IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. CLARK ALLEN BAILEY, aka Clarke Allen Bailey, Defendant-Appellant Petitioner on Review.	Multnomah County Circuit Court Case No. 101033810 CA A148109 SC S061647

PETITIONER'S REPLY BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
On Appeal from a judgment
Of the Circuit Court for Multnomah County
Honorable Edward J. Jones, Judge

Affirmed: August 14, 2013
Author of Opinion: Armstrong, P.J.
Concurring Judges: Armstrong, Presiding Judge and De Muniz, Senior Judge
Dissenting Judge: Egan, Judge

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STATEMENT OF THE CASE

This court granted defendant leave to file a reply brief by order dated April 7, 2014.

Summary of Argument

In its respondent's brief, the state argues that the discovery of an arrest warrant is the "legally significant" cause of the discovery of evidence found after the execution of that warrant and that any other causal connection between unlawful police action and the discovered evidence is merely a "but for" connection.

The state is mistaken. It is the arrest itself and the ensuing search incident to arrest that leads to the discovery of the challenged evidence. In order for that arrest to function as an intervening event that purges the taint of the prior illegality, it must be a *lawful* arrest, as this court stated in *State v. Dempster*, 248 Or 404, 434 P2d 746 (1967).

To execute an arrest warrant, police must have two pieces of information: the arrest warrant and the knowledge that the person they are arresting is the person named in the warrant. Without knowledge of the defendant's identity, police cannot lawfully execute a warrant.

Information about a person's identity is private, and police may not use a constitutionally unjustified search or seizure to obtain that information. Information about a person's name is no different than information about what a person did yesterday or what he has in his pocket at the moment. If police want that information, they must have a constitutionally justified means of getting it.

If police obtain a person's name through unlawful means, that information is tainted. When that tainted information is used to obtain evidence in an otherwise lawful manner, such as the execution of an arrest warrant, that arrest is also tainted. A tainted arrest, like a tainted search warrant obtained with tainted evidence, may not purge the taint of a prior illegality.

Here, police unlawfully detained defendant, who was a passenger in a lawfully stopped vehicle. When defendant refused to identify himself, police called another officer to identify him. That officer arrived during the unlawful seizure of defendant and after any justification for the stop of the vehicle had ended. The later officer was able to identify defendant by name, and that information was used to execute a warrant for defendant's arrest. That arrest was tainted by the unlawfully obtained information regarding defendant's identity. Consequently, any subsequent evidence must be suppressed.

Regarding the Fourth Amendment, the state argues that this court should abandon the three-part test from *Brown v. Illinois*, 422 US 590, 95 S Ct 2254,

45 L Ed 2d 416 (1975), in favor of its own three-part analysis derived from *Hudson v. Michigan*, 547 US 586, 126 S Ct 2159, 165 L Ed 2d 56 (2006). However, every court that has considered the question of whether the execution of an arrest warrant purges the taint of a prior unlawful seizure has applied the *Brown* test, even post-*Hudson*. This court should not deviate from that well-established framework.

Argument

I. The acquisition by police of incriminating information is a legally significant event in an Article I, section 9, exploitation analysis.

A. The state misidentifies the "legally significant" event that yields the challenged evidence in this type of case.

The state's proposed rule of law is that "[t]he discovery of an outstanding arrest warrant categorically attenuates any causal connection between an improper seizure and evidence discovered during a search incident to arrest on that arrest warrant." Resp BOM at 3. Later it explains:

> "Where officers unlawfully seize an individual, and then uncover evidence of a crime only after (1) discovering an outstanding arrest warrant, (2) arresting him, and (3) searching him incident to arrest, the causal connection between the preceding illegality and the discovery of the evidence dissipates. The *direct* cause of the search that revealed the contested evidence is not the unlawful seizure; rather, the source of the evidence is the warrant, the arrest, and the search incident to arrest."

Resp BOM at 22 (emphasis in original); *see also* Resp BOM at 25 ("Discovery of the arrest warrant thus serves as an event that attenuates the direct causal

connection between the unlawful seizure and the evidence discovered pursuant to arrest on the warrant.); Resp BOM at 27 ("the legally significant cause of discovery of the evidence—the discovery of the outstanding warrant and the subsequent search incident to arrest"). However, the *discovery of the arrest warrant* is not what yields the incriminating evidence; it is the arrest itself (and the subsequent search incident to arrest). That arrest must be lawful to purge the taint of any prior illegality.

