERIAL FACTS

A. After officers knocked on defendant's back door, defendant invited them inside, he voluntarily consented to a search of his house, and the search produced drug-crime evidence.

As described below, police officers found drug evidence inside defendant's home. Based on that evidence, a jury convicted defendant of two counts of manufacturing cocaine and of two counts of endangering the welfare of a minor. (ER-3, Judgment; ER-1, Indictment).[1]

Four law-enforcement officers approached defendant's house shortly before 10:00 a.m. on a Sunday, after receiving citizen reports of drug use and drug sales at the house. (10/8/09 Tr 6). Officers had been told that a "couple children * * * were in the house and * * * had actually gotten their hands on the cocaine," and "that there were so many guns in the residence that the children at some point had to walk over the guns." (10/8/09 Tr 6).

The officers intended to ask defendant for consent to search the house. (*See* 10/8/09 Tr at 9, containing officer's testimony that, when he first spoke to defendant, he explained that "when kids are involved" and officers receive a "drug complaint," we "talk to the homeowner and ask for permission and if they would show us around the house"). Officers knocked on defendant's front door but received no answer. (10/8/09 Tr 8). The officers then knocked on a

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[1] "ER" refers to the excerpt of record attached to defendant's appellant's brief in the Court of Appeals.

second front door, one that was plainly visible beneath the front deck. (10/8/09 Tr 8; Ex 2). They again received no answer. (10/8/09 Tr 8). Because the officers saw two cars in the driveway, they believed someone was home; they followed a concrete path that led to a wrap-around back deck and sliding glass door. (10/8/09 Tr 8).

An officer knocked on the glass door and—when a person inside asked who it was—"called out, sheriff's office." (10/8/09 Tr 8). Defendant opened the door. (10/8/09 Tr 8). The officer testified that he "[i]ntroduced myself, [said] my name is Kevin with the sheriff's office." (10/8/09 Tr 8). After defendant "reached out his hand to shake it," the officer "advised him of a complaint that we'd received * * * ." (10/8/09 Tr 8). Defendant "invited us into the home." (10/8/09 Tr 8).

Defendant "escorted" the officers to the kitchen, where everyone introduced themselves. (10/8/09 Tr9). The officers told defendant about the drug complaints and explained that "especially when kids are involved," they "talk to the homeowner and ask for permission and if they would show us around the house." (10/8/09 Tr 9). The officers did not "make any threats of arrest if [defendant] didn't give permission." (10/8/09 Tr 9). Defendant agreed to "show [them] around the house." (10/8/09 Tr 9).

The officers had asked defendant to lead them through the house because "[t]hat way they show us only places that they want us to see[.]" (10/8/09 Tr 8-

9). Defendant was "cordial" and "very cooperative," and he led them through the house without "express[ing] any hesitation." (10/8/09 Tr 26).

While on the house's lower level, the officers "saw a torn piece of a baggie." It contained "white powder and some small crystals." *State v. Unger*, 252 Or App 478, 480-81, 287 P3d 1196 (2012), *review allowed*, 353 Or 533 (2013). The officers informed defendant that they had found the baggie, and one of the officers left the house to conduct a field test "to determine whether, as he believed, it contained methamphetamine residue." 252 Or App at 480.

Defendant then called his lawyer, and he ultimately instructed the officers to leave. 252 Or App at 480. At that point, the officer who tested the baggie reported "that the baggie had tested positive for methamphetamine, and the officers arrested defendant." 252 Or App at 481. The officers then used the information from the search of the house to obtain a search warrant. They executed the warrant later that day and found additional drug-crime evidence in defendant's home. 252 Or App at 481.

B. The trial court concluded that defendant had consented voluntarily and denied defendant's motion to suppress.

Defendant filed a motion to suppress the evidence found in his home. He argued that the officers had illegally entered his back yard "and that all evidence derived from the violation had to be suppressed," including the evidence found inside the house. *Unger*, 252 Or App at 481.

The trial court did not expressly address whether the police had illegally entered defendant's back yard, but it concluded that defendant's consent was "freely and voluntarily made." The court denied the motion to suppress. (10/8/09 Tr 59-63, 62).

C. The Court of Appeals reversed, holding that *State v. Hall* required suppression.

Defendant appealed. In the Court of Appeals, defendant did not challenge the trial court's voluntariness ruling, but again argued that the trespass—under Article I, section 9, of the Oregon Constitution—rendered the discovered evidence inadmissible. (App Br 4-5, 14-18). The state argued that, even if the officers had illegally trespassed, "they did not exploit that illegality to gain defendant's voluntary consent to enter the house and search for drugs." (Resp Br 1). Because defendant's consent was voluntary, and because the trespass gave police nothing "more than the opportunity to seek consent," no exploitation occurred, and the discovered evidence was admissible. (Resp Br 11).

The Court of Appeals reversed, holding that the exclusionary rule articulated by *State v. Hall*, 339 Or 7, 115 P3d 908 (2006), required suppression. *Unger*, 252 Or App at 483-88. Under *Hall*'s two-step approach, a defendant first must show "the existence of a minimal factual nexus—that is, at minimum, the existence of a 'but for' relationship—between the evidence

sought to be suppressed and prior unlawful police conduct." *Hall*, 339 Or at 25. The Court of Appeals held that defendant satisfied that requirement by proving that officers were unlawfully on his back porch when he agreed to let them enter the home, and by showing that the trespass thus "gave the officers the opportunity to obtain defendant's consent." *Unger*, 252 Or App at 486.[2] "In addition," the Court of Appeals noted, "the trespass was ongoing when the officers obtained defendant's consent to enter his house * * * ." 252 Or App at 486.

Under *Hall*'s second step, once the defendant shows the "minimal factual nexus," the state "nevertheless may establish that the disputed evidence is admissible under Article I, section 9, by proving that the evidence did not derive from the preceding illegality." *Hall*, 339 Or at 25. The Court of Appeals held that, although the state established that defendant's consent was voluntary, it failed to show that the consent had not derived from the trespass. The trespass "tainted [defendant's] subsequent consent to the officers' entry into and

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[2] The state does not dispute that the trespass onto defendant's back porch invaded a protected privacy interest of defendant's and thus implicated Article I, section 9. The state notes, however, that not all trespasses by police onto private property necessarily implicate a protected privacy interest. *See State v. Dixon/Digby*, 307 Or 195, 211-12, 766 P2d 1015 (1988) ("[a] person who wishes to preserve a constitutionally protected privacy interest in land outside the curtilage must manifest an intention to exclude the public by erecting barriers to entry").

search of his house," and the discovered evidence should have been suppressed. *Unger*, 252 Or App at 488.[3]

ARGUMENT

A. This court should revisit and reject the exclusionary rule articulated and applied in *Hall*.

Article I, section 9, of the Oregon Constitution, recognizes "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure." Although the provision generally requires searches to be conducted pursuant to a search warrant, this court repeatedly has recognized that a defendant's voluntary consent can render a warrantless search constitutional. Under *Hall*, however, suppression of evidence found during a voluntary-consent search often is required if consent follows police conduct that violates Article I, section 9. Under *Hall*, suppression will be required if (1) the defendant "shows a minimal factual nexus" between the unlawful police conduct and the consent; and (2) the state then fails to prove that consent "was independent of, or only tenuously related to, the unlawful police conduct." *Hall*, 339 Or at 34-35.

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[3] The Court of Appeals stated that "[t]he state does not argue that defendant's consent was independent of or only tenuously related to the officers' trespass." 252 Or App at 486. In fact, the state—by arguing that the trespass gave officers nothing more than an opportunity to request consent, and that officers did not "exploit" the trespass to obtain consent—*did* argue that the consent was insufficiently related to the trespass to justify suppression.

As applied by *Hall* and its progeny, that standard appears to require suppression whenever the voluntary consent is given while the police illegality is ongoing, or whenever the consent is otherwise close in time to the illegality. *See Hall*, 339 Or at 36 (holding that "defendant here consented to the search during an unlawful stop" and that—absent any circumstances mitigating the unlawful stop's effect—"the close temporal proximity between the illegal detention and defendant's consent" required suppression "even if [consent was] voluntary"); *State v. Rodgers/Kirkeby*, 347 Or 610, 630, 227 P3d 695 (2010) (explaining that officers asked the defendants for consent to search during an unlawful detention and that, "as in *Hall*," the "temporal proximity between the illegal detention and each defendant's consent" meant that "consent, even if voluntary, was the product of police conduct that violated Article I, section 9"); *State v. Ayles*, 348 Or 622, 648, 237 P3d 805 (2010) (Kistler, J., dissenting) (describing *Ayles* majority as "hold[ing] that, under *Hall* a minimum factual nexus will exist between an illegality and a defendant's consent as long as the consent occurs while the unlawful stop is ongoing").