As defendant argued in the opening brief, the discovery of the arrest warrant is often legally independent of any illegal seizure. Pet BOM at 21 n 7. Like many other kinds of government information, such as the registered owner of a vehicle and the status of a person's driving privileges, whether a particular person has an outstanding warrant is information that police possess and may access at any time. *See State v. Davis*, 237 Or App 351, 239 P3d 1002 (2010), *aff'd by an equally divided court*, 353 Or 166, 295 P3d 617 (2013) (holding that a person does not have a privacy interest in his driving records, which are maintained by the state and may be accessed by police using a vehicle's registration plate, which is legally required to be in plain view). The fact that the police choose to access that information while they illegally detain a person makes the person's subsequent arrest easier to execute. Consequently, the prior illegal detention is at least a "but for" cause of the evidence discovered pursuant to the ensuing search incident to arrest. But because the police already had the

information about the outstanding warrant in their possession, the "discovery" (or more accurately the accessing) of the outstanding warrant is not a result of the prior illegal detention.

What the state fails to recognize is that to arrest a person on an outstanding warrant, the police must have *two* pieces of information: the outstanding warrant and the knowledge that the person that they are arresting is the person named in the warrant. It is impossible to arrest a person on a warrant without that second piece of information. Thus, when the state says that "the source of the evidence is the warrant, the arrest, and the search incident to arrest," it leaves out an indispensible step – the identification of the defendant.

When, as in *State v. Dempster*, 248 Or 404, 434 P2d 746 (1967), the police already know who the defendant is before they illegally detain him, they have all the pieces to conduct a lawful arrest – an arrest warrant and the knowledge that the defendant is the person named in the warrant – before the illegal detention. In that case, the arrest is not tainted by the illegal detention. It is a *lawful* arrest that in turn purges the taint of the illegal detention. On the other hand, when police obtain information from the illegal detention that allows them to make an arrest, that arrest is *unlawful*, and it cannot purge the taint of any illegality.

B. The legally significant event in this case was when the police obtained defendant's name.

1. *Dempster* requires a lawful arrest to purge the taint of a prior unlawful detention.

In *Dempster*, this court held that "[t]he *lawful* arrest on the bench warrant purged the search incident thereto of the taint of any illegality in the detention of defendant prior to that time." 248 Or at 408 (emphasis added). The state does not appear to dispute that point. It explains that in *Dempster*, "this court reasoned that even if defendant's initial arrest was unlawful, police lawfully arrested the defendant pursuant to the warrant, and before he had been searched." Resp BOM at 21; *see also Id*. ("This court determined, in other words, that once the officer had discovered a lawful basis to arrest the defendant, the defendant was thereafter lawfully detained even where the preceding detention was unlawful."). Later, the state argues, "Stated differently, the connection between the unlawful seizure and the discovery of the evidence is supplanted with an independent—and lawful— basis for seizing (in fact, arresting) the defendant and conducting a search." Resp BOM at 22.

The fact that in *Dempster* "this court made no reference to whether or not the police had lawfully obtained the defendant's identification" is unsurprising. *See* Resp BOM at 20-21 (so arguing). Because the police already knew who Mr. Dempster was before they illegally detained him, the case did not present that issue. The *Dempster* court stated, "The validity of the bench warrant is not

challenged, and when the sergeant found the warrant he was bound to obey its command and arrest defendant." 248 Or at 407. If the police in *Dempster* had not known Mr. Dempster's identity when they found the bench warrant, they could not have obeyed the command of the warrant to arrest him. But that is not the sort if counterfactual that is generally addressed in an opinion.

2. *Pooler* holds that an arrest based on unlawfully obtained information is invalid.

In *Pooler v. MVD*, 306 Or 47, 755 P2d 701 (1988), this court held that an arrest was invalid because it was based on probable cause using evidence obtained during an illegal stop. In *State v. Juarez-Godinez*, 326 Or 1, 942 P2d 772 (1997), this court held that evidence obtained pursuant to a tainted search warrant had to be suppressed because the search warrant was obtained using evidence obtained as the result of an unlawful detention. As the state explains, "those cases stand for the simple proposition that the taint of the illegal conduct cannot be purged by later events that are themselves tainted." Resp BOM at 25.

The state then argues that because in this case "the warrant pre-existed any police misconduct," that warrant "is the direct and untainted cause of the search incident to arrest on that warrant and the resulting evidence." Resp BOM at 25. Again, the state misses a step. The arrest is the direct cause of the search incident to arrest and the discovery of the evidence. But that arrest is tainted, because the identity of the defendant (which is necessary for the arrest)

was *not* known to the police before any police misconduct. Like the information that provided probable cause for the arrest in *Pooler* and the search warrant in *Juarez-Godinez*, the information of defendant's identity in this case was tainted by the unlawful detention, which in turn tainted the subsequent arrest.