The state, as it did in *Hemenway*, asks this court to revisit *Hall*'s suppression holding and to abandon it. This court is "willing to reconsider" its own state constitutional holdings "whenever a party presents * * * a principled argument" that the earlier decision "wrongly considered or wrongly decided the issue in question." *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 54, 11 P3d 228

(2000). Although constitutional decisions should be "stable and reliable," "there is a 'similarly important need to be able to correct past errors' because '[t]his court is the body with the ultimate responsibility for construing our constitution, and if [it] err[s], no other reviewing body can remedy that error.'" *Farmers Insurance Company of Oregon v. Mowry*, 350 Or 686, 693-94, 261 P3d 1 (2011), quoting *Stranahan*, 331 Or at 53. Because *Hall* was wrongly decided, because overruling it will clarify rather than complicate the law, and because it is based on an incomplete application of the pertinent methodology, this court should re-assess it.

1. *Hall*'s suppression holding undervalues the constitutional significance of a voluntary consent to a search, and produces incorrect outcomes in a significant area of criminal law.

At heart, and as recounted in greater detail later in this brief, *Hall*'s suppression holding vastly undervalues the constitutional significance of a defendant's voluntary consent to a search. At the same time, *Hall*'s suppression holding accords far too much significance to the presence of mere "temporal proximity" between a police illegality and a subsequent consent. As a result, *Hall* requires trial courts to regularly suppress incriminating evidence in criminal cases in which—under the Oregon Constitution—no reason for suppression should exist. That factor favors re-assessment of *Hall*'s suppression holding. *See Stranahan*, 331 Or at 54 (court is "willing to reconsider" state constitutional holdings "whenever a party presents * * * a

principled argument" that the earlier decision "wrongly decided the issue in question").

2. Re-assessing *Hall* will clarify the law rather than complicate it.

A party challenging a constitutional holding must show that "when the passage of time and the precedential use of the challenged rule is factored in, overturning the rule will not unduly cloud or complicate the law." *State v. Ciancanelli*, 291 Or 282, 291, 121 P3d 613 (2005). Here, the law will be unduly clouded and complicated *unless* this court revisits and overrules *Hall*. As it stands, *Hall*'s suppression holding is internally inconsistent, and applying it has proved confusing for courts and litigants. Moreover, because that holding is relatively new and has not been heavily relied on by this court, abandoning it will not dismantle decades of jurisprudence or demolish long-held principles of trial court practice. In the end, re-assessing *Hall* is more likely to clarify than to complicate or cloud the law.

a. *Hall*'s suppression holding is internally inconsistent and difficult to apply.

Although the *Hemenway* decision has been vacated, the *Hemenway* court's observations about the confusion that *Hall* has fostered remain accurate. *See* 353 Or at 138, 141("in practice, the *Hall* test has caused some confusion," "has been unevenly applied and, apparently, has proved confusing to lawyers and judges"). Internal contradictions plague both steps in *Hall*'s two-step test,

and this court—as is true of lower courts—has struggled to apply the test in a consistent manner.

(1) Internal contradictions mark the first step in *Hall*'s two-step test.

Under *Hall*, courts first ask if the defendant has shown "a minimal factual nexus" between the police illegality in question and the defendant's consent to a search. *Hall*, 339 Or at 34-35. In assessing whether a defendant has met that burden, lower courts must choose between three contradictory analytical options. First, *Hall* can be read as requiring defendants to show *more* than a "but for" connection between the illegality and subsequent consent. S*ee Hall*, 339 Or at 25 (noting that court had "rejected" the notion that evidence is inadmissible "simply because it was obtained after unlawful police conduct or because it would not have been obtained 'but for' unlawful police conduct").

Second, *Hall* can be read as requiring defendants to show *merely* a "but for" connection in order to justify suppression. *See Ayles,* 348 Or at 649 n 5 (Kistler, J., dissenting, joined by Balmer, J., and Linder, J.; emphasis added) (*Hall* can be read as suggesting that "proof of [nothing more than] a 'but for' causal connection *will* be sufficient to establish a minimum factual nexus and thus to presume that the consent was the product of the illegality"); *see Hall*, 339 Or at 25 (noting that defendant must show "existence of a 'but for'

relationship" "at minimum," but arguably leaving it open whether a "but for" showing—by itself—might suffice).

Third, *Hall* can be read as requiring even *less* than a "but for" connection. *See Ayles*, 348 Or at 650-51 (Kistler, J., dissenting, joined by Balmer, J., and Linder, J.) (suggesting that majority's application of *Hall* in *Ayles* can be read as "substitut[ing] a temporal connection for a causal connection," and as eliminating any duty to show a minimal "causal connection").

(2) Internal contradictions mark *Hall*'s second step.

If the defendant establishes the requisite "factual nexus," *Hall* requires the state to show that consent "was independent of, or only tenuously related to, the unlawful police conduct." *Hall*, 339 Or at 35. Here, too, *Hall*'s methodology is confusing for courts and litigants.

Perhaps most significantly, although *Hall* purports to identify a totality-of-the-circumstances test for determining when the state has met its burden, *Hall* and its progeny have—in applying the test—reduced it to a single factor. *Hall* declared that "[d]eciding whether the state has satisfied [its] burden requires a fact-specific inquiry into the totality of the circumstances to determine the nature of the causal connection between the unlawful police conduct and the defendant's consent." 339 Or at 34-35. Yet the *Hall*, *Rodgers/Kirkeby*, and *Ayles* courts held that—because an illegal seizure was

ongoing when voluntary consent was given—evidence found during the consent search had to be suppressed. In each of those cases, the court concluded that mere "temporal proximity" between the illegality and the consent required suppression. It did so without assessing any other circumstances, and without explaining why, under the particular circumstances involved, the illegality was likely to have significantly affected the defendant's decision to consent. *Hall* and its progeny suggest that *Hall*—despite purporting to identify a "totality of the circumstances" test for assessing the "nature of the causal connection" between a police illegality and consent—regularly reduces the test to nothing more than a "temporal proximity" inquiry.

In addition, *Hall* has fostered confusion about whether it is significant that a police illegality affected an officer's decision to seek consent. Although *Hall* suggested that the effect of the illegality on the decision is pertinent to the "causal connection" assessment, *Ayles* suggests otherwise. *See Hall*, 339 Or at 35 ("[a] causal connection requiring suppression may exist because the police sought the defendant's consent solely as the result of knowledge of inculpatory evidence obtained from unlawful police conduct"); *Ayles*, 348 Or at 630-31 (rejecting state's suggestion that because officers would have sought consent regardless of police illegality, preceding illegality does not require suppression).

Revisiting *Hall*, rather than unduly complicating the law, will give this court the chance to clarify and simplify the exclusionary rule that applies when voluntary consent follows a police violation of Article I, section 9.

b. "Passage of time" and "precedential use" considerations do not weigh against reconsideration.

Neither "passage of time" nor "precedential use" considerations suggest that overruling *Hall* would unduly complicate the law. *See Ciancanelli*, 339 Or at 291 (party challenging a constitutional holding must show that "when the passage of time and the precedential use of the challenged rule is factored in, overturning the rule will not unduly cloud or complicate the law"). For that reason also, this court should not hesitate to revisit *Hall*.

In essence, *Hall* announced a new suppression rule for voluntary-consent-search cases. Before *Hall*, this court followed the same rule of law that the state proposes here: If police officers discover evidence during a voluntary-consent search, the discovered evidence is admissible under Article I, section 9, even if a police illegality preceded the consent. *See State v. Kennedy*, 290 Or 493, 501, 624 P2d 99 (1981) (if officers obtain consent to search "during an illegal stop," "the proper approach"—in assessing whether evidence found during a later consent search must be suppressed—is to "determine * * *

whether [the] defendant's consent to the search was voluntary"). *Hall* abandoned that approach.[4]

Hall's suppression rule is just eight years old. This court has applied the rule just four times,[5] and—setting aside the vacated *Hemenway* decision—this is the first time the court has granted a petition for review asking it to revisit *Hall*. This case thus resembles *Stranahan*, in which the court "acted at the

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[4] According to the *Hall* majority, this court "*repeatedly* ha[d] recognized that, even when a defendant's consent is voluntary," a preceding illegality may require suppression. 339 Or at 26-27 (emphasis added). But of the five decisions that the *Hall* majority cited to support that statement, 339 Or at 27-29, 32-33, four required suppression not under Article I, section 9, but based on a statute or on the Fourth Amendment. *See State v. Toevs,* 327 Or 525, 537-38, 964 P2d 1007 (1998) (officer's violation of ORS 810.410(3) required suppression of subsequently discovered evidence in defendant's car); *State v. Carston*, 323 Or 75, 79, 85-87, 913 P2d 709 (1996) (police violation of ORS 165.540 required suppression of evidence found during later consent search); *State v. Dominguez-Martinez*, 321 Or 206, 213-14, 895 P2d 306 (1995) (officer's violation of ORS 810.410(3), prior to defendant's consent to search, required suppression of evidence discovered during search); *State v. Olson*, 287 Or 157, 162-66, 598 P2d 670 (1979) (applying Fourth Amendment suppression rule to police conduct that violated both the Fourth Amendment and Article I, section 9). The fifth cited decision—*State v. Rodriguez*, 317 Or 27, 42, 854 P2d 399 (1993)—merely stated, without citing any supporting authority, that if a defendant voluntarily consents to a search, "[t]here *may* be cases" in which a prior illegality affects admissibility. 317 Or at 39 (emphasis added).