3. The knowledge of a person's identity is private information, like any other information that may be discovered during a seizure.

In its brief, the state acknowledges that "but for the unlawful seizure, the officers would not have been in a position to obtain his identity and run the warrants check that ultimately revealed the outstanding warrant." Resp BOM at 26. However, it claims, "that fact bears no constitutional significance." *Id.* The state appears to base that conclusion on its insistence that the warrant is the source of the challenged evidence, as opposed to the arrest based on the warrant. *Id*. The state argues:

> "The information obtained from the unlawful seizure—defendant's identity—is not what provides the basis for the search of defendant and his belongings. And his identity alone is not evidence subject to suppression. Instead, the officers discovered the evidence only after defendant's arrest warrant came to light and officers were mandated to take defendant into custody."

Id.

Defendant does not claim that his "identity" is subject to suppression. When defendant is tried in court, the state may present evidence that defendant

is the person who committed the charged acts. What is subject to suppression is evidence that is obtained as a direct result of illegal police action, such as evidence discovered during an illegal search or a confession obtained during an illegal seizure. And as discussed in the previous section, when tainted information is used to effect a seizure or a search, an otherwise lawful seizure or search becomes unlawful.

Information about a person's identity is no different than any other private information about a person, such as his beliefs, his private actions, and what he has in his pockets. When that information is not in plain view or otherwise publically available, police may not seize or search a person without justification to obtain that information. A person may attempt to conceal his identity, even in public, by wearing dark glasses, a wig, or a disguise. A person is not required to provide his identity to police unless he is driving a vehicle or subject to a citation or arrest. *See* ORS 162.385 (describing the crime of giving false information to a peace officer for issuance or service of a citation or for an arrest on a warrant); ORS 807.570 (describing the offense of failure to carry a license or to present a license to a police officer, which has driving a vehicle as an element). We do not tattoo people with an identification number in plain view for the convenience of the authorities, as was done to concentration camp inmates in Nazi Germany. In short, a person's identity is private information that a person may keep private.

Furthermore, there is no principled distinction between evidence of a person's identity and any other evidence obtained by police during a seizure or search. Potentially incriminating information that police might observe during a stop ranges from drugs sticking out of a person's pocket, blood on a murder suspect's shirt, distinctive shoes matching the description of a robbery suspect, a unique tattoo, a distinctive scar, a person's physical appearance that allows an officer to recognize him or her, all the way to a name, a driver's license number or a confession. All of that is information about a person. When that information is acquired as a direct result of a prior illegality, it is tainted and may not be used to obtain further information that can be used in a criminal trial.

That is the distinction between a mere "but for" cause and a constitutionally significant cause – the obtaining and use of private information. Article I, section 9, protects a person's privacy interests. *State v. Howard*, 342 Or 635, 639-40, 157 P3d 1189 (2007). A person has the right to privacy in his personal information. *State v. Nagel*, 320 Or 24, 30-31, 880 P2d 451 (1994) (holding that administration of field sobriety tests constitutes a search because they yield information "that was otherwise not observable by either the officer or by members of the general public and was, thus, private"). When police obtain that information through unlawful means and use it to obtain further

evidence, that evidence must be suppressed to vindicate the person's Article I, section 9, privacy rights.

4. When the knowledge of a person's identity is discovered as a direct result of an unlawful seizure, as occurred in this case, that information is tainted and any resulting arrest using that information is unlawful.

Here, it is undisputed that defendant was seized without constitutional justification. As a direct result of that seizure, police were able to learn defendant's name. That is because, "some time after the officers had concluded their investigation into the status of the driver's insurance," when the ongoing seizure of the vehicle in which defendant was a passenger was no longer justified, Officer Burley arrived and identified defendant by name. *State v. Bailey*, 258 Or App 18, 20, 308 P3d 368 (2013).

The state argues:

> "Contrary to the manner in which defendant frames the officers' conduct, the record is devoid of any evidence—and therefore of any factual finding by the trial court—that the officers seized defendant for the purpose of running a warrant check. To be sure, the officers seized defendant, and subsequently ran a warrants check. But defendant takes two events that follow in time and links them causually to infer an intent that the record simply does not support. *See also Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968) (where the trial court did not make explicit factual findings, this court presumes that it found the facts to be consistent with its ultimate conclusion)."