[5] The court applied *Hall's* suppression holding in *Ayles*, 348 Or 622; *Rodgers/Kirkeby*, 347 Or 610, 629-30, 227 P3d 695 (2010); *State v. Thompkin*, 341 Or 368, 379, 143 P3d 530 (2006); and *State v. Crandall*, 340 Or 645, 649-52, 136 P3d 30 (2006). The court cited *Hall* in *State v. Ashbaugh*, 349 Or 297, 306-07 n 7, 244 P3d 360 (2010), and in *State v. Vondehn*, 348 Or 462, 465, 477, 236 P3d 691 (2010), but did not expressly apply *Hall*'s suppression holding in either case.

earliest possible moment" to "correct" a decision that was less than 10 years old and that "few intervening precedents had relied on." *Ciancanelli,* 339 Or at 290-91.

Abandoning *Hall*'s suppression holding will not upend decades of jurisprudence, or destroy longstanding principles that govern trial court practice. *Hall*'s relative youth ensures that this court appropriately may revisit it.

3. *Hall*'s suppression holding reflects an incomplete application of the pertinent methodology.

In deciding whether to revisit a prior decision, this court pays "particular attention to arguments that * * * demonstrate some failure [by the earlier court] to follow its usual paradigm for considering and construing the meaning of the provision in question." *Stranahan*, 331 Or at 54. To determine the meaning of a state constitutional provision, this court scrutinizes the provision's text, its own case law construing the text, and pertinent historical information. *See State v. Davis*, 350 Or 440, 446, 256 P3d 1075 (2011) (when construing original Oregon Constitution, court "examine[s] the text in its context, the historical circumstances of the adoption of the provision, and the case law that has construed it"). Yet the *Hall* majority did not follow those steps in construing Article I, section 9. For that reason also, this court should re-examine *Hall*'s suppression holding.

Although Article I, section 9, prohibits only "unreasonable" searches, the *Hall* majority did not discuss the meaning of "unreasonable," refer to the constitutional divide between reasonable and unreasonable searches, or discuss whether Article I, section 9's text "implies a right" to suppress evidence found during a voluntary-consent search. *Hall*, 339 Or at 20-37; *see State v. Davis*, 295 Or 227, 235, 666 P2d 802 (1983) (in assessing whether a violation of the Oregon Constitution requires suppression, courts must assess "the character of the rule violated in the course of securing the evidence" and "whether the rule implied a right not to be prosecuted upon evidence so secured"). Second, the *Hall* majority did not address the line of cases—*State v. Bea*, 318 Or 220, 229, 864 P2d 854 (1993); *State v. Paulson*, 313 Or 346, 351, 833 P2d 1278 (1992); *State v. Newton*, 291 Or 788, 801, 636 P2d 393 (1981); and *State v. Pogue*, 243 Or 163, 164, 412 P2d 28 (1966), discussed at page 24 of this brief—describing voluntary-consent searches as "reasonable" and therefore lawful under the Oregon Constitution. *Hall*, 339 Or at 20-37. Third, the *Hall* majority did not discuss whether historical circumstances supported its ultimate holding. 339 Or at 20-37.

Because *Hall* was wrongly decided, because overruling it will clarify rather than cloud the law, and because it reflects an incomplete application of the appropriate methodology, it warrants re-assessment.

B. *Hall* undervalued the constitutional significance of a voluntary consent to a search.

1. If a police illegality is followed by voluntary consent to a search, the consent is an independent, constitutionally significant event that makes suppression inappropriate.

In the state's view, evidence found during a voluntary-consent search necessarily is admissible under Article I, section 9. In essence, *Hall* misapplied the "vindication of rights" principle embodied by Article I, section 9's exclusionary rule. As this court repeatedly has explained, Article I, section 9 authorizes a suppression-of-evidence remedy if, and only if, suppression will "vindicate" a defendant's Article I, section 9 rights, by restoring the defendant to the same constitutional position he or she would have occupied had no police illegality occurred. *See State v. Davis,* 313 Or 246, 254, 834 P2d 1008 (1992) (the "exclusionary rule * * * operates to vindicate a constitutional right"); *Hall*, 339 Or at 24 (quoting *Davis*, 295 Or at 234, while noting that "the aim of the Oregon exclusionary rule is to restore a defendant to the same position as if 'the government's officers had stayed within the law'"); *Davis*, 295 Or at 234 (the goal is "to preserve that person's rights to the same extent as if the government's officers had stayed within the law").[6]

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[6] Consequently, if suppression's sole purpose in a particular case is to deter future police misconduct, Article I, section 9, will not authorize suppression. *See Davis*, 313 Or at 254 ("the focus [of suppression under Article I, section 9] * * * is on protecting the individual's rights," and "not on deterring or punishing the excessive conduct of any particular government actor"); *Hall*,

Footnote continued…

Here, the right at issue is the Article I, section 9, right to be free from "unreasonable" searches. That a defendant *voluntarily* consented to a search of his or her person or property shows that the police trespass did not alter the defendant's constitutional position with respect to the state's ability to conduct a lawful search, or with respect to the evidence at issue. If a defendant's consent to a search is voluntary, he or she necessarily retained—despite any preceding police illegality—the power to authorize or forbid the requested search. *See State v. Wolfe*, 295 Or 567, 572, 669 P2d 320 (1983) (consent is voluntary if the defendant exercised "free will" in deciding to consent, and if the decision did not result from express or implied police coercion).

Under those circumstances, the defendant, despite the police illegality, is still in the same constitutional position with respect to his or her ability to prevent the government from engaging in the requested search. The defendant's ability to simply say "no" to the request has not been compromised. As a result, suppression of evidence found during a voluntary consent search is not required to vindicate the defendant's Article I, section 9 rights with respect to that evidence. *See State v. Smith*, 327 Or 366, 379-80, 963 P2d 642 (1998) ("the Oregon exclusionary rule exists to vindicate a personal right to be free

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339 Or at 24 (noting that prior decisions "explicitly * * * rejected the view that the Oregon exclusionary rule is predicated upon a deterrence rationale").

from unlawful searches and seizures"; "[t]o support that purpose, it is sufficient to suppress only evidence that is actually obtained out of an illegal search or seizure"; emphasis and citations omitted); *Hall*, 339 Or at 51 (Durham, J., dissenting) (when consent to search follows police illegality, the voluntariness inquiry—which considers the effect of illegal police conduct on the decision to consent—"fully vindicates the rights of the defendant").

Furthermore, by ultimately giving a voluntary consent, a defendant ensures that the ensuing search (assuming it falls within the consent's scope) is "reasonable" and hence constitutional. *See State v. Weaver*, 319 Or 212, 219, 874 P2d 1322 (1994) ("[a] warrantless search by the police is 'reasonable' under Article I, section 9, when the search falls into one or another of the recognized exceptions to the warrant requirement," and "[o]ne such exception is consent"; emphasis omitted); *Bea*, 318 Or at 229 (same); *Paulson*, 313 Or at 351; *Newton*, 291 Or at 801 (state constitutional "warrant requirement may be excused if there is consent"); *Pogue*, 243 Or at 164 ("[w]hen there is consent to the search, no warrant is necessary").[7] Because a voluntary-consent search is

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[7] Those decisions comport with a common-sense reading of Article I, section 9's text. "Reasonable," as understood by the constitution's drafters and as commonly understood today, can connote "not excessive," "agreeable to reason," "rational," or "just." *See* John Bouvier, II *Bouvier's Law Dictionary* at 424 (1856) (defining "reasonable" as "[c]onformable or agreeable to reason; just; rational"); Noah Webster, *An American Dictionary of the English Language* (1830) (defining "reasonable" as, among other things, "[n]ot

Footnote continued…

reasonable as a matter of law, neither suppression nor any other remedy can be required to give effect to—or to "vindicate"—defendant's Article I, section 9 rights with respect to the searched property or with respect to the discovered evidence. That is no less true when the consent follows unlawful police conduct.[8]

2. At the very least, voluntary consent is a highly significant factor in assessing whether a preceding illegality requires suppression.