Resp BOM at 31. However, the Court of Appeals' unchallenged recitation of facts from the trial court record states:

> "Two backup officers arrived several minutes after the initiation of the stop. One of those officers, Stradley, recognized defendant to be a gang associate but could not remember his name. Various officers made repeated efforts to discern the identities of the two backseat passengers, but the passengers refused to identify themselves to the police. While the first officer on the scene was trying to contact the driver's insurance company, Stradley called Officer Burley to the scene to try to identify defendant and the other backseat passenger.
>
> "Thirty minutes after the initiation of the stop, and some time after the officers had concluded their investigation into the status of the driver's insurance, Burley arrived. Burley looked inside the vehicle and was immediately able to identify defendant by name. After Burley recognized defendant, Stradley ran defendant's name for warrants and discovered that there was an outstanding felony warrant for defendant's arrest."

Bailey, 258 Or App at 20.

Because Officer Burley was called to the scene for the express purpose of identifying defendant, which he did in fact do, but not until after any justification for holding the vehicle had expired, the information about defendant's name was a direct result of the unlawful seizure. That is the tainted information that was used to arrest defendant. Because the arrest of defendant was tainted, the evidence discovered pursuant to that arrest was fruit of the poisonous tree and must be suppressed. A tainted arrest, even pursuant to a warrant, may not purge the taint of a prior illegality.

II. This court should adhere to the *Brown v. Illinois* Fourth Amendment exploitation analysis.

In its Fourth Amendment discussion, the state ask this court to abandon the long-established and oft-applied exploitation analysis presented in *Brown v. Illinois*, 422 US 590, 95 S Ct 2254, 45 L Ed 2d 416 (1975), in favor of its own analysis culled from the Court's opinion in *Hudson v. Michigan*, 547 US 586, 126 S Ct 2159, 165 L Ed 2d 56 (2006). *See* Resp BOM at 34 ("Because *Hudson* contains the clearest, fullest, and most recent articulation of Fourth Amendment suppression doctrine, it is the starting point of any suppression analysis.").

Hudson is not so broad. First, the majority does not even mention *Brown*, which according to the state, it is supposed to supplant. It does once cite *Wong Sun v. United States*, 371 US 471, 487-488, 83 S Ct 407, 9 L Ed 2d 441 (1963), on which *Brown* relies, for the proposition that

> "Even in the early days of the exclusionary rule, we declined to
>
> > 'hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." ' "

Hudson, 547 US at 592 (quoting *Wong Sun*, 371 US at 487-488). Thus, rather than abandoning traditional exploitation analysis, *Hudson* adheres to its basic principles.

Hudson does contain the three pieces of analysis that the state now advocates should apply to all Fourth Amendment exploitation analysis, any one of which could preclude suppression in the state's view: "(1) logical causation and attenuation, (2) interest-based attenuation, and (3) cost-benefit balancing." Resp BOM at 35. However, in *Hudson*, each of those considerations was presented as another reason justifying a blanket rule of not applying the exclusionary rule to knock-and-announce violations. They were not intended to constitute a new exclusionary rule analysis to be applied in all situations.

To defendant's knowledge, no court has applied the state's "*Hudson* analysis" to the question of whether the taint of an illegal seizure is purged by the execution of an arrest warrant.[1] As discussed in the appellant's brief, every jurisdiction applies the *Brown* test to that question. Pet BOM at 37-39. The

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[1] The one case that the state cites as an example of an application of the *Hudson* analysis is *United States v. Hector*, 474 F3d 1150 (9th Cir 2007), cert den, 552 US 1104 (2008). That case involved the improper execution of a valid search warrant (the officer failed to present the defendant with a copy of the warrant at the time of the search), which is very close to the issue in *Hudson*, which involved a violation of the knock-and-announce rule. The fact that the *Hector* court used the same analysis as *Hudson* does not support the conclusion that a *Hudson*-type analysis applies to all applications of the exclusionary rule.

state dismisses the authorities cited in the petitioner's brief and the Court of Appeals dissent, because "many pre-date *Hudson*, and the rest fail to follow the analysis prescribed in that case." Resp BOM at 34 n 6. However, several of those cases are post-*Hudson,* including an in depth discussion of the issue in *United States v. Gross*, 662 F3d 393, 401 (6th Cir 2011).

This court should not depart from the standard exploitation test of *Brown*, which is applied by virtually all jurisdictions to the question in this case, in favor of the new analysis proposed by the state, which is based on an opinion that does not purport to create a new analysis.

CONCLUSION

For the foregoing reasons (and those contained in the petitioner's brief on the merits), defendant respectfully prays that this court reverse the decision of the Court of Appeals, vacate the judgment, and remand to the trial court for further proceedings.

Respectfully submitted,

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

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,660 words.

Type size

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

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Reply Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on April 10, 2014.

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

Respectfully submitted,

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