If this court rejects the rule proposed in the preceding pages, it should adopt the following alternative rule: If a defendant voluntarily consents to a search after police have violated his Article I, section 9, rights, the trial court must then assess the totality of circumstances surrounding the consent. If those

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excessive" and "agreeable to reason; just; rational"); *Merriam-Webster Online: Dictionary and Thesaurus*, merriam-webster.com (defining "reasonable," in part, as "in accordance with reason," and as "not extreme or excessive"). If a person or his property is searched only because the person willingly agreed to the search, the search can be described as "not excessive," as conduct that would be viewed as "rational" by both the searcher and the person who gave consent, and as "just."

[8] To hold otherwise renders a defendant's voluntary decision to authorize a search without legal significance, and communicates that, under certain circumstances, he may *not* authorize a search of his person or property. *Cf. Rodgers/Kirkeby*, 347 Or at 633-34 (Durham, J., dissenting, joined by Linder, J.) (Oregon courts should not "insist on maintaining the privacy of a person's property, and [on] suppress[ing] its admission as evidence in court, after the person himself of herself has voluntarily consented to its disclosure to police").

circumstances suggest—despite the voluntariness finding—that the police illegality significantly affected the defendant's decision to consent, Article I, section 9, requires exclusion. But if the record reflects nothing more than temporal proximity between the police illegality and the voluntary consent, no basis for suppression will exist.[9]

In applying that standard, courts must assess the nature of the particular illegality, and must assess the likelihood that it had some actual, practical effect on the defendant's ability to freely consent. In some cases, for example, the egregious nature of a police illegality—use of excessive force, for example, or other unlawful behavior likely to physically or emotionally intimidate a defendant—will suggest that the illegality significantly affected the decision to consent, and that suppression thus is required. In other cases, the unusual length of an unauthorized seizure might significantly affect the defendant's decision. *See Ayles*, 348 Or at 654 (Kistler, J., dissenting) ("under a rights-based suppression analysis, the degree of attenuation necessary to * * * restore

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[9] Here, the state is asking the court to again declare, as it did in *Hemenway*, that *Hall*—in assessing whether police exploited an illegality to obtain consent—undervalued the importance of voluntary consent to a search while overvaluing the significance of "temporal proximity." *See Hemenway*, 353 Or at 149 (*Hall* "did not give sufficient weight to a defendant's voluntary consent to a search"); *id*. at 150 ("the focus on 'temporal proximity' too easily leads to the conclusion that any consent search that occurs when a person is unlawfully stopped is invalid, when the better-framed question is whether police *exploited* the unlawful stop to obtain the consent"; emphasis in original).

the defendant to the position he or she would have been in had no constitutional violation occurred * * * varies with the extent, nature, and severity of any illegality"). But if the record shows an absence of those types of factors, and if it simultaneously shows that consent was "voluntary" for constitutional purposes, it will demonstrate that suppression is not required to vindicate a defendant's Article I, section 9, rights.

That conclusion is consistent with this court's repeated explanations that an Article I, section 9 violation cannot require suppression merely because it preceded the consent, or merely because it was a "but for" cause of consent. *See Kennedy*, 290 Or at 500-01 (noting that United States Supreme Court had rejected "test which would require that evidence must be suppressed if it would not have been discovered 'but for' the illegal police actions," and that Oregon Supreme Court has "applied the same analysis"). In many consent-search cases (this one included), the police illegality does nothing more than put police in a position to *request* consent to search, and no reason will exist to think that the illegality—by itself—made the defendant any more or less likely to *give* consent than he or she otherwise would have been. In those cases, the illegality is merely a link in the chain of circumstances leading to a consent search and qualifies, at most, as a "but for" cause of the consent. *See State v. Quinn*, 290 Or 383, 396, 623 P2d 630 (1981), *overruled on other grounds, Hall*, 339 Or at

26-27 (mere "but for" causation exists "if any link in the chain of circumstances leading to the evidence involves unlawful police action").

Similarly, even if a police illegality is ongoing when a defendant consents to a search, that fact—by itself—does not automatically reflect that the illegality significantly affected the decision to consent. Although the totality of circumstances in a given case might suggest that a particular ongoing illegality likely affected the defendant's ultimate decision, the assessment must be case specific. If a defendant consents while unlawfully seized, for example, but if the seizure has been of short duration and the encounter with police has been relaxed and cordial, no reason will exist to think that the seizure affected—in a constitutionally significant manner—the decision to consent. By itself, temporal proximity between a police illegality and voluntary consent, or even the existence of an ongoing illegality when consent is given, cannot require suppression.

C. Article I, section 9, also does not require suppression if discovery of the evidence was inevitable or came about through a source that was independent of the police illegality.

In addition, if the state shows that discovery of the evidence at issue was inevitable, or came about through a source that was "independent" of the police illegality, no suppression will be required. *See State v. Johnson*, 335 Or 511, 514-15 n 2, 73 P3d 282 (2003) ("[t]he 'inevitable discovery' doctrine 'permits the prosecution to purge the taint of illegally obtained evidence by proving

* * * that such evidence inevitably would have been discovered, absent the illegality, by proper and predictable police investigatory procedures'"), *quoting State v. Miller*, 300 Or 203, 225, 709 P2d 225 (1985), *cert den*, 475 US 1141 (1986); *Hall*, 339 Or at 35 (suppression is not required if state "prove[s] that the defendant's consent was independent of * * * the unlawful police conduct"). That conclusion also is consistent with the "vindication-of-rights" purpose behind Article I, section 9's exclusionary rule. If discovery of particular evidence was "inevitable," or genuinely "independent" of a police illegality, it follows that the illegality did not ultimately alter the defendant's position with respect to that evidence. Suppression under those circumstances conflicts with the required vindication-of-rights approach.

In sum, Article I, section 9 will not require suppression if (1) the totality of the circumstances shows that a defendant voluntarily consented to the search that revealed the evidence in question and does not suggest that any prior police illegality significantly affected the decision to consent; (2) the record shows that discovery of the evidence was inevitable; or (3) the discovery is attributable to a source that was independent of the police illegality.

D. Although police trespassed on defendant's porch before obtaining consent to search his home, the trespass did not require suppression.

It is undisputed that police were unlawfully on defendant's back porch when he agreed to let them enter his home. It also is undisputed that defendant

consented voluntarily—for constitutional purposes—when he agreed to let the officers enter the home, and when he subsequently agreed to let them search the house. Here, correct application of Article I, section 9's exclusionary rule reveals no basis for suppressing the discovered evidence.

First, defendant's voluntary consent—by itself—rendered the ensuing search lawful, and precluded any need to suppress the evidence.

Second, even if this court rejects that proposition, the challenged evidence is admissible. Aside from demonstrating that defendant's consent was voluntary, the record shows no reason to conclude that the preceding police illegality significantly affected defendant's decision to consent. The record shows that the police illegality—the trespass on the porch—was of short duration. Further, nothing suggests that anything about the trespass, or anything about the officers' conduct when defendant encountered them on his porch, was aggressive or intended to intimidate. Instead, the officer who first encountered defendant introduced himself by his first name ("Kevin") and explained the purpose of the visit. (10/8/09 Tr 9). Once inside, the remaining officers also introduced themselves. (10/8/09 Tr 8-9). Further, nothing suggests that defendant perceived the officer's conduct as intimidating, or that he appeared fearful or intimidated upon encountering the officers. Instead, defendant was "cordial" and "very cooperative" throughout. (10/8/09 Tr 26). Those facts reflect that any unlawful police conduct was not the type of conduct

likely to reduce defendant's ability to exercise his free will in deciding whether to consent to a search of his home.

In short, the state demonstrated not only that defendant consented voluntarily, but that the preceding illegality was unaccompanied by any circumstances that significantly affected his decision to consent. No basis exists for suppression.[10]

CONCLUSION

This court should revisit and should abandon *Hall*'s suppression ruling. It should hold that, for purposes of Article I, section 9's exclusionary rule, a defendant's voluntary consent to a search is highly significant. Moreover, mere temporal proximity between a police illegality and a subsequent voluntary consent cannot—by itself—require suppression of evidence found during a voluntary-consent search. Here, because defendant voluntarily consented to the

[10] That conclusion comports with the court's application of Article I, section 9's exclusionary rule in the vacated *Hemenway* decision. *See* 353 Or at 151-54 (although unlawful seizure was ongoing when defendant consented to a search of his person, and was ongoing when he consented to a search of a tin found inside his pocket, record did not reflect any threatening behavior by officers, and officers did not exploit their illegal conduct to obtain the consents).

search of his home, and because nothing suggests that the preceding police trespass affected that consent, the evidence at issue is admissible. This court should reverse the Court of Appeals' decision and affirm the trial court's judgment.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on June 5, 2013, I directed the original Petitioner on Review's Brief on the Merits to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Jason Edward Thompson, attorney for appellant/respondent on review, by using the court's electronic filing system.

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

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 7,473 words. I further 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).

